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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* DANIEL B.*
(SC 19788)

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

Syllabus

Convicted of the crime of attempt to commit murder, the defendant appealed to the Appellate Court, claiming, inter alia, that there was insufficient evidence to support his conviction under the statute (§ 53a-49) governing attempt crimes because the state had failed to prove that his conduct constituted a substantial step in a course of conduct that was intended to culminate in the murder of T, from whom the defendant was in the process of seeking a divorce. The defendant's conviction arose from his efforts to hire a hit man to kill T. During the defendant's trial, the jury viewed a video recording in which the defendant is shown meeting with an individual he believed to be a hit man, agreeing to a price to have T killed, providing necessary information to effectuate her murder, and planning the murder. The Appellate Court concluded that a reasonable jury could have found, in light of that video recording, that the defendant took a substantial step in a course of conduct intended to culminate in T's murder, and that the defendant's failure to pay the individual posing as a hit man did not render his conduct merely preparatory. Accordingly, the Appellate Court affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. On appeal, the defendant claimed that the Appellate Court,

* In furtherance of our policy of protecting the privacy interests of the subject of a criminal protective order, we refer to the protected person only by the subject's first initial and decline to identify the defendant or others through whom the subject's identity may be ascertained.

in concluding that there was sufficient evidence to sustain his conviction, improperly construed § 53a-49 (a) (2) by focusing on what already had been done rather than on what remained to be done to carry out T's murder. *Held* that the Appellate Court properly concluded that the state presented sufficient evidence to permit a jury reasonably to find the defendant guilty of attempt to commit murder: a review of the relevant language and history of § 53a-49 (a) (2), as well as prior case law interpreting the statute, led this court to conclude that the Appellate Court properly construed § 53a-49 (a) (2) in determining that the defendant's actions constituted a substantial step in a course of conduct planned to culminate in the commission of T's murder by focusing on what the defendant had already done rather than on what remained to be done to carry out the murder; moreover, construing the evidence in the light most favorable to sustaining the verdict, this court concluded that there was ample evidence from which the jury reliably could have determined the defendant's intent, including evidence that he had contemplated murdering T for two years beforehand and had begun planning well in advance of his meeting with the hit man, that he contacted a third party in order to obtain contact information for an individual, E, to whom he had not spoken in years, to inquire about procuring a hit man only four days before the dissolution of his marriage to T was to be finalized, that he engaged in a series of texts and phone calls to E over a twenty-four hour period, and that he then met with the individual he believed was a hit man, provided him with T's name, the name of T's employer, her home and work addresses, work schedule, physical description, and a photograph, discussed the manner and method to best effectuate the killing, established an alibi, and agreed to a structured payment schedule, with the first payment to be made approximately ten hours after the meeting.

(*One justice dissenting*)

Argued September 11, 2018—officially released March 5, 2019

Procedural History

Substitute information charging the defendant with the crimes of attempt to commit murder and criminal violation of a protective order, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the jury before *Hudock*, *J.*; verdict and judgment of guilty of attempt to commit murder, from which the defendant appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Beach* and *Bishop*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Philip D. Russell, with whom were *A. Paul Spinella* and, on the brief, *Peter C. White* and *Michael Thomason*, for the appellant (defendant).

Ronald G. Weller, senior assistant state's attorney, with whom, on the brief, were *Richard J. Colangelo*, state's attorney, and *Maureen Ornousky*, senior assistant state's attorney, for the appellee (state).

Opinion

KAHN, J. The present appeal requires us to consider whether, in determining the sufficiency of the evidence to support a conviction for attempt to commit murder under the substantial step provision of General Statutes § 53a-49 (a) (2), the proper inquiry should focus on what the actor had already done or on what the actor had left to do to complete the crime of murder. In the present case, the jury found the defendant, Daniel B., guilty of attempt to commit murder in violation of General Statutes §§ 53a-54a and 53a-49 (a) (2). Following our grant of certification,[1] the defendant appeals from the judgment of the Appellate Court affirming the judgment of conviction. See *State* v. *Daniel B.*, 164 Conn. App. 318, 354, 137 A.3d 837 (2016). The defendant claims that, in concluding that the evidence was sufficient, the Appellate Court improperly construed § 53a-49 (a) (2) to require the substantial step inquiry to focus on "what [the actor] has already done," rather than what "remains to be done . . . ." Id., 332. The state responds that the Appellate Court properly held that the focus is on what the actor has already done and that, when considering

[1] This court granted the defendant's petition for certification to appeal, limited to the following issue: "In concluding that there was sufficient evidence to sustain the defendant's conviction of attempted murder in violation of . . . §§ 53a-54a and 53a-49 (a) (2), did the Appellate Court properly construe § 53a-49 (a) (2) in determining that the defendant's conduct constituted a 'substantial step in a course of conduct planned to culminate in his commission' of murder?" *State* v. *Daniel B.*, 323 Conn. 910, 149 A.3d 495 (2016).

the defendant's conduct in the present case, the Appellate Court properly concluded that there was sufficient evidence to sustain the defendant's conviction of attempted murder. See id., 333. We conclude that the determination of what conduct constitutes a substantial step under § 53a-49 (a) (2) focuses on what the actor has already done rather than on what the actor has left to do to complete the substantive crime. We therefore affirm the judgment of the Appellate Court.

The jury reasonably could have found the following relevant facts. In December, 2010, the defendant brought an action seeking the dissolution of his marriage to the victim, T. The couple's relationship subsequently began to further deteriorate, leading T to call the police regarding the defendant four times in two months. T's first call to the police occurred in February, 2011, after T returned home to discover that the defendant had installed a coded padlock on their bedroom door, apparently in an attempt to keep her out of the bedroom.

T called 911 on three additional occasions in March, 2011. On March 6, 2011, while T was watching a movie at her sister's house, she received several phone calls from the defendant, who appeared upset, asking her where she was. When she answered her cell phone near a kitchen window, she "could hear him talking outside before [she] heard his voice coming through the cell phone," and realized he was standing outside her sister's home. On that occasion, an officer with the Stamford Police Department arrested the defendant, and T obtained a partial protective order against him the following day. The next day, on March 7, 2011, after T returned home from her sister's house and she discovered that the defendant had packed away her belongings and left them by the front door, the police were again called. Two days later, on March 9, 2011, T came home to find the defendant moving bedroom furniture and

taking her belongings off the bed and other furniture in their bedroom. When T confronted the defendant, an argument ensued during which he shoved her multiple times through the upstairs hallway, eventually attempting to push her down the stairs, causing both her and their three year old son to fall at the top of the staircase. Stamford police arrested the defendant for the second time, and T obtained a full protective order against him. By June, the defendant and T had reached an agreement regarding the dissolution of their marriage.

On June 9, 2011, four days before the dissolution was scheduled to be finalized, the defendant called an old friend, John Evans, to whom he had not spoken in a "couple of years." To obtain Evans' contact information, the defendant requested Evans' phone number from a mutual friend, who called Evans and obtained permission to give his number to the defendant. The record is unclear as to when the defendant made this request and how much time passed before he received Evans' phone number. The record does reveal, however, that between the hours of 12 and 2 a.m. on June 9, the defendant called Evans and requested to meet with him that day at approximately 3 p.m. at a donut shop in Stamford. When they met fifteen hours later, the defendant explained that he was getting divorced from T and she was "getting the house, the kids . . . and she was trying to get some money from him, too." The defendant asked Evans if he "knew anybody that could murder [T]" for him. When Evans tried to dissuade him, the defendant told him that "[he had] been thinking about it for two years, and he made up his mind . . . . He needs it done."

Evans responded that he would "see what [he] could do." Shortly after leaving the defendant, Evans called Mike Malia, a mutual friend who knew the defendant better than Evans did, for advice on how to proceed. Malia told Evans that "when [the defendant] gets some-

thing in his head, he's gonna do it. So, you know, make a call, call somebody." Evans called John Evensen, a retired Stamford police officer for whom Evans had acted as a confidential informant in the past, to tell him about the defendant's request. Evensen encouraged Evans to "do the right thing," because "somebody's life" was endangered, and told Evans that he would connect him with someone. Evensen then called James Matheny, then commander of the Bureau of Criminal Investigations for the Stamford Police Department, and arranged for Matheny to contact Evans.

After speaking to Evans himself, Matheny's team formulated a plan that called for Evans to introduce the defendant to an undercover police officer who would pose as a hit man. As part of the plan, Evans called and texted the defendant, relaying to him that he "found a guy" that would "take care of it ASAP." Through a series of texts and calls beginning at 3:27 p.m. and ending at 12:22 a.m.,[2] the defendant agreed to meet Evans and the hit man at the McDonald's restaurant located at the southbound rest area off Interstate 95 in Darien. The defendant met Evans at approximately 1 a.m., and Evans introduced him to Michael Paleski, Jr., an officer with the Branford Police Department assigned to the New Haven Drug Task Force. Paleski had been engaged by the Stamford police to pose as the hit man. The defendant entered Paleski's vehicle, which was equipped with a hidden video camera that recorded their entire encounter.

[2] At trial, the parties stipulated that the defendant called Evans four times, at 3:27 p.m., 9:16 p.m., and 11:45 p.m. on June 9, 2011, and at 12:57 a.m. on June 10, 2011, and that Evans called the defendant two times, at 11:56 p.m. on June 9, 2011, and at 12:41 a.m. on June 10, 2011. The defendant also introduced into evidence a text log indicating eight text messages exchanged between the defendant and Evans from 11:25 p.m. on June 9, 2011, to 12:22 a.m. on June 10, 2011. At 11:40 p.m., Evans texted the defendant to tell him that he had found someone that would kill T. One minute later, at 11:41 p.m., the defendant responded and asked Evans when and where they were going to meet.

While in the vehicle, the defendant and Paleski discussed the manner, method and price to best effectuate T's murder. The first issue the defendant and Paleski discussed was the price Paleski would require to perform the hit. The defendant agreed to pay Paleski $10,000 in the following manner: an $800 payment due the following morning in order for Paleski to obtain a firearm, along with a down payment of $3000, and the remainder due approximately one month after the murder. Next, the defendant told Paleski the information necessary for him to murder T, including her full name, home address, place of employment, and work schedule. The defendant also showed Paleski a photograph of T to help him identify her. When the defendant showed Paleski the photograph of T, the defendant noted that it was an older photograph and that T's hair color had changed.[3] He explained that it was the only photograph of her he had because "she's not fucking big on pictures." The record does not reveal when and how the defendant had obtained the photograph of T. T testified, however, that, one month prior to the meeting between the defendant and Paleski, the defendant had asked T to provide him with a photograph of herself, but she refused.

At the defendant's suggestion, the two agreed to stage T's murder as a carjacking, as demonstrated by the following exchange[4] captured by the video camera:

"[Paleski]: How do you want it done? . . .

"[The Defendant]: I don't know. The only thing I was thinking about was because she drives through—you from Stamford or no?

[3] T testified that state's exhibit 4 was a photograph of her, the defendant, and their newborn daughter at the hospital following their daughter's birth.

[4] Although we cite only to portions of the conversation between the defendant and Paleski, the entire transcript, state's exhibit 11, is jointly appended to the majority and dissenting opinions. We note that the best evidence was the video recording itself, which the jurors viewed, and, therefore, they were able to observe the defendant's conduct, demeanor, and tone and to make credibility findings.

"[Paleski]: No.

"[The Defendant]: Okay, well she—the hospital is in a rough section and she's got a nice car . . . so I'm like, I don't know if it makes sense, if that would be the best way to go about it.

"[Paleski]: Or you might want to make it look like a carjacking or something?

"[The Defendant]: Something like that . . . take the car, the car is going to get found and it kind of like explains it.

"[Paleski]: Yup.

"[The Defendant]: You know, I'm not sure what's the best thing to do . . . I didn't put that thought into the detail of how.

"[Paleski]: You want her completely out of the picture right? Morte?

"[The Defendant]: [The defendant is nodding.] That's where it's getting to . . . .

"[Paleski]: That's what you want? . . .

"[The Defendant]: I wish we didn't need to be there but . . . you know."

Later in the conversation, Paleski again asked for confirmation that the defendant wanted him to kill T. Paleski told the defendant: "Just so [you] know, I'm going to put two in that bitch's head and take that car and be gone, and I'll fucking burn it somewhere." The defendant responded, "[t]hat's the only way that I can come up with that . . . makes sense . . . ."

Concerned that he would be "the first person . . . [the police] looked at," the defendant believed that the carjacking scenario near T's work would also provide him with an alibi because the defendant would typically

have the children with him at one of his aunt's houses. When Paleski confirmed by saying, "I can take the bitch off when you're with [your aunts]," the defendant responded, "[e]xactly." Aware that the police would look at the defendant's actions when investigating T's murder, Paleski and the defendant discussed how quickly the defendant could get the money:

"[Paleski]: I'll do it but I need . . . some of that wood.

"[The Defendant]: Yea.

"[Paleski]: Can you get me the $800 tonight?

"[The Defendant]: I can work it out, yea, I could.

"[Paleski]: Alright.

"[The Defendant]: I just don't want to—for me to get it I got to like disturb people tonight . . . I don't want anything out of place tonight.

"[Paleski]: Okay, but I ain't doing shit without some money.

"[The Defendant]: Understood.

"[Paleski]: Feel me?

"[The Defendant]: Clear. I'm saying to you I'm not asking you for the urgency of tonight, I'd rather do it so it's not—I don't want anything out of character.

"[Paleski]: Right, right.

"[The Defendant]: You know . . . that's my pause for tonight, because it's going to be out of character for me to go get it tonight . . . .

"[Paleski]: How soon do you think you can get that money?

"[The Defendant]: I can get it tomorrow without doing anything . . . out of character."

Paleski told the defendant that, in order to effectuate the carjacking, he needed the defendant to write down

T's full name, the make and model of her car, T's place of employment, and her home address. The defendant exited Paleski's vehicle and went to Evans' vehicle to retrieve a piece of paper on which to write down the information. In an apparent effort to distance himself from the crime, the defendant asked Evans to write down the information as the defendant dictated it to him. The piece of paper was admitted into evidence, and Evans testified that he wrote the note.

When the defendant returned to Paleski's vehicle with the note, he handed it to him, and they once again discussed the plan to have T killed near her place of employment at a time when the children were with the defendant. They discussed T's typical work schedule and the defendant's concerns that sometimes her work shifts change. They also discussed whether it was best to have it done before the divorce settlement was signed the following Monday. The defendant expressed a desire to communicate with Paleski only through Evans because he did not want to use his own phone to call anyone or to coordinate a meeting with Paleski. The defendant indicated that he would get a prepaid phone and then get rid of it. The defendant told Paleski that he would get the money and meet Paleski at the same location at 10 a.m. that same day. The defendant agreed to bring the money to that meeting. The defendant thanked Paleski and exited the vehicle, at which point he was apprehended by Stamford police officers and arrested.

Following a six day trial, a jury found the defendant guilty of attempt to commit murder in violation of §§ 53a-54a and 53a-49 (a) (2), and the court sentenced the defendant to twenty years imprisonment, execution suspended after fifteen years, followed by five years of probation. The defendant appealed, claiming, among other things, that there was insufficient evidence to support his conviction of attempted murder, because

the state failed to prove that his conduct constituted a substantial step insofar as he had not yet paid Paleski. *State* v. *Daniel B.*, supra, 164 Conn. App. 322–23, 332. In addressing the defendant's claim, the Appellate Court reviewed our case law and concluded that this court has "frame[d] our criminal attempt formulation in conformance with [§ 5.01 of] the Model Penal Code," upon which § 53a-49 (a) (2) was based, which focuses on "what the defendant has already done and not what remains to be done." Id., 329. Consequently, that court upheld the defendant's conviction, concluding that a reasonable jury, after watching video footage of the defendant's agreeing to a price to have his wife killed, providing "key information" to effectuate her murder, and planning the manner of the killing, including his own alibi, could have found that the defendant took a substantial step and, therefore, that the defendant's failure to pay Paleski did not render his conduct merely preparatory. See id., 332–34. This certified appeal followed.

The defendant claims that, in concluding there was sufficient evidence to sustain his conviction of attempt to commit murder, the Appellate Court improperly construed § 53a-49 (a) (2). Specifically, the defendant claims that the determination of what constitutes a substantial step in a course of conduct intended to culminate in murder depends on "what remains to be done" as opposed to what "has already been done." The state argues that the Appellate Court properly looked to our case law, which articulates the proper framework under § 53a-49 (a) (2) for determining a substantial step and focuses on what the defendant has already done. We conclude that, in determining whether a defendant's actions constitute a substantial step in a course of conduct planned to culminate in his commission of murder, the proper focus is on what the defendant has already done. Applying that standard in the present case, the

Appellate Court properly concluded that the state presented sufficient evidence to permit a jury reasonably to find the defendant guilty of attempt to commit murder under the substantial step subdivision.

We begin with the general principles that guide our review. "In reviewing a sufficiency of the evidence claim, we apply a [two part] test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the jury reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty."[5] (Internal quotation marks omitted.) *State* v. *Moreno-Hernandez*, 317 Conn. 292, 298–99, 118 A.3d 26 (2015).

In the present case, the determination of whether there was sufficient evidence to support the defendant's conviction of attempt to commit murder is inextricably linked to a question of statutory interpretation. That is, prior to determining whether there was sufficient evidence, we must resolve whether the Appellate Court properly construed § 53a-49 (a) (2) to focus on what already has been done rather than what remains to be done. We exercise plenary review over questions of statutory interpretation, guided by well established principles regarding legislative intent. See, e.g., *Kasica*

[5] The dissent agrees that the jury was properly instructed on the elements required to find a defendant guilty under the substantial step provision of § 53a-49 (a) (2), and the defendant has not challenged the trial court's charge to the jury. Our inquiry, therefore, is limited to whether, in the light most favorable to sustaining the verdict, there was sufficient evidence for a jury reasonably to find the defendant guilty under the substantial step provision.

v. *Columbia*, 309 Conn. 85, 93, 70 A.3d 1 (2013) (explaining plain meaning rule under General Statutes § 1-2z and setting forth process for ascertaining legislative intent).

We begin with the statutory language. Our criminal attempt statute proscribes two distinct ways in which a person is guilty of an attempt to commit a crime: through the attendant circumstances subdivision, § 53a-49 (a) (1), or the substantial step subdivision, § 53a-49 (a) (2). This appeal involves the interpretation of the substantial step subdivision, which defines criminal attempt in relevant part as follows: "A person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he . . . intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime." General Statutes § 53a-49 (a) (2). Included in the threshold inquiry are our prior interpretations of the statutory language, which we have stated are encompassed in the term "text" as used in § 1-2z. See *Hummel* v. *Marten Transport, Ltd.*, 282 Conn. 477, 497–99, 923 A.2d 657 (2007).

We have held that the substantial step inquiry "focuses on what the actor has *already done* and not on what remains to be done." (Emphasis in original.) *State* v. *Lapia*, 202 Conn. 509, 515, 522 A.2d 272 (1987).[6] For example, in *Lapia*, the defendant, Louis Lapia, kid-

[6] In addition to claiming that the Appellate Court misread this court's precedent in concluding that the focus of the substantial step inquiry is on what has been done, the defendant claims that the Appellate Court misread its own case law. We disagree and observe that the Appellate Court properly followed this court's precedent in focusing its inquiry on what has been done. See, e.g., *State* v. *Hanks*, 39 Conn. App. 333, 341, 665 A.2d 102 ("[the substantial step] standard focuses on what the actor has already done and not what remains to be done" [internal quotation marks omitted]), cert. denied, 235 Conn. 926, 666 A.2d 1187 (1995).

napped a victim who was mentally disabled and held him for three days. The victim testified that, while captive, he was "bound and blindfolded . . . beaten on three different occasions, and . . . threatened [that Lapia was going] to kill his parents." Id., 513. In addition, the victim testified that Lapia asked him to perform oral sex. Id., 514. When the victim refused, Lapia "tightened the ropes which bound [him] and threatened to beat him again." Id. On appeal, Lapia claimed that the evidence was insufficient to sustain his conviction of attempt to commit sexual assault in the first degree under the substantial step subdivision because his actions did not exceed "mere preparation" when he only requested that the victim perform oral sex. Id., 512, 515. In holding that there was sufficient evidence to find that Lapia attempted to commit sexual assault in the first degree, this court reasoned that "[Lapia's] argument that his conduct 'remained in the zone of preparation' because no sexual assault occurred is without merit. . . . [T]o constitute a substantial step, the conduct must be 'strongly corroborative of the actor's criminal purpose.' . . . This standard differs from other approaches to the law of criminal attempt in that it focuses on what the actor has *already done* and not on what remains to be done. . . . What constitutes a substantial step in a given case is a question of fact. . . . Under the facts of this case, it was not unreasonable for the jury to conclude that [Lapia] had progressed so far in the perpetration . . . [when he] request[ed] that the [victim] perform oral sex and tighten[ed] the ropes upon his refusal . . . ." (Citations omitted; emphasis in original.) Id., 515–16.

Likewise, in *State* v. *Carter*, 317 Conn. 845, 120 A.3d 1229 (2015), this court addressed a sufficiency of the evidence claim under the substantial step subdivision. The defendant in that case, Kenneth R. Carter, was at a cafe in Groton when two police officers—who had

received a tip that Carter intended to shoot someone there—entered the cafe. Id., 848–49. When the officers moved in his direction, Carter raised and pointed a gun at one of them, Brigitte Nordstrom. Id. Carter refused to drop the gun when ordered to do so and eventually " 'turned away toward the bar, with his gun and both of his hands in front of him and his back to Nordstrom . . . .' " Id., 849–50. After apprehending Carter, the officers discovered that Carter was holding a " '.22 caliber Jennings semiautomatic pistol with five rounds in the magazine but none in the chamber.' " Id., 850. Because the gun was not " 'racked' "; id., 851; Carter argued that there was insufficient evidence " 'to prove that [he] intended to cause serious physical injury [under the substantial step subdivision] as required to sustain a conviction [of attempt to commit] assault in the first degree . . . .' " Id., 852.

In rejecting Carter's argument, this court reasoned that it was not necessary for the gun to be racked in order to find Carter guilty of attempt under the substantial step provision. This court stated that "[t]he defendant's claim that he did not rack the gun, even if true, would only support the proposition that he did not take the *next* step to complete the crime which, of course, is irrelevant to the inquiry whether he took a *prior* substantial step to commit the offense. . . . [I]t was only necessary for him to take a substantial step under the circumstances as he believe[d] them to be . . . ." (Emphasis in original; internal quotation marks omitted.) Id., 861; see also *State* v. *Wilcox*, 254 Conn. 441, 468–69, 758 A.2d 824 (2000) (focusing on what defendant had done and not on what he had left to do); *State* v. *Milardo*, 224 Conn. 397, 404, 618 A.2d 1347 (1993) (same); *State* v. *Anderson*, 211 Conn. 18, 28–29, 557 A.2d 917 (1989) (same).

Our prior interpretation of § 53a-49 (a) (2) finds support in the history of the statute. When the legislature

codified the crime of attempt and incorporated the substantial step as one of the means by which a defendant could be held liable, it adopted the substantial step provision from the Model Penal Code. See *State* v. *Moreno-Hernandez*, supra, 317 Conn. 303–304. The Model Penal Code's substantial step provision did not require "a 'last proximate act' or one of its various analogues" in order to "permit the apprehension of dangerous persons at an earlier stage than . . . other approaches without immunizing them from attempt liability." *United States* v. *Jackson*, 560 F.2d 112, 120 (2d Cir. 1977) (citing Model Penal Code § 5.01, comment, pp. 47–48 [Tentative Draft No. 10, 1960]), cert. denied sub nom. *Allen* v. *United States*, 434 U.S. 1017, 98 S. Ct. 736, 54 L. Ed. 2d 726 (1978), and cert. denied, 434 U.S. 941, 98 S. Ct. 434, 54 L. Ed. 2d 301 (1977). The drafters of the Model Penal Code explained that just because "further major steps must be taken before the crime can be completed does not preclude a finding that the steps already undertaken are substantial." 1 A.L.I., Model Penal Code and Commentaries (1985) § 5.01, comment 6 (a), p. 329.

Although not the focus of the substantial step provision, the consideration of what the actor has left to do is not completely irrelevant to the inquiry of whether he has taken a substantial step. Because "[a] substantial step must be something more than mere preparation, yet may be less than the last act necessary before the actual commission of the substantive crime . . . the finder of fact may give weight to that which has already been done *as well as* that which remains to be accomplished before commission of the substantive crime." (Emphasis added; internal quotation marks omitted.) *State* v. *Sorabella*, 277 Conn. 155, 180, 891 A.2d 897, cert. denied, 549 U.S. 821, 127 S. Ct. 131, 166 L. Ed. 2d 36 (2006). Accordingly, the defendant is free to emphasize to the jury what he had left to do to commit the

crime. The main focus, however, will be on what the defendant "has already done." Model Penal Code and Commentaries, supra, § 5.01, comment 6 (a), p. 329; id., p. 331. We conclude, therefore, that, in holding that there was sufficient evidence to sustain the defendant's conviction of attempt to commit murder under the substantial step provision of § 53a-49 (a) (2), the Appellate Court properly construed § 53a-49 (a) (2) by focusing on what the defendant had already done in determining that his conduct constituted a "substantial step in a course of conduct planned to culminate in his commission" of murder. See *State* v. *Daniel B.*, supra, 164 Conn. App. 334–35.

For two reasons, we find unpersuasive the defendant's reliance on this court's language in *State* v. *Green*, 194 Conn. 258, 277, 480 A.2d 526 (1984), cert. denied, 469 U.S. 1191, 105 S. Ct. 964, 83 L. Ed. 2d 969 (1985), that "[the] substantial step . . . standard properly directs attention to overt acts of the defendant which convincingly demonstrate a firm purpose to commit a crime. . . . This standard shifts the focus from what has been done to what remains to be done." (Citation omitted; internal quotation marks omitted.) First, *Green* is distinguishable from the present case because the issue presented required us to construe both the attendant circumstances provision and the substantial step provision. That is, in *Green*, this court held that there was sufficient evidence for a jury reasonably to find that the defendant's actions satisfied both the attendant circumstances and substantial step subdivisions of § 53a-49 (a). Id., 276–77. We have emphasized the distinctions between the two provisions, explaining that they "are not coextensive. The substantial step subdivision criminalizes certain conduct that would fall short of violating the attendant circumstances subdivision. . . . For instance, a pickpocket who reaches into an empty pocket would be guilty of attempt to commit larceny

under both subdivisions . . . but a pickpocket who is apprehended immediately before reaching into the empty pocket could be found guilty under only the substantial step subdivision and not the attendant circumstances subdivision. Thus, the distinction between the two subdivisions is the degree of completeness each requires in the course of an actor's conduct." (Citations omitted.) *State* v. *Moreno-Hernandez*, supra, 317 Conn. 311.

Second, in *Green*, this court relied on common-law attempt doctrine that predated our legislature's adoption of the substantial step provision.[7] For example, the court in *Green* cited to *State* v. *Mazzadra*, 141 Conn. 731, 736, 109 A.2d 873 (1954), to support its statement that the "acts must be . . . at least the start of a line of conduct . . . ." *State* v. *Green*, supra, 194 Conn. 272. The Commission to Revise the Criminal Statutes rejected that language in its comments to § 53a-49. The commission explained that the substantial step theory of attempt was a "new [concept] . . . used to distinguish acts of preparation from acts of perpetration and is contrasted with criteria specified in . . . *Mazzadra* . . . . This section requires more than a mere start of a line of conduct leading to the attempt." (Citation omitted.) Commission to Revise the Criminal Statutes, Penal Code Comments, Conn. Gen. Stat. Ann. (West 2012) § 53a-49, comment, p. 76. Therefore, in outlining what conduct constitutes an attempt, the court in *Green* cited language from prior case law that our legislature rejected in adopting the substantial step provision. Subsequent to *Green*, this court has held that the substantial step inquiry focuses on what the actor has already done

[7] We agree that our law in this area has been less than clear, and we take this opportunity to clarify. We do not cast any doubts, however, on whether *Green* was correctly decided. As we have explained, the statement in *Green* was not central to the holding.

and not what remains to be done.[8] See, e.g., *State* v. *Carter*, supra, 317 Conn. 861; *State* v. *Lapia*, supra, 202 Conn. 515–16.

Relying on this court's prior precedent, the Appellate Court properly held that the focus is on what the defendant had already done rather than what remained to be done. Applying the proper focus to the present case, and construing the evidence in the light most favorable to sustaining the guilty verdict, we conclude that the Appellate Court properly determined that the state presented sufficient evidence for a jury reasonably to find the defendant guilty beyond a reasonable doubt of attempt to commit murder in violation of § 53a-49 (a) (2).[9] The evidence, which is strongly corroborative of

[8] For similar reasons, the defendant's reliance on *Small* v. *Commissioner of Correction*, 286 Conn. 707, 946 A.2d 1203 (2008), is misplaced. *Small* concerned a habeas appeal in which the defendant claimed ineffective assistance of counsel after neither his trial nor appellate counsel challenged the lack of a jury instruction on criminal attempt with respect to the predicate felony attempted robbery for which he was ultimately convicted and upon which one of his convictions of felony murder was based. Id., 709. In concluding that the failure to instruct was harmless, the court made a reference to the statement in *Green* without any analysis of that case or of the cases subsequent to *Green* that have stated that the focus is on what the actor has already done. Id., 730. Like *Green*, therefore, the decision in *Small* did not address the controlling precedent of this court.

Because our decision in the present case clarifies that, contrary to the defendant's contention, this court's precedent that the determination of what constitutes a substantial step depends on what the actor has already done, we reject the defendant's claim, based on *Small*, that the Appellate Court's decision in the present case constitutes a retroactive application of the law that violates his due process rights.

[9] A review of case law from other jurisdictions that have addressed the murder for hire scenario under the Model Penal Code's framework supports our conclusion. See, e.g., *State* v. *Manchester*, 213 Neb. 670, 676, 331 N.W.2d 776 (1983) (holding that evidence was sufficient to constitute substantial step where defendant "made plans for the murder, solicited a killer, discussed the contract price and set the money aside . . . arranged for the weapon and a scope, and showed the killer the victim, his residence, and place of work"); *State* v. *Urcinoli*, 321 N.J. Super. 519, 537, 729 A.2d 507 (App. Div.) (there was sufficient evidence for jury to determine that defendant took substantial step where defendant "showed [hit man] his bank statement to prove that he could pay him [after the fact] . . . provided [hit man] with details concerning the intended victims, including . . . address[es], phone

numbers, cars and license plate numbers, physical descriptions . . . [and] daily routine[s]"), cert. denied, 162 N.J. 132, 741 A.2d 99 (1999).

We agree with the dissent that those states—unlike Connecticut—that have *not* adopted the Model Penal Code require the defendant to have taken steps closer to the final act and, in some instances, require a dangerous proximity to success. See *State* v. *Moreno-Hernandez*, supra, 317 Conn. 303–304 (noting that Connecticut adopted substantial step provision from Model Penal Code § 5.01). The Model Penal Code, however, by drawing the line further away from the final act, created "relaxed standards"; *State* v. *Disanto*, 688 N.W.2d 201, 211 (S.D. 2004); that include "in criminal attempt much that was held to be preparation under former decisions." Id., 210. In fact, this court has observed that "[t]he drafters of the Model Penal Code considered and rejected all previous formulations [including the dangerous proximity test] in favor of [the substantial step]." (Internal quotation marks omitted.) *State* v. *Sorabella*, 277 Conn. 155, 181 n.29, 891 A.2d 897 (citing Model Penal Code § 5.01 [1] [c] [Proposed Official Draft 1962]), cert. denied, 549 U.S. 821, 127 S. Ct. 131, 166 L. Ed. 2d 36 (2006).

We also agree with the dissent that the payment of money is *not* "a necessary prerequisite" for a jury to reasonably determine that a defendant committed a substantial step in a murder for hire scenario. Our disagreement with the dissent lies in the application of that principle to the facts of this case. Specifically, the dissent states that, notwithstanding the general rule that the payment of money is not a necessary prerequisite for a jury to find that a defendant took a substantial step in a murder for hire scenario, "the act of making payment in *this* case, on *this* record, became the only reliable indicator of the defendant's actual intentions during the crucial time period at issue." (Emphasis in original.) That conclusion, however, is not reconcilable with the applicable standard of review, which requires this court to view the evidence in the light most favorable to sustaining the verdict. *State* v. *Moreno-Hernandez*, supra, 317 Conn. 298–99. For example, although the dissent claims that "[n]o one can fairly read the full transcript of the conversation without detecting a degree of hesitation and equivocation on the part of the defendant," the jurors who observed the video of the defendant's conversation with the hit man and reviewed the transcript, along with all of the other evidence of the defendant's conduct prior to the video recorded meeting with the hit man, determined that the defendant's conduct indicated his intent to murder T, as they found him guilty of attempt under the substantial step provision. In addition to all of the actions the defendant took to hire a hit man to kill his soon to be ex-wife, the jury easily could have credited the defendant's own words prior to and during the video recorded meeting to find beyond a reasonable doubt that he intended to murder T. For example, the defendant told Evans he had contemplated murdering his wife for two years, and he described to the hit man that he thought the best way to accomplish T's murder was to stage a carjacking that would provide him with an alibi and divert suspicion away from him. The jurors also heard the defendant discuss the timing of T's murder and whether it would be better for the defendant if T was killed prior to the execution of their divorce settlement. Throughout the more than twenty-

the defendant's intent, amounts to more than a "mere conversation standing alone." *State* v. *Molasky*, 765 S.W.2d 597, 602 (Mo. 1989). The defendant's course of conduct, beginning prior to June 9 and ending with his arrest, provided ample evidence from which the jury could have reliably determined his intent. The state presented evidence of the defendant's motive through testimony about the defendant's pending divorce proceedings and the deteriorating relationship between the defendant and T.[10] Moreover, the state presented evi-

four hours that took place between his first call to Evans and his arrest, the defendant had numerous communications with Evans and could have cancelled his request or changed his mind. His words and his conduct over that more than twenty-four hour period, however, established his clear intent to murder T.

Additionally, we disagree that, viewed in the light most favorable to sustaining the verdict, the failure of the defendant to provide money instantly is significant. The time of day was relevant. The jury reasonably could have inferred that the defendant's decision not to withdraw money from a bank at 1:30 a.m. to pay the hit man who had just agreed to murder his wife was born of a desire to avoid being implicated in the murder, rather than an affirmative refusal "to take the one action that . . . would have demonstrated his firm intention to commit the crime . . . ." In fact, he reassured the hit man that he had the money but did not want to get it until the morning because it would look suspicious. The defendant repeatedly states that that the purpose of finding a hit man was to prevent the police from tying him to the killing.

[10] The defendant claims that the Appellate Court improperly focused on only one aspect of the substantial step analysis—namely, whether the focus is on what has been done—and that, had the Appellate Court properly addressed the intent requirement of the attempt statute, it would not have upheld the defendant's conviction. This argument lacks merit, as the Appellate Court analyzed all of the evidence to prove the offense, including the evidence that established intent, and so concluded that the defendant "had been contemplating this course of action for 'two years,' " and, when he met with Paleski, he "agreed to a price (to include a down payment and money for the murder weapon), provided Paleski with key information, namely, his wife's name, home and work address[es], her work schedule, a description of her vehicle, and suggested a day, location, and manner for the murder to ensure that the defendant would have an alibi. [In addition] the jury also saw the defendant twice confirm to Paleski that he wanted his wife murdered." *State* v. *Daniel B.*, supra, 164 Conn. App. 332.

The defendant separately claims that the Appellate Court failed to address how the defendant "act[ed] 'with the kind of mental state required for commission of' " murder, when considering the " 'circumstances as he

dence that the defendant had begun his planning well in advance of June 9, through testimony that the defendant had told Evans that he had contemplated murdering T for "two years, and he made up his mind" that he was going to do it, and through evidence demonstrating that the defendant had attempted to procure a more recent photograph of her, and had contacted a third party to obtain Evan's telephone number.[11] The fact that the defendant voluntarily contacted Evans, someone he had not spoken to in years, to inquire if Evans knew some-

believed them to be' " at the time, as required under § 53a-49 (a). The jury heard testimony from Evans, however, that the defendant believed he was meeting a hit man at the rest stop. Believing Paleski was a hit man, the defendant provided him with the information necessary to murder his wife and took steps to distance himself from being suspected of participating in the murder. Therefore, looking at the circumstances as the defendant believed them to be, T stood in life threatening danger.

Finally, the defendant claims that the Appellate Court failed to address how the defendant's actions were "strongly corroborative of [his] criminal purpose" under § 53a-49 (b). The Appellate Court concluded, however, that "it was reasonable for the jury to have concluded that a person, with the intent to commit murder who hires a hit man has demonstrated his dangerousness to society." *State* v. *Daniel B.*, supra, 164 Conn. App. 333 n.10. As the defendant himself concedes, the Appellate Court did not need to incorporate a discussion of the statutory examples from § 53a-49 (b) in order to properly construe the substantial step subdivision. See *State* v. *Green*, supra, 194 Conn. 277 ("[t]hese examples are not all-inclusive").

[11] The dissent points out that "[t]here is no evidence that the defendant conducted any surveillance [supposedly of T], obtained or furnished a weapon, [or] 'cased' the potential crime scene [which was T's place of employment]," and cites *State* v. *Damato*, 105 Conn. App. 335, 343–45, 937 A.2d 1232, cert. denied, 286 Conn. 920, 949 A.2d 481 (2008), to make the same point. However, unlike the victim in *Damato*, T was not a stranger to the defendant, and he did not need to conduct surveillance to know where she resided and worked. Rather, like the defendant in *Damato*, it is relevant that the defendant came prepared to the meeting with all the information the hit man would need to locate and murder T. As we have explained, our analysis properly focuses on the evidence that *was* presented, viewed in the light most favorable to sustaining the verdict. The defendant's meeting with the hit man, a complete stranger, in the middle of the night at a rest area off the highway was more than a mere conversation to vent about his frustration of not seeing his children earlier that day. It was, as the jury concluded, an attempt to murder T.

one who could murder T,[12] only four days before the

[12] The defendant also claims that, by focusing on what the actor has already done to commit the crime, we will extend attempt liability beyond what was intended by the legislature because the approach will blur the line between attempt and solicitation. We disagree. We have observed that "the inciting or urging, whether it be by a letter or word of mouth, is a mere solicitation . . . ." *State* v. *Schleifer*, 99 Conn. 432, 438, 121 A. 805 (1923). "An attempt [on the other hand] necessarily includes the intent, and also an act of endeavor adapted and intended to effectuate the purpose. . . . The act [or] endeavor must be some act done in part execution of a design to commit the crime." (Citation omitted; internal quotation marks omitted.) Id.; see also Model Penal Code and Commentaries, supra, § 5.02, comment 3, p. 373 ("this section provides for separate definition of criminal solicitation on the ground that each of the two inchoate offenses presents problems not pertinent to the other").

The present case provides a clear example of the distinction between solicitation and attempt as articulated in *Schleifer*. The defendant first solicited Evans to find a hit man. Had Evans refused, there would necessarily be no act or endeavor that followed to constitute attempt. The state presented sufficient evidence, however, that the defendant had taken steps before contacting Evans, believed Evans found a hit man, and took steps to create a plan under which he would not be targeted as the killer. Unlike the dissent's contention that this was "mere conversation" amounting to "two solicitations," a jury reasonably could have found that the defendant's conduct that followed his initial contact with Evans constituted an attempt, as the defendant's outward acts—which included driving to the rest area, getting in Paleski's car, giving Paleski a piece of paper with information on it, and showing Paleski a photograph of his wife—evinced an intent to have his wife murdered.

Furthermore, we reject the defendant's argument that the police should have waited until the defendant gave Paleski some money the next morning before arresting him. Payment is not necessary for a jury to determine that a defendant's conduct constituted a substantial step in a murder for hire scenario. See, e.g., *State* v. *Urcinoli*, 321 N.J. Super. 519, 537, 729 A.2d 507 (App. Div.), cert. denied, 162 N.J. 132, 741 A.2d 99 (1999). In addition, knowing the defendant's intent to follow through with the plan, the police would have put T's life in jeopardy, because the defendant, whose prior conduct against T led her to call the police multiple times and to obtain multiple protective orders against him, could have decided that he did not want to pay Paleski and could have killed her himself. Research in the field of domestic violence has identified certain factors that create a greater risk of violence or lethality. A well recognized factor that can increase risk to victims is the finalization of a divorce or separation. See, e.g., J. Campbell et al., "Intimate Partner Homicide: Review and Implications of Research and Policy", 8 Trauma, Violence & Abuse 246, 254 (2007) (noting that divorce and separation increase woman's risk of experiencing lethal violence); L.

dissolution of his marriage to T was set to be finalized, also corroborates the defendant's intent. The evidence also revealed that, after his initial contact with Evans, the defendant continued to exchange a series of texts and made phone calls to Evans over a twenty-four hour period, culminating in the defendant's driving to a rest area to meet a complete stranger who he believed was a "hit man" willing to kill his wife. The jury had sufficient evidence to find that the resulting meeting was more than a mere conversation; rather, it was the culmination of a series of acts all aimed at the same end, procuring a hit man to kill T.

The jury watched the video recording of the defendant entering Paleski's vehicle and providing Paleski with the information necessary to murder T. Specifi-

Dugan et al., "Exposure Reduction or Retaliation? The Effects of Domestic Violence Resources on Intimate-Partner Homicide," 37 L. & Society Rev. 169, 193 (2003) (noting that "increases in divorce are also related to more killings of spouses . . . [which] is not entirely surprising in light of prior research showing that the most dangerous time in a relationship is as it is ending," and citing to various scholars on the subject, including Jacquelyn C. Campbell). In the present case, the defendant called Evans four days before his dissolution from T was to be finalized. Coupled with the history of domestic violence known to law enforcement at the time of the arrest, the risk in this case was real. Many courts have opined that "failing to attach criminal responsibility to the actor—and therefore prohibiting law enforcement officers from taking action—until the actor is on the brink of consummating the crime endangers the public and undermines the preventative goal of attempt law." *State* v. *Reeves*, 916 S.W.2d 909, 913–14 (Tenn. 1996), citing *United States* v. *Stallworth*, 543 F.2d 1038, 1040 (2d Cir. 1976).

The defendant's additional claim that the Appellate Court's construction of § 53a-49 (a) (2) will result "in a lower threshold of conduct constituting a substantial step," because the defendant's conduct was "closer in nature to the acts necessary [for] conspiracy," which requires " 'a [less] demanding showing' " than proof of a substantial step merits little discussion. Our legislature set forth the crimes of conspiracy and attempt in different sections of our Penal Code, and the two sections remedy different conduct. Compare General Statutes § 53a-48 with General Statutes § 53a-49. In the present case, regardless of whether the defendant's conduct would satisfy the elements required for conspiracy under § 53a-48, a jury reasonably could have found that his conduct amounted to a substantial step under § 53a-49 (a) (2).

cally, when the defendant entered Paleski's car, he provided Paleski with his wife's name, home address, employer, work address, work schedule, and physical description. The defendant offered Paleski his plan for murdering T, namely, that the killing take place "in a rough section" of Stamford and involve her "nice car" to make it look like an impersonal attack and to ensure that neither the defendant nor his children would be near the scene. The jury watched the defendant leave Paleski's car to retrieve a piece of paper that ultimately provided Paleski with, among other things, the make and model of T's car to effectuate the carjacking scenario that he had concocted. After hearing T's testimony that she refused the defendant's request for a photograph of her one month before, the jury watched the defendant show Paleski an old photograph of T and describe how her hair color had changed since the photo was taken to ensure that Paleski would recognize her. In addition to providing critical information, the defendant planned both the manner of killing and how to secure his alibi. To effectuate the murder, the defendant and Paleski created a structured payment scheme, whereby they agreed on a total price, a down payment amount, and upfront payment amount to be paid by the defendant to Paleski approximately ten hours later. After clarifying the logistics of making the first payment, the jury reasonably could have determined that the defendant made one final indication of his intent when he thanked Paleski before exiting the vehicle. There was more than ample evidence from which the jury could have determined beyond a reasonable doubt that the defendant intended to murder T and, by hiring a hit man, took a substantial step to achieve that goal.

The judgment of the Appellate Court is affirmed.

In this opinion ROBINSON, C. J., and PALMER, D'AURIA, MULLINS and VERTEFEUILLE, Js., concurred.

ECKER, J., dissenting. The majority concludes that the defendant's conversations with John Evans and the undercover "hitman," Michael Paleski, Jr., provided sufficient evidence for the jury to find beyond a reasonable doubt that the defendant committed the crime of attempted murder. I disagree that those preliminary discussions, without more, constitute a substantial step under General Statutes § 53a-49 and, therefore, I respectfully dissent.

I

Before getting to the heart of the case, I pause to express a minor concern with the methodological framework developed by the majority as a prelude to its finding that the evidence was sufficient to support the defendant's conviction of attempted murder. The majority describes the issue on appeal as whether the proper inquiry under the "substantial step" provision of our criminal attempt statute "should focus on what the [defendant] had already done or on what the [defendant] had left to do to complete the crime . . . ." The bulk of the court's opinion is devoted to examining that question and, after a lengthy discussion, the majority concludes that the "main focus" of the substantial step inquiry will be on what the defendant already has done. The majority then hastens to add that "the consideration of what the [defendant] has left to do is not completely irrelevant to the inquiry of whether he has taken a substantial step" and "the defendant is free to emphasize to the jury what he had left to do to commit the crime."

I intend no criticism of the majority's choice to address the "already-done versus remains-to-be-done" issue. The Appellate Court's decision in this case uses that dichotomous framework to reach its conclusion and the parties present their respective arguments to this court using that same approach. Under these cir-

cumstances, there is an obvious need for this court to clarify what the Appellate Court described as the "conflicting" case law invoking the "already-done versus remains-to-be done" approach. *State* v. *Daniel B.*, 164 Conn. App. 318, 327 and n.7, 137 A.3d 837 (2016) (citing cases from this court and Appellate Court reflecting inconsistent treatment). Nor do I disagree with the majority's basic conclusion on the issue: whether a criminal attempt has occurred will depend on what the defendant already has done, although what still remains to be done is not irrelevant to the analysis. My concern relates solely to the suggestion, implicit but unmistakable, that the "already-done versus remains-to-be-done" framework provides any meaningful guidance on the question of when preparation ends and attempt begins.

In the criminal law, the idea of an "attempt"—like the idea of a "substantial step"—is fundamentally and intrinsically a *relative* concept.[1] More particularly, these terms derive their content and meaning in significant part from a *terminal* reference point. An attempt to do what? A substantial step toward what end? These questions only can be answered by reference to the intended end point, regardless of whether it ultimately is achieved. I fully agree with the proposition that a criminal attempt under our law can (and usually will) occur before the defendant or his agent has taken the

[1] See, e.g., *U.S. Industries/Federal Sheet Metal, Inc.* v. *Director, Office of Workers' Compensation Programs*, 455 U.S. 608, 619 n.3, 102 S. Ct. 1312, 71 L. Ed. 2d 495 (1982) (recognizing that "[t]he term 'substantial' is relative"); *Bausch & Lomb, Inc.* v. *Alcon Laboratories, Inc.*, 79 F. Supp. 2d 243, 249 (W.D.N.Y. 1999) ("[t]he word 'significant,' like 'substantial,' is a relative term that does not inherently convey any particular quantifiable standard"); *Fisette* v. *DiPietro*, 28 Conn. App. 379, 384, 611 A.2d 417 (1992) (holding that "the term 'substantial circulation' is relative"); *Saugus Auto Theatre Corp.* v. *Munroe Realty Corp.*, 366 Mass. 310, 311, 318 N.E.2d 615 (1974) (noting that "the word substantial . . . is a relative term and must be examined in its context to gauge its meaning" [internal quotation marks omitted]).

last step, or even the penultimate or antepenultimate step, necessary to complete the crime. The Model Penal Code, which has been adopted in Connecticut and many other jurisdictions, makes this point crystal clear. See 1 A.L.I., Model Penal Code and Commentaries (1985) § 5.01, comment 6 (a), p. 329. But it also is true, as the majority seems to acknowledge, that the ultimate objective cannot be ignored entirely when the critical question is whether the defendant's "step" toward that objective is a "substantial" one.

I believe that the "already-done versus remains-to-be-done" framework is ineffectual as a legal standard, at least in hard cases like this one, because it does little to resolve the central difficulty of locating the point at which planning ends and perpetration begins. I do not offer a better legal standard with brighter lines for easier application—nor do I believe that one exists.[2] I simply caution lawyers and trial judges that they should not expect the framework set forth in the majority opinion to provide particularly helpful guidance in resolving these difficult issues in cases where such guidance is most needed.

[2] Judges and legal scholars have long struggled to identify and articulate a coherent, workable theory of criminal attempt and, to this day, remain dissatisfied with the results. See J. Hall, "Criminal Attempt—A Study of Foundations of Criminal Liability," 49 Yale L.J. 789, 789 (1940) ("Whoever has speculated on criminal attempt will agree that the problem is as fascinating as it is intricate. At every least step it intrigues and cajoles; like la belle dame sans merci, when solution seems just within reach, it eludes the zealous pursuer, leaving him to despair ever of enjoying the sweet fruit of discovery."). A recent article sketches the intellectual history of this endeavor since Lord Mansfield's "discovery" of the crime of attempt in the late eighteenth century. See M. Fenster, "The Dramas of Criminal Law: Thurman Arnold's Post-Realist Critique of Law Enforcement," 53 Tulsa L. Rev. 497, 510 (2018) ("[t]he doctrine today remains as muddled and contentious as it was in Arnold's era [in the 1930s]; yet it continues to attract commentators who obsessively offer their own solutions as if only they and their pet theory can finally solve the doctrinal riddle" [footnote omitted]).

II

I begin my analysis with the appropriate standard of review for claims challenging the sufficiency of the evidence. As the majority points out, "we apply a two-part test" to sufficiency of the evidence claims, which requires us first to "construe the evidence in the light most favorable to sustaining the verdict," and second, to "determine whether upon the facts so construed and the inferences reasonably drawn therefrom the jury reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt." *State* v. *Moreno-Hernandez*, 317 Conn. 292, 298, 118 A.3d 26 (2015). This standard of review undeniably requires great deference to the jury's verdict. But it does not negate or dilute the obligation of an appellate court reviewing a criminal conviction to ensure that the evidentiary basis for the conviction meets the constitutional "beyond a reasonable doubt" standard. See J. Newman, "Beyond 'Reasonable Doubt,' " 68 N.Y.U. L. Rev. 979, 980 (1993) (encouraging appellate courts "to take the [reasonable doubt] standard seriously as a rule of law against which the validity of convictions is to be judged"). Our review, in other words, "is not entirely toothless . . . for [w]e do not . . . fulfill our duty through rote incantation of [the principles governing a review of sufficiency of evidence] followed by summary affirmance." (Citation omitted; internal quotation marks omitted.) *United States* v. *Salamanca*, 990 F.2d 629, 638 (D.C. Cir.), cert. denied, 510 U.S. 928, 114 S. Ct. 337, 126 L. Ed. 2d 281 (1993). Although "[a] jury is entitled to draw a vast range of reasonable inferences from evidence, [it] may not base a verdict on mere speculation"; id.; "and caution must be taken that the conviction not be obtained by piling inference on inference." (Internal quotation marks omitted.) *United States* v. *Jones*, 44 F.3d 860, 865 (10th Cir. 1995).

These cautionary precepts take on special relevance under the circumstances of the present case, in which the jury was not presented with the option of convicting the defendant of a lesser crime more closely matching his criminal conduct. "The sufficiency of the evidence warrants particular scrutiny when the evidence strongly indicates that a defendant is guilty of a crime other than that for which he was convicted, but for which he was not charged. Under such circumstances, a trier of fact, particularly a jury, may convict a defendant of a crime for which there is insufficient evidence to vindicate its judgment that the defendant is blameworthy. Compelling evidence that a defendant is guilty of some crime is not, however, a cognizable reason for finding a defendant guilty of another crime." *United States* v. *Salamanca*, supra, 990 F.2d 638; see also *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) ("It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.").

The defendant was convicted of the crime of attempted murder. Our attempt statute, § 53a-49, provides in relevant part that "[a] person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he . . . intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime. . . ." General Statutes § 53a-49 (a) (2). "In general terms . . . [a] substantial step must be something more than mere preparation, yet may be less

than the last act necessary before the actual commission of the substantive crime, and thus the finder of fact may give weight to that which has already been done as well as that which remains to be accomplished before commission of the substantive crime. . . . In order for behavior to be punishable as an attempt, it need not be incompatible with innocence, yet it must be necessary to the consummation of the crime and be of such a nature that a reasonable observer, viewing it in context could conclude beyond a reasonable doubt that it was undertaken in accordance with a design to violate the statute." (Internal quotation marks omitted.) *State* v. *Sorabella*, 277 Conn. 155, 180–81, 891 A.2d 897, cert. denied, 549 U.S. 821, 127 S. Ct. 131, 166 L. Ed. 2d 36 (2006); see also *State* v. *Lapia*, 202 Conn. 509, 514–15, 522 A.2d 272 (1987) ("[t]he mere preparation to do something, absent an act constituting a substantial step toward the commission of a specific offense, is insufficient to sustain a conviction for criminal attempt").

Pursuant to § 53a-49 (b), "[c]onduct shall not be held to constitute a substantial step . . . unless it is strongly corroborative of the actor's criminal purpose. . . ." General Statutes § 53a-49 (b). "This formulation is used to distinguish acts of preparation from acts of perpetration" and it "requires *more* than a mere start of a line of conduct leading to the attempt." (Emphasis added.) Commission to Revise the Criminal Statutes, Commentary on Title 53a: The Penal Code (1969), pp. 28–29. The acts undertaken must be "substantial" and "unambiguous in supporting a criminal purpose." Id. Although, as a general matter, "[w]hat constitutes a substantial step in any given case is a question of fact"; (internal quotation marks omitted) *State* v. *Osbourne*, 138 Conn. App. 518, 528, 53 A.3d 284, cert. denied, 307 Conn. 937, 56 A.3d 716 (2012); the court must exercise its gatekeeping function to ensure that the defendant's conduct is "strongly corroborative of the actor's criminal

purpose. . . .” General Statutes § 53a-49 (b); see also *United States* v. *Crowley*, 318 F.3d 401, 415 (2d Cir.) (noting that “the ‘strongly corroborative’ language” is used in Model Penal Code to instruct “courts as to what kinds of acts may be ‘held’ to be sufficient to constitute substantial steps”), cert. denied, 540 U.S. 894, 124 S. Ct. 239, 157 L. Ed. 2d 171 (2003); Model Penal Code and Commentaries, supra, § 5.01, comment 6 (c), p. 352 (noting that “the judge can refuse to submit the issue to the jury or refuse to accept the decision of the jury only if there is insufficient evidence of criminal purpose or there is no reasonable basis for holding that the defendant’s conduct was ‘strongly corroborative’ of the criminal purpose attributed to him”). If the defendant’s conduct is not substantial and strongly corroborative of his criminal purpose, then the evidence is insufficient as a matter of law to constitute a substantial step.

Subsection (b) of the statute lists seven examples of conduct that “if strongly corroborative of the actor’s criminal purpose, shall not be held insufficient as a matter of law . . . .” General Statutes § 53a-49 (b). One of the enumerated circumstances is “soliciting an *innocent* agent to engage in conduct constituting an element of the crime. . . .” (Emphasis added.) General Statutes § 53a-49 (b) (7); see generally General Statutes § 53a-179a.[3] Indeed, the rule in Connecticut has long been that a solicitation, even if “accompanied by a bribe” or an “offer of money,” is “never an attempt.” *State* v. *Schleifer*, 99 Conn. 432, 438, 121 A. 805 (1923).

[3] General Statutes § 53a-179a provides in relevant part: “(a) A person is guilty of inciting injury to persons or property when, in public or private, orally, in writing, in printing or in any other manner, he advocates, encourages, justifies, praises, incites or solicits the unlawful burning, injury to or destruction of any public or private property or advocates, encourages, justifies, praises, incites or solicits . . . the killing or injuring of any class or body of persons, or of any individual.

“(b) Inciting injury to persons or property is a class C felony.”

In *State* v. *O'Neil*, 65 Conn. App. 145, 782 A.2d 209 (2001), aff'd, 262 Conn. 295, 811 A.2d 1288 (2003), the Appellate Court expounded upon the distinction between solicitation and attempt. In *O'Neil*, the defendant was convicted of attempt to commit murder because he mailed a letter asking someone to kill a witness. Id., 148. The Appellate Court noted that in addition to the common-law distinction between the crimes of attempt and solicitation, the Model Penal Code, upon which our attempt statute is based, "counseled against classifying solicitations as attempts." Id., 164. Specifically, the commentary to § 5.02 of the Model Penal Code provides that "[w]hile attempts and solicitations have much in common and are closely related in their historical development, this section provides for separate definition of criminal solicitation on the ground that each of the two inchoate offenses [attempt and solicitation] presents problems not pertinent to the other." (Internal quotation marks omitted.) Id., quoting Model Penal Code and Commentaries, supra, § 5.02, comment 3, pp. 372–73. Additionally, "the inclusion of the 'innocent' agent formulation in § 53a-49 (b) (7) is a factor that reinforces the common-law distinction between solicitation and attempt," because by "including one specific solicitation situation in the attempt statute, it is logical to conclude that the legislature implicitly determined that other forms of solicitation, in and of themselves, do not constitute an attempt to commit a crime."[4] *State* v. *O'Neil*, supra, 167. In light

[4] The Appellate Court explained the inclusion of the "innocent agent" exception in § 53a-49 (b) as follows: "The example given in the Model Penal Code and Commentaries of why the language, 'soliciting an innocent agent,' was included as one of the seven examples of conduct or a situation that might be sufficient to satisfy the requisite conduct for attempt is an example attributed to Professor Glanville Williams. That example, as given, is: '(vii) *Solicitation of Innocent Agent.* Professor Glanville Williams suggests the situation where "D unlawfully tells E to set fire to a haystack, and gives him a match to do it with. . . . If, as D knows, E (mistakenly) believes that it is D's stack and that the act is lawful, E is an innocent agent, and D is guilty of attempted arson; D, in instructing E, does the last thing that he

of the distinction between the crimes of solicitation and attempt, which "has persisted for almost eighty years," the Appellate Court reversed the defendant's conviction because "[t]he conduct of the defendant consisted of a mere solicitation or a mere preparation—that is not enough to constitute an attempt." Id., 171; see also *State* v. *Damato*, 105 Conn. App. 335, 343–45, 937 A.2d 1232 (holding that evidence was sufficient to support defendant's conviction of attempted murder because defendant did not just solicit hitman, he also followed victim and surveilled victim's residence), cert. denied, 286 Conn. 920, 949 A.2d 481 (2008).

In the present case, there is no question that the defendant's conversations with Evans and Paleski constituted criminal solicitations in violation of § 53a-179a.

intends in order to effect his criminal purpose. (It would be the same if he only used words and did not give E a match.)'" Model Penal Code and Commentaries, supra, § 5.01, comment [6] (b) (vii), p. 346 [and] n.214, quoting G. Williams, Criminal Law: The General Part (2d Ed. 1961) p. 616.

"As the defendant points out, the commentary on Professor Williams' example explains that '[t]he prohibition against criminal solicitation does not apply in this case because *E* is himself not being incited to commit a crime. For this reason *E* is not in a position, as an independent moral agent, to resist *D's* inducements; unlike the situation in criminal solicitation, *E* is wholly unaware that commission of a crime is involved. Analytically, therefore, *D's* conduct, in *soliciting an innocent agent*, is conduct constituting an element of the crime, which is properly subsumed under the attempt section; and the solicitation, irrespective of whether it happens to be the last act, should be the basis for finding a substantial step toward the commission of a crime.' . . . Model Penal Code and Commentaries, supra, § 5.01, comment [6] (b) (vii), pp. 346–47. So E, being an 'innocent agent,' wholly unaware that a crime is involved, is not in the position to resist or reject D's requests; whereas a noninnocent agent, in that situation, knowing this criminal activity is afoot is free to accept or reject D's requests. The 'innocent agent' can fairly be said to include one who is clear of responsibility because for example, he lacks mens rea; E would fall into that category. Therefore, D's conduct, in soliciting E, an innocent agent, is conduct constituting an element of the crime, which comes within § 53a-49 (b) (7) of the attempt section and the solicitations, 'irrespective of whether it happens to be the last act, should be the basis for finding a substantial step toward the commission of a crime.' Id." (Emphasis in original.) *O'Neil*, supra, 65 Conn. App. 166–67.

The defendant, however, was not charged with the crime of solicitation to commit murder; he was charged with the crime of attempt to commit murder in violation of General Statutes §§ 53a-54a and 53a-49.[5] The question presented in this appeal is whether the defendant crossed the line between solicitation and attempt by taking a substantial step toward the commission of the offense, i.e., whether he went beyond mere planning and preparation by committing acts strongly corroborative of his criminal purpose and of such a nature that a reasonable observer could conclude beyond a reasonable doubt that they were undertaken with the clear intent to commit the crime of murder.

"[T]he question of when preparation ends and attempt begins is exceedingly difficult." (Internal quotation marks omitted.) *United States* v. *Irving*, 665 F.3d 1184, 1195 (10th Cir. 2011), cert. denied, 566 U.S. 928, 132 S. Ct. 1873, 182 L. Ed. 2d 656 (2012); see also *United States* v. *Coplon*, 185 F.2d 629, 633 (2d Cir. 1950) (Hand, C. J.) ("[t]he decisions are too numerous to cite, and would not help much anyway, for there is, and obviously can be, no definite line" between preparation and attempt), cert. denied, 342 U.S. 920, 72 S. Ct. 362, 96 L. Ed. 688 (1952). I agree with the majority that the fact that "further major steps must be taken before the crime can be completed does not preclude a finding that the steps already undertaken are substantial." (Internal

[5] Solicitation to commit murder is a class C felony punishable by "a term not less than one year nor more than ten years"; General Statutes § 53a-35a (1) (A) (7); whereas attempt to commit murder is a class B felony punishable by "a term not less than one year nor more than twenty years . . . ." General Statutes § 53a-35a (1) (A) (6); see also General Statutes § 53a-51 ("[a]ttempt and conspiracy are crimes of the same grade and degree as the most serious offense which is attempted or is an object of the conspiracy, except that an attempt or conspiracy to commit a class A felony is a class B felony"); General Statutes § 53a-179a (b) ("[i]nciting injury to persons or property is a class C felony"). The defendant was sentenced to twenty years of incarceration, execution suspended after fifteen years, and five years of probation with special conditions.

quotation marks omitted.) The majority, however, fails to give sufficient weight to the requirement that the steps already undertaken must be *substantial* and *strongly corroborative* of the actor's criminal intent in order to rise to the level of an attempt.

To determine whether the defendant's conduct in this case constituted a substantial step toward the commission of the crime of murder, sister state precedent is instructive. Although there is not a complete and uniform consensus as to what acts are sufficient to support a conviction of attempted murder in the murder-for-hire context; see *State* v. *Disanto*, 688 N.W.2d 201, 208 (S.D. 2004) (noting that "the courts are divided" in murder-for-hire cases); the general agreement among those states that have adopted the Model Penal Code definition of attempt is that more than mere conversation is required.[6] See *State* v. *Molasky*, 765 S.W.2d 597, 602

[6] Many of the states that have not adopted the Model Penal Code definition of attempt require the defendant to have taken *more* than a substantial step and be dangerously close to the commission of the offense. See, e.g., *Commonwealth* v. *Hamel*, 52 Mass. App. 250, 256, 752 N.E.2d 808 (reversing defendant's attempted murder conviction, even though defendant solicited two undercover officers posing as hitmen, agreed upon price, offered goods and property as "upfront payment," provided "descriptions of [victims] and their habits," and produced sketches of victims' home, because "[t]here were no acts, on the part either of the defendant or of the officers, that came close to or formed part of any physical perpetration of any murders"), cert. denied, 435 Mass. 1104, 759 N.E.2d 328 (2001); *State* v. *Melton*, 821 S.E.2d 424, 431–32 (N.C. 2018) (reversing defendant's attempted murder conviction, even though defendant met "with the supposed hired killer, tender[ed] the [$2500] in cash as an initial payment, provid[ed] the hired killer the details necessary to complete the killing of defendant's former wife, and help[ed] the hired killer plan how to get his former wife alone and how to kill her out of the presence of their daughter," because such acts, "calculating as they are, [do] not amount to proof of overt acts" because they would not, without more, "inexorably result in the commission of the offense" [internal quotation marks omitted]); *State* v. *Disanto*, supra, 688 N.W.2d 207, 213 (reversing defendant's attempted murder conviction, even though defendant gave "the [hitman] a final order to kill," because defendant's actions did not go "beyond preparation into acts of perpetration"). Other states with different formulations of the crime of attempt also require more than the mere solicitation and hiring of a hitman—the defendant must

(Mo. 1989) (noting that, to constitute substantial step, have committed slight or overt acts exhibiting his firm intention to commit the crime of murder. See *Braham* v. *State*, 571 P.2d 631, 637 (Alaska 1977) (holding that solicitation plus commission of overt acts is enough to sustain conviction of attempted murder, and concluding that evidence was sufficient because defendant and hitman "entered into a contract . . . to kill [the intended victim]," settled "on the contract price [of] $600," and defendant committed overt act by having hitman visit victim in hospital to gain victim's trust), cert. denied, 436 U.S. 910, 98 S. Ct. 2246, 56 L. Ed. 2d 410 (1978); *State* v. *Mandel*, 78 Ariz. 226, 229, 278 P.2d 413 (1954) (The court affirmed the defendant's conviction of attempted murder because the defendant "not only solicited, she consummated the contract to that end and partly executed the same by payment of a portion of the consideration; she identified for the intended assassin the home and the car of the intended victim, pointed out a possible site for disposition of the body and advised the place and time when and where contact could be made for the consummation of the murder. She did everything she was supposed to do to accomplish the purpose. Had it not been for the subterfuge, the intended victim would have been murdered."); *People* v. *Superior Court (Decker)*, 41 Cal. 4th 1, 9, 157 P.3d 1017, 58 Cal. Rptr. 3d 421 (2007) (affirming defendant's attempted murder conviction because defendant solicited and hired hitman, agreed on price, provided hitman "with all of the necessary information concerning [the victim], her home and office, and her habits and demeanor," gave the hitman "the agreed-on [down payment] of [$5000]" and expressed that he was " 'absolutely, positively, 100 percent sure' " he wanted murder committed); *Saienni* v. *State*, 346 A.2d 152, 153–54 (Del. 1975) (affirming defendant's attempted murder conviction because defendant procured life insurance on victim, contracted hitman, traveled to Maryland with hitman and "pointed out the entire physical layout and discussed step by step how the murder was to be accomplished," "discussed and rehearsed the murder in great detail" in subsequent meetings with hitman, and "started [the] sequence of events" planned to culminate in murder); *Duke* v. *State*, 340 So.2d 727, 730 (Miss. 1976) (affirming defendant's attempted murder conviction because defendant's acts "went far beyond mere preparation and planning because he solicited [his employee] to kill [the intended victim], arranged a hunting trip for that purpose, and following the failure to kill [the intended victim] during the . . . hunting trip, he again solicited [his employee] to find a [hitman], agreed to pay $15,000 to have [the intended victim] killed, and actually paid $11,500 to a person whom he believed had killed [the intended victim]"); *State* v. *Burd*, 187 W. Va. 415, 419, 419 S.E.2d 676 (1991) (affirming defendant's attempted murder conviction because defendant "not only had several conversations with [the hitman], but gave him $150 to purchase a weapon and $500 as a down payment for the commission of the murders; promised to pay another $550 upon completion of the crimes; gave him a sketch of the crime scene and descriptions of the intended victims; gave him a suicide note and instructed him on how to make the murders look

there must be "something beyond conversation," such as "making a cash payment, delivering a weapon, visiting a crime scene, waiting for a victim, etc., [that] has accompanied the conversation, thus evidencing the seriousness of purpose, and making the planned crime closer to fruition"). To cross the line between criminal solicitation and attempt, the defendant must take some *action*, beyond the solicitation of a surrogate to commit the crime, strongly corroborative of his criminal purpose. Some examples of such action include the payment of money, surveillance of the victim, visiting the crime scene, furnishing the weapon for the commission of the offense, expressing urgency and certainty regarding the murder-for-hire plan, meeting with the hitman multiple times, and repeatedly importuning the hitman to commit the crime. See, e.g., *Martin-Argaw* v. *State*, 343 Ga. App. 864, 866, 806 S.E.2d 247 (2017) (affirming defendant's conviction of attempted murder because "[t]he evidence in this case showed that [the defendant] had expressly asked the undercover officer—whom he believed to be a [hitman]—to kill three people; that he had given the [hitman] specific information about the three people to help him accomplish this purpose; that he had agreed to pay a negotiated price for the hit; that he had discussed the logistics of making the payment; and that he had responded affirmatively when the [hitman] made it clear that [the defendant] did not need to do anything else before the hit occurred"); *State* v. *Manchester*, 213 Neb. 670, 676, 331 N.W.2d 776 (1983) (affirming defendant's conviction of attempted murder because defendant "made plans for the murder, solic-

like murder-suicide; instructed him on where to inflict the gun shots; and finally, took [the hitman] and physically showed him the intended victims' home"); but see *State* v. *Gay*, 4 Wn. App. 834, 840, 486 P.2d 341 (1971) (holding that hiring hitman constitutes overt act that "goes beyond the sphere of mere solicitation and . . . may constitute the crime of attempt" where defendant had hired hitman, agreed on price, and provided down payment, pictures and information about victim).

ited a killer, discussed the contract price and set the money aside in his billfold, arranged for the weapon and a scope, and showed the killer the victim, his residence, and his place of work"); *State* v. *Kilgus*, 128 N.H. 577, 585, 519 A.2d 231 (1986) (holding that defendant's solicitation of another to commit murder, payment of $1000, identification of victim, and instruction to dispose of corpse out-of-state "was more than . . . 'mere' or 'naked' solicitation," rather, "[i]t was a 'substantial step' toward the commission of capital murder"); *State* v. *Fornino*, 223 N.J. Super. 531, 540, 539 A.2d 301 (App. Div.) (holding that "defendant's visits to the scene of the planned crime and his receipt of money for its commission could properly be found by the jury to constitute 'substantial steps in a course of conduct planned to culminate in the commission of the crime' which were 'strongly corroborative of the actor's criminal purpose' "), cert. denied, 111 N.J. 570, 546 A.2d 499 (1988), and cert. denied, 488 U.S. 859, 109 S. Ct. 152, 102 L. Ed. 2d 123 (1988); *State* v. *Group*, 98 Ohio St. 3d 248, 263, 781 N.E.2d 980 (2002) (holding that defendant's acts of "offering [an acquaintance] $150,000 to throw a firebomb through the window of [the intended victim's] house, providing him with her address, repeatedly importuning him to commit the crime, and instructing him how to make the bomb and how to misdirect any subsequent police investigation—strongly corroborate [his] criminal purpose, and therefore constitute a substantial step in a course of conduct planned to culminate in the aggravated murder of [the intended victim]"); but see *State* v. *Kimbrough*, 364 Or. 66, 89–90, 431 P.3d 76 (2018) (reversing defendant's attempted murder conviction even though defendant "intended all the substantive crimes to be committed by the hitman and . . . took steps toward realizing that goal," because "to be guilty of attempt, the defendant must personally engage in conduct that constitutes a substantial step, and that

substantial step must be toward a crime that the defendant intends to participate in himself"). Without some substantial action, there is no way to distinguish between "people who pose real threats from those who are all hot air . . . ." *United States* v. *Gladish*, 536 F.3d 646, 650 (7th Cir. 2008) (noting that "[t]reating speech (even obscene speech) as the 'substantial step' would abolish any requirement of a substantial step"); see also *United States* v. *Resendiz-Ponce*, 549 U.S. 102, 107, 127 S. Ct. 782, 166 L. Ed. 2d 591 (2007) (noting that under Model Penal Code, as well as common law, "mere intent to violate a . . . criminal statute is not punishable as an attempt unless it is also accompanied by significant conduct").[7]

In light of this extensive case law focused on the crime of attempt in the murder-for-hire context, and after a thorough review of the record in the present case, I conclude that the defendant's actions, although morally reprehensible and criminally punishable under our solicitation statute, are insufficient as a matter of law to constitute a substantial step toward the commission of the crime of murder. The events at issue occurred over a very short period of time,[8] during which

[7] The majority cites only a single case, *State* v. *Urcinoli*, 321 N.J. Super. 519, 729 A.2d 507 (App. Div.), cert. denied, 162 N.J. 132, 741 A.2d 99 (1999), that upholds a conviction on facts anywhere close to those in the present case. The vast majority of cases employing the Model Penal Code standard—our legal standard in Connecticut—require some action beyond mere conversation as a "substantial step" toward the commission of the crime of attempted murder.

[8] I disagree with the majority that the evidence was sufficient for the jury reasonably to find that "the defendant had begun his planning well in advance of June 9 . . . ." The defendant may have *thought about* killing his wife prior to June 9, but it is "[o]ne of the basic premises of the criminal law . . . that bad thoughts alone cannot constitute a crime. This is no less true as to an attempt . . . ." (Footnote omitted.) 2 W. LaFave, Substantive Criminal Law (3d Ed. 2018) § 11.4; see also Model Penal Code and Commentaries, supra, § 2.01, comment 1, p. 214 ("[i]t is fundamental that a civilized society does not punish for thoughts alone"). There are important and critical distinctions between *thinking* about the commission of a crime, *planning* the commission of a crime, and *perpetrating* a crime. The defendant did not

the defendant was upset because he "was suppose[d] to have the kids [for visitation]," but his wife "didn't give [him] the kids" in accordance with his expectation. The defendant's conversations with Evans represent an initial attempt to find a hitman. The defendant met later that night to solicit Paleski, the supposed hitman. The defendant's meeting with Paleski, like his earlier meeting with Evans, was a solicitation to commit a crime. Although there were two solicitations (one of Evans and one of Paleski), two solicitations within the same day to commit the same crime do not add up to an attempt. By equating the defendant's efforts to hire a hitman with a substantial step toward the commission of the crime of murder, the majority blurs the important distinction between the crimes of solicitation and attempt—a distinction that has persisted in our case law for more than eighty years. The real issue is whether applicable law would permit a juror to conclude, beyond a reasonable doubt, that the defendant crossed the line between planning a murder and perpetrating a murder on the basis of his conversations with Evans and Paleski. I answer that question "no" for the following reasons.

At no point during his seventeen minute conversation with Paleski did the defendant express a clear and unambiguous intention to implement his murder-for-hire idea. No one can fairly read the full transcript of the conversation without detecting a degree of hesitation and equivocation on the part of the defendant.[9] When Paleski attempted to clarify the defendant's intent by asking him whether he wanted the would-be victim

pursue the notion of putting his bad thoughts into motion until the day he met Evans and Paleski, June 9, 2011, and, even then, he did not *do* anything to take his idea beyond the realm of preliminary planning and preparation.

[9] A complete copy of the transcript of the defendant's conversation with Paleski, which has been redacted to protect the privacy of the would-be victim, is attached as a Joint Appendix to the Majority and Dissenting Opinions.

"out of the picture . . . ? Morte," the defendant responded equivocally: "[T]hat's where it's getting to . . . it's like . . . I wish we didn't need to be there but . . . ." The same ambivalence is repeated at numerous points during the conversation.[10] The defendant clearly stated that he "didn't put that [much] thought into the details" of his murder-for-hire idea because "it all happened fast, I fucking talked to fucking [Evans] tonight. [H]e said he was going to talk to somebody, he went to talk to somebody, and then that was that. . . . [A]nd here I'm sitting with you I was expecting to talk to him." The defendant asked for the meeting with Paleski, but during that meeting he comes across as rushed, not resolute, as Paleski tries to engage him to help formulate more concrete plans. See Commission to Revise the Criminal Statutes, Commentary on Title 53a: The Penal Code (1969), p. 29 (noting that § 53a-49 "requires *more* than a mere start of a line of conduct leading to the attempt" [emphasis added]).

The majority makes much of the fact that the defendant provided Paleski with identifying information about the would-be victim, such as her name, address, appearance, work schedule, and automobile. The trans-

[10] The record reflects the following colloquies between the defendant and Paleski:

"[Paleski]: you want her completely out of the picture right? Morte

"[The Defendant]: that's where it's getting to . . . it's like

"[Paleski]: that's what you want? Alright brother

"[The Defendant]: I wish we didn't need to be there but . . .

"[Paleski]: well I mean

"[The Defendant]: you know

* * *

"[Paleski]: and this is what you want . . just so know I'm going to put 2 in that bitches head and take that car and be gone and I'll fucking burn it somewhere

"[The Defendant]: that's the only way that I [c]an come up . . . that I thought from my like that . . . it makes sense you know what I mean it's gonna hopefully like going to make it not . . ya' know . . . how? What am I? . . . ya' know what I mean? . . . I don't fucking know . . all know is I'm going to be fucking hemmed up in fucking jail again."

mittal of this information was necessary, however, for Paleski to understand what he was being solicited to do; it did not elevate the crime of solicitation to the crime of attempted murder. Identifying information of this nature is part and parcel of the solicitation and preliminary planning of the crime; to treat it as part of the perpetration of the crime erodes the demarcation between solicitation and attempt. Moreover, if we look at this particular portion of the conversation to discern the *defendant's* state of mind, what stands out as significant is the fact that virtually all of the information provided by the defendant regarding the would-be victim was not offered by him until elicited by Paleski's direct, explicit, and extremely persistent questioning.[11]

[11] For example, the record reflects the following colloquy between the defendant and Paleski:

"[Paleski]: who's this the ex-wife?

"[The Defendant]: to be or what you know

"[Paleski]: alright alright what's her name?

"[The Defendant]: [T's full name redacted]

"[Paleski]: [T] you got an address and shit? . . alright

"[The Defendant]: Yes, she works the night shift

"[Paleski]: she got a job?

"[The Defendant]: yea

"[Paleski]: where at?

"[The Defendant]: Stamford Hospital

"[Paleski]: alright . . she works every night or part time?

"[The Defendant]: only like 1 or 2 nights a week

"[Paleski]: alright . . . she lives in Stamford?

"[The Defendant]: yea

"[Paleski]: what's the address?

"[The Defendant]: [T's street address redacted]

"[Paleski]: what's the number?

"[The Defendant]: [T's street address number redacted]

"[Paleski]: . . . ok . . . alright . . you (got) have a picture of her or anything?"

The defendant had not brought a printed photograph of the would-be victim to the meeting, but showed Paleski a photograph that he had on his cell phone in response to Paleski's inquiry. Similarly, the information on the piece of paper the defendant gave to Paleski was information that Paleski specifically requested:

"[Paleski]: I ain't got shit in here but can you get me a piece of paper and write down her name

I return to the fact that the only evidence of a criminal attempt in this case consists of the words spoken by the defendant to Evans and Paleski soliciting them to commit a crime, and the words spoken in the same discussion with Paleski sketching out, for the very first time, an incipient plan to commit that crime. The damning "actions" identified by the majority involve nothing more than the basic acts physically necessary to hold such meetings—the defendant drove his car, provided information to identify the would-be victim, and shared other basic information to begin planning the crime. There is no evidence that the defendant conducted any surveillance, obtained or furnished a weapon, "cased" the potential crime scene to test the viability of a plan, or took any *actions*, beyond mere solicitation, to implement his murder-for-hire idea. Indeed, the record reflects that the defendant affirmatively *declined* to take the one action that, under the particular circumstances of this case, would have demonstrated his firm intention to commit the crime—the payment of money. Paleski repeatedly informed the defendant that he would not "do shit without that money," but despite this knowledge, the defendant still declined to provide a cash down payment to Paleski that night. I do not suggest that the payment of money is a necessary prerequisite in all murder-for-hire cases; see *State* v. *Servello*, 59 Conn. App. 362, 373 and n.4, 757 A.2d 36, cert. denied, 254 Conn. 940, 761 A.2d 764 (2000); but I believe that the act of making payment in *this* case, on *this* record,

"[The Defendant]: yup
"[Paleski]: house address
"[The Defendant]: yup
"[Paleski]: hospital name
"[The Defendant]: yup
"[Paleski]: what kind of car she drives
"[The Defendant]: mm hmmmm

* * *

"[Paleski]: write it all . . . write that shit down for me
"[The Defendant]: alright."

became the only reliable indicator of the defendant's actual intentions during the crucial time period at issue. Under the circumstances of this case—where the conversation has not moved beyond preliminary planning, the time period is short, the defendant's words reflect some uncertainty, and the defendant has been told in explicit terms that payment is an absolute prerequisite to any steps being taken toward commission of the offense—I would hold that the failure to provide payment is strongly indicative that a final decision to commit the crime has not been made. See *State* v. *Molasky*, supra, 765 S.W.2d 602. Because "a substantial step is evidenced by actions, indicative of purpose, not mere conversation standing alone"; (footnote omitted) id.; the record in this case, in my view, does not contain sufficient evidence to sustain the defendant's conviction of attempted murder.

Lastly, I note that there is absolutely no evidence in the record to support the majority's conclusion that the would-be victim was in imminent danger of harm, thus necessitating the defendant's immediate arrest. The defendant's commitment to his murder-for-hire idea was less than certain, but to the extent that the defendant intended to follow through with it, he made abundantly clear to Paleski that there was no "urgency of tonight" and that he "definitely [didn't] want to do anything at the house" or "near the kids," just as Paleski made it clear to the defendant that he would do absolutely nothing without being paid first. The majority's hypothesis that the defendant "could have killed [the victim] himself" before meeting with Paleski in the morning not only is unsupported by any record evidence, it is contradicted by that evidence.[12] If the author-

[12] The majority's conclusion is predicated in part on an episode of alleged domestic violence between the defendant and the would-be victim on March 9, 2011. On that date, the would-be victim accused the defendant of attempting to push her down the stairs, but the defendant denied engaging in the alleged conduct. The defendant subsequently was charged with violation of a criminal protective order under General Statutes §§ 53a-223 and

ities harbored any concerns whatsoever about the would-be victim's safety, moreover, they had ample evidence to arrest and charge the defendant with the crime of solicitation. The fact that the authorities decided to charge the defendant with the crime of attempted murder, rather than solicitation, does not diminish the state's burden to prove, beyond a reasonable doubt, that the defendant took a substantial step toward the commission of the offense.

Because there is insufficient evidence to prove beyond a reasonable doubt that the defendant committed any substantial acts strongly corroborative of his criminal intent, I would reverse the judgment of the Appellate Court. Accordingly, I respectfully dissent.

JOINT APPENDIX to the MAJORITY and DISSENTING OPINIONS

(State's Exhibit No. 11)
Murder for Hire Transcript: Daniel B.

Today's Date is Friday June 10, 2011, Time: Approx 12:53 am

12:11[1] [Paleski]: target is walking over to the car now.
12:38 [Paleski] what's up brother, what's going on? Why don't you hop in brother so we can talk. What's good?
12:55 [The Defendant]: shit . . . right about now.. you know.. fucking life and living . . . and trying to deal and get through it all
13:06 [Paleski]: what you need some work put in?
[The Defendant]: yes sir
[Paleski]: what's going on?
[The Defendant]: uhhh divorce
13:13 [Paleski]: yea . . . you got some wood?
[The Defendant]: not right this second cause I didn't (pause inaudible) we're . . . I think he told you already.. I didn't know what was going on/ /I didn't know I was meeting anyone someone tonight..
13:24 [Paleski]: I need to know that you are for real about this.. you know what I'm saying

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46b-38c (e) based on the March 9 allegations, and the jury in the present case *acquitted* the defendant of the charged crime. Outside of those allegations, there was no claim of any history of physical violence perpetrated on the would-be victim by the defendant. Indeed, the would-be victim testified at trial that the defendant never had struck her or threatened her physically.

[1] Times shown indictate the time stamp on the video recording.

[The Defendant]: that's fine I understand that
[Paleski]: I need some wood to get my, to get a burner . . . so I can take care of this shit
13:32 [The Defendant]: alright
[Paleski]: you know.. he said it's 10 large
[The Defendant]: alright
13:41 [Paleski]: alright.. I need like $800 up front to get a burner tonight
[The Defendant]: alright
[Paleski]: alright . . . I want to meet you tomorrow morning I need at least 3 grand before it's done
[The Defendant]: alright
[Paleski]: alright
[The Defendant]: not a problem
13:52 [Paleski]: who's this the ex-wife?
[The Defendant]: to be or what you know
[Paleski]: alright alright what's her name?
14:03 [The Defendant]: [T's full name redacted]
[Paleski]: [T] you got an address and shit? .. alright
[The Defendant]: Yes, she works the night shift
[Paleski]: she got a job?
[The Defendant]: yea
[Paleski]: where at?
14:41 [The Defendant]: Stamford Hospital
[Paleski]: alright.. she works every night or part time?
[The Defendant]: only like 1 or 2 nights a week
14:22 [Paleski]: alright . . . she lives in Stamford?
[The Defendant]: yea
[Paleski]: what's the address?
[The Defendant]: [T's street address redacted]
[Paleski]: what's the number?
[The Defendant]: [T's street address number redacted]
[Paleski]: . . . ok . . . alright.. you (got) have a picture of her or anything?
14:37 [The Defendant]: I do have a little bit older..she's not fucking big on pictures
[Paleski]: she works nights at the hospital?
[The Defendant]: yea
[Paleski]: every night she works?
[The Defendant]: no
[Paleski]: just part time?
[The Defendant]: just a couple days a week . . . one or two nights a week
[Paleski]: she got a steady schedule though?
14:56 [The Defendant]: usually Tuesdays and Thursdays...7pm to 7am, but a lot of times she'll get cancelled from like 7-11 and she'll work like from 11-7...11pm to 7am
[Paleski]: yup
[The Defendant]: so I don't know . . . ya' know we don't talk anymore
[Paleski]: well how soon do you want this done.. I mean
15:20 [The Defendant]: probably.. whatever you do you
[Paleski]: can you get me some money tonight?
[The Defendant]: I can yes

[Paleski]: I need $800 man so I can get a burner . . . alright I already got a dude lined up.. numbers are off it I'm good to go.. that's a picture of her . . . that's how she looks now?
15:43 [The Defendant]: uh her hair is more mixed in colors
[Paleski]: what color?
[The Defendant]: she got all fucking crazy highlights.. like brown and blond and a little bit of black
[Paleski]: alright
15:53 [The Defendant]: I don't think that's the that's the best picture I don't think I have another picture . . . that's with her in it
[Paleski]: is she working tonight?
[The Defendant]: she was supposed to work tonight but I don't know for sure.. because like she was supposed to work Tuesday night
[Paleski]: yup
16:13 [The Defendant]: and she ends up not working at all...so I don't fucking know what, I don't know when (unable to translate)...I don't know for a fact because they cancelled her and shit . . . it's like you know hard to say...I can't answer
[Paleski]: I mean you want this done like quick.. like soon or...
[The Defendant]: that's what I..
[Paleski]: is there some place you don't want it done: I mean I can do it at the house
[The Defendant]: that's what I was trying to figure out from fucking not doing it for you know what I mean a job that's what I was saying to him...I didn't know which way . . . obviously the first person their is going to be looked at is me
[Paleski]: right
[The Defendant]: so I'm trying to obviously to put a little bit of thought into it, talking to Johnny about it he was saying ya' know just talk, he'll talk to you guys and whatever.. figure out
[Paleski]: I'll do however you want.. but if you want it done quick you know I need the $800 I got to get a burner.. and like I said I already got one lined up I can grab that tonight . . . but you have to get me the $800
[The Defendant]: right
[Paleski]: and then I got to hook up with you I want 3 grand in advance
[The Defendant]: right
[Paleski]: before I do it and then after it's done I'll will wait a month or so I'll get in touch with you and then I'll collect the rest
17:14 [The Defendant]: yes or well however...whatever
[Paleski]: or we can go do somebody nab someone else (inaudible) you know
[The Defendant]: Yeah, that's fine...that's why I was telling... I was telling Johnny like . . .
[Paleski]: how you want it done?
[The Defendant]: my relationship with Johnny I don't I didn't care how it worked I just give it to him and let you guys work you know...do however it works
[Paleski]: right
[The Defendant]: I don't know the only thing I was thinking about was because she drives through . . . you from Stamford or no
[Paleski]: No
[The Defendant]: ok well she the hospital is in a rough section and she's got a nice car

[Paleski]: alright
[The Defendant]: so I'm like I don't know if it makes sense, if that would be the best way to go about it
[Paleski]: or you might want to make it look like a car jacking or something
[The Defendant]: something like that...take the car the car is going to get fund and it kind of like explains it
[Paleski]: yup
[The Defendant]: I'm not sure what the best thing to do...I didn't put that thought into the details of how
[Paleski]: you want her completely out of the picture right? Morte 18:10 [The Defendant]: that's where it's getting to...it's like
[Paleski]: that's what you want? Alright brother
[The Defendant]: I wish we didn't need to be there but . . .
[Paleski]: well I mean
[The Defendant]: you know
[Paleski]: I'll do it but I need, I need, I need some of that wood
[The Defendant]: yea
[Paleski]: can you get me the 800 tonight?
[The Defendant]: I can work it out yea...l could
[Paleski]: alright
[The Defendant]: I just don't want to . . . for me to get it I got to like disturb people tonight.. so I'm only saying it only because I don't want to anything out of place tonight
[Paleski]: ok...but I ain't doing shit without some money
[The Defendant]: understood
[Paleski]: feel me
[The Defendant]: clear.. I'm saying to you I'm not asking you for the urgency of tonight I rather do it so it's not, I don't want to do anything out of character
[Paleski]: Right . . . right
[The Defendant]: you know that's that's my pause for tonight.. because it's going to be out of character for me to go get it tonight
[Paleski]: I ain't got shit in here but can you get me a piece of paper and write down her name
[The Defendant]: yup
[Paleski]: house address
[The Defendant]: yup
[Paleski]: hospital name
[The Defendant]: yup
19:15 [Paleski]: what kind of car she drives
[The Defendant]: mm hmmmm
[Paleski]: do you know the plate on it or anything like that
[The Defendant]: I don't have it memorized
[Paleski]: ok fuck it
[The Defendant]: I can get it
[Paleski]: just write down the type of car she drives just get that for me now just write that shit down
9:28. [The Defendant]: alright
[Paleski]: get that over to me...and then well talk about when were going to do it and
[The Defendant]: alright
[Paleski]: you know
[The Defendant]: works for me I'll get you the info I'll get the money to you through John

[Paleski]: what about at the house you got any fucking Rottweiler's or pit bulls or anything at the house like that?
[The Defendant]: no...at the house I definitely, I definitely don't want to do anything at the house
[Paleski]: you don't want me to do it at the house
[The Defendant]: no
[Paleski]: alright I'm going to have to put some work in then...fucking sitting out there and shit.. what kind of neighborhood is it?
[The Defendant]: the neighborhood is not cool anything is suspicious in the neighborhood . . . so that's why I'm saying I think the job is the safest thing but I just I can't I don't know she doesn't work guaranteed every.. you know this time that time...that's...ya' know I'm trying
[Paleski] write done her name for me, her address, and what kind of car she drives
[The Defendant]: alright
[Paleski]: and come back here we got to get some money going
[The Defendant]: yea...thats fine I'll definitely do that
[Paleski]: you have a piece of paper or something in your car
[The Defendant]: yea I'm sure (inaudible) that I got somethin'
[Paleski]: write it all...write that shit down for me
[The Defendant]: alright
20:39 ***[The Defendant] exits car***
22:54 ***[The Defendant] returns to vehicle***
[Paleski]: how soon do you think you can get that money?
[The Defendant]: I can get it to tomorrow without doing anything . . . you know
[Paleski]: right
[The Defendant]: out of character
[Paleski]: and this is what you want.. just so know I'm going to put 2 in that bitches head and take that car and be gone and I'll fucking burn it some where
[The Defendant]: that's the only way that I an come up . . . that I thought from my like that . . . it makes sense you know what I mean it's gonna hopefully like going to make it not.. ya' know . . . how? What am I? ...ya' know what I mean? (not able to translate).. I don't fucking know.. all know is I'm going to be fucking hemmed up in fucking jail again
23:15 [Paleski]: you'll be straight man.. just make sure your ain't around
[The Defendant]: well exactly
[Paleski]: make sure your with someone so you got you got a story
[The Defendant]: that's exactly what I'm wondering too
[Paleski]: as long as your with someone your straight
[The Defendant]: and if it's a night that she's...this is where she's fucking being fucked up because what's happening what I can tell you is that were supposed to be working off of an alternating week.
[Paleski]: right
[The Defendant]: where on Thursday to Sunday I have the kids but on the alternating week I have them from Friday to Sunday.. so when I have them Thursday to Sunday and if she's working on Thursday night got the kids I'm with the kids
[Paleski]: your fucking golden bro

[The Defendant]: I'm at my aunts house I got the kids I'm all set . . . like I'm good...
[Paleski]: Yea
[The Defendant:] Yea . . . that's why I'm saying that why I think the best circumstances be that.. you know
[Paleski]: Yea
[The Defendant]: 'cause then I'm with my two elderly aunts I'm in the house.. I'm with the kids
[Paleski]: and I can take the bitch off when your with them
[The Defendant]: exactly.. and then it doesn't you know obviously I don't want nothing to be nowhere near the kids and so then I have them
[Paleski]: and she don't pick the kids up after work: Ain't no chance the kids are going to be with her no shit like that?
[The Defendant]: no not when she is going to work or getting out of work.. no.. because I will have the kids Thursday to Sunday
[Paleski]: the best thing to do is one of the nights that you have the kids and your with you parents or something
[The Defendant]: but she's been, the problem is that she is fucking me around right now with the kids.. like I should've have had the kids today, yesterday I don't even know what fucking day it is today.. whatever today is Thursday right.. l was supposed to have the kids today but she didn't give me the kids today.. we're supposed to sign a settlement for divorce probably Monday.. so then if I get it.. lf l know then
[Paleski]: you want to do this shit before the settlement is done
[The Defendant]: that's what I'm trying to fucking think about it because I don't know if there any legally better to do it before or after you know what I mean.. it all happened fast I fucking talked to fucking Johnny tonight.. he said he was going to go talk to somebody he went to talk to somebody and then that was that..
[Paleski]: right
[The Defendant]: and here I'm sitting with you I was expecting to talk to him
***[Evans] knocks at window"""
[The Defendant]: umm were good.. give me a call when you have time tomorrow so we'll can get together
[Paleski]: I need that money bro I can't do shit without that money
[The Defendant]: clear
[Paleski]: alright
[The Defendant]: as soon as he gets.. your going to be with Bam tomorrow right.. and then as soon as your free give me a call.. yea.. the second he gets out we'll meet up
[Paleski]: alright man I'll talk to you...so you're going to be able to get the money tomorrow morning?
[The Defendant]: yea that's not a problem
[Paleski]: ok about what time.. do you want to meet up at?
[The Defendant]: anytime I can meet up with him afterwards when he gets out, I'm meet up with Johnny and then...I'm like trying to be cautious you know what I mean
[Paleski]: right
[The Defendant]: I don't fucking know.. l just, all I know is being that I'm getting divorced I know I'm going straight they're coming straight for me

[Paleski]: yea but if your home with the kids and shit your straight
[The Defendant]: right but I when they look into shit that's why I'm not calling nobody anybody from my phone and I was telling him.. you know I don't want to do nothing on my phone I don't want to nothing.. I don't want there to.. l'm trying to you know
[Paleski]: did you...did you...you got a phone I can call you on tomorrow to meet up where do you want to meet up...you want to set a date, you want to set a time right now that we can meet tomorrow . . . a location and a time
[The Defendant]: that's what I'm trying to figure out...if l talk to Johnny and Johnny's cool with like you guys can talk and meet it has nothing to do with me
[Paleski]: I don't need to talk to that motherfucker it's all about you
[The Defendant]: yea...but he's the perfect like has nothing to do like we're friends at where Johnny's like one of the only dudes that I like trusted to talk about it . . .
[Paleski]: right
[The Defendant]: so with that me and Johnny have a great relationship when we see each other sporadically...so I could see him tomorrow again and he could meet up with you so that when anyone...someone's worrying about where I am there's no..
[Paleski]: well I need....I need to get the money from you.. l ain't fucking meeting with him.. l rather not be dealing with him anymore
[The Defendant]: ok
[Paleski]: you feel me.. you know
[The Defendant]: it's fine whatever you're the boss.. i'm just trying to let you know what I'm thinking..
[Paleski]: right . . . I want to meet with you get the money well figure out a fucking schedule and well get this shit done.. you know I can do what I got to do and get the fuck out of here and go south
[The Defendant]: alright.. do you want to meet back here tomorrow morning?
[Paleski]: what time?
[The Defendant]: what works for you around 9?
[Paleski]: 9 o'clock.. what time is it now?...10 o'clock well meet down here at 10?
28:09 [The Defendant]: yea that's fine;;yea I got 1:20 now
[Paleski]: alright.. well meet here at 10 o'clock you bring the money
[The Defendant]: yup
[Paleski]: and well work out a fucking schedule.. you figure out when you're going to have the kids and then I'll take care of the rest..
[The Defendant]: alright
[Paleski]: alright
[The Defendant]: then how do you want to talk from there?
[Paleski]: talk about it tomorrow bro.. once it's done we ain't talking
[The Defendant]: right
[Paleski]: I'll get in touch with you through Johnny
[The Defendant]: alright
[Paleski]: alright
[The Defendant]: that's why I'm just trying to be clear because you just said you know what I mean
[Paleski]; alright
[The Defendant]: which way you want to go about it . . . then I'll just pick up a phone.. l can get a prepaid phone or something for.. then get rid of it

[Paleski]: yup.. bring me the money tomorrow morning then well get the shit squared away
[The Defendant]: alright
[Paleski]: alright
[The Defendant]: you got it
[Paleski]: I'll see you tomorrow morning here at 10
[The Defendant]: yes sir
[Paleski]: alright
[The Defendant]: thank you
[Paleski]: yup
28:55 [The Defendant] leaves vehicle
29:09 [Paleski]: All right...he's away . . . I don't know if you guys want to wait, probably be better off but, I'm heading out.
29:40 Incoming phone call Hello, What's up
29:52 Hang up

ORDERS

CONNECTICUT REPORTS

VOL. 331

ORDERS

LUIS ARIEL RIVERA *v.* COMMISSIONER OF CORRECTION

The petitioner Luis Ariel Rivera's petition for certification to appeal from the Appellate Court, 186 Conn. App. 506 (AC 38837), is denied.

D'AURIA, J., did not participate in the consideration of or decision on this petition.

Temmy Ann Miller, assigned counsel, in support of the petition.

Steven R. Strom, assistant attorney general, in opposition.

Decided February 20, 2019

U.S. BANK NATIONAL ASSOCIATION, TRUSTEE *v.* ROGER W. WOLF ET AL.

The defendant Ruthann Wolf's petition for certification to appeal from the Appellate Court, 186 Conn. App. 902 (AC 40326), is denied.

Ruthann Wolf, self-represented, in support of the petition.

Melanie Dykas and *Tara L. Trifon*, in opposition.

Decided February 20, 2019

SCOTT JACOBSON *v.* COMMISSIONER OF CORRECTION

The petitioner Scott Jacobson's petition for certification to appeal from the Appellate Court, 187 Conn. App. 901 (AC 40826), is denied.

Jennifer B. Smith, assigned counsel, in support of the petition.

Linda F. Currie-Zeffiro, assistant state's attorney, in opposition.

Decided February 20, 2019

STATE OF CONNECTICUT *v.* VICTOR SANTIAGO

The defendant's petition for certification to appeal from the Appellate Court, 187 Conn. App. 350 (AC 41228), is denied.

Katherine C. Essington, assigned counsel, in support of the petition.

Timothy J. Sugrue, assistant state's attorney, in opposition.

Decided February 20, 2019

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CONNECTICUT APPELLATE REPORTS

Vol. 188

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

CADCO, LTD. *v.* DOCTOR'S ASSOCIATES, INC., ET AL.
(AC 40306)

Sheldon, Elgo and Flynn, Js.

Syllabus

The plaintiff sought to recover damages from the defendants for, inter alia, unfair and deceptive acts and practices in their business dealings concerning the design and development of a certain new product in violation of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.). Beginning in February, 2012, and over the course of approximately one and one-half years, the plaintiff engaged in a business relationship with the defendants to design and produce a metal heating plate for the defendants' production of a certain new food product in certain of its restaurants. In August or September, 2013, following the dissemination of information about the heating plate to the defendants and orders of the heating plate for testing by the defendants, the plaintiff filed an application for a design patent for the heating plate, which was granted following the initiation of this action. In October, 2013, the plaintiff was informed that the defendants had decided to go with another provider for the heating plate, and, subsequently, the plaintiff discovered that another company, with personal ties to the defendants, had supplied a nearly identical heating plate to the defendants. The trial court granted the defendants' motions for summary judgment on all counts and rendered judgment thereon, from which the plaintiff appealed to this court. *Held*:

1. The trial court properly concluded that there was no genuine issue of material fact that the defendants' conduct did not amount to an unfair act or practice in violation of CUTPA; the plaintiff's claims failed to meet any prong of the cigarette rule, which is used to determine whether a practice violates CUTPA, as the defendants' prolonged negotiations with the plaintiff and the defendant's conduct in giving the plaintiff's design to a competitor in the absence of a patent or confidentiality agreement, and granting a contract to a manufacturer with ties to the defendants, which the defendants were free to do, did not offend public policy in such a way as to violate an established concept of unfairness, the defendants' behavior in not hiring the plaintiff to produce the new heating plates it had designed or in taking the plaintiff's design to a competitor with ties to the defendant companies was not immoral, unethical, oppressive, or unscrupulous in any way, and any injury that the plaintiff suffered could reasonably have been avoided by obtaining a confidentiality agreement or other stopgap measure to protect its product design until the patent it had applied for was issued.

2. The trial court properly concluded that there was no genuine issue of material fact as to whether the defendants' conduct constituted a deceptive act or practice under CUTPA; there was no evidence of any misrepresentation, omission, or practice by the defendants likely to mislead the plaintiff to believe that it would receive a contract from the defendants, and to the extent the plaintiff claimed that the defendants should have informed it explicitly that they were soliciting bids from others and that one potential bidder had been given the plaintiff's design upon which to formulate its own bid, such omissions did not amount to a CUTPA violation because the defendants were under no duty to so inform the plaintiff.

3. The trial court did not err in concluding that there was no genuine issue of material fact as to whether the defendants were unjustly enriched to the plaintiff's detriment by the defendants' alleged conduct; although the defendants benefited from the time and effort it took the plaintiff to design the heating plate, there was no evidence that they did not compensate the plaintiff fully for that benefit, as there was evidence that the defendants paid the plaintiff each time they purchased one or more heating plates for product and market testing.

Argued November 14, 2018—officially released March 5, 2019

Procedural History

Action to recover damages for, inter alia, unfair trade practices, and for other relief, brought to the Superior Court in the judicial district of Litchfield, where the court, *Pickard, J.*, granted the plaintiff's motion to cite in additional parties; thereafter, the matter was transferred to the judicial district of Hartford, Complex Litigation Docket; subsequently, the court, *Moukawsher, J.*, granted the defendants' motions for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Patrick E. Power, for the appellant (plaintiff).

Jeffrey R. Babbin, with whom were *David R. Roth* and, on the brief, *John M. Doroghazi*, for the appellees (named defendant et al.).

Matthew W. Buttrick, pro hac vice, with whom was *David T. Martin*, for the appellee (defendant Independent Purchasing Cooperative, Inc.).

Opinion

SHELDON, J. The plaintiff, Cadco, Ltd., commenced this action alleging that the defendants, Doctor's Associates, Inc. (Doctor's Associates), Franchise World Headquarters, LLC (Franchise), and Independent Purchasing Cooperative, Inc. (Independent), engaged in unfair acts or practices and unfair methods of competition and deceptive acts or practices in their business dealings with the plaintiff concerning the design and development of a new product in violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and that in so doing they unjustly enriched themselves to the plaintiff's detriment. The plaintiff appeals from the summary judgment rendered in favor of the defendants on its complaint. We conclude that the trial court properly determined that the defendants were entitled to summary judgment on each of the plaintiff's claims against them because they established that there was no genuine issue of material fact that the plaintiff had no right to prevail on any of those claims. Accordingly, we affirm the judgment of the trial court.

The following facts are undisputed. In February, 2012, representatives from Doctor's Associates, the franchisor of the Subway restaurant chain in the United States, and Franchise, a corporation that provides administrative services to Doctor's Associates, approached the plaintiff about purchasing a standard flat metal heating plate that the plaintiff manufactured. The plate was to be considered for use in Subway restaurants to cook a new flatbread pizza product called the "Flatizza." As a result of this meeting, the plaintiff provided one of its standard heating plates to Doctor's Associates for testing at Subway headquarters. Doctor's Associates also requested that the plaintiff sign a nondisclosure agreement to protect various details about its business practices, which the plaintiff signed on February 27, 2012.

During the course of testing, representatives from Franchise notified the plaintiff that problems had arisen with using the plaintiff's standard plate to cook the Flatizzas. Thereafter, between April, 2012, and September, 2012, the plaintiff made numerous changes to its standard heating plate to address those problems, creating six different versions of the plate for the defendants to test. In its correspondence with defendants Doctor's Associates and Franchise concerning the changes that had been made to the plates, the plaintiff shared detailed technical information about its design. By the end of the testing period, Doctor's Associates had purchased a total of 133 heating plates from the plaintiff. Subway's primary oven manufacturer, TurboChef, ultimately approved the fifth version of the modified heating plate for use in its ovens in Subway restaurants. Subway then began to test market the Flatizza in several cities across the country to determine if it should offer the new product nationally. To facilitate such market testing, Doctor's Associates purchased 1,728 of the modified heating plates from the plaintiff, in eight separate orders from May, 2012 through February, 2013.

On June 4, 2012, a meeting was held between several the plaintiff representatives and representatives from Doctor's Associates and Franchise. At that meeting, the plaintiff was informed that if Subway's management decided to offer the Flatizza throughout the country, it would aim to distribute the modified heating plates to its franchisees in March, 2013, and thus the plaintiff would be expected to begin production of the new plates in October, 2012, after the plaintiff and Independent, Subway's purchasing arm, determined the pricing for the "full production rollout." The plaintiff e-mailed representatives of Doctor's Associates and Franchise on June 7, 2012, to memorialize the June 4 meeting, but received no response. The defendants later decided to delay the March, 2013 rollout of the Flatizza.

From March, 2013 through September, 2013, the defendants continued to update the plaintiff regarding the Flatizza project and to gather information from the plaintiff regarding its production capabilities for the new plates, the process by which it would seek national public health and safety approval for them, and its updates to its proposal for pricing the plates' production. On March 25, 2013, Ed Degnan, an equipment specialist for Franchise, requested a detailed production timeline and cost information from the plaintiff for an order of 16,000 plates, but he cautioned in an e-mail the following day: "To be clear, this is exploratory only [and] not an order. DO NOT ORDER ANY MATERIALS." In April, 2013, Franchise informed the plaintiff, in another e-mail, that it was working with four different vendors on the project. On May 31, 2013, Tricia Hetherington, the director of new product development for Franchise, e-mailed the plaintiff, stating that she would "like to explore how we could be ready for a potential February, 2014 launch of Flatizza."

On July 10, 2013, the plaintiff e-mailed a representative from Independent to confirm the details of a recent phone call between itself and Independent concerning the need for a production timeline and pricing for 22,000 of the new plates, Subway's intent to roll out the Flatizza in its restaurants in February, 2014, and, to that end, its need to have all of the new plates delivered to a warehouse in Massachusetts for that purpose by December 20, 2013, and for the plaintiff to commit to filling the order no later than September 1, 2013. In response to that e-mail, the Independent representative stated that, although the plaintiff's summary of the phone call was accurate, "[m]uch on our end is not firm, so please await further information . . . ."

At the same time, there was uncertainty as to whether Merrychef, the manufacturer of a different oven used in certain Subway restaurants as an alternative to the

TurboChef oven, would make its own heating plates for use in its ovens to cook Flatizzas rather than using plates manufactured by the plaintiff. Thereafter, on July 10, 2013, Independent asked the plaintiff to inform it of "the impact of an additional 7000 Merrychef style plates should we add these to the order." On July 18, 2013, Franchise sent an e-mail to the plaintiff with the subject line "Pizza Plate Bid Information." That e-mail read: "Do you guys have any questions on this bid? I have notified my Merrychef rep that if you guys are approved to manufacture both plates then Merrychef will need to approve your plate in their oven. I would then send one of the [two] Merrychef plates you sent me to Merrychef for approvals." This was the first and only documented mention to the plaintiff by any defendant that the choice of manufacturer for the new heating plates, if they were ordered, would be made through a bidding process. Later that evening, Franchise e-mailed the plaintiff that it "looks like you are ready to [go] if we give you the go ahead."

On August 1, 2013, Independent e-mailed the plaintiff to verify the production timeline information for a presentation by Franchise and Independent to "the leadership," so that the leadership could "understand the timing of the decision required." On August 16, 2013, the plaintiff e-mailed Independent to confirm a quote for the heating plates of $67.27 per unit. On September 13, 2013, Degnan informed the plaintiff that there were no new updates on the Flatizza project and that he would not expect any decisions that year. The final e-mail exchange between Franchise and the plaintiff occurred on September 23, 2013, when the plaintiff asked Franchise to "go over a few things" over the telephone and Franchise responded that it was not sure what the plaintiff wanted to discuss, but it still needed the information about production capabilities and other matters it had requested from the plaintiff earlier that day.

On October 10, 2013, Sam Grano de Oro, the director of operations for the plaintiff, received a telephone call from Degnan. Degnan first asked whether the plaintiff had purchased the materials needed to fulfill an order from the defendants for the full production rollout. Grano de Oro responded that the plaintiff had not purchased any materials, but that all of the necessary preparations to do so had been made with its materials suppliers. Degnan then informed Grano de Oro that the defendants had "decided to go with another provider," without offering any explanation for its decision. Grano de Oro responded by requesting an opportunity to address any concerns that the defendants might have had with their bid, but that request was not honored. All he could do at that time was to inform Degnan that the new heating plate and its design belonged to the plaintiff. Sometime in late August or early September, 2013, the plaintiff filed an application for a design patent for the modified heating plate. That application was ultimately granted approximately two years later, on September 15, 2015.

Early in 2014, the plaintiff became aware that Subway had proceeded with the nationwide rollout of the Flatizza. In April, 2014, representatives from the plaintiff began to investigate how that had been done and discovered that a metal heating plate similar to the one the plaintiff had designed for the defendants was being used in Subway restaurants in Florida and Connecticut. The plaintiff then hired a mechanical engineer and a material science engineer to compare the new heating plate it had designed to the plate being used in Subway restaurants. The engineers opined that the two plates were nearly identical and that the defendants' plate appeared to be a refinement of the plaintiff's plate. Through its continued investigation, the plaintiff discovered that an executive at VTM Concepts, the supplier of the nearly identical heating plate being used in Subway

restaurants, is married to the president of Doctor's Associates and Franchise, who had been copied on several of the e-mails between the plaintiff and Franchise regarding the progress of the heating plate project.

The plaintiff subsequently filed this action. In its five-count amended complaint, the plaintiff alleged that the defendants were jointly and severally liable on the following theories of liability: (1) in the first count, for unfair acts or practices and unfair methods of competition in violation of CUTPA; (2) in the second count, for punitive damages under CUTPA, based upon the unfair acts or practices and unfair methods of competition alleged in the first count; (3) in the third count, for deceptive acts or practices in violation of CUTPA; (4) in the fourth count, for punitive damages under CUTPA based upon the deceptive acts or practices alleged in the third count; and (5) in the fifth count, unjust enrichment based upon the conduct alleged in the first four counts. The complaint alleged, more specifically, that over the course of one and one half years, the defendants had expressly or impliedly represented to the plaintiff, and thereby caused it to believe, that it would receive an order for over 25,000 new heating plates if Subway decided to launch the Flatizza nationwide. In reliance on these representations, the plaintiff had designed a custom heating plate for the defendants, supplied samples of the new plate to Subway for test marketing purposes, and turned over to the defendants the design and technical information needed to manufacture the plates. Each of the defendants answered the complaint by denying all allegations of wrongdoing against it and pleading several special defenses.

On January 13, 2017, the defendants filed parallel motions for summary judgment. In its memorandum of decision granting the motions for summary judgment as to all defendants on all counts, the trial court concluded that the undisputed facts showed that there was

nothing unfair or deceptive about the defendants' dealings with the plaintiff with respect to the new heating plates, noting that "not every missed business opportunity violates CUTPA," and that the plaintiff could have avoided any injury to itself resulting from others' use of its product design by taking reasonable steps to protect itself. The court further concluded that the defendants had not been unjustly enriched by the plaintiff's efforts to design the new heating plate because the plaintiff had not been deceived or misled to provide its design to the defendants without paying for it or without protecting itself by negotiating a confidentiality agreement.

On appeal, the plaintiff claims that (1) the trial court improperly concluded that no genuine issue of material fact exists as to whether the defendants' conduct constituted an unfair act or practice in violation of CUTPA, (2) the court improperly concluded that there was no genuine issue of material fact as to whether the defendants' conduct constituted a deceptive act or practice in violation of CUTPA, and (3) the court erred in concluding that no genuine issue of material fact exists as to whether the defendants were unjustly enriched to the plaintiff's detriment.

"Our review of the trial court's decision to grant a motion for summary judgment is plenary." (Internal quotation marks omitted.) *Brusby* v. *Metropolitan District*, 160 Conn. App. 638, 646, 127 A.3d 257 (2015). Practice Book § 17-49 provides in relevant part: "[Summary] judgment . . . shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." "In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . Although the party seeking summary judgment has the burden of showing the nonexistence of any material

fact . . . a party opposing summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue. . . . It is not enough . . . for the opposing party merely to assert the existence of such a disputed issue. . . . Mere assertions of fact, whether contained in a complaint or in a brief, are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court [in support of a motion for summary judgment]." (Emphasis omitted; internal quotation marks omitted.) *Marsala* v. *Yale-New Haven Hospital, Inc.*, 166 Conn. App. 432, 458–59, 142 A.3d 316 (2016). "A material fact is a fact that will make a difference in the result of a case." (Internal quotation marks omitted.) *Silberstein* v. *54 Hillcrest Park Associates, LLC*, 135 Conn. App. 262, 266, 41 A.3d 1147 (2012).

I

The plaintiff first claims that the trial court improperly concluded that no genuine issue of material fact exists as to whether the defendants' conduct constituted an unfair act or practice under CUTPA. Specifically, the plaintiff argues that the defendants induced the plaintiff to believe that it would receive a large order for new plates of the type it had designed and developed for the defendants if the Flatizza was introduced in Subway restaurants nationwide, but instead gave their design to a manufacturer run by the spouse of a high ranking executive of Doctor's Associates and Franchise, from which they purchased the new plates at a slightly lower price than that quoted to them by the plaintiff. Although the conduct complained of by the plaintiff might very well constitute a CUTPA violation if the circumstances were as alleged, that claim is factually unsupported in this case. Cf. *Milford Paintball, LLC* v. *Wampus Milford Associates, LLC*, 156 Conn. App. 750, 765–66, 115 A.3d 1107, cert. denied, 317 Conn.

912, 116 A.3d 812 (2015) (persistent negligent misrepresentations intended to induce execution of subject lease by plaintiff supported finding of unfairness under CUTPA); *Utzler* v. *Braca*, 115 Conn. App. 261, 281, 972 A.2d 743 (2009) (builder's material intentional misrepresentation that induced plaintiff to invest in project was an unfair or deceptive practice that violated CUTPA). There is no factual basis for the plaintiff's claim that it was unfairly induced to act to its own detriment in any way. To the contrary, the evidentiary materials submitted to the trial court show that the plaintiff freely sold the defendants a product and the design specifications therefor that were unprotected, and thus fully available to the defendants to use, refine or copy as they saw fit. Therefore, we agree with the court's determination that there is no genuine issue of material fact that the defendants' conduct did not amount to an unfair act or practice in violation of CUTPA, and thus that the defendants were entitled to judgment on the plaintiff's first two claims as a matter of law.

General Statutes § 42-110b (a) provides: "No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." "It is well settled that in determining whether a practice violates CUTPA [our Supreme Court has] adopted the criteria set out in the cigarette rule by the [F]ederal [T]rade [C]ommission for determining when a practice is unfair: (1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, [competitors or other businesspersons]. . . . All three

criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three." (Internal quotation marks omitted.) *Ulbrich* v. *Groth*, 310 Conn. 375, 409, 78 A.3d 76 (2013).

A

The first prong of the cigarette rule requires us to consider whether the alleged unfair practice offends public policy to the extent that it constitutes a breach of an established concept of unfairness. The plaintiff argues that such a breach can be found in (1) the defendants' inducement of the plaintiff to believe that it would receive a contract for a large order of the new plates, which allowed the defendants to obtain technical information for the plate's product design, (2) giving the plaintiff's design for the new plate to a competitor that had personal ties to the defendants, and (3) then awarding the manufacturing contract for the new plates to that competitor instead of to the plaintiff. The plaintiff does not explicitly state which public policies support its claims, arguing general unfairness instead. It appears that the public policy basis for the plaintiff's first argument is equitable estoppel.

"Strong public policies have long formed the basis of the doctrine of equitable estoppel. The office of an equitable estoppel is to show what equity and good conscience require, under the particular circumstances of the case, irrespective of what might otherwise be the legal rights of the parties. . . . No one is ever estopped from asserting what would otherwise be his right, unless to allow its assertion would enable him to do a wrong. . . . There are two essential elements to an estoppel: the party [against whom it is asserted] must do or say something which is intended or calculated to induce another to believe in the existence of certain

facts and to act upon that belief; and the other party, influenced thereby, must actually change his position or do something to his injury which he otherwise would not have done. Estoppel rests on the misleading conduct of one party to the prejudice of the other. In the absence of prejudice, estoppel does not exist." (Internal quotation marks omitted.) *Fischer* v. *Zollino*, 303 Conn. 661, 668, 35 A.3d 270 (2012).

We agree with the trial court that the defendants' prolonged negotiations with the plaintiff do not offend public policy in such a way as to violate an established concept of unfairness within the meaning of the first prong of the cigarette rule. In rejecting the plaintiff's CUTPA claim, the trial court concluded that there was no genuine issue of material fact that the defendants' communications with the plaintiff about the design or development of the new plate was misleading or intended to induce the plaintiff to believe that it would receive the contract. Although the defendants spent one and one half years discussing the plaintiff's potential receipt of a contract for a large order of the new plates, the plaintiff concedes that there never was such a contract and that throughout its dealings with the defendants it fully understood that Subway might decide to forego a national rollout of the Flatizza, in which case no order for the new plates it designed and developed would ever be placed with anyone. Even if the defendants had explicitly stated that they intended to purchase plates from the plaintiff in the event of a nationwide rollout of the Flatizza, it is undisputed that any order was conditioned on the rollout's occurrence. Moreover, the defendants cautioned the plaintiff on more than one occasion that it should not take any actions in reliance on their exploratory conversations. As noted by the trial court, the plaintiff hoped that it would be chosen to manufacture a large order of plates for the defendants and, from the e-mails discussing

production timelines, shipping details, and pricing, it seemed for some time that that would happen; however, the defendants never made any statements that would lead the plaintiff reasonably to believe that a future contract was guaranteed. Without any misleading statements or conduct on the part of the defendants, the public policy underlying equitable estoppel was not violated by their conduct in violation of the first prong of the cigarette rule.

The plaintiff further contends that the defendants violated CUTPA by giving the plaintiff's design to a competitor. Here again, the plaintiff does not point this court to any particular public policy which it claims to have been violated by such conduct, thus establishing its unfairness under the first prong of the cigarette rule. In support of its argument, however, the plaintiff states that during its dealings with the defendants it was seeking a patent for the modified heating plate and had informed the defendants of these efforts. Therefore, we consider whether the defendants' actions violated any established public policy related to the plaintiff's efforts to patent the new heating plate.

As an initial matter, it is undisputed that there was no patent or confidentiality agreement in effect for the plaintiff's design at the time of its dealings with the defendants. The most protection the product had was the pending patent application that was not submitted until August or September, 2013. It is disputed between the parties as to whether the plaintiff ever informed the defendants that it had filed a patent application for the heating plate. The defendants deny being told by the plaintiff that it had filed such an application. The plaintiff claims that in September, 2012, representatives from the plaintiff had met with representatives from Doctor's Associates and Franchise at Subway headquarters to give them a status report on the heating plate project and during that meeting it had noted that it was

in the process of applying for a design patent for the new plate. The plaintiff also etched the words "Patent Pending" on at least forty of the heating plates that it sold to the defendants during the testing process. However, these disputed facts are not material because, even if we assume that the plaintiff informed the defendants of its pending patent application in September, 2012, and that the defendants, knowing this information, took the plaintiff's plate design to a competitor, these acts would not have violated any established public policy.

"To willfully infringe a patent, the patent must exist and one must have knowledge of it. . . . Filing an application is no guarantee any patent will issue and a very substantial percentage of applications never result in patents." (Emphasis omitted; internal quotation marks omitted.) *State Industries, Inc.* v. *A.O. Smith Corp.*, 751 F.2d 1226, 1236 (Fed. Cir. 1985). There is a "strong federal policy favoring the full and free use of ideas in the public domain." *Lear, Inc.* v. *Adkins*, 395 U.S. 653, 674, 89 S. Ct. 1902, 23 L. Ed. 2d. 610 (1969). "[P]atent laws have embodied a careful balance between the need to promote innovation and the recognition that imitation and refinement through imitation are both necessary to invention itself and the very lifeblood of a competitive economy." *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 146, 109 S. Ct. 971, 103 L. Ed. 2d 118 (1989).

By informing the defendants that they were in the process of applying for a patent and marking their product "Patent Pending," the plaintiff merely gave notice that the plate might be subject to future protection. The plaintiff argues that the trial court erred in its analysis of the defendants' conduct under the first and second prongs of the cigarette rule by requiring the plaintiff to have taken reasonable measures to avoid the injury, which is only required under prong three of the rule.

We disagree with the plaintiff's interpretation of the trial court's decision and conclude that the steps taken to protect the heating plates, as referenced by the trial court, are relevant to determine whether the defendants' actions were unfair under the circumstances. Here, Doctor's Associates made several arm's length purchases of these unprotected products from the plaintiff over the course of a year and a half. The defendants were free to do as they wished with the plaintiff's products that they purchased in that time frame, including showing those products, which they then owned without restriction, to other companies and asking those companies to refine the products' design. The public policy underlying our patent law supports such imitation and refinement. Thus, it cannot be said that the defendants' conduct in so doing violated any established concept of unfairness.

Finally, the plaintiff argues that the defendants' committed an unfair act or practice by causing it to engage in a "sham 'bidding' process," in the course of which it was forced to bid against only one competitor with personal ties to the defendant companies that had been given the plaintiff's design with which to prepare and submit its competing bid. Nothing about the fact that the defendants gave the contract to a manufacturer run by the spouse of the president of Doctor's Associates and Franchise offends public policy. It is well established that a trader or manufacturer carrying on an entirely private business is free to determine with whom it will deal. See *United States* v. *Freight Assn.*, 166 U.S. 290, 320–21, 17 S. Ct. 540, 41 L. 3d. 1007 (1897). Further, there is nothing about the fact that there were only two companies bidding for the contract that is inherently unfair.

In reaching our conclusion, we are mindful that in *Landmark Investment Group, LLC* v. *CALCO Construction & Development Co.*, 318 Conn. 847, 882, 124

A.3d 847 (2015), our Supreme Court concluded that the "trial court acted improperly when, rather than considering what inferences could have been drawn by the jury from the totality of the defendants' conduct, it parsed [the plaintiff's] allegations and concluded that each of the defendants' acts did not meet the standard necessary to prove a violation of CUTPA." An individual examination of each of the defendants' discrete acts is necessary to analyze the public policy implications of the totality of the conduct. When considering the totality of the defendants' conduct—of negotiating with the plaintiff over a substantial period of time without making any misrepresentations, giving another manufacturer the plaintiff's unprotected design to reverse engineer and refine, and granting a contract to a manufacturer with ties to the defendant companies, which it was free to do—such conduct does not amount to a violation under CUTPA. Therefore, we conclude that the defendants' actions do not violate the first prong of the cigarette rule.

B

Under the second prong of the cigarette rule, we must consider whether the defendants' actions were "immoral, unethical, oppressive or unscrupulous." (Internal quotation marks omitted.) *Johnson Electric Co.* v. *Salce Contracting Associates, Inc.*, 72 Conn. App. 342, 357, 805 A.2d 735, cert. denied, 262 Conn. 922, 812 A.2d 864 (2002). Whether conduct so qualifies is not controlled by "a global standard but rather must reflect the particular circumstances of the case." Id. "A trade practice that is undertaken to maximize the defendant's profit at the expense of the plaintiff's rights comes under the second prong of the cigarette rule." *Votto* v. *American Car Rental Inc.*, 273 Conn. 478, 485, 871 A.2d 981 (2005).

In *Johnson Electric Co.*, the defendant general contractor submitted a bid for a contract on a construction

project in which it named the plaintiff as the subcontractor it would use to complete the project if the bid were awarded, but hired a different subcontractor after the bid was awarded when the plaintiff refused its request to reduce its quoted price. *Johnson Electric Co.* v. *Salce Contracting Associates, Inc.*, supra, 72 Conn. App. 346. An attorney trial referee found that it was industry practice that a subcontractor named in a successful bid would receive a subcontract for the work it had quoted when the contract was awarded on the basis of that quote. Id. The trial court, rejecting the report of the attorney trial referee, found that the plaintiff had not proven its CUTPA claim. Id., 344. In reversing the trial court, this court found that the defendant's conduct met the second prong of the cigarette rule because it deliberately refused to conform its conduct to the established industry practice for the admitted purpose of maximizing its profit, and thereby caused substantial injury to the plaintiff. Id., 357.

In *Glazer* v. *Dress Barn, Inc.*, 274 Conn. 33, 873 A. 2d 929 (2005), by contrast, the plaintiffs argued that the defendant had violated the second prong of the cigarette rule by inducing them to believe that the defendant would either provide financing for a deferred billing program or close on the proposed acquisition of the plaintiff's company. See id., 48. It was undisputed that there was no enforceable agreement between the parties for either the financing or the acquisition. See id., 85. The plaintiff's theory at trial was that the defendant initially intended to provide financing to the plaintiff but then changed its mind when the cost estimates changed for the program. Id., 81. In concluding that there was no CUTPA violation, our Supreme Court stated that the defendant "expressly retained the right not to proceed with the acquisition. Thus, [a]lthough the plaintiffs hoped and even expected that [the defendant] would [complete the acquisition], [the defendant] was

under no statutory or contractual obligation to do so. Under those circumstances, [the defendant] did not violate CUTPA by declining to do that which it simply was not required to do. The analysis does not differ because the plaintiffs, effectively, gambled on an expectation that [the defendant] would choose to proceed differently than it did and, subsequently, lost that gamble." (Internal quotation marks omitted.) Id., 83–84.

In the present case, the defendants' behavior in not hiring the plaintiff to produce the new heating plates it had designed to implement the nationwide rollout of the Flatizza, unlike that of the defendants in *Johnson Electric Co.* in declining to hire the plaintiff as a subcontractor on the project for which it had bid successfully on the basis of the plaintiff's quote, did not violate any established trade or industry practice or public policy, as discussed in the part I A of this opinion, or thus qualify, on that basis, as "immoral, unethical, oppressive or unscrupulous"; (internal quotation marks omitted) *Johnson Electric Co.* v. *Salce Contracting Associates, Inc.*, supra, 72 Conn. App. 357; under the second prong of the cigarette rule. Rather, like the defendant in *Glazer* that declined to provide financing for or to buy out the plaintiff's company, the defendants here, by not hiring the plaintiff to manufacture the new heating plates for the rollout of the Flatizza, merely declined to do something that they were not legally required to do despite the disappointed plaintiff's hope or expectation to the contrary.

As for taking the plaintiff's design to a competitor with ties to the defendant companies, for the same reasons articulated in part I A of this opinion, there was nothing "immoral, unethical, oppressive or unscrupulous"; (internal quotation marks omitted) *Johnson Electric Co.* v. *Salce Contracting Associates, Inc.*, supra, 72 Conn. App. 357; about the defendants' behavior, for it did not infringe on the plaintiff's rights in

any way and involved no more than taking a legally unprotected product, which the defendants had duly purchased and therefore owned without restriction, to another manufacturer to improve upon its design and, so improved, to manufacture and sell it. We conclude that such fully lawful conduct was not immoral, unethical, oppressive or unscrupulous in any way, and thus did not violate the second prong of the cigarette rule.

C

The third prong of the cigarette rule requires us to consider whether the defendants' actions caused substantial injury to the plaintiff. Under this prong, "[t]o justify a finding of unfairness the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided." (Internal quotation marks omitted.) *McLaughlin Ford, Inc.* v. *Ford Motor Co.*, 192 Conn. 558, 569–70, 473 A.2d 1185 (1984).

The plaintiff alleges that the injury it suffered as a result of the defendants' conduct was the loss of an expected order of approximately 25,000 plates. We agree with the trial court that this loss was substantial for the plaintiff, at a price of $67.27 per plate. There are no facts to suggest that the cost savings for the defendants in purchasing from VTM Concepts in any way passed through to the consumer so as to establish a countervailing benefit that outweighs the injury. We agree with the trial court, however, that this injury was one that the plaintiff reasonably could have avoided by the simple expedient of obtaining a confidentiality agreement or some other stopgap measure to protect its product design until the patent it had applied for was issued. This is especially true considering that Doctor's

Associates had the plaintiff sign a nondisclosure agreement at the outset of their business relationship, at which point the plaintiff could have requested such an agreement to protect their design in return. Instead, by proceeding without such protection for its work product, the plaintiff freely allowed the defendants to take its design to a competitor that might in turn refine it or simply manufacture it, with or without refinements, more cheaply. Because this result reasonably could have been avoided, the plaintiff fails to meet the third requirement of the third prong of the cigarette rule.

In conclusion, because the plaintiff's claims fail to meet any prong of the cigarette rule, we agree with the trial court's conclusion that there is no genuine issue of material fact that the defendants committed no unfair acts or practices in violation of CUTPA.

II

The plaintiff next claims that the court improperly concluded that there was no genuine issue of material fact as to whether the defendants' conduct constituted a deceptive act or practice under CUTPA. We disagree.

An act or practice is deceptive if three requirements are met. "First, there must be a representation, omission, or other practice likely to mislead consumers. Second, the consumers must interpret the message reasonably under the circumstances. Third, the misleading representation, omission, or practice must be material—that is, likely to affect consumer decisions or conduct." (Internal quotation marks omitted.) *Caldor*, *Inc.* v. *Heslin*, 215 Conn. 590, 597, 577 A.2d 1009 (1990), cert. denied, 498 U.S. 1088, 111 S. Ct. 966, 112 L. Ed. 2d 1053 (1991). "[A] party need not prove an intent to deceive to prevail under CUTPA." *Cheshire Mortgage Service*, *Inc.* v. *Montes*, 223 Conn. 80, 106, 612 A.2d 1130 (1992).

Here, the plaintiff alleges that the defendants misrepresented to the plaintiff that it would receive a contract

for a large order of heating plates. As discussed in part I of this opinion, however, there is no evidence of any misrepresentation, omission, or practice likely to mislead the plaintiff to believe that it would receive such a contract. The parties negotiated the details of a potential order for a prolonged period of time, but there is no evidence that the defendants made any misrepresentations during that period. To the extent that the plaintiff is arguing that the defendants should have informed it explicitly that they were soliciting bids from others and that one potential bidder had been given its design upon which to formulate its own bid, such omissions do not amount to a CUTPA violation because the defendants were under no duty to so inform it.

"[Our Supreme Court has] held that [a] failure to disclose can be deceptive only if, in light of all the circumstances, there is a duty to disclose." (Internal quotation marks omitted.) *Glazer* v. *Dress Barn, Inc.*, supra, 274 Conn. 84. "Regarding the duty to disclose, the general rule is that . . . silence . . . cannot give rise to an action . . . to set aside the transaction as fraudulent. Certainly this is true as to all facts which are open to discovery upon reasonable inquiry." (Internal quotation marks omitted.) Id. "A duty to disclose may be imposed by statute or regulation . . . or such a duty may arise under common law." (Citation omitted.) Id., 85. As correctly noted by the defendants Doctor's Associates and Franchise, the plaintiff has not identified any basis for imposing a duty upon them to disclose the details of the bidding process, and we have found no authority establishing such a duty under these circumstances. Therefore, the defendants did not commit a deceptive act or practice by that omission. For these reasons, we conclude that the defendants were also entitled to summary judgment on the plaintiff's claims that they committed deceptive acts or practices in violation of CUTPA.

III

The plaintiff's final claim is that the court erred in concluding that there was no genuine issue of material fact as to whether the defendants were unjustly enriched to the plaintiff's detriment by the defendants' alleged conduct. Specifically, it argues that the defendants were unjustly enriched by retaining the benefit of the research and development efforts that the plaintiff put into the design of the new heating plate.

"A right of recovery under the doctrine of unjust enrichment is essentially equitable, its basis being that in a given situation it is contrary to equity and good conscience for one to retain a benefit which has come to him at the expense of another. . . . With no other test than what, under a given set of circumstances, is just or unjust, equitable or inequitable, conscionable or unconscionable, it becomes necessary in any case where the benefit of the doctrine is claimed, to examine the circumstances and the conduct of the parties and apply this standard. . . . Unjust enrichment is, consistent with the principles of equity, a broad and flexible remedy. . . . Plaintiffs seeking recovery for unjust enrichment must prove (1) that the defendants were benefited, (2) that the defendants unjustly did not pay the plaintiffs for the benefits, and (3) that the failure of payment was to the plaintiffs' detriment." (Internal quotation marks omitted.) *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 433, 451–52, 970 A.2d 592 (2009).

Although the defendants benefited from the time and effort it took the plaintiff to design the custom heating plate prototype, there is no evidence that they did not compensate the plaintiff fully for that benefit. To the contrary, there is evidence that the defendants paid the plaintiff several times, each time they purchased one or more plates for product and market testing. The

plaintiff could have charged the defendants higher prices when it sold the defendants those plates for the labor and time it had spent developing the designs for them. The fact that it elected not to do so and that the design of the new plate was not protected does not convert the time it spent perfecting that design into an unpaid for benefit for which compensation is due to it in equity from the defendants. Because there is no evidence that the defendants failed to pay the plaintiff for any benefit they received, we conclude that the court did not err in rendering summary judgment for the defendants on the plaintiff's unjust enrichment claim.

The judgment is affirmed.

In this opinion the other judges concurred.

LAURENCE V. PARNOFF *v.* AQUARION WATER COMPANY OF CONNECTICUT ET AL.
(AC 40109)

Keller, Moll and Eveleigh, Js.

Syllabus

The plaintiff sought to recover damages from the defendant police department, its police chief and a police officer, M, for, inter alia, false arrest and pursuant to the applicable federal law (42 U.S.C. § 1983) for the alleged violation of his constitutional rights in connection with his arrest by M. In count twenty-two of the operative complaint, which set forth a § 1983 claim against M, the plaintiff incorporated certain paragraphs of count eighteen that briefly described the events that led to the plaintiff's arrest and the arrest itself. The plaintiff then asserted broadly that M had deprived him of his rights, privileges and immunities under state and federal law, but he did not clearly articulate the basis of his § 1983 claim. M filed a motion for summary judgment with respect to count twenty-two on the ground that he was immune from liability under the doctrine of qualified immunity. In his memorandum of law in opposition to the motion for summary judgment, the plaintiff primarily argued that summary judgment on that count was not warranted because there was a genuine issue of material fact as to whether M had probable cause to arrest him. In rendering summary judgment in favor of M, the trial court first clarified that the plaintiff claimed false arrest in count eighteen of

his complaint. The court then concluded that summary judgment on count twenty-two was appropriate because there was no issue of material fact concerning the objective evidence of probable cause for the plaintiff's arrest. In reaching its conclusion, the court stated that qualified immunity precluded recovery under 42 U.S.C. § 1983 and that lack of probable cause is a critical element of both a common-law false arrest claim and a claim brought under § 1983. On appeal, both of the plaintiff's claims challenged the trial court's summary judgment on the ground that a genuine issue of material fact existed as to the reasonableness of the force used by M in effectuating the plaintiff's arrest. *Held* that this court declined to review the plaintiff's claims on appeal, the plaintiff having challenged the trial court's summary judgment on the basis of a distinctly different theory from the theory that he argued before the trial court and on which the trial court actually rendered its summary judgment; the plaintiff's complaint failed to articulate with sufficient clarity the basis of the § 1983 claim, the theory that the plaintiff pursued in opposition to M's motion for summary judgment was not based on M's use of excessive force but, rather, concerned false arrest and whether there was a genuine issue of material fact as to whether M had probable cause to arrest him, the plaintiff made no argument before the trial court pertaining to excessive force although he had the opportunity to do so, and the trial court's memorandum of decision, therefore, addressed only whether there was an issue of material fact as to probable cause for the arrest.

Argued October 22, 2018—officially released March 5, 2019

Procedural History

Action to recover damages for, inter alia, false arrest, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Radcliffe, J.*, granted the motion for summary judgment filed by the defendant Glynn McGlynn et al. and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

John R. Williams, for the appellant (plaintiff).

John A. Florek, with whom was *Alexander Florek*, for the appellee (defendant Glynn McGlynn).

Opinion

KELLER, J. This appeal, and a related appeal, *Parnoff* v. *Aquarion Water Co. of Connecticut*, 188 Conn. App. 153, A.3d (2019), which we also officially release

today and which contains a recitation of the underlying facts, involve a challenge by the plaintiff, Laurence V. Parnoff, to the summary judgments rendered by the trial court in favor of the defendants. In the present appeal, the plaintiff appeals from the summary judgment rendered by the trial court in favor of the defendant Glynn McGlynn, a Stratford police officer.[1] The plaintiff claims that (1) "[t]he evidence before the court was sufficient to permit a jury to find that the force used by the defendant . . . was unreasonable under the fourth amendment," and (2) the "defendant's assertion of the affirmative defense of qualified immunity was unavailing at the summary judgment stage of this case" because the defendant cannot reasonably contend that no objective police officer could have thought that the force used was reasonable. For the reasons set forth herein, we decline to review the plaintiff's claims.

In the present appeal, the plaintiff appeals from the summary judgment rendered in favor of the defendant and, in setting forth the grounds for the appeal, he argues that an issue of material fact exists as to the force used by the defendant in effectuating the plaintiff's arrest. However, the theory he pursued in opposition to the defendant's motion for summary judgment was based not on the excessive use of force by the defendant but on the lack of probable cause for his arrest. The trial court construed the plaintiff's count

[1] The plaintiff's sixth revised complaint also named as defendants Aquarion Water Company of Connecticut (Aquarion), and its employees, Beverly A. Doyle, David Lathlean, and Kyle Lavin; Patrick Ridenhour, the Stratford chief of police; and the Stratford Police Department. The related appeal previously mentioned addresses the plaintiff's challenge to the trial court's summary judgment as to the counts pertaining to Aquarion, Doyle, Lathlean, and Lavin (counts one through seventeen). In the present appeal, the plaintiff does not challenge the summary judgment as to the counts pertaining to Ridenhour or the Stratford Police Department. The plaintiff's sole challenge in the present appeal is to the court's summary judgment in favor of McGlynn as to count twenty-two. Accordingly, we refer to McGlynn in this opinion as the defendant.

directed against McGlynn to be a false arrest claim and determined that summary judgment on count twenty-two in favor of the defendant was appropriate because there was "no issue of material fact concerning the objective evidence of probable cause for the arrest of" the plaintiff.

At the outset, we note that the plaintiff's sixth revised complaint, which is the operative complaint in this case, is not a model of clarity. Count twenty-two is titled "Title 42 of the United States Code, Section 1983 as to Defendant Glynn McGlynn (Town of Stratford Police Officer)." Therein, the plaintiff incorporated paragraphs 1 through 20 of count eighteen, titled "Tortious Conduct," which briefly described the events leading up to his arrest and the arrest itself, and then asserted broadly that the defendant deprived him of the rights, privileges, and immunities secured to him by the constitution and laws of the United States and the state of Connecticut. At no point in count twenty-two did he use the term "force" or the phrase "excessive force" to support his claim under 42 U.S.C. § 1983.[2] It is unclear on what exactly his § 1983 claim is based.

In the defendant's memorandum of law in support of his motion for summary judgment, he argued that he was immune from liability under the doctrine of qualified immunity. The defendant set forth multiple bases for why he believed that the doctrine applied. First, the defendant argued that qualified immunity

[2] Although the plaintiff describes in count twenty-two that his arrest was "unwarranted, unjustifiable and excessive," it is ambiguous as to whether he was claiming false arrest or excessive force.

On appeal, the plaintiff supports his claim by indicating that he alleged that the defendant "grabbed and forcibly turned the plaintiff around . . . violently pulled the plaintiff's arthritic arms behind him . . . unduly tightly and painfully handcuffed the plaintiff pulling the plaintiff's arms behind his back and requiring later corrective action . . . ." This allegation, however, was never included in or incorporated into count twenty-two.

existed because the force used in effectuating the plaintiff's arrest was objectively reasonable given the situation he faced, but he contended that the plaintiff's "language used in count twenty-two is hardly fact specific" and indicated that the plaintiff appeared also to complain about the arrest itself. The defendant then argued that it was clear that there was "probable cause to arrest the plaintiff" at the time of his arrest, citing to case law supporting the contention that "the existence of probable cause to arrest is a complete defense to an action for false arrest."

In the plaintiff's memorandum of law in opposition to the motion for summary judgment, he spent the vast majority of his argument relating to count twenty-two, arguing that no probable cause existed for the arrest. The plaintiff began his argument by calling to the court's attention an "expert who [would] present evidence that the plaintiff's arrest on all charges was without probable cause" and directed the court to his appendix, which contained an affidavit from an expert attesting that it was his opinion that no probable cause existed for the plaintiff's arrest. The plaintiff then recited law on the issue of qualified immunity. He argued that summary judgment was not appropriate because there were conflicting facts as to whether the defendant had probable cause to arrest the plaintiff and, in a conclusory manner, "whether [his] force was excessive." He does not, however, develop the excessive force statement or point to any evidence attached to his memorandum to support it. The plaintiff then set forth the facts leading up to his arrest. Our review of his memorandum of law in opposition to the defendant's motion for summary judgment reasonably suggests that he discussed these facts in order to persuade the court that there was no probable cause to arrest him. He then concluded his argument as follows: "Based upon this failure to investigate prior to making the arrest, a trier of fact could conclude that

the [defendant's] actions were objectively unreasonable. It is almost absolute that the claim of lack of probable cause for the plaintiff's arrest, with evidence that such claim will be presented to the trier of fact, is sufficient to raise a significant issue as to whether the [defendant] would be able to pass the reasonableness test and prevail relative to [his] defense of qualified immunity. We believe that [he] cannot, and that our objection should be sustained."

On August 29, 2016, the court held a hearing on the motion for summary judgment. As to the counts pertaining to the defendant, the court first addressed count eighteen, which was the count the plaintiff incorporated entirely into count twenty-two to support his § 1983 claim against the defendant. The court stated: "[Count eighteen] is tortious conduct. I assume that that's false arrest." The defendant's counsel seemed to agree by stating that "[i]t seems to be some type of general tort theory" and then proceeding to his governmental immunity argument. At no point during the proceeding did the plaintiff's counsel argue that count twenty-two, or count eighteen for that matter, was an excessive force claim rather than one alleging false arrest. Instead, the plaintiff's counsel began by saying that "[r]elative to the immunities, if the arrests were illegal, I question whether the immunities protect the police officer." He proceeded to argue that "when you arrest without probable cause, then I think you lose your immunities." He indicated to the court that "[w]e've briefed this thoroughly. I'm not going to waste a lot of the court's time. Arrests are discretionary acts, no question, if there's probable cause. The [§] 1983 action, that's a reasonable standard. Under all the facts that are presented to the court here, there's enough to raise a question of fact as to whether or not the actions of the police officer were reasonable."

On January 5, 2017, the court issued a memorandum of decision. It granted the motion for summary judgment as to count twenty-two recognizing "that the defense of qualified immunity, which protects public officials from civil actions where they are performing discretionary functions, precludes recovery under [42 U.S.C. §] 1983." It went on to state that "[l]ack of probable cause is a critical element of both a common-law false arrest claim and one brought pursuant to [§] 1983." It concluded that there was "no genuine issue of material fact concerning the objective evidence of probable cause for the arrest" of the plaintiff. There was no discussion of excessive force.

To allow the plaintiff to appeal from the summary judgment on the basis of a distinctly different ground or theory from the ground or theory he argued before the trial court would amount to an ambuscade of the trial court. See *Ahmadi* v. *Ahmadi*, 294 Conn. 384, 395, 985 A.2d 319 (2009) ("[a] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one" [internal quotation marks omitted]). In the present case, the plaintiff's complaint failed to articulate with sufficient clarity what he was claiming in count twenty-two. Although the defendant was cautious and argued multiple reasons why qualified immunity applied to that count in his motion for summary judgment, the plaintiff focused his opposition to the defendant's motion for summary judgment on false arrest by arguing that there was an issue of material fact as to whether the defendant had probable cause to arrest the plaintiff. Although the plaintiff made a conclusory statement about the force used in effectuating his arrest, he never developed that legal assertion further. See *McKiernan* v. *Caldor, Inc.*, 183 Conn. 164, 166, 438 A.2d 865 (1981) (issue "briefly suggested" in trial court is not distinctly raised). Then, during the hearing on the motion, the court noted its confusion

with count eighteen (the count incorporated fully into count twenty-two) by attempting to clarify that the plaintiff was claiming false arrest in that count. At no point did the plaintiff indicate that he was claiming otherwise. When it was the plaintiff's opportunity to address the court, he pressed the issue of false arrest. He stated, inter alia, that "when you arrest without probable cause, then I think you lose your immunities." He made no arguments pertaining to excessive force, and the court's memorandum of decision understandably addressed solely whether there was an issue of material fact as to probable cause for the arrest.

If this court were to reverse the summary judgment on the independent theory the plaintiff now argues on appeal—i.e., whether the evidence before the trial court was sufficient to permit a jury to find that the force used by the defendant was unreasonable—it would usurp the trial court's authority to consider and rule on issues before it.[3] See *Jahn* v. *Board of Education*, 152 Conn. App. 652, 665, 99 A.3d 1230 (2014) ("[t]o allow the [plaintiff] to argue one theory . . . [before the trial court] and then press a distinctly different theory on appeal would amount to an ambuscade of the trial court" [internal quotation marks omitted]). Accordingly, we decline to review the plaintiff's claims on appeal.

[3] We note that the plaintiff never filed a motion for articulation or a motion for reargument with the trial court, which he could have filed if he believed that the court failed to address his purported excessive force argument. See *Orcutt* v. *Commissioner of Correction*, 284 Conn. 724, 738, 937 A.2d 656 (2007) ("[i]t is . . . the responsibility of the appellant to move for an articulation or rectification of the record [when] the trial court has failed to state the basis of a decision . . . to clarify the legal basis of a ruling . . . or to ask the trial judge to rule on an overlooked matter" [internal quotation marks omitted]); *Opoku* v. *Grant*, 63 Conn. App. 686, 692–93, 778 A.2d 981 (2001) ("[T]he purpose of reargument is . . . to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension of facts. . . . [Reargument] also may be used to address alleged inconsistencies in the trial court's memorandum of decision as well as claims of law that the [movant] claimed were not addressed by the court." [Citation omitted; internal quotation marks omitted.]).

We also note that the plaintiff does not appear to challenge the specific ground, false arrest, on which the court actually rendered summary judgment; he simply argues on appeal that "the evidence before the court was sufficient to permit a jury to find that the force used by the defendant was . . . unreasonable under the fourth amendment."

The judgment is affirmed.

In this opinion the other judges concurred.

LAURENCE V. PARNOFF *v.* AQUARION WATER COMPANY OF CONNECTICUT ET AL.
(AC 40383)

Keller, Moll and Eveleigh, Js.

Syllabus

The plaintiff sought to recover damages from the defendant water company, A Co., and its employees, the defendants D, L and K, for trespass, negligent and intentional infliction of emotional distress, invasion of privacy and violation of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.) in connection with their alleged conduct in entering the plaintiff's property without his consent in July, 2011, to service one of A Co.'s fire hydrants on the property. During the incident, the defendants accused the plaintiff of tampering with the hydrant to steal water. The plaintiff denied stealing any water and ordered the defendants to immediately leave the property, which they refused to do because of public health and safety concerns. Thereafter, the police were called, and the plaintiff eventually was arrested. The defendants filed a motion for summary judgment as to all seventeen counts of the plaintiff's revised complaint that were directed against them. In support of their motion, the defendants filed a memorandum of law and submitted thirty-two exhibits, including affidavits from D, L and K, A Co.'s maintenance records for the hydrant and a tariff approved by the Public Utilities Regulatory Authority authorizing A Co. to access the subject property. The trial court granted the defendants' motion for summary judgment as to all claims except with respect to the negligent infliction of emotional distress claims alleged in counts six through eight. The defendants subsequently filed a supplemental motion for summary judgment as to those remaining claims against them on the ground that the claims were barred by the applicable two year statute of limitations

(§ 52-584). They also filed a sealed copy of medical records documenting the plaintiff's visit with a psychiatrist in September, 2011, which indicated that the plaintiff had been diagnosed at that time with depression related to the incident. The trial court granted the supplemental motion for summary judgment on the basis of the medical evidence, concluding that the claims were time barred because the actionable harm was sustained in September, 2011, and the action was commenced in July, 2014. On the plaintiff's appeal to this court, *held*:

1. The plaintiff's claim that the trial court improperly granted the defendants' motion for summary judgment as to his trespass claims because the defendants use of A Co.'s easement on his property was unreasonable was not reviewable, as the trespass claims were moot; because the plaintiff challenged the granting of the motion for summary judgment on his trespass claims only on the issue of the defendants' use of the easement and did not challenge the other ground on which the trial court based its ruling, namely, that the defendants' entry on the property was authorized by the regulatory authority, there still existed an unchallenged, independent ground on which the court based its decision and, therefore, there was no practical relief that could be afforded the plaintiff, and although the plaintiff raised the issue of whether the entry on his property was authorized by the regulatory authority in his reply brief, claims raised for the first time in a reply brief are not reviewable.
2. The trial court properly granted the defendants' supplemental motion for summary judgment and determined that the plaintiff's negligent infliction of emotional distress claims were barred by the statute of limitations set forth in § 52-584: the plaintiff's medical records having indicated that the plaintiff discovered some form of actionable harm in September, 2011, and the plaintiff not having commenced this action until July, 2014, it was clear that the action was commenced well beyond the two year limitation period, and although the plaintiff averred in an affidavit that he did not discover the injurious effect that the July, 2011 incident had on him until the summer of 2016, that averment was merely a bald statement that a genuine issue of material fact existed, not proof that supported the existence of such an issue; moreover, the plaintiff's claim that the continuing course of conduct doctrine tolled the statute of limitations was unavailing, as the statute began to run once the plaintiff discovered his injury and, thus, the continuing course of conduct doctrine did not apply.
3. The trial court properly granted the defendants' motion for summary judgment as to the plaintiff's invasion of privacy by intrusion on seclusion claims, as that court properly concluded that, as matter of law, the alleged tortious conduct of the defendants failed to establish a claim of intrusion on seclusion, which required that he prove an intentional intrusion on his solitude or seclusion that would be highly offensive to a reasonable person: even if the plaintiff was correct in that the defendants misused their easement or tariff rights and their conduct constituted a

trespass, a reasonable person could not conclude on the basis of the record that the defendants thrusted or forced in or on the plaintiff's property as to constitute an intentional intrusion, nor could a reasonable person find that the defendants' presence on the property, coupled with statements made to the plaintiff accusing him of stealing water, was the type of substantial interference necessary to constitute an intentional intrusion; moreover, the submissions before the trial court did not support a finding that the driveway area where the defendants parked their vehicles, the area where they walked to discover and service the hydrant, or the open canopy tent located approximately ten feet from the hydrant where they found a missing hydrant cap, were private areas in which the plaintiff had secluded himself and had an objectively reasonable expectation of seclusion or solitude; furthermore, the submissions demonstrated that the defendants were servicing a hydrant that A Co. had maintained for many decades, and although D, L and K walked around the plaintiff's property to discover the hydrant, searched in the area around the hydrant for the missing cap and allegedly accused the plaintiff of stealing water, a reasonable person would not find that conduct to be highly offensive.

4. The plaintiff's claim that the trial court improperly granted the defendants' motion summary judgment as to his intentional infliction of emotional distress claims was without merit, as the defendants' conduct was insufficient to form the basis for such an action; the defendants' conduct on the day of the incident did not come close to extreme and outrageous conduct, and contrary to the plaintiff's contention that the defendants' continued cooperation with an allegedly unfounded criminal investigation taken together with the events on the day of the incident satisfied the standard of extreme and outrageous conduct, the defendants' mere cooperation with a criminal investigation by the state related to the incident did not constitute conduct that was so atrocious as to exceed all bounds usually tolerated by a decent society.

5. The trial court properly rendered summary judgment in favor of A Co. as to the plaintiff's CUTPA claim, the plaintiff having failed to allege and demonstrate that he suffered any ascertainable loss; contrary to the plaintiff's contention that punitive damages and attorney's fees are sufficient to fulfill the ascertainable loss requirement under CUTPA, those potential remedies, which are available to a plaintiff once he has met the threshold barrier of the ascertainable loss requirement and prevails on his CUTPA claim, cannot be the basis of demonstrating an ascertainable loss, and although the plaintiff claimed that his emotional distress fulfilled the ascertainable loss requirement, this court has determined previously that a claim of emotional distress does not constitute an ascertainable loss of money or property for purposes of CUTPA.

Argued October 22, 2018—officially released March 5, 2019

Procedural History

Action to recover damages for, inter alia, trespass, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Radcliffe*, *J.*, granted in part the motion for summary judgment filed by the named defendant et al. and rendered judgment thereon; thereafter, the court granted the supplemental motion for summary judgment filed by the named defendant et al. and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Thomas J. Weihing, with whom, on the brief, were *John T. Bochanis* and *Joeseph D. Compagnone*, for the appellant (plaintiff).

Edward P. McCreery, with whom, on the brief, were *Adam S. Mocciolo* and *Martha M. Royston*, for the appellees (named defendant et al.).

Opinion

KELLER, J. This appeal, and a related appeal, *Parnoff* v. *Aquarion Water Co. of Connecticut*, 188 Conn. App. 145, A.3d (2019), which we also officially release today, involve a challenge by the plaintiff, Laurence V. Parnoff, to the summary judgments rendered by the trial court in favor of the defendants in this action. In this appeal, the plaintiff appeals from the summary judgments rendered by the trial court in favor of the defendants Aquarion Water Company of Connecticut (Aquarion) and its employees, Beverly A. Doyle, David Lathlean, and Kyle Lavin.[1] The plaintiff claims that the trial court erred by rendering summary judgment in

[1] The plaintiff's sixth revised complaint also named as defendants Glynn McGlynn, a Stratford police officer; Patrick Ridenhour, the Stratford chief of police; and the Stratford Police Department (counts eighteen through twenty-five). Those defendants are not the subject of this appeal. Accordingly, any references in this opinion to the defendants refer solely to Aquarion, and its employees, Doyle, Lathlean, and Lavin.

favor of the defendants as to his (1) claims of trespass, (2) claims of negligent infliction of emotional distress, (3) claims of invasion of privacy, (4) claims of intentional infliction of emotional distress, and (5) claim under the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110b (a). For the reasons set forth in this opinion, we disagree with the plaintiff and affirm the judgments of the trial court.

In July, 2014, the plaintiff commenced the present action against the defendants, alleging in his twenty-five count revised complaint filed on May 24, 2016, various claims arising from a July 11, 2011 incident that took place on his property at 3392 Huntington Road, Stratford, and the adjacent lot he owned. Therein, he alleged, inter alia, that the defendants trespassed onto his property beyond any easement rights of Aquarion and did so against his express orders or consent. He alleged that Lavin "ran up to [the plaintiff] shouting 'you're stealing water' and put his camera in [the plaintiff's] face." The plaintiff alleged that he denied stealing any water and instructed the defendants to "immediately remove their three vehicles from [his property] and leave."

Furthermore, the plaintiff alleged that both he and Lathlean called the Stratford Police Department.[2] After doing so, the plaintiff alleged that Police "[O]fficer [Glynn] McGlynn was dispatched by the Stratford Police Department and told of both calls." Upon arrival, the plaintiff asserted, inter alia, that McGlynn "spoke at length with the Aquarion employees" and asked the plaintiff to "leave because McGlynn was conducting an investigation." The plaintiff alleged that McGlynn

[2] The plaintiff alleged that Lathlean was on a cell phone speaking with the Stratford Police Department and was recorded saying, "I just kind of need just a little bit of support that's all, nothing really more than that just the presence." The plaintiff indicated that he called the police "asking for an officer to be sent to have the trespass and its sequelae abated."

eventually arrested him. He averred that McGlynn transported him to a holding cell at the Stratford Police Department, allowing the defendants to trespass further on his property. Moreover, he asserted that the defendants "exhort[ed] public officials to take further baseless action to humiliate and embarrass" him and publicly accused him of theft. In his complaint, the plaintiff included counts against each of the four defendants for trespass (counts one through four), negligent infliction of emotional distress (counts five through eight), intentional infliction of emotional distress (counts nine through twelve), and invasion of privacy (counts thirteen through sixteen). He also included a count against Aquarion alleging a violation under CUTPA (count seventeen).[3]

On July 13, 2016, the defendants filed an answer with eleven special defenses.[4] The defendants alleged that the plaintiff's trespass claims in counts one through four were barred because Doyle, Lathlean, and Lavin's entry, presence, and activities on the property were expressly permitted by easements, reservations, and exceptions held by Aquarion. As to counts five through eight, the defendants argued that the plaintiff's claims were barred by the relevant statute of limitations. As to all the counts, the defendants alleged the plaintiff's claims were barred in whole or in part by the plaintiff's waiver because he had agreed, inter alia, to permit

[3] Counts eighteen through twenty-five contained various claims against McGlynn, Stratford Police Chief Patrick Ridenhour, and the Stratford Police Department. As previously noted, those defendants are not the subject of this appeal. See footnote 1 of this opinion.

[4] We note that prior to filing their answer and special defenses, the defendants moved to strike counts five through seventeen of the plaintiff's revised complaint dated January 21, 2015. The plaintiff filed an objection and memorandum of law in opposition to the motion to strike on May 4, 2015. On October 22, 2015, the court, *Arnold*, *J.*, granted the motion to strike on counts five through seventeen. Although previously stricken, similar allegations were then amended or inserted in a newly revised complaint.

Aquarion to "inspect, maintain and repair hydrants"; by the doctrines of absolute and qualified immunity; by the doctrine of privilege with consent; by the doctrine of privilege; by the doctrine of consent or license; by the plaintiff's contributory negligence; and because the defendants' actions were authorized and/or permitted by federal and state laws, rules and regulations, including those promulgated and approved by the Connecticut Public Utilities Regulatory Authority (PURA) and the Connecticut Department of Energy and Environmental Protection. As to the plaintiff's claims in equity, the defendants alleged that the claims were barred in whole or in part by the doctrine of unclean hands.[5]

On August 1, 2016, the defendants filed a motion for summary judgment as to all of the counts directed against them. As to the trespass allegations in counts one through four, the defendants argued that, in addition to their rights pursuant to an easement on the plaintiff's property, they also had a tariff from PURA to access the plaintiff's property.[6] In regard to counts five through twelve and seventeen, which included the claims of negligent infliction of emotional distress, intentional infliction of emotional distress, and a violation of CUTPA, the defendants argued that the counts were barred by absolute immunity for all statements made in relation to the judicial action brought against the plaintiff and any statements made to the Statewide

[5] After the defendants filed their answer and special defenses, they filed a subsequent motion requesting leave to amend their special defenses for the purpose of adding a new special defense asserting that to the extent the defendants' presence on the plaintiff's property was not authorized by Aquarion's express easement, Aquarion acquired a prescriptive easement for those activities as a result of its fifteen years of prior uninterrupted activities on the plaintiff's property. The court granted the defendants' motion on August 16, 2016.

[6] In the defendants' motion for summary judgment, they argued specifically that they "had a tariff from the Department of Public Utility Control" but indicated that that entity is now known as the Public Utility Regulatory Authority (PURA).

Grievance Committee, which began an investigation of the plaintiff, a member of the Connecticut bar, related to the incident on July 11, 2011. They also argued that qualified immunity barred the counts for all communications made to the police or other investigative officers on July 11, 2011, the day before criminal charges arising from the July 11, 2011 incident were filed against the plaintiff.

As to counts five through eight, in which the plaintiff raised claims of negligent infliction of emotional distress, the defendants argued they were time barred under the applicable statute of limitations. With respect to counts nine through twelve, in which the plaintiff raised claims of intentional infliction of emotional distress, the defendants argued that the counts were deficient because the defendants' conduct could not be regarded as extreme or outrageous. Furthermore, with respect to counts thirteen through sixteen, the defendants argued that the pleadings were facially deficient as to the plaintiff's invasion of privacy by unreasonable intrusion upon seclusion claims because the conduct alleged by the plaintiff cannot be regarded as highly offensive. Lastly, as to count seventeen, Aquarion alleged that the plaintiff failed to establish a CUTPA violation because he did not suffer an ascertainable loss as required under the act, a trespass or police report does not form a business relationship to satisfy the commercial transaction requirement, and the conduct complained of "does not rise to the required level of a deceptive practice or violation" under the act.

In support of their motion, the defendants filed a memorandum of law and thirty-two exhibits.[7] These

[7] Those exhibits include, among others, affidavits from Doyle, Lathlean, Lavin, and Lucy A. Teixeira, the vice president of administration for Aquarion; chain of title for the plaintiff's property; transcripts from the depositions of the plaintiff and his wife, Barbara Parnoff; the Stratford police incident report; site photographs taken on July 11, 2011, by Lavin and Doyle; excerpts of the plaintiff's answers to Aquarion's interrogatories; hydrant maintenance records; and the PURA approval, dated November 3, 2010.

exhibits demonstrate that on the morning of July 11, 2011, the defendants were servicing one of Aquarion's hydrants, which was located on the plaintiff's property. When Lavin and Lathean first located the hydrant, they found that it was missing a cap and was leaking, and that the ground was wet. They also observed a red garden hose on the ground next to the hydrant, which they traced to a goat pen located next to a pond. Additionally, they observed other hoses located under leaves that appeared to lead to the goat pen, where two goats resided. These hoses branched off from a red hose that was located on the fencing of the goat pen. Lathlean and Lavin began searching for the missing hydrant cap in the immediate vicinity of the hydrant and walked into an open canopy tent located about ten feet from the hydrant, where they spotted the missing hydrant cap on the floor of the plaintiff's tractor, along with a pipe wrench. The defendants provided photographs of the altered cap, which showed that a hole was drilled into it with a connection welded over it. Lavin and Lathlean's affidavits demonstrate that they suspected that tampering with the fire hydrant had occurred, potentially including an unsafe cross-connection to the water system, which they believed could lead to contamination and endanger the health and safety of Aquarion's customers.[8] They attested that the plaintiff confronted them and yelled at them to get off his property. They also attested that the plaintiff threatened to get a gun and kill them if they did not get off his property. At that point, Lathlean decided to call the police. By

[8] In the defendants' memorandum of law, they indicated and provided exhibits that demonstrate that after Lathlean and Lavin discovered the tampering, Lathlean called Doyle, whose functions at Aquarion include dealing with incidents of tampering and threats to the water system. After Doyle arrived at the property and was shown the hydrant and the hoses, she also reached the same conclusion that "the modified cap, nearby hose and open hydrant was indicia of tampering and posed a system contamination hazard." The defendants understood that they needed to remain on the property until the issue was resolved.

submitting the plaintiff's deposition testimony, the defendants demonstrated that the plaintiff knew that they were Aquarion workers and had arrived in Aquarion trucks, that there was a hydrant on his property, and that he suspected that they were there to inspect the hydrant even before he walked over to them.

The plaintiff filed an amended memorandum of law in opposition to the defendants' motion for summary judgment on August 26, 2016, which he supported with court transcripts, deposition transcripts, and an interrogatory response from the defendants. On August 29, 2016, the defendants filed a reply memorandum to the plaintiff's opposition, and the court held a hearing on the motion.

On January 5, 2017, the court issued a memorandum of decision. As to the trespass claims in counts one through four, the court concluded that the defendants were entitled to summary judgment on two separate grounds: (1) Aquarion "has an express easement to enter upon the property"; and (2) even in the absence of an express easement, the defendants' entry was also "permitted by the Department of Public Utilit[y] Control."[9] As to the negligent infliction of emotional distress

[9] In the defendants' memorandum of law in support of their motion for summary judgment, they argued that they had an easement and also that the "tariff approved by the Connecticut Public Utility Regulatory Authority authorized access to [the plaintiff's] property." As to the second ground for granting the motion for summary judgment, the court stated: "Even in the absence of the express easement by deed, entry by Aquarion . . . employees is permitted by the Department of Public Utilit[y] Control (DPUC). The evidence reveals that the employees were merely doing their jobs on July 11, 2011, and were at all times acting within the confines of the law and applicable regulations. None of the employees was acquainted with the plaintiff . . . prior to July 11, 2011, and none entered the property with any improper motive."

PURA is statutorily charged with regulating Connecticut's investor owned water companies, including Aquarion. See General Statutes § 16-6b. As such, its regulations require water companies to submit certain documents and information for its approval, including, inter alia, "(1) A copy of the company's tariff, which shall include but not be limited to: (A) A copy of each schedule of rates for service, together with the applicable riders; (B) A copy

claim in count five directed against Doyle, the court concluded that summary judgment was appropriate because there was no genuine issue of material fact and that her conduct did not rise to the level necessary to sustain such a claim because she never spoke to the plaintiff. As to the negligent infliction of emotional distress claims against the other defendants in counts six through eight, the court denied the motion for summary judgment on their statute of limitations argument because it concluded that a trier of fact might find "that the actionable harm was not sustained, until sometime after July 11, 2011, when the extent of [the plaintiff's] alleged distress became known."

As to the intentional infliction of emotional distress claims in counts nine through twelve, the court concluded that the defendants' alleged conduct "does not even approach the threshold for extreme and outrageous conduct." As to the invasion of privacy claims in counts thirteen through sixteen, the court granted the motion for summary judgment stating that the "claims are utterly unsupported by the facts, even when viewed in the light most favorable to the plaintiff." As to the CUTPA claim in count seventeen against Aquarion, the court concluded, inter alia, that the plaintiff failed to present evidence to "establish any ascertainable loss."

On February 7, 2017, the defendants filed a motion requesting permission to file a supplemental motion for summary judgment because they obtained "irrefutable evidence" that showed that the plaintiff failed to commence the action on the remaining negligent infliction of emotional distress counts (six through eight) within

of the company's rules, or terms and conditions, describing the company's policies and practices in rendering service. These rules shall include: (I) A list of items which the company normally furnishes, owns and maintains on the customer's premises; (II) The utility's extension plan or plans as required in section 16-11-61 . . . ." Regs. Conn. State Agencies § 16-11-53

the applicable statute of limitations. On the same day, the court granted the motion, and the defendants filed a supplemental motion for summary judgment. On March 27, 2017, the defendant filed an objection to the defendants' supplemental motion, attaching to it an affidavit and deposition transcripts. On April 10, 2017, the court held a hearing on the motion and rendered summary judgment in favor of the defendants on the remaining counts.[10] It concluded that the "actionable harm was sustained in September of 2011, and the action brought in July of 2014 [was] time barred by the applicable statute of limitations . . . ." (Citation omitted.) This appeal followed.

Our review of a trial court's decision granting a motion for summary judgment is well established. Practice Book § 17-49 provides that the "judgment sought shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." "A material fact is a fact that will make a difference in the result of the case. . . . The facts at issue are those alleged in the pleadings. . . .

"In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes

[10] The court's decision on April 10, 2017, became an appealable final judgment because it disposed of the remaining causes of action in the complaint against the defendants. See Practice Book § 61-3.

any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . .

"The party opposing a motion for summary judgment must present evidence that demonstrates the existence of some disputed factual issue . . . . The movant has the burden of showing the nonexistence of such issues but the evidence thus presented, if otherwise sufficient, is not rebutted by the bald statement that an issue of fact does exist. . . . To oppose a motion for summary judgment successfully, the nonmovant must recite specific facts . . . which contradict those stated in the movant's affidavits and documents. . . . The opposing party to a motion for summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue. . . . The existence of the genuine issue of material fact must be demonstrated by counteraffidavits and concrete evidence. . . . Our review of the trial court's decision to grant a motion for summary judgment is plenary." (Internal quotation marks omitted.) *Brusby* v. *Metropolitan District*, 160 Conn. App. 638, 645–46, 127 A.3d 257 (2015). "On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Internal quotation marks omitted.) *Lucenti* v. *Laviero*, 327 Conn. 764, 773, 176 A.3d 1 (2018).

I

The plaintiff first claims that the court improperly granted the defendants' motion for summary judgment on his trespass claims, arguing that the defendants' use of the easement was unreasonable and, thus, constituted a trespass. We need not, however, reach the merits

of the plaintiff's trespass claims because we conclude that those claims are moot.

"Where an appellant fails to challenge all bases for a trial court's adverse ruling on his claim, even if this court were to agree with the appellant on the issues that he does raise, we still would not be able to provide [him] any relief in light of the binding adverse finding[s] [not raised] with respect to those claims. . . . Therefore, when an appellant challenges a trial court's adverse ruling, but does not challenge all independent bases for that ruling, the appeal is moot." (Internal quotation marks omitted.) *MacDermid, Inc.* v. *Leonetti*, 328 Conn. 726, 755, 183 A.3d 611 (2018); see also *Windsor Federal Savings & Loan Assn.* v. *Reliable Mechanical Contractors, LLC*, 175 Conn. App. 651, 661–62, 168 A.3d 586 (2017).

In the present case, even if we were to determine that the plaintiff's claims regarding the defendants' use of the easement had merit, there still would exist another ground on which the trial court based its judgment—i.e., that "entry by Aquarion . . . employees is permitted by the Department of Public Utilit[y] Control"—which has not been properly challenged on appeal. We have found no place in the plaintiff's principal brief where he challenges this other ground for granting the motion for summary judgment on his trespass claims. Although he appears to raise the issue for the first time in his reply brief after the defendants' brief drew his attention to this independent ground, it is a well established principle that "[c]laims . . . are unreviewable when raised for the first time in a reply brief." (Internal quotation marks omitted.) *SS-II, LLC* v. *Bridge Street Associates*, 293 Conn. 287, 302, 977 A.2d 189 (2009).

Accordingly, we conclude that the plaintiff's trespass claims are moot, and, therefore, this court lacks subject matter jurisdiction to consider those claims.

II

The plaintiff next challenges the court's granting of the supplemental motion for summary judgment as to his negligent infliction of emotional distress claims. In particular, he argues that the court improperly concluded that his claims were barred by the two year statute of limitations in General Statutes § 52-584[11] because, in his view, "the continuing course of conduct doctrine may be applied in the present case to toll the statute of limitations."[12] The defendants argue, however, that the continuing course of conduct doctrine is inapplicable as a matter of law in this case. We agree with the defendants.

Section 52-584 provides in relevant part: "No action to recover damages for injury to the person . . . 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, and except that no such action may be brought more than three years from the date of the act or omission complained of . . . ." We have explained that this

[11] General Statutes § 52-584 provides: "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, 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, and except that no such action may be brought more than three years from the date of the act or omission complained of, except that a counterclaim may be interposed in any such action any time before the pleadings in such action are finally closed."

[12] On appeal, the plaintiff argues that "[s]ufficient questions of material fact toll the statute of limitations in . . . § 52-584 as to [the plaintiff's] negligent infliction of emotional distress claims"; however, this argument is relevant only to summary judgment as to Lathlean, Lavin, and Aquarion (counts six through eight). Because the court granted the motion for summary judgment in favor of Doyle on a different ground not addressed in the plaintiff's appellate brief, we construe his appeal to challenge summary judgment as to only Lathlean, Lavin, and Aquarion.

statute imposes two particular time requirements on plaintiffs. "The first requirement, referred to as the discovery portion . . . requires a plaintiff to bring an action 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 second provides that in no event shall a plaintiff bring an action more than three years from the date of the act or omission complained of. . . . The three year period specifies the time beyond which an action under § 52-584 is absolutely barred, and the three year period is, therefore, a statute of repose." (Emphasis omitted; internal quotation marks omitted.) *Mollica* v. *Toohey*, 134 Conn. App. 607, 612, 39 A.3d 1202 (2012). We have also explained that the continuing course of conduct doctrine does not apply to the discovery portion of § 52-584. See *Rosato* v. *Mascardo*, 82 Conn. App. 396, 405, 844 A.2d 893 (2004) (explaining that policy behind continuing course of conduct doctrine no longer has any force once harm discovered). We thus have concluded that "[o]nce the plaintiff has discovered [the] injury, the statute begins to run." (Internal quotation marks omitted.) *Mollica* v. *Toohey*, supra, 614.

"When applying § 52-584 to determine whether an action was timely commenced, this court has held that an injury occurs when a party suffers some form of actionable harm. . . . Actionable harm occurs when the plaintiff discovers . . . that he or she has been injured and that the defendant's conduct caused such injury. . . . The statute begins to run when the plaintiff discovers some form of actionable harm, not the fullest manifestation thereof. . . . The focus is on the plaintiff's knowledge of facts, rather than on discovery of applicable legal theories." (Internal quotation marks omitted.) *Wojtkiewicz* v. *Middlesex Hospital*, 141 Conn. App. 282, 287, 60 A.3d 1028, cert. denied, 308 Conn. 949, 67 A.3d 291 (2013).

On February 7, 2017, the defendants filed their supplemental motion for summary judgment and a corresponding memorandum of law. The defendants also filed with their motion a sealed copy of the plaintiff's medical records that documented the plaintiff's visit with a psychiatrist on September 6, 2011—two months after the incident on his property. The defendants argued that the plaintiff did not commence counts six through eight within two years of his actionable harm and, thus, was time barred from bringing those counts. First, the defendants argued that the plaintiff's actionable harm occurred on the day of the incident, July 11, 2011, because the plaintiff alleges in his complaint that the defendants terrorized him on that day, which made him fearful and anxious. Second, they argued that even if the plaintiff did not realize that the defendants caused him emotional distress on July 11, 2011, his medical records indisputably demonstrate that he discovered his injury on September 6, 2011, when his psychiatrist diagnosed him with depression after he complained that he was "depressed/angry" because "water officials came to his property and accused him of stealing water." The plaintiff indicated to the psychiatrist that he was going to "hurt" the defendants by seeking legal recourse.

On March 27, 2017, the plaintiff filed an objection to the defendants' supplemental motion for summary judgment and a memorandum of law. In support of his objection, he included an affidavit and excerpts from deposition transcripts of Doyle, Lavin, and Lathlean. In his affidavit, he broadly attested that he "did not learn until the summer of 2016 the nature and effect on me of the medical condition the July 11, 2011 incident on my property and its continuing sequelae had caused." On the basis of that representation, he argued that the present action was filed well within the statutory period. On April

10, 2017, the court granted the defendants' supplemental motion for summary judgment on the basis of the supplemental medical evidence provided to it and concluded that the statute of limitations had expired.

As we previously indicated, "once the plaintiff has discovered [his] injury, the statute begins to run." *Rosato* v. *Mascardo*, supra, 82 Conn. App. 405. It is clear from the plaintiff's medical records that the plaintiff discovered that the defendants caused him injury during the events of July 11, 2011, no later than September 6, 2011. Although the plaintiff attests in his affidavit that he did not discover the injurious effect that the July 11, 2011 incident had on him until the summer of 2016, that affirmation is merely a bald statement that an issue of fact exists, not proof that supports the existence of such issue. See *Brooks* v. *Sweeney*, 299 Conn. 196, 221, 9 A.3d 347 (2010) ("[The party opposing a motion for summary judgment] must present evidence that demonstrates the existence of some disputed factual issue . . . . The movant has the burden of showing the nonexistence of such issues but the evidence thus presented, if otherwise sufficient, is not rebutted by the bald statement that an issue of fact does exist." [Internal quotation marks omitted.]). The plaintiff failed to recite specific facts that contradict those stated in the defendants' documents. See *Brusby* v. *Metropolitan District*, supra, 160 Conn. App. 646 ("The opposing party to a motion for summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue. . . . The existence of the genuine issue of material fact must be demonstrated by counteraffidavits and concrete evidence." [Internal quotation marks omitted.]).

On the basis of the medical evidence presented by the defendants, we conclude that the plaintiff discovered some form of actionable harm in September, 2011.

Because he did not bring this action until July, 2014, it is clear that it was commenced well beyond the two year limitation period. Accordingly, we conclude that the trial court properly granted the defendants' supplemental motion for summary judgment as to his negligent infliction of emotional distress claims in counts six through eight.

III

The plaintiff's third claim on appeal challenges the granting of the motion for summary judgment as to his invasion of privacy claims against the defendants. He argues that the defendants "unreasonably intruded upon his seclusion" when they "proceeded to walk well beyond any claimed consent, authority, or reasonable use of an easement." Moreover, he argues that the defendants subjected him and his family to "offensive verbal comments," including making accusations that he was stealing water. The defendants argue that the court correctly held that as a matter of law the conduct the plaintiff alleges cannot sustain a claim of intrusion upon seclusion. We agree with the defendants.

In 1982, our Supreme Court recognized for the first time a cause of action for invasion of privacy. See *Goodrich* v. *Waterbury Republican-American, Inc.*, 188 Conn. 107, 127, 448 A.2d 1317 (1982). The court observed that "the law of privacy has not developed as a single tort, but as a complex of four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff to be let alone." (Internal quotation marks omitted.) Id., 127–28, citing Prosser, Torts (4th Ed. 1971) § 117, p. 804. The court instructed that "the four categories of invasion of privacy are set forth in 3 Restatement (Second), Torts § 652A [1977] as follows: (a) unreasonable

intrusion upon the seclusion of another; (b) appropriation of the other's name or likeness; (c) unreasonable publicity given to the other's private life; or (d) publicity that unreasonably places the other in a false light before the public." Id., 128.

In the parties' appellate briefs, they indicated that neither this court nor our Supreme Court has had the occasion to define what is required under the intrusion upon seclusion category of invasion of privacy, but briefed their arguments based on the formulation set forth in the Restatement (Second) of Torts. After the parties submitted their principal briefs, but prior to oral argument, this court addressed for the first time an intrusion upon seclusion claim in *Davidson* v. *Bridgeport*, 180 Conn. App. 18, 30, 182 A.3d 639 (2018). In *Davidson*, we noted that "[§] 652B of the Restatement (Second) of Torts provides: One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." Id., 30 n.15. Relying on the Restatement, as our Supreme Court did in *Goodrich* when it adopted the invasion of privacy cause of action, we indicated broadly that the plaintiff was required to prove by a preponderance of the evidence "that the defendants unreasonably intruded on his seclusion and that the intrusion would be highly offensive to a reasonable person." Id., 30. We held in that case that the plaintiff "failed to carry his burden to prove that the defendants invaded his privacy . . . ." Id., 35.

It is clear from the Restatement's language that to establish a claim for intrusion upon the seclusion of another, a plaintiff must prove three elements: (1) an intentional intrusion, physical or otherwise, (2) upon the plaintiff's solitude or seclusion or private affairs or concerns, (3) which would be highly offensive to a

reasonable person. See, e.g., *Mauri* v. *Smith*, 324 Or. 476, 483, 929 P.2d 307 (1996); see also *Wolf* v. *Regardie*, 553 A.2d 1213, 1217 (D.C. 1989); *Swarthout* v. *Mutual Service Life Ins. Co.*, 632 N.W.2d 741, 744–45 (Minn. App. 2001).[13] For there to be liability, the defendant's interference with the plaintiff's seclusion must be substantial, must be of a kind that would be highly offensive to a reasonable person, and must be a result of conduct to which a reasonable person would strongly object. See 3 Restatement (Second), supra, § 652B, comment (d). In the context of intrusion upon seclusion, questions about the reasonable person standard are ordinarily questions of fact, but they become questions of law if reasonable persons can draw only one conclusion from the evidence. See *Smith* v. *Leuthner*, 156 Conn. 422, 424–25, 242 A.2d 728 (1968).

To analyze whether the evidence created a question of fact, we will examine each of those elements in turn. The plaintiff argues that the defendants unreasonably intruded upon his seclusion by going onto his private premises. He argues that the defendants "proceeded to walk well beyond any claimed consent, authority, or reasonable use of an easement," and subjected him and his family to "offensive verbal comments" by accusing him of stealing water.

As stated previously, the first element of the tort of invasion of privacy by intrusion upon seclusion is an intentional intrusion, physical or otherwise. Although courts often use the phrase "intentional intrusion," the Restatement does not define it. A few courts, however, have done so. See, e.g., *O'Donnell* v. *United States*, 891

[13] See also E. Meltz, "No Harm, No Foul? 'Attempted' Invasion of Privacy and the Tort of Intrusion Upon Seclusion," 83 Fordham L. Rev. 3431, 3440 (2015) (explaining that thirty-six states "recognize intrusion upon seclusion under common law and follow the Restatement's formulation, either explicitly adopting it or closely mirroring the Restatement's definition and description of the cause of action").

F.2d 1079, 1082 (3d Cir. 1989). In *O'Donnell*, the plaintiff was a former patient of the Veterans Administration (administration), who brought an action against the administration for intrusion upon seclusion when it released a summary of his psychiatric treatment to his employer without obtaining authorization to do so. Id., 1081. The trial court granted the administration's motion for summary judgment. Id., 1080. In reviewing the claim on appeal, the United States Court of Appeals for the Third Circuit defined "intent" by looking to § 8 of the Restatement (Second) of Torts, which defines the term to mean "that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it." *O'Donnell* v. *United States*, supra, 1083. Because the Restatement is devoid of any definition for the term "intrusion," the court looked to a dictionary for guidance. Id. We follow suit. Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) defines "intrude" to mean to thrust or force in or upon someone or something especially without permission or welcome. Moreover, the comments and illustrations to § 652B of the Restatement (Second) of Torts suggest that an intrusion upon seclusion claim typically involves a defendant who does not believe that he or she has either the necessary personal permission or legal authority to do the intrusive act. See 3 Restatement (Second), supra, § 652B, comment (b), illustrations (1)–(5).[14] We thus conclude, as other courts have, that an actor commits an intentional intrusion if he believes, or is substantially certain, that he lacks the necessary legal or personal permission to commit the intrusive act. See, e.g., *Mauri* v. *Smith*, supra, 324 Or. 484; *O'Donnell* v. *United States*, supra, 1083.

[14] For example, illustration (1) provides: "A, a woman, is sick in a hospital with a rare disease that arouses public curiosity. B, a newspaper reporter, calls her on the telephone and asks for an interview, but she refuses to see him. B then goes to the hospital, enters A's room and over her objection takes her photograph. B has invaded A's privacy." 3 Restatement (Second), supra, § 652B, comment (b), illustration (1).

In the present case, the defendants' submissions in support of their motion for summary judgment reflect that they believed that they had permission to service the hydrant on the plaintiff's property by either the easement or the tariff approved by PURA. Additionally, they provided the hydrant maintenance records from 1965 to 2004 and 2008 to 2014, which demonstrated that they had routinely maintained the hydrant on the plaintiff's property for decades. Even if we assume arguendo that the plaintiff was correct in that the defendants misused their easement or tariff rights and their conduct constituted a trespass, a reasonable person could not conclude on the basis of the record before us that the defendants thrusted or forced in or upon the plaintiff's property to constitute an intentional intrusion. Nor could a reasonable person find that the defendants' presence on the property, coupled with statements made to the plaintiff accusing him of stealing water, was the type of substantial interference the Restatement contemplates as necessary to constitute an intentional intrusion.[15]

Even if the plaintiff could demonstrate that the record was sufficient to create a question of material fact with respect to the first element, he is unable to do so with respect to the others. The second element requires that the intentional intrusion be upon the plaintiff's solitude or seclusion or private affairs or concerns. The plaintiff therefore must show that he had an objectively reasonable expectation of seclusion or solitude in that place. See *Shulman* v. *Group W Productions, Inc.*, 18 Cal. 4th 200, 232, 955 P.2d 469 (1998). "The invasion may be by physical intrusion into a place in which the plaintiff has secluded himself, as when the defendant forces his way

[15] The plaintiff argues that the defendants also subjected his family to "offensive verbal comments" to support his claim. As the defendants properly note in their appellate brief, however, the plaintiff cannot assert alleged offenses to family members as a basis for his own claims.

into the plaintiff's room in a hotel or insists over the plaintiff's objection in entering his home." 3 Restatement (Second), supra, § 652B, comment (b). Viewed in the light most favorable to the plaintiff, the submissions before the court do not support a finding that the driveway area where the defendants parked their vehicles, the area where they walked to discover and service the hydrant, or the open canopy tent located approximately ten feet from the hydrant where they found the cap, were private areas in which the plaintiff had secluded himself. At no point does the plaintiff indicate that the defendants entered his residence or that they compromised any private information or the general privacy of the plaintiff. Accordingly, the conduct the plaintiff attributes to the defendants cannot, as a matter of law, sustain the second element.

As to the third and final element of the tort, it requires that the intentional intrusion upon a plaintiff's solitude or seclusion be highly offensive to a reasonable person. As we noted previously, there is "no liability unless the interference with the plaintiff's seclusion is a substantial one, of a kind that would be highly offensive to the ordinary reasonable man, as the result of conduct to which the reasonable man would strongly object." Id., comment (d). Viewing the evidence in the light most favorable to the plaintiff, no reasonable person could conclude that the conduct the plaintiff attributed to the defendants was highly offensive. The submissions demonstrate that the defendants, a water company and its employees, were servicing a hydrant the company had maintained for many decades. Although they walked around the plaintiff's property to discover the hydrant, searched in the area of the hydrant for the missing and altered cap, and allegedly accused the plaintiff of stealing water, a reasonable person would not find this conduct to be highly offensive.

On the basis of the foregoing, we conclude that the trial court did not commit error in rendering summary judgment in favor of the defendants on the invasion of privacy claims.

IV

The plaintiff next claims that the court incorrectly granted the motion for summary judgment in favor of the defendants as to his intentional infliction of emotional distress claims (counts nine through twelve). The plaintiff argues that "[w]hile the events that occurred on July 11, 2011, may not be extreme and outrageous in and of themselves, the continued cooperation of the [defendants] with an unfounded criminal investigation along with the events on July 11, 2011, seem to rise to the standard of extreme and outrageous." The plaintiff's argument is without merit, and, therefore, we affirm the judgment as to these counts.

"In order for the plaintiff to prevail in a case for liability under . . . [intentional infliction of emotional distress], four elements must be established. It must be shown: (1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the defendant's conduct was the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe." (Internal quotation marks omitted.) *Petyan* v. *Ellis*, 200 Conn. 243, 253, 510 A.2d 1337 (1986). "Whether a defendant's conduct is sufficient to satisfy the requirement that it be extreme and outrageous is initially a question for the court to determine." *Appleton* v. *Board of Education*, 254 Conn. 205, 210, 757 A.2d 1059 (2000). Only where reasonable minds could disagree does it become an issue for the jury. Id.

"Liability for intentional infliction of emotional distress requires conduct that exceeds all bounds usually tolerated by decent society . . . . Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, Outrageous! . . . Conduct on the part of the defendant that is merely insulting or displays bad manners or results in hurt feelings is insufficient to form the basis for an action based upon intentional infliction of emotional distress." (Citations omitted; internal quotation marks omitted.) Id., 211.

In the present case, the materials submitted to the court in support of the defendants' motion for summary judgment reflect that once Lathlean and Lavin located the hydrant they were on the property to service, they found that it was missing a cap and was leaking, and that the ground was wet around it. Additionally, they traced a red hose that was on the ground near the hydrant to a pond on the property. Lathean and Lavin searched for the cap in the vicinity of the hydrant, where they discovered it next to a wrench under a canopy tent. In viewing all the documents submitted to the court in the manner most favorable to the plaintiff, and assuming that each of the defendants accused the plaintiff of stealing water in a "rude" and "aggressive" manner, this conduct does not come close to extreme and outrageous conduct. See id. (occurrences may have been distressing and hurtful to plaintiff, but do not constitute extreme and outrageous conduct).

On appeal, the plaintiff concedes that "the events that occurred on July 11, 2011, may not be extreme and

outrageous," but argues "that the continued cooperation of the [defendants] with an unfounded criminal investigation along with the events on July 11, 2011, seem to rise to the standard of extreme and outrageous." He did not, however, make this argument in his objection to the defendants' motion for summary judgment. Even if we were to construe these facts in the plaintiff's favor and consider this argument as a ground against rendering summary judgment, the defendants' mere cooperation with a criminal investigation that the state pursued does not constitute conduct that is so atrocious as to exceed all bounds usually tolerated by a decent society. See, e.g., *Tracy* v. *New Milford Public Schools*, 101 Conn. App. 560, 567–70, 922 A.2d 280 (conduct not outrageous where plaintiff's supervisor conspired with superintendent in pattern of harassment including denial of position, initiating disciplinary actions without proper investigation, defamation of character and intimidation), cert. denied, 284 Conn. 910, 931 A.2d 935 (2007). Accordingly, the defendants' conduct is insufficient to form the basis of an action for intentional infliction of emotional distress, and, thus, the trial court properly granted the motion for summary judgment as to counts nine through twelve.

V

In the plaintiff's final claim, he argues that the court improperly granted the motion for summary judgment in favor of Aquarion as to his CUTPA claim (count seventeen). He argues that he suffered an ascertainable loss and that "the collective acts of [the defendants] raise a sufficient question of material fact such that it could be found that [Aquarion] engaged in tortious conduct and, therefore, also violated the first criteria of the cigarette rule."[16] We disagree.

[16] Our Supreme Court first used the term "cigarette rule" in *McLaughlin Ford, Inc.* v. *Ford Motor Co.*, 192 Conn. 558, 473 A.2d 1185 (1984), to refer to the criteria used to determine what may constitute an unfair or deceptive act or practice under CUTPA. Id., 568, citing *Conaway* v. *Prestia*, 191 Conn.

General Statutes § 42-110g (a) provides in relevant part: "Any person who suffers any ascertainable loss of money or property . . . as a result of the use or employment of a method, act or practice prohibited by section 42-110b, may bring an action . . . to recover actual damages. . . . The court may, in its discretion, award punitive damages and may provide such equitable relief as it deems necessary or proper." "The ascertainable loss requirement is a threshold barrier [that] limits the class of persons who may bring a CUTPA action seeking either actual damages or equitable relief. . . . Thus, to be entitled to any relief under CUTPA, a plaintiff must first prove that he has suffered an ascertainable loss due to a CUTPA violation." (Internal quotation marks omitted.) *National Waste Associates, LLC* v. *Scharf*, 183 Conn. App. 734, 750–51, 194 A.3d 1 (2018).

It is well settled that our Supreme Court has adopted the criteria set out in the so-called cigarette rule by the Federal Trade Commission for determining when a practice is unfair: "(1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, [competitors or other businesspersons]. . . . All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of

484, 492, 464 A.2d 847 (1983). The term is derived from a Federal Trade Commission regulation that first set forth the criteria. See *McLaughlin Ford, Inc.* v. *Ford Motor Co.*, supra, 566 n.10, citing Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8355 (1964); see also *Federal Trade Commission* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5, 92 S. Ct. 898, 905, 31 L. Ed. 2d 170 (1972).

the criteria or because to a lesser extent it meets all three. . . . Thus a violation of CUTPA may be established by showing either an actual deceptive practice . . . or a practice amounting to a violation of public policy. . . . In order to enforce this prohibition, CUTPA provides a private cause of action to [a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a [prohibited] method, act or practice . . . .'' (Internal quotation marks omitted.) *Ulbrich* v. *Groth*, 310 Conn. 375, 409–10, 78 A.3d 76 (2013).

In his complaint, the plaintiff alleged that the ''conduct of [Aquarion] by and through its . . . employees constitutes a violation of [CUTPA] including its aforesaid conduct to cover the wrongful conduct of its employees by taking and approving unwarranted destructive action against the plaintiff; was unfair and abuse of the law and the authority of a public utility, immoral, unethical, oppressive, and unscrupulous conduct which caused substantial injury to the plaintiff, one of its customers. Such acts include claiming it had an easement and had only remained on that easement when in fact none existed or it significantly trespassed in an area where it should not have been, without permission and over strenuous objection as aforesaid.''

In the defendants' memorandum of law in support of their motion for summary judgment, they argued, inter alia, that the plaintiff did not suffer any ascertainable loss. They argued that when they served him with a second interrogatory in order for him to identify and describe the damages he sustained as a result of the defendants' alleged violation of CUTPA, he responded, ''punitive damages and attorney's fees as authorized by CUTPA to be set by the court for violations.'' On the basis of this response, the defendants argued that he identified no actual damages as a result of Aquarion's purported CUTPA violation. In the plaintiff's objection

to the motion, he asserted broadly that he suffered a loss of "his liberty, being arrested, falsely accused of committing crimes upon his property, injured during the arrest and suffering physical, emotional and mental damages . . . as well as financial loses." However, he provided no affidavits or other relevant documentary evidence to demonstrate any loss. The court concluded that the plaintiff failed to establish any ascertainable loss.

On appeal, the plaintiff argues that he clearly stated during the discovery process "that a portion of the damages that he sustained are both 'punitive damages and attorney's fees.' " He then concludes that "the ascertainable loss [he] suffered . . . [is] both the emotional harm and the incurred attorney's fees that stem from the tortious conduct of the defendants."

Here, although the plaintiff suggests that "punitive damages and attorney's fees" are sufficient to fulfill the ascertainable loss requirement under CUTPA, he has provided no authority for this contention. Punitive damages and attorney's fees are remedies under CUTPA. See *Freeman* v. *A Better Way Wholesale Autos, Inc.*, 174 Conn. App. 649, 668, 166 A.3d 857 ("A court may exercise its discretion to award punitive damages to a party who has suffered any ascertainable loss pursuant to CUTPA. . . . Accordingly, when the trial court finds that the defendant has acted recklessly, [a]warding punitive damages and attorney's fees under CUTPA is discretionary . . . ." [Citation omitted; internal quotation marks omitted.]), cert. denied, 327 Conn. 927, 171 A.3d 60 (2017). As our Supreme Court has made clear, "[t]he ascertainable loss requirement . . . is a threshold barrier which limits the class of persons who may bring a CUTPA action seeking either actual damages or equitable relief." (Internal quotation marks omitted.) *Marinos* v. *Poirot*, 308 Conn. 706, 713, 66 A.3d 860 (2013). Thus, punitive damages and attorney's fees,

which are potential remedies available to a plaintiff once he meets this threshold barrier and prevails on his CUTPA claim, cannot be the basis of demonstrating ascertainable loss. To hold otherwise essentially would eliminate the ascertainable loss requirement.

As to the plaintiff's contention that his emotional harm can fulfill the ascertainable loss requirement, we have explicitly held that a "claim of emotional distress does not constitute an ascertainable loss of money or property for purposes of CUTPA." *Di Teresi* v. *Stamford Health System, Inc.*, 149 Conn. App. 502, 512, 88 A.3d 1280 (2014). We need go no further. For the reasons set forth previously, we agree with the trial court that the plaintiff failed to allege and demonstrate an ascertainable loss, and, accordingly, it properly rendered summary judgment as to count seventeen.[17]

The judgments are affirmed.

In this opinion the other judges concurred.

JOHN STRANO ET AL. *v.* DARWYN AZZINARO ET AL. (AC 40752)

Sheldon, Elgo and Beach, Js.

Syllabus

The plaintiff J, individually and as parent and next friend of his minor son, the plaintiff R, sought to recover damages from the defendants for intentional infliction of emotional distress. The plaintiffs alleged that R, who was a member of a certain Boy Scouts troop, had been bullied by a fellow member of the troop. After J requested that the defendant A, the committee chairman of the troop, and other leaders intervene in an effort to stop the bullying, J attended troop meetings to monitor his son's treatment. Subsequently, A sent J a letter notifying him that R was no longer permitted to attend troop meetings or events because J's

[17] We need not reach the issue of whether there was a genuine issue of material fact as to whether the defendants' conduct constituted an unfair or deceptive practice because we have determined that the plaintiff failed to allege and demonstrate an ascertainable loss.

presence at troop meetings disrupted the group's functioning. The plaintiffs thereafter brought this action, alleging, inter alia, that the defendants punished R for the actions of his father in order to cause J pain and injury, and, as a result of the conduct of the defendants in expelling R for an allegedly false reason, both of the plaintiffs suffered extreme emotional distress. Following the trial court's granting of a motion to strike the complaint for failure to plead sufficient facts to establish that the defendants had engaged in extreme and outrageous conduct, the plaintiffs filed a revised complaint, in which they pleaded additional facts, including that R had been diagnosed with autism spectrum disorder and that the defendants were aware that R required educational accommodations, and in which they described several instances where R had been bullied by the fellow troop member. Subsequently, the trial court granted the defendants' motion to strike the revised complaint on the ground that it failed to plead facts sufficient to allege that the defendants had engaged in extreme and outrageous conduct. Thereafter, the plaintiffs did not file a timely new pleading and the trial court granted the defendants' motion for judgment. On the plaintiffs' appeal to this court, *held* that the trial court did not err in granting the defendants' motion to strike the plaintiffs' revised complaint, the plaintiffs having failed to allege facts sufficient to support the conclusion that the defendants engaged in extreme and outrageous conduct toward them: J's claim that the defendants inflicted emotional distress on him by expelling R and that R's expulsion was effected for the purpose of inflicting distress on J was unavailing, as the conduct of the defendants, even if hurtful, did not exceed all bounds of decency in civilized society, and although this court was mindful of R's alleged vulnerability and recognized that troop participation may have been a valuable opportunity for R to interact positively with others, and that being terminated from participation in that activity may have caused him distress, and although efforts by the defendants allegedly were inadequate to end the bullying, the defendants' alleged conduct toward R was not extreme and outrageous, beyond all bounds of civilized behavior, as it was not alleged that R was expelled because he was autistic, nor was it alleged that the defendants promoted bullying and R suffered distress as a result, the mechanics of the expulsion were not alleged to be abusive or degrading, and, thus, under these circumstances, the expulsion in itself was not sufficient to constitute extreme and outrageous conduct for purposes of sounding in intentional infliction of emotional distress; moreover, the manner in which R was expelled did not rise to the level of intentional infliction of emotional distress, as the revised complaint did not allege that the defendants used any harsh or humiliating language in the letter or at any time, and even if the defendants' given reason for the expulsion was untrue, the scenario did not exceed the bounds of civilized behavior.

Argued October 17, 2018—officially released March 5, 2019

Procedural History

Action to recover damages for intentional infliction of emotional distress, brought to the Superior Court in the judicial district of Middlesex, where the court, *Domnarski*, *J.*, granted the defendants' motion to strike the plaintiffs' revised complaint; thereafter, the court granted the defendants' motion for judgment and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

John R. Williams, for the appellants (plaintiffs).

Stephen P. Brown, with whom, on the brief, was *Nicole R. Cuglietto*, for the appellees (defendants).

Opinion

BEACH, J. The plaintiffs, John Strano and Rider Strano, appeal from the judgment of the trial court rendered after its decision striking their claims sounding in intentional infliction of emotional distress, which claims were brought against the defendants, Darwyn Azzinaro, in his official capacity as Essex Boy Scouts Troop 12 Committee Chairman, and the Boy Scouts of America Corporation. The plaintiffs claim that their revised complaint alleged facts sufficient to support the conclusion that the defendants engaged in extreme and outrageous conduct toward them. We affirm the judgment of the trial court.[1]

The following facts and procedural history are pertinent to our decision. The original complaint was brought by John Strano on his own behalf and as the father and next friend of his minor son. The plaintiffs alleged, in relevant part, that the minor plaintiff, a scout

[1] In their brief, the defendants claimed that the Federal Volunteer Protection Act, 42 U.S.C. § 14503 (a), barred recovery. In oral argument, the defendants noted that they did not raise this claim at the trial level because they had not yet filed an answer and defenses. Accordingly, the defendants agreed that we need not consider this claim.

in the Essex Boy Scouts Troop 12, had been bullied by a fellow scout. After John Strano requested that Azzinaro and other adult troop leaders intervene to stop the bullying and John Strano attended troop meetings to monitor his son's treatment, Azzinaro sent John Strano a letter notifying him that the minor plaintiff was no longer permitted to attend troop meetings or events, because John Strano's presence at troop meetings disrupted the group's functioning.[2]

The defendants filed a motion to strike the complaint on the ground that the plaintiffs failed to allege facts sufficient to establish that the defendants had engaged in extreme and outrageous conduct. The court granted the motion to strike, concluding that no reasonable fact finder could find that the defendants' conduct was extreme and outrageous.

The plaintiffs filed a revised complaint, in which they pleaded additional facts in support of their claim of intentional infliction of emotional distress. The revised complaint added that the minor plaintiff had been diagnosed with autism spectrum disorder, which diagnosis qualified him for an Individual Education Plan pursuant to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 et seq., and that the defendants were aware that the minor plaintiff required educational accommodations. The revised complaint also described several instances in which a fellow scout had bullied the minor plaintiff, as well as remedial actions that the alleged bully's parents and the defendants had taken in response to the bullying.

The defendants filed a motion to strike the plaintiffs' revised complaint on the ground that it, like the original complaint, failed to plead facts sufficient to allege that the defendants had engaged in extreme and outrageous

[2] The revised complaint quoted only a brief portion of the letter.

conduct toward them. The court granted the defendants' motion. The plaintiffs did not file a new pleading within the time allotted in Practice Book § 10-44. The defendants filed a motion for judgment, which the court granted. This appeal followed.

The plaintiffs claim that the court erroneously determined that no reasonable fact finder could find that the defendants' alleged conduct had been extreme and outrageous and, therefore, erred in striking their revised complaint. We disagree.

"The standard of review for granting a motion to strike is well settled. In an appeal from a judgment following the granting of a motion to strike, we must take as true the facts alleged in the plaintiff's complaint and must construe the complaint in the manner most favorable to sustaining its legal sufficiency. . . . A motion to strike admits all facts well pleaded. . . . A determination regarding the legal sufficiency of a claim is, therefore, a conclusion of law, not a finding of fact. Accordingly, our review is plenary. . . . If facts provable in the complaint would support a cause of action, the motion to strike must be denied. . . . Moreover, we note that [w]hat is necessarily implied [in an allegation] need not be expressly alleged." (Citations omitted; internal quotation marks omitted.) *Bell* v. *Board of Education*, 55 Conn. App. 400, 404, 739 A.2d 321 (1999).

To prevail on a claim sounding in intentional infliction of emotional distress, a plaintiff must prove the following four elements: "(1) that the actor intended to inflict emotional distress; or that he knew or should have known that emotional distress was a likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the defendant's conduct was the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe." (Internal quotation marks omitted.) Id., 409, citing, inter alia, 1

Restatement (Second), Torts § 46 (1965). "In assessing a claim for intentional infliction of emotional distress, the court performs a gatekeeper function. In this capacity, the role of the court is to determine whether the allegations of a complaint . . . set forth behaviors that a reasonable fact finder could find to be extreme or outrageous. In exercising this responsibility the court is not [fact-finding], but rather it is making an assessment whether, as a matter of law, the alleged behavior fits the criteria required to establish a claim premised on intentional infliction of emotional distress." (Internal quotation marks omitted.) *Historic District Commission* v. *Sciame*, 140 Conn. App. 209, 218, 58 A.3d 354 (2013).

"Liability for intentional infliction of emotional distress requires conduct exceeding all bounds usually tolerated by decent society, of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind." (Internal quotation marks omitted.) *Bell* v. *Board of Education*, supra, 55 Conn. App. 409. "Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, Outrageous!" (Internal quotation marks omitted.) *Appleton* v. *Board of Education*, 254 Conn. 205, 211, 757 A.2d 1059 (2000), quoting 1 Restatement (Second), supra, § 46, comment (d).

"[E]ven if emotional harm is inflicted for no purpose other than to cause such harm, some degree of emotional harm must be expected in social interaction and tolerated without legal recourse. Under the 'extreme and outrageous' requirement, an actor is liable only if the conduct goes beyond the bounds of human decency such that it would be regarded as intolerable in a civilized community. Ordinary insults and indignities are not enough for liability to be imposed, even if the actor

desires to cause emotional harm." 2 Restatement (Third), Torts § 46, comment (d), pp. 138–39 (2012).

In *Bell* v. *Board of Education*, supra, 55 Conn. App. 400, the parents of several children alleged that the principal of their elementary school "imposed on the children a teaching method . . . [which emphasized] social skills at the expense of discipline and academics. . . [and, consequently,] the defendants encouraged, created and tolerated an atmosphere of chaos, disruptiveness and violence at the school so that the children were exposed on a daily basis to so much physical and verbal violence that it became a place of fear." Id., 403. Emphasizing that the "place of fear" lasted for two years, this court concluded that the allegations were sufficient to state a cause of action for intentional infliction of emotional distress. Id., 411.

In *Appleton* v. *Board of Education*, supra, 254 Conn. 205, and *Dollard* v. *Board of Education*, 63 Conn. App. 550, 777 A.2d 714 (2001), on the other hand, offensive and insulting behavior was alleged but the allegations were not found sufficient to support a conclusion of intentional infliction of emotional distress. In *Appleton*,[3] the plaintiff teacher was allegedly insulted in front of her colleagues. The defendants allegedly questioned her vision and her ability to read, her daughter was told that the plaintiff had been "acting differently" and should take a few days off, she was subjected to two psychiatric examinations, and police were called to escort her from work. *Appleton* v. *Board of Education*, supra, 211. Although the events "may very well have been distressing and hurtful to the plaintiff," they were held not to constitute "extreme and outrageous" conduct. Id.

In *Dollard* v. *Board of Education*, supra, 63 Conn. App. 550, the complaint alleged that the plaintiff school

[3] In *Appleton*, our Supreme Court reversed this court's conclusion that summary judgment for the defendants had been rendered improperly.

psychologist had been subjected to a concerted plan to compel her to resign from her position and to make her distraught. Allegedly, she was transferred against her wishes and her replacement was secretly hired. Id., 552–53. She was publicly admonished for chewing gum, being habitually late and disorganized and not using time well, and she was unnecessarily placed under the close supervision of a friend of a defendant. Id., 553. This court deemed these allegations insufficient to establish extreme and outrageous conduct. Id., 555.

I

We first apply the foregoing principles to the allegations specifically regarding John Strano. The plaintiffs alleged that John Strano asked the defendants to intervene to protect the minor plaintiff from bullying. Subsequently, Azzinaro sent a letter to John Strano expelling the minor plaintiff from the troop. Azzinaro allegedly stated that John Strano's presence "at troop meetings [was] a major disruption to the other scouts, scout parents, Rider and leaders of the troop." The plaintiffs alleged that this statement was false and that the defendants punished the minor plaintiff "for the purpose of causing pain and injury to John Strano."

He alleged, in essence, that the defendants inflicted emotional distress on him by expelling his son, and that the expulsion was effected for the purpose of inflicting distress on John Strano. This conduct is not different in kind or degree from that alleged in cases such as *Appleton* v. *Board of Education*, supra, 254 Conn. 205, and *Dollard* v. *Board of Education*, supra, 63 Conn. App. 550. Even if hurtful, the conduct did not exceed all bounds of decency in civilized society. We, therefore, affirm the trial court's judgment as to John Strano.

II

Our analysis of the minor plaintiff's claim is modified by two factors that do not apply to the claim of John

Strano. The Restatement provides that conduct may be deemed extreme and outrageous if the actor knew that "the other person was especially vulnerable." 2 Restatement (Third), supra, § 46, comment (d). The Restatement also provides: "Whether an actor's conduct is extreme and outrageous depends on the facts of each case, including the relationship of the parties, [and] whether the actor abused a position of authority over the other person . . . ." Id., comment (d).

The complaint alleged facts sufficient to trigger consideration of the additional factors. The plaintiffs alleged that the minor plaintiff exhibited neuroatypical behaviors associated with his autism spectrum diagnosis, and that the defendants knew that the minor plaintiff required speech and language services at school to address deficits in social skills and executive functioning. They further alleged several instances in which the minor plaintiff was bullied by a fellow scout while participating in troop activities. Although the defendants notified the other scout's parents of these instances and suspended the fellow scout from meetings for four weeks, they refused to take any further—and, impliedly, more harsh—disciplinary action against the bully. The revised complaint asserts, as well, that the defendants had a duty to protect troop members from bullying and sets forth facts sufficient to conclude that the defendants were in a position of authority over the minor plaintiff. Thus, vulnerability on the part of the minor plaintiff and the position of authority on the part of the defendants were alleged.

The allegation of additional factors, however, does not necessarily compel the conclusion that the element of extreme and outrageous conduct has been adequately alleged. There remains the dispositive question as to whether under the circumstances, which include vulnerability and the exercise of authority, the alleged conduct was extreme and outrageous, as defined and

illustrated in case law. We turn, then, to illustrative cases.

In *Karlen* v. *Westport Board of Education*, Docket No. 3:07-CV-309 (CFD), 2010 WL 3925961 (D. Conn. September 30, 2010), the plaintiff alleged that the defendant failed to act to mitigate racially motivated harassment of a minor student. The court noted that in response to the plaintiff's reporting that she was the victim of racially motivated harassment, the defendant investigated her allegations, met with her parents, and promptly honored her father's request to transfer the plaintiff to another school. Id., *18. In light of such actions, the District Court, applying Connecticut law, concluded that summary judgment was appropriate because "the plaintiffs have not alleged conduct that is sufficiently 'extreme and outrageous' to constitute intentional infliction of emotional distress." Id.

It is instructive to note a qualitative difference between *Bell* and *Karlen*. In *Karlen* v. *Westport Board of Education*, supra, 2010 WL 3925961, the defendant superintendent allegedly made an effort to address the hurtful behavior complained of, though the effort may have been unproductive. In *Bell* v. *Board of Education*, supra, 55 Conn. App. 400, by contrast, the defendants *themselves* allegedly created the "place of fear" that plagued the plaintiffs for two years. Failure to remedy a difficult environment, at least where some effort is made to do so, is rarely, if ever, the kind of behavior that exceeds the bounds of civil decency for the purpose of proving the tort of intentional infliction of emotional distress. See also *Bass ex rel. Bass* v. *Miss Porter's School*, 738 F. Supp. 2d 307 (D. Conn. 2010) (expulsion of student for violating school code of conduct, even though she previously told staff she had been ridiculed for her attention deficit disorder, not sufficiently extreme and outrageous conduct).

Additionally, we find persuasive guidance in *Rudis* v. *National College of Education*, 548 N.E.2d 474 (Ill. App. Ct. 1989), in which the court applied the Restatement in determining whether the additional factors alleged in the plaintiff's complaint alleged facts sufficient to support a conclusion that the defendant's conduct was extreme and outrageous. In *Rudis*, the plaintiff was employed as a schoolteacher in Illinois. The National College of Education invited her to apply as a student to their Masters in Computer Education Program. Id., 475. After enrolling in the program, the plaintiff was dismissed from the school on a number of grounds, but, after seeking legal counsel, she was reinstated. Id., 476. The plaintiff then received several comments from faculty who called her "a cheat and a computer hacker, and accused her of 'not getting what she deserved.' " Id. Rumors spread at her place of employment, and she was denied expected promotions and advancements. Id. The plaintiff claimed intentional infliction of emotional distress based on this course of conduct. Id.

The plaintiff alleged that the conduct was extreme and outrageous because "(1) the character of the conduct itself is extreme and outrageous, (2) the conduct arises out of an abuse of a position or relationship in which the defendant has authority over the plaintiff, [and] (3) the defendant knew [the plaintiff had] some peculiar susceptibility . . . to emotional distress." See id. As to the character of the defendants' conduct, the court concluded that "[the plaintiff] has not alleged that the defendants used vituperative, profane, threatening, or coercive language or conduct. While the defendants' remarks may have been insulting or untrue, we do not believe that they rise to a level of intensity or duration that no reasonable man could be expected to endure." Id., 477. Additionally, the court rejected the plaintiff's argument that the defendants abused their authority,

reasoning that the defendants had not coerced the plaintiff into engaging in behavior in which she would not otherwise have engaged and did not use expulsion as a threat against her. Id., 478. Moreover, the court noted that "[e]ven if we were to accept [the plaintiff's] argument that the defendants wielded some position of authority over her, such authority does not transform conduct which otherwise amounts to no more than insults or indignities into extreme and outrageous conduct." Id. Finding no outrageous conduct, the court reasoned that the plaintiff's contention that her peculiar susceptibility could warrant a finding of extreme and outrageous conduct must also fail as "peculiar susceptibility unaccompanied by major outrage cannot of itself raise the defendants' conduct to the level of extreme and outrageous." Id. The court affirmed the trial court's judgment granting the defendant's motion to dismiss. Id.; see also *Shore* v. *Mirabello*, Docket No. 3:16-cv-2078 (VLB), 2018 WL 1582548 (D. Conn. March 29, 2018) (although plaintiff allegedly had learning disorder and allegedly had been called " 'like a fifth grader,' 'not too swift,' 'slow,' and 'stupid' " by instructor, expulsion from professional training school after telling prospective students about instances in which she was criticized, demeaned, and unfairly treated by instructor was not basis for intentional infliction of emotional distress claim, as such conduct did not transgress all bounds of decency).[4]

With these principles in mind, we turn to the precise allegations of the minor plaintiff. As stated previously, the revised complaint alleged that the minor plaintiff was autistic and that the defendants knew that he required speech and language services at school to address deficits in his executive ability and social skills. The revised complaint alleged that he had been bullied

[4] Although the federal cases applying Connecticut law and the appellate case from another jurisdiction are not binding, we find them persuasive.

several times, most notably by a particular fellow scout. The defendants suspended the bully for four weeks but did not take further action against him. The defendants then expelled the minor plaintiff for the stated reason that the presence of his father, the plaintiff John Strano, at troop activities was "a major disruption to the other scouts, scout parents, [the minor plaintiff] and leaders of the troop." The stated reason was false, according to the revised complaint, as John Strano had asked the defendants to intervene to protect the minor plaintiff from bullying, and it was the defendants' obligation to do so. The revised complaint concluded by alleging that the defendants punished the minor plaintiff for the actions of his father in order to cause John Strano pain and injury, and, as a result of the conduct of the defendants, both of the plaintiffs suffered extreme emotional distress.

It is instructive to note what was not alleged. It was not alleged that the minor plaintiff was expelled because he was autistic, nor was it alleged that the defendants promoted bullying and the minor plaintiff suffered distress as a result. Nor were the mechanics of the expulsion allegedly abusive or degrading. Rather, it allegedly was the expulsion itself, for an allegedly false reason *not* based on the minor plaintiff's behavior or character, that caused him extreme emotional distress.

In these circumstances, we conclude that the expulsion in itself was not sufficient to constitute extreme and outrageous conduct for purposes of a claim sounding in intentional infliction of emotional distress. In so concluding, we are mindful of the minor plaintiff's alleged vulnerability. We recognize that troop participation may have been a valuable opportunity for the minor plaintiff to interact positively with others, and that being terminated from participation in that activity may have caused him distress. Although efforts by the defendants

allegedly were inadequate to end the bullying, we are not persuaded that, in light of the previously discussed authorities, their alleged conduct toward the minor plaintiff was extreme and outrageous, beyond all bounds of civilized behavior.

Additionally, the manner in which the minor plaintiff was expelled does not rise to the level of intentional infliction of emotional distress. The revised complaint does not allege that the defendants used any harsh or humiliating language in the letter or, for that matter, at any time. Even if the defendants' given reason for the expulsion was untrue, the scenario does not exceed the bounds of civilized behavior.

The allegations in the present case present a scenario that may well have been difficult, and the plaintiffs perhaps may have been treated unfairly. Allegedly uneven discipline and punishment for a parent's actions are a far cry from the two years of an intensely fearful environment such as was presented in *Bell* v. *Board of Education*, supra, 55 Conn. App. 400, and which the plaintiffs in *Bell* had no choice but to attend. The circumstances of this case are consistent with the scenarios in those cases that present unfortunate, but not totally uncivilized, behavior.

The judgment is affirmed.

In this opinion the other judges concurred.

IN RE PROBATE APPEAL OF CHRISTOPHER KUSMIT ET AL., COADMINISTRATORS (ESTATE OF CONNOR KUSMIT) (AC 40671)

Elgo, Bright and Moll, Js.

Syllabus

The plaintiff coadministrators of the estate of the decedent appealed to the trial court from the decision of the Probate Court allocating the distribution of certain disputed attorney's fees, totaling $66,666.67, to

the defendant attorney D and to M, an attorney, both of whom previously represented the estate. The trial court rendered judgement, awarding D $40,000 in attorney's fees and ordering M, who was holding the disputed attorney's fees, to disburse that amount to D and return to the estate $26,666. On appeal to this court, the plaintiffs claimed that certain of the legal fees in dispute belonged to M, who was not a party to the action. Specifically, they claimed that, although they were obligated to pay the entirety of the disputed fees, they were aggrieved by the court's decision to allocate the disputed attorney's fees to D instead of to M's law firm. *Held* that because the plaintiffs were not aggrieved by the judgment of the Superior Court, they lacked standing to appeal from that judgment, and, therefore, this court lacked subject matter jurisdiction over the appeal; the plaintiffs did not claim to be statutorily aggrieved by the judgment of the trial court, and they were not classically aggrieved, as they failed to provide any legal authority to support their proposition that administrators of an estate have a specific, personal and legal interest in how a court allocates the distribution of attorney's fees when the estate claims no interest in any portion of those fees, and although the court awarded a portion of the disputed fees to a party not of the plaintiffs' choosing, the plaintiffs failed to show how they were specifically and injuriously affected by the trial court's allocation of the disputed fees.

Argued December 10, 2018—officially released March 5, 2019

Procedural History

Appeal from the order and decree of the Probate Court for the district of East Haven-North Haven allocating the distribution of certain attorney's fees, brought to the Superior Court in the judicial district of New Haven and tried to the court, *S. Richards*, *J.*; judgment in part for the defendant Douglas Mahoney, from which the plaintiffs appealed to this court. *Appeal dismissed.*

Ryan Veilleux, with whom, on the brief, was *Edmund Q. Collier*, for the appellants (plaintiffs).

Damian K. Gunningsmith, with whom, on the brief, was *John R. Horvack, Jr.*, for the appellee (defendant Douglas Mahoney).

Opinion

ELGO, J. In this dispute over attorney's fees, the plaintiffs, the coadministrators of the estate of Connor

Kusmit,[1] appeal from the judgment of the Superior Court rendered in favor of the defendant Douglas Mahoney.[2] We conclude that the plaintiffs lack standing to challenge that judgment. We, therefore, lack subject matter jurisdiction and, accordingly, dismiss the plaintiffs' appeal.

The record reveals the following undisputed facts. On August 29, 2012, Connor Kusmit was riding a bicycle when he was struck by a vehicle operated by Christina Groumousas. He died as a result of the collision. On September 20, 2012, the plaintiffs signed a retainer agreement with the defendant's law firm, which provided that the law firm was to represent them, on behalf of the estate, in connection with their claim for damages "resulting from an event which occurred on or about the 29th day of August, 2012 at Clintonville Rd. North Haven." The plaintiffs agreed to pay the defendant's law firm one third of the gross amount recovered. The defendant subsequently settled a wrongful death claim against Groumousas for $50,000, and the Probate Court approved the settlement on July 16, 2013.

On March 28, 2014, Christopher Kusmit called the defendant and requested a copy of the estate's file. On May 7, 2014, Attorney John Mills wrote to the defendant

[1] The coadministrators are Christopher Kusmit and Kelly Kusmit. We note that, although the summons lists the named plaintiff as the estate of Connor Kusmit, it is undisputed that the present action is maintained by the coadministrators. See *Estate of Brooks* v. *Commissioner of Revenue Services*, 325 Conn. 705, 706 n.1, 159 A.3d 1149 (2017), cert. denied, U.S. , 138 S. Ct. 1181, 200 L. Ed. 2d 314 (2018); see also *Estate of Rock* v. *University of Connecticut*, 323 Conn. 26, 32, 144 A.3d 420 (2016) ("An estate is not a legal entity. It is neither a natural nor artificial person, but is merely a name to indicate the sum total of the assets and liabilities of the decedent or incompetent. . . . Not having a legal existence, it can neither sue nor be sued." [Internal quotation marks omitted.]). Accordingly, the caption has been changed to reflect that.

[2] The Probate Court for the district of East Haven-North Haven is a nonappearing party in this case and any reference to the defendant refers to Mahoney.

to notify him that he had been retained by the plaintiffs and would be pursuing an underinsured motorist claim on behalf of the estate.[3] On May 13, 2014, the defendant filed a request in the Probate Court, seeking permission to take his one-third contingency fee of $16,666 and expenses from the $50,000 wrongful death claim settlement, and informed the Probate Court that he no longer represented the estate. On July 8, 2014, the Probate Court ordered the disbursement of $31,499.08, the amount remaining after the payment of the defendant's fees and expenses, to the plaintiffs from the wrongful death claim settlement. On that same date, the Probate Court also authorized Mills' settlement of the underinsured motorist claim for $200,000. Thereafter, the defendant notified the Probate Court that he was claiming a portion of the $66,666.67 in attorney's fees that Mills sought from the $200,000 underinsured motorist claim settlement (disputed fees).

After a hearing held on May 4, 2015, at which only the defendant appeared, the Probate Court entered an order allocating $40,000 of the disputed fees to the defendant and the remaining $26,666.67 to Mills, from which the plaintiffs subsequently appealed to the Superior Court. Following a trial de novo held on January 20, 2017, the Superior Court awarded the defendant $40,000 in fees and ordered Mills, who was holding the disputed funds, to disburse that amount to the defendant and return to the estate $26,666.[4] This appeal followed. On December 4, 2018, this court, sua sponte, ordered the following: "In light of the [plaintiffs'] position that the legal fee in dispute belongs to the Mills

[3] We note that, although the plaintiffs represent in their brief that they entered into a one-third contingency fee agreement with Mills' law firm, the Mills Law Firm, LLC (Mills Law Firm), that agreement does not appear in the record before us.

[4] In a footnote, without explanation, the Superior Court stated that "Mills withdrew any claim he had for a contingency fee from the $200,000 [underinsured motorist claim] settlement . . . ."

Law Firm, and given that the Mills Law Firm is not a party to this case, counsel should be prepared to address at argument how the [plaintiffs are] aggrieved by the decision of the trial court and why the [plaintiffs have] standing to seek relief on behalf of a nonparty."

On appeal, the plaintiffs raise a variety of claims.[5] Before considering the merits of those claims, we must address the threshold issue of standing. As our Supreme Court has consistently stated: "A threshold inquiry of this court upon every appeal presented to it is the question of appellate jurisdiction. . . . Although not raised by any party to this appeal, the issue of jurisdiction may be examined by this court on its own motion." (Citations omitted.) *Kulmacz* v. *Kulmacz*, 177 Conn. 410, 412, 418 A.2d 76 (1979). "The right to appeal is purely statutory, and only an aggrieved party may appeal. . . . General Statutes § 52-263, which governs the subject matter jurisdiction of this court, provides in relevant part that if either party is aggrieved by the decision of the court or judge upon any question or questions of law arising in the trial . . . he may appeal to the court having jurisdiction from the final judgment of the court or of such judge . . . . A determination

[5] The plaintiffs claim that the trial court improperly (1) agreed "to hear an equitable claim by previously discharged counsel for additional legal fees beyond those provided by the terms of a written contingency fee agreement," (2) decided "a claim [for] attorney's fees belonging to a nonparty . . . and not belonging to the estate," (3) awarded "additional legal fees based upon claims in equity when counsel seeking the additional fees had been retained by the estate pursuant to a written contingency fee agreement," (4) heard "a claim for additional attorney's fees after [that] issue had already been previously adjudicated," (5) granted "standing to [the defendant] absent a motion to be added as a party," (6) failed "to dismiss [the defendant's] claims for lack of subject matter jurisdiction," (7) ruled "that [the defendant] was entitled to [two thirds] of the contingency fee belonging to Mills Law Firm," (8) disqualified "legal counsel retained by the estate on the basis [that] counsel would be an indispensable witness at the time of trial," and (9) ordered "a nonparty to refund part of an earned contingency fee when no refund was sought by the plaintiff[s] in any pleading."

regarding . . . subject matter jurisdiction is a question of law . . . [and, therefore] our review is plenary. . . .

"It is axiomatic that aggrievement is a basic requirement of standing, just as standing is a fundamental requirement of jurisdiction. . . . There are two general types of aggrievement, namely, classical and statutory; either type will establish standing, and each has its own unique features. . . . Classical aggrievement requires a two part showing. First, a party must demonstrate a specific, personal and legal interest in the subject matter of the [controversy], as opposed to a general interest that all members of the community share. . . . Second, the party must also show that the [alleged conduct] has specially and injuriously affected that specific personal or legal interest. . . . Statutory aggrievement exists by legislative fiat, not by judicial analysis of the particular facts of the case. In other words, in cases of statutory aggrievement, particular legislation grants standing to those who claim injury to an interest protected by that legislation. . . . Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *Trikona Advisers Ltd.* v. *Haida Investments Ltd.*, 318 Conn. 476, 485–86, 122 A.3d 242 (2015).

In the present case, the plaintiffs do not claim to be statutorily aggrieved. We, therefore, consider whether they have been classically aggrieved by the judgment of the Superior Court. See id., 486. The plaintiffs do not dispute that they are obligated to pay attorney's fees. At oral argument before this court, the plaintiffs' counsel stated that the estate had expected to pay one third of the $200,000 underinsured motorist claim settlement in attorney's fees, i.e., the entirety of the disputed fees. He also confirmed that, in total, the estate is not paying

any more in attorney's fees than it had originally contemplated.[6] Further, despite the fact that the Superior Court ordered Mills to return a portion of the disputed fees to the estate, at oral argument, the plaintiffs' attorney asserted that the estate is not entitled to any portion of the disputed fees. Rather, as they indicate in their brief, the plaintiffs take the position that "the legal fee[s] in dispute belong to [the] Mills Law Firm, not to the [e]state," even though they acknowledge that the "Mills Law Firm is not a party to this case."

While the plaintiffs also recognize that they are obligated to pay the entirety of the disputed fees, they nevertheless claim that they are aggrieved by the Superior Court's decision to allocate the disputed fees to the defendant instead of to the Mills Law Firm. As clients of the Mills Law Firm, and as fiduciaries of the funds, the plaintiffs argue that they have an interest in the allocation of the disputed fees, which gives them "a say in the underlying actions." The plaintiffs, however, fail to provide any legal authority, and we are aware of none, to support their proposition that administrators of an estate have a "specific, personal and legal interest"; (internal quotation marks omitted) *Trikona Advisers Ltd.* v. *Haida Investments Ltd.*, supra, 318 Conn. 485; in how a court allocates the distribution of attorney's fees when the estate claims no interest in any portion of those fees. Furthermore, besides the Superior Court awarding a portion of the disputed fees to a party not of the plaintiffs' choosing, the plaintiffs have not shown how they are "specifically and injuriously affected"; (internal quotation marks omitted) id.; by the Superior Court's allocation of the disputed fees. Moreover, the Superior Court's judgment, from which the plaintiffs appeal and claim to be aggrieved, orders

[6] Additionally, when asked at oral argument if there is any possibility, regardless of how this case is decided, that the estate would have to pay more in legal fees than the disputed fees, the plaintiffs' attorney answered: "Not to my knowledge."

that they retain a portion of the disputed fees, leaving them paying $40,000, instead of $66,666.67, in attorney's fees. On the basis of these facts and the plaintiffs' disavowal of any claim to any portion of the disputed fees, we conclude that the plaintiffs are not aggrieved by the judgment of the Superior Court, and, thus, the plaintiffs do not have standing to appeal from that judgment.

The appeal is dismissed.

In this opinion the other judges concurred.

NILDA RIVERA *v.* PATIENT CARE OF CONNECTICUT ET AL.
(AC 39154)

Sheldon, Bright and Harper, Js.

Syllabus

The plaintiff appealed to this court from the decision of the Compensation Review Board affirming the decision of the Workers' Compensation Commissioner, who approved the defendant employer's request to transfer the plaintiff's benefit status from temporary partial disability to permanent partial disability on the basis of a medical examination that determined that the plaintiff had reached maximum medical improvement. The plaintiff claimed that the board improperly affirmed the commissioner's decision because the commissioner failed to require the defendant to prove that she had a work capacity and improperly shifted the burden to her to prove that she did not have a work capacity. The board rejected the plaintiff's claim, reasoning, inter alia, that a person could reach maximum medical improvement, have a permanent partial impairment and be temporarily totally disabled from working, all at the same time. The board also noted that it was within the commissioner's discretion to bifurcate the issue of temporary total disability benefits and work capacity. On the plaintiff's appeal to this court, *held* that the plaintiff's claim that the burden of proving that she did not have a work capacity was improperly shifted to her was without merit; the board noted that the defendant requested only a finding of maximum medical improvement as to the plaintiff's right lower extremity and a change to her disability designation from temporary partial to permanent partial, and given that the defendant did not seek any change to the plaintiff's

incapacity benefits, the commissioner did not need to address the issue of the plaintiff's work capacity.

Argued November 28, 2018—officially released March 5, 2019

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Sixth District dismissing the plaintiff's claim for benefits, brought to the Compensation Review Board, which affirmed the commissioner's decision, and the plaintiff appealed to this court. *Affirmed.*

Jennifer Levine, with whom was *Harvey Levine*, for the appellant (plaintiff).

Eric F. King, for the appellee (named defendant).

Opinion

SHELDON, J. The plaintiff, Nilda Rivera, appeals from the decision of the Compensation Review Board (board) affirming the decision of the Workers' Compensation Commissioner (commissioner), in which the commissioner approved a form 36[1] filed by the defendant Patient Care of Connecticut[2] based upon a finding that the plaintiff had reached maximum medical improvement as to one of the three injuries claimed by the plaintiff and accepted by the defendant for which she had been receiving and continues to receive temporary incapacity benefits.[3] On appeal, the plaintiff claims

[1] "A [f]orm 36 is a notice to the compensation commissioner and the [plaintiff] of the intention of the employer and its insurer to discontinue [or reduce] compensation payments. The filing of this notice and its approval by the commissioner are required by statute in order properly to discontinue [or reduce] payments." (Internal quotation marks omitted.) *Brinson* v. *Finlay Bros. Printing Co.*, 77 Conn. App. 319, 320 n.1, 823 A.2d 1223 (2003); General Statutes § 31-296 (a).

[2] Zurich American Insurance Company, the defendant's workers' compensation insurance carrier, also is a defendant but is not a party to this appeal. We therefore refer to Patient Care Connecticut as the defendant.

[3] The commissioner also rejected the plaintiff's claims for injuries to her left foot and right shoulder. The plaintiff did not challenge that ruling.

that the board erred in affirming the commissioner's ruling because the commissioner did not require the defendant to prove that she had a work capacity and improperly shifted the burden to her to prove that she did not have a work capacity. Because the commissioner limited his finding on the defendant's form 36 to the issue of whether the plaintiff reached maximum medical improvement as to her partial disability to her right lower extremity, he did not need to address the issue of the plaintiff's work capacity. Consequently, the record does not support the plaintiff's contention that the commissioner improperly required her to prove that she lacked a work capacity. Accordingly, we affirm the decision of the board.

The following relevant facts were found by the commissioner.[4] On May 30, 2006, the plaintiff was working as a certified nursing assistant and day care instructor for the defendant, when she sustained a fracture of the third metatarsal of her right foot, which required a surgical repair. Following surgery, she has experienced significant and persistent pain as a result of her injury. As a result of her persistent pain, she has become clinically depressed. As a result of the injury to her right foot, she also has developed bursitis in her right hip. The defendant has accepted all three of these injuries. Since the date of the plaintiff's initial injury, she has received incapacity benefits.

On August 29, 2012, the defendant filed a form 36 in which it requested "transfer of benefit status from [temporary partial disability] to [permanent partial disability] based on commissioner's exam[ination] by Dr. Enzo Sella dated July 2, 2012, that places [the plaintiff] at maximum medical improvement with 6 percent

[4] The plaintiff filed an extensive motion to correct the findings of the commissioner. That motion was denied by the commissioner and the denial of that motion was affirmed by the board. The board's ruling affirming the denial of the motion to correct has not been challenged on appeal.

impairment rating to the right lower extremity." At an informal hearing held on October 2, 2012, the commissioner approved the form 36.

On December 2, 2014, the commissioner held a formal hearing on the form 36, limited to the issue of "[w]hether the [plaintiff] has reached maximum medical improvement to [her] right lower extremity with a permanent partial disability rating of six (6) percent."[5] The commissioner issued his written finding and dismissal on March 31, 2015. The commissioner held, inter alia: "I find the opinion of Dr. Sella persuasive in that the [plaintiff] has reached maximum medical improvement of her right lower extremity with a permanent partial disability rating of 6 percent to the right lower extremity, which equates to 9 percent rating of the [plaintiff's] right foot." The plaintiff thereafter filed a motion to correct the commissioner's decision, which was denied.

The plaintiff filed a petition for review with the board, claiming that "the . . . commissioner's decision to limit the scope of the trial de novo on the form 36 approved on October 2, 2012, to the issue of maximum medical improvement and exclude the issue of work capacity constituted error . . . ."[6] The plaintiff argued that the commissioner "erred by ignoring the incapacity issue and refusing to require that the [defendant] sustain [its] burden of proof showing that . . . she . . . has a work capacity." (Internal quotation marks omitted.) The board rejected the plaintiff's claim, explaining that "[a] person may reach maximum medical improvement, have a permanent partial impairment, and be temporarily totally disabled from working all at the same time.

[5] As noted herein, the commissioner also addressed the compensability of the plaintiff's claimed injuries to her left foot and right shoulder. The commissioner determined that those injuries were not related to her initial injury and therefore were not compensable.

[6] The plaintiff asserted two additional claims of error, but does not challenge the board's holdings on those issues on appeal.

. . . Moreover, a [plaintiff] deemed totally disabled due to one injury or condition is entitled to receive ongoing total disability benefits even if the claimant has reached maximum medical improvement for a different injury or condition." (Citations omitted; emphasis omitted; internal quotation marks omitted.) The board noted that, here, the defendant was not seeking to terminate or reduce the plaintiff's incapacity benefits. Instead, the defendant's form 36 sought a change in the designation of her right lower extremity injury from temporary partial disability to permanent partial disability based on a claim that the plaintiff had reached maximum medical improvement as to that injury. Because the defendant was not seeking to terminate or reduce the plaintiff's incapacity benefits, the board concluded that it was "well within [the commissioner's] discretion to bifurcate the issue of temporary total disability benefits and work capacity."[7] The board thus affirmed the commissioner's decision. This appeal followed.

The plaintiff claims that the board erred in affirming the commissioner's approval of the form 36 because the commissioner failed to require the defendant to prove that she had a work capacity and improperly shifted the burden to her to prove that she did not have a work capacity. We disagree.

As the board aptly noted, the defendant's form 36 requested only a finding of maximum medical improvement as to the plaintiff's right lower extremity and a change to the plaintiff's disability designation as to her right lower extremity from temporary partial to permanent partial. The defendant did not seek any change to the plaintiff's incapacity benefits. Consequently, the

[7] The board noted that the plaintiff had been receiving incapacity benefits pursuant to General Statutes § 31-308 (a), "which, by definition, contemplates a partial work capacity." The board concluded that any claim for temporary total disability benefits asserted by the plaintiff was outside the scope of the form 36.

commissioner did not need to address the issue of the plaintiff's work capacity. Accordingly, the plaintiff's claim that the burden of proving that she did not have a work capacity was improperly shifted to her is without merit.[8]

The decision of the Compensation Review Board is affirmed.

In this opinion the other judges concurred.

ELOY CRUZ *v.* JON L. SCHOENHORN ET AL. (AC 40510)

DiPentima, C. J., and Moll and Bear, Js.

Syllabus

The plaintiff sought to recover damages for legal malpractice from the defendant attorneys, J and A, who represented him in a prior civil action in which he alleged that he had sustained severe injuries after being attacked at a rap music concert. The plaintiff claimed the defendants failed to effectuate proper service of process on two of the defendants in the prior civil action. The trial court granted the defendants' motions for summary judgment, concluding that the plaintiff's action was not brought within the applicable statute of limitations (§ 52-577), and rendered judgments thereon, from which the plaintiff appealed to this court. *Held*:

1. The trial court properly rendered summary judgment in favor of J: the plaintiff did not submit any affidavits or documentary evidence in support of his objection to J's motion, and there was no merit to the plaintiff's claim that the trial court, in adjudicating J's motion for summary judgment, improperly failed to consider the plaintiff's affidavit, which had been filed in support of the plaintiff's opposition to A's motion for summary judgment, as that affidavit was not properly before the court with respect to J's motion for summary judgment, on which the court heard argument nearly two months before the plaintiff filed the

[8] The plaintiff also claims that the "posttermination evidentiary hearing was fundamentally unfair and violated the plaintiff's due process rights." She claims that her constitutional right to due process was violated because "[t]he posttermination evidentiary hearing did not reconsider the plaintiff's work incapacity, and the defendant did not bear the burden of proving work capacity." As explained herein, the commissioner did not consider or make any ruling regarding the plaintiff's work capacity. The plaintiff thus raises a claim of procedural error that did not actually yield any error.

affidavit, and, thus, the court could not have considered the affidavit in adjudicating J's motion for summary judgment; moreover, the court did not misconstrue the plaintiff's argument in opposing J's motion for summary judgment, as the plaintiff at no time argued to the trial court that his attorney-client relationship with J ended in 2012, the plaintiff did not submit any evidence to support his assertion of the applicability of the continuous representation doctrine, and, therefore, the court properly concluded that a de facto termination of the plaintiff's attorney-client relationship with J occurred on August 26, 2009, when the plaintiff filed an appearance as a self-represented party in the civil action, that the limitations period ran on August 26, 2012, and that this legal malpractice action, commenced in December, 2014, was therefore filed outside of the limitations period.

2. The trial court properly granted A's motion for summary judgment: the plaintiff's affidavit in opposition to A's motion for summary judgment did not set forth any specific facts or evidence to support his conclusory statement that his attorney-client relationship with A ended in September, 2012, nor did the affidavit contradict A's documentary evidence demonstrating, inter alia, that the plaintiff had filed grievance complaints against him in 2006 and 2010 and had filed an appearance on his own behalf in the prior civil action on August 26, 2009, by which point the plaintiff had lost confidence in A and was no longer seeking his legal advice; moreover, the court did not misconstrue the plaintiff's argument in opposition to A's motion for summary judgment, because contrary to the plaintiff's assertion, the court did not make any statement identifying the date on which the plaintiff argued that his attorney-client relationship with A ended, and the court having determined that there was no issue of fact that the latest possible date on which a de facto termination of the plaintiff's attorney-client relationship with A occurred on August 26, 2009, this legal malpractice action, commenced in December, 2014, was time barred pursuant to § 52-577.

Argued November 29, 2018—officially released March 5, 2019

Procedural History

Action to recover damages for legal malpractice, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Elgo*, *J.*, granted the defendants' motions for summary judgment and rendered judgments thereon, from which the plaintiff appealed to this court. *Affirmed.*

Kenneth A. Votre, for the appellant (plaintiff).

Elizabeth M. Cristofaro, with whom, on the brief, was *Kelvin L. Thomas*, for the appellee (defendant Jon L. Schoenhorn).

Louis B. Blumenfeld, with whom, on the brief, was *Lorinda S. Coon*, for the appellee (defendant Arnaldo J. Sierra).

Opinion

MOLL, J. The plaintiff, Eloy Cruz, appeals from the summary judgments rendered by the trial court in favor of the defendants, Jon L. Schoenhorn and Arnaldo J. Sierra, respectively.[1] On appeal, the plaintiff asserts that the trial court erroneously concluded that his legal malpractice claims against the defendants were time barred pursuant to General Statutes § 52-577,[2] the statute of limitations applicable to tort actions, because genuine issues of material fact exist as to whether the continuous representation doctrine applies so as to toll § 52-577. We disagree and, accordingly, affirm the summary judgments of the trial court.[3]

The following facts and procedural history are relevant to our resolution of the plaintiff's claims. The defendants represented the plaintiff in a civil action commenced in 2003 in which the plaintiff alleged that he had sustained severe injuries after being attacked by several individuals at a rap music concert in 2001. See *Cruz* v. *Continental Corp.*, Superior Court, judicial district of Hartford, Docket No. CV-03-0824221-S (Continental action). Two of the defendants in the Continental action, Jayson Phillips and David Styles, were nonresident individuals upon whom service of process purportedly had been made in April, 2004, pursuant to General

[1] For purposes of clarity, we refer to Jon L. Schoenhorn and Arnaldo J. Sierra collectively as the defendants, and individually by last name.

[2] General Statutes § 52-577 provides: "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of."

[3] Because we conclude that the court properly rendered summary judgments in favor of the defendants on the ground that the plaintiff's legal malpractice claims against them were time barred pursuant to § 52-577, we need not reach the alternative grounds for affirmance raised by the defendants in their appellate briefs.

Statutes § 52-59b. Phillips and Styles subsequently were defaulted for failure to appear. On November 2, 2005, following a hearing in damages, the trial court rendered judgment against Phillips and Styles in the amount of $779,378.22.[4] In 2006, Schoenhorn made unsuccessful attempts to collect upon the judgment. Dissatisfied with the postjudgment collection efforts, the plaintiff filed grievance complaints against Schoenhorn in 2006 and in 2008, both of which were dismissed. In addition, in 2006 and in 2010, the plaintiff filed grievance complaints against Sierra, both of which were dismissed.

On August 26, 2009, the plaintiff filed an appearance as a self-represented party in the Continental action. The plaintiff's appearance form did not signify whether he was appearing in lieu of or in addition to the defendants. On October 20, 2009, the plaintiff, representing himself, filed an application for a waiver of fees and a motion to "reopen case and force execution of existing judgment" against Phillips and Styles. On November 5, 2009, the court denied the plaintiff's motion as untimely.

There was no additional activity in the Continental action until September 17, 2012, when the law firm of Minnella, Tramuta, and Edwards, LLC, appeared on behalf of the plaintiff, according to the appearance form, in lieu of the plaintiff and the defendants. On October 16, 2012, the plaintiff filed a motion seeking postjudgment interest in the amount of $733,735.29, which the court granted on November 13, 2012. On November 27, 2012, Phillips filed a motion to open and set aside the judgment, asserting that the court lacked personal jurisdiction over him as a result of insufficient service of process. On December 18, 2012, the court granted Phillips' motion.

[4] The plaintiff settled with the other defendants in the Continental action prior to trial.

On January 18, 2013, Phillips filed a motion to dismiss for lack of personal jurisdiction as a result of insufficient service of process. On February 7, 2013, Styles filed a motion to dismiss on the same ground. On May 14, 2013, absent objection, the court granted the respective motions to dismiss filed by Phillips and Styles.

On July 11, 2013, the plaintiff filed an appearance as a self-represented party in lieu of Minnella, Tramuta, and Edwards, LLC, in the Continental action and filed a motion to open the judgment, to which Phillips and Styles filed a joint objection. On July 29, 2013, the court denied the plaintiff's motion to open. After July, 2013, there was no activity in the Continental action.

On December 15, 2014, the plaintiff, representing himself, commenced the present action against the defendants. In his operative one count complaint filed on August 24, 2015, the plaintiff asserted a legal malpractice claim against the defendants, alleging that the defendants had failed to effectuate proper service of process on Phillips and Styles in the Continental action. The defendants filed separate answers and special defenses, including statute of limitations defenses pursuant to § 52-577. The plaintiff moved to strike, inter alia, the defendants' statute of limitations defenses, which the trial court denied. Thereafter, the plaintiff did not file a reply pleading to each of the defendants' special defenses.[5]

[5] The defendants do not raise any claim on appeal predicated on the plaintiff's failure to reply to their special defenses and, therefore, we do not address this pleading deficiency. See Practice Book §§ 10-56 and 10-57; see also *Straw Pond Associates, LLC* v. *Fitzpatrick, Mariano & Santos, P.C.*, 167 Conn. App. 691, 700 n.7, 145 A.3d 292 (observing that, although continuous representation doctrine, like continuing course of conduct doctrine, is matter that must be pleaded in avoidance of statute of limitations special defense pursuant to Practice Book § 10-57, defendants did not claim prejudice resulting from plaintiffs' lapse in pleading), cert. denied, 323 Conn. 930, 150 A.3d 231 (2016).

On July 12, 2016, Schoenhorn filed a motion for summary judgment, accompanied by a memorandum of law and exhibits, asserting that he was entitled to judgment as a matter of law because, among other things, the plaintiff's claim against him was time barred pursuant to § 52-577. On August 31, 2016, the plaintiff filed an objection to Schoenhorn's motion for summary judgment, accompanied by a memorandum of law, relying solely on the allegations of the plaintiff's operative complaint.[6] The plaintiff did not submit an affidavit or other documentary evidence in support of his objection to Schoenhorn's motion for summary judgment. On September 14, 2016, Schoenhorn filed a reply memorandum of law. On September 19, 2016, the court heard argument on Schoenhorn's motion for summary judgment.

On September 9, 2016, Sierra filed a motion for summary judgment, accompanied by a memorandum of law and exhibits, arguing that he was entitled to judgment as a matter of law because, among other things, the plaintiff's claim against him was time barred pursuant to § 52-577. On November 9, 2016, the plaintiff filed a memorandum of law in opposition to Sierra's motion for summary judgment, as well as an affidavit signed by the plaintiff (November 9, 2016 affidavit).[7] On November 23, 2016, Sierra filed a reply memorandum of law accompanied by exhibits. On December 5, 2016, the court heard argument on Sierra's motion for summary judgment.

On April 24, 2017, the court issued a memorandum of decision granting Schoenhorn's motion for summary judgment, concluding that the plaintiff's claim against

[6] On August 5, 2016, the law firm of Votre & Associates, P.C., filed an appearance on behalf of the plaintiff, in addition to the plaintiff's self-represented party appearance. The plaintiff acted solely via counsel throughout the remainder of the trial court proceedings.

[7] The November 9, 2016 affidavit did not identify the memorandum in opposition that it was supporting.

Schoenhorn was time barred pursuant to § 52-577.[8] On May 23, 2017, the court issued a separate memorandum of decision granting Sierra's motion for summary judgment, concluding that the plaintiff's claim against Sierra also was time barred pursuant to § 52-577.[9] This appeal followed. Additional facts and procedural history will be set forth as necessary.

We begin by setting forth the relevant standard of review and legal principles that govern our review of the plaintiff's claims. "Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive

[8] In his motion for summary judgment, Schoenhorn also argued that his alleged negligent conduct did not cause the damages claimed by the plaintiff. After concluding that the plaintiff's legal malpractice claim against Schoenhorn was time barred pursuant to § 52-577, the court, in a footnote, stated that "it is not clear how the plaintiff can causally link [Schoenhorn's] alleged misconduct with the ultimate dismissal of [the] plaintiff's attempt to enforce the judgment. Because the statute of limitations bar definitively decides the outcome, however, this court does not elaborate further as to this claim."

[9] In his motion for summary judgment, Sierra also argued that his alleged negligent conduct did not cause the damages claimed by the plaintiff and that he had no duty to effectuate service on Phillips and Styles in the Continental action. After concluding that the plaintiff's legal malpractice claim against Sierra was time barred pursuant to § 52-577, the court, in a footnote, stated that "it is not clear how the plaintiff can causally link [Sierra's] alleged misconduct with the ultimate dismissal of [the] plaintiff's attempt to enforce the judgment. Because the statute of limitations bar definitively decides the outcome, however, this court does not elaborate further as to this claim." The court also did not address the merits of Sierra's claim that he had no duty to effectuate service on Phillips and Styles in the Continental action.

law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . [I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Internal quotation marks omitted.) *Perez* v. *Metropolitan District Commission*, 186 Conn. App. 466, 471–72, A.3d (2018).

"Summary judgment may be granted where the claim is barred by the statute of limitations." (Internal quotation marks omitted.) *Meyers* v. *Livingston, Adler, Pulda, Meiklejohn & Kelly, P.C.*, 134 Conn. App. 785, 789, 41 A.3d 674 (2012), aff'd, 311 Conn. 282, 87 A.3d 534 (2014). "Actions for legal malpractice based on negligence are subject to § 52-577, the tort statute of limitations." (Internal quotation marks omitted.) *Weiner* v. *Clinton*, 106 Conn. App. 379, 386, 942 A.2d 469 (2008). "This court has determined that [§] 52-577 is an occurrence statute, meaning that the time period within which a plaintiff must commence an action begins to run at the moment the act or omission complained of occurs. . . . Moreover, our Supreme Court has stated that [i]n construing our general tort statute of limitations . . . § 52-577, which allows an action to be brought within three years from the date of the act or omission complained of, we have concluded that the history of that legislative choice of language precludes any construction thereof delaying the start of the limitation period until the cause of action has accrued or the

injury has occurred. . . . The three year limitation period of § 52-577, therefore, begins with the date of the act or omission complained of, not the date when the plaintiff first discovers an injury." (Internal quotation marks omitted.) *Chamerda* v. *Opie*, 185 Conn. App. 627, 652, 197 A.3d 982, cert. denied, 330 Conn. 953, 197 A.3d 893 (2018).

"To alleviate the harsh consequences of the occurrence rule, our Supreme Court . . . adopted the continuous representation doctrine in *DeLeo* v. *Nusbaum*, 263 Conn. 588, 821 A.2d 744 (2003). Under that rule, a plaintiff may invoke the doctrine, and thus toll the statute of limitations, when the plaintiff can show: (1) that the defendant continued to represent him with regard to the same underlying matter; *and* (2) either that the plaintiff did not know of the alleged malpractice *or* that the attorney could still mitigate the harm allegedly caused by that malpractice during the continued representation period." (Emphasis in original; internal quotation marks omitted.) *Farnsworth* v. *O'Doherty*, 85 Conn. App. 145, 150, 856 A.2d 518 (2004). "With regard to the first prong . . . the representation continues for the purposes of the continuous representation doctrine until either the formal or the de facto termination of the attorney-client relationship. The formal termination of the relationship occurs when the attorney is discharged by the client, the matter for which the attorney was hired comes to a conclusion, or a court grants the attorney's motion to withdraw from the representation. A de facto termination occurs if the client takes a step that unequivocally indicates that he has ceased relying on his attorney's professional judgment in protecting his legal interests, such as hiring a second attorney to consider a possible malpractice claim or filing a grievance against the attorney. Once such a step has been taken, representation may not be said to continue for purposes of the continuous representation doctrine.

A client who has taken such a concrete step may not invoke this doctrine, because such actions clearly indicate that the client no longer is relying on his attorney's professional judgment but instead intentionally has adopted a clearly adversarial relationship toward the attorney. Thus, once such a step has been taken, representation does not continue for purposes of the continuous representation doctrine." (Footnotes omitted.) *DeLeo* v. *Nusbaum*, supra, 597–98.

"[I]n the context of a motion for summary judgment based on a statute of limitations special defense, a defendant typically meets its initial burden of showing the absence of a genuine issue of material fact by demonstrating that the action had commenced outside of the statutory limitation period. . . . When the plaintiff asserts that the limitations period has been tolled by an equitable exception to the statute of limitations, the burden normally shifts to the plaintiff to establish a disputed issue of material fact in avoidance of the statute." (Internal quotation marks omitted.) *Chamerda* v. *Opie*, supra, 185 Conn. App. 653.

On appeal, the plaintiff asserts that because there are genuine issues of material fact as to whether the continuous representation doctrine applies so as to toll § 52-577, the court erred in rendering summary judgments in favor of the defendants on the ground that his claims were time barred. More specifically, the plaintiff contends that there are genuine issues of material fact with respect to the date upon which his attorney-client relationships with the defendants terminated and that the court (1) failed to consider the November 9, 2016 affidavit or, alternatively, improperly weighed the evidence submitted by the parties, and (2) misconstrued the arguments that he presented in opposition to the defendants' motions for summary judgment.[10] We disagree.

[10] The plaintiff also claims that, as a matter of public policy, the Rules of Professional Conduct provide that an attorney should clarify any doubt

I

We first turn to the plaintiff's claims relating to the summary judgment rendered in favor of Schoenhorn.[11] For the reasons that follow, we reject these claims.

The following additional facts and procedural history are relevant to our resolution of these claims. In moving for summary judgment on the ground that the plaintiff's

regarding the existence of an attorney-client relationship with a client and should confirm the termination of an attorney-client relationship by way of a written statement sent to the client. See Rules of Professional Conduct 1.3, commentary ("Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. . . . Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so."); Rules of Professional Conduct 1.16, commentary ("A written statement to the client confirming the termination of the relationship and the basis of the termination reduces the possibility of misunderstanding the status of the relationship. The written statement should be sent to the client before or within a reasonable time after the termination of the relationship.").

The plaintiff asserts that the Rules of Professional Conduct support his contention that his attorney-client relationships with the defendants terminated on September 17, 2012, and, thus, that genuine issues of material fact exist as to the date of the termination of the attorney-client relationships. The plaintiff's reliance on the Rules of Professional Conduct, to which he refers for the first time on appeal, is misplaced. Our Supreme Court explained in *DeLeo* that "the representation continues for the purposes of the continuous representation doctrine until either the formal *or* the de facto termination of the attorney-client relationship." (Emphasis added.) *DeLeo* v. *Nusbaum*, supra, 263 Conn. 597. As we conclude subsequently in this opinion, there are no genuine issues of material fact that de facto terminations of the plaintiff's attorney-client relationships with the defendants occurred on or by August 26, 2009. Whether the defendants failed to clarify their attorney-client relationships with the plaintiff or to confirm the termination of their attorney-client relationships with the plaintiff in writing does not alter our analysis.

[11] In his appellate brief, the plaintiff does not segregate his claims directed to the summary judgment rendered in favor of Schoenhorn from his claims directed to the summary judgment rendered in favor of Sierra. For ease of discussion, we address the plaintiff's claims challenging each judgment separately.

claim against him was time barred pursuant to § 52-577, Schoenhorn asserted that any available tolling of the statute of limitations pursuant to the continuous representation doctrine ended on August 26, 2009, when there was a de facto termination of his attorney-client relationship with the plaintiff. In support of his motion for summary judgment, Schoenhorn submitted, inter alia, an affidavit based on his own personal knowledge and a copy of the transcript of the plaintiff's deposition taken in the present case, which demonstrated that the plaintiff filed a self-represented party appearance in the Continental action on August 26, 2009, and that, by that time, the plaintiff was no longer speaking with Schoenhorn and no longer had confidence in him. Schoenhorn contended that the plaintiff commenced the present case on December 15, 2014, over two years after the three year statute of limitations had expired on August 26, 2012.

The plaintiff argued, through counsel, in opposition to Schoenhorn's motion for summary judgment, that there was a genuine issue of material fact as to the date upon which his attorney-client relationship with Schoenhorn ended. Specifically, he argued, without citation to any evidence in the record, that Schoenhorn "continued to represent [him] after the filing of the grievances in both 2006 and 2008 and continued to represent [him] for some time after 2008 and into 2009" and that he had commenced the present case within two years after he had "learned of [Schoenhorn's] negligence on December 18, 2012," when the trial court granted Phillips' motion to open and set aside the judgment in the Continental action. The plaintiff did not submit any affidavits or other documentary evidence in support of his objection to Schoenhorn's motion.

In its memorandum of decision granting Schoenhorn's motion for summary judgment, the trial court summarized the plaintiff's argument to be that the con-

tinuous representation doctrine served to toll the statute of limitations "because [the plaintiff] did not know of the defendant's wrongful conduct until December 18, 2012, and because Schoenhorn continued to represent the plaintiff until sometime into 2009." The court found that the plaintiff's reasoning was "unclear and, in any event, unpersuasive." The court observed that § 52-577 is an occurrence statute, such that the limitations period begins when the act or omission complained of occurs, not when the plaintiff first discovers an injury. Thus, the court concluded, the limitations period expired in April, 2007, three years following Schoenhorn's alleged negligent conduct in April, 2004. The court additionally concluded: "Even if, however, the plaintiff could argue that the defendant still represented him through August 26, 2009, thereby tolling [§ 52-577] until that date, the plaintiff would have been required to file this action by August 26, 2012. Instead, the plaintiff here commenced the action on December 15, 2014 . . . . Because the plaintiff failed to timely file his action, this court concludes that the action is barred by § 52-577 . . . ."

The plaintiff claims that the court, in granting Schoenhorn's motion for summary judgment, failed to consider the November 9, 2016 affidavit, in which he averred that the defendants continued to represent him until September 17, 2012. This claim is without merit. The November 9, 2016 affidavit was not properly before the court with respect to Schoenhorn's motion for summary judgment. Practice Book (2016) § 17-45 provides in relevant part: "A motion for summary judgment shall be supported by such documents as may be appropriate, including but not limited to affidavits . . . . The motion shall be placed on the short calendar to be held not less than fifteen days following the filing of the motion and the supporting materials, unless the judicial authority otherwise directs. . . . *Any adverse party*

shall at least five days before the date the motion is to be considered on the short calendar file opposing affidavits and other available documentary evidence." (Emphasis added.) The court heard argument on Schoenhorn's motion for summary judgment on September 19, 2016, nearly two months before the plaintiff had filed the November 9, 2016 affidavit. In fact, during such argument, the plaintiff's counsel expressed to the court his intention to rely on the plaintiff's brief and contended that Schoenhorn had not satisfied his initial burden of proof. Moreover, the November 9, 2016 affidavit was filed on the same day the plaintiff filed his memorandum in opposition to Sierra's motion for summary judgment. Simply put, the plaintiff's suggestion that the November 9, 2016 affidavit was filed in opposition to Schoenhorn's motion for summary judgment was first made on appeal. Under these circumstances, the court could not have considered the November 9, 2016 affidavit in adjudicating Schoenhorn's motion for summary judgment. See, e.g., *Magee Avenue, LLC* v. *Lima Ceramic Tile, LLC*, 183 Conn. App. 575, 583–85, 193 A.3d 700 (2018) (concluding that trial court erroneously rendered summary judgment where, among other things, court improperly considered untimely affidavit filed by movant in support of motion for summary judgment). Thus, the plaintiff's claim fails.[12]

The plaintiff also claims that the court misconstrued the argument that he presented in opposing Schoenhorn's motion for summary judgment. Specifically, he contends that he argued to the trial court that his attorney-client relationship with Schoenhorn ended on September 17, 2012, whereas the court interpreted his

[12] As a result of our conclusion that the November 9, 2016 affidavit was not properly before the court with regard to Schoenhorn's motion for summary judgment, we need not reach the plaintiff's alternative claim that the court erroneously weighed the evidence submitted by the parties in adjudicating Schoenhorn's motion for summary judgment.

argument to be that his attorney-client relationship with Schoenhorn ended sometime in 2009. We disagree. In his memorandum of law opposing Schoenhorn's motion for summary judgment, the plaintiff explicitly asserted that Schoenhorn "continued to represent [him] after the filing of the grievances in both 2006 and 2008 and continued to represent [him] for some time after 2008 and into 2009." Nowhere in his objection or accompanying memorandum of law did the plaintiff contend that his attorney-client relationship with Schoenhorn ended on September 17, 2012. In addition, during argument on Schoenhorn's motion for summary judgment, the plaintiff did not argue that the representation ended on September 17, 2012, or on any other specific date.[13] In any event, the plaintiff did not submit any evidence at all to support his assertion of the continuous representation doctrine. See *Chamerda* v. *Opie*, supra, 185 Conn. App. 653 ("[w]hen the plaintiff asserts that the limitations period has been tolled by an equitable exception to the statute of limitations, the burden normally shifts to the plaintiff to establish a disputed issue of material fact in avoidance of the statute" [internal quotation marks omitted]). Accordingly, the plaintiff's claim fails.[14]

[13] In his appellate brief, to support his contention that the court misconstrued his argument with respect to Schoenhorn's motion for summary judgment, the plaintiff cites to his memorandum of law in opposition to Sierra's motion for summary judgment and the transcript of the argument on that motion. In his opposition to Sierra's motion for summary judgment and during argument on that motion, the plaintiff expressly argued that his attorney-client relationship with Sierra ended on September 17, 2012. Before this court the plaintiff conflates the defendants' distinct motions for summary judgment, which, although involving similar claims, were briefed, argued, and decided separately.

[14] The plaintiff also refers to the November 9, 2016 affidavit in an effort to demonstrate that he had argued to the court that his attorney-client relationship with Schoenhorn terminated on September 17, 2012. As we concluded previously in this opinion, however, the November 9, 2016 affidavit was not properly before the court with respect to Schoenhorn's motion for summary judgment.

In light of the foregoing, with respect to Schoenhorn's motion for summary judgment, we conclude that no genuine issue of material fact exists that a de facto termination of the plaintiff's attorney-client relationship with Schoenhorn occurred on August 26, 2009, thereby tolling § 52-577 to that date pursuant to the continuous representation doctrine.[15] Thus, the limitations period ran on August 26, 2012. The plaintiff commenced the present action on December 15, 2014, outside of the limitations period. Accordingly, as a matter of law, the plaintiff's legal malpractice claim against Schoenhorn is time barred pursuant to § 52-577, and, thus, the court properly rendered summary judgment in favor of Schoenhorn.

II

We next address the plaintiff's claims relating to the summary judgment rendered in favor of Sierra. For the reasons that follow, we conclude that these claims are unavailing.

The following additional facts and procedural history are relevant to our resolution of these claims. In moving for summary judgment on the ground that the plaintiff's claim against him was time barred pursuant to § 52-577, Sierra asserted that, pursuant to the continuous representation doctrine, there were three possible dates upon which a de facto termination of his attorney-client relationship with the plaintiff occurred: (1) September 19, 2006, when the plaintiff filed his first grievance complaint against Sierra, thereby causing the limitations

[15] In moving for summary judgment, Schoenhorn did not argue that the plaintiff's filing of the first grievance complaint against him in 2006 constituted a de facto termination of the plaintiff's attorney-client relationship with him. See *DeLeo* v. *Nusbaum*, supra, 263 Conn. 597–98 (client's filing of grievance complaint against attorney constitutes de facto termination of attorney-client relationship). Accordingly, we do not address whether the plaintiff's filing of the first grievance complaint against Schoenhorn in 2006 was a de facto termination of their attorney-client relationship.

period to expire on September 19, 2009; (2) August 26, 2009, when the plaintiff filed his first appearance as a self-represented party in the Continental action, thereby causing the limitations period to expire on August 26, 2012; and (3) July 10, 2010, when the plaintiff filed his second grievance complaint against Sierra, thereby causing the limitations period to expire on July 10, 2013. In support of his motion for summary judgment, Sierra submitted, inter alia, an affidavit based on his own personal knowledge and excerpts of the transcript of the plaintiff's deposition, upon which he relied to demonstrate that the plaintiff's grievance complaints against him had been filed and dismissed and that the plaintiff, having lost confidence in him, appeared as a self-represented party in the Continental action on August 26, 2009, after which the plaintiff sought no additional legal services from him. Sierra contended that because the plaintiff commenced the present action on December 15, 2014, beyond all three of the possible expiration dates of the limitations period set forth in § 52-577, the plaintiff's claim was time barred.

The plaintiff argued in opposition to Sierra's motion for summary judgment that there was a genuine issue of material fact as to the date upon which his attorney-client relationship with Sierra ended. Specifically, he argued that Sierra's representation of him terminated on September 17, 2012, when the law firm of Minnella, Tramuta, and Edwards, LLC, appeared on his behalf in the Continental action, and that he had been unaware of Sierra's alleged negligent conduct until the trial court granted Phillips' motion to open and set aside the judgment in the Continental action on December 18, 2012.

In the November 9, 2016 affidavit, filed in opposition to Sierra's motion for summary judgment, the plaintiff averred in relevant part that "[Sierra] and [Schoenhorn] continued to represent [him] until [he] retained new counsel on September 17, 2012."

In its memorandum of decision granting Sierra's motion for summary judgment, the trial court summarized the plaintiff's argument as follows: "The plaintiff asserts that . . . Sierra served the wrong defendants [in the Continental action] which would mean that [Sierra's] allegedly negligent conduct occurred in April, 2004. . . . [T]he plaintiff does not dispute that he filed his own appearance in August 26, 2009, no longer had contact with counsel, had filed grievances against Sierra . . . and testified that he had lost confidence in [the defendants]. Instead, the plaintiff argues that the continuous representation doctrine tolls [§ 52-577] because he did not know of [Sierra's] wrongful conduct until December 18, 2012." The court found that the plaintiff's reasoning was "unclear and, in any event, unpersuasive." The court concluded that § 52-577 is an occurrence statute such that the limitations period begins when the act or omission complained of occurs, not when the plaintiff first discovers the injury, and, thus, the statute of limitations expired in April, 2007, three years following Sierra's alleged improper service of process on Phillips and Styles in April, 2004. The court further concluded: "Even if, however, the plaintiff could argue that [Sierra] still represented him through August 26, 2009, thereby tolling [§ 52-577] until that date, the plaintiff would have been required to file this action by August 26, 2012. Given the grievances filed, the undisputed evidence that he lost confidence in Sierra and did not have contact with Sierra after August 26, 2009, the court cannot find that the doctrine of continuous representation applies to toll the statute. The plaintiff here commenced the action on December 15, 2014 . . . . Because the plaintiff failed to timely file his action, this court concludes that the action is barred by § 52-577 . . . ."

The plaintiff claims that the court, in rendering summary judgment in favor of Sierra, failed to consider

the November 9, 2016 affidavit or, alternatively, if it considered the November 9, 2016 affidavit, the court erroneously weighed the evidence submitted by the parties. We are not persuaded. The November 9, 2016 affidavit did not set forth any specific facts or evidence to support the plaintiff's conclusory statement that his attorney-client relationship with Sierra terminated on September 17, 2012, after he had retained new counsel, nor did the November 9, 2016 affidavit contradict Sierra's documentary evidence demonstrating, inter alia, that the plaintiff had filed grievance complaints against him in 2006 and 2010 and had filed an appearance on his own behalf in the Continental action on August 26, 2009, by which point he had lost confidence in Sierra and was no longer seeking legal advice from Sierra. See *Horvath* v. *Hartford*, 178 Conn. App. 504, 509, 176 A.3d 592 (2017) ("[a] conclusory assertion . . . does not constitute evidence sufficient to establish the existence of a disputed material fact for purposes of a motion for summary judgment" [internal quotation marks omitted]). The November 9, 2016 affidavit was inadequate to create a genuine issue of material fact regarding the termination date of the plaintiff's attorney-client relationship with Sierra and, therefore, we reject the plaintiff's claims. Cf. *Busque* v. *Oakwood Farms Sports Center, Inc.*, 80 Conn. App. 603, 606–608, 836 A.2d 463 (2003) (reversing summary judgment where plaintiff's affidavit filed in opposition to defendant's motion for summary judgment, which plaintiff claimed trial court had failed to consider in rendering summary judgment in favor of defendant, created genuine issues of material fact), cert. denied, 267 Conn. 919, 841 A.2d 1190 (2004).

The plaintiff also claims that the court misconstrued the argument that he presented in opposing Sierra's motion for summary judgment. Specifically, he contends that he argued to the trial court that his attorney-client relationship with Sierra ended on September 17,

2012, whereas the court interpreted his argument to be that his attorney-client relationship with Sierra ended in August, 2009. Contrary to the plaintiff's assertion, however, the court did not make any statement identifying the date upon which the plaintiff argued that his attorney-client relationship with Sierra ended.[16] Rather, the court determined that, in light of the grievance complaints filed by the plaintiff against Sierra and the undisputed evidence demonstrating that the plaintiff had filed an appearance on his own behalf in the Continental action on August 26, 2009, by which point he had lost confidence in Sierra and was no longer in contact with Sierra, there was no genuine issue of material fact that the latest possible date upon which a de facto termination of the plaintiff's attorney-client relationship with Sierra occurred, and thus the latest possible date to which § 52-577 could have been tolled, was August 26, 2009. Therefore, the plaintiff's claim fails.

Accordingly, with respect to Sierra's motion for summary judgment, we conclude that no genuine issue of material fact exists that a de facto termination of the plaintiff's attorney-client relationship with Sierra occurred no later than August 26, 2009, thereby tolling the limitations period set forth in § 52-577 to that date, at the latest, pursuant to the continuous representation doctrine.[17] Thus, the limitations period ran no later than

[16] The plaintiff again conflates the court's decision granting Sierra's motion for summary judgment with the court's separate decision granting Schoenhorn's motion for summary judgment.

[17] Unlike Schoenhorn, Sierra argued in moving for summary judgment that the plaintiff's filing of the first grievance complaint against him on September 19, 2006, constituted a de facto termination of the plaintiff's attorney-client relationship with him. Pursuant to *DeLeo*, a de facto termination of Sierra's attorney-client relationship with the plaintiff occurred when the plaintiff filed the first grievance complaint against Sierra. See *DeLeo* v. *Nusbaum*, supra, 263 Conn. 597–98. Thus, with respect to the plaintiff's claim against Sierra, the limitations period set forth in § 52-577 was tolled only until September 19, 2006, and thereafter expired on September 19, 2009. Regardless of whether we rely on the de facto termination that occurred upon the filing of the plaintiff's first grievance complaint against Sierra on September

August 26, 2012. The plaintiff commenced the present action on December 15, 2014, outside of the limitations period. As a matter of law, the plaintiff's legal malpractice claim against Sierra is time barred pursuant to § 52-577, and, thus, the court properly rendered summary judgment in favor of Sierra.

The judgments are affirmed.

In this opinion the other judges concurred.

GORDON MACCALLA ET AL. *v.* AMERICAN MEDICAL RESPONSE OF CONNECTICUT, INC.
(AC 40782)

DiPentima, C. J., and Lavine and Moll, Js.

Syllabus

The six plaintiffs, emergency medical responders employed by the defendant, brought this action against the defendant in 2012 alleging claims for promissory estoppel. After several delays in the production of the plaintiffs' discovery responses, depositions of the plaintiffs were scheduled to take place at the office of the plaintiffs' counsel in July, 2017. On the first day of depositions, counsel for the defendant arrived with S, a corporate representative for the defendant, and the plaintiffs' counsel objected that there was no advance notice given of S's attendance. After completing the deposition of the plaintiff M, the plaintiffs' counsel stated that S was being considered a trespasser, and the defendant's counsel cancelled the remaining depositions and left the premises. Shortly thereafter, the defendant filed a motion for nonsuit or default and entry of judgment of dismissal or other appropriate sanctions against all of the plaintiffs except for M. Following a hearing, the trial court rendered judgment dismissing the case as to all of the plaintiffs, from which the plaintiffs appealed to this court. They claimed that the trial court erred in dismissing their case solely on the basis of the conduct of counsel and in dismissing the claim of M, who had complied with his discovery obligations and was not named in the defendant's motion for nonsuit. *Held*:

19, 2006, or on the de facto termination that occurred upon the plaintiff filing his first appearance as a self-represented party in the Continental action on August 26, 2009, which is the date upon which the court focused in its memorandum of decision, the plaintiff's claim against Sierra is time barred pursuant to § 52-577.

1. The trial court erred in dismissing M's claim sua sponte; the defendant never alleged M was noncompliant with a discovery order issued by the trial court and never sought sanctions against that particular plaintiff.
2. The trial court did not abuse its discretion in dismissing the claims of the other five plaintiffs: the actions of the plaintiffs' counsel at the plaintiffs' depositions were unprofessional and unacceptable, as the conduct of the plaintiffs' counsel in labeling a party's corporate representative attending a deposition a trespasser evinced a disregard for the provisions of the rules of practice and the authority of the court, and the plaintiffs' explanation that the accusation against S as a trespasser was being made out of concern for the fairness of the depositions was unavailing, as both of the plaintiff deponents stated that they did not feel physically threatened by S and indicated a willingness to proceed with their depositions despite S's presence; moreover, the defendant sought sanctions for the plaintiffs' noncompliance with a discovery order, which was not directed solely to the plaintiffs' counsel, and the court's dismissal was predicated, at least in part, on the plaintiffs' failure to prepare their case properly, as the trial court determined that the case was not ready for trial despite the fact that the plaintiffs had been afforded more than four years to prepare.

Argued November 26, 2018—officially released March 5, 2019

Procedural History

Action, in the first case, to recover damages for, inter alia, promissory estoppel, and for other relief, and action, in the second case, to recover damages for antitrust violations, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *B. Fischer*, *J.*, granted the defendant's motion to strike the amended complaint in part in the first case; thereafter, the court, *Abrams*, *J.*, granted the defendant's motion to consolidate; subsequently, the court granted the defendant's motion to dismiss and motion for an order of nonsuit in the first case and rendered judgment thereon, from which the plaintiffs appealed to this court; thereafter, the court, *Nazzaro*, *J.*, granted the defendant's motion to dismiss in the second case and rendered judgment thereon; subsequently, the court, *Abrams*, *J.*, filed an order in response to this court's request for rectification. *Reversed in part*; *further proceedings*.

Mark S. Kliger, with whom, on the brief, was *Irving J. Pinsky*, for the appellants (plaintiffs).

John M. Barr, pro hac vice, with whom, were *Carolyn A. Trotta* and, on the brief, *David C. Salazar-Austin*, for the appellee (defendant).

Opinion

DiPENTIMA, C. J. The plaintiffs, Gordon MacCalla, Alexis Scianna, Tyler Grailich, John Cronin, Timothy J. Yurksaitis, and Cate Saidler, appeal from the judgment of the trial court dismissing their action against the defendant, American Medical Response of Connecticut, Inc., as a sanction for the unprofessional and dilatory conduct of the plaintiffs' counsel, Attorney Irving Pinsky, during discovery. On appeal, the plaintiffs claim that the trial court erred in dismissing (1) the plaintiffs' case solely on the basis of counsel's conduct and (2) the claim of MacCalla, who had in fact complied with his discovery obligations and was not named in defendant's motion for nonsuit. We agree with the plaintiffs' second claim and reverse the judgment of dismissal as to MacCalla. We affirm the judgment of dismissal in all other respects.

The following undisputed facts and procedural history are relevant to this appeal. On December 14, 2012, the plaintiffs initiated this action (2012 case) against the defendant. The operative complaint, sounding in promissory estoppel, alleged that the plaintiffs were emergency medical responders employed by the defendant and, prior to their employment, the defendant made a "clear and unambiguous promise" to each of them that they could retain simultaneous employment with Valley Emergency Medical Service, Inc. and/or Danbury Ambulance Service, Inc., while also working for the defendant. The complaint also alleged that, after they were hired, the defendant unilaterally withdrew its approval of simultaneous employment and requested

that they either discontinue working for the other ambulance services or resign. The complaint alleged that they came to work for the defendant in reliance on the defendant's promise and that enforcement of this promise was "essential to avoid injustice and detriment." While this case was pending, the plaintiffs initiated a separate action (2016 case) against the defendant on August 11, 2016, alleging damages as a result of the defendant's violation of one or more provisions of the Connecticut Antitrust Act, General Statutes § 35-24 et seq. The 2016 case was consolidated with the 2012 case.

On February 7, 2017, the defendant sent six sets of interrogatories and, purportedly, requests for production to Pinsky's office. On February 16, 2017, each plaintiff filed a motion for extension of time, seeking an additional thirty days in which to respond to the "interrogatories and requests for production"; the defendant did not object. Despite the extension, the plaintiffs failed to submit responses prior to the date they were due.[1] On April 25, 2017, the defendant filed a motion for order of compliance as to each of the six plaintiffs.

Contemporaneously, the defendant sought to schedule depositions of the six plaintiffs. The depositions were noticed originally for May 3 and 4, 2017, in Hartford. The plaintiffs agreed to the dates but requested that the location be moved to New Haven; the defendant assented and resent notice of the depositions accordingly. On April 26, 2017, as a result of the plaintiffs' failure to provide timely discovery responses, the defendant's counsel, Attorney David Salazar-Austin, e-mailed Pinsky, informing him that the depositions would not go forward. The next day, Pinsky replied that the discovery responses would be provided on or before May 12, 2017,

[1] The defendant asserts that its counsel sent several e-mails to Pinsky, asking when the discovery responses would be provided, but it received no response to any of those e-mails.

and that the plaintiffs were available to be deposed on May 25, 26, and 31, and on June 1, 2017. In response, the defendant noticed the depositions for May 25 and 26, to be held at Pinsky's office in New Haven.

On May 12, 2017, the plaintiffs provided responses and objections to the defendant's interrogatories. In response to the defendant's inquiry as to why the plaintiffs did not respond to the requests for production, Pinsky claimed that he never received any such requests. In an e-mail sent to Pinsky, Salazar-Austin was skeptical of this assertion, contending that the interrogatories and requests for production had been sent as a single document. In the same e-mail, Salazar-Austin asked that the plaintiffs respond promptly to the requests for production and sought to reschedule the plaintiffs' depositions. In his reply e-mail, Pinsky iterated that he had not received the requests for production and indicated that his clients would not be available for depositions until sometime between "very late June and mid-July." Because jury selection was scheduled to begin in early August, the defendant was not amenable to this time frame and filed a request for adjudication of the discovery dispute with the court.

On June 5, 2017, the court held a hearing on the defendant's request for adjudication. At the hearing, the parties agreed that the plaintiffs would provide responses to the requests for production by July 7, 2017, and that the plaintiffs' depositions would be held at Pinsky's office on July 17 and 18, 2017. Although the plaintiffs argue in their brief that this agreement was never adopted as a court order, the hearing transcript clearly indicates otherwise:

"[The Plaintiffs' Counsel]: My understanding is production by July 7 and depositions to be taken . . . [on July 17 and 18]; is that correct?

"[The Defendant's Counsel]: Yes.

"[The Plaintiffs' Counsel]: Yes. Okay.

"The Court: Okay. That's now an order of the court."

Consistent with the parties' agreement and the court's order, the plaintiffs, with the exception of Saidler, provided complete responses to the defendant's requests for production, and their depositions, starting with MacCalla, were scheduled for July 17, 2017. On that date, Salazar-Austin and Attorney John M. Barr arrived at Pinsky's office to conduct the depositions on behalf of the defendant. Accompanying them was the defendant's corporate representative, William Schietinger. Upon learning that Schietinger would be attending the depositions, the plaintiffs' counsel, Attorney Mark Kliger, objected on the ground that the Practice Book required the defendant to provide prior notice. Following a review of the Practice Book, the parties agreed that notice was required only if the deposition was to be held by remote electronic means.[2] Nonetheless, at the start of MacCalla's deposition, the following colloquy occurred:

"[Barr]: Before we get started, opposing counsel wants to make an objection on the record. So please go ahead. Did you want to object?

"[Kliger]: Yes, I want to put something on the record. On behalf of Mr. MacCalla, Attorney Mark Kliger from Irving Pinsky's office.

"Mr. Schietinger from [American Medical Response of Connecticut, Inc.] is present here at the deposition. He's sitting at the table where the deposition is being conducted. Counsel for [American Medical Response of Connecticut, Inc.] did not tell us in advance that Mr. Schietinger would be attending the deposition. My client, Mr. MacCalla, has indicated he feels a sense of intimidation by Mr. Schietinger's presence, and so we're

[2] See Practice Book § 13-30 (g) (3).

going to preserve any right we have to object to Mr. Schietinger's presence.

"We quoted Section 13-30 in support of our position, and there may be other Practice Book provisions as well which apply specifically to the fact that we were not given notice in advance of Mr. Schietinger's attendance at the deposition, and we did not consent to it, and also again bearing in mind Mr. MacCalla has indicated to me that he feels a sense of intimidation by Mr. Schietinger's presence.

"Again, we want to preserve all rights we have with regard to an objection to this deposition and the way it's being conducted. That's it."

Despite Kliger's objection, Schietinger was present at MacCalla's deposition. MacCalla testified that he did not feel physically threatened by Schietinger and, although he indicated that he was intimidated "[s]lightly" by Schietinger's presence, did not object to proceeding with the deposition. After MacCalla's deposition, the parties took a lunch break and then reconvened for the deposition of Yurksaitis. During Yurksaitis' deposition, Kliger stated the following:

"[Kliger]: Okay. Also on that subject, Mr. Pinksy has asked me to place on the record as part of the objection that since Mr. Schietinger was not invited on Mr. Pinsky's property, that Mr. Pinsky considers Mr. Schietinger to be a trespasser.

"[Barr]: Well, then we need to leave because if Mr. Pinsky considers him to be a trespasser, I'm not going to put my client at risk of arrest, and we'll just have to take it up with the judge. You better go talk to Mr. Pinsky really fast, because if my client is a trespasser, I am not having him subject to arrest."

When Kliger returned after speaking with Pinsky, he stated the following:

"[Kliger]: Okay. I've checked with Mr. Pinsky, and his position is if Mr. Schietinger is going to be—he considers Mr. Schietinger to be a trespasser, someone who's not invited on the property and was not invited to participate in the deposition."

After a short discussion, in which Yurksaitis stated that he did not feel physically intimidated by Schietinger, the defendant's counsel suspended the deposition, and the two attorneys for the defendant and Schietinger left Pinsky's office. Later that day, Salazar-Austin sent Pinsky an e-mail that attempted to resolve the issue regarding Schietinger's presence at the plaintiffs' depositions. In the e-mail, Salazar-Austin indicated that if the plaintiffs' counsel was "willing to drop [his] insistence that [American Medical Response of Connecticut, Inc.'s] designated representative is a trespasser," the defendant was willing to conduct the remaining depositions the next day.

On August 2, 2017, pursuant to Practice Book §§ 13-14[3] and 17-31,[4] the defendant filed a motion for nonsuit or default and entry of judgment of dismissal or other appropriate sanctions against all of the plaintiffs except for MacCalla. In the memorandum of law accompanying

[3] Practice Book § 13-14 provides in relevant part: "(a) If any party . . . has failed to appear and testify at a deposition duly noticed pursuant to this chapter, or has failed otherwise substantially to comply with any other discovery order made pursuant to Sections 13-6 through 13-11, the judicial authority may, on motion, make such order as the ends of justice require.

"(b) Such orders may include the following:

"(1) The entry of a nonsuit or default against the party failing to comply;

* * *

"(5) If the party failing to comply is the plaintiff, the entry of a judgment of dismissal."

[4] Practice Book § 17-31 provides in relevant part: "Where either party is in default by reason of failure to comply with Sections 10-8, 10-35, 13-6 through 13-8, 13-9 through 13-11, the adverse party may file a written motion for a nonsuit or default or, where applicable, an order pursuant to Section 13-14."

that motion, the defendant sought dismissal of the plaintiffs' claims or other appropriate sanctions, given their "complete disregard for their discovery obligations . . . ." The plaintiffs filed an objection to the defendant's motion, and, on August 11, 2017, the court heard oral argument. Following argument, the court took a brief recess before issuing its decision:

"The Court: These type of cases are very complicated and require thorough preparation, and they are not—they're not rearend accident cases.

"The lack of early discovery requests by the defendant does not excuse the failure to prepare one's case. The shenanigans surrounding the depositions are unprofessional and unacceptable.

"The [2012] case is four and [one-half] years old and it is nowhere ready for trial. I'm dismissing the case."

At that time, the court did not dismiss the consolidated 2016 case.[5] Following its decision from the bench, the court granted the defendant's motion for nonsuit and entered a judgment of dismissal against the plaintiffs, including MacCalla, as to the 2012 case.[6] The plaintiffs appeal from this decision.

We begin by setting forth our standard of review for a trial court's imposition of sanctions pursuant to Practice Book § 13-14. "In order for a trial court's order of sanctions for violation of a discovery order to withstand scrutiny, three requirements must be met. First, the order to be complied with must be reasonably clear.

[5] The 2016 case was dismissed on November 20, 2017, for lack of subject matter jurisdiction.

[6] Upon review of the trial court file, it was unclear as to whether the court's entry of judgment of dismissal was based on its granting of the defendant's motion for nonsuit. Following a sua sponte request from this court, the trial court issued a clarification providing: "On August 11, 2017, this court granted the defendant's motion for nonsuit or default and entry of judgment of dismissal or other appropriate sanctions (#144). In doing so, the court entered a judgment of dismissal in this action."

In this connection, however, we also state that even an order that does not meet this standard may form the basis of a sanction if the record establishes that, notwithstanding the lack of such clarity, the party sanctioned in fact understood the trial court's intended meaning. This requirement poses a legal question that we will review de novo. Second, the record must establish that the order was in fact violated. This requirement poses a question of fact that we will review using a clearly erroneous standard of review. Third, the sanction imposed must be proportional to the violation. This requirement poses a question of the discretion of the trial court that we will review for abuse of that discretion." (Internal quotation marks omitted.) *Krahel* v. *Czoch*, 186 Conn. App. 22, 32, 198 A.3d 103, cert. denied, 330 Conn. 958, A.3d (2018).

For the ease of discussion, we begin by addressing the plaintiffs' second claim on appeal, namely, the contention that the court abused its discretion in dismissing MacCalla's claim as a sanction for Pinsky's actions and for failing to comply with the court's June 5, 2017 order.[7] As noted previously in this opinion, the defendant's motion for nonsuit was not directed to MacCalla, and the defendant at oral argument before this court and the trial court[8] acknowledged that MacCalla had fully complied with his discovery obligations and the June 5, 2017 order. Accordingly, we agree with the plaintiffs that the court's sua sponte dismissal of MacCalla's claim

[7] To the extent the plaintiffs contend that the court never adopted the parties' agreement to conduct the depositions on July 17 and 18 as a *discovery* order, this argument is inadequately briefed and, therefore, does not merit our review. *Ravalese* v. *Lertora*, 186 Conn. App. 722, 724 n.1, A. 3d (2018) ("[c]laims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion" [internal quotation marks omitted]).

[8] During argument on its motion for nonsuit, the defendant conceded that it was able to take MacCalla's deposition and, therefore, was not seeking sanctions against him.

was in error given that the defendant never alleged MacCalla was noncompliant with the discovery order and never sought sanctions against this particular plaintiff.[9]

Having resolved that the dismissal of MacCalla's claim was an abuse of discretion, we now turn to the plaintiffs' argument that the court's dismissal of the entire 2012 case was a disproportionate sanction given the noncompliance at issue. The plaintiffs contend that the court abused its discretion in dismissing the entire 2012 case because their conduct during discovery was not intended to be dilatory or obstructive and that the incident on June 17, 2017, was predicated on Pinsky's good faith, but mistaken, belief that prior notice of Schietinger's attendance was required. Additionally, the plaintiffs claim that the court erred inasmuch as the dismissal of the 2012 case constituted a sanction for conduct solely limited to counsel. In response, the defendant argues that the plaintiffs repeatedly failed to comply with discovery deadlines and, with respect to the plaintiffs' depositions, Pinsky accused Schietinger of being a trespasser after both sides had reviewed the Practice Book and determined that prior notice of a party's attendance was not required in this instance. Thus, according to the defendant, Pinsky's subsequent actions during Yurksaitis' deposition represented a deliberate indifference to the rules of practice and a wilful violation of the court's discovery order.

We have examined the record and conclude that the court did not abuse its discretion in dismissing the

[9] The defendant contends that the court's decision constituted harmless error because MacCalla's deposition testimony reveals that his promissory estoppel claim has no evidentiary basis. We decline to address this argument, however, as it requires us to reach the merits of the underlying case in the absence of a motion for summary judgment or trial. See *Emeritus Senior Living* v. *Lepore*, 183 Conn. App. 23, 26 n.3, 191 A.3d 212 (2018) ("A court may not grant summary judgment sua sponte. . . . The issue first must be raised by the motion of a party and supported by affidavits, documents or other forms of proof." [Internal quotation marks omitted.]).

claims of the other five plaintiffs in the 2012 case. We agree with the court's finding that Pinsky's actions were "unprofessional and unacceptable." Labeling a party's corporate representative attending a deposition a trespasser evinces a disregard for the provisions of the Practice Book and the authority of the court. This court has held previously that "where a party [has] show[n] a deliberate, contumacious or unwarranted disregard for the court's authority," dismissal of the entire case may constitute an appropriate sanction. *Emerick* v. *Glastonbury*, 177 Conn. App. 701, 736, 173 A.3d 28 (2017), cert. denied, 327 Conn. 994, 175 A.3d 1245 (2018). Moreover, we do not accept the plaintiffs' explanation in their appellate brief that Pinsky made this accusation "out of concern for the fairness of the depositions in light of intimidation felt and expressed by two of the plaintiffs," as both deponents, MacCalla and Yurksaitis, stated that they did not feel physically threatened by Schietinger and indicated a willingness to proceed with their depositions despite his presence. In any event, the appropriate action, had counsel believed that the depositions were "being conducted in bad faith or in such a manner as unreasonably to annoy, embarrass, or oppress the deponent or party," would have been to file a motion with the court to cease or limit the scope and manner of the depositions. Practice Book § 13-30 (c); see Practice Book § 13-5.

Further, we conclude that it was not an abuse of discretion for the court to dismiss the claims of the other five plaintiffs on the basis of their counsel's actions. This case is distinguishable from *Herrick* v. *Monkey Farm Cafe, LLC*, 163 Conn. App. 45, 53, 134 A.3d 643 (2016), in which we reversed the trial court's decision to dismiss a litigant's case as a sanction for his counsel's conduct. In *Herrick*, the plaintiff's counsel was sanctioned $500 for failing to revise the operative complaint in accordance with an earlier court ruling.

Id., 47–48. When counsel failed to pay the fine in a timely fashion, the trial court dismissed the action. Id., 48. On appeal, this court ruled that the entry of dismissal was a disproportionate sanction in light of the fact "that the dilatory behavior found offensive by the court involved only counsel and not the plaintiff . . . [and] the court made no finding that counsel's failures were wilful." Id., 52. Here, the defendant sought sanctions for the plaintiffs' noncompliance with a discovery order, which was not directed solely to counsel, and the court's dismissal was predicated, at least in part, on the plaintiffs' failure to prepare their case properly. Although in some circumstances it may be unduly harsh to impute counsel's transgressions to his client, "our adversarial system [also] requires that the client be responsible for acts of the attorney-agent whom [he] has freely chosen . . . ." *Thode* v. *Thode*, 190 Conn. 694, 698, 462 A.2d 4 (1983); see *Sousa* v. *Sousa*, 173 Conn. App. 755, 773 n. 6, 164 A.3d 702 ("[a]n attorney is the client's agent and his knowledge is imputed to the client" [internal quotation marks omitted]), cert. denied, 327 Conn. 906, 170 A.3d 2 (2017). Unlike in *Herrick*, the court in this case found that the conduct of plaintiffs' counsel demonstrated a deliberate and contumacious disregard for its authority insofar as Pinsky's actions were determined to be "unprofessional and unacceptable," and that the noncompliance was not limited to counsel, given that the case was "nowhere ready for trial" despite the plaintiffs being afforded more than four years to prepare. Cf. *Herrick* v. *Monkey Farm Cafe, LLC*, supra, 52–53; see also *Faile* v. *Stratford*, 177 Conn. App. 183, 210, 172 A.3d 206 (2017) (court abused its discretion in dismissing action without finding "wilful disregard of its orders").

The judgment is reversed only as to the dismissal of MacCalla's claim and the case is remanded for further proceedings thereon; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

JUAN G. *v.* COMMISSIONER OF CORRECTION*
(AC 40923)

DiPentima, C. J., and Alvord and Prescott, Js.

Syllabus

The petitioner, who had been convicted of sexual assault in a cohabiting relationship, assault in the second degree, and criminal violation of a protective order, sought a writ of habeas corpus, claiming that his trial counsel provided ineffective assistance and that the retroactive revocation of his risk reduction earned credit violated the ex post facto clause of the United States constitution. The respondent, the Commissioner of Correction, filed a motion to dismiss the ex post facto claim, which the habeas court granted. Subsequently, the habeas court rendered judgment denying the habeas petition, from which the petitioner, on the granting of certification, appealed to this court. During the pendency of this appeal, our Supreme Court decided *Breton* v. *Commissioner of Correction* (330 Conn. 462), in which it held that the 2013 amendment (P.A. 13-3, § 59) to the statute ([Rev. to 2013] § 54-125a) governing parole eligibility, which eliminated risk reduction credit awarded pursuant to statute (§ 18-98e) from the calculation of a violent offender's initial parole eligibility date, thereby requiring the offender to complete 85 percent of his definite sentence before becoming parole eligible, as applied retroactively to the petitioner in *Breton*, violated the ex post facto clause. Our Supreme Court noted that its holding would affect only inmates who are incarcerated for committing a violent crime between 2011 and 2013. Thereafter, the parties jointly filed a motion for the summary reversal of the habeas court's dismissal of the petition for a writ of habeas corpus with respect to the petitioner's ex post facto claim. *Held* that because the resolution of this appeal was controlled by *Breton* in that the petitioner, as a violent offender who committed his crimes in 2012, fell within the small class of inmates affected by the *Breton* holding, the 2013 amendment to § 54-125a (b) (2), as applied to the petitioner, violated the ex post facto clause of the United States constitution, and the petitioner was entitled to parole consideration prior to completion of 85 percent of his definite sentence; accordingly, the parties joint motion was granted and the judgment of the habeas court was reversed only with respect to the dismissal of the petitioner's ex post facto claim.

Considered January 23—officially released March 5, 2019

* In accordance with our policy of protecting the privacy interests of the victims of family violence and sexual assault, we decline to use the petitioner's full name or to identify the victim or others through whom her identity may be ascertained. See General Statutes § 54-86e.

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Sferrazza, J.*; thereafter, the court granted the respondent's motion to dismiss the second count of the petition; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court; subsequently, the parties jointly filed a motion for the summary reversal of the habeas court's judgment with respect to the second count of the habeas petition. *Reversed in part*; *judgment directed.*

James E. Mortimer, *William Tong*, attorney general, and *Steven R. Strom*, assistant attorney general, in support of the motion.

Opinion

PER CURIAM. The petitioner, Juan G., and the respondent, the Commissioner of Correction, ask this court by way of a joint motion filed on January 16, 2019, to reverse summarily the habeas court's dismissal of the second count of the petitioner's petition for a writ of habeas corpus with respect to the petitioner's claim that the retroactive application of an amended statute that eliminated certain risk reduction earned credit from the calculation of a violent offender's initial parole eligibility date violated the constitutional prohibition against ex post facto laws.[1] See General Statutes §§ 18-98e and 54-125a. We agree with the parties that resolution of this appeal is controlled by our Supreme Court's recent decision in *Breton* v. *Commissioner of Correction*, 330 Conn. 462, 196 A.3d 789 (2018). Accordingly, we grant the parties' motion and reverse in part the judgment of the habeas court with direction to grant the petition only as it relates to the petitioner's ex post facto claim.

[1] The constitution of the United States, article one, § 10, provides in relevant part: "No State shall . . . pass any . . . ex post facto Law . . . ."

The petitioner was found guilty, following a jury trial, of two counts of sexual assault in a cohabiting relationship in violation of General Statutes § 53a-70b, one count of assault in the second degree in violation of General Statutes § 53a-60 (a) (2), and two counts of criminal violation of a protective order in violation of General Statutes § 53a-223. His conviction was upheld by this court on direct appeal. *State* v. [*Juan G.*], 167 Conn. App. 298, 300, 142 A.3d 1227, cert. denied, 323 Conn. 929, 149 A.3d 500 (2016).

The petitioner filed an amended petition for a writ of habeas corpus on July 29, 2016, alleging that the retroactive revocation of his risk reduction earned credit constituted an ex post facto violation, and that he had received the ineffective assistance of trial counsel. On May 23, 2017, the respondent filed a motion to dismiss the ex post facto claim, arguing that the court lacked subject matter jurisdiction over any and all claims related to parole eligibility and risk reduction earned credit. The court conducted a hearing on June 5, 2017, following which it granted the motion to dismiss. On September 14, 2017, following a hearing, the habeas court denied the remainder of the habeas petition. It subsequently granted the petitioner's petition for certification to appeal, and this appeal followed.

The sole issue raised on appeal is whether the habeas court improperly concluded that it lacked subject matter jurisdiction over the petitioner's ex post facto claim.[2]

[2] On October 11, 2018, this court, with the consent of the parties, granted a stay of the briefing in this case until sixty days after a decision by our Supreme Court in *Breton* and a companion case, *Garner* v. *Commissioner of Correction*, 330 Conn. 486, 196 A.3d 1138 (2018), which had been argued together and concerned the same ex post facto claim raised in the present appeal. Our Supreme Court released its decisions in *Breton* and *Garner* on December 4, 2018. See *Breton* v. *Commissioner of Correction*, supra, 330 Conn. 462; *Garner* v. *Commissioner of Correction*, supra, 486. On January 2, 2019, this court issued an order lifting the stay and ordering the parties, sua sponte, to file supplemental briefs addressing the effect, if any, of *Breton* and *Garner* on this appeal. This court later vacated the supplemental briefing order in light of the filing of this joint motion for a supervisory order.

On December 4, 2018, our Supreme Court published its opinion in *Breton* v. *Commissioner of Correction*, supra, 330 Conn. 462. The court in *Breton* agreed with the petitioner that the "2013 amendment to General Statutes (Rev. to 2013) § 54-125a; see Public Acts 2013, No. 13-3, § 59 (P.A. 13-3), codified at General Statutes (Supp. 2014) § 54-125a; which eliminated risk reduction credit awarded pursuant to . . . § 18-98e from the calculation of a violent offender's initial parole eligibility date, thereby requiring the offender to complete 85 percent of his definite sentence before becoming parole eligible, as applied retroactively to him, violates the ex post facto clause of the United States constitution . . . ." (Footnotes omitted.) *Breton* v. *Commissioner of Correction*, supra, 464–65. In reversing the judgment of the habeas court dismissing the habeas petition and remanding the case back to that court with direction to render judgment for the petitioner, our Supreme Court indicated as follows: "It is true, of course, that only a relatively small percentage of inmates—namely, those inmates who, like the petitioner, are incarcerated for committing a violent crime between 2011 and 2013—will be affected by our holding today. Moreover, the only relief to which those inmates are entitled is parole consideration prior to completion of 85 percent of their sentence; whether to grant parole at that time is a decision that remains solely within the broad discretion of the [Board of Pardons and Paroles]. But the ex post facto clause safeguards the right of those inmates to such consideration regardless of whether they are granted parole at that initial hearing." (Emphasis omitted.) Id., 485–86.

"Although our rules of practice do not contain an express provision authorizing a summary disposition of an appeal on the merits, this court has the authority to suspend the rules [i]n the interest of expediting decision, or for other good cause shown . . . . If the disposition of an appeal is plainly and undeniably mandated

by a decision of our Supreme Court . . . summary disposition is warranted and further adjudication of the appeal would waste precious judicial resources. Summary disposition is particularly warranted if . . . such relief is unopposed . . . .'' (Citation omitted; internal quotation marks omitted.) *In re Sandy J. M.-M.*, 179 Conn. App. 772, 775, 180 A.3d 1033 (2018).

As the respondent concedes, because the petitioner in the present case is a violent offender pursuant to § 54-125a (b) (2) (B) who committed his crimes in December of 2012, he falls within the small class of inmates affected by the *Breton* holding. Thus, the 2013 amendment to § 54-125a (b) (2), as applied to him, violates the ex post facto clause. The petitioner is entitled to parole consideration prior to completion of 85 percent of his definite sentence.

The motion is granted, the judgment of the habeas court is reversed with respect to the dismissal of the petitioner's ex post facto claim, and the case is remanded with direction to grant that portion of the petition.

JAMES A. MITCHELL *v.* STATE OF CONNECTICUT (AC 40927)

Keller, Moll and Bishop, Js.

Syllabus

The petitioner, who had been convicted of the crimes of attempt to commit murder, conspiracy to commit murder, kidnapping in the first degree, conspiracy to commit kidnapping in the first degree, sexual assault in the first degree, conspiracy to commit sexual assault in the first degree, assault in the first degree, conspiracy to commit assault in the first degree and criminal possession of a firearm, appealed to this court from the judgment of the trial court denying his request for leave to file a late petition for certification to appeal from the denial of his petition for a new trial. The petitioner claimed that the trial court abused its

discretion in denying his request because the court, in considering the length of the delay in filing the request, did not consider the reasons for the delay or any other factors relevant to permitting a late filing and, instead, denied his request on the basis of the merits of his appeal. *Held* that the trial court did not abuse its discretion in denying the petitioner's request for leave to file a late petition for certification to appeal; there was a substantial delay of close to one year between the time the petitioner filed his appeal and his request for leave to file a late petition for certificate to appeal, in his request for leave the petitioner attributed the delay to the fact that he had not been provided with a written notice of appeal procedures and the statutory certification requirement, which neither the state nor the court were obligated to provide to the petitioner, and although the court, in its memorandum of decision, referenced the merits of the petitioner's claims on appeal, it also made clear that its decision was based in large part on the petitioner's delay, and the court, which explicitly concluded that the petitioner's claims were meritless and too late, considered the length of the petitioner's delay and afforded due regard to the reasons for the delay.

Argued January 9—officially released March 5, 2019

Procedural History

Amended petition for a new trial following the petitioner's conviction of the crimes of attempt to commit murder, conspiracy to commit murder, kidnapping in the first degree, conspiracy to commit kidnapping in the first degree, sexual assault in the first degree, conspiracy to commit sexual assault in the first degree, assault in the first degree, conspiracy to commit assault in the first degree and criminal possession of a firearm, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Hon. Edward J. Mullarkey*, judge trial referee; judgment denying the petition, from which the petitioner appealed to this court, which dismissed the appeal; subsequently, the court, *Hon. Edward J. Mullarkey*, judge trial referee, denied the petitioner's request for leave to file a late petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Dante R. Gallucci, assigned counsel, for the appellant (petitioner).

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's

attorney, and *Donna Mambrino*, senior assistant state's attorney, for the appellee (respondent).

Opinion

PER CURIAM. The petitioner, James A. Mitchell, appeals from the trial court's denial of his request for leave to file a late petition for certification to appeal from the denial of his petition for a new trial. On appeal, the petitioner claims that the court abused its discretion in denying his request because the court, in considering the length of the delay in filing the request, did not consider the reasons for the delay or any other factors relevant to permitting a late filing but, rather, addressed the merits of the petitioner's appeal. We dismiss this appeal.

The following procedural history was outlined by this court in the petitioner's habeas appeal: "In 2005, following a jury trial, the petitioner was convicted of attempt to commit murder in violation of General Statutes §§ 53a-49 (a), 53a-8 and 53a-54a, conspiracy to commit murder in violation of General Statutes §§ 53a-48 (a) and 53a-54a, kidnapping in the first degree in violation of General Statutes §§ 53a-8 and 53a-92 (a) (2) (A), conspiracy to commit kidnapping in the first degree in violation of General Statutes §§ 53a-48 and 53a-92 (a) (2) (A), sexual assault in the first degree in violation of General Statutes §§ 53a-8 and 53a-70 (a) (1), conspiracy to commit sexual assault in the first degree in violation of General Statutes §§ 53a-48 and 53a-70 (a) (1), assault in the first degree in violation of General Statutes §§ 53a-8 and 53a-59 (a) (5), conspiracy to commit assault in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-59 (a) (5), and criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1). The court imposed a total effective sentence of fifty-seven years imprisonment.

"The petitioner appealed from the judgment of conviction to this court, which affirmed the judgment of the trial court. *State* v. *Mitchell*, 110 Conn. App. 305, 955 A.2d 84, cert. denied, 289 Conn. 946, 959 A.2d 1012 (2008)." *Mitchell* v. *Commissioner of Correction*, 156 Conn. App. 402, 404, 114 A.3d 168, cert. denied, 317 Conn. 904, 114 A.3d 1220 (2015). During the pendency of the petitioner's direct appeal, he filed a petition for a new trial on January 18, 2006.[1] In 2010, the petitioner filed a petition for a writ of habeas corpus, which the habeas court denied. Id., 406–407. This court affirmed that decision. Id., 421.

Following a period of several years, during which the petitioner's direct and habeas appeals were decided, a hearing on the petition for a new trial was held on divers dates in 2016. On August 22, 2016, the trial court, *Hon. Edward J. Mullarkey*, judge trial referee, issued a memorandum of decision denying the petition for a new trial. On September 28, 2016, the petitioner appealed from the trial court's denial of his petition for a new trial. On September 5, 2017, the petitioner was notified by this court that a petition for certification to appeal had not been filed as required pursuant to General Statutes § 54-95 (a).[2] Thereafter, on September 8, 2017, the petitioner filed a request for leave to file a petition for certification to appeal with the trial court. On September 14, 2017, after a hearing, this court dismissed the petitioner's appeal for failure to comply with § 54-95 (a).

[1] The petitioner subsequently filed an amended petition for a new trial, which was dated November 18, 2013.

[2] General Statutes § 54-95 (a) provides in relevant part that "[n]o appeal may be taken from a judgment denying a petition for a new trial unless, within ten days after the judgment is rendered, the judge who heard the case or a judge of the Supreme Court or the Appellate Court, as the case may be, certifies that a question is involved in the decision which ought to be reviewed by the Supreme Court or by the Appellate Court."

On October 12, 2017, the trial court, relying on § 54-95 (a) and our Supreme Court's decision in *Santiago* v. *State*, 261 Conn. 533, 804 A.2d 801 (2002), denied the petitioner's request for leave to file a late petition for certification to appeal. This appeal followed.

The petitioner's sole claim on appeal, related to the trial court's denial of his request for leave to file a late petition for certification to appeal, does not merit extensive discussion. In *Santiago* v. *State*, supra, 261 Conn. 539, 543, our Supreme Court held that, even though the failure to comply with § 54-95 (a) is not a jurisdictional bar to an appeal from the denial of a petition for a new trial, "the certification requirement of § 54-95 (a) is mandatory rather than directory." In addition, the court in *Santiago* rejected the petitioner's argument that the state had waived its right to seek dismissal of the petitioner's appeal, concluding that "any purported waiver by the state of the certification requirement of § 54-95 (a) simply is not an adequate substitute for compliance with that requirement . . . ." Id., 544. As such, the court concluded that there was "no reason why an appellate tribunal should entertain an appeal from a denial of a petition for a new trial unless the petitioner first has sought certification to appeal pursuant to § 54-95 (a)." Id. In reaching this conclusion, the court noted that "the decision of whether to entertain an untimely request for certification to appeal . . . is within the sound discretion of the [trial] court. . . . In exercising that discretion, the court should consider the reasons for the delay." (Citation omitted; internal quotation marks omitted.) Id., 544–45 n.17. The court further reiterated that "[the trial] court will be required to decide whether to excuse the petitioner's delay in filing his petition for certification to appeal . . . *with due regard to the length of the delay, the reasons for the delay, and any other relevant*

factors." (Citation omitted; emphasis added.) Id., 545 n.18.

In the case at hand, the petitioner claims that in denying his request for leave to file a late petition, the trial court abused its discretion by failing to consider the reasons for the delay and, instead, denied his request on the basis of the merits of his appeal. We are unpersuaded.

The record makes clear that there was a substantial delay of close to one year between the time the petitioner filed his appeal and his request for leave to file a late petition for certification to appeal. Moreover, in his request for leave, the petitioner attributed the delay to not being provided with a written notice of appeal procedures. Neither § 54-95 (a) nor our case law creates any obligation on the part of the state or the court to provide a petitioner with notice of the statutory certification requirement, and, even if such a requirement existed, any inference that the failure to provide notice constituted a "waiver by the state of the certification requirement of § 54-95 (a) *simply is not an adequate substitute for compliance with that requirement*. . . ." (Emphasis added.) Id., 544. In the trial court's memorandum of decision, although the petitioner is correct that it referenced the merits of the petitioner's claims on appeal, it also made clear that its decision was based in large part on the petitioner's delay, citing § 54-95 (a). Indeed, the court explicitly concluded that the "[p]etitioner's claims are meritless and *too late*." (Emphasis added.) Accordingly, by considering the length of the petitioner's delay, the court afforded due regard to the reasons for the delay, and, thus, the court's denial of the petitioner's request for leave to file a late petition for certification to appeal was not an abuse of discretion.

The appeal is dismissed.

MAURICE ROSS *v.* COMMISSIONER OF CORRECTION (AC 41091)

Lavine, Elgo and Bear, Js.

Syllabus

The petitioner, who had been convicted of murder and carrying a pistol or revolver without a permit in connection with the shooting death of the victim, sought a writ of habeas corpus, claiming, inter alia, that his trial counsel had provided ineffective assistance in failing to call a toxicologist as an expert witness in order to present an adequate intoxication defense. The habeas court rendered judgment denying the habeas petition, from which the petitioner, on the granting of certification, appealed to this court. *Held:*

1. The habeas court properly determined that trial counsel did not provide ineffective assistance by failing to present the expert testimony of a toxicologist; that court properly concluded that trial counsel's decision not to present an expert witness to testify about the effects of the drugs the petitioner had ingested was a reasonable trial strategy in response to the petitioner's unanticipated testimony that the gun had spontaneously discharged.
2. The petitioner could not prevail on his claim that the habeas court erred in determining that trial counsel's failure to object to certain allegedly improper comments of the prosecutor during closing argument did not constitute deficient performance; this court having determined on the petitioner's direct appeal that the prosecutor's improper comments did not prejudice the petitioner or deprive him of a fair trial, that determination constituted a valid final judgment that precluded the relitigation of that issue under the doctrine of collateral estoppel.

Argued January 2—officially released March 5, 2019

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Sferrazza*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Robert L. O'Brien, assigned counsel, with whom, on the brief, was *Christopher Y. Duby*, assigned counsel, for the appellant (petitioner).

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *Patrick Griffin*, state's attorney, and *Rebecca Barry*, senior assistant state's attorney, for the appellee (respondent).

Opinion

LAVINE, J. The petitioner, Maurice Ross, appeals from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. The petitioner claims on appeal that the habeas court improperly rejected his claim that his trial counsel provided ineffective assistance by failing (1) to call a toxicologist as an expert witness in order to present an adequate intoxication defense and (2) to object to improprieties in the prosecutor's closing arguments. We affirm the judgment of the habeas court.

The following facts, as set forth by this court in affirming the petitioner's judgment of conviction, and procedural history are relevant to our disposition of the petitioner's appeal. "In early February, 2009, the [petitioner] and the victim, Sholanda Joyner, were involved in a romantic relationship. The two had known each other since they were children, and had dated intermittently during the preceding eleven years. The victim's relationship with the [petitioner] was, as the victim's sister described it, 'dysfunctional . . . .'

"Several days before February 5, 2009, the [petitioner] went to the victim's apartment on Woolsey Street in New Haven and encountered two of her male acquaintances. A physical altercation between the two men and the [petitioner] ensued, and the [petitioner] was forcefully ejected from the victim's apartment. Shortly thereafter, the [petitioner] purchased a revolver for the purpose of killing the two men. The [petitioner] returned to the victim's apartment the next morning and encountered the individuals who had assaulted him the previous day. After displaying the revolver, the [petitioner] took their money, cell phones, and some drugs. . . .

"On February 5, 2009, the victim appeared, crying . . . at her father's doorstep. Approximately two minutes later, the [petitioner] arrived and demanded that the victim leave with him. Over the protests of the victim's stepmother, the [petitioner] grabbed the victim by the arm and pulled her out the door. Later that evening, at the home of the victim's grandmother, the victim was crying and pleading with the [petitioner] to leave her alone. The [petitioner] again commanded the victim to depart with him, and the two left.

"After leaving the house of the victim's grandmother at approximately 11 p.m., the [petitioner] and the victim walked to the victim's apartment. Along the way, the victim stopped and purchased some ecstasy pills and phencyclidine (PCP). The victim and the [petitioner] smoked the PCP while en route to the victim's apartment. After arriving at the victim's home, the [petitioner] and the victim went into the victim's bedroom, and both of them ingested ecstasy. At some point, the [petitioner] retrieved a revolver and asked the victim if she had 'set [him] up . . . .' The [petitioner] then fired one gunshot into her head, intentionally killing her. . . .

"The [petitioner] was arrested and charged with murder in violation of [General Statutes] § 53a-54a (a), and carrying a pistol or revolver without a permit in violation of [General Statutes] § 29-35 (a). At trial, the [petitioner] testified and admitted that he shot the victim. He claimed, however, that the gun had fired accidentally. The jury found the [petitioner] guilty of both charges. The court subsequently sentenced him to a total effective term of sixty years in prison." (Footnote omitted.) *State* v. *Ross*, 151 Conn. App. 687, 688–91, 95 A.3d 1208, cert. denied, 314 Conn. 926, 101 A.3d 271 (2014). On April 28, 2017, the petitioner filed an amended petition for writ of habeas corpus. On November 6, 2017, after a trial, the habeas court denied the

petition and on November 15, 2017, granted the petitioner's petition for certification to appeal. This appeal followed. Additional facts will be set forth as necessary.

"It is well established that [a] criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings . . . . This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. . . . As enunciated in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], this court has stated: It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . The second prong is . . . satisfied if the petitioner can demonstrate that there is a reasonable probability that, but for that ineffectiveness, the outcome would have been different. . . . An ineffective assistance of counsel claim will succeed only if both prongs [of *Strickland*] are satisfied." (Citations omitted; internal quotation marks omitted.) *Sanders* v. *Commissioner of Correction*, 169 Conn. App. 813, 823, 153 A.3d 8 (2016), cert. denied, 325 Conn. 904, 156 A.3d 536 (2017).

"In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Internal quotation

marks omitted.) *Mourning* v. *Commissioner of Correction*, 169 Conn. App. 444, 449, 150 A.3d 1166 (2016), cert. denied, 324 Conn. 908, 152 A.3d 1246 (2017).

I

The petitioner first claims that the habeas court improperly determined that trial counsel did not render ineffective assistance by failing to present the expert testimony of a toxicologist. The essence of the petitioner's argument is that this failure constituted deficient performance because the jury needed expert testimony to understand the scientific basis underlying the petitioner's intoxication defense and to properly determine whether the effects of the drugs he ingested could affect his ability to form the intent needed for a murder conviction. We are unpersuaded.

The following additional facts, as found by the habeas court, are relevant to the resolution of this claim. "[Trial counsel] consulted with an expert witness . . . Caroline Easton, [Ph.D,] about the influence that ingestion of ecstasy . . . and [PCP] typically exerts on people and may have exerted on the petitioner, in particular. . . . Easton was ready to testify at the petitioner's criminal trial that the illicit drugs consumed by the petitioner before the shooting can cause vivid delusions and visual and auditory hallucinations. . . .

"[Trial counsel] encountered an unexpected problem at the criminal trial in establishing a foundation for . . . Easton's testimony. The difficulty arose because the petitioner altered his version of events surrounding the shooting when he spoke to the state's expert and on the witness stand at his trial from that which he discussed with . . . Easton. The petitioner's later description attributed the firing of the weapon to an accidental discharge as he was attempting to put his pistol down rather than as the result of drug-induced derangement of his perceptions about his environment.

This description conflicted with that which the petitioner had recounted to . . . Easton.

"[Trial counsel] asked . . . Easton to remain in attendance at the courthouse in case the petitioner's testimony reflected his earlier recitation . . . . However, once the petitioner ascribed the firing of the gun as purely the result of the accidental mishandling of the weapon, [trial counsel] chose to release . . . Easton."

The habeas court concluded that trial counsel's decision not to call Easton[1] to testify did not amount to deficient performance, stating that trial counsel's "assessment of the nonutility of [Easton's] testimony [was] within the realm of competent legal assistance. It is commonly understood that juries look askance at alternative defenses such as, 'I didn't do it, but if I did do it, I have a good excuse.' " We agree with the habeas court.

"[T]here is no requirement that counsel call an expert when he has developed a different trial strategy." *Stephen J. R.* v. *Commissioner of Correction*, 178 Conn. App. 1, 13, 173 A.3d 984 (2017), cert. denied, 327 Conn. 995, 175 A.3d 1246 (2018). "[T]here is no per se rule that requires a trial attorney to seek out an expert witness. . . . Furthermore, trial counsel is entitled to make strategic choices in preparation for trial." (Internal quotation marks omitted.) *Brian S.* v. *Commissioner of Correction*, 172 Conn. App. 535, 542, 160 A.3d

[1] The petitioner additionally argues that counsel's having retained Easton, who is not a physician, was not adequate to address his intoxication defense as "she simply could not do what a [toxicologist] could: explain these drugs so that the jury could comprehend them." The record is inadequate to address such a claim. "It is a well established principle of appellate procedure that the [petitioner] has the duty of providing this court with a record adequate to afford review." (Internal quotation marks omitted.) *Blum* v. *Blum*, 109 Conn. App. 316, 331, 951 A.2d 587, cert. denied, 289 Conn. 929, 958 A.2d 157 (2008). Moreover, the petitioner's intoxication defense was not viable due to the petitioner's testimony describing the discharge of the gun as an accident, thus rendering this argument moot.

1110, cert. denied, 326 Conn. 904, 163 A.3d 1204 (2017). "The reasonableness of counsel's actions may be determined or substantially influenced by the [petitioner's] own statements or actions." *Strickland* v. *Washington*, supra, 466 U.S. 691.

In the present case, trial counsel's decision not to present an expert witness to testify about the effects of the drugs the petitioner ingested was a reasonable trial strategy in response to the petitioner's unanticipated testimony that the gun spontaneously discharged as he was attempting to put it down on the bedroom dresser. The petitioner, therefore, fails to meet his burden in demonstrating that he received deficient performance from his trial counsel. We conclude that the habeas court properly determined that trial counsel did not render ineffective assistance by not presenting expert testimony.

II

The petitioner next claims that the habeas court erred in determining that counsel's failure to object to the prosecutor's improper comments made during closing argument did not constitute deficient performance. We disagree.

First, we note that "[t]he decision of a trial lawyer not to make an objection is a matter of trial tactics, not evidence of incompetency. . . . [T]here is a strong presumption that the trial strategy employed by a criminal [defendant's] counsel is reasonable and is a result of the exercise of professional judgment . . . ." (Internal quotation marks omitted.) *Moore* v. *Commissioner of Correction*, 119 Conn. App. 530, 543, 988 A.2d 881, cert. denied, 296 Conn. 902, 991 A.2d 1103 (2010).

In the present matter, trial counsel specifically testified before the habeas court that he "did not want to highlight" the improper comments, was "not confident that it was a winner" because "judges tend to give a

fair leniency to the interpretation of evidence," and that he tries not to object unless he feels "very strongly that [he has] a winner" because "when you interrupt someone in an argument, you get really bad vibes out of a jury." As this court stated on the petitioner's direct appeal, "defense counsel may elect not to object to arguments . . . that he or she deems marginally objectionable for tactical reasons . . . ." (Internal quotation marks omitted.) *State* v. *Ross*, supra, 151 Conn. App. 702.

We need not, however, address whether trial counsel's failure to object constituted ineffective assistance, as this court, on direct appeal, has already determined that the prosecutor's improper comments did not prejudice the petitioner. Id., 705-706. "A court deciding an ineffective assistance of counsel claim need not address the question of counsel's performance, if it is easier to dispose of the claim on the ground of insufficient prejudice." *Nardini* v. *Manson*, 207 Conn. 118, 124, 540 A.2d 69 (1988).

The petitioner claimed on direct appeal that "he was deprived of his constitutional right to a fair trial by prosecutorial impropriety. Specifically, [he] argue[d] that during closing and rebuttal argument, the prosecutor improperly argued facts not in evidence and appealed to the jury's emotions. [This court] agree[d] with the [petitioner] that at least one of the prosecutor's comments was improper, but conclude[d] that any improprieties did not deprive the [petitioner] of a fair trial." *State* v. *Ross*, supra, 151 Conn. App. 688.

"The fundamental principles underlying the doctrine of collateral estoppel are well established. The common-law doctrine of collateral estoppel, or issue preclusion, embodies a judicial policy in favor of judicial economy, the stability of former judgments and finality. . . . Collateral estoppel means simply that when an issue of ultimate fact has once been determined by a

valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. . . . Issue preclusion arises when an issue is actually litigated and determined by a valid and final judgment, and that determination is essential to the judgment. . . . Collateral estoppel express[es] no more than the fundamental principle that once a matter has been fully and fairly litigated, and finally decided, it comes to rest." (Internal quotation marks omitted.) *Cumberland Farms, Inc.* v. *Groton*, 262 Conn. 45, 58, 808 A.2d 1107 (2002). This court's determination in the petitioner's direct appeal that the prosecutor's improper comments did not cause prejudice to the petitioner constitutes a final judgment that precludes any relitigation of this issue.

The judgment is affirmed.

In this opinion the other judges concurred.

IN RE BIANCA K.*
(AC 41819)

Lavine, Prescott and Bishop, Js.

Syllabus

The respondent mother appealed to this court from the judgment of the trial court terminating her parental rights with respect to her minor child. *Held*:

1. The respondent mother's claim that the trial court erred in concluding that she failed to achieve the requisite degree of personal rehabilitation required by statute (§ 17a-112 [j] [3] [B] [i]) was unavailing; although the mother asserted, and the court acknowledged, that she had made substantial progress toward the completion of certain specific steps ordered by the court, the court reasonably found that the mother had failed to understand the impact of domestic violence on her and the

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

minor child given the evidence concerning the mother's relationship with J, which was marked by a history of domestic violence and substance abuse, that she had continued to have a relationship with J notwithstanding his violent behavior, and that she failed to recognize the dangers that his violent history posed to her and her child, and although there was no specific step that precluded the mother from having contact with J, the court was not strictly bound by the enumerated specific steps when determining whether the mother had failed to rehabilitate, and the cumulative effect of the evidence presented was sufficient to justify the court's determination that the mother had failed to achieve sufficient personal rehabilitation as required by § 17a-112 (j) (3) (B) (i).

2. The respondent mother could not prevail on her claim that the trial court improperly determined that the termination of her parental rights was in the best interest of the minor child; that court made specific findings with respect to each of the seven factors delineated by statute (§ 17a-112 [k]), including finding that the termination of the mother's parental rights would provide the minor child with a consistent, stable, safe, and secure environment, and although the court found that the mother and the minor child shared a close bond, it was not clearly erroneous for the court to conclude that it was in the best interest of the minor child to terminate the mother's parental rights.

Argued January 3–officially released February 26, 2019**

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of Middlesex, Child Protection Session at Middletown, and tried to the court, *Hon. Barbara M. Quinn*, judge trial referee; judgment terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Affirmed.*

Ani A. Desilets, with whom was *Lisa M. Vincent*, for the appellant (respondent mother).

Benjamin Zivyon, assistant attorney general, with whom, on the brief, were *George Jepsen*, former attorney general, and *Rachel Catanese*, legal intern, for the appellee (petitioner).

** February 26, 2019, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Ellin M. Grenger, with whom, on the brief, was *Rosemary J. Dempsey*, for the minor child.

Opinion

BISHOP, J. The respondent mother appeals from the judgment of the trial court terminating her parental rights with respect to her minor child, Bianca K.[1] On appeal the respondent claims that the court improperly concluded that (1) by the clear and convincing evidence adduced at the termination hearing, she had failed to achieve sufficient personal rehabilitation within the meaning of General Statutes § 17a-112 (j) (3) (B) (i), and (2) that the termination of her parental rights was in the best interest of the child. We affirm the judgment of the trial court.

The court found the following pertinent facts:[2] "On August 27, 2017, the [Commissioner] of Children and Families [commissioner] . . . filed a petition for the termination of the parental rights of [the respondent] . . . to [her] daughter, Bianca. The child was first removed from her parents on an order of temporary custody on July 1, 2014, when she was not yet three years old. She was returned to her mother about a year later under an order of protective supervision on July 30, 2015. She was removed for the second time on March 7, 2016, when testing revealed that her mother was still abusing illegal drugs and was generally noncompliant with the other conditions of protective supervision. Bianca has been in nonrelative foster care since that time. . . .

[1] The parental rights of Bianca's biological father were terminated in the same proceeding after he was defaulted for his failure to appear. He did not participate in this appeal.

[2] Pursuant to Practice Book § 63-4 (a) (2), the respondent certified that no transcripts were necessary for the resolution of this appeal. See also Practice Book § 63-8. As a result, our review of the record is confined to the trial court file, exhibits marked at trial, and the respective appendices submitted by the parties.

"[The respondent] is now twenty-eight years old and Bianca is her only child. She also experienced a dysfunctional family growing up, with [Department of Children and Families (department)] involvement and time spent in relative care during her childhood and teenage years. [The respondent's] mother has struggled with mental health and substance abuse issues. [The respondent's] two adult relationships with intimate partners have involved domestic violence and substance abuse, as well as mental health difficulties for herself and her partners. [The department] and the police have been involved with her at various times since [2014]. During much of this time, she has not been cooperative with [the department], conduct she shares with many children who have rejected [the department] due to the agency's involvement in their earlier lives. [The respondent] has not only been resistant to services, but secretive and quite misleading as to the details of her life.

"[The respondent] began using alcohol, marijuana and cocaine as a teenager in high school. She failed to graduate, although she believes she did quite well. However, she has not to this date earned her equivalency diploma. After she stopped going to school, she continued her cocaine use. She was arrested, convicted and incarcerated at age nineteen. After her child was born, she did not change her drug-abusing behavior. She broke up with the father of her child soon after Bianca's birth and began a relationship with James P., someone she had known since high school. Bianca sees James as her father. James, like Bianca's biological father, has engaged in domestic violence toward Bianca and her mother and continues to be very heavily involved in drug abuse. He is a convicted felon and has been incarcerated a number of times. . . .

"[The respondent] and her child came to the attention of [the department] early in Bianca's life. Consistent with the policy of trying to keep families together,

Bianca was not immediately removed from [the respondent's] care, yet the neglectful and potentially life threatening incidents did not end. The first event occurred in 2013 when Bianca was eighteen months old. She ingested Klonopin, which she apparently found loose in the back of her mother's car. [The respondent], when questioned, first denied it was her medication but later admitted that it was. Next, there was a police visit to the home where Bianca's grandmother reported that she had a fight with James P. and she was thrown to the ground, while James and [the respondent] held her there. They were all living in her house at that time. All three adults were reported to be intoxicated at that time, while Bianca was in the house. Next, in July of that year, when Bianca was not yet two, her grandmother apparently saw James P. strike Bianca. He was arrested for his conduct.[3] In March, 2014, when Bianca was two and [one-half years old], James was arrested for selling heroin from his car, while Bianca and her mother were in the car with him. [The respondent] admitted at that time to opiate abuse. In June of 2014, James broke into the house and attempted to strangle [the respondent]. . . . [I]n July, 2014, Bianca was treated for an overdose of Suboxone, her mother's pills, which she had found and ingested. She was very lethargic and was hospitalized. It was this last of these many neglectful events which brought about the first order of temporary custody and Bianca's removal from her mother's home and chaotic drug-impacted lifestyle.

"During the next year, [the respondent] attended programs to which she was referred for treatment of drug addiction, counseling, and domestic violence. She received parenting education and had regular visitation. As she testified [at] trial, [the respondent] did the things she was supposed to do, and said what she had to say

[3] James admitted to slapping Bianca in the face and was charged with risk of injury to a child.

in order to have Bianca returned to her care. She now admits she did not really change her behavior or internalize any of the behavioral changes needed.

"Bianca was returned home to [the respondent] in June, 2015, when she was not yet four years old. [Department] services continued for a period of time, but [the respondent's] participation was inconsistent. She participated in a child and family reunification therapeutic family time program, but was discharged when she attended less than half of the sessions. She also did not consistently engage in therapy during this time. She did not routinely attend random urine drug screenings [and the department] was very concerned about her continued contact with James P., despite his known drug use and his documented abuse of Bianca. Fears about [the respondent's] own drug use and the lack of urine screenings made [the department] insist upon a hair test. When the test was completed in February, 2016, the test showed continued illegal opiate use, which [the respondent] denied. As was typical, she later admitted to such use. Bianca was again removed from her mother's care under an order of temporary custody, given her mother's behavior, continued drug use and lack of compliance with her specific steps. At the time of the removal in March, 2016, Bianca was four and one-half years old. . . .

"Bianca was placed in a [nonrelative] foster care home where she has remained since her removal from her mother's care in 2016. She has done well there, but as her foster mother testified, from time to time, she will become sad and want to go home to her mother. . . . It is apparent that Bianca remains closely attached to her mother with whom she enjoys a comfortable visiting relationship. It is a connection that she and [the respondent] both enjoy.

"As has been the case before, specific steps were issued for [the respondent] for services and programs

in which to participate before she could be reunited with Bianca. These services include counseling, drug treatment and a component for her to understand the impact of domestic violence on her as well as its seriousness for her daughter and the potential for additional abuse in the future. As was the case in the past, [the respondent] attended fitfully with starts and stops. She successfully completed the drug treatment component of her specific steps and the various programs for such treatment. She has participated in parenting education and has done well." (Footnote added.)

The court addressed the respondent's continued relationship with James and her attempts to conceal the relationship from the department despite James' past violent conduct toward her and Bianca. It stated: "The court received a DVD into evidence, which shows [the respondent] and James at a Henny Penny and shopping at a market. It is very apparent that they are closely connected, as evidenced by their body language and the frequency with which the social worker randomly encountered them together in the community. The social worker's information makes [the respondent's] testimony about these events less than credible. One event took place when James' car broke down on an off-ramp. [The respondent] was seen by the social worker helping him and then they went to the Henny Penny for gas. Next, she saw them at a market shopping together. While they [entered] the store at separate times, while shopping, the video shows them interacting and together. Neither of these events was disclosed by [the respondent] to [the department] until she was confronted. The court concludes that the two of them continue to be involved with each other in some fashion, and therein lies the problem.

"[The department] also received information from [the respondent's] neighbor in December, 2017, concerning James' presence in the home, which [the

respondent] denies to this day. Specifically, the neighbor said that James was there regularly.[4] Certainly, the evidence is that a truck, which [the respondent] viewed as belonging to James, was registered and insured in her own name. The truck was parked next to the neighbor's part of the duplex in which [the respondent] resides. In addition, James is known to drink a certain alcoholic drink and an empty can of it was found outside [the respondent's] home in early 2018. While none of this information directly proves that James was present in the home, it strains the court's credulity, when combined with all the other evidence, to imagine that the two of them have not had regular contact. [The respondent] does admit that, from time to time, she and James share a meal and she continues to see nothing wrong with that contact. While [the respondent] certainly is entitled to have such friends as she finds appropriate, when her desire for maintaining an old and harmful friendship is in direct conflict with her desire to have Bianca returned to her care, concerns for Bianca's safety must remain paramount. It is clear from the evidence that Bianca cannot safely be returned home." (Footnotes added and omitted.) This appeal followed.

I

The respondent first claims that the trial court improperly concluded by clear and convincing evidence that she had failed to achieve sufficient personal rehabilitation within the meaning of § 17a-112 (j) (3) (B) (i). Specifically, the respondent argues that the court, in concluding that she failed to rehabilitate, "undervalued"

[4] The court recognized that there were credibility issues concerning the neighbor's testimony, particularly because she withdrew some statements she made during her deposition. The court, however, determined that the "cumulative weight of all the tangential evidence and [the respondent's] general secretive and manipulative behavior and testimony . . . persuades the court that James P. is regularly present in her life."

the substantial progress she made toward the completion of specific steps ordered by the court. Citing to her sobriety, her procurement of stable housing and an income, the completion of parenting classes, and the progress she has made in therapy, the respondent claims that she has in fact rehabilitated. We are not persuaded.

We begin by setting forth the applicable standard of review and relevant legal principles that guide our analysis. "Proceedings to terminate parental rights are governed by § 17a-112. . . . Under [that provision], a hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more . . . grounds for termination of parental rights set forth in § 17a-112 [(j) (3)] exists by clear and convincing evidence. The commissioner . . . in petitioning to terminate those rights, must allege and prove one or more of the statutory grounds. . . . Clear and convincing proof is a demanding standard denot[ing] a degree of belief that lies between the belief that is required to find the truth or existence of the [fact in issue] in an ordinary civil action and the belief that is required to find guilt in a criminal prosecution. . . . [The burden] is sustained if evidence induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist. . . . If the trial court determines that the petitioner has failed to meet this high burden, it must deny the petition." (Citations omitted; internal quotation marks omitted.) *In re Mariana A.*, 181 Conn. App. 415, 427–28, 186 A.3d 83 (2018).

"Personal rehabilitation as used in [§ 17a–112 (j) (3) (B) (i)] refers to the restoration of a parent to his or her former constructive and useful role as a parent.

. . . The statute does not require [a parent] to prove precisely when [she] will be able to assume a responsible position in [her] child's life. Nor does it require [her] to prove that [she] will be able to assume full responsibility for [her] child, unaided by available support systems. . . . Rather, [§ 17a-112] requires the trial court to analyze the [parent's] rehabilitative status as it relates to the needs of the particular child, and further, that such rehabilitation must be foreseeable within a reasonable time. . . . [The statute] requires the court to find, by clear and convincing evidence, that the level of rehabilitation [the parent] has achieved, if any, falls short of that which would reasonably encourage a belief that at some future date [he or she] can assume a responsible position in [his or her] child's life. . . . [I]n assessing rehabilitation, the critical issue is not whether the parent has improved [his or her] ability to manage [his or her] own life, but rather whether [he or she] has gained the ability to care for the particular needs of the child at issue." *In re Lilyana P.*, 169 Conn. App. 708, 717–18, 152 A.3d 99 (2016), cert. denied, 324 Conn. 916, 153 A.3d 1290 (2017).

"Our Supreme Court has clarified that [a] conclusion of failure to rehabilitate is drawn from both the trial court's factual findings and from its weighing of the facts in assessing whether those findings satisfy the failure to rehabilitate ground set forth in § 17a-112 (j) (3) (B). Accordingly . . . the appropriate standard of review is one of evidentiary sufficiency, that is, whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court. . . . We will not disturb the court's subordinate factual findings unless they are

clearly erroneous." (Internal quotation marks omitted.) *In re Damian G.*, 178 Conn. App. 220, 237, 174 A.3d 232 (2017), cert. denied, 328 Conn. 902, 177 A.3d 563 (2018). "A factual finding is clearly erroneous when it is not supported by any evidence in the record or when there is evidence to support it, but the reviewing court is left with the definite and firm conviction that a mistake has been made." (Internal quotation marks omitted.) *Bauer* v. *Bauer*, 173 Conn. App. 595, 601, 164 A.3d 796 (2017).

We turn now to the application of this statutory and decisional law to the matter at hand. Although the court acknowledged in its findings that the respondent had made substantial progress with respect to the specific steps she relies on in her claim, the court concluded, as noted in its thorough and well reasoned memorandum of decision, that the respondent has failed to "understand the impact of domestic violence on her as well as its seriousness for her daughter and the potential for additional abuse in the future," as required by one of the specific steps provided to her after Bianca had been taken into the commissioner's temporary custody.[5] To support its determination, the court explained that the respondent has completely failed to understand that maintaining a relationship with James, platonic or otherwise, raises concern for Bianca's safety and is detrimental to the respondent's unification efforts. Indeed, the respondent, through counsel, conceded in her principal appellate brief that "the risk of Bianca being exposed to domestic violence is far greater with

[5] The record reflects that after the court had issued its second order of temporary custody of Bianca on March 7, 2016, the court issued several specific steps to the respondent to facilitate Bianca's return to her. Although none of these steps made explicit reference to James, one step required the respondent to make progress toward addressing the impact of domestic violence as part of her required counseling. It is clear from the record that the trial court found that the respondent's continuing relationship with James was strong evidence of the respondent's failure to adhere to this step.

James in the picture, and this is precisely the reason why [the respondent] has not brought James around Bianca." Further, despite the respondent's insistence that she has had minimal contact with James, the court found the respondent's testimony to be entirely incredible and demonstrated that she was unable to understand why she could not have contact with James, that she has yet to acknowledge the harm James caused to her and Bianca, and that she even seemed to excuse James' violent behavior toward Bianca. On review, we are mindful of the principle that "[i]t is the exclusive province of the trier of fact to weigh conflicting testimony and make determinations of credibility, crediting some, all or none of any given witness' testimony. . . . Questions of whether to believe or to disbelieve a competent witness are beyond our review." *State* v. *DeMarco*, 311 Conn. 510, 519–20, 88 A.3d 491 (2014).

When construing the evidence available to us in a manner most favorable to sustaining the judgment of the trial court, it is apparent that the court's subordinate findings were not clearly erroneous and that the evidence was sufficient to support the court's conclusion that the respondent has failed to rehabilitate. The respondent does not dispute that she still maintains a relationship with James and that she has not been forthcoming with the department about her repeated contact with him. To further support its conclusion, the court refers in its memorandum of decision to, inter alia, the respondent's deceitful conduct and failure to disclose that she was having contact with James, video evidence of the respondent and James shopping together, photographs of James' truck parked near the respondent's residence, an empty can of James' alcoholic beverage of choice outside of her home, and testimony from a neighbor that James frequently visits the respondent's home. Moreover, the court found credible a social study of the respondent performed by Kelly

F. Rogers, a court-appointed psychologist. Specifically, the court found persuasive Rogers' assessment that the respondent was likely to take advantage of the goodwill of others and tended to blame others and her perceived unfair treatment to justify her actions.

Her contact with James notwithstanding, the respondent argues that her specific steps for reunification did not stipulate that she was to have no contact with James and that she is free to associate with whomever she wishes. Although there was no specific step that precluded contact with James, our Supreme Court has made clear that a court is not strictly bound by the enumerated specific steps when determining whether a parent has failed to rehabilitate. "Although . . . specific steps provide a benchmark by which the court measures whether either reunification or termination of parental rights is appropriate, the court necessarily will consider the underlying adjudication and the attendant findings." (Internal quotation marks omitted.) *In re Natalie S.*, 325 Conn. 833, 844, 160 A.3d 1056 (2017). "Specific steps provide notice and guidance to a parent as to what should be done to facilitate reunification and prevent termination of rights. Their completion or noncompletion, however, does not guarantee any outcome. A parent may complete all of the specific steps and still be found to have failed to rehabilitate. . . . Conversely, a parent could fall somewhat short in completing the ordered steps, but still be found to have achieved sufficient progress so as to preclude a termination of his or her rights based on a failure to rehabilitate." (Citation omitted; internal quotation marks omitted.) *In re Elvin G.*, 310 Conn. 485, 507–508, 78 A.3d 797 (2013). "Our Supreme Court has stated that [i]n determining whether a parent has achieved sufficient personal rehabilitation, a court may consider whether the parent has corrected factors that led to the initial commitment, regardless of whether those factors were

included in specific expectations ordered by the court or imposed by the department. . . . Accordingly, successful completion of expressly articulated expectations is not sufficient to defeat a department claim that the parent has not achieved sufficient rehabilitation." (Internal quotation marks omitted.) *In re Jazmine B.*, 121 Conn. App. 376, 390–91, 996 A.2d 286, cert. denied, 297 Conn. 924, 998 A.2d 168 (2010).

On the basis of the record and mindful of controlling law, we conclude that it was proper for the court, in deciding that the respondent had failed to rehabilitate, to consider the respondent's continued contact with James and her reluctance to accept that, given James' history of violence toward her and Bianca, his presence in the respondent's life posed a credible threat to Bianca's safety and demonstrated a lack of understanding of the impact of domestic violence on her and Bianca. Thus, on the basis of the cumulative effect of the evidence presented, there was sufficient evidence to establish the court's ultimate conclusion that the respondent failed to rehabilitate within the meaning of § 17a-112 (j) (3) (B) (i).[6]

II

The respondent next claims that the trial court improperly concluded that the termination of her parental rights was in the best interest of the child. Specifically, the respondent argues that because of the close

[6] In its memorandum of decision, the court stated its belief that the respondent had been impregnated by James after being evaluated by the court-appointed psychologist. The respondent asserts that this was an erroneous finding by the court and that the record reflects only that she was impregnated and had her pregnancy terminated prior to her evaluation with Rogers. Even if this factual finding was made in error, this discrepancy alone does not demonstrate that the court's finding that the respondent had failed to rehabilitate was clearly erroneous. As previously set forth, the court relied on a plethora of other factual findings to determine that the respondent had failed to rehabilitate. Thus, we conclude that this finding, even if erroneous, does not erode our conclusion with respect to the court's factual findings regarding the respondent's failure to rehabilitate.

bond shared between her and Bianca, termination of her parental rights is not in the best interest of the child. We disagree.

We begin our analysis by setting forth the relevant legal principles and standard of review. "In the dispositional phase of a termination of parental rights hearing, the emphasis appropriately shifts from the conduct of the parent to the best interest of the child. . . . It is well settled that we will overturn the trial court's decision that the termination of parental rights is in the best interest of the [child] only if the court's findings are clearly erroneous. . . . The best interests of the child include the child's interests in sustained growth, development, well-being, and continuity and stability of [his or her] environment. . . . In the dispositional phase of a termination of parental rights hearing, the trial court must determine whether it is established by clear and convincing evidence that the continuation of the respondent's parental rights is not in the best interest of the child. In arriving at this decision, the court is mandated to consider and make written findings regarding seven factors delineated in [§ 17a-112 (k)]. . . . The seven factors serve simply as guidelines for the court and are not statutory prerequisites that need to be proven before termination can be ordered. . . . There is no requirement that each factor be proven by clear and convincing evidence." (Internal quotation marks omitted.) *In re Athena C.*, 181 Conn. App. 803, 811, 186 A.3d 1198, cert. denied, 329 Conn. 911, 186 A.3d 14 (2018).

The court, in its memorandum of decision, made written findings regarding the seven factors. In its findings, the court acknowledged and considered the bond between the respondent and Bianca in making its determination to terminate the respondent's parental rights. Nonetheless, "[o]ur courts consistently have held that even when there is a finding of a bond between parent

and a child, it still may be in the child's best interest to terminate parental rights." (Internal quotation marks omitted.) *In re Daniel A.*, 150 Conn. App. 78, 104, 89 A.3d 1040, cert. denied, 312 Conn. 911, 93 A.3d 593 (2014). Such was the finding in the present case. Specifically, the court noted that termination of the respondent's parental rights would enable Bianca to grow up in a consistent, stable, safe, and secure environment where she would be able to overcome issues associated with her upbringing thus far. As a result, it was not clearly erroneous for the court to conclude that it was in the best interest of the child to terminate the respondent's parental rights even while recognizing the continuing bond between the respondent and Bianca.[7]

The judgment is affirmed.

In this opinion the other judges concurred.

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[7] The respondent also argues, without citing to any authority, that the trial court committed "clear error" in considering the testimony of Bianca's foster mother, who stated that she would be willing to permit the respondent to continue to have contact with Bianca even after the termination of the respondent's parental rights. Specifically, the court stated: "In this case, the foster mother testified to her awareness of the child's connection to her mother and indicated her willingness to permit contact, even after termination, if that is the outcome." The respondent cannot demonstrate that this statement was integral to the court's analysis and ultimate conclusion that termination of the respondent's parental rights was in the best interest of the child. Rather, this statement appears to be an acknowledgement of the continuing bond between the respondent and Bianca. As previously noted, the strong bond between parent and child is not dispositive as to whether it is in the best interest of the child to terminate parental rights. Further, the trial court's memorandum of decision is replete with facts supporting the conclusion that termination of the respondent's parental rights was in the best interest of the child.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 188

MEMORANDUM DECISIONS

STEVEN K. STANLEY *v.* ADAM B. SCOTT
(AC 41645)

Alvord, Keller and Eveleigh, Js.

Argued February 14—officially released March 5, 2019

Plaintiff's appeal from the Superior Court in the judicial district of Hartford, *Schuman, J.*

Per Curiam. The judgment is affirmed.

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SUPREME COURT PENDING CASES

The following appeals are fully briefed and eligible for assignment by the Supreme Court in the near future.

STATE *v.* JAYEVON BLAINE, SC 20087
Judicial District of Fairfield

Criminal; Conspiracy; Plain Error; Whether Failure to Instruct Jury Regarding Requisite Intent for Conspiracy in Accordance with *State* v. *Pond* Constituted Plain Error. The defendant was convicted of conspiracy to commit robbery in the first degree. The conviction stemmed from the defendant's involvement in an alleged conspiracy with four coconspirators to rob a drug dealer, which resulted in the shooting death of the victim. At trial, the defendant's four coconspirators each testified that they, together with the defendant, had devised a plan to rob the victim with a weapon and that the weapon would be carried by the defendant. In its jury charge, the trial court instructed on the elements of the substantive crime of robbery in the first degree, including that one or more participants in the robbery be armed with a deadly weapon, and that to find the defendant guilty of conspiracy, the jury had to find that he specifically intended to commit the substantive crime. The defendant appealed, arguing that the trial court committed plain error in failing to instruct the jury that a guilty verdict on the conspiracy charge required a finding that he specifically intended that one or more participants in the robbery be armed with a deadly weapon. The defendant relied on *State* v. *Pond*, 315 Conn. 451 (2015), which held that, in order to be convicted of conspiracy, a defendant must have specifically intended that every element of the planned offense be accomplished, including elements of the underlying crime that do not require specific intent. The Appellate Court (179 Conn. App. 499) affirmed the defendant's conviction, concluding that the record did not support his claim of plain error. The Appellate Court found that because the trial court instructed the jury that a guilty verdict on the conspiracy charge required a finding that the defendant specifically intended to commit the crime of robbery in the first degree and because the armed with a deadly weapon requirement was included in the definition of the underlying crime, it was at least arguable that the instruction logically required the jury to find that the defendant had agreed that a participant in the robbery would be armed with a deadly weapon. The Appellate Court further found that the conspiracy instruction did not result in manifest injustice in light of ample evidence presented at trial that the defendant had agreed to the robbery and had agreed that one of the participants would use a weapon. The defendant appeals, and the Supreme Court

will determine whether the Appellate Court properly concluded that the trial court's failure to instruct the jury in accordance with *Pond* did not constitute plain error.

JENZACK PARTNERS, LLC *v.* STONERIDGE ASSOCIATES, LLC, et al.,SC 20188/20189
Judicial District of Middletown

Foreclosure; Hearsay; Whether Appellate Court Properly Ruled That Plaintiff had Standing to Foreclose Mortgage Given by Guarantor Where Plaintiff had not Been Assigned Guarantee; Whether Appellate Court Properly Ruled that Evidence as to Amount Due on Note was Wrongly Admitted Under Business Records Exception to Hearsay Rule. In 2006, Stoneridge Associates, LLC, obtained a $1.65 million construction loan from Sovereign Bank. Stoneridge executed a promissory note in connection with the loan. When the loan was modified in 2008, the defendant Jennifer Tine executed a limited guarantee in favor of Sovereign Bank guaranteeing repayment of the sum due under the Stoneridge note as modified. As security for her guarantee, the defendant gave Sovereign Bank a mortgage (Tine mortgage) on her residential property in Cromwell. Sovereign Bank subsequently assigned the Tine mortgage and its interests in the Stoneridge note to the plaintiff. The plaintiff brought this action to foreclose on the Tine mortgage in 2012, alleging that Stoneridge had defaulted on its obligations under the note. The defendant argued that the trial court lacked subject matter jurisdiction over the foreclosure action because the plaintiff did not have standing to seek foreclosure. She argued that her guarantee was not specifically assigned to the plaintiff. The defendant also claimed that the plaintiff failed to establish the amount of the debt due on the note because evidence of the computation of the debt, which included a starting balance provided to the plaintiff by Sovereign Bank, was inadmissible hearsay. The trial court rendered a judgment of strict foreclosure, ruling that the plaintiff had standing to foreclose and that the plaintiff had properly established the amount of the debt due on the note. The defendant appealed, and the Appellate Court (183 Conn. App. 128) reversed the judgment of foreclosure and ordered a new trial. It rejected the defendant's claim that the plaintiff lacked standing to foreclose because Sovereign Bank did not specifically assign the defendant's guarantee to the plaintiff, ruling that an examination of the surrounding circumstances demonstrated that Sovereign Bank had intended to equitably assign the guarantee as part of its assignment of the note and reasoning that the note had no value to the plaintiff

without the guarantee. The Appellate Court concluded, however, that the trial court erred in holding that the plaintiff had established the debt due on the note, finding that the trial court had wrongly deemed an exhibit that detailed the amount due admissible under the business records exception to the hearsay rule. The Supreme Court granted both the defendant and the plaintiff certification to appeal. In the defendant's appeal, the Supreme Court will decide whether the Appellate Court properly concluded that the plaintiff had standing to seek foreclosure of the Tine mortgage even though Sovereign Bank did not assign the defendant's guarantee to the plaintiff. In the plaintiff's appeal, the Supreme Court will consider whether the Appellate Court properly reversed the judgment of foreclosure on concluding that the exhibit detailing the amount of the debt was not admissible under the business records exception to the hearsay rule.

STATE *v.* RAASHON JACKSON, SC 20193
Judicial District of Fairfield

Criminal; Whether Trial Court Properly Admitted Expert Testimony on Cell Phone Location Data; Whether *Porter* Hearing Required Prior to Admission of Cell Phone Location Evidence; Whether Trial Court Properly Admitted Consciousness of Guilt Evidence. The defendant was charged with murder, conspiracy to commit murder, and assault in the first degree in connection with a shooting death in Bridgeport. During jury selection seven days before the trial, the state disclosed to the defense a PowerPoint presentation created by an expert for the state. The expert had been retained to analyze global positioning system and cell phone data to determine the locations of the defendant and others at the time of the shooting. The defendant was convicted, and he appealed. The Appellate Court (183 Conn. App. 623) affirmed the conviction, rejecting the defendant's claims that the trial court improperly denied his motion to preclude the testimony of the state's expert witness concerning cell phone location data and improperly denied his request in the alternative for a six week continuance to consult with his own expert. The Appellate Court determined that the trial court properly concluded that the state's belated disclosure did not warrant the exclusion of the expert witness' testimony as a sanction. The Appellate Court further determined that the trial court did not abuse its discretion in denying the defendant's request for a continuance where the defendant was able to effectively cross-examine the expert witness and where a six week continuance would have disrupted the trial. The Appellate Court posited that, even if the trial court abused its discretion, the error was

harmless in light of the relative strength of the state's case. The Appellate Court declined to review the defendant's claim that the trial court abused its discretion in admitting the testimony of the state's expert witness without first holding a hearing under *State* v. *Porter*, 241 Conn. 57 (1997), to assess the scientific reliability and relevancy of the testimony. The defendant relied on the then newly released decision in *State* v. *Edwards*, 325 Conn. 97 (2017), which held that a trial court must hold a *Porter* hearing before admitting the testimony of an expert witness cell phone location data. In refusing to review the *Edwards* claim, the Appellate Court noted that the defendant had failed to preserve the claim by requesting a *Porter* hearing at trial. Finally, the Appellate Court held that the trial court properly admitted evidence of the defendant's failure to appear in court on an unrelated matter as evidence of consciousness of guilt and properly precluded the defendant's investigator from providing testimony to rebut that of the state's cell phone expert. The Supreme Court granted the defendant certification to appeal, and it will decide whether the Appellate Court properly upheld the trial court's rulings denying the defendant's motion to preclude the testimony of the state's expert witness and his request for a six week continuance. It will also decide whether the Appellate Court properly affirmed the admission of the consciousness of guilt evidence and the exclusion of Smith's testimony. Finally, the Supreme Court will decide whether the Appellate Court properly concluded that the defendant failed to preserve his *Edwards* claim.

IN RE TEAGAN K.-O., SC 20245
Juvenile Matters at Waterford

Child Protection; Neglect; Whether Trial Court Properly Denied Father's Motion to Dismiss Petition Alleging Predictive Neglect as to Child Born in Florida. Cassandra D. and Gary O. (the mother and father) have three children together. Their first two children were ordered committed to the care and custody of the Connecticut Department of Children and Families (department). When the mother was pregnant with a third child, the couple moved to Florida, and Teagan was born in a Gainesville hospital. Days after her birth, the department filed a petition in the Superior Court for Juvenile Matters at Waterford alleging that Teagan was being neglected. The petition also alleged that the mother and father's parental rights in their first child had been terminated and that a termination petition was pending as to their second child. Florida authorities then sought that jurisdiction over Teagan be transferred to the Connecticut court. A Florida court ordered the transfer, affirming a magistrate's finding

that Connecticut was a more convenient forum state because, given the parents' long and ongoing history with the department, the witnesses and evidence pertaining to the case were located in Connecticut. The department was then granted temporary custody of Teagan, and she was transported to Connecticut and placed in a foster home with one of her siblings. The father filed a motion to dismiss the neglect petition, claiming that the Connecticut court lacked subject matter jurisdiction over the matter. The trial court denied the father's motion to dismiss, finding that it had subject matter jurisdiction over the neglect petition under the dictates of the Uniform Child Custody Jurisdiction and Enforcement Act. The court noted that a Florida trial court had declined to exercise jurisdiction on the ground that Connecticut was the more appropriate forum, that a Florida appellate court had affirmed that decision, and that a Connecticut court had accepted the conclusion of the Florida trial court. The father appeals from the order denying his motion to dismiss the neglect petition. He acknowledges that an order that denies a motion to dismiss is not ordinarily deemed a final judgment, but he argues that the ruling here is immediately appealable because it threatens irreparable harm to the parent-child relationship. The father claims, as to the merits, that the trial court wrongly determined that it had jurisdiction over a Connecticut neglect petition that alleges predictive neglect as to a child who was born in Florida to parents who left Connecticut with no intention of returning, and he urges that a petition alleging predictive neglect must allege that the neglect will likely occur in the state that is exercising jurisdiction. Finally, the father contends that the trial court confused the doctrine of forum non conveniens with the requirement that a court must have subject matter jurisdiction, and he claims that the trial court failed to properly apply the law of subject matter jurisdiction when it denied his motion to dismiss.

The Practice Book Section 70-9 (a) presumption in favor of coverage by cameras and electronic media does not apply to the case above.

The summaries appearing here are not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. These summaries are prepared by the Staff Attorneys' Office for the convenience of the bar. They in no way indicate the Supreme Court's view of the factual or legal aspects of the appeal.

John DeMeo
Chief Staff Attorney

NOTICES OF CONNECTICUT STATE AGENCIES

CHEFA Community Development Corporation

Notice of Intent to Adopt Operating Procedures

In accordance with the provisions of Conn. Gen Stat. § 1-121, notice is hereby given that the CHEFA Community Development Corporation (the ''Corporation'') intends to adopt Operating Procedures (''Procedures''), for purposes of having written procedures for (1) adopting an annual budget and plan of operations; (2) hiring, dismissing, promoting and compensating employees, including an affirmative action policy and a requirement that the Corporation's Board of Directors (the ''Board'') approve the creation of a position or the filling of a vacant position; (3) acquiring real and personal property and contracting for services, including a requirement for Board approval of any non-budgeted expenditure in excess of five thousand dollars; (4) contracting for financial, legal, and other professional services, including a requirement that the Board solicit proposals at least once every three years for each such service which it uses; (5) awarding loans, grants and other financial assistance, including eligibility criteria, the application process and the role played by the Corporation's staff and Board; and (6) using surplus funds.

Such Procedures shall be deemed adopted and effective thirty days after this notice has been published in the Connecticut Law Journal, unless the Executive Director in her sole discretion, shall determine based on comments received from members of the public, during such thirty day period, that it would be desirable or appropriate to defer such adoption and effectiveness so that the Board may reconsider the proposed Procedures in light of such comments, such determination to be conclusively evidenced by the Executive Director's written notice thereof to the Board.

A copy of the proposed Procedures is available upon request by contacting Jeanette W. Weldon, Executive Director, CHEFA Community Development Corporation, 10 Columbus Boulevard, 7th Floor, Hartford, CT 06106, via email at jweldon@chefa.com or by telephone at (860) 520-4700.

All written comments, questions, and concerns regarding the proposed Procedures may be submitted within thirty days of the publication of this notice to Jeanette W. Weldon, Executive Director, CHEFA Community Development Corporation, 10 Columbus Boulevard, 7th Floor, Hartford, CT 06106 or via email at jweldon@chefa.com.

DEPARTMENT OF HOUSING

Notice of Issuance of a Certificate of Affordable Housing Completion in the Town of Westport

In accordance with C.G.S. 8-30g, the Department of Housing (DOH) has issued a Certificate of Affordable Housing Completion. This certificate entitles the Town of Westport to a Moratorium of Applicability with regard to said statute. The effective date of this moratorium is on the date of publication in the Connecticut Law Jour-

nal, and will remain in effect, unless revoked in accordance with the statute for a four year period. For additional information, please call or write to Laura Watson, Economic and Community Development Agent, DOH, 505 Hudson Street, Hartford, CT 06106, (860) 270-8169.

DEPARTMENT OF HOUSING

Notice of Availability of List of Municipalities Exempt from the Affordable Housing Appeals Procedure

In accordance with § 8-30-g of the Connecticut General Statutes, the Department of Housing (DOH) has prepared the list of municipalities that are exempt from the affordable housing appeals procedure and those municipalities that are not exempt. This list is effective March 1, 2019. A copy of this list is available on the agency website at www.ct.gov/doh For additional information please write to Laura Watson, Economic and community Development Agent, 505 Hudson Street, Hartford, CT 06106 or call at (860) 270-8169.

STATE ELECTIONS ENFORCEMENT COMMISSION

State Elections Enforcement Commission advisory opinions are published herein pursuant to General Statutes Section 9-7b (14) and are printed exactly as submitted to the Commission on Official Legal Publications.

DECLARATORY RULING 2019-01:

The State Contractor Status of Medical Marijuana Industry Licensees

On October 25, 2018, the State Elections Enforcement Commission (the ''Commission'') received a request for a Declaratory Ruling by Attorney Andrew C. Glassman of Pullman & Comley LLC concerning whether medical marijuana industry licenses would be considered state contracts. At its regular meeting on November 14, 2018, the Commission voted to initiate a declaratory ruling proceeding responsive to this petition.

In September 2018, Mr. Glassman verbally inquired of staff whether a company that has a license issued by the State of Connecticut to produce medical marijuana in the state is considered a state contractor. Given that the monetary thresholds in this licensing arrangement appear to have been met since the payment for the license exceeded $50,000 per year and the definition of ''state contract'' includes an ''agreement'' for ''a licensing arrangement,'' staff advised that such licenses would likely be covered.

Mr. Glassman now seeks a formal ruling from the Commission, arguing that ''licensing arrangement'' is not meant to include ''[licensees] operating a trade or business within the state'' because such a license is not a bilateral agreement between two parties and the state contractor restrictions are only meant to cover contracts in which the State is paying the party for services rather than the party paying the State. He further contends that such an interpretation would lead to the absurd result that occupational licenses such as those for barbers, doctors, and lawyers, would be covered by the state contractor ban.

Executive Summary

The plain language of General Statutes § 9-612 (f) (1) (C) clearly indicates that the medical marijuana industry licenses would be considered state contracts. Even if the language of the statute itself was not clear, the legislative history of the 2007 changes to the definition of state contract favors this reading: ''[O]ne of the things that this bill does is it expands the application of the prohibitions on contributions and solicitations by principals of state contractors to cover virtually any agreement, contract, or arrangement with the state for which the value is at least $50,000 in a calendar year, which includes fees, compensation, or remuneration of any kind.'' S. Proc., 2007 Sess., pp. 51-52, remarks of Senator Slossberg on Public Act 07-01.

I. Background

In 2012, Public Act 12-55, An Act Concerning the Palliative Use of Marijuana, became law. This Act permits the medical use of marijuana statewide for certain medical conditions, making Connecticut the seventeenth state to enact such a law. *See* Chapter 420f of the General Statutes (as amended by Public Act 12-55). The Act tasked the Department of Consumer Protection (''DCP'') to run the medial

marijuana program. There are three types of licenses issued by the State under the Program: (1) dispensary licenses; (2) dispensary facility licenses; and (3) producer licenses.[1] All licenses issued under the Program expire one year after the date of their issuance and annually thereafter if renewed. Regs., Conn. State Agencies § 21a-408-25 (b). Licensees are required to file a renewal application and the proper fees, as set forth below, 45 days prior to the expiration of the license. Regs., Conn. State Agencies § 21a-408-28 (a).

A. Dispensary Licenses

A dispensary license is given to individuals who are qualified to acquire, possess, distribute, and dispense marijuana. The individual must have both an active pharmacist license in good standing issued by DCP and have a position with a medical marijuana dispensary facility that has been awarded a license by DCP. The initial license fee is $100 and the annual renewal fee is $100, all of which are nonrefundable. General Statutes § 21a-408h; Regs., Conn. State Agencies § 21a-408-29 (6).

B. Dispensary Facility Licenses

A dispensary facility license is given to a place of business that qualifies to dispense or sell at retail marijuana to qualifying patients and primary caregivers. Only a dispensary facility that has obtained a license from DCP may dispense marijuana to such individuals.

The initial application fee is $5,000 with a $5,000 license fee, if approved, and a $5,000 renewal fee, all of which are nonrefundable. General Statutes § 21a-408h; Regs., Conn. State Agencies § 21a-408-29 (7) & (8).

C. Producer Licenses

A producer license allows the holder to operate a secure, indoor facility in which the production of marijuana occurs.

The initial application fee is $25,000 with a $75,000 license fee, if selected to be a producer, and a $75,000 annual renewal fee. All of these fees are nonrefundable. General Statutes § 21a-408i; Regs., Conn. State Agencies § 21a-408-29 (13).

After the 2012 legislation passed legalizing medical marijuana and DCP's regulations for the program were approved, consistent with its charge of administering the program, DCP issued a request for applications for producer licenses, seeking to award three, with an application deadline of November 15, 2013. There were 16 applications and the State awarded four licenses after two tied for third.[2]

As of April 2018, the number of producers has remained at four, and the number of dispensary facilities has increased from six to nine.[3] In addition, DCP awarded nine more dispensary facility licenses in December 2018.

[1] All of the information in this Background section is taken from DCP's website, https://portal.ct.gov/DCP/Medical-Marijuana-Program/Medical-Marijuana-Program, unless otherwise noted, and confirmed in discussions with its staff.

[2] Ken Dixon, ''Four companies win marijuana-growing licenses,'' Connecticut Post, January 28, 2014, https://www.ctpost.com/news/article/Four-companies-win-marijuana-growing-licenses-5183225.php.

[3] Matthew Ormseth, ''Medical Marijuana Patients Say There's a Pot Shortage In Connecticut,'' Hartford Courant, April 20, 2018, http://www.courant.com/news/connecticut/hc-news-marijuana-grower-shortage-20180326-story.html; https://portal.ct.gov/DCP/Medical-Marijuana-Program/Connecticut-Medical-Marijuana-Dispensary-Facilities.

II. Relevant Statutes

General Statutes § 9-612 (f) (1) (C) defines ''state contract'' as ***any agreement*** or contract:

- ***with the state or any state agency*** or any quasi-public agency,
- let through a procurement process ***or otherwise***,
- having ***a value of fifty thousand dollars or more***, or a combination or series of such agreements or contracts having a value of one hundred thousand dollars or more ***in a calendar year***,
- for (i) the rendition of services, (ii) ***the furnishing of*** any goods, material, supplies, equipment or ***any items of any kind***, (iii) the construction, alteration or repair of any public building or public work, (iv) the acquisition, sale or lease of any land or building, (v) ***a licensing arrangement***, or (vi) a grant, loan or loan guarantee.[4]

The statute goes on to state that ''state contract'' does not include any agreement or contract with the state, any state agency or any quasi-public agency that:

- is exclusively federally funded,
- an education loan,
- a loan to an individual for other than commercial purposes
- or any agreement or contract between the state or any state agency and the United States Department of the Navy or the United States Department of Defense.

General Statutes § 9-612 (f) (1) (C).

If a given license qualifies as a state contract under the above language, then a company holding the license will be deemed a ''state contractor'' and a certain limited group of people within the company will be deemed ''principals of state contractor'' pursuant to

General Statutes § 9-612 (f) (1) (D) & (E). The designation as principal will result in limitations on contributions. General Statutes § 9-612 (f) (2) (B).

III. Analysis

The plain and broad language of General Statutes § 9-612 (f) (1) (C) indicates that the medical marijuana industry licenses would be considered agreements to enter a licensing arrangement and therefore state contracts. The legislative history further bolsters this interpretation, as more fully discussed below.

In his petition, Mr. Glassman essentially makes four assertions as to why the medical marijuana producer license should not be considered a state contract. The Commission does not find any of these arguments persuasive and will address them in turn.

[4] The statute provides in full: ***''State contract'' means an agreement or contract with the state or any state agency*** or any quasi-public agency, let through a procurement process or otherwise, having ***a value of fifty thousand dollars or more***, or a combination or series of such agreements or contracts having a value of one hundred thousand dollars or more ***in a calendar year***, for (i) the rendition of services, (ii) the furnishing of any goods, material, supplies, equipment or any items of any kind, (iii) the construction, alteration or repair of any public building or public work, (iv) the acquisition, sale or lease of any land or building, (v) ***a licensing arrangement***, or (vi) a grant, loan or loan guarantee. ''State contract'' does not include any agreement or contract with the state, any state agency or any quasi-public agency that is exclusively federally funded, an education loan, a loan to an individual for other than commercial purposes or any agreement or contract between the state or any state agency and the United States Department of the Navy or the United States Department of Defense. General Statutes § 9-612 (f) (1) (C) (emphasis added).

Argument 1 – The definition of a ''state contract'' requires that the State is the party giving money and receiving products or services in return, which is not the case in the context of a medical marijuana industry license.

The Petitioner argues that in order to be a ''state contract,'' there must be a bilateral negotiated written agreement wherein the contractor is *receiving* $50,000 or more from the State rather than the State being the party receiving payment. According to the Petitioner's preferred definition, the State must be receiving products or services and giving money.

While this might be a fine statutory definition of ''state contract'', it is not *the* definition in Connecticut's state contractor provisions. There is nothing in the plain language of General Statutes § 9-612 (f) that indicates the state contractor provisions are only triggered when the State is the party paying over $50,000 for something of value provided by the contractor as opposed to the contractor paying over $50,000 for something of value provided by the State.

Arrangements resulting in payments to the State rather than from the State also fall within the definition of state contract. The Commission has long advised this. For example, the Commission's Frequently Asked Questions webpage for the state contractor provisions provide:

> **Question**: Is a contract with a state agency that produces revenue to the state included in the definition of a state contract and therefore subject to the contribution and solicitation ban?
>
> **Answer**: Yes. Contracts that result in revenue to the state of Connecticut, ***such as payments paid by airlines*** to Bradley International Airport for use of communication towers, are considered state contracts for purposes of the ban.

SEEC Website, ''Frequently Asked Questions for State Contractor Provisions,'' https://www.ct.gov/seec/cwp/view.asp?a=3563&q=505580.

In 2008, staff advised that a sales tax emption program would be considered a state contract even though under the program, the quasi-public agency would be the party selling the goods – specifically, in that case, it was the Connecticut Development Authority purchasing construction materials and selling them to program participants to essentially pass on its sales tax exemption. In 2016, Commission staff members advised a nonprofit that had hired a local community college to provide services to them for over $50,000 that the arrangement would be considered a state contract even though the state was the party providing services and getting paid. The statute is written broadly and works both ways. Staff also advised that year that the state's deal with Sikorsky Aircraft, where it offered the company millions of dollars in sales tax exemptions and grants, would also be covered because, again, the provisions work in both directions.

While the Commission itself has not yet had occasion to opine this in formal, written guidance until now, it agrees with its staff's longstanding advice. There is simply nothing in the statute that indicates it only covers contracts where the money is going in one direction but not the other.

It is also worth noting that the original state contractor ban enacted with Public Act 05-5 included in the definition of ''state contract'' the ''rendition of ***personal*** services'' rather than ''rendition of services'' and included no definition of the phrase ''rendition of personal services.'' In Opinion of Counsel 2006-6, Commis-

sion staff construed this phrase to mean: ''*any* agreement for *any* service rendered to the state, a state agency, or quasi-public agency for which the provider receives a fee, remuneration, or ***any compensation of any kind, either directly from the state or through the contractual arrangement with the state,*** unless otherwise specifically exempted.''

The legislature agreed with this broad interpretation and actually amended the statute to make sure that the broad application was clear. In Public Act 07-1, the definition of state contract was modified to include the phrase ''rendition of services'' rather than ''rendition of personal services'' and a definition of this phrase tracking that from Opinion of Counsel 2006-6 was also added to General Statutes § 9-612 (g) (1) (I) (now General Statutes § 9-612 (f) (1) (I)). The legislature went on to further broaden other areas of the definition of state contract as well by amending the language we must now interpret as follows:

> (C) ''State contract'' means an agreement or contract with the state or any state agency or any quasi-public agency, let through a procurement process or otherwise, having a value of fifty thousand dollars or more, or a combination or series of such agreements or contracts having a value of one hundred thousand dollars or more in a [fiscal] calendar year, for (i) the rendition of [personal] services, (ii) the furnishing of any goods, material, supplies,[or] equipment or any items of any kind, (iii) the construction, alteration or repair of any public building or public work, (iv) the acquisition, sale or lease of any land or building, (v) a licensing arrangement, or (vi) a grant, loan or loan guarantee. ''State contract'' does not include any agreement or contract with the state, any state agency or any quasi-public agency that is exclusively federally funded, an education loan or a loan to an individual for other than commercial purposes.

The bill also added to the definition exceptions to the definition for education loans and for loans to an individual that were not for commercial purposes; thus, making it clear that all other loans are covered.

The legislative history of the 2007 changes to the definition of state contracts includes this description of the legislature's intent in doing so: ''[O]ne of the things that this bill does is it expands the application of the prohibitions on contributions and solicitations by principals of state contractors ***to cover virtually any agreement, contract, or arrangement with the state for which the value is at least $50,000 in a calendar year***, which includes fees, compensation, or remuneration of any kind.'' S. Proc., 2007 Sess., pp. 51-52, remarks of Senator Slossberg (emphasis added).

Individuals and entities who receive commercial loans, grants and tax incentives with large payments involved also have a motivation to protect that relationship and to endear themselves to the very people who control the award of such benefits.[5] So do those whose business receives a lucrative license in return for a payment of $50,000 or more. It is precisely this type of licensing arrangement that the state contractor provisions are designed to prevent from influencing campaign finance.

[5] The Petitioner, in a February 1, 2019 comment to the Commission's proposed draft, then argued that the language covers only situations where the state is acting as either a buyer or a seller for an item being sold. This argument ignores the explicit statutory language covering grants, loans, loan guarantees and licensing arrangements. The legislature recognized the breadth of its language when it specifically exempted out education loans and loans to an individual for other than commercial purposes. It did not choose to exempt out all occupational licenses or permits issued by the state, even those with a fee of over $50,000, although it certainly could have done so.

Argument 2 – The term ''licensing arrangements'' in General Statutes § 9-612 (f) (1) is only meant to include arrangements where there is a bilateral understanding or agreement between the parties.

The Petitioner also argues that the term ''licensing arrangement'' is only meant to include those arrangements where there is a bilateral understanding or agreement between the party and the State and therefore does not include the acquisition of a license required to run a business within the State. He contends that ''licensing arrangements'' as used in the statute refers only to ''the use of real estate or facilities often called 'licenses' because licenses tend to be for shorter terms than leases and do not convey interests in real estate.''

He cites the 5th edition of Black's Law Dictionary (1979) for the following definition of ''license'' – ''permission accorded by competent authority to do an act which, without such permission, would be illegal, a trespass, or a tort.'' Under this definition that the Petitioner himself has cited, it is enough that the act would be illegal to make the permission by a competent authority conferring a right into a license. It does not have to be a trespass on real estate. The marijuana producer license is a permission accorded by a competent authority, conferring the right to produce pot products which without such authorization would be illegal.

The Petitioner further refers to the definition of ''license'' in Black's 5th edition in which the following statement and citation is made: ''A [state-granted] license is not a contract between the state and the licensee, but is a mere personal permit.'' *Rosenblatt v. California State Board of Pharmacy*, 69 Cal. App. 23, 158 P.2d 199, 203 (1945). He goes onto assert that a state-issued license cannot possibly be construed to be a contract between the state and the licensee.

The Commission is not required to determine that a medical marijuana dispensary facility license is a contract. Rather, it must determine whether, pursuant to General Statutes § 9-612 (f) (1)'s definition of ''state contract,'' such a license is a contract *or an agreement*. In the same 1979 edition of Black's, the definition of ''agreement'' states: ''Although often used as synonymous with 'contract', agreement is a broader term; e.g. an agreement might lack an essential element of a contract.'' The most recent 10th edition of Black's Law Dictionary further expands upon this in the definition of ''agreement'':

> The term ''agreement'' although frequently used as synonymous with the word ''contract,'' is really an expression of greater breadth of meaning and less technicality. Every contract is an agreement; but not every agreement is a contract. In its colloquial sense, the term ''agreement'' would include any arrangement between two or more persons intended to affect their relations (whether legal or otherwise) to each other. . . . [E]ven an agreement which is intended to affect the legal relations of the parties does not necessarily amount to a contract in the strict sense of the term. For instance, a conveyance of land or a gift of a chattel, though involving an agreement, is . . . not a contract; because its primary legal operation is to effect a transfer of property, and not to create an obligation.

Black's Law Dictionary (10th ed. 2014) (citing 2 *Stephen's Commentaries on the Laws of England* 5 (L. Crispin Warmington ed., 21st ed. 1950)).

With this context in mind, the Commission believes that there *is* an agreement between the State and the licensee in the context of a medical marijuana producer license. In order to have the license, the producers must agree to abide by a number of terms as laid out in the statutes and regulations. They must agree to not

produce or manufacture marijuana in any place except their approved production facility, to not sell, deliver, transport or distribute marijuana from any place except in their approved production facility, to not produce or manufacture marijuana for use outside of Connecticut, and to establish and maintain an escrow account in a financial institution in Connecticut in the amount of $2 million, to name a few. Regs., Conn. State Agencies § 21a-408-54. There are also requirements on how licensed producers keep records, which types of marijuana products they may sell, how they package, label, and transport their products, and how they maintain proper security at their facility. Regs., Conn. State Agencies §§ 21a-408-56 through 21a-408-57, 21a-408-62 through 21a-408-66. And of course they are required to hold the license they receive (in exchange for submitting an application and payment and then, if chosen, abiding by the terms laid out in the statutes and regulations) in order to sell marijuana to dispensaries legally.

The Petitioner's offer of an alternative definition makes no sense. In order to argue that ''licensing arrangements'' are really short-term real estate leases, he ignores the structure of the statute and seems to be applying the interpretive principle of *noscitur a sociis* which basically says that you interpret items in a list to be similar. The problem with his argument, however, is that in order for it to work, the statute would have had to have been written with the following changes so that the term licensing arrangement really was part of the list that pertains to real estate:

> *''State contract'' means an agreement or contract with the state or any state agency* or any quasi-public agency, let through a procurement process or otherwise, having *a value of fifty thousand dollars or more*, or a combination or series of such agreements or contracts having a value of one hundred thousand dollars or more *in a calendar year*, for (i) the rendition of services, (ii) the furnishing of any goods, material, supplies, equipment or any items of any kind, (iii) the construction, alteration or repair of any public building or public work, (iv) the acquisition, sale or lease of any land or building, [(v)] or *a licensing arrangement*, or [(vi)] (v) a grant, loan or loan guarantee. ''State contract'' does not include any agreement or contract with the state, any state agency or any quasi-public agency that is exclusively federally funded, an education loan, a loan to an individual for other than commercial purposes or any agreement or contract. (Emphasis added).

The statute is not so written. Instead the term licensing arrangement stands alone and separate from the language regarding real estate. The Petitioner is attempting to subsume item (v) of the list into item (iv). Such a result would essentially render the term meaningless since the language used in item (iv) is already so broad as to cover short-term leases. *See Sylvan R. Shemitz Designs, Inc., v. Newark Corp.*, 291 Conn. 224, 235 (2009) (''It is a basic tenet of statutory construction . . . that the legislature does not intend to enact meaningless provisions.'' (internal quotation marks omitted)).

The statute, as written, simply does not support the Petitioner's argument that licensing arrangements are only real estate licenses.

> **Argument 3 – Determination of the $50,000 threshold should not be based on the income derived from the contract.**

The Petitioner maintains that Commission staff verbally advised him that it is the income derived by the licensee in the industry that is the operative amount considered in determining whether the $50,000 threshold has been met. He goes

on to assert that this would cover most licensees in the State because most of them generate an income and profit for the license holder greater than $50,000.

Staff never advised the Petitioner that the determination of the $50,000 threshold would be based on what a person or entity earned as a result of holding the license. Rather, the Petitioner was advised that the $50,000 threshold is determined by the payment exchanged. With respect to two of the three marijuana licenses, this means they are not covered because the payment involved with those two licensing arrangements is well below $50,000 per year. The payment for a dispensary license is $100-$200 annually and the payment for a dispensary facility license is $5,000-$10,000 annually. In the case of the medical marijuana provider license, however, the cost of obtaining and/or maintaining the license each year is easily determined and is well over the $50,000 threshold.

Argument 4 – Deeming the medical marijuana industry licenses to be state contracts would mean that occupational licenses such as those for hairdressers, barbers, doctors, lawyers, liquor store operators, and restauranteurs would also be covered.

The Petitioner also argues that ''the logical extension of [Commission staff's] position would result in everyone who needs an occupational permit or license to be considered a state contractor.''

As previously discussed, the legislature defined ''state contract'' to require, among other things, that payments involved between the state and contractor had to amount to $50,000 or more in a calendar year. Unlike the medical marijuana producer license, the licenses required of hairdressers, barbers, lawyers, and liquor store operators do not involve payments of $50,000 or more. In fact, while the Department of Consumer Protection issues over 200 types of licenses, permits and credentials, only one of them costs over $50,000 per year – the medical marijuana producer license.[6]

IV. Conclusion

Given that the cost of a medical marijuana producer license exceeds $50,000 per year and the definition of state contractor includes ''a licensing arrangement,'' the Commission concludes that the producer license is covered under the state contractor restrictions while the remaining two types of licenses issued under the program, dispensary and dispensary facility, are not given that they cost less than $50,000 per year.[7]

Adopted this __th day of February, 2019 at Hartford, Connecticut by a vote of the Commission.

Salvatore Bramante, *Vice Chair*

[6] Email from Department of Consumer Protection Commissioner Michelle Seagull, dated November 29, 2018. Commissioner Seagull noted in her email that sealed ticket distributors pay a license fee per year of only $2,500 but often pay over $50,000 per year to the State as they are required to pay a percentage of their sales back to the State. Whether they would be considered state contractors would be a separate discussion. Sealed tickets are lottery type scratch-off tickets that are sold typically to nonprofit organizations to sell at their fundraising events where the nonprofit pays out any winnings. Telephone conversation with Charles Kostruba and James Schmitt of the Department of Consumer Protection's Charitable Games Unit, November 30, 2018.

[7] The resulting contribution and solicitation restrictions laid out in General Statutes § 9-612 (f) do not apply to everyone who works at the licensee but only to those who are considered principals. Anyone seeking guidance on whether they meet the definition of principal is urged to call Commission staff.

Resolution and Order Setting Forth
Specified Proceedings for Petition for Declaratory Ruling

Requested by Caitlin Clarkson Pereira Regarding
the Use of Campaign Funds to Offset Candidate's Childcare Costs

Pursuant to General Statutes § 4-176 (e) and Connecticut Agency Regulations § 9-7b-65 (c), it is hereby resolved and ordered that the following proceedings are set regarding the Petition for a Declaratory Ruling in Response to ''Opinion of Counsel 2018-05: Use of Public Funds to Offset Candidate's Child Care Costs,'' received on October 19, 2018 from Caitlin Clarkson Pereira:

(1) The Commission votes to approve for comment the Proposed Declaratory Ruling 2019-02: *Use of Campaign Funds to Offset Candidate's Child-care Costs*.

(2) The Commission directs staff to post the Proposed Declaratory Ruling on the SEEC website, and to circulate the Proposed Declaratory Ruling via email to the list on file of all persons who have requested notice of declaratory rulings, with a comment period to close at 11:59 p.m. on Wednesday, March 13, 2019, with consideration of any received comments at the Wednesday, March 20, 2019 Commission meeting.

Salvatore Bramante – *Vice Chair* Date
By Order of the Commission

PROPOSED DECLARATORY RULING 2019-02:

The Use of Campaign Funds to Offset Candidate's Childcare Costs

On October 19, 2018, the State Elections Enforcement Commission (the ''Commission'') received a request for a Declaratory Ruling by Caitlin Clarkson Pereira, a candidate for state representative during the 2018 election cycle, as to whether public grant funds that her candidate committee received to run for office through Connecticut's clean elections program, the Citizens' Election Program (''CEP''), could be used to cover childcare costs while she was campaigning. The Petitioner had asked this question of Commission staff during the election cycle and, in Opinion of Counsel 2018-05: *Use of Public Funds to Offset Candidate's Child Care Costs*, issued on August 9, 2018, was told that such costs were not permissible for CEP candidates to pay out of clean elections grant monies.

In her Declaratory Ruling request, the Petitioner argues that the opinion of counsel misinterpreted the laws and regulations and asks that the Commission reconsider the result.

At its regular meeting on November 14, 2018, the Commission voted to initiate a declaratory ruling proceeding responsive to this Petition and the Commission now issues the following guidance.

Executive Summary

Campaign funds generally may be spent to pay for childcare costs incurred by a candidate as a result of campaigning as long as such payments are (1) a direct result of campaign activity which would not exist irrespective of the candidate's campaign; (2) reasonable and customary for the services rendered; and (3) properly documented by the campaign.

For candidates participating in the CEP, however, campaign funds may not be spent on such costs after the campaign has been approved to receive grant monies from the CEF (''Citizens' Election Fund'').

I. Applicable Law

In general, for expenditures to be considered permissible, they must be made for the lawful purpose of the committee, and, for a candidate committee, the lawful purpose means ''the promoting of the nomination or election of the candidate who established the committee.'' General Statutes § 9-607 (g).

General Statutes § 9-607 (g) (4) further states:

> [E]xpenditures for ''personal use'' include expenditures to defray normal living expenses for the candidate, the immediate family of the candidate or any other individual and expenditures for the personal benefit of the candidate or any other individual as defined in [General Statutes § 9-607 (g) (2)]. ***No goods, services, funds and contributions received by any committee under this chapter shall be used or be made available for the personal use of any candidate or any other individual.*** No candidate, committee, or any other individual shall use such goods, services, funds or contributions for any purpose other than campaign purposes permitted by this chapter.
>
> (Emphasis added.)

For candidates who have been approved to receive a grant from the CEF, however, the rules are stricter than what is laid out in General Statutes § 9-607 (g) alone. CEP grant recipients must additionally abide by a set of regulations, including Regs. Conn. State Agencies § 9-706-1 (a), which state:

> ***All funds in the depository account of the participating candidate's qualified candidate committee***,[1] including grants and other matching funds distributed from the Citizens' Election Fund, qualifying contributions and personal funds, shall be used ***only for campaign-related expenditures made to directly further*** the participating candidate's nomination for election or election to the office specified in the participating candidate's affidavit certifying the candidate's intent to abide by Citizens' Election Program requirements.
>
> (Emphasis added.)

The CEP regulations further provide:

> (b) In addition to the requirements set out in section 9-706-1 of the Regulations of Connecticut State Agencies, participating candidates and the treasurers of such participating candidates shall comply with the following citizens' election program requirements. Participating candidates and the treasurers of such participating candidates shall ***not*** spend funds in the participating candidate's depository account for the following:line
>
> 1. ***Personal use***, as described in section 9-607(g)(4) of the Connecticut General Statutes; [and]line
>
> 2. The ***participating candidate's personal support or expenses***, such as for personal appearance or the candidate's household day-to-day food items, supplies, merchandise, mortgage, rent, utilities, clothing or attire, ***even if such personal items*** (such as the participating candidate's residence, or business suits) ***are used for campaign related purposes***; . . . .

Regs. Conn. State Agencies § 9-706-2 (b) (Emphasis added.)

II. Commission Staff's Advice in Opinion of Counsel 2018-05

In Opinion of Counsel 2018-05, Commission staff cited the above and referenced other scenarios in which it has been asked about the limits on personal use under the Program:

> We have been asked, for example, whether public funds could be used to cover part of the mortgage payments for a family member's house that was used as campaign headquarters, to cover a portion of the candidate's personal cell phone bill since it was used to make calls to campaign staff and voters, and to pay for the candidate's clothing which was purchased with campaign engagements in mind. We have looked at whether public funds could be spent to replace the tires of a car that suffered wear and tear crisscrossing the state during a campaign. We have been asked whether CEP funds could be used to pay for a candidate's

[1] A ''qualified candidate committee'' is defined as:

> A candidate committee (A) established to aid or promote the success of any candidate for nomination or election to the office of Governor, Lieutenant Governor, Attorney General, State Comptroller, State Treasurer, Secretary of the State, state senator or state representative, and (B) ***approved by the commission to receive a grant from the Citizens' Election Fund*** under section 9-706.§

General Statutes § 9-700 (12) (emphasis added).

flight to Amsterdam in order to attend a conference the subject of which was part of his campaign platform and would result in pictures he could use in mailers.

Staff explained that while it was sympathetic to these requests and understood the argument that the personal items were being used for campaign-related purposes, it was concerned with the regulations mandating that funds were not to be spent on items that are personal in nature, *even if campaign-related*, since the regulations specifically state that grant funds were to be used ''only for campaign-related expenditures made ***to directly further***'' the candidate's nomination for election or election to the specified office. Regs., Conn. State Agencies § 9-706-1 (a) (emphasis added). Under the regulations, ***even if personal items are used for campaign related purposes,*** costs for personal support or expenses may not be paid out of grant monies. Because of these regulations, staff opined that CEP grant monies should not be used to pay for a participating candidate's childcare costs.

III. Commission's Prior Decisions & Other Precedent

The Commission has considered the spending of campaign funds for personal use to be a serious issue. In one matter it assessed a fine equivalent to twice the amount of what a CEP candidate committee paid for clothing and other personal items in violation of the personal use statutes and CEP regulations. *See In re Audit Report for Friends of Gerry Garcia*, File No. 2012-072. The purchase of clothing outside of the CEP has also been found to be personal use. For example, in *In the Matter of a Complaint by John Bysko, et al.*, Old Lyme, File No. 2004-170, the Commission found a violation of the prohibition against personal use after an exploratory committee used funds to pay for the candidate's shoes and clothing. In another case, *In the Matter of a Complaint by Adam Gutcheon*, Windsor, File No. 2002-192, the Commission ordered the respondent candidate to forfeit the equivalent of what his committee had spent on clothing out of campaign funds. *See also In the Matter of Complaints by Tom Kelly*, Bridgeport, File Nos. 2011-090 & 097 (finding that political committee's reimbursements to chairperson for telephone, computer, and internet access bills, without any records substantiating relation to committee, violated personal use prohibition); *In the Matter of Government Action Fund (GAF PAC)*, File No. 2008-003 (concluding that a political committee's payment of chairman senator's personal cell phone bill and his personal credit card without adequate documentation, as well as payments for him to attend legislative conferences, raised personal use concerns).

Over forty years ago, the Commission did, however, address the permissibility of paying for childcare with privately raised campaign funds. In 1976, the Commission issued an advisory opinion that found the cost of care for a dependent to be part of traveling expenses and therefore a permissible expenditure. *See* Advisory Opinion 1976-23: *Cost of Care for Dependents*. The Commission considered the fact that the statutes permit a campaign funds to be used to pay for the candidate's expenses for postage, telegrams, telephoning, stationery, expressage, traveling, meals and lodging provided that the candidate adequately documented the expenses. The Commission then reasoned that freeing a candidate to travel by paying for his or her childcare was as necessary as procuring a bus ticket or renting a car since ''if such care were not purchased, the candidate, presumably, would not be able to travel to attend whatever campaign functions were required, as surely as if the candidate could not purchase a ticket on public transportation.'' *Id.*

We also looked to other jurisdictions with clean elections programs that provide grant monies. Of the ten that provided responses to Commission staff's survey, four of them – Massachusetts, West Virginia, Oakland, CA, and Tucson, AZ – would

not allow campaign funds to be used for childcare. Two jurisdictions – Maryland and Minnesota[2] – allow public funds to be spent on childcare costs. Three jurisdictions have not opined on the subject – Maine, Michigan, and Seattle, WA. New York City's program has the most comprehensively articulated approach – allowing for privately raised funds to be used when certain conditions are met but prohibiting the use of matching grant monies given by the state.[3]

IV. Analysis

While the Petitioner's request was limited to the use of clean election grant monies, the Commission will take this opportunity to point out that it is not retracting its 1976 advisory opinion and that it would be a permissible expenditure of *privately raised* campaign funds to cover the costs of childcare incurred by a candidate while campaigning as long as such payments are: (1) a direct result of campaign activity which would not exist but for the candidate's campaign; (2) reasonable and customary for the services rendered; and (3) properly documented by the campaign.[4]

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[2] Minnesota has a specific statute that recognizes the cost of childcare for a candidate's children while campaigning as a legitimate expenditure, whether public or general campaign funds are used. *See* Minn. Stat. § 10A.01, subd. 26 (11).

[3] Prior to 2018, New York City's matching funds program had a specific statutory provision that prohibited the use of campaign funds to cover childcare costs. Section 3-702 (21) (b) of the administrative code of the City of New York had provided: ''Campaign funds shall not be converted by any person to a personal use which is unrelated to a political campaign. Expenditures not in furtherance of a political campaign for elective office include the following: . . . (6) Tuition payments and childcare costs; . . . .''

After a series of hearings in 2018, the New York City legislature passed legislation on October 31, 2018 to permit campaign funds to be used for certain childcare expenses provided specified criteria had been met. Specifically, the language modified subdivision 21 of section 3-702 to permit campaign funds to be spent on:

> 13. Childcare services, provided that: (i) the candidate has received an approved statement of campaign childcare eligibility, pursuant to subdivision 23 of this section, demonstrating that such services are for a child or children under thirteen years of age for whom the candidate is a primary caregiver and that either the need for such services would not exist but for the campaign or the candidate has experienced a significant loss of salary or wage earnings that would not have occurred but for the campaign; and (ii) that expenditures for such services may only be incurred during the calendar year of the election, and the year immediately preceding the calendar year of the election, and may not be incurred after such election is held.

The legislation further provides that such childcare expenses are exempted from the expenditure limit for the first $20,000 spent in the election year. Notably, the legislation only applies to ***non-public*** campaign funds and only during the calendar year of the election and the immediately preceding year.

See A Local Law to Amend the Administrative Code of the City of New York, in Relation to Permitting the Use of Campaign Funds for Certain Childcare Expenses, File No. 0899-2018.

[4] When a committee anticipates it will pay someone over $100 for services, it is required to have a written agreement in place which lays out the nature and duration of the fee arrangement and describes the scope of the work to be performed before any work is begun, and is also required to maintain records documenting the actual work performed or services rendered. *See* Regs., Conn. State Agencies § 9-607-1. In this particular case, where personal use concerns are raised even if the payment is well below $100, the Commission still urges some base level documentation of the childcare services being provided at all amounts, such as the dates and hours worked, the associated fee, and the campaign activity that necessitated the childcare.

As far as whether CEP grant monies may be used to cover a candidate's childcare costs while campaigning, the Commission confirms its staff's advice that under the current law and regulations, once a committee is approved to receive CEP grant funds, its campaign funds may not be used to pay for such expenses. The regulations that come into play once a campaign has been approved for a grant state that all expenditures must ''directly further'' the candidate's campaign and ''even if'' personal items are used for campaign related purposes, costs for personal support or expenses may not be paid out of grant monies.

The Commission reminds candidates that these regulations only come into play once the candidate committee has been approved to receive a grant. As such, the candidate committee of a candidate intending to participate in the CEP may pay for the candidate's childcare expenses with potentially qualifying contributions raised to demonstrate adequate public support in connection with the grant application, provided the three criteria listed above have been met. This may occur up until the committee is approved for a grant.

V. Conclusion

Privately raised campaign funds may generally be spent to pay for childcare costs incurred by a candidate as a result of campaigning as long as such payments are (1) a direct result of campaign activity which would not exist but for of the candidate's campaign; (2) reasonable and customary for the services rendered; and (3) properly documented by the campaign.

In the context of candidates participating in the CEP, campaign funds may be spent on such costs up until the campaign has been approved to receive a clean elections grant from the CEF. Once a committee is approved for a grant, monies may not be spent on childcare.

A change in legislation would be needed to alter this outcome. If the legislature chooses to consider allowing CEP grant monies to be used for costs such as childcare, the Commission would recommend looking to New York City's clean elections program for its recent handling of the issue. While New York City does not ultimately allow such an expenditure out of matching grant funds, the documentation requirements and restrictions recently adopted into its law are instructive.

This constitutes a declaratory ruling pursuant to General Statutes § 4-176. A declaratory ruling has the same status and binding effect as an order issued in a contested case and shall be a final decision for purposes of appeal in accordance with the provisions of General Statutes § 4-183, pursuant to General Statutes § 4-176 (h). Notice has been given to all persons who have requested notice of declaratory rulings on this subject matter.

Adopted this __th day of March, 2019 at Hartford, Connecticut by a vote of the Commission.

Anthony J. Castagno, *Chairman*

STATE OF CONNECTICUT
DIVISION OF CRIMINAL JUSTICE

JOB OPPORTUNITY

DCJ Deputy Assistant State's Attorney
Judicial District of Danbury

PLEASE FOLLOW THE SPECIFIC APPLICATION FILING INSTRUCTIONS ON THE LAST PAGE

LOCATION: 146 White Street, Danbury, CT 06810

HOURS: 8:00 a.m. – 5:00 p.m.

SALARY RANGE: $67,641.02 - $141,217.18 Yearly

PCN: 5014/83099

CLOSING DATE: March 15, 2019

Candidates may be required to handle a variety of situations, including afterhours work with police departments and scene investigation, as well as community involvement, such as citizens police academies. Demonstrated trial experience, ability to write well, knowledge of the judicial district and knowledge of computer assisted trial demonstration programs preferred. A legal writing sample should be submitted with the application.

Examples of Duties

Reviews all documentation relative to assigned criminal cases and infractions and directs supplemental or further investigation; prepares cases for arraignment, selecting appropriate charges, preparing original statement of facts; reviews outstanding defense motions and prepares responses or objections as appropriate; interviews witnesses and victims; evaluates strengths and weaknesses of case in light of above findings; initiates and completes related legal research; responsible for plea negotiation with defense attorneys; conducts pre-trial conferences; conducts jury selection; tries cases before juries, three-judge panels, single judge or magistrate; may prepare appellate material for submission to Chief State's Attorney's Office after conviction; reviews applications for arrest warrants and - upon approval - signs and presents to presiding judge for final review and signature; may review applications for search and seizure warrants; maintains liaison with and functions as resource to state and local police; advises victims of crimes as to their rights and directs them to the appropriate supportive agencies; defends petitions of habeas corpus including preparation of pleadings, argument of motions, and trial of action; if a member of the Appellate Unit, defends appeals brought by convicted defendants before the Appellate Court and Supreme Court; performs related duties as required.

Knowledge, Skill and Ability

Knowledge of criminal law and legal process, legal principles and practice; knowledge of and ability to interpret and apply relevant State and federal criminal law; knowledge of the statutory authority, operation and administration of the Division of Criminal Justice; considerable interpersonal skill; considerable negotiating skill, considerable trial and counseling skills; considerable oral and written communi-

cation skill; considerable ability to analyze legal problems, present statements of fact, law and argument; ability to write legal briefs and supporting documentation.

Minimum Qualifications – General Experience

Membership in the Connecticut Bar and residency in the State of Connecticut.

Application Procedure

In addition to meeting the above requirements, candidates must submit the following information in order to be considered for this position.

1. Cover letter

2. Division of Criminal Justice Application for Employment - available online at **www.ct.gov/csao**

3. Resume

4. Copy of law school transcript

5. Writing Sample

6. The names and contact information for three (3) professional references to:

By e-mail to: DCJ.HR@ct.gov with a copy to DCJ.Danbury@ct.gov. All documents must be combined into a single pdf

(This is the Preferred Method)

Or

Office of the Chief State's Attorney
300 Corporate Place
Rocky Hill, CT 06067
Attn: Human Resources

Application packages must be received or postal stamped no later than **March 15, 2019**

Applications received by facsimile will not be accepted

A complete job specification for DCJ Deputy Assistant State's Attorney is available here.

STATE OF CONNECTICUT

DIVISION OF CRIMINAL JUSTICE

JOB OPPORTUNITY

DCJ Deputy Assistant State's Attorney
Hartford Judicial District
G.A. 12 in Manchester

PLEASE FOLLOW THE SPECIFIC APPLICATION FILING INSTRUCTIONS ON THE LAST PAGE

LOCATION: 410 Center Street, Manchester, CT 06040

HOURS: 8:00 a.m. – 5:00 p.m.

SALARY RANGE: $67,641.02 - $141,217.18 Yearly

PCN: 5066/5091

CLOSING DATE: March 15, 2019

In the Division of Criminal Justice, this class is accountable for receiving training and representing the interests of the state in prosecution of assigned criminal and motor vehicle cases and infractions.

Examples of Duties

Reviews all documentation relative to assigned criminal cases and infractions and directs supplemental or further investigation; prepares cases for arraignment, selecting appropriate charges, preparing original statement of facts; reviews outstanding defense motions and prepares responses or objections as appropriate; interviews witnesses and victims; evaluates strengths and weaknesses of case in light of above findings; initiates and completes related legal research; responsible for plea negotiation with defense attorneys; conducts pre-trial conferences; conducts jury selection; tries cases before juries, three-judge panels, single judge or magistrate; may prepare appellate material for submission to Chief State's Attorney's Office after conviction; reviews applications for arrest warrants and - upon approval - signs and presents to presiding judge for final review and signature; may review applications for search and seizure warrants; maintains liaison with and functions as resource to state and local police; advises victims of crimes as to their rights and directs them to the appropriate supportive agencies; defends petitions of habeas corpus including preparation of pleadings, argument of motions, and trial of action; if a member of the Appellate Unit, defends appeals brought by convicted defendants before the Appellate Court and Supreme Court; performs related duties as required.

Knowledge, Skill and Ability

Knowledge of criminal law and legal process, legal principles and practice; knowledge of and ability to interpret and apply relevant State and federal criminal law; knowledge of the statutory authority, operation and administration of the Division of Criminal Justice; considerable interpersonal skill; considerable negotiating skill, considerable trial and counseling skills; considerable oral and written communication skill; considerable ability to analyze legal problems, present statements of fact, law and argument; ability to write legal briefs and supporting documentation.

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3. Resume

4. Copy of law school transcript

5. The names and contact information for three (3) professional references to:

By e-mail to: DCJ.HR@ct.gov, cc: DCJ.Hartford@ct.gov. All documents must be combined into a single pdf

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Office of the Chief State's Attorney
300 Corporate Place
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Applications received by facsimile will not be accepted

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STATE OF CONNECTICUT

DIVISION OF CRIMINAL JUSTICE

JOB OPPORTUNITY

DCJ Deputy Assistant State's Attorney
Hartford Judicial District
G.A. 13 in Enfield

PLEASE FOLLOW THE SPECIFIC APPLICATION FILING INSTRUCTIONS ON THE LAST PAGE

LOCATION: 111 Phoenix Avenue, Enfield, CT 06082

HOURS: 8:00 a.m. – 5:00 p.m.

SALARY RANGE: $67,641.02 - $141,217.18 Yearly

PCN: 5097

CLOSING DATE: March 15, 2019

In the Division of Criminal Justice, this class is accountable for receiving training and representing the interests of the state in prosecution of assigned criminal and motor vehicle cases and infractions.

Examples of Duties

Reviews all documentation relative to assigned criminal cases and infractions and directs supplemental or further investigation; prepares cases for arraignment, selecting appropriate charges, preparing original statement of facts; reviews outstanding defense motions and prepares responses or objections as appropriate; interviews witnesses and victims; evaluates strengths and weaknesses of case in light of above findings; initiates and completes related legal research; responsible for plea negotiation with defense attorneys; conducts pre-trial conferences; conducts jury selection; tries cases before juries, three-judge panels, single judge or magistrate; may prepare appellate material for submission to Chief State's Attorney's Office after conviction; reviews applications for arrest warrants and - upon approval - signs and presents to presiding judge for final review and signature; may review applications for search and seizure warrants; maintains liaison with and functions as resource to state and local police; advises victims of crimes as to their rights and directs them to the appropriate supportive agencies; defends petitions of habeas corpus including preparation of pleadings, argument of motions, and trial of action; if a member of the Appellate Unit, defends appeals brought by convicted defendants before the Appellate Court and Supreme Court; performs related duties as required.

Knowledge, Skill and Ability

Knowledge of criminal law and legal process, legal principles and practice; knowledge of and ability to interpret and apply relevant State and federal criminal law; knowledge of the statutory authority, operation and administration of the Division of Criminal Justice; considerable interpersonal skill; considerable negotiating skill, considerable trial and counseling skills; considerable oral and written communication skill; considerable ability to analyze legal problems, present statements of fact, law and argument; ability to write legal briefs and supporting documentation.

Minimum Qualifications – General Experience

Membership in the Connecticut Bar and residency in the State of Connecticut.

Application Procedure

In addition to meeting the above requirements, candidates must submit the following information in order to be considered for this position.

1. Cover letter

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Or

Office of the Chief State's Attorney
300 Corporate Place
Rocky Hill, CT 06067
Attn: Human Resources

Application packages must be received or postal stamped no later than **March 15, 2019**

Applications received by facsimile will not be accepted

A complete job specification for DCJ Deputy Assistant State's Attorney is available here.

Notice of Reprimand of Attorneys

Pursuant to Practice Book Section 2-54, notice is hereby given of the following reprimands ordered by reviewing committees of the Statewide Grievance Committee:

Reviewing Committee Reprimands

November 23, 2018: Robert Louis Fiedler, New Britain, Connecticut – 307165

Copies of the full text of the decision of the Statewide Grievance Committee is available through the Committee's offices at Second Floor, Suite Two, 287 Main Street, East Hartford, Connecticut 06118-1885. The fee for copies is $.25 (twenty-five cents) per page. The full text of the decision is also available on the Connecticut Judicial Branch website (www.jud.ct.gov).

Attest:

Michael P. Bowler
Statewide Bar Counsel

Notice of Suspension of Attorney

Pursuant to § 2-54 of the Connecticut Practice Book, notice is hereby given that on February 5, 2019, in Docket Number HHD-CV-18-6104599 Harry Tun, juris # 307291, of Washington D.C. was suspended from the practice of law commencing for one year.

1. Respondent must comply with Practice Book § 2-47B (Restrictions on the Activities of Deactivated Attorneys).
2. The Respondent shall apply for reinstatement pursuant to Practice Book Section 2-53.

Susan Cobb
Judge