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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

DIANE BOISVERT ET AL. *v.* JAMES GAVIS
(SC 20049)
(SC 20053)

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

Syllabus

The plaintiffs, the maternal grandparents of the defendant father's minor child, B, filed, in the trial court, a petition for visitation with B pursuant to statute (§ 46b-59). The defendant had been granted custody of B following the death of B's mother, before which the plaintiffs enjoyed a significant relationship with B and contributed meaningfully to his care. The defendant unilaterally terminated visitation shortly after the mother's death, contending that the plaintiffs did not abide by his wishes with respect to B's care during B's time with them, and also because he believed that the plaintiffs were seeking to have him incarcerated so that they could be awarded custody of B. Following an evidentiary hearing, the trial court granted the plaintiffs' petition, finding that the plaintiffs had a parent-like relationship with B and that the denial of visitation would cause B real and significant harm, and the defendant appealed. Thereafter, the defendant filed a motion seeking a no contact order between B and his maternal aunt, R, who was living with B's maternal grandmother at the time. The court denied the motion, and the defendant, upon certification by the Chief Justice pursuant to statute (§ 52-265a) that a matter of substantial public interest was involved, filed an appeal from the denial of the motion, which was consolidated with his direct appeal. While the defendant's consolidated appeals were pending, the defendant offered the plaintiffs visitation with B in an amount that was substantially less than what the trial court had previously ordered in conjunction with the plaintiffs' petition. In conjunction with his offer, the defendant filed a motion to open and to terminate visitation, contending that the trial court was divested of subject matter jurisdiction in light of his offer, which the trial court denied. Meanwhile, the defendant discontinued B's visitation with the plaintiffs, and the plaintiffs moved for contempt.. The court found the defendant in wilful contempt for failure to comply with its visitation order. Subsequently, the plaintiffs filed a second motion for contempt on the basis of the

* This case originally was scheduled to be argued before a panel of this court consisting of Chief Justice Robinson and Justices Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker. Although Justice Kahn was not present when the case was argued before the court, she has read the briefs and appendices, and has listened to a recording of the oral argument prior to participating in this decision.

defendant's continued refusal to comply with the trial court's orders, which the trial court granted, and the defendant filed an amended appeal. On appeal, the defendant claimed, inter alia, that the trial court's order of visitation violated the implicit requirements of § 46b-59 and the due process clause of the fourteenth amendment to the United States constitution because it did not include a provision directing the plaintiffs to abide by the defendant's decisions regarding B's care while B was visiting with the plaintiffs and that the court's order violated the defendant's fundamental parental rights because the amount of visitation ordered was more than was necessary to further the state's compelling interest in sustaining B's relationship with the plaintiffs. *Held*:

1. The trial court correctly determined that it was not deprived of subject matter jurisdiction by virtue of the defendant's postjudgment offer of visitation to the plaintiffs and, therefore, properly denied the defendant's motion to dismiss the plaintiffs' action: the defendant's postjudgment offer of visitation did not render the action moot because, even if a controversy involving an existing order of third-party visitation could be rendered moot due to a custodial parent's voluntary offer of meaningful visitation with the third party, the defendant failed to establish that his particular offer of visitation was made in good faith and with the intention of allowing visitation rather than of avoiding or undermining the existing visitation order, particularly given that the defendant had consistently and vehemently opposed the plaintiffs' visitation and twice had been held in contempt for his refusal to comply with the court-ordered visitation; moreover, this court concluded that, in light of its determination that the trial court was not divested of jurisdiction by virtue of the defendant's postjudgment offer of visitation, that court also properly rejected the defendant's claim that the trial court's contempt order was void for lack of subject matter jurisdiction.

2. There was no merit to the defendant's claim that the trial court's visitation order violated the implicit requirements of § 46b-59 and the due process clause of the fourteenth amendment insofar as it failed to include a provision directing the plaintiffs to abide by his decisions, as a fit parent, regarding fundamental aspects of B's care during B's visitation with the plaintiffs:

   a. There was no implicit requirement in § 46b-59 that the trial court include a provision directing a third party to abide by a fit parent's decisions regarding the child's care during visitation with the third party, as subsection (e) of that statute simply authorizes the trial court to craft the terms and conditions of third-party visitation and provides that those terms and conditions are to be guided by the best interest of the child.

   b. The defendant could not prevail on his claim that the due process clause compels a trial court ordering third-party visitation to include a provision requiring the third party to abide by all of a fit parent's decisions regarding the child's care during visitation and that § 46b-59 was unconstitutional as applied to the facts of the present case insofar as

the order of visitation allowed the plaintiffs to override the defendant's exercise of his fundamental parental right to make decisions regarding B's care: constitutional and statutory principles governing third-party visitation do not confer on a parent the absolute right to dictate the terms and conditions governing third-party visitation, and the fundamental purpose of the statute, to sustain the deep, emotional bond between the child and the third party, would be thwarted if a parent opposing third-party visitation were given unfettered authority to micromanage the visitation and to supplant the third party's caregiving choices during the period of visitation with his or her own; nevertheless, a court, in assessing what terms may be in the best interest of the minor child, must accord special weight to a fit parent's preferences when those preferences pertain to the most fundamental aspects of a child's life, such as the child's education, health, religion, and association, but the court should satisfy itself that the parental request concerning such preferences is made in good faith before according those preferences special weight; moreover, a custodial parent seeking to impose terms and conditions on a court's visitation order must make a specific and timely request that includes an explanation as to how the requested terms and conditions further the best interest of the child, and, if the parent believes that the requested terms and conditions are necessary to protect his or her fundamental parental rights, he or she must specify the alleged constitutional nature of the request and the right asserted; furthermore, in the present case, the defendant's request was neither timely, as it was filed after the close of evidence, after the issuance of the visitation order, and despite the defendant's knowledge that R was living with D at the time of the evidentiary hearing, nor specific, as it was unaccompanied by any explanation as to why his requested no contact order between B and R was desired or necessary.

3. This court declined to review, under *State* v. *Golding* (213 Conn. 233), the defendant's unpreserved constitutional claim that the amount of visitation ordered by the trial court violated his fundamental parental rights under the due process clause of the fourteenth amendment, the record having been inadequate for such review: although the defendant filed various postjudgment motions in the trial court challenging its visitation order, he did not ask that court to reconsider the amount of visitation or to articulate the basis for that amount, or otherwise bring before the court the due process claim he raised on appeal, and, because the trial court never had the opportunity to rule on that issue, it was not preserved for review; moreover, given the inherently fact bound nature of how the trial court's visitation order should be implemented, the defendant's failure to request that the trial court make particularized findings as to the amount of visitation necessary to sustain the plaintiffs' relationship with B would render any decision by this court concerning the defendant's claim entirely speculative.

Argued September 10, 2018—officially released July 2, 2019

Procedural History

Petition for visitation with the defendant's minor child, brought to the Superior Court in the judicial district of Windham and tried to the court, *Graziani*, *J.*; judgment granting the petition, from which the defendant appealed; thereafter, the court, *Graziani*, *J.*, denied the defendant's motion for an order precluding contact between the minor child and a third party; subsequently, the defendant, upon certification by the Chief Justice pursuant to General Statutes § 52-265a that a matter of substantial public interest was involved, filed a separate appeal with this court, which consolidated the appeals; thereafter, the court, *Graziani*, *J.*, denied the defendant's motion to open and to terminate visitation, and the defendant's motion to dismiss, and the defendant, upon certification by the Chief Justice pursuant to § 52-265a that a matter of substantial public interest was involved, filed an amended appeal. *Affirmed.*

Mathew Olkin, for the appellant (defendant).

Douglas T. Stearns, for the appellees (plaintiffs).

Justine Rakich-Kelly and *Pamela Magnano* filed a brief for the Children's Law Center of Connecticut as amicus curiae.

Leslie I. Jennings-Lax and *Louise T. Truax* filed a brief for the Connecticut Chapter of the American Academy of Matrimonial Lawyers as amicus curiae.

George Jepsen, former attorney general, and *Carolyn A. Signorelli*, *Benjamin Zivyon* and *John E. Tucker*, assistant attorneys general, filed a brief for the Department of Children and Families as amicus curiae.

Mark S. Randall filed a brief for the Connecticut Bar Association as amicus curiae.

Opinion

ECKER, J. The principal issue in this appeal is whether an order granting a third party's petition for visitation pursuant to General Statutes § 46b-59[1] over

[1] General Statutes § 46b-59 provides: "(a) As used in this section: (1) 'Grandparent' means a grandparent or great-grandparent related to a minor child by (A) blood, (B) marriage, or (C) adoption of the minor child by a child of the grandparent; and (2) 'Real and significant harm' means that the minor child is neglected, as defined in section 46b-120, or uncared for, as defined in said section.

"(b) Any person may submit a verified petition to the Superior Court for the right of visitation with any minor child. Such petition shall include specific and good-faith allegations that (1) a parent-like relationship exists between the person and the minor child, and (2) denial of visitation would cause real and significant harm. Subject to subsection (e) of this section, the court shall grant the right of visitation with any minor child to any person if the court finds after hearing and by clear and convincing evidence that a parent-like relationship exists between the person and the minor child and denial of visitation would cause real and significant harm.

"(c) In determining whether a parent-like relationship exists between the person and the minor child, the Superior Court may consider, but shall not be limited to, the following factors: (1) The existence and length of a relationship between the person and the minor child prior to the submission of a petition pursuant to this section; (2) The length of time that the relationship between the person and the minor child has been disrupted; (3) The specific parent-like activities of the person seeking visitation toward the minor child; (4) Any evidence that the person seeking visitation has unreasonably undermined the authority and discretion of the custodial parent; (5) The significant absence of a parent from the life of a minor child; (6) The death of one of the minor child's parents; (7) The physical separation of the parents of the minor child; (8) The fitness of the person seeking visitation; and (9) The fitness of the custodial parent.

"(d) In determining whether a parent-like relationship exists between a grandparent seeking visitation pursuant to this section and a minor child, the Superior Court may consider, in addition to the factors enumerated in subsection (c) of this section, the history of regular contact and proof of a close and substantial relationship between the grandparent and the minor child.

"(e) If the Superior Court grants the right of visitation pursuant to subsection (b) of this section, the court shall set forth the terms and conditions of visitation including, but not limited to, the schedule of visitation, including the dates or days, time and place or places in which the visitation can occur, whether overnight visitation will be allowed and any other terms and conditions that the court determines are in the best interest of the minor child, provided such conditions shall not be contingent upon any order of

the objection of a fit custodial parent must include a provision requiring the third party to abide by all of the parent's decisions regarding the care of the child during the visitation. We conclude that neither § 46b-59 nor the due process clause of the fourteenth amendment to the United States constitution requires the trial court to impose such a broad term and condition on an order of third-party visitation. With respect to the more limited claim of the custodial parent, the defendant James Gavis, that the denial of his postjudgment motion for a no contact order between the minor child and the child's maternal aunt violated the defendant's fundamental parental right to make decisions regarding his child's associations, we conclude that the defendant failed to meet his burden of demonstrating any such constitutional violation because he failed, as a threshold matter, to articulate a reason in support of the requested term and condition. We reject the defendant's remaining claims and affirm the judgment of the trial court.

I

The following facts and procedural history are relevant to this appeal. On November 3, 2016, the plaintiffs,

financial support by the court. In determining the best interest of the minor child, the court shall consider the wishes of the minor child if such minor child is of sufficient age and capable of forming an intelligent opinion. In determining the terms and conditions of visitation, the court may consider (1) the effect that such visitation will have on the relationship between the parents or guardians of the minor child and the minor child, and (2) the effect on the minor child of any domestic violence that has occurred between or among parents, grandparents, persons seeking visitation and the minor child.

"(f) Visitation rights granted in accordance with this section shall not be deemed to have created parental rights in the person or persons to whom such visitation rights are granted, nor shall such visitation rights be a ground for preventing the relocation of the custodial parent. The grant of such visitation rights shall not prevent any court of competent jurisdiction from thereafter acting upon the custody of such child, the parental rights with respect to such child or the adoption of such child and any such court may include in its decree an order terminating such visitation rights.

"(g) Upon motion, the court may order the payment of fees for another party, the attorney for the minor child, the guardian ad litem, or any expert by any party in accordance with such party's financial ability."

Diane Boisvert and Thomas Boisvert,[2] filed a verified petition for visitation with their grandson, B,[3] pursuant to § 46b-59. The defendant, who is B's father, opposed the petition. The trial court, *Graziani*, *J.*, conducted an evidentiary hearing on the plaintiffs' petition, after which it issued a written memorandum of decision making the following findings of fact.

The defendant and Nicole M. Gavis (Nicole) were married in October, 2011, and divorced in July, 2013. They had one child, B, who was born in June, 2012. The defendant was "the primary cause of the breakdown of the marriage" because he subjected Nicole "to a course of domestic violence, threats and humiliation." (Internal quotation marks omitted.) As a consequence, "[t]he defendant has been in prison on seven different occasions with multiple incarcerations based [on] domestic violence . . . ." During his incarcerations, the defendant failed to provide any financial support for his family. After their divorce in 2013, Nicole was awarded sole custody of B, and the defendant had no visitation until April, 2015, at which time he was given supervised access to B. Nicole died on March 8, 2016.

The plaintiffs are B's maternal grandparents and, although they are divorced, they both have had a significant relationship with B since his birth. Prior to Nicole's death, her mother, Diane Boisvert, "provided [B with] care, including feeding, doctor appointments, taking [B] to day care, school appointments, taking day trips with [B] as well as taking [B] on vacation." Thomas Boisvert's "role in taking care of [B] was less than that of" Diane Boisvert, but he still had a "significant relationship"

[2] The plaintiffs will be referred to collectively as "the plaintiffs," except when it is necessary to identify them individually by name.

[3] In view of this court's policy of protecting the privacy interests of juveniles, we refer to the child involved in this matter as B. See, e.g., *Frank* v. *Dept. of Children & Families*, 312 Conn. 393, 396 n.1, 94 A.3d 588 (2014).

with B, which "involved . . . babysitting, feeding and changing [B's] diapers."

The defendant was granted custody of B after Nicole's death in March, 2016. The plaintiffs continued to be involved in B's life until June 26, 2016,[4] when the defendant terminated the plaintiffs' contact with B because he believed that they were "seeking custody of [B] and [were] also seeking to get [the defendant] sent back to jail." The defendant claimed that the plaintiffs "did not follow his directions as to how they were to treat" B during their visits. For example, the defendant did not want B to use a pacifier, but the plaintiffs did not comply with his request. On another occasion, the defendant apparently did not want Diane Boisvert to assist B with his shoe, but she did so anyway.

At the evidentiary hearing on the plaintiffs' petition for visitation, Steven H. Humphrey, a licensed clinical psychologist, testified as an expert witness. Humphrey testified that the plaintiffs had been very involved as B's primary caretakers for twenty-two months of his young life while the defendant was incarcerated. In Humphrey's expert opinion, the plaintiffs both have a " 'warm and healthy bond' " with B, who has maintained a sense of their importance in his life. Humphrey explained that the sudden death of B's mother was "very traumatic . . . and severely disruptive and long lasting" for B and that the unexplained disappearance of the plaintiffs from B's life has compounded his sense

[4] The memorandum of decision states that the plaintiffs' contact with B was terminated on June 26, 2017, but the 2017 date appears to be a scrivener's error. It is undisputed that there had been a complete denial of visitation at the time the plaintiffs' petition for visitation was filed on November 3, 2016. Additionally, the trial court stated in its decision, which was issued on August 11, 2017, that the plaintiffs' visitation with B had been "terminated by the defendant father approximately a year ago . . . ." From this we conclude that the correct date on which the defendant terminated the plaintiffs' contact with B was June 26, 2016, less than four months after Nicole's death.

of loss. Humphrey opined that the lack of contact between B and the plaintiffs "is very detrimental to [B] and would cause real and significant harm to [B]" if allowed to continue. Humphrey further testified that depriving B of "individuals who have been in a caretaker capacity, who have helped bridge the difficulties caused by maternal death and paternal incarceration, and who are capable and eager to provide [B] with such support, would not be in his best interest, and there are reasons for concern that there would be significant psychological harm to cessation of these relationship[s]." The trial court found Humphrey's in-court testimony, expert report, and expert opinions to be credible, "well thought out, appropriate, and reasonable."

Tracie Molinaro, the guardian ad litem appointed on behalf of B, also testified at the evidentiary hearing. In Molinaro's opinion, B has a "healthy relationship" with the plaintiffs, whom he "adores and loves . . . ." Molinaro testified that the plaintiffs had a regular and consistent relationship with B and that they had been actively involved in his day-to-day care, especially during the defendant's incarceration. Molinaro believed that B had a parent-like relationship with Diane Boisvert and that the denial of visitation would cause B real and significant harm. As for Thomas Boisvert, Molinaro testified that the relationship was healthy, loving and positive, but she did not believe that the relationship rose to the level of a parent-like relationship. In Molinaro's opinion, neither of the plaintiffs would undermine the defendant's role as a parent if visitation was ordered. The trial court found Molinaro's testimony to be "credible and consistent with the testimony of . . . Humphrey, with the exception of the maternal grandfather not having a parent-like relationship" with B, which the trial court did not find to be correct.

The trial court issued its written memorandum of decision on August 11, 2017. On the basis of the evi-

dence adduced at the evidentiary hearing, the trial court found, by clear and convincing evidence, that the plaintiffs had a parent-like relationship with B and that a denial of visitation would cause B real and significant harm. The trial court explained: "This child is five years old. During his life, he has suffered the loss of his father as a result of his incarceration for approximately two years, being 40 percent of the child's life. [After] [t]he death of his mother on March 8, 2016, the cessation of any meaningful contact with his maternal grandparents for the last year as a result of the unilateral actions of the father is clearly harmful to the child. As . . . Humphrey articulated in his testimony and report, the death of the child's mother, compounded with the unexplained disappearance of the maternal grandparents, is very detrimental to the child and would cause real and significant harm to the child. . . . Humphrey also opined that disruptive relationships in the life of a child can have deleterious effects for the child, including mood problems, insecurity and problems with socialization and self-confidence. The death of the mother cannot be changed. The cessation of the child's contact with the maternal grandparents can be changed by the court. The father, in terminating a support for the child in the form of . . . consistent and loving figures in the life of the child, the maternal grandparents, is not acting in the best interest of the child. Contact with the child's mother's family provides a source of information to the child as to the mother that he no longer gets to see by virtue of her death. The emotional development of the child in dealing with the loss of his mother and the cessation of contact with the maternal grandparents clearly is harmful to the child and not in the best interest of the child. The court thereby, having found the existence of a parent-like relationship between the child and the maternal grandparents, also finds that the termination of that relationship does cause a real and significant harm to the child."

The trial court granted the plaintiffs' petition for visitation, awarding Diane Boisvert visitation "every other weekend from Friday at 5 p.m. until Sunday at 5 p.m.," and Thomas Boisvert visitation "every Wednesday from the end of school each Wednesday, or noon if there is no school, until 8 p.m." The trial court also imposed the following terms and conditions on visitation: (1) "[t]he parties shall not disparage the other parties in the presence of the minor child"; (2) "[a]ll communication between the parties regarding visitation and/or the minor child shall be via text message or other written communication"; and (3) "[n]othing herein shall prohibit the parties [from] expanding the visitation for any specific visit as agreed by [the] parties in writing by the parties."

The defendant filed an appeal from the trial court's judgment. Shortly thereafter, the defendant also filed a postjudgment motion for order, pursuant to Practice Book § 25-24 (a), asking the trial court to enter an order requiring the plaintiffs to "allow no contact between [the] minor child [B] and a certain third party, Regina Riddell . . . ."[5] The defendant represented in his motion that he had "asked the plaintiffs to allow no contact between the minor child and . . . Riddell but that the plaintiffs ha[d] refused to give assurance that they [would] honor such request." The defendant argued that the plaintiffs' refusal to honor his request constituted a denial of his fundamental parental right to make decisions regarding B's care, control and associations. The trial court conducted a hearing on the defendant's motion at which the plaintiffs' counsel explained that the defendant's motion "stems from . . . Diane Boisvert, having her daughter living in her house, her daughter [Riddell] . . . is an adult, and it stems from the request that [Riddell] not be present for any

[5] Riddell, also known as Regina Boisvert, is B's maternal aunt, i.e., Nicole's sister and the plaintiffs' daughter.

of the visitation." The plaintiffs' counsel continued: "[T]here have been no documented concerns of any harm that would come to the child from [Riddell]. This was never brought up during the trial about [Riddell's] presence being a concern. And so this seems like an unreasonable request . . . ." The defendant did not testify at the hearing and presented no evidence in support of his motion. The trial court denied the defendant's postjudgment motion on the ground that there was "not one scintilla of evidence to show that [B's contact with Riddell] is inappropriate, puts the child in any danger, or reduces the level of care." The trial court noted that "visitation is always an open issue, it's never cast in stone," and, if an order of visitation puts a child at risk or is not in a child's best interest, "then the court can always modify or terminate the visitation . . . ." The trial court explained, however, that it was not otherwise "going to micromanage" the visitation because "[there are] literally millions and millions of circumstances that may ultimately follow . . . ."

The defendant subsequently filed a motion to reargue, contending that "it was irrelevant that the defendant failed to produce evidence to show the child could be harmed if the defendant's decisions were not complied with" because the defendant is a fit parent whose decisions must be presumed to be in the best interest of his child. The defendant argued that "[t]he constitutional limitations [that] constrain the *granting* of third-party visitation orders necessarily apply with equal force to the terms and conditions of the visitation order itself," and, as such, the trial court is obligated to "craft orders [that] preserve, to the extent possible, a parent's fundamental right to make parenting decisions." (Emphasis in original.) The trial court denied the defendant's motion to reargue.

The defendant then filed an application for an expedited public interest appeal from the trial court's denial

of his postjudgment motions pursuant to General Statutes § 52-265a and Practice Book § 83-1. He contended that the trial court's failure to direct the plaintiffs to abide by his parental decisions regarding the care, control and custody of B violates § 46b-59 and the due process clause of the fourteenth amendment to the United States constitution. The application was granted by then Chief Justice Rogers. Thereafter, the defendant's direct appeal was transferred from the Appellate Court to this court pursuant to Practice Book § 65-1, and his direct appeal and his certified public interest appeal were consolidated for this court's review.

While these appeals were pending, on January 9, 2018, the defendant filed in the trial court a postjudgment motion to open and terminate visitation, claiming that a change in circumstances had divested the trial court of subject matter jurisdiction. The defendant informed the trial court that he had offered each of the plaintiffs what he considered to be meaningful visitation in the amount of a four hour visit each month plus a four hour visit on or near a major holiday, and argued that, in light of this offer, the trial court was divested of jurisdiction because there no longer was a denial of visitation that would cause real and significant harm to B under § 46b-59 (b). Two months later, on March 22, 2018, the plaintiffs filed a motion for contempt in the trial court, alleging that the defendant had refused to comply with the third-party visitation order on the basis of his offer of visitation, which "is very limited and outside of any court orders." The defendant moved to dismiss the motion for contempt for lack of subject matter jurisdiction. The trial court denied the defendant's postjudgment motion to open and terminate visitation, determining that the defendant's unilateral offer of visitation did not divest the trial court of "subject matter jurisdiction over the action at the time it rendered the underlying judgment and issued its memorandum of decision."

The trial court held a hearing on the plaintiffs' motion for contempt on July 18, 2018. On the morning of the hearing, the defendant filed a postjudgment motion to dismiss for lack of subject matter jurisdiction, again contending that his January 9, 2018 offer of visitation had divested the trial court of subject matter jurisdiction. At the hearing, the defendant argued that "nothing can be adjudicated today because of the motion I filed this morning seeking dismissal for a lack of subject matter jurisdiction." The trial court denied the defendant's motion to dismiss for lack of subject matter jurisdiction and also denied his motion to dismiss the plaintiffs' motion for contempt. On the merits of the contempt motion, the trial court heard testimony that court-ordered visitation had been refused for four months, which is "sixteen days of weekends, plus every single Wednesday . . . ." On the basis of the evidence adduced at the hearing, the trial court found the defendant to be "in wilful contempt by clear and convincing evidence of the August 11, 2017 court orders and enter[ed] the following remedial orders: (1) The defendant shall pay the plaintiffs' [attorney's] fees in the amount of $1400. This amount shall be paid within thirty days. (2) The visitation which was previously ordered on August 11, 2017, shall resume immediately. The maternal grandmother's weekend visitation shall commence on July 20, 2018, and the maternal grandfather's Wednesday visitation shall commence on July 25, 2018. (3) In addition to the previously ordered visitation, the maternal grandmother shall have five days of continuous visitation with the minor child this summer. The dates shall be selected upon agreement of the parties. If the parties are unable to come to an agreement, the maternal grandmother shall have visitation with the minor child from August 13, 2018, through August 17, 2018."

On July 23, 2018, the plaintiffs filed a second motion for contempt, alleging that the defendant had "again

refused visitation," even after being "ordered to resume visitation after being found in contempt . . . ." The trial court conducted a hearing at which the plaintiffs testified that the defendant continued to refuse to permit them any visitation with B, despite the trial court's prior orders. Following the hearing, the trial court found, by clear and convincing evidence, that "the defendant had notice of the valid court orders both on August 11, 2017, and the subsequent court order of July 19, 2018," and had "wilfully failed to comply with the orders of the court, which are clear and unambiguous, by not providing the visitation in accordance with the court orders with the plaintiff Diane Boisvert [from] July 20 through [July] 22 of 2018, and the plaintiff Thomas Boisvert on July 25, 2018." The court found the defendant to be in wilful contempt and committed him to the custody of the Department of Correction. The trial court stayed its order of incarceration, however, pending compliance with the court's order of visitation.[6]

The defendant filed an amended appeal in this court seeking review of the trial court's July 19, 2018 contempt order and the denial of his postjudgment motion to dismiss for lack of subject matter jurisdiction. The defendant's amended appeal was treated as an application for certification to file a public interest appeal pursuant to § 52-265a and Practice Book § 83-1, which was granted by Chief Justice Robinson. Thereafter, the parties filed supplemental briefs addressing the trial court's subject matter jurisdiction and the validity of the contempt order.

[6] The order provided: "The defendant is . . . ordered to provide visitation of the minor child with the plaintiff Diane Boisvert on Friday, August 31, 2018, at 5 p.m. until Sunday, September 2, at 5 p.m., and every other weekend thereafter, and provide visitation with the plaintiff Thomas Boisvert, on Wednesday, August 29, [2018] from the end of school, and each Wednesday, [from] noon if there is no school, until 8 p.m." The court further ordered the defendant to "pay the plaintiffs' attorney's fees in the amount of $1500 within thirty days of this order."

The defendant raises the following claims in these consolidated appeals: (1) the trial court improperly denied the defendant's postjudgment motion to dismiss for lack of subject matter jurisdiction because it failed to make the requisite factual findings under *Roth* v. *Weston*, 259 Conn. 202, 789 A.2d 431 (2002); (2) the trial court's July 19, 2018 order of contempt is void for lack of subject matter jurisdiction; (3) the order of visitation violates the implicit requirements of § 46b-59 and the due process clause of the fourteenth amendment because it does not include, as a term and condition governing the visitation, a provision affirmatively directing the plaintiffs to abide by the defendant's decisions regarding B's care; (4) the order of visitation violates the defendant's fundamental parental rights under the due process clause because the amount of visitation is more than is necessary to further the state's compelling interest in sustaining B's relationship with the plaintiffs; and (5) the "magnitude as well as the duration of the constitutional deprivations" warrant vacatur of the order of visitation and dismissal of the plaintiffs' petition for visitation.[7]

[7] After oral argument in these consolidated appeals, this court, sua sponte, invited the filing of amicus curiae briefs from the Family Law Section of the Connecticut Bar Association, the Children's Law Center of Connecticut, the Office of the Public Defender, the Center for Children's Advocacy, and the Child Protection Unit of the Office of the Attorney General. We asked the proposed amici curiae to address the following questions in their briefs: (1) "Once a trial judge has decided to issue an order granting third-party visitation under . . . § 46b-59, do the custodial parent's substantive due process rights require the judge to order the [third party] to abide by all of the custodial parent's specific directives regarding care of the minor child during the visitation?" (2) "More generally, what legal standard must the trial judge apply when crafting the terms and conditions of visitation relating to any specific aspect(s) of the environment or care provided by the [third party] as to which the custodial parent objects? (Is it the 'best interests of the child' standard under . . . § 46b-59 [e], or is a different legal standard constitutionally required?)" And (3) "Does a different legal standard and burden of proof apply when a party moves for modification of the terms and conditions of a third-party visitation order under . . . § 46b-59?" The Connecticut Bar Association, the Children's Law Center of Connecticut, the Department of Children and Families, and the Connecticut Chapter of the

II

It will be useful at the outset to review the fundamental constitutional principles and relevant statutory provisions governing third-party visitation. A parent's right to control his or her child's upbringing was first accorded constitutional protection in two United States Supreme Court cases decided almost one century ago. See *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534–35, 45 S. Ct. 571, 69 L. Ed. 1070 (1925) (referring to "the liberty of parents and guardians to direct the upbringing and education of children under their control"); *Meyer* v. *Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) (referring to parent's right to "bring up children"). Seventy-five years later, in *Troxel* v. *Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), the United States Supreme Court had occasion to consider whether this parental right was violated by Washington's third-party visitation statute, which permitted " '[a]ny person' to petition a superior court for visitation rights 'at any time,' and authorize[d] that court to grant such visitation rights whenever 'visitation may serve the best interest of the child.' " Id., 60 (plurality opinion), quoting Wash. Rev. Code § 26.10.160 (3) (2000). Pursuant to the Washington statute, Jenifer and Gary Troxel were granted visitation with their granddaughters over the objection of their mother, Tommie Granville. Id., 60–61. The United States Supreme Court held that the order of visitation infringed on Granville's fundamental right under the due process clause of the fourteenth amendment of the United States constitution to "make decisions concerning the care, custody, and control of her two daughters." Id., 72. The court noted that "[t]he Washington nonparental visitation statute [was] breathtakingly broad"; id., 67; and "directly contravened the traditional presumption that a fit parent will act in the

American Academy of Matrimonial Lawyers accepted our invitation and submitted amicus briefs.

best interest of his or her child." Id., 69. Because the due process clause "does not permit a [s]tate to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made," the court held that Washington's third-party visitation statute was unconstitutional. Id., 72–73. In arriving at its conclusion, the court noted that it did not need to "define . . . the precise scope of the parental due process right in the visitation context" because "the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied . . . ." Id., 73. In short, "the constitutional protections in this area are best 'elaborated with care.' " Id.[8]

In *Roth* v. *Weston*, supra, 259 Conn. 205, this court considered whether Connecticut's then existing third-party visitation statute, General Statutes (Rev. to 2001) § 46b-59, was unconstitutional in light of *Troxel*. We acknowledged in *Roth* that parents have a fundamental constitutional right "to raise their children as they see fit," and "*Troxel* teaches that courts must presume that fit parents act in the best interests of their children . . . ." (Internal quotation marks omitted.) Id., 216, quoting *Troxel* v. *Granville*, supra, 530 U.S. 68 (plurality opinion). "*Troxel* confirms that among those interests lying at the core of a parent's right to care for his or her own children is the right to control their associations. . . . The essence of parenthood is the compan-

[8] *Troxel* produced six different opinions. The plurality decision has been widely criticized for its failure to provide adequate direction to courts and legislatures attempting to abide by its holding. See, e.g., D. Lannetti, "A Nonparent's Ability To Infringe on the Fundamental Right of Parenting: Reconciling Virginia's Nonparental Child Custody and Visitation Standards," 30 Regent U. L. Rev. 203, 210 (2018) ("[t]he *Troxel* decision is known today more for what it failed to address than what it actually decided, and its six opinions—with the noticeable absence of a majority opinion—unsurprisingly caused confusion for both courts and practitioners as they attempted to discern the [c]ourt's guidance, or lack thereof").

ionship of the child and the right to make decisions regarding his or her care, control, education, health, religion and association[s]." (Citation omitted.) *Roth* v. *Weston*, supra, 216–17.

Roth also recognized, however, that there are "limitations on these parental rights." Id., 224. One such limitation occurs when an otherwise fit parent denies his or her child access to an individual who has a parent-like relationship with the child and "the parent's decision regarding visitation will cause the child to suffer real and substantial emotional harm . . . ."[9] Id., 226. Under such circumstances, the state has a compelling interest in protecting "the child's own complementary interest in preserving [parent-like] relationships that serve [the child's] welfare" by avoiding the "serious and immediate harm to [the] child" that would result from the parent's decision to terminate or impair the child's relationship with the third party. Id., 225; see also id. ("[The] issue of grandparent visitation is not simply 'a bipolar struggle between the parents and the [s]tate over who has final authority to determine what is in a child's best interests. There is at a minimum a third individual, whose interests are implicated in every case to which the statute applies—the child.' "), quoting *Troxel* v. *Granville*, supra, 530 U.S. 86 (Stevens, J., dissenting). *Roth* holds that a third party seeking visitation over a fit parent's objection must surmount a "high hurdle"; *Roth* v. *Weston*, supra, 229; and requires the petitioning party to establish, by clear and convincing evidence, that (1) a parent-like relationship exists, and (2) denial of visitation would cause the child to suffer real and significant harm. Id., 225–29. These two factors, commonly referred to as the *Roth* factors, "must be satisfied

[9] In *Troxel* v. *Granville*, supra, 530 U.S. 73 (plurality opinion), the United States Supreme Court did not consider "whether the [d]ue [p]rocess [c]lause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation."

in order for a court: (1) to have jurisdiction over a petition for visitation contrary to the wishes of a fit parent; and (2) to grant such a petition." Id., 234. Once this high burden is met, visitation "is appropriate and should be ordered." *DiGiovanna* v. *St. George*, 300 Conn. 59, 73, 12 A.3d 900 (2011).

In 2012, our legislature amended § 46b-59 in accordance with the constitutional standards set forth in *Roth*. See Public Acts 2012, No. 12-137, § 1 (P.A. 12-137). The amended statute provides that "[a]ny person may submit a verified petition to the Superior Court for the right of visitation with any minor child. Such petition shall include specific and good-faith allegations that (1) a parent-like relationship exists between the person and the minor child, and (2) denial of visitation would cause real and significant harm. Subject to subsection (e) of this section, the court shall grant the right of visitation with any minor child to any person if the court finds after hearing and by clear and convincing evidence that a parent-like relationship exists between the person and the minor child and denial of visitation would cause real and significant harm."[10] General Statutes § 46b-59 (b). "In determining whether a parent-like relationship exists . . . the Superior Court may consider, but shall not be limited to, the following factors: (1) The existence and length of a relationship between the person and the minor child prior to the submission of a petition pursuant to this section; (2) The length of time that the relationship between the person and the minor child has been disrupted; (3) The specific parent-like activities of the person seeking visitation toward the minor child; (4) Any evidence that the person seeking visitation has unreasonably undermined the authority and discretion of the custodial parent; (5) The

[10] "'Real and significant harm' means that the minor child is neglected, as defined in section 46b-120, or uncared for, as defined in said section." General Statutes § 46b-59 (a) (2).

significant absence of a parent from the life of a minor child; (6) The death of one of the minor child's parents; (7) The physical separation of the parents of the minor child; (8) The fitness of the person seeking visitation; and (9) The fitness of the custodial parent." General Statutes § 46b-59 (c). Additionally, if the third party seeking visitation is a grandparent, the trial court may consider "the history of regular contact and proof of a close and substantial relationship between the grandparent and the minor child." General Statutes § 46b-59 (d).

Section 46b-59 (e) provides in relevant part that a trial court granting visitation "shall set forth the terms and conditions of visitation including, but not limited to, the schedule of visitation, including the dates or days, time and place or places in which the visitation can occur, whether overnight visitation will be allowed and any other terms and conditions that the court determines are in the best interest of the minor child, provided such conditions shall not be contingent upon any order of financial support by the court. In determining the best interest of the minor child, the court shall consider the wishes of the minor child if such minor child is of sufficient age and capable of forming an intelligent opinion. In determining the terms and conditions of visitation, the court may consider . . . the effect that such visitation will have on the relationship between the parents or guardians of the minor child and the minor child . . . ." The statute also makes clear that a grant of visitation does not create any "parental rights in the person or persons to whom such visitation rights are granted . . . ." General Statutes § 46b-59 (f).

In *DiGiovanna* v. *St. George*, supra, 300 Conn. 73, we specifically addressed the trial court's authority to fashion terms and conditions governing third-party visitation. In that case, the plaintiff sought visitation with the child over the mother's intense objection. Id., 61–62,

65. The mother's opposition to third-party visitation was so vehement and unrestrained that, even though the trial court found by clear and convincing evidence that both of the *Roth* factors had been satisfied, the trial court nonetheless denied the plaintiff's petition for visitation because it believed that the mother would take her anger out on the child and, on that basis, concluded that visitation ultimately was not in the child's best interest. Id., 67. This court reversed the judgment of the trial court, explaining that the best interest of the child standard cannot "overcome the *Roth* standard for ordering visitation." Id., 69. We clarified that the best interest of the child standard "determines *how* [an] order of visitation should be implemented"; (emphasis in original) id., 73; and the trial court has many "tools in its arsenal to effectuate visitation." Id., 75. For example, the trial court has authority under General Statutes § 46b-56 (i) to order both parents and third parties to undergo counseling; id., 74–75; and can "[prescribe] specific conditions under which visitation would take place to address legitimate concerns of either party." Id., 75. With specific reference to the mother's concern that "the plaintiff had attempted to buy the [child's] affections by excessively spending money on [him] and buying [him] toys and gifts," we observed that the trial court "could have limited the circumstances under which the plaintiff could buy things for" the child. Id., 75 n.8. We noted, finally, that the trial court can always use "its contempt powers to coerce . . . compliance" with visitation orders and may even "consider whether to order intervention by the [D]epartment [of Children and Families]." Id., 76. *DiGiovanna* clarifies that the best interest of the child standard "guides the court in determining how best to foster" the relationship between the third party and the child once visitation is ordered under the *Roth* factors, as codified in § 46b-59, and the trial court may, in implementing the visita-

tion order, consider "counseling, as well as restrictions on the time, place, manner, and extent of visitation." Id., 78.

III

With this legal framework in mind, we turn to the defendant's claims on appeal. A threshold issue involves the defendant's challenge to the trial court's subject matter jurisdiction. The jurisdictional attack is predicated on the defendant's postjudgment offer of visitation to the plaintiffs, which was conveyed to the plaintiffs by letter dated January 9, 2018. The defendant argued in the trial court that this postjudgment offer of visitation deprived the court of subject matter jurisdiction over the action because there no longer was a "denial of visitation" that "would cause real and significant harm." General Statutes § 46b-59 (b); see also *Roth* v. *Weston*, supra, 259 Conn. 234 (holding that both *Roth* factors "must be satisfied in order for a court . . . to have jurisdiction over a petition for visitation contrary to the wishes of a fit parent"). The defendant acknowledged that the trial court may have "*previously* . . . possessed subject matter jurisdiction over this action" because there was a complete denial of visitation when the trial court granted the plaintiffs' petition for visitation, but contended that his subsequent "offer of meaningful visitation serves to deprive [the] court of jurisdiction over this action *presently*." (Emphasis in original.) He renews this claim on appeal.

The defendant's argument is predicated on *Denardo* v. *Bergamo*, 272 Conn. 500, 509, 863 A.2d 686 (2005), which he contends requires application of the *Roth* factors to a postjudgment motion to dismiss filed by a fit parent.[11] The defendant's reliance on *Denardo* is

[11] The defendant also filed a motion to open and terminate visitation on the basis of his January 9, 2018 offer of visitation. The motion to open was denied by the trial court. Because the defendant did not appeal from the trial court's denial of this motion, we do not consider or decide the merits of that ruling.

misplaced, however, because *Denardo* involved an award of third-party visitation that was not supported by the *Roth* factors in the first instance. See id., 503. In *Denardo*, the trial court's initial order granting visitation to the paternal grandparents, over the mother's objection, was made prior to this court's decision in *Roth*. Id., 505–506. The trial court therefore based its initial ruling on the "best interest of the child standard [which at the time] was in accord with the judicial gloss that this court had applied to [the pre-*Roth* version of] § 46b-59 . . . ." Id., 506. After our decision in *Roth* was issued, the defendant in *Denardo* moved to modify and terminate the third-party visitation order on the ground that the standard articulated in *Roth* applied retrospectively. Id., 507. The trial court agreed, and this court affirmed, stating: "The plaintiffs failed to allege or attempt to prove that their relationship with the child was similar to a parent-child relationship and that denial of visitation would cause real and significant harm to the child. Without those specific, good faith allegations or such proof, either at the time of the filing of their petition or at the time of the hearing on the defendant's motion, the trial court's prior order of visitation was rendered without subject matter jurisdiction." Id., 514. Although *Denardo* held that the *Roth* factors apply retroactively to third-party visitation orders issued under the pre-*Roth* best interest of the child standard, that case says nothing about the jurisdiction of a trial court to adjudicate a postjudgment motion to dismiss on the basis of events that occur after an award of third-party visitation is made by a court duly applying the *Roth* factors under § 46b-59, as amended by P.A. 12-137. *Denardo*, therefore, lends no support to the defendant's jurisdictional claim.

The defendant's jurisdictional argument is not cast in terms of mootness, but he appears to argue that his postjudgment offer of visitation rendered the action

moot because he voluntarily remedied any legally cognizable harm. "Mootness implicates [the] court's subject matter jurisdiction" and, therefore, "presents a question of law over which our review is plenary." (Internal quotation marks omitted.) *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 502, 506–507, 970 A.2d 578 (2009). "Mootness presents a circumstance wherein the issue before the court has been resolved or had lost its significance because a change in the condition of affairs between the parties. . . . A case becomes moot when due to intervening circumstances a controversy between the parties no longer exists" and "the court can no longer grant any practical relief." (Internal quotation marks omitted.) *Taylor* v. *Zoning Board of Appeals*, 71 Conn. App. 43, 46, 800 A.2d 641 (2002).

"It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a . . . court of its power to determine the legality of the practice," because, "[i]f it did, the courts would be compelled to leave [t]he defendant . . . free to return to his old ways." (Internal quotation marks omitted.) *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000). The voluntary cessation exception to the mootness doctrine is founded on "the principle that a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior." *City News & Novelty, Inc.* v. *Waukesha*, 531 U.S. 278, 284 n.1, 121 S. Ct. 743, 148 L. Ed. 2d 757 (2001). Thus, the standard "for determining whether a case has been mooted by the defendant's voluntary conduct is stringent," and a case becomes moot only "if subsequent events [make] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." (Internal quotation marks omitted.) *Friends of the Earth, Inc.* v. *Laidlaw*

Environmental Services (TOC), *Inc.*, supra, 189. "The heavy burden of persua[ding] the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." (Internal quotation marks omitted.) Id.; see also *Windels* v. *Environmental Protection Commission*, 284 Conn. 268, 281, 933 A.2d 256 (2007) (holding that defendant's voluntary cessation of challenged activity did not render case moot because defendant had "not alleged, much less established, that it does not intend to resume" challenged activity).

Even if we were to assume, for the sake of argument, that a controversy involving an existing order of third-party visitation could be rendered moot under some circumstances due to the custodial parent's voluntary offer to allow meaningful visitation, the defendant has failed to satisfy his heavy burden of establishing that his January 9, 2018 offer of visitation was made in good faith and with the intention to permit the plaintiffs to visit with B, rather than to avoid or undermine the purpose of the third-party visitation order. The record reflects that the defendant consistently and vehemently has opposed the plaintiffs' visitation with B. Indeed, the defendant's opposition to the plaintiffs' visitation is so intense that he has refused to comply with court-ordered visitation for months at a time and twice has been found to be in contempt of court, resulting in an order of commitment to the Department of Correction. The defendant's voluntary offer of visitation, on these facts, plainly did not divest the trial court of subject matter jurisdiction.

Our conclusion on this point also disposes of the defendant's claim that the trial court's July 19, 2018 order of contempt was void for lack of subject matter jurisdiction. Having determined that the trial court had subject matter jurisdiction over this matter, we hold that the defendant's challenge to the contempt order

must fail. See *Eldridge* v. *Eldridge*, 244 Conn. 523, 530, 710 A.2d 757 (1998) ("[a]n order of the court must be obeyed until it has been modified or successfully challenged" [internal quotation marks omitted]). Therefore, the trial court's July 19, 2018 order of contempt is affirmed.

IV

The defendant claims that the trial court's order of visitation violated the implicit requirements of § 46b-59 and the due process clause of the fourteenth amendment to the United States constitution because it failed to include a provision affirmatively directing the plaintiffs to abide by his decisions regarding B's care during the duration of their visit with B. It is important to understand at the outset that the defendant does not challenge the trial court's *Roth* findings or the award of visitation in favor of the plaintiffs. He contends, instead, that the third-party visitation order is unlawful because both § 46b-59 and the due process clause require a trial court granting third-party visitation to "affirmatively [direct] the third party not to override the parent's decisions concerning the minor child's care, control, education, health, religion, and associations." (Emphasis omitted.) We disagree.

A

We first address defendant's claim regarding the implicit requirements of § 46b-59. "[I]ssues of statutory construction raise questions of law, over which we exercise plenary review. . . . The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case, including the question of whether the language does so apply. . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner,

the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Ugrin* v. *Cheshire*, 307 Conn. 364, 379–80, 54 A.3d 532 (2012).

Section 46b-59 (e) expressly addresses the terms and conditions governing a third-party visitation order. It provides: "If the Superior Court grants the right of visitation pursuant to subsection (b) of this section, the court shall set forth the terms and conditions of visitation including, but not limited to, the schedule of visitation, including the dates or days, time and place or places in which the visitation can occur, whether overnight visitation will be allowed and any other terms and conditions that the court determines are in the best interest of the minor child . . . . In determining the best interest of the minor child, the court shall consider the wishes of the minor child if such minor child is of sufficient age and capable of forming an intelligent opinion. In determining the terms and conditions of visitation, the court may consider (1) the effect that such visitation will have on the relationship between the parents or guardians of the minor child and the minor child, and (2) the effect on the minor child of any domestic violence that has occurred between or among parents, grandparents, persons seeking visitation and the minor child." General Statutes § 46b-59 (e).

Nothing in § 46b-59 requires the trial court to include, as a term and condition governing the order of third-party visitation, a provision affirmatively directing the

third party not to override a fit parent's decisions regarding the child's care. To the contrary, the statute plainly provides the trial court with the authority to craft "terms and conditions that the court determines are in the best interest of the minor child . . . ." General Statutes § 46b-59 (e); see also *DiGiovanna* v. *St. George*, supra, 300 Conn. 73 (clarifying "that the best interest of the child determines *how* th[e] order of visitation should be implemented" [emphasis in original]). We therefore reject the defendant's statutory argument.

B

The defendant next argues that the due process clause of the fourteenth amendment compels a trial court ordering third-party visitation to include a provision requiring the third party to abide by all of a fit parent's decisions regarding the child's care during the visitation. This claim is based on the "traditional presumption that a fit parent will act in the best interest of his or her child." *Troxel* v. *Granville*, supra, 530 U.S. 69 (plurality opinion); see also *Roth* v. *Weston*, supra, 259 Conn. 221. In light of this traditional presumption, the defendant contends that § 46b-59 is unconstitutional as applied to the facts of this case because the trial court's visitation order permits the plaintiffs to override the defendant's exercise of his fundamental parental right to make decisions regarding B's care.

"Determining the constitutionality of a statute presents a question of law over which our review is plenary. . . . It [also] is well established that a validly enacted statute carries with it a strong presumption of constitutionality, [and that] those who challenge its constitutionality must sustain the heavy burden of proving its unconstitutionality beyond a reasonable doubt. . . . The court will indulge in every presumption in favor of the statute's constitutionality . . . . Therefore, [w]hen a question of constitutionality is raised, courts must

approach it with caution, examine it with care, and sustain the legislation unless its invalidity is clear." (Internal quotation marks omitted.) *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 405, 119 A.3d 462 (2015). In evaluating the constitutionality of a statute, moreover, we will construe the statute in such a manner as "to save its constitutionality," rather than "to destroy it." *State* v. *Indrisano*, 228 Conn. 795, 805, 640 A.2d 986 (1994). In doing so, "we may also add interpretative gloss to a challenged statute in order to render it constitutional. In construing a statute, the court must search for an effective and constitutional construction that reasonably accords with the legislature's underlying intent." (Internal quotation marks omitted). Id., 805–806.

The due process clause of the fourteenth amendment requires a court to apply the "traditional presumption that a fit parent will act in the best interest of his or her child"; *Troxel* v. *Granville*, supra, 530 U.S. 69 (plurality opinion); see also *Roth* v. *Weston*, supra, 259 Conn. 221; and to accord "special weight" to a fit parent's determination of his or her child's best interest. *Troxel* v. *Granville*, supra, 69. Indeed, it is because of this constitutional deference to a fit parent's decision-making authority that § 46b-59 contains an implicit but "rebuttable presumption that visitation that is opposed by a fit parent is not in a child's best interest." *Roth* v. *Weston*, supra, 234. In order to obtain an order of visitation over a fit parent's objection, a third party must surmount a "high hurdle" and demonstrate, by clear and convincing evidence, both that a parent-like relationship exists and that disruption of the third-party relationship would cause the child to suffer real and significant harm. Id., 229. Once this high hurdle has been surmounted, however, and the trial court orders third-party visitation over a fit parent's objection, the "traditional presumption" relied on by the defendant

has been rebutted with respect to whether visitation is in the child's best interest. Stated another way, once there has been a judicial determination that a parent's denial of visitation would cause the child to suffer real and significant harm, then it no longer can be presumed that a fit parent is acting in his or her child's best interest in connection with the third-party visitation. The *Roth* standard itself is built on the premise that judicial intervention is warranted precisely because the interactions between an otherwise fit parent and a third party seeking visitation can be so fraught with hostility, tension, and resentment—often for reasons unrelated to the child—that the parent is unable or unwilling to act in the child's best interest, resulting in real and significant harm to the child.[12]

None of this means that a fit parent who is subject to a third-party visitation order has forfeited his or her parental rights or that the third party has obtained parental rights by virtue of the order of visitation. A fit parent retains the "quintessential rights of parenthood," which "include the right to make medical, educational, religious and other decisions that affect the most fundamental aspects of the child's life . . . ." (Internal quotation marks omitted.) *Fish* v. *Fish*, 285 Conn. 24, 58, 939 A.2d 1040 (2008). Likewise, § 46b-59 (f) explicitly provides that "[v]isitation rights granted in accordance with this section shall not be deemed to have created parental rights in the person or persons to whom such

[12] It should be recalled that a fit parent's decision-making authority also is protected at the threshold stage by § 46b-59 (c) (4), which directs the trial court to consider, in determining whether a parent-like relationship exists in the first instance, "[a]ny evidence that the person seeking visitation has unreasonably undermined the authority and discretion of the custodial parent . . . ." This provision does not guarantee that visitation will be permitted only to a third party whose views on child rearing are entirely harmonious with the parent's views, but it does provide a strong incentive for the third party to make sure that his or her decisionmaking does not unreasonably undermine the parent's authority.

visitation rights are granted . . . .'' These precepts remain fixed and unchanged, but they do not confer on the parent an absolute right to dictate the terms and conditions governing the visitation. The animating purpose of the statute is to sustain and nurture the deep, emotional bond between the child and the third party, and the third party's caregiving choices for the child while acting in a ''parent-like'' capacity necessarily are integral to the formation and sustenance of that bond—a bond that the trial court has determined must be preserved to prevent real and significant harm to the child. The fundamental purpose of the statute would be thwarted if the parent opposing third-party visitation were given unfettered authority to micromanage the visitation and to replace the third party's caregiving choices during the period of visitation with his or her own.

We recognize that, during the course of the child's visitation with the third party, the third party may make decisions for the child that potentially implicate a parent's fundamental parental rights to direct his or her child's upbringing, and the longer the period of visitation, the more decisions that the third party must make. See *Roth* v. *Weston*, supra, 259 Conn. 229 n.13 (recognizing that ''[v]isitation is a limited form of custody during the time the visitation rights are being exercised'' [internal quotation marks omitted]). Most of the third party's decisions during visitation will be of the mundane variety, and, less frequently, the third party may need to make weighty, discretionary, and sometimes instantaneous decisions pertaining to the child's health, safety, and well-being. The question we must resolve in the present appeal is, when a conflict arises between a fit parent and a third party regarding the third party's caregiving decisions that implicate the parent's constitutional rights, how should that conflict be resolved so

as to preserve the parent's rights, while at the same time sustaining the child's relationship with the third party?

To answer this question, we turn to § 46b-59 (e), which provides the trial court with the authority to devise terms and conditions governing third-party visitation. Section 46b-59 (e) provides in relevant part that if visitation is granted, "the court shall set forth the terms and conditions of visitation including, but not limited to, the schedule of visitation, including the dates or days, time and place or places in which the visitation can occur, whether overnight visitation will be allowed and any other terms and conditions that the court determines are in the best interest of the minor child . . . . In determining the best interest of the minor child, the court shall consider the wishes of the minor child if such minor child is of sufficient age and capable of forming an intelligent opinion. In determining the terms and conditions of visitation, the court may consider . . . *the effect that such visitation will have on the relationship between the parents or guardians of the minor child and the minor child* . . . ." (Emphasis added.) General Statutes § 46b-59 (e) (1). Thus, in setting forth terms and conditions governing the order of third-party visitation, the trial court can and should consider the effect that the visitation order will have on the parent-child relationship, which include any good faith concerns that the parent might have regarding the third party's caregiving choices and how those choices may infringe on the parent's fundamental rights relating to the child's upbringing. The statute therefore provides the trial court with the ability to craft particularized terms and conditions to protect the parental prerogatives at the heart of the parent-child relationship while simultaneously preserving the constitutive elements of a meaningful third-party visitation.

In assessing what terms and conditions may be in the "best interest of the minor child" under § 46b-59

(e), the trial court must accord "special weight" to a fit parent's preferences; *Troxel* v. *Granville*, supra, 530 U.S. 69 (plurality opinion); when those preferences pertain to the most fundamental aspects of the child's life, such as the child's "education, health, religion, and association." *Roth* v. *Weston*, supra, 259 Conn. 217; see also *Fish* v. *Fish*, supra, 285 Conn. 58 (describing parent's "right to make medical, educational, religious and other decisions that affect the most fundamental aspects of the child's life during the custodial period"). When it comes to these particular matters, properly tailored parental requests made in good faith should not be rejected by the trial court solely on the basis of the third party's conflicting views or the "judge's [own] personal or lifestyle preferences." *Fish* v. *Fish*, supra, 47. For example, if a parent requests as a term and condition of visitation an order prohibiting the third party from taking the child to religious services in the third party's faith because the child is being raised in a different faith (or no faith at all), the trial court should not deny this parental request because he or she (or the third party) believes that the child would benefit from exposure to the other religion. If made in good faith, these types of parental requests, which affect "the most fundamental aspects of the child's life"; id., 58; are not subject to judicial override under color of an order of third-party visitation. See General Statutes § 46b-59 (f).

Two caveats are necessary. First, many decisions do not fall within the scope of this category of fundamental parental prerogative, and, with respect to those matters, the trial court has discretion under the statute to formulate terms and conditions that serve the best interest of the child. In doing so, the trial court always should take into account the fit parent's good faith preferences, but those preferences are not entitled to "special weight" under the due process clause of the fourteenth

amendment. See *Troxel* v. *Granville*, supra, 530 U.S. 69 (plurality opinion); *Roth* v. *Weston*, supra, 259 Conn. 217. Second, even in the realm of decisionmaking involving those matters that affect the most fundamental aspects of a child's upbringing, the trial court should satisfy itself that the parental request is made in good faith before according it the special weight the constitution requires. A good faith inquiry is necessary because the relationship between the parent and the third party may be so toxic, and the parent's opposition to the visitation may be so vehement, that the parent may try to undermine the third-party visitation by imposing unreasonable and unfounded terms and conditions. See *DiGiovanna* v. *St. George*, supra, 300 Conn. 78 (declining to create loophole by which recalcitrant parent may thwart intent of third-party visitation statute). By way of example, perhaps the third party and the child always have shared a special interest in baseball, and the parent requests an order preventing the third party from taking the child to baseball games or playing baseball with the child out of an alleged concern for the child's health and safety due to the risk of harm. The third party objects and questions the good faith nature of the parental request, in light of the undisputed fact that the parent allows the child to play baseball at all other times. After considering the facts and the parties' explanations, the trial court may deny the requested term and condition, even though it allegedly implicates a fundamental parental right, if the trial court finds that the parental request represents a bad faith attempt to undermine the third-party relationship.

We can hypothesize an infinite variety of factual scenarios and a limitless number of parental and third-party motivations that may require judicial resolution, depending on the facts and circumstances of each individual case.[13] Given the depth and complexity of the

[13] The situation becomes still more challenging because (1) the third party, like the parent, may allow animosity toward the opposing party to influence

issues involved, we believe that the trial court is in the best position to "[prescribe] specific conditions under which visitation [should] take place to address legitimate concerns of either party." *DiGiovanna* v. *St. George*, supra, 300 Conn. 75.

The present case illustrates the need for the parties to follow certain commonsense procedures to provide an optimal framework for the trial court to determine what terms and conditions may be necessary under § 46b-59 (e). A party seeking to impose terms and conditions on the order of visitation must make a *specific* and *timely* request. A request is specific if it is tailored to identify and ameliorate the party's concern and is accompanied by an explanation of how the requested terms and conditions further the best interest of the child. See General Statutes § 46b-59 (e) ("terms and conditions that the court determines are in the best interest of the minor child"). If the requesting party is a parent who believes that the requested terms and conditions are necessary to protect his or her fundamental parental rights, the parent must alert the trial court to the alleged constitutional nature of the request and the right asserted. See General Statutes § 46b-59 (f) ("[t]he grant of such visitation rights shall not prevent any court of competent jurisdiction from thereafter acting upon . . . the parental rights with respect to such child"). The explanation provided to the trial court need not be exhaustive, but it should be sufficient to alert the trial court to the content and contours of the requesting party's claim.[14] The required explana-

his or her views about the child's best interest, and (2) neither party may be fully aware of their underlying motivations in this context. The difficult task of sorting out these dynamic uncertainties is left to the discretion of the trial court based on a careful consideration of all of the evidence.

[14] As we previously indicated, if the requesting party is a parent who claims that the proposed terms and conditions are necessary to protect his or her fundamental parental rights to make decisions regarding the child's education, health, religion, or association, then the parent's determination of his or her child's best interest should be accorded special weight. See

tion, and the reasons for any opposition, ordinarily will be based on the evidence elicited during the hearing on the contested petition for visitation. If additional evidence is needed, an evidentiary hearing will be necessary to enable the trial court to make the factual determinations and credibility assessments required for a decision. The evidence not only will enable the trial court to decide whether the requested terms and conditions are made in good faith, but also will allow the trial court to weigh the competing considerations and determine whether it is possible to fashion terms and conditions that may accommodate competing interests, wishes, and needs.

A request is timely if it is made without unreasonable delay once the requesting party knows or reasonably should know of the factual circumstances that prompt the requested terms and conditions. The requesting party is not barred from belatedly requesting such terms and conditions in a postjudgment motion, as was done in this case, but the belated nature of the request may support an inference that it is not made in good faith, if the inference reasonably is justified under the surrounding circumstances. The requirements of specificity and timeliness are not intended to preclude good faith requests for reasonable terms and conditions that may arise as circumstances develop over time, but to provide an optimal and efficient procedure by which the trial court can evaluate the requested terms and conditions and fashion appropriate relief responsive to the parties' concerns and the child's needs.

Troxel v. *Granville*, supra, 530 U.S. 69 (plurality opinion). Nonetheless, an explanation is necessary in order for the trial court to ascertain whether the proposed terms and conditions actually implicate the parent's fundamental parental rights, reflect sincerely held parental beliefs, and involve disputed questions of fact necessitating an evidentiary hearing. The requesting party's explanation and the opposing party's responses not only will provide the trial court with the information necessary to address the parties' concerns and fashion appropriate relief, but also will provide an appellate court with an adequate record to review the trial court's order, if necessary.

Ultimately it is up to the trial court, as the finder of fact and the arbiter of credibility, to determine the issues relating to the terms and conditions of visitation, including, without limitation, whether the requested terms and conditions reflect a parent's sincerely held belief regarding a fundamental aspect of the child's upbringing or whether they are a pretext to undermine the third-party relationship or the order of visitation. The trial court has many "tools in its arsenal" to protect a fit parent's fundamental rights while simultaneously fostering the third-party relationship by effectuating the order of visitation. *DiGiovanna* v. *St. George*, supra, 300 Conn. 75, 78; see General Statutes § 46b-56.

Applying these principles to the facts of this case, we conclude that the trial court properly denied the defendant's request for a broad order requiring the plaintiffs to abide by all of his parental decisions regarding B's care during the course of the plaintiffs' visitation. The defendant's motion was untimely because it was filed after the close of evidence and the issuance of the trial court's order of third-party visitation. Moreover, for the reasons previously explained, the due process clause of the fourteenth amendment does not require the trial court to issue a broad order requiring a third party to abide by *all* of a parent's decisions regarding the child's care, regardless of the nature of the parent's decisions, the reasons for the request, whether the decisions further the child's best interest, and whether they implicate the parent's constitutional right to guide his or her child's upbringing. As the United States Supreme Court has cautioned, "the constitutional protections in this area are best 'elaborated with care,' " because "[state court] adjudication in this context occurs on a case-by-case basis . . . ." *Troxel* v. *Granville*, supra, 530 U.S. 73 (plurality opinion). The assessment of what terms and conditions are necessary in the third-party visitation context is highly fact dependent; see *DiGio-*

vanna v. *St. George*, supra, 300 Conn. 78; and cannot be undertaken "in a factual vacuum." *Lehrer* v. *Davis*, 214 Conn. 232, 234, 571 A.2d 691 (1990); see id., 235–36 (holding that record was inadequate to undertake "a constitutional review of § 46b-59").

Turning to the defendant's specific request for a no contact order between B and Riddell, we note that this request was untimely[15] and unaccompanied by an explanation regarding its origin or basis. The request, rather, was formulated as a naked demand resting on the classic invocation of absolute parental authority used to preempt discussion: "Because I'm the parent and I said so." This resort to fiat reflects a perfectly adequate parenting position in many day-to-day parent-child interactions, but it will not suffice when a judicial authority has determined that state interference in the parent-child relationship "is justified" because the third party has "demonstrated a compelling need [for third-party visitation] to protect the child from harm." *Roth* v. *Weston*, supra, 259 Conn. 229. Although the right to control a child's associations is a fundamental parental right; see id., 216–17; in the absence of an explanation, the trial court cannot evaluate the good faith nature of the parental request, assess the need for evidence to resolve disputed questions of fact, or fashion appropriate relief. See footnote 14 of this opinion. Because the defendant failed to give any reason in support of the requested term and condition regarding B's contact with Riddell, we conclude that the trial court properly denied the defendant's postjudgment motion.

[15] It appears from the record that the defendant was aware that Riddell was living in Diane Boisvert's home at the time of the evidentiary hearing, but did not raise the issue as a concern or request any particular terms and conditions limiting B's contact with Riddell prior to the issuance of the trial court's visitation order. Furthermore, although the defendant filed several postjudgment motions, he never filed a motion to modify the order of visitation to include a no contact order between B and Riddell.

We emphasize that our holding confers no parental rights on the plaintiffs; nor does it bestow any visitation rights on Riddell. As the trial court aptly observed, the order of visitation simply gave "visitation to the plaintiffs" and "[i]n no way, shape, or form did the court grant any visitation to [Riddell]" or create any parental rights on behalf of the plaintiffs. The trial court simply found that in the absence of any reason or any evidence to justify the defendant's requested restriction on the order of third-party visitation, there was no basis to find that the requested restriction was in the child's best interest. We agree and, therefore, affirm the judgment of the trial court.

V

Lastly, the defendant claims that the amount of visitation awarded to the plaintiffs violates his fundamental parental rights under the fourteenth amendment to the United States constitution. The defendant points out that § 46b-59 is subject to strict scrutiny; *Roth* v. *Weston*, supra, 259 Conn. 218; and argues that the amount of visitation awarded under the statute must be narrowly tailored to further the state's compelling interest in sustaining the child's relationship with the third party. Under this theory, the defendant contends that any visitation in excess of the amount minimally necessary to sustain the child's relationship with the third party "constitutes a significant interference" with his parental rights.

Although the defendant filed various postjudgment motions challenging the order of visitation, he never asked the trial court to reconsider the amount of visitation or to articulate the basis for the amount of visitation awarded to the plaintiffs.[16] Because the trial court never

[16] At the hearing on the plaintiffs' first motion for contempt, the defendant testified that he believed the order of visitation "was way too much because the only time that I have to spend with my son is a couple hours after work and every weekend." Additionally, as explained in parts I and III of this opinion, the defendant filed a postjudgment motion to open and terminate

had an opportunity to rule on this issue, we conclude that it is not preserved for our review. See, e.g., *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 142, 84 A.3d 840 (2014) ("[i]t is well settled that [o]ur case law and rules of practice generally limit [an appellate] court's review to issues that are distinctly raised at trial" [internal quotation marks omitted]). Nonetheless, because the defendant's claim implicates his fundamental parental rights under the United States constitution, we consider whether review is appropriate under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989).[17]

Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error, (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis in original; footnote omitted.) Id.; see also *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying third prong of *Golding*). The burden is on the party

visitation and a postjudgment motion to dismiss for lack of subject matter jurisdiction on the basis of his January 9, 2018 offer of visitation, which would have provided substantially less visitation than the amount ordered by the trial court. At no point, however, did the defendant argue that the amount of visitation ordered by the court violated his fundamental parental rights under the United States constitution.

[17] The defendant's failure affirmatively to request and brief his entitlement to *Golding* review does not preclude our consideration of his constitutional claim. See *State* v. *Elson*, 311 Conn. 726, 730, 91 A.3d 862 (2014) (holding that there is no requirement "that a party must 'affirmatively request' *Golding* review in its main brief in order to receive appellate review of unpreserved constitutional claims").

seeking review of unpreserved constitutional claims under *Golding* to demonstrate both that the record is adequate for review and that the claim "is indeed a violation of a fundamental constitutional right." *State* v. *Golding*, supra, 213 Conn. 240. "If the facts revealed by the record are insufficient, unclear or ambiguous as to whether a constitutional violation has occurred, we will not attempt to supplement or reconstruct the record, or to make factual determinations, in order to decide the defendant's claim." Id.

The trial court is in the best position to determine how the order of visitation should be implemented; *DiGiovanna* v. *St. George*, supra, 300 Conn. 73; and must set forth the "terms and conditions of visitation including, but not limited to, the schedule of visitation, including the dates or days, time and place or places in which the visitation can occur, [and] whether overnight visitation will be allowed . . . ." General Statutes § 46b-59 (e). "[T]he best interest of the child [standard] guides the court" in crafting these terms and conditions and "in determining how best to foster [the third-party] relationship." *DiGiovanna* v. *St. George*, supra, 78. The trial court must weigh "all the facts and circumstances of the family situation. Each case is unique. The task is sensitive and delicate, and involves the most difficult and agonizing decision that a trial judge must make." (Internal quotation marks omitted.) *Gallo* v. *Gallo*, 184 Conn. 36, 44, 440 A.2d 782 (1981). The trial court's factual findings may be reversed on appeal only if they are clearly erroneous. See *DiGiovanna* v. *St. George*, supra, 69 ("[t]o the extent that the defendant claims that the trial court should have credited certain evidence over other evidence that the court did credit, it is well settled that such matters are exclusively within the province of the trial court"); see also *Misthopoulos* v. *Misthopoulos*, 297 Conn. 358, 377, 999 A.2d 721 (2010) ("To the extent that the trial court has made findings of fact, our review is limited to deciding whether such

findings were clearly erroneous. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." [Internal quotation marks omitted.]).

In light of the inherently fact bound nature of the trial court's schedule of visitation, we conclude that the record is inadequate to review the defendant's constitutional challenge to the amount of visitation awarded to the plaintiffs under § 46b-59 (e). See *Lehrer* v. *Davis*, supra, 214 Conn. 234, 236 (recognizing "[t]he [fact bound] nature of . . . constitutional challenge[s] to § 46b-59" and counseling "against the adjudication of constitutional questions in a factual vacuum"). The defendant did not request, and therefore the trial court did not provide, particularized factual findings regarding the amount of visitation necessary to sustain the plaintiffs' relationship with B. "Without the necessary factual and legal conclusions furnished by the trial court . . . any decision by us respecting [the defendant's claims] would be entirely speculative." (Internal quotation marks omitted.) *State* v. *Brunetti*, 279 Conn. 39, 63, 901 A.2d 1 (2006), cert. denied, 549 U.S. 1212, 127 S. Ct. 1328, 167 L. Ed. 2d 85 (2007). The record is "inadequate to establish whether the alleged constitutional violation did, in fact, occur"; id., 64; and, therefore, we decline to review the defendant's unpreserved constitutional claim.[18]

The judgment is affirmed.

In this opinion the other justices concurred.

[18] Because the defendant has failed to establish the violation of his fundamental parental rights under the United States constitution, we need not reach the defendant's claim that the "magnitude as well as the duration of the constitutional deprivations" warrant vacatur of the order of visitation and dismissal of the plaintiffs' petition for third-party visitation.

GEORGE W. NORTHRUP ET AL. *v.* HENRY J. WITKOWSKI, JR., ET AL.
(SC 20023)

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

Syllabus

Pursuant to statute (§ 52-557n [a] [2] [B]) and the common law of this state, respectively, municipalities and their employees enjoy qualified immunity from liability for their negligent acts or omissions in the performance of duties that require the exercise of judgment or discretion.

The plaintiffs, who reside in the borough of Naugatuck on a particular parcel of property that is prone to flooding, appealed to the Appellate Court from the trial court's judgment in favor of the defendants, the borough and several of its officials, which was rendered on the basis of governmental immunity. The plaintiffs had alleged, inter alia, that the defendants' negligence caused their property to be inundated by water on eight separate occasions. Specifically, the plaintiffs had alleged that a nearby municipally owned catch basin in the area routinely became clogged or otherwise inadequately redirected storm water away from their property. In support of their motion for summary judgment, the defendants claimed that the plaintiffs' negligence claims were barred by governmental immunity because they involved acts or omissions that required the exercise of judgment or discretion. In granting that motion, the trial court concluded that, because the municipal ordinance setting forth the general duties of the relevant municipal department did not contain specific directions or mandates as to how those duties should be discharged, the plaintiffs' claims necessarily pertained to discretionary acts or omissions. The trial court acknowledged this court's decision in *Spitzer* v. *Waterbury* (113 Conn. 84), which held that the repair and maintenance of municipally owned drainage systems are ministerial functions, but concluded that, under more recent case law, the duty to repair and maintain drainage systems is discretionary unless an ordinance prescribes the particular manner in which that duty is to be discharged. The plaintiff subsequently appealed from the trial court's judgment in favor of the defendants to the Appellate Court, which distinguished the facts of *Spitzer* and ultimately agreed that there was no genuine issue of material fact with respect to whether the allegedly negligent omissions in the present case were discretionary in nature. Accordingly, the Appellate Court affirmed the trial court's judgment, and the plaintiffs, on the granting of certification, appealed to this court. *Held* that the Appellate Court properly upheld the trial court's granting of summary judgment in favor of the defendants, this court having concluded that the borough's duty to maintain and repair its drainage

system was discretionary rather than ministerial in nature and, therefore, subject to governmental immunity: neither the question of whether the duty to repair and maintain the drainage system was imposed by statute or voluntarily assumed, nor the distinction between construction and repair, was relevant to consideration of the nature of the defendants' duty, because, under modern principles of governmental immunity, the salient consideration in determining whether that duty was discretionary or ministerial is whether any statute, charter provision, ordinance, regulation, rule, policy, or any other directive required the defendants to act in a prescribed manner, and, accordingly, the defendants could be held liable to the plaintiffs only if there was some legal directive prescribing the specific manner in which the defendants were required to maintain and repair the borough's storm drainage system; moreover, the plaintiffs did not challenge the Appellate Court's conclusion that the language of the relevant municipal ordinance did not, in and of itself, create a ministerial duty to repair and maintain the drainage system, and, even if this court were to assume that a policy or rule from a municipal agency could give rise to a ministerial duty, deposition testimony from the borough's superintendent of streets evincing an annual maintenance schedule and a general policy of attempting to respond to public complaints about clogged storm drains was insufficient to establish the existence of such a policy or rule that could convert the borough's discretionary duty mandated by ordinance into a ministerial duty, as a contrary conclusion would disincentivize municipalities from making virtually any attempt to ensure that their discretionary duties are regularly and properly carried out; furthermore, this court could not conclude that the defendants had breached a ministerial duty by failing to conduct any maintenance on the basin at issue because the plaintiffs cited no evidence that would support such a finding, and, even if they had, a general duty to maintain and repair the drainage system as a whole would not encompass a judicially enforceable duty to maintain and repair each individual component of that system.

Spitzer v. *Waterbury* (113 Conn. 84), to the extent it concluded that municipal duties with respect to the maintenance and repair of drains and sewers are ministerial in nature, overruled.

(*One justice dissenting*)

Argued October 16, 2018—officially released July 2, 2019

Procedural History

Action to recover damages for the alleged negligence of the named defendant et al. in maintaining and repairing certain municipal storm water systems, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Blue*,

J., granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiffs appealed to the Appellate Court, *Alvord*, *Prescott* and *Mullins*, *Js.*, which affirmed the trial court's judgment, and the plaintiffs, on the granting of certification, appealed to this court. *Affirmed.*

Joshua F. Gilman, for the appellants (plaintiffs).

Thomas R. Gerarde, with whom, on the brief, was *Beatrice S. Jordan*, for the appellees (defendants).

Aaron S. Bayer and *Tadhg Dooley* filed a brief for the city of Bridgeport et al. as amici curiae.

Opinion

ROBINSON, C. J. This certified appeal requires us to consider the continued vitality of this court's decision in *Spitzer* v. *Waterbury*, 113 Conn. 84, 88, 154 A. 157 (1931), which held that "[t]he work of constructing drains and sewers, as well as that of keeping them in repair, is ministerial, and the municipality is responsible for negligence in its performance." The plaintiffs, Helen M. Northrup, George W. Northrup, and Timothy Northrup,[1] brought this action against the defendants, the borough of Naugatuck (town) and several town officials,[2] claiming, inter alia, that the defendants' negligence in maintaining and repairing the town's storm drains and drainage pipes had caused the repeated flooding of the plaintiffs' residence. The plaintiffs now appeal, upon our granting of their petition for certifica-

[1] For the sake of simplicity, we refer to the plaintiffs individually by first name when necessary. We also note that the present action was brought on Timothy's behalf by Helen, his mother, as next friend.

[2] The following officials were named as defendants: (1) Robert A. Mezzo, the town's mayor; (2) Henry J. Witkowski, Jr., who served as the town's superintendent of streets; and (3) James Stewart, who served as town engineer until 2009, when he was appointed director of the town's newly formed public works department, which replaced the streets commission.

tion,[3] from the judgment of the Appellate Court affirming the trial court's granting of the defendant's motion for summary judgment on the ground that the negligence claims were barred because, under more recent cases refining and clarifying *Spitzer*, the maintenance of storm drains and drainage systems is a discretionary function subject to governmental immunity, rather than a ministerial function, the negligent performance of which can subject a municipality to liability. *Northrup* v. *Witkowski*, 175 Conn. App. 223, 250, 167 A.3d 443 (2017). We disagree with the plaintiffs' claim that the Appellate Court improperly failed to follow *Spitzer* because we conclude that decision must be overruled in light of modern case law governing the distinction between ministerial and discretionary duties. Accordingly, we affirm the judgment of the Appellate Court.

The opinion of the Appellate Court aptly sets forth the following facts and procedural history. "The plaintiffs reside on property located in the town at 61 Nettleton Avenue. On eight different occasions between 2009 and 2012, the plaintiff's property was damaged when surface rainwater and/or 'black water'[4] inundated the property because the single catch basins in the area routinely became clogged or inadequately redirected water away from the property.

"After the first occurrence in July, 2009, Helen . . . contacted [James] Stewart, who, at that time, was

[3] We granted the plaintiffs' petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly conclude that the maintenance and repair of storm water systems is a discretionary duty, in light of this state's precedents, including *Spitzer* v. *Waterbury*, [supra, 113 Conn. 84], and *Silberstein* v. *54 Hillcrest Park Associates, LLC*, 135 Conn. App. 262, 41 A.3d 1147 (2012)?" *Northrup* v. *Witkowski*, 327 Conn. 971, 173 A.3d 392 (2017).

[4] "In their complaint, the plaintiffs define 'black water' as surface rainwater that overwhelms and causes a [backup] in the sanitary sewer system, resulting in flood waters that contain sewage and other contaminants." *Northrup* v. *Witkowski*, supra, 175 Conn. App. 226 n.4.

the [town] engineer. He told her that the flooding was the result of a rare storm and that it would not happen again. Despite his assurance, however, flooding occurred again in October and December of that year. The plaintiffs continued to contact Stewart, to no avail. The plaintiffs made several requests to the town for sandbags; one such request was granted, but others were denied or simply ignored.

"The town received a report in October, 2009, from an engineering firm about the Nettleton Avenue neighborhood. The report indicated that, over the past forty years, many residences in the neighborhood had experienced periodic flooding of their properties following periods of heavy rainfall. It further indicated that the drainage system in the area was likely to experience flooding after rainfalls of two inches or more, which could occur several times a year. The report attributed the flooding to the fact that runoff was required to flow through relatively narrow drainpipes that were in poor to fair condition and that the majority of catch basins in the area were old and had small openings that often became overgrown with vegetation or obstructed by trash. The report recommended that the town construct new, larger storm drains to handle the storm runoff in the area, but the town failed to adopt that proposal. The plaintiffs' property flooded again in July of 2010, March and August of 2011, and June and September of 2012." (Footnote in original.) Id., 226–27.

On June 4, 2013, the plaintiffs filed the operative second amended complaint alleging negligence against Henry J. Witkowski, Stewart, and the town, and recklessness against the individual defendants. See footnote 2 of this opinion. In addition, the plaintiffs alleged negligent infliction of emotional distress against Witkowski, Stewart, and the town.

"On October 30, 2015, the defendants filed [a] motion for summary judgment . . . . The defendants submit-

ted a supporting memorandum of law, attached to which were partial transcripts from the depositions of Helen . . . and the individual defendants, as well as an affidavit by Stewart. The defendants argued that the negligence counts, including those alleging negligent infliction of emotional distress, were barred by governmental immunity because they involved acts or omissions that required the exercise of judgment or discretion, and no other recognized exception to governmental immunity applied. The defendants further argued that the recklessness counts brought against the individual defendants also failed as a matter of law because, on the basis of the allegations and evidence presented, no reasonable fact finder could determine that the individual defendants had engaged in demonstrably reckless conduct.

"The plaintiffs filed an objection to the motion for summary judgment on November 18, 2015, arguing with respect to the negligence counts that there remained genuine issues of material fact as to whether the defendants were exercising ministerial or discretionary duties and, if discretionary, whether the identifiable person-imminent harm exception to governmental immunity applied." *Northrup* v. *Witkowski*, supra, 175 Conn. App. 228–29.

"On January 20, 2016, the court issued a memorandum of decision granting summary judgment in favor of the defendants on all counts. With respect to the negligence counts, including those counts alleging negligent infliction of emotional distress, the court concluded that the plaintiffs' specifications of negligence amounted to a 'litany of discretionary omissions' and that their 'allegations boiled down to a claim that the defendants failed to perform their municipal duties in an appropriate manner.' The court determined that the city ordinance on which the plaintiffs relied in opposing summary judgment only set forth the general duties of

the [streets commission] without any specific directions or mandates as to how those duties should be discharged." Id., 230.

The trial court acknowledged this court's decision in *Spitzer* v. *Waterbury*, supra, 113 Conn. 88, holding that the repair and maintenance of drainage systems is a ministerial function, but concluded that more recent cases had "refined [the] analysis of the relationship and differences between ministerial and discretionary acts . . . ." *Silberstein* v. *54 Hillcrest Park Associates, LLC*, 135 Conn. App. 262, 272, 41 A.3d 1147 (2012). The trial court concluded that, under those more recent cases, the repair and maintenance of drainage systems are discretionary unless an ordinance "prescribe[s] the *manner* in which the drainage systems are to be maintained . . . ." (Emphasis in original.)

"Accordingly, the court concluded that the defendants' acts or omissions in maintaining the town's drainage system were discretionary in nature. Furthermore, the court concluded that the identifiable person-imminent harm exception to discretionary act immunity was inapplicable as a matter of law because the risk of the property flooding at any given time was indefinite and, thus, did not constitute an imminent harm. The court also granted summary judgment with respect to the recklessness counts, concluding that they also were barred by governmental immunity.

"The plaintiffs filed a motion to reargue and for reconsideration, which the defendants opposed. The court denied the plaintiffs' motion, and [the plaintiffs' appeal to the Appellate Court] followed."[5] *Northrup* v. *Witkowski*, supra, 175 Conn. App. 230.

[5] On appeal to the Appellate Court, the plaintiffs contended that the trial court improperly (1) determined that the governmental acts complained of were discretionary in nature rather than ministerial, (2) concluded that the identifiable person-imminent harm exception to governmental immunity did not apply, and (3) raised sua sponte the issue of whether the plaintiffs' allegations of recklessness directed against the individual defendants could

The Appellate Court held that "to demonstrate the existence of a ministerial duty on the part of a municipality and its agents, a plaintiff ordinarily must point to some statute, city charter provision, ordinance, regulation, rule, policy, or other directive that, by its clear language, compels a municipal employee to act in a prescribed manner, without the exercise of judgment or discretion. See *Violano* v. *Fernandez*, 280 Conn. 310, 323, 907 A.2d 1188 (2006); *Evon* v. *Andrews*, 211 Conn. 501, 506–507, 559 A.2d 1131 (1989); *DiMiceli* v. *Cheshire*, [162 Conn. App. 216, 224–25, 131 A.3d 771 (2016)]; *Grignano* v. *Milford*, 106 Conn. App. 648, 659–60, 943 A.2d 507 (2008)." *Northrup* v. *Witkowski*, supra, 175 Conn. App. 235. The court ultimately concluded that, "although there is language in § 16-32 of the [Naugatuck Code of Ordinances] that requires the streets commission to maintain and repair the town's storm water sewer system, the ordinance contains no provisions that mandate the time or manner in which those responsibilities are to be executed, leaving such details to the discretion and judgment of the municipal employees." Id., 238.

The Appellate Court then acknowledged this court's statement in *Spitzer* v. *Waterbury*, supra, 113 Conn. 88, that the repair and maintenance of drains and sewers are ministerial functions, but it concluded that *Spitzer* was distinguishable on its facts because it involved only the question of whether a drainage system "as it was planned could handle even ordinary amounts of rain," not whether the city had properly maintained and cleaned the system. *Northrup* v. *Witkowski*, supra, 175 Conn. App. 239. In addition, the Appellate Court con-

be maintained against them and ultimately concluded that the claims were barred by government immunity. *Northrup* v. *Witkowski*, supra, 175 Conn. App. 225–26, 245–46. The Appellate Court rejected all of these claims. Id., 250. The Appellate Court's rulings on the second and third claims are not at issue in this certified appeal. See footnote 3 of this opinion.

cluded that the statement in *Spitzer* was dictum. Id., 241. The Appellate Court concluded that, "[c]onsidered in light of our modern case law analyzing qualified governmental immunity, we are convinced that the [trial] court correctly determined that there was no genuine issue of material fact to be resolved with respect to whether the alleged[ly] negligent acts or omissions of the defendants were discretionary in nature and, thus, subject to immunity." Id., 242. Accordingly, the Appellate Court affirmed the judgment of the trial court. Id., 250. This certified appeal followed.[6] See footnote 3 of this opinion.

On appeal to this court, the plaintiffs contend that the Appellate Court incorrectly determined both that *Spitzer* is distinguishable on its facts and that this court's statement in *Spitzer* that the repair and maintenance of drains and sewers are ministerial functions was dictum. Rather, they argue that *Spitzer* is directly on point and is binding authority for the proposition that the duty of a municipality to maintain and repair its drainage system is ministerial and, therefore, that the negligent performance of that duty will subject the municipality to liability. We conclude that we need not determine whether the language in *Spitzer* was dictum because, even if it was not, *Spitzer* must be overruled in light of more modern case law and statutes governing the distinction between ministerial and discretionary duties. We further conclude that the Appellate Court correctly determined that, under those more modern cases, the town's duty to maintain and repair its drainage system was discretionary and, therefore, subject to governmental immunity.

[6] After the plaintiffs filed this certified appeal, we granted permission to the cities of Bridgeport, Danbury, Hartford, New Haven, Stamford and Waterbury to file a joint brief as amicus curiae in support of the defendants' position.

As a preliminary matter, we set forth the standard of review. "Summary judgment shall be rendered forthwith if the pleadings, affidavits and 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. . . . The scope of our appellate review depends upon the proper characterization of the rulings made by the trial court. . . . When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Meyers* v. *Livingston, Adler, Pulda, Meiklejohn & Kelly, P.C.*, 311 Conn. 282, 289–90, 87 A.3d 534 (2014).

We next review the law governing governmental immunity. "The [common-law] doctrines that determine the tort liability of municipal employees are well established. . . . Generally, a municipal employee is liable for the misperformance of ministerial acts, but has a qualified immunity in the performance of governmental acts. . . . Governmental acts are performed wholly for the direct benefit of the public and are supervisory or discretionary in nature. . . . The hallmark of a discretionary act is that it requires the exercise of judgment. . . . In contrast, [m]inisterial refers to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion." (Internal quotation marks omitted.) *Violano* v. *Fernandez*, supra, 280 Conn. 318.

"The tort liability of a municipality has been codified in [General Statutes] § 52-557n. Section 52-557n (a) (1) provides that '[e]xcept as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within

the scope of his employment or official duties . . . .' Section 52-557n (a) (2) (B) extends, however, the same discretionary act immunity that applies to municipal officials to the municipalities themselves by providing that they will not be liable for damages caused by 'negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law.' " Id., 320.

"Municipal officials are immunized from liability for negligence arising out of their discretionary acts in part because of the danger that a more expansive exposure to liability would cramp the exercise of official discretion beyond the limits desirable in our society. . . . Discretionary act immunity reflects a value judgment that—despite injury to a member of the public—the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury. . . . In contrast, municipal officers are not immune from liability for negligence arising out of their ministerial acts, defined as acts to be performed in a prescribed manner without the exercise of judgment or discretion. . . . This is because society has no analogous interest in permitting municipal officers to exercise judgment in the performance of ministerial acts." (Internal quotation marks omitted.) Id., 318–19.

"This court has identified two other policy rationales for immunizing municipalities and their officials from tort liability. The first rationale is grounded in the principle that for courts to second-guess municipal policy making by imposing tort liability would be to take the administration of municipal affairs out of the hands to which it has been entrusted by law. . . . Second, we have recognized that a civil trial may be an inappropri-

ate forum for testing the wisdom of legislative actions. This is particularly true if there is no readily ascertainable standard by which the action of the government servant may be measured . . . . Thus, [t]he policy behind the exception is to avoid allowing tort actions to be used as a monkey wrench in the machinery of government decision making." (Citation omitted; internal quotation marks omitted.) Id., 319 n.7.

For purposes of determining whether a duty is discretionary or ministerial, this court has recognized that "[t]here is a difference between laws that impose general duties on officials and those that mandate a particular response to specific conditions." *Bonington* v. *Westport*, 297 Conn. 297, 308, 999 A.2d 700 (2010). "A ministerial act is one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment [or discretion] upon the propriety of the act being done."[7] (Internal quotation marks omitted.) *Blake* v. *Mason*, 82 Conn. 324, 327, 73 A. 782 (1909); see also *Benedict* v. *Norfolk*, 296 Conn. 518, 520 n.4, 997 A.2d 449 (2010) (municipal acts are "deemed ministerial if a policy or rule limiting discretion in the completion of such acts exists"); *Pluhowsky* v. *New Haven*, 151 Conn. 337, 347, 197 A.2d 645 (1964) (describing ministerial acts in similar terms). In contrast, when an official has a general duty to perform

[7] See, e.g., *Grignano* v. *Milford*, supra, 106 Conn. App. 657–60 (municipal ordinance requiring owner of structure within harbor or marine facility that has been found to be dangerous to post proper notice, to construct barricade, and to adequately illuminate area until repairs are made created ministerial duty); see also *Wright* v. *Brown*, 167 Conn. 464, 471–72, 356 A.2d 176 (1975) (statute requiring town dog warden to quarantine dog for fourteen days after dog bit person created ministerial duty); *Pluhowsky* v. *New Haven*, 151 Conn. 337, 347, 197 A.2d 645 (1964) (town clerk has ministerial duty to record instrument that has been accepted for recordation in land records); *Leger* v. *Kelley*, 142 Conn. 585, 589, 116 A.2d 429 (1955) (statute prohibiting commissioner of motor vehicles from registering any motor vehicle that was not equipped with safety glass created ministerial duty).

a certain act, but there is no "city charter provision, ordinance, regulation, rule, policy, or any other directive [requiring the government official to act in a] prescribed manner," the duty is deemed discretionary. *Violano* v. *Fernandez*, supra, 280 Conn. 323.

"In general, the exercise of duties involving inspection, maintenance and repair of hazards are considered discretionary acts entitled to governmental immunity." *Grignano* v. *Milford*, supra, 106 Conn. App. 656. This is so because there ordinarily is no legal directive mandating the specific manner in which officials must perform these tasks. Rather, "[a] municipality necessarily makes discretionary policy decisions with respect to the timing, frequency, method and extent of inspections, maintenance and repairs." Id.; see also *Bonington* v. *Westport*, supra, 297 Conn. 308–309 (when plaintiff claimed that defendants had improperly or inadequately inspected neighboring property for zoning violations, alleged acts of negligence constituted discretionary acts because no legal authority mandated inspection to be performed in prescribed manner); *Martel* v. *Metropolitan District Commission*, 275 Conn. 38, 50–51, 881 A.2d 194 (2005) (in absence of any policy or directive requiring defendants to design, supervise, inspect and maintain trail on defendant's property, defendants "were engaged in duties that inherently required the exercise of judgment," and, therefore, those duties were discretionary in nature); *Evon* v. *Andrews*, supra, 211 Conn. 506–507 (defendants' acts were discretionary in nature because what constitutes reasonable, proper or adequate fire safety inspection to ensure that multifamily residence was in compliance with state and local building codes involves exercise of judgment); *Pluhowsky* v. *New Haven*, supra, 151 Conn. 347–48 (in absence of any legal directive requiring defendants to repair malfunctioning catch basin under specific conditions or in particular manner, duty was discretionary); *Grig-*

nano v. *Milford*, supra, 656–57 (ordinance requiring owner of maritime facility to maintain physical improvements in safe condition imposed discretionary duty because ordinance did not "[prescribe] the manner in which the defendant is to perform reasonable and proper inspection and maintenance activities"); *Segreto* v. *Bristol*, 71 Conn. App. 844, 857–58, 804 A.2d 928 (city's allegedly negligent design and maintenance of stairwell located on premises of senior center that was owned and operated by city was discretionary because determinations of what is reasonable or proper under particular set of circumstances necessarily involve exercise of judgment), cert. denied, 261 Conn. 941, 808 A.2d 1132 (2002).

Consistent with these principles, the Appellate Court concluded in *Silberstein* v. *54 Hillcrest Park Associates, LLC*, supra, 135 Conn. App. 273, that the maintenance of storm drains is discretionary in nature. See also *Brusby* v. *Metropolitan District*, 160 Conn. App. 638, 656, 127 A.3d 257 (2015) (in absence of legal directive prescribing manner in which sanitary sewer system was to be maintained or repaired, duty was discretionary). In *Silberstein*, the plaintiffs owned property in the Hillcrest Park neighborhood of Old Greenwich. *Silberstein* v. *54 Hillcrest Park Associates, LLC*, supra, 264. The plaintiffs alleged that the defendants, the Hillcrest Park Tax District (tax district) and Hillcrest Park Association, Inc., which were responsible for maintaining and constructing roads and storm sewers in the Hillcrest neighborhood, had negligently failed to do so, resulting in the periodic flooding of the plaintiffs' property. Id., 264–65. The trial court granted the defendant's motion for summary judgment on the ground of governmental immunity. Id., 267. On appeal, the Appellate Court noted that, although the tax district's bylaws stated clearly that one of the functions of that organization was "to construct and maintain roads . . . drains,

[and] storm sewers"; (internal quotation marks omitted) id., 273; the bylaws did not "prescribe the *manner* in which the roads and drainage systems [were] to be maintained, and there [was] no evidence in the record of any procedure or directive governing the manner of their maintenance." (Emphasis in original.) Id. Accordingly, the court concluded that "the manner in which the defendants discharge their duty to maintain the roads and drainage systems plainly involves the exercise of judgment and discretion," and the duty was, therefore, discretionary. Id.

Like the plaintiffs in the present case, the plaintiffs in *Silberstein* had relied on this court's statement in *Spitzer* v. *Waterbury*, supra, 113 Conn. 88, that "[t]he work of constructing drains and sewers, as well as that of keeping them in repair, is ministerial, and the municipality is responsible for negligence in its performance" to support their contention to the contrary. *Silberstein* v. *54 Hillcrest Park Associates, LLC*, supra, 135 Conn. App. 272. In *Silberstein*, the Appellate Court concluded that *Spitzer* was distinguishable on the ground that this court had concluded in *Spitzer* that "a municipality's construction and repair of storm water sewers and drains [were] ministerial because [they were] 'incidental to' the municipality's statutorily imposed duty to maintain its streets and highways. . . . The court [in *Spitzer*] reasoned: 'The duty imposed by statute upon the municipality to maintain the highways within its limits makes it necessary for the municipality to dispose of all surface water falling upon them.' . . . Thus, the municipality was legally obligated to maintain and repair the drains. In contrast to the municipality in *Spitzer*, the defendants in [*Silberstein* were] not charged with having failed to fulfill a duty that was *imposed* upon them by statute. Rather, the plaintiffs claim[ed] that the defendants negligently failed to carry out a duty that they assumed pursuant to the tax district

bylaws. The tax district bylaws, however, [did] not prescribe the specific manner in which the duty to maintain and repair the roads, drains and storm sewers is to be performed." (Citations omitted; emphasis in original.) Id., 272, quoting *Spitzer* v. *Waterbury*, supra, 87–88.

The plaintiffs in the present case contend that *Spitzer* is controlling because, as in that case—unlike *Silberstein*—the duty of the defendants to repair and maintain the drainage system "originate[s] from the General Statutes, which require Connecticut municipalities to maintain the highways within their limits."[8] The plaintiffs further contend that *Silberstein* is distinguishable because the plaintiffs in that case alleged that the defendants had negligently failed to install a properly functioning drainage system, and "the decision to *build or construct* storm water systems is almost universally held to be a governmental discretionary act." (Emphasis added.) In contrast, the plaintiffs in the present case allege that the defendants failed to adequately *maintain and repair* the storm drainage system, which, they argue are ministerial duties. We disagree with both of these claims.

We first address the plaintiffs' contention that the defendants' duty to maintain and repair the sewer system is ministerial because it derives from statute rather from the town's own ordinances or rules. As we have indicated, the Appellate Court also made this distinction in *Silberstein* v. *54 Hillcrest Park Associates, LLC*, supra, 135 Conn. App. 272. In support of the proposition

[8] The plaintiffs do not identify the specific statutes that, according to them, impose this ministerial duty. We note, however, that General Statutes § 13a-99 provides: "Towns shall, within their respective limits, build and repair all necessary highways and bridges, and all highways to ferries as far as the low water mark of the waters over which the ferries pass, except when such duty belongs to some particular person. Any town, at its annual meeting, may provide for the repair of its highways for periods not exceeding five years and, if any town fails to so provide at such meeting, the selectmen may provide for such repairs for a period not exceeding one year."

that a duty imposed on a municipality by statute is necessarily ministerial, whereas a duty voluntarily assumed by the municipality is discretionary, the Appellate Court cited only this court's statement in *Spitzer* v. *Waterbury*, supra, 113 Conn. 87, that "[t]he duty imposed by statute upon the municipality to maintain the highways within its limits makes it necessary for the municipality to dispose of all surface water falling upon them." (Internal quotation marks omitted.) *Silberstein* v. *54 Hillcrest Park Associates, LLC*, supra, 272. In turn, *Spitzer* v. *Waterbury*, supra, 87, supported that proposition with a citation to *Bronson* v. *Wallingford*, 54 Conn. 513, 519–20, 9 A. 393 (1887), in which this court suggested, in dictum and without citation to any authority, that a municipality may be held liable for damages caused while carrying out its statutory duty to dispose of surface waters falling on its highways, whereas it would be immune from liability for acts performed pursuant to a duty imposed by the city charter in the absence of any charter provision providing a remedy.[9]

[9] *Bronson* also states that municipalities may be held liable for damage caused by rainwater runoff from roadbeds "only in special cases, where wanton or unnecessary damage is done, or where [the] damage results from negligence . . . ." *Bronson* v. *Wallingford*, supra, 54 Conn. 520. The cases cited in *Bronson*, however, may be characterized as sounding in nuisance. See id. As we discuss more fully subsequently in this opinion, a municipality may be held liable for the creation of a nuisance even when the act that created the nuisance was, in the language of the older cases, governmental or, in the language of more recent cases, discretionary. Thus, *Bronson* may have conflated the notion that a municipality may be held liable for creating a nuisance while carrying out a statutory duty with the notion that a municipality may be held liable for the performance of nongovernmental acts. Suffice it to say that there are a myriad of cases in Connecticut and other jurisdictions addressing the issue of municipal liability for damages caused by the failure to maintain roads and sewers, and it is likely possible to find an isolated case to support any position. See 4 J. Dillon, Commentaries on the Law of Municipal Corporations (5th Ed. 1911) § 1740, p. 3051 ("[i]t is, perhaps, impossible to reconcile all of the cases" on subject of municipal liability for damage caused by municipal drains and sewers).

Other cases predating *Spitzer* present a mirror image of this proposition, however, and hold that municipalities may *not* be held liable when they violate public duties that have been imposed on them by the state, whereas municipalities *can* be held liable for the violation of duties that they voluntarily take upon themselves. In *Jones* v. *New Haven*, 34 Conn. 1, 13 (1867), this court stated that "[w]henever a public duty is *imposed* upon a town . . . without its consent, express or implied, such town . . . is not liable to an action for negligence in respect to such duty, unless a right of action is given by statute." (Emphasis added.) In contrast, "when a grant is made to a [municipality] of some special power or privilege *at its request*, out of which public duties grow; and when some special duty is imposed upon a [municipality] not belonging to it under the general law *with its consent*; in these and like cases, if the corporation is guilty of negligence in the discharge of such duty, thereby causing injury to another, it is liable to an action in favor of the party injured." (Emphasis added.) Id., 14; see also *Dyer* v. *Danbury*, 85 Conn. 128, 131, 81 A. 958 (1911) (same). There are also cases predating *Spitzer* holding that acts performed pursuant to voluntarily assumed duties may be governmental and, therefore, immune from liability, *as well as* acts performed pursuant to duties imposed by statute. See *Hannon* v. *Waterbury*, 106 Conn. 13, 17, 126 A. 876 (1927) ("Whether the duty is directly imposed upon the city or permissive, that is, one which it voluntarily assumed . . . does not change the character of the act or function. The duty in either case will be governmental if the nature and character of [the] act or function be such."); *Pope* v. *New Haven*, 91 Conn. 79, 82, 99 A. 51 (1916) (function may be governmental regardless of whether "the legislature determines the necessity and expediency of the act to be performed" or "the necessity and expediency are left to be deter-

mined by the municipality"). We are aware of no authority other than the court's unsupported dictum in *Bronson* v. *Wallingford*, supra, 54 Conn. 519–20, however, that would support *Spitzer*'s suggestion that a duty imposed by statute, as distinct from a duty that is voluntarily assumed by the municipality, is by virtue of that fact ministerial.

In any event, the distinction applied by the court in *Jones* and *Dyer* has been superseded by more recent developments in municipal law and the law governing governmental immunity. As the Appellate Court recognized in *Roman* v. *Stamford*, 16 Conn. App. 213, 219, 547 A.2d 97 (1988), aff'd, 211 Conn. 396, 559 A.2d 710 (1989), "[u]nlike the *Dyer* and *Jones* doctrine of assumption of municipal liability based upon a charter provision, the modern construct of municipal liability rests upon distinctly different considerations." See also id., 218–19 ("construct [set forth in *Jones* and *Dyer*], wherein special powers are granted to or imposed upon the municipality, harkens back to the days before the advent of the principle of home rule" and, therefore, is no longer "a valid conceptualization of the doctrine of actionable private duties of a municipality").[10] Specifi-

[10] Remnants of the construct set forth in *Dyer* and *Jones* survive in the principle that a municipality may be held liable for negligent acts that are proprietary in nature, as opposed to governmental. See *Considine* v. *Waterbury*, 279 Conn. 830, 844, 905 A.2d 70 (2006) ("municipalities are liable for their negligent acts committed in their proprietary capacity"); see also General Statutes § 52-557n (a) (1) ("a political subdivision of the state shall be liable for damages to person or property caused by . . . [B] negligence in the performance of functions from which the political subdivision derives a special corporate profit or pecuniary benefit"). Although "the distinction between a municipality's governmental and proprietary functions has been criticized as being illusory, elusive, arbitrary, unworkable and a quagmire"; *Considine* v. *Waterbury*, supra, 845; it is relatively clear that, under the more modern rule, not *all* duties that a municipality voluntarily assumes for the benefit of its inhabitants, as distinct from those that it performs for the benefit of the general public as the agent of the state, are proprietary or, in the language of the older cases, corporate, and, therefore, subject to liability. See id., 846 ("functions that appear to be for the sole benefit of a municipality's inhabitants, but nevertheless provide indirect benefits to the

cally, under modern principles of governmental immunity, the salient consideration in determining whether a municipal duty is discretionary or ministerial is not whether the duty was imposed on the municipality by statute or voluntarily assumed pursuant to its own ordinances or regulations, but whether there is any statute, "city charter provision, ordinance, regulation, rule, policy, or any other directive [requiring the government official to act *in a*] *prescribed manner*." (Emphasis added.) *Violano* v. *Fernandez*, supra, 280 Conn. 323; see also *Roman* v. *Stamford*, supra, 221 (under modern principles of governmental immunity, "[a] ministerial act, as opposed to a discretionary act, refers to [one] which is to be performed in a prescribed manner without the exercise of judgment or discretion" [internal quotation marks omitted]). Accordingly, we disagree with the plaintiffs' argument that *Silberstein* v. *54 Hillcrest Park Associates, LLC*, supra, 135 Conn. App. 272, is not controlling because, unlike in *Silberstein*, the defendants' duty in the present case was imposed by statute.

We next address the plaintiffs' argument that, in contrast to the design of storm water drainage systems, the duty to repair and maintain such systems is ministe-

general public because the activities were meant to improve the general health, welfare or education of the municipality's inhabitants" are governmental); id., 848 ("a municipality is engaged in a proprietary function when it acts very much like private enterprise" [internal quotation marks omitted]). The plaintiffs in the present case make no claim that the maintenance and repair of a storm sewer system is proprietary in nature. Cf. *Platt Bros. & Co.* v. *Waterbury*, 72 Conn. 531, 549, 45 A. 154 (1900) ("[w]hile sewers or drains for the disposition of surface waters collecting in highways may be considered as mere adjuncts of a highway, partaking of its nature as a governmental use . . . it is different with *sewers for the disposition of refuse and filth accumulated on private property*" [citation omitted; emphasis added]); *Brusby* v. *Metropolitan District*, supra, 160 Conn. App. 653 (concluding that there was genuine issue of material fact as to whether maintenance of sanitary sewer system, of which plaintiff was paying customer, was proprietary function).

rial. In support of this claim, the plaintiffs rely on several cases from other jurisdictions. The holdings of those cases, however, can be traced to the outmoded distinction between duties that are imposed on municipalities and those that they voluntarily assume. See *Johnston* v. *District of Columbia*, 118 U.S. 19, 21, 6 S. Ct. 923, 30 L. Ed. 75 (1886) (repair of sanitary sewer is ministerial duty), citing *Child* v. *Boston*, 86 Mass. 41, 52 (1862) (municipality is not liable for defective sanitary sewer plan because creation of plan involved duty of quasi-judicial nature, but could be held liable for negligent care and maintenance of sanitary sewers because those duties were not imposed by legislative authority for public purposes but were voluntarily assumed by municipality); *Barton* v. *Syracuse*, 36 N.Y. 54, 54 (1867) (municipality was liable for negligent failure to repair sanitary sewers because it voluntarily accepted duty and assessed costs on beneficiaries);[11] *Portsmouth* v. *Mitchell Mfg. Co.*, 113 Ohio St. 250, 255–56, 148 N.E. 846 (1925) (citing *Barton* and concluding that municipality cannot be held liable for failure to construct storm sewer but can be held liable for failure to keep storm sewer in repair). In addition, all of these cases either involved or relied on cases involving the maintenance and repair of *sanitary* sewers, which, unlike the maintenance and repair of storm sewers, arguably may be a proprietary function under certain circumstances, even under more modern case law.[12] See footnote 10 of this opinion.

[11] New York state courts continue to accept this distinction between duties that are imposed on municipalities and those that they voluntarily assume. See *Fireman's Fund Ins. Co.* v. *Nassau*, 66 App. Div. 3d 823, 824, 887 N.Y.S.2d 242 (2009) (municipality is immune from liability for negligent design of sanitary sewer, but maintenance of sewer is ministerial function); *Biernacki* v. *Ravena*, 245 App. Div. 2d 656, 657, 664 N.Y.S.2d 682 (1997) (following *Johnston* and concluding that, while municipality is not liable for defective sanitary sewer plan, construction and repair of sewer are ministerial functions).

[12] The plaintiffs have not cited any Connecticut cases to support their position that the construction of sewers is discretionary but that their mainte-

We recognize that, for purposes of imposing liability on a municipality, some Connecticut cases predating *Spitzer* made the distinction between a municipality's duty to construct roads and sidewalks, and, by extension, the storm drains and sewers that are required to ensure that the roads are functional, as opposed to a duty of maintenance and repair. In *Hoyt* v. *Danbury*, 69 Conn. 341, 351, 37 A. 1051 (1897), for example, this court observed that a municipality's statutory obligation to provide highways "carried with it the correlative right of determining the mode of their construction," and "[a]s to which, out of any appropriate modes of building the particular sidewalk in question, was to be chosen, it was for the borough to decide; and so long as the mode selected was an appropriate and lawful one, its decision was not subject to collateral review in a suit of this nature." In other words, *Hoyt* recognized that the *construction* of highways is a discretionary function. As to highway *repairs*, this court noted that municipal liability for the failure to keep roads in good repair had been imposed by statute, now codified at General Statutes § 13a-149,[13] "since early colonial times." Id. The highway defect statute, however, *waives* governmental immunity from claims by travelers on the

nance and repair are ministerial. We note that *Spitzer* itself made no such distinction, but indicated that "[t]he work of constructing drains and sewers, as well as that of keeping them in repair, is ministerial . . . ." *Spitzer* v. *Waterbury*, supra, 113 Conn. 88. *Spitzer* also stated, however, that "the duty to provide . . . drains, authorized by the defendant's charter, is governmental in its nature." Id. Because, at that time, acts in furtherance of governmental or public duties were deemed to be immune from liability, i.e., *not* ministerial; see *Gauvin* v. *New Haven*, 187 Conn. 180, 184, 445 A.2d 1 (1982) (citing *Spitzer* for proposition that "[a] municipality is immune from liability for the performance of governmental acts, as distinguished from ministerial acts"); there would appear to be an inconsistency within *Spitzer*. This apparent inconsistency may reflect the somewhat confusing state of the law governing governmental immunity at the time.

[13] General Statutes § 13a-149 provides in relevant part: "Any person injured in person or property by means of a defective road or bridge may recover damages from the party bound to keep it in repair. . . ."

highway arising from highway defects. See *McIntosh* v. *Sullivan*, 274 Conn. 262, 282, 875 A.2d 459 (2005) (highway defect statute at issue in *Hoyt* "abrogated governmental immunity"). Put differently, the highway defect statute does not *impose a ministerial duty* to repair highways, so that a municipality may be held liable to abutting landowners for breach of that duty. See *Aerotec Corp.* v. *Greenwich*, 138 Conn. 116, 119, 82 A.2d 356 (1951) (highway defect statute "provides no right of recovery to an abutting landowner for damage from a defective highway"). Thus, the distinction made in *Hoyt* between the construction of highways and their repair, which was premised on the highway defect statute, is consistent with the modern rule distinguishing "laws that impose general duties on officials," which impose discretionary duties, "and those that mandate a particular response to specific conditions," which impose ministerial duties. *Bonington* v. *Westport*, supra, 297 Conn. 308.

The authority that *Spitzer* itself cited in support of its statement that the duty to construct and repair drainage systems is ministerial also can be at least partially reconciled with the modern rule. In *Spitzer*, this court relied on a treatise on Municipal Corporations authored by John F. Dillon. See *Spitzer* v. *Waterbury*, supra, 113 Conn. 88, citing 4 J. Dillon, Commentaries on the Law of Municipal Corporations (5th Ed. 1911) §§ 1742 and 1743, pp. 3054–57. That treatise states the following: "[A] municipal corporation *is liable for negligence in the ministerial duty to keep its sewers . . . in repair* . . . ." (Emphasis in original.) 4 J. Dillon, supra, § 1742, p. 3055. A careful review of the treatise, however, reveals that this statement was at least partially premised on the principle that municipalities are "bound to preserve and keep in repair erections [they have] constructed, so that they shall not become a source

of *nuisance* to others."[14] (Emphasis altered; internal quotation marks omitted.) Id. Consistent with this principle, it is well established in this state that "towns will not be justified in doing an act lawful in itself in such a manner as to create a nuisance, any more than individuals. And if a nuisance is thus created, whereby another suffer[s] damage, towns like individuals are responsible." (Internal quotation marks omitted.) *Hoffman* v. *Bristol*, 113 Conn. 386, 390, 155 A. 499 (1931); accord *Keeney* v. *Old Saybrook*, 237 Conn. 135, 165, 676 A.2d 795 (1996) ("a municipality may be liable for a nuisance it creates through its negligent misfeasance or nonfeasance"); *Wright* v. *Brown*, 167 Conn. 464, 470, 356 A.2d 176 (1975) ("[l]iability in nuisance can be imposed on a municipality only if the condition constituting the nuisance was created by the positive act of the municipality"); *Prifty* v. *Waterbury*, 133 Conn. 654, 657, 54 A.2d 260 (1947) ("the rule which exempts municipalities from liability when their employees are acting in discharge of a public duty does not relieve them from liability for the consequences of particular acts which the municipality has directed to be performed and which, from their character or the manner in which they are so ordered to be executed, will naturally work a direct injury to others or create a nuisance"); *Colwell* v. *Waterbury*, 74 Conn. 568, 572–73, 51 A. 530 (1902) (same); *Judd* v. *Hartford*, 72 Conn. 350, 354, 44 A. 510 (1899) (although duty to construct sewer was governmental, municipality could be held liable for negligent failure to remove temporary obstructions after construction because failure to do so turned "city property into a nuisance"); *Mootry* v. *Danbury*, 45 Conn. 550, 556 (1878) (when town constructed bridge over stream that blocked water flow, causing plaintiff's upstream

[14] Dillon's treatise also relied on the now outmoded distinction between public duties, which are imposed on municipalities, and corporate duties, which municipalities voluntarily assume. See 4 J. Dillon, supra, § 1742, p. 3057 n.1.

property to flood, it may be held liable because "towns will not be justified in doing an act lawful in itself in such a manner as to create a nuisance, any more than individuals").[15]

The fact that a municipality may be liable for creating a nuisance, however, does not necessarily mean—at least not under our more recent cases—that the act that created the nuisance was ministerial in nature. Indeed, this court has held that "a municipality may be liable for a nuisance . . . even if [its] misfeasance or nonfeasance also constitutes negligence from which the municipality would be immune" because the municipality was engaged in a discretionary function.[16] *Keeney*

[15] We note that *Spitzer* cited *Judd* and *Mootry* in support of its conclusion that a municipality is "bound to exercise due care in the construction of its storm water sewers, and would be liable for its failure to do so . . . ." *Spitzer* v. *Waterbury*, supra, 113 Conn. 88.

[16] This court stated in *Elliott* v. *Waterbury*, 245 Conn. 385, 421, 715 A.2d 27 (1998), that, "in order to overcome the governmental immunity of municipal defendants where it applies, the plaintiff must prove that the defendants, by some positive act, *intentionally* created the conditions alleged to constitute a nuisance." (Emphasis added.) In support of this statement, this court cited, among other cases, *Keeney* v. *Old Saybrook*, supra, 237 Conn. 165–66, and *Hoffman* v. *Bristol*, supra, 113 Conn. 390–92. See *Elliott* v. *Waterbury*, supra, 421. In both *Keeney* and *Hoffman*, however, this court expressly recognized that a municipality may be held liable for *negligently* creating a nuisance. See *Keeney* v. *Old Saybrook*, supra, 165 (municipality may be held liable for nuisance even if its conduct "constitutes negligence from which the municipality would be immune"); *Hoffman* v. *Bristol*, supra, 389 (municipality may be held liable for nuisance "irrespective of whether the misfeasance or nonfeasance causing the nuisance also constituted negligence"); see also *Judd* v. *Hartford*, supra, 72 Conn. 353 (municipality was liable when, "after planning and constructing an adequate sewer, [the municipality] left obstructions in it, placed there for temporary purposes, which its agents *carelessly* omitted to remove after those purposes had been accomplished" [emphasis added]). It is clear, therefore, that, by using the word "intentionally," *Elliott* merely intended to emphasize that, for a municipality to be held liable for creating a nuisance, the nuisance must be the result of some positive act of the municipality, and that this court did not intend to suggest that only the intentional act of a municipality can create a nuisance. In other words, there is a difference between a *positive* act, which may be negligent, as was the act of the municipality in *Judd*, and an *intentional* act.

v. *Old Saybrook*, supra, 237 Conn. 165; but see *Judd* v. *Hartford*, supra, 72 Conn. 353–54 (duty to remove temporary obstructions from sewer so as to prevent creation of nuisance was ministerial).

In other words, unlike Dillon's treatise, which seems to suggest that ministerial acts are the only acts for which a municipality may be held liable and, therefore, that if a municipality can be held liable for creating a nuisance, the municipal function that resulted in the creation of the nuisance must be a ministerial one, our more recent cases have treated nuisance and the violation of a ministerial duty as entirely distinct theories of municipal liability.[17] See *Grady* v. *Somers*, 294 Conn. 324, 335 n.10, 984 A.2d 684 (2009) (governmental immunity does not apply to claims alleging "[1] liability in nuisance, which [may] be imposed . . . only if the condition constituting the nuisance was created by the positive act of the municipality; and [2] the negligent performance of ministerial acts" [internal quotation

[17] The plaintiffs in the present case have made no claim that the defendants may be held liable for their failure to properly maintain and repair the storm sewer system under a nuisance theory because a positive act by the town caused damage to their property. Indeed, at oral argument before this court, counsel for the plaintiffs conceded that he did not believe that the facts of this case would support a nuisance claim. See *Aerotec Corp.* v. *Greenwich*, supra, 138 Conn. 120 (noting that municipal liability for nuisance "exists . . . only for those nuisances which have been created by positive act" and that "[t]here is no liability where the condition of the highway which is dangerous has come into being simply because of the failure of the town to take remedial steps"); *Karnasiewicz* v. *New Britain*, 131 Conn. 691, 694, 42 A.2d 32 (1945) (when dangerous highway condition does not constitute defect under highway defect statute and does not constitute nuisance, "a municipality is not liable where its sole fault is a failure to take remedial steps"); see also footnote 18 of this opinion.

These decisions lend support to our conclusion that the maintenance and repair of a storm drainage system are not ministerial functions. It would be odd to conclude that a city is not liable for harms caused by a dangerous condition on a highway unless the condition was created by a positive act of the municipality or constituted a defect under the highway defect statute, but the city may be held liable for harms caused by the failure to take steps to remedy a dangerous condition in a storm drainage system.

marks omitted]); see also *Keeney* v. *Old Saybrook*, supra, 237 Conn. 165. Accordingly, although we agree with Dillon's treatise to the extent that it recognizes that there are situations in which a municipality may be held liable for damage caused by a storm sewer system that the municipality was responsible for maintaining and repairing—namely, when the municipality's positive act has created a nuisance—we do not agree with its suggested inference from that proposition, namely, that the duty to maintain and repair storm sewers is necessarily ministerial.[18] Indeed, if that were the case, municipalities could be held liable for *any* damage caused by their failure to maintain and repair storm sewer systems, even if the "positive act" element of nuisance were not satisfied. See *Wright* v. *Brown*, supra, 167 Conn. 470 ("[l]iability in nuisance can be imposed on a municipality only if the condition constituting the nuisance was created by the positive act of the municipality").

[18] We recognize that this court has held that, by enacting § 52-557n, the legislature eliminated common-law actions against municipalities arising from injuries for which § 13a-149, the highway defect statute, provides a remedy, including nuisance actions. See *Sanzone* v. *Board of Police Commissioners*, 219 Conn. 179, 192, 592 A.2d 912 (1991) (§ 52-557n provides that § 31a-149 "is a plaintiff's exclusive remedy against a municipality or other political subdivision 'for damages resulting from injury to any person or property by means of a defective road or bridge' "); see also General Statutes § 52-557n (a) (1) (providing that municipality may be held liable for its negligent acts and negligent acts of its employees acting within scope of official duties, for acts from which political subdivision derives corporate profit, and for creation of nuisance, "provided, no cause of action shall be maintained for damages resulting from injury to any person or property by means of a defective road or bridge except pursuant to section 13a-149"). As we have indicated herein, however, § 13a-149 does not provide a right of recovery to an abutting landowner for damage to the land caused by a defective highway. See *Aerotec Corp.* v. *Greenwich*, supra, 138 Conn. 119. Moreover, a highway need not be *defective* to constitute a nuisance to abutting landowners. See *Wright* v. *Brown*, supra, 167 Conn. 470 ("[l]iability in nuisance can be imposed on a municipality only if the condition constituting the nuisance was created by the positive act of the municipality").

We therefore disagree with the plaintiffs' argument that, in determining whether a municipality's duty with respect to its storm drains and sewers is ministerial or discretionary, the relevant considerations are (1) whether the duty was imposed by statute or, instead, was voluntarily assumed by the town, and (2) whether the municipality was constructing the sewers or, instead, was maintaining or repairing them. Rather, the relevant consideration under well established modern principles of governmental immunity remains whether the duty was a general one or, instead, whether there was a "city charter provision, ordinance, regulation, rule, policy, or any other directive [requiring the government official to act in a] prescribed manner." *Violano* v. *Fernandez*, supra, 280 Conn. 323; see also *Bonington* v. *Westport*, supra, 297 Conn. 308 ("[t]here is a difference between laws that impose general duties on officials and those that mandate a particular response to specific conditions"). To the extent that *Spitzer* v. *Waterbury*, supra, 113 Conn. 84, held otherwise, it is hereby overruled.

We conclude, therefore, that the defendants in the present case may be held liable to the plaintiffs only if there was some legal directive prescribing the specific manner in which they were required to maintain and repair the town's storm sewer system. As we have indicated, the Appellate Court concluded that, "although there is language in § 16-32 of the [Naugatuck Code of Ordinances] that requires the streets commission to maintain and repair the town's storm water sewer system, the ordinance contains no provisions that mandate the time or manner in which those responsibilities are to be executed, leaving such details to the discretion and judgment of the municipal employees."[19] *Northrup*

[19] Section 16-32 of the Naugatuck Code of Ordinances provides: "Except as otherwise provided in this article, the streets commission shall be responsible for the care and management of all streets, avenues, highways, alleys and bridges, and the opening, [grading, improving], repairing and cleaning of the same; of the construction, protection, repair, furnishing, cleaning,

v. *Witkowski*, supra, 175 Conn. App. 238. The plaintiffs do not challenge the Appellate Court's conclusion that the language of that ordinance does not, in and of itself, create a ministerial duty.

Instead, the plaintiffs claim that Witkowski's deposition testimony that the streets commission had developed a schedule to ensure that every catch basin was maintained at least once a year and that, "if there were calls from the public about a basin being blocked or a bad situation that needed to be addressed, we would attempt to do that," established the existence of a rule or policy that limited the streets commission's discretionary authority under § 16-32 of the Naugatuck Code of Ordinances and thereby created a ministerial duty.[20] In support of this claim, the plaintiffs argue that, in *Mills* v. *Solution, LLC*, 138 Conn. App. 40, 51–52, 50

heating, lighting and general care of all public streets and appurtenances, except such as are by the express terms of the Charter under the control of some other officer or department; of the construction, repair, cleaning and general care of all drains, culverts, sluiceways and catch basins, and the collection and disposing of ashes, garbage and refuse. The streets commission shall make all suitable rules and regulations in regard to the department and the conduct of its business."

[20] The plaintiffs raised this claim for the first time in their reply brief. They contend that they did not raise this claim in their main brief because "the question certified by this [court] was not specific to the [town's] directives, but to storm water systems in general . . . ." They point out that the defendants nevertheless addressed "the question more narrowly as it relates only to the [town]." The plaintiffs fail to recognize, however, that this court is required to reach the question of whether the defendants' own acts had created a ministerial duty only if it *rejects* their claim that a ministerial duty was created by statute and that our review of the former issue can only be to their benefit. By failing to address the issue in their main brief, the plaintiffs effectively abandoned it. See, e.g., *State* v. *Jose G.*, 290 Conn. 331, 341 n.8, 963 A.2d 42 (2009) ("[i]t is a well established principle that arguments cannot be raised for the first time in a reply brief" [internal quotation marks omitted]). Nevertheless, because the plaintiffs cannot prevail on this claim, and because the defendants have briefed it, we review it. See *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 157–58, 84 A.3d 840 (2014) (review of unpreserved claim may be appropriate when party who raised it cannot prevail).

A.3d 381, cert. denied, 307 Conn. 928, 55 A.3d 570 (2012), the Appellate Court held that, although the use of the mandatory language "shall" in a statute does not necessarily create a ministerial duty, if the municipality has a policy or rule limiting the discretion of public officials in the performance of a mandatory duty that would otherwise be discretionary, the duty is ministerial.[21] We are not persuaded that this is a correct interpretation of *Mills*. Rather, *Mills* is more reasonably interpreted as holding that mandatory statutory language is not sufficient to create a ministerial duty unless the *statute itself* limits discretion in the performance of the mandatory act. See id., 52 ("[w]here the text of the statute explicitly vests the chief of police with the discretion to determine when and how to furnish police protection, we decline to hold that the same statute imposes a ministerial duty on the chief of police to furnish the protection he deems, in his discretion, to be necessary").

We need not decide, however, whether the existence of a municipal agency's "policy or rule" that limits the agency's discretion in performing a duty imposed by ordinance or statute can ever convert a duty that otherwise would be discretionary into a ministerial duty because, even if we were to assume, without deciding, that there are circumstances under which it can, we

[21] See also *Wisniewski* v. *Darien*, 135 Conn. App. 364, 374–75, 42 A.3d 436 (2012) (although no legal directive prescribed specific manner in which tree warden was required to perform duties, evidence that town's assistant director of public works had repeatedly provided same general direction to tree warden upon receiving complaints of unsafe trees and tree warden's testimony that he had nondiscretionary duty to perform inspection upon receipt of complaint were sufficient to establish ministerial duty); *Kolaniak* v. *Board of Education*, 28 Conn. App. 277, 281, 610 A.2d 193 (1992) (in case in which board of education had issued bulletin to all maintenance personnel directing that walkways were to be inspected and kept clean on daily basis, maintenance workers had no discretion to determine whether there was sufficient accumulation of snow before clearing walkways but had ministerial duty to clear walkways of snow and ice).

conclude that Witkowski's testimony would not be sufficient to establish the existence of such a policy or rule in the present case. This court previously has held that a municipality may be held liable for the negligent performance of a duty only if the "the official's duty is *clearly* ministerial." (Emphasis added; internal quotation marks omitted.) *Bonington* v. *Westport*, supra, 297 Conn. 308. We conclude that neither the creation of a schedule for cleaning all catch basins at least once per year, nor the practice of attempting to respond to every complaint about malfunctioning storm drains, constitutes a "policy or rule" converting the discretionary duty to carry out the functions mandated by § 16-32 of the Naugatuck Code of Ordinances into a clear ministerial duty. If we were to conclude otherwise, virtually *any* attempt by a municipal agency to ensure that its discretionary duties are regularly and properly carried out would convert its discretionary duty into a ministerial duty, thereby creating a disincentive for municipal agencies to make such attempts and undermining the very policy considerations that the doctrine governmental immunity was intended to advance. See *Violano* v. *Fernandez*, supra, 280 Conn. 319 ("[d]iscretionary act immunity reflects a value judgment that—despite injury to a member of the public—the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury" [internal quotation marks omitted]).

For similar reasons, we reject the plaintiffs' claim that the defendants violated a ministerial duty when they completely failed to perform *any* maintenance or repair of some storm drains and catch basins. In support of this claim, the plaintiffs rely on this court's decision in *Evon* v. *Andrews*, supra, 211 Conn. 506, in which

we noted that the plaintiffs had not alleged that "the defendants failed to inspect the dwelling" but that they had "failed to make *reasonable and proper inspections* . . . ." (Emphasis in original; internal quotation marks omitted.) The plaintiffs contend that this implies that municipalities have no discretion to completely *fail* to perform a mandatory duty, even if the manner of carrying out the duty is discretionary. We disagree. First, the plaintiffs have cited no evidence that would support a finding that there are town storm drains and catch basins that the defendants have *never* maintained or repaired, and the frequency of maintenance and repair is discretionary. See *Grignano* v. *Milford*, supra, 106 Conn. App. 656 ("[a] municipality necessarily makes discretionary policy decisions with respect to the timing, *frequency*, method and extent of inspections, maintenance and repairs" [emphasis added]). Second, even if we were to assume that the defendants never maintained or repaired certain storm drains and catch basins, we cannot conclude that, in a system as large and complex as a municipal storm drainage system, the duty to maintain and repair the system encompasses a judicially enforceable duty to maintain and repair each individual component of the system, regardless of the needs of the system as a whole. It is not the function of this court to second-guess the administration of such complex municipal affairs, particularly when "there is no readily ascertainable standard by which the action of the government servant may be measured . . . ."[22]

[22] The dissenting justice would conclude that, because "[*o*]*nly* the municipality can construct a storm water drainage system and, once constructed, *only* the municipality can maintain the system and repair it to prevent property damage foreseeably resulting from its malfunction," and "[b]ecause storm water drainage systems are municipal property and subject to exclusive municipal control," a municipality should not be permitted to invoke municipal immunity to "escape liability." (Internal quotation marks omitted.) The very *purpose* of the doctrine of governmental immunity, however, is to bar liability for harmful negligent conduct by a municipality, and it is in the very nature of harmful negligent conduct that the harm was within the power of the tortfeasor to prevent. Thus, to create an exception to the

(Internal quotation marks omitted.) *Violano* v. *Fernandez*, supra, 280 Conn. 319 n.7.

For the foregoing reasons, we conclude that the defendants' duty to maintain and repair the town's storm drains and sewers was discretionary and that the Appellate Court properly upheld the trial court's granting of the defendant's motion for summary judgment on the ground of governmental immunity.

The judgment of the Appellate Court is affirmed.

In this opinion PALMER, McDONALD, D'AURIA and KAHN, Js., concurred.

ECKER, J., dissenting. In *Spitzer* v. *Waterbury*, 113 Conn. 84, 88, 154 A. 157 (1931), this court held, consistent with its prior precedent and the prevailing case law in the majority of our sister states, that the "[t]he work of constructing drains and sewers, as well as that of keeping them in repair, is ministerial, and the municipality is responsible for negligence in its performance." This line of cases imposing liability on municipalities for the negligent maintenance and repair of drains and sewers has been on our books for over a hundred years without any sign of legislative disapproval or criticism from this court. Today we overrule *Spitzer* and the well established case law on which it relied because the majority believes, contrary to *Spitzer*, that the maintenance and repair of a storm water drainage system is not ministerial, but discretion-

doctrine in cases in which the dangerous condition was within the municipality's control and the municipality could have prevented the harm would eviscerate the doctrine, and would entirely disregard the underlying "value judgment that—despite injury to a member of the public—the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury." (Internal quotation marks omitted.) *Violano* v. *Fernandez*, supra, 280 Conn. 319.

ary. I cannot understand why we would choose to overturn an established line of cases, which has been codified by the legislature in General Statutes § 52-557n, without any compelling reason to do so. The choice to overrule this long-standing precedent becomes still more mystifying upon the realization that we are doing so in favor of an immunity doctrine that can only serve to encourage municipal carelessness by removing any financial incentive to act with due care. The immunity we confer today imposes the entire burden of a municipality's negligence on the unlucky few who suffer its direct consequences in the form of property damage or personal injury, rather than spreading those costs across the entire community that benefits from the relevant municipal operation. I respectfully dissent.

I begin with a brief review of certain facts that cannot be ignored at the summary judgment stage. The plaintiffs' opposition to summary judgment included a technical report dated October, 2009, entitled "Stormwater Management Report Nettleton Avenue Neighborhood" (drainage study), which was prepared by an engineering firm at the request of the defendant borough of Naugatuck (town). As the majority notes, the drainage study indicates that the flooding in the Nettleton Avenue neighborhood, where the plaintiffs reside, occurs after periods of particularly heavy rainfall and attributes the flooding "to the fact that runoff was required to flow through relatively narrow drainpipes that were in poor to fair condition and that the majority of catch basins in the area were old and had small openings that often became overgrown with vegetation or obstructed by trash." (Internal quotation marks omitted.) The majority's abridged summary, although accurate, fails to acknowledge all of the pertinent facts contained in the drainage study. Additional aspects of the drainage study warrant further elaboration because they illustrate the

nature and extent of the alleged negligent acts and omissions at issue in this case.

The drainage study explains that the cause of the flooding in the Nettleton Avenue neighborhood is not limited to the outdated and dilapidated condition of the drainage pipes and catch basins. Rather, "[t]he street is used as an overflow channel" and "[w]hen the street's capacity is exceeded, water will find and follow the path of least resistance to reach the watershed's natural low point . . . ." The street's ability to act as an overflow channel had been compromised by the town's role in repaving the neighborhood streets and curbs. The repaving had thickened the asphalt and reduced "the height of the curbs above the asphalt . . . decreas[ing] the curb's ability to carry storm water runoff." The excess storm water runoff "adds to the flow already in Trowbridge Place and accumulates at the low point in Trowbridge Place (about [fifty] feet east of Nettleton Avenue) where it overflows the curb and drains through the yards between Trowbridge Place and Moore Avenue." The plaintiffs' home is located at the low point on Nettleton Avenue, near the intersections of Trowbridge Place and Moore Avenue.

According to the drainage study, residents on Nettleton Avenue between Trowbridge Place and Moore Avenue "described being flooded by surface waters that overflow the drainage system in the adjacent streets. The resident at 75 Goodyear Avenue described water backing up into the basement from Trowbridge Place during heavy storms. Residents along the east side of Nettleton Avenue and the north side of Moore Avenue describe water flowing over the curbs on the south side of Trowbridge Place and then through their yards causing water damage during heavy rainfall events. Such flooding was reported to have occurred every one or two years."

The drainage study reflects that the town was aware of the defective condition of the storm water drainage system and the need for maintenance and repairs to prevent flooding in the Nettleton Avenue neighborhood. Additionally, the plaintiffs submitted an affidavit in which Helen M. Northrup averred that she "repeatedly" informed the defendants, James Stewart, the town's director of public works, and Robert A. Mezzo, the town's mayor, that her home continued to flood and asked them to "[take] measures to protect" her home. Her requests were ignored and her home, as well as those in the surrounding neighborhood, continued to flood during periods of heavy rainfall with "rain surface water, black water, and storm water mixed with sewage . . . ."

In my view, the evidence supports a reasonable inference that the defendants were negligent in constructing, maintaining, and repairing all of the components of the storm water drainage system—municipal streets, curbs, catch basins, and drainage pipes—serving the plaintiffs' neighborhood. The evidence further supports a reasonable inference that the plaintiffs' property was damaged by the repeated flooding caused by the defendants' negligent construction, repair, or maintenance of the storm water drainage system. I believe that the defendants' motion for summary judgment should have been denied on this factual record.

The majority affirms the grant of summary judgment in favor of the defendants because, in its view, the construction, maintenance and repair of a storm water drainage system requires the exercise of judgment or discretion under § 52-557n (a) (2) (B).[1] In arriving at

[1] General Statutes § 52-557n (a) (1) (A) provides in relevant part that "[e]xcept as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by . . . [t]he negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties . . . ." The statute further provides, however, that "a political subdivision of the state shall not be liable for damages to person or property caused

this conclusion, the majority overrules this court's holding in *Spitzer* v. *Waterbury*, supra, 113 Conn. 88, that "[t]he work of constructing drains and sewers, as well as that of keeping them in repair, is ministerial, and the municipality is responsible for negligence in its performance." The majority characterizes *Spitzer* as an aberrant case without support elsewhere in Connecticut case law and rooted in an antiquated line of out-of-state cases which relied on "outmoded" distinctions between public and corporate duties, the law of negligence and nuisance, and duties assumed versus duties imposed. I disagree. *Spitzer* was anything but an outlier when decided and its fundamental underlying principles remain vital to this day.

The plaintiffs in *Spitzer* alleged that "after a heavy rainfall, [a] stream overflowed through a catch basin in front of the plaintiffs' house, discharging water into the street which ran into the plaintiffs' cellar, causing damage to their property." Id., 85. This court noted that the defendant city was "bound to exercise due care in the construction of its storm water sewers, and would be liable for its failure to do so though the work was done in the performance of a public and governmental duty. . . . The work of constructing drains and sewers, as well as that of keeping them in repair, is ministerial, and the municipality is responsible for negligence in its performance. . . . If, apart from any defect in the plan, the city's employees had so negligently and improperly constructed the outlet of this storm water sewer that, under conditions reasonably to be anticipated, it would not carry off the water collected by it, the city would be responsible for damage directly resulting to the plaintiffs' property." (Citations omitted.) Id., 88. The plaintiffs' complaint in *Spitzer* foundered only because it

by . . . negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law." General Statutes § 52-557n (a) (2) (B).

was not predicated on a claim that the city was negligent in the construction, maintenance, and repair of the storm water drainage system, but rather on a claim of negligent *design*—i.e., that "the failure of the city, in planning a storm water disposal system, to adopt a plan which provided an outlet of sufficient size adequately to dispose of the water discharged by the storm water sewer into the covered stream." Id., 88–89. This court held that "[s]uch a defect in the plan upon which the system was constructed, if one existed, was the result of an error of judgment on the part of the officers of a public corporation on which has been cast the burden of discharging a governmental duty of a quasi-judicial character," and, therefore, "the defendant is not liable." Id., 89.

Spitzer holds that the design of a storm water drainage system is discretionary and, therefore, protected by municipal immunity, whereas the construction, maintenance, and repair of such a system is a ministerial duty for which the municipality may be held liable in negligence. Id. The majority contends that *Spitzer* stands alone in this view, but it has not cited a single decision of this court inconsistent with *Spitzer* regarding the subject at issue, i.e., municipal liability for property damage caused by the negligent construction, maintenance, and/or repair of a storm water drainage system.[2] To the contrary, there is extensive authority demonstrating that *Spitzer* accurately states the law governing this field of municipal operations. See *Phelan* v. *Waterbury*, 97 Conn. 85, 90–91, 115 A. 630 (1921) (reversing judgment in favor of plaintiff because there was no evidence that city negligently failed to clean

[2] The majority's reliance on Appellate Court precedent contrary to *Spitzer*, such as *Silberstein* v. *54 Hillcrest Park Associates, LLC*, 135 Conn. App. 262, 41 A.3d 1147 (2012), is misplaced in light of the well settled rule that "the Appellate Court and Superior Court are bound by our precedent." *Stuart* v. *Stuart*, 297 Conn. 26, 45–46, 996 A.2d 259 (2010).

and maintain catch basins; instead, plaintiff's injury was due to alleged inadequate design of storm water drainage system); *Katzenstein* v. *Hartford*, 80 Conn. 663, 666–67, 70 A. 23 (1908) (reversing judgment in favor of plaintiffs because trial court's charge to jury "entirely overlook[ed] the element of negligence" and city was liable for property damage caused by flooded sewer only "upon proof of such negligence"); *Rudnyai* v. *Harwinton*, 79 Conn. 91, 95, 63 A. 948 (1906) ("The statute imposing upon towns the duty of building and repairing necessary highways within their respective limits, does not authorize them, in the discharge of that duty, for the purpose of protecting their highways from surface water, to make use of the adjoining private property by constructing sluices and drains upon it, or by discharging upon it, by means of sluices or ditches or other structures designed for that purpose, the surface water which has accumulated because of the manner in which the road has been constructed, or has been collected by means of gutters or ditches on the sides of the roads. . . . When a municipality directs the performance of such an act, not within the scope of the imposed governmental duty, it becomes liable like any other [wrongdoer] for the resulting injury." [Citations omitted.]); *Judd* v. *Hartford*, 72 Conn. 350, 354, 44 A. 510 (1899) (Holding city was liable for flooding caused by obstructions negligently left in sewer because "its duty . . . to clean up, and remove any temporary appliances which, if left where they were, would render the sewer unserviceable or inadequate, was a new and ministerial one. It was a simple and definite duty arising under fixed conditions, and implied by law."); *Bronson* v. *Wallingford*, 54 Conn. 513, 520–21, 9 A. 393 (1887) (Holding municipal defendant was not liable for property damage caused by storm water runoff because "[t]he defendant is accused of no negligence . . . it is not accused of a faulty construction or repair of the

highway by reason of which the plaintiff has been injured . . . [nor is it] accused of improperly discharging the surface water on the plaintiff's premises in such a manner as to expose her property unnecessarily to special damage . . . . It is only in special cases, where wanton or unnecessary damage is done, or where damage results from negligence, that [towns, cities, and boroughs] can be held responsible." [Citations omitted.]).

Despite its age, the rule announced in *Spitzer* is neither vestigial nor forgotten. Rather, it has continued vitality and routinely is cited by trial courts for the central proposition "that the construction, maintenance, and repair of sewer and drainage systems is ministerial." See *Leone* v. *Portland*, Superior Court, judicial district of Middlesex, Docket No. CV-12-6008054-S (May 9, 2014) (58 Conn. L. Rptr. 201, 203); see also *DeMarco* v. *Middletown*, Superior Court, judicial district of Middlesex, Docket No. CV-11-6006185-S (April 3, 2014) (58 Conn. L. Rptr. 4, 6) ("given that the Supreme Court in *Spitzer* did not limit its holding only to sewer water systems, numerous trial courts have applied [its] holding toward sewage systems, and the plaintiff's complaint clearly alleges that the defendant's conduct has risen out of its construction and repair of sewers, the defendant's actions are deemed ministerial and government[al] immunity does not apply"); *Donahue* v. *Plymouth*, Superior Court, judicial district of New Britain, Docket No. CV-12-6016848, 2013 WL 1943951, *5 (April 22, 2013) (citing *Spitzer* and noting that "[t]he city is not immune from suit stemming from the performance of ministerial acts such as the construction and repair of sewers"); *Voghel* v. *Waterbury*, Superior Court, judicial district of Waterbury, Docket No. CV-96-0134423, 1999 WL 732984, *4 (September 9, 1999) (holding that defendant city was not immune from liability for property damage caused by sanitary sewer backup because, pur-

suant to *Spitzer*, defendant had ministerial duty to maintain and repair sewer system); but see *Pyskaty* v. *Meriden*, Superior Court, judicial district of New Haven, Docket No. CV-12-6005514-S, 2015 WL 5236948, *10 (August 3, 2015) (relying on Appellate Court's decision in *Silberstein* v. *54 Hillcrest Park Associates, LLC*, 135 Conn. App. 262, 41 A.3d 1147 [2012], to hold "that [the] logic and . . . holding [in *Spitzer*] have been limited and should not be expanded to apply" to alleged improper construction, maintenance, and repair of detention basin).

Numerous additional authorities confirm that *Spitzer* correctly states the law of negligence as it relates to municipal storm water drainage systems. Contrary to the majority's account, the doctrinal analysis contained in *Spitzer*—and particularly its assertion that municipal immunity does not extend to "ministerial" negligence in the maintenance and repair of drainage systems—accurately reflects the law as it existed, and still exists, in most jurisdictions. One of the leading tort law treatises at the turn of the twentieth century describes a legal framework that perfectly matches the doctrine as described in *Spitzer*: "[T]he act of constructing a bridge by a county, or of sewers and drains by a municipality, after the plan is formulated, *is regarded as ministerial in its nature*, and if there is any *negligence* in the construction and the keeping of the same in repair, the county (by statute) and the municipality (by common law) is liable for any injury caused by its neglect." (Emphasis added; footnotes omitted.) 1 E. Kinkead, Commentaries on the Law of Torts (1903) § 158, p. 364. "The importance of this distinction [between the discretionary planning stage and the ministerial construction and repair stage] is obvious. 'It may well be the law,' it is said, 'that a municipal corporation is not liable for any error or want of judgment upon which its system of drainage of surface water may be devised,

nor for any defect in the plan which it adopts. The . . . council must, from necessity, exercise its judgment and discretion . . . and should be at liberty to adopt the best plan to accomplish the end.' . . . [F]or injury, occasioned by the plan of improvement, as distinguished from the mode of carrying it out, there is ordinarily no liability. The true distinction in this matter is that the obligation to establish and open sewers is a legislative duty, *while the obligation to construct them with care and not negligently and to keep them in repair is a ministerial act.* Some confusion is found among the cases touching this matter, due to improper distinction in the particular cases." (Emphasis added; footnotes omitted.) Id., pp. 364–65.; see also Recent Cases, "Municipal Corporations—Sewer System—Negligence in Construction—*Hart* v. *City of Neillsville*, 123 N.W. 125 (Wis.)," 19 Yale L.J. 389, 389 (1910); Recent Cases, "Municipal Corporation—Negligence in Maintaining Drains—Injury to Health and Property," 16 Harv. L. Rev. 68, 68–69 (1902).

According to contemporary sources, this liability rule continues to prevail in most jurisdictions. One leading treatise on municipal corporations observes that "municipalities are generally liable for negligence in the construction or failure to repair sewers and drains. Municipal liability for negligence in failure to repair is generally the same, in extent, as for negligence in the construction of sewers, or in the failure to keep sewers free from obstructions." (Footnotes omitted.) 18A E. McQuillin, Municipal Corporations (3d Ed. 2018 Rev.) § 53:154. Although this is not a uniform rule,[3] in general

[3] A minority of jurisdictions consider the maintenance and repair of storm water drainage systems to be discretionary. See 18A E. McQuillin, supra, § 53:154 ("[h]owever, it [also] has been held that the duty of a city to maintain its sewerage and drainage system in a good working and sanitary condition is a governmental function for which no liability against the municipality exists in an action for negligence"); see also annot., 54 A.L.R.6th §§ 7 and 8, pp. 247–60 (2010) (citing cases in § 7 for view that maintenance and operation of drains and sewers is ministerial function negating immunity,

"[a] municipality must exercise ordinary care to maintain in proper manner a system of gutters and drains constructed by it in its streets, and if due to its negligence they become obstructed so as to overflow and flood private premises, the city will be liable." Id.

It is true that this court has held in other contexts that municipal acts or omissions are not ministerial unless there is a "city charter provision, ordinance, regulation, rule, policy, or any other directive" requiring the municipality to act in a "prescribed manner." *Violano* v. *Fernandez*, 280 Conn. 310, 323, 907 A.2d 1188 (2006); see id., 324 (holding municipal official immune from liability for alleged negligence in securing plaintiffs' personal property because there was no "rule, policy, or directive that prescribed the manner in which [defendant] was to secure the property"). Particularly in light of *Spitzer*, however, there is no legal or logical basis to apply this narrow definition in the context of property damage caused by municipal storm water drainage systems. *Only* the municipality can construct a storm water drainage system and, once constructed, *only* the municipality can maintain the system and repair it to prevent property damage foreseeably resulting from its malfunction. Because storm water drainage systems are municipal property and subject to exclusive municipal control, no one else can perform the maintenance and repairs necessary to avoid the risk of harm. See *Judd* v. *Hartford*, supra, 72 Conn. 354 (holding municipality had ministerial duty to remove temporary obstruction because "[n]o one else could perform it" because "[t]he sewer was part of the defendant's property and under its exclusive control"). The plaintiffs in the present case were powerless to avoid the harm to their property, given the immovable nature

and, in § 8, for view that maintenance is discretionary function protected by immunity); id., p. 201 (noting, however, that "[i]n general, a city may be held liable for damage resulting from the obstruction or clogging of a municipal drain or sewer when it has actual or constructive notice of a problem and still fails to take action to remedy it").

of a permanent residential structure and the inevitable occurrence of heavy rainfalls in the area. Under these circumstances, "to permit the city to escape liability under the cloak of the exercise of a governmental function [is] unwarranted and unjust." *Denver* v. *Mason*, 88 Colo. 294, 299, 295 P. 788 (1931).

Contrary to the majority's assertion, I do not urge the creation of "an exception to the doctrine [of municipal immunity] in cases in which the dangerous condition was within the municipality's control and the municipality could have prevented the harm . . . ." The exception, rather, was created long ago by *Spitzer* and scores of other cases from around the country. Liability is imposed in these cases because, until today, Connecticut recognized the commonsense proposition that flood damage to private property caused by negligently maintained municipal storm water drainage systems is categorically different than the usual negligence case against a municipality. The rule announced in *Spitzer* did not "eviscerate" the municipal immunity doctrine; nor did it "disregard" its purpose. Instead, this court in *Spitzer* conducted a thorough analysis of the municipal immunity doctrine and made a "value judgment"; *Violano* v. *Fernandez*, supra, 280 Conn. 319; that the purpose of the doctrine was not served when it came to the negligent construction, maintenance, and repair of storm water drainage systems. See *Spitzer* v. *Waterbury*, supra, 113 Conn. 89.

Indeed, my conclusion finds further support in the legislative codification of the common-law distinction between ministerial and discretionary acts or omissions in § 52-557n (a) (2) (B). See *Violano* v. *Fernandez*, supra, 280 Conn. 327. As this court previously has observed, "we are bound" by the codification of this distinction and, therefore, "[i]rrespective of the merits of [a] competing approach . . . [w]e must resist the temptation . . . to enhance our own constitutional authority by trespassing upon an area clearly reserved

as the prerogative of a coordinate branch of government." (Internal quotation marks omitted.) Id., 328; see also *Durrant* v. *Board of Education*, 284 Conn. 91, 107, 931 A.2d 859 (2007) ("[s]ince the codification of the common law under § 52-557n, this court has recognized that it is not free to expand or alter the scope of governmental immunity therein"). The majority would have us believe that the legislature silently intended to overrule *Spitzer*, despite no textual indication of any such intention and no legislative history to support the contention. The customary rules of statutory construction require the opposite conclusion; we must presume that when the legislature enacted § 52-557n in 1986; see Public Acts 1986, No. 86-338, § 13; it was aware of and intended to codify the well established common-law principle expressed in *Spitzer* that the construction, maintenance, and repair of storm water drainage systems is a ministerial duty for which municipalities may be held liable in negligence.[4] See *Chadha* v. *Charlotte Hungerford Hospital*, 272 Conn. 776, 793 n.21, 865 A.2d 1163 (2005) ("the legislature is presumed to be aware of prior judicial decisions involving common-law rules"); *Elliott* v. *Waterbury*, 245 Conn. 385, 406, 715 A.2d 27 (1998) ("we generally will not interpret a statute as effecting a change in a fundamental common-law principle . . . in the absence of a clear indication of legislative intent to do so" [citation omitted]). In light of the codification of this principle, we are not at liberty to expand the scope of municipal immunity in § 52-557n (a) (2) (B).

[4] In subdivision (2) of § 52-557n (b), the legislature exempted municipalities from liability for "damages to person or property resulting from . . . the condition of a reservoir, dam, canal, conduit, drain or similar structure when used by a person in a manner which is not reasonably foreseeable," but did not do so with respect to damages resulting from the negligent construction, maintenance, or repair of storm water drainage systems. See *Spears* v. *Garcia*, 263 Conn. 22, 33–34, 818 A.2d 37 (2003) (holding that, absent evidence to contrary, exceptions listed in § 52-557n [b] were intended "to be exclusive" [internal quotation marks omitted]).

In my view, this case presents the strongest imaginable rationale for retaining liability for municipal negligence in the absence of a legislative mandate to the contrary.[5] The plaintiffs here did not sustain damage caused by a municipal activity from which they could opt out; nor did they have the ability to engage in self-help to repair the municipality's drainage system. They had no right themselves to repair the cracks, breaks, and misaligned joints in the existing sewers, or to replace the pipes with diameters too small to meet present conditions with larger pipes, or to regrade the neighborhood streets and raise the curbs to protect their home against the flooding. If the plaintiffs cannot come to court for redress under these circumstances, then they have nowhere to turn to obtain compensation for the property damage they sustained as a result of the defendants' alleged negligence. This court's own precedent entitles the plaintiffs to relief if they are able to prove the elements of their claim. Because we are not required to overrule that precedent, we should not do so here. I therefore dissent.

[5] It is important to emphasize that the issue on appeal is whether the plaintiffs' common-law negligence claims are barred by the doctrine of municipal immunity. The plaintiffs' complaint did not contain any claim for common-law nuisance; nor did it raise a statutory claim under General Statutes § 13a-138. For this reason, the majority's discussion of nuisance law; see footnote 17 of the majority opinion; is dicta. See *Cruz* v. *Montanez*, 294 Conn. 357, 376–77, 984 A.2d 705 (2009) ("[d]ictum includes those discussions that are merely passing commentary . . . those that go beyond the facts at issue . . . and those that are unnecessary to the holding in the case" [internal quotation marks omitted]). Unfortunately, the majority's discussion implies that a landowner in the plaintiffs' position would have no ability to recover against a municipality on a theory of nuisance. I find this assertion deeply troubling because that issue was not raised in this case, was not briefed by the parties, and was never litigated or adjudicated. Therefore, we should not be expressing views on it. Nothing in our decision today, by implication or otherwise, should be taken to preclude or limit a plaintiff's ability to recover on any theory other than the theory of negligence as pleaded. See, e.g., *State* v. *DeJesus*, 288 Conn. 418, 454 n.23, 953 A.2d 45 (2008) (noting that dicta is "not binding precedent" and, therefore, does not dictate outcome of future cases).

ORDERS

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STATE OF CONNECTICUT *v.* ELIZARDO MONTANEZ

The defendant's petition for certification to appeal from the Appellate Court, 185 Conn. App. 589 (AC 40359), is denied.

KAHN, J., did not participate in the consideration of or decision on this petition.

Erica A. Barber, assigned counsel, in support of the petition.

Ronald G. Weller, senior assistant state's attorney, in opposition.

Decided June 19, 2019

ALETA DEROY *v.* STEPHEN M. RECK ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 188 Conn. App. 292 (AC 40021), is denied.

Aleta Deroy, self-represented, in support of the petition.

Cristin E. Sheehan, in opposition.

Decided June 19, 2019

NATHANIEL SUTERA *v.* DEBORAH NATIELLO ET AL.

The defendants' petition for certification to appeal from the Appellate Court, 189 Conn. App. 631 (AC 40749), is denied.

Cassie N. Jameson, in support of the petition.

Dana M. Hrelic, in opposition.

Decided June 19, 2019

SANTOS CANCEL *v.* COMMISSIONER OF CORRECTION

The petitioner Santos Cancel's petition for certification to appeal from the Appellate Court, 189 Conn. App. 667 (AC 40977), is denied.

MULLINS, J., did not participate in the consideration of or decision on this petition.

Vishal K. Garg, assigned counsel, in support of the petition.

Lisa A. Riggione, senior assistant state's attorney, in opposition.

Decided June 19, 2019

OFFICE OF CHIEF DISCIPLINARY COUNSEL *v.* JOSEPHINE SMALLS MILLER

The defendant's petition for certification to appeal from the Appellate Court (AC 42395) is dismissed.

Josephine Smalls Miller, self-represented, in support of the petition.

Decided June 19, 2019

CECILIA FLETCHER *v.* JONATHAN A. LIEBERMAN

The defendant's petition for certification to appeal from the Appellate Court (AC 42656) is denied.

Gaetano Ferro, in support of the petition.

Gary I. Cohen, in opposition.

Decided June 19, 2019

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CONNECTICUT APPELLATE REPORTS

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* PATRICIA DANIELS
(AC 40321)

Lavine, Bright and Bear, Js.

Syllabus

Convicted, after a jury trial, of the crimes of, inter alia, reckless manslaughter in the first degree and misconduct with a motor vehicle, which involves the criminally negligent operation of a motor vehicle, the defendant appealed to this court. The defendant's conviction stemmed from an incident in which her vehicle hit the victim's vehicle, causing it to hit a tree, which resulted in the victim's death. The jury also had found the defendant guilty of intentional manslaughter in the first degree, but the court vacated her conviction of that charge at sentencing. On appeal, the defendant claimed that the jury's verdicts were legally inconsistent in that each of the alleged crimes required a mutually exclusive mental state and that the trial court erred when it failed to exclude certain testimonial hearsay. *Held*:

1. The defendant could not prevail on her claim that the jury's guilty verdicts on the charges of intentional and reckless manslaughter were legally inconsistent because they required findings that the defendant simultaneously acted intentionally and recklessly with respect to one act and one alleged victim; in finding the defendant guilty of both intentional and reckless manslaughter, the jury reasonably could have found that the defendant specifically intended to cause serious physical injury to the victim, which satisfied the mental state required for intentional manslaughter, and that, in doing so, she consciously disregarded a substantial and unjustifiable risk that her actions created a grave risk of

death to the victim, which satisfied the mental state required for reckless manslaughter, and, therefore, because the guilty verdicts on the charges of intentional and reckless manslaughter required findings that the defendant simultaneously acted intentionally and recklessly with respect to different results, the verdicts were not legally inconsistent.

2. The defendant could not prevail on her claim that the mental states required for the crimes of intentional manslaughter and criminally negligent operation of a motor vehicle were mutually exclusive and that the guilty verdicts on those charges were legally inconsistent, as the mental states required for each crime were not mutually exclusive; the defendant could have intended to cause serious physical injury to the victim, as required for intentional manslaughter, while, at the same time, failing to perceive a substantial and unjustifiable risk that the manner in which she operated her vehicle would cause the victim's death, as required for criminally negligent operation of a motor vehicle, and, thus, the mental state elements for each crime did not relate to the same result.

3. The jury's guilty verdicts as to the crimes of reckless manslaughter and criminally negligent operation of a motor vehicle were legally inconsistent: although the state claimed on appeal that the jury could have viewed the defendant's two strikes of the victim's vehicle each as separate acts, it never made that argument to the jury and, instead, argued that the strikes constituted one continuous act, and, thus, it was bound by the theory it had presented to the jury, and the mental state element for each crime was mutually exclusive when examined under the facts and theory of the state argued at trial, as the defendant could not have consciously disregarded a substantial and unjustifiable risk that her actions would cause the victim's death, as required for reckless manslaughter, while simultaneously failing to perceive a substantial and unjustifiable risk that her actions would cause the victim's death, as required for criminally negligent operation of a motor vehicle; accordingly, because the mental state elements for each crime related to the same result, the verdicts were legally inconsistent, and a new trial on those charges was necessary; furthermore, this court declined the state's request to reinstate the intentional manslaughter conviction but, rather, consistent with the defendant's request for a retrial on the three charges of intentional and reckless manslaughter, and criminally negligent operation of a motor vehicle, the case was remanded for a new trial on those charges.

4. The defendant's unpreserved claim that the trial court erred when it failed to exclude certain testimonial hearsay was not reviewable, as it failed under the second prong of *State* v. *Golding* (213 Conn. 233) in that the admission of an out-of-court statement for purposes other than its truth raised no confrontation clause issue and was not of a constitutional magnitude; the statement at issue—that a vehicle in photographs obtained by the police was a certain newer model—was not hearsay because it was not offered for the truth of the matter asserted, that the

vehicle was a certain newer model but, rather, was offered to show its effect on the listener, a police officer, and to demonstrate the route that the police took in deciding to obtain a list of certain vehicles and in conducting their investigation, which included investigating fifteen model years of two vehicle models and not just a certain newer model.

Argued March 4—officially released July 2, 2019

Procedural History

Substitute information charging the defendant with two counts of the crime of manslaughter in the first degree, and with the crimes of misconduct with a motor vehicle, risk of injury to a child, and evasion of responsibility in the operation of a motor vehicle, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, and tried to the jury before *Kavanewsky, J.*; verdict and judgment of guilty; thereafter, the court vacated the conviction as to one count of manslaughter in the first degree, and the defendant appealed to this court. *Reversed in part*; *further proceedings*.

Laila M. G. Haswell, senior assistant public defender, for the appellant (defendant).

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Marc R. Durso*, senior assistant state's attorney, for the appellee (state).

Opinion

BRIGHT, J. The defendant, Patricia Daniels, appeals from the judgment of conviction, rendered by the trial court following a jury trial, of manslaughter in the first degree in violation of General Statutes § 53a-55 (a) (3) (reckless manslaughter) and misconduct with a motor vehicle in violation of General Statutes § 53a-57 (a) (criminally negligent operation).[1] The defendant also

[1] The defendant also was convicted of risk of injury to a child in violation of General Statutes § 53-21 (a) (1) and evasion of responsibility in the operation of a motor vehicle in violation of General Statutes § 14-224 (a). The judgment as to those convictions is not challenged.

had been convicted of manslaughter in the first degree in violation of § 53a-55 (a) (1) (intentional manslaughter), but at sentencing the trial court vacated her conviction of that charge. On appeal, the defendant claims that (1) the jury's verdict was legally inconsistent because each of these crimes requires a mutually exclusive mental state, and (2) the court erred in failing to exclude testimonial hearsay. We agree that the verdict is legally inconsistent, and, therefore, we reverse in part the judgment of the trial court.

The following facts, as reasonably could have been found by the jury, are relevant to this appeal. The victim, Evelyn Agyei, left her Bridgeport home at approximately 6 a.m. on December 4, 2014. Her eleven year old son accompanied her. Agyei and her son got into her Subaru Outback (Subaru), Agyei driving and her son in the back seat on the passenger's side. After traversing some back roads, they took Bond Street and arrived at the intersection of Bond Street and Boston Avenue. Agyei stopped at the red light and then proceeded to make a right turn onto Boston Avenue, staying in the right lane. As she was making the right turn, her son looked to the left and saw a white BMW sport utility vehicle (BMW) approximately two streets down, traveling at a high rate of speed in the left lane.

After Agyei got onto Boston Avenue, the driver of the BMW pulled alongside Agyei's vehicle. Agyei's son saw the BMW logo on the hood; however, he could not see the driver or the license plate. The driver of the BMW then moved into the right lane, hitting Agyei's Subaru once on the driver's side and causing her to begin to lose control of the vehicle. The driver of the BMW then moved behind the Subaru and ran into it from behind, causing the vehicle to cross the median, proceed under a fence, and hit a tree. Tragically, Agyei died from her injuries, and her son, who also was

injured, continues to have vision problems as a result of the injuries he sustained.

After an investigation, which included obtaining a video of the incident from a nearby high school that had surveillance cameras in the area, the police, having concluded that the defendant was the driver of the BMW that hit the Subaru, causing Agyei's death and the injuries to Agyei's son, arrested the defendant.[2] Ultimately, she was charged, in a long form information, with, inter alia, intentional manslaughter, reckless manslaughter, and criminally negligent operation of a motor vehicle; the jury found her guilty of these charges, among others. See footnote 1 of this opinion. The court accepted the jury's verdicts and rendered judgment accordingly. On the date of sentencing, upon the request of the state,[3] the court vacated the defendant's conviction of intentional manslaughter, and it, thereafter, sentenced the defendant to twenty years incarceration,

[2] There is no indication in the record as to why the defendant engaged in the conduct that led to her arrest and conviction.

[3] At the sentencing hearing, the state argued in relevant part: "Based on the Supreme Court's recent decisions in *State* v. *Polanco*, [308 Conn. 242, 61 A.3d 1084 (2013)], [*State* v.] *Miranda*, [317 Conn. 741, 120 A.3d 490 (2015)], and [*State* v.] *Wright*, [320 Conn. 781, 135 A.3d 1 (2016)], the state is asking that Your Honor enter an order to vacate the conviction on the intentional manslaughter under the legal theory of vacatur and that Your Honor sentence the defendant on the remaining counts, the reckless manslaughter . . . and misconduct with a motor vehicle. I think that goes along with the spirit of the state's intent during the beginning of this case. The state did have the belief when we initially filed our long form information that we [would proceed] on both a legal theory of intentional and reckless manslaughter based on the fact that the defendant's vehicle came into contact with the Agyei vehicle twice. But, in light of the convictions, we'd ask that she be sentenced solely on the reckless manslaughter and that Your Honor vacate the intentional manslaughter for sentencing purposes."

The cases relied on by the state in support of its motion to vacate each involve cumulative convictions that violated double jeopardy protections. In *Polanco*, our Supreme Court held that vacatur was the appropriate remedy for double jeopardy violations involving cumulative convictions for both greater and lesser included offenses. *State* v. *Polanco*, supra, 308 Conn. 245. In *Miranda*, the court held that vacatur was the appropriate remedy for double jeopardy violations involving cumulative convictions of capital felony

execution suspended after sixteen years, with five years of probation.[4] The defendant raises two claims on appeal—(1) the jury's verdicts of guilty on the crimes of intentional and reckless manslaughter and criminally negligent operation were legally inconsistent because each of these crimes requires a mutually exclusive mental state, and (2) the court erred in failing to exclude testimonial hearsay—and requests that we reverse the judgment of the trial court and order a new trial on all charges and, alternatively, on the charges of intentional manslaughter, reckless manslaughter, and criminally negligent operation. Additional facts will be set forth as necessary.

I

INCONSISTENT VERDICTS

The defendant first claims that the jury's verdicts on the counts of intentional manslaughter, reckless manslaughter, and criminally negligent operation were legally inconsistent because they each require a mutually exclusive mental state.[5] She argues that it was logically impossible for the defendant to have possessed

and felony murder, where both convictions involved the murder of a single victim. *State* v. *Miranda*, supra, 317 Conn. 753. In *Wright*, the court held that vacatur was the appropriate remedy for the double jeopardy violation caused by the conviction of three counts of conspiracy arising from a single agreement with multiple criminal objectives. *State* v. *Wright*, supra, 320 Conn. 830.

Following the state's motion to vacate the intentional manslaughter conviction in the present case, the defendant objected, stating, in part, that she wanted to preserve the record for appeal; she also requested a mistrial on the ground that the state had overcharged in this case; the court denied the defendant's request, and it vacated the defendant's conviction of intentional manslaughter.

[4] Specifically, the court sentenced the defendant to twenty years incarceration, execution suspended after sixteen years, followed by five years probation on the manslaughter in the first degree count, five years incarceration on the misconduct with a motor vehicle count, ten years incarceration on the risk of injury to a child count, and ten years incarceration on the evasion of responsibility count. The court ordered all sentences to run concurrently.

[5] Because the defendant did not raise this claim in the trial court, she seeks to prevail under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d

three forms of intent, simultaneously, for a single act, involving a single victim. The defendant explains that, at trial, the state's theory of the case was that her action in twice hitting Agyei's vehicle was one single act, which caused Agyei's death. She argues that the state tried the case under the theory that each of the three relevant counts of the information were charged in the alternative, one being intentional, one reckless, and one negligent. She contends that the fact that the jury found her guilty of all three charges, each requiring a different mental state, and that the state, thereafter, requested that the court vacate the intentional manslaughter conviction, demonstrates that the verdicts were legally inconsistent. After setting forth our standard of review and the general legal principles involved, we will consider the relevant mental element of each of these crimes in order to ascertain whether convictions of all three crimes would be legally inconsistent.

"It is well established that *factually* inconsistent verdicts are permissible. [When] the verdict could have been the result of compromise or mistake, we will not probe into the logic or reasoning of the jury's deliberations or open the door to interminable speculation. . . . Thus, claims of legal inconsistency between a conviction and an acquittal are not reviewable [on appeal]. . . . We employ a less limited approach, however, when we are confronted with an argument that [two or more convictions] are inconsistent as a matter of law or when the [convictions] are based on a legal impossibility. . . . A claim of legally inconsistent convictions, also referred to as mutually exclusive convictions, arises when a conviction of one offense requires a finding that negates an essential element of another

823 (1989) as modified by *In re Yasiel R.*, 317 Conn. 773, 120 A.3d 1188 (2015), which governs our consideration of unpreserved constitutional claims. The state concedes that the defendant is entitled to such review, but argues that a constitutional violation does not exist.

offense of which the defendant also has been convicted. . . . In response to such a claim, we look carefully to determine whether the existence of the essential elements for one offense negates the existence of [one or more] essential elements for another offense of which the defendant also stands convicted. If that is the case, the [convictions] are legally inconsistent and cannot withstand challenge. . . . Whether two convictions are mutually exclusive presents a question of law, over which our review is plenary." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Nash*, 316 Conn. 651, 659, 114 A.3d 128 (2015).

"[C]ourts reviewing a claim of legal inconsistency must closely examine the record to determine whether there is any plausible theory under which the jury reasonably could have found the defendant guilty of [more than one offense]." Id., 663. Nevertheless, the state is bound by the theory it presented to the jury. See *State* v. *Chyung*, 325 Conn. 236, 255–56, 157 A.3d 628 (2017) (where state argued defendant engaged in only one act, rather than two, principles of due process prohibited state from relying on different theory on appeal).

A

Intentional Manslaughter and Reckless Manslaughter

We first consider whether the charges of intentional manslaughter and reckless manslaughter were legally inconsistent under the facts of this case and in view of the state's theory.[6] We conclude that they were not

[6] The state suggests in its brief that we need not consider whether the two manslaughter verdicts are legally inconsistent because the court vacated the intentional manslaughter conviction. We disagree. Accepting the state's argument would mean that a review of potentially legally inconsistent verdicts could be thwarted by the state requesting that the trial court vacate one of the convictions. That is not consistent with our jurisprudence. See *State* v. *Chyung*, supra, 325 Conn. 240 (despite trial court's vacatur of manslaughter in first degree conviction, Supreme Court also vacated inconsistent murder conviction and remanded case for new trial on both counts, holding "legally inconsistent verdicts involve jury error . . . because there

legally inconsistent because the mental state element for each of these crimes related to different results.

The following additional facts and procedural history inform our review. As set forth previously in this opinion, the state charged the defendant with, inter alia, intentional manslaughter and reckless manslaughter. As to intentional manslaughter, the state charged in relevant part that, "on or about the 4th day of December, 2014, at approximately 6:30 a.m., at or near Boston Avenue within [Bridgeport] . . . PATRICIA DANIELS, with the intent to cause serious physical injury to another person, caused the death of EVELYN AGYEI, in violation of [§] 53a-55 (a) (1) . . . ."

As to reckless manslaughter, the state charged in relevant part that, "on or about the 4th day of December, 2014, at approximately 6:30 a.m., at or near Boston Avenue within [Bridgeport] . . . PATRICIA DANIELS, under circumstances evincing an extreme indifference to human life, recklessly engaged in conduct which created a grave risk of death to one EVELYN AGYEI, and thereby caused the death of . . . EVELYN AGYEI, in violation of [§] 53a-55 (a) (3) . . . ."

During closing and rebuttal argument, the state specifically argued to the jury: "[The defendant] knowingly and recklessly got behind the wheel of her BMW; she intentionally rammed that car off the road. And, by the way, if you don't believe it was intentional, she recklessly ran that vehicle off the road." It also argued: "We've proven beyond a reasonable doubt, based on the video of that white BMW ramming, the intentional ramming into Evelyn Agyei's car. That's intentional conduct. But intent is a question of fact for you to decide. The state recognizes that because, if you disagree that it was intentional, we also submit and argue in the

is no way for the trial court or this court to know which charge the jury found to be supported by the evidence, neither verdict can stand").

alternative . . . that that conduct was, at the very least, reckless. She had a reckless disregard for Evelyn Agyei's life . . . ."[7]

Although the state clearly contended that these crimes were charged in the alternative, neither it nor the defendant requested that the court specifically instruct the jury to consider each charge in the alternative. To be clear, the defendant has not claimed on appeal that the state's argument that the jury should consider the charges in the alternative, itself, precluded the jury from finding her guilty of both charges; rather, her argument is that because each of the charges required a mutually exclusive mental state, the jury was precluded from finding guilt on both charges because one intent negates the other. The defendant argues that the guilty verdicts on the counts of intentional manslaughter and reckless manslaughter were legally inconsistent because she could not have engaged in both intentional and reckless conduct simultaneously, involving only one act and one alleged victim. She contends that it was legally impossible for the jury to have found every element of both crimes because, under the state's theory of the case, each of the charges required a mutually exclusive finding with respect to her mental state. We disagree.

Section 53a-55 (a) provides in relevant part: "A person is guilty of manslaughter in the first degree when: (1) With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or . . . (3) under circumstances evincing an extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person."

[7] The state made no argument to the jury concerning criminally negligent operation. The court, however, instructed the jury on that crime.

Pursuant to General Statutes § 53a-3 (11): "A person acts 'intentionally' with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct . . . ." Additionally, pursuant to General Statutes § 53a-3 (13): "A person acts 'recklessly' with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregarding it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation . . . ."

In support of her claim that intentional manslaughter and reckless manslaughter require mutually exclusive mental states, the defendant relies, in part, on *State* v. *King*, 216 Conn. 585, 583 A.2d 896 (1990). In *Nash*, our Supreme Court discussed *King* at length and explained: In *King*, the defendant had "claimed that his convictions of attempt to commit murder and reckless assault of the same victim based on the same conduct were legally inconsistent because they required mutually exclusive findings with respect to his mental state. . . . We agreed with this claim, explaining that King's conviction for attempt to commit murder required the jury to find that he acted with the *intent to cause the death of the victim*, whereas his conviction for reckless assault required the jury to find that he *acted recklessly and thereby created a risk that the victim would die*. . . . We further explained that the statutory definitions of intentionally and recklessly are mutually exclusive and inconsistent. . . . Reckless conduct is not intentional conduct because [a person] who acts recklessly does not have a conscious objective to cause a particular result. . . . Thus, we observed that [t]he *intent to cause death required for a conviction of attempted*

murder [under General Statutes §§ 53a-49 and 53a-54a (a)] . . . necessitated a finding that the defendant *acted with the conscious objective to cause death* . . . [whereas] [t]he *reckless conduct necessary to be found for a conviction of assault* under [General Statutes § 53a-59 (a) (3)] . . . required a finding that *the defendant acted without such a conscious objective*. . . . We concluded, therefore, that the jury verdicts [with respect to attempt to commit murder and reckless assault in the first degree] each of which requires a mutually exclusive and inconsistent state of mind as an essential element for conviction cannot stand." (Citations omitted; emphasis added; footnote omitted; internal quotation marks omitted.) *State* v. *Nash*, supra, 316 Conn. 660–61.

The defendant also relies on *State* v. *Chyung*, 325 Conn. 236, 157 A.3d 628 (2017). In *Chyung*, the jury found the defendant guilty of murder, in violation of § 53a-54a, and of reckless manslaughter in the first degree with a firearm, in violation of General Statutes §§ 53a-55a (a) and 53a-55 (a) (3), for the shooting death of his wife. Id., 239, 239 n.1.

Section 53a-54a provides in relevant part: "(a) A person is guilty of murder when, with *intent to cause the death* of another person, he causes the death of such person . . . ." (Emphasis added.) Section 53a-55a (a) provides in relevant part: "A person is guilty of manslaughter in the first degree with a firearm when he commits manslaughter in the first degree as provided in section 53a-55, and in the commission of such offense he uses, or is armed with and threatens the use of or displays or represents by his words or conduct that he possesses a . . . firearm. . . ." As noted previously, § 53a-55 (a) provides in relevant part: "A person is guilty of manslaughter in the first degree when . . . (3) under circumstances evincing an extreme indifference to human life, *he recklessly engages in conduct which*

creates a grave risk of death to another person, and thereby causes the death of another person." (Emphasis added.)

The court in *Chyung* found that the jury's guilty verdicts as to both charges were legally inconsistent because the defendant could not act both intentionally and recklessly with respect to the same victim, the same act, and the same result simultaneously. *State* v. *Chyung*, supra, 325 Conn. 247–48. Our Supreme Court explained that to find the defendant guilty of the crime of intentional murder, the jury was required to find that the defendant had the *specific intent to kill the victim*, his wife, but, to find the defendant guilty of reckless manslaughter, the jury was required to find that he acted recklessly, meaning, that he *acted without a conscious objective to cause the death of the victim*, but consciously disregarded the risk of his actions, thereby putting the life of the victim in grave danger. Id., 246–48. The court concluded that a defendant cannot act with a *conscious disregard* that his actions will create *a grave risk of death* to another, while, at the same time, specifically *intending to kill* that person. Id. The "defendant cannot simultaneously act intentionally and recklessly with respect to the same act and the same result . . . ." Id., 247–48.

Although the defendant argues that both *King* and *Chyung* are controlling in this case, the state contends that the defendant's claim is governed by *State* v. *Nash*, supra, 316 Conn. 659–70. In *Nash*, the jury found the defendant guilty of, among other things, both intentional and reckless assault in the first degree pursuant to General Statutes § 53a-59 (a) (1) and (a) (3), respectively,[8] and the court rendered judgment in accordance

[8] General Statutes § 53a-59 (a) provides in relevant part: "A person is guilty of assault in the first degree when: (1) With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or dangerous instrument . . . or (3) under circumstances evincing an extreme indifference to human

with the jury's verdicts. Id., 656–57. On appeal, the defendant claimed in part that the jury's verdicts of guilty on both intentional and reckless assault were legally inconsistent because each crime required a mutually exclusive state of mind. Id., 657. Our Supreme Court disagreed, explaining that the two mental states required for intentional and reckless assault in the first degree *related to different results*. Id., 666. More specifically, the court explained, "in order to find the defendant guilty of [*both* intentional and reckless assault in the first degree], the jury was required to find that *the defendant intended to injure another person and that, in doing so, he recklessly created a risk of that person's death*. In light of the state's theory of the case, there was nothing to preclude a finding that the defendant possessed both of these mental states with respect to the same victim at the same time by virtue of the same act or acts. In other words, the jury could have found that the defendant intended only to injure another person when he shot into [the victim's] bedroom but that, in doing so, he recklessly created a risk of that [victim's] death in light of the circumstances surrounding his firing of the gun into the dwelling. Accordingly, because the jury reasonably could have found that the defendant simultaneously possessed both mental states required to convict him of both intentional and reckless assault, he cannot prevail on his claim that the convictions were legally inconsistent." (Emphasis added; footnotes omitted.) Id., 666–68.

The court in *Nash* went on to examine and compare § 53a-59 (a) (1) and (3): "Intentional assault in the first degree in violation of § 53a-59 (a) (1) requires proof that the defendant (i) had the intent to cause serious physical injury to a person, (ii) caused serious physical injury to such person or to a third person, and (iii)

life he recklessly engages in conduct which creates a risk of death to another person, and thereby causes serious physical injury to another person . . . ."

caused such injury with a deadly weapon or dangerous instrument. Reckless assault in the first degree in violation of § 53a-59 (a) (3) requires proof that the defendant (i) acted under circumstances evincing an extreme indifference to human life, (ii) recklessly engaged in conduct that created a risk of death to another person, and (iii) caused serious physical injury to another person. As we previously explained, the mental state elements in the two provisions—'intent to cause serious physical injury' and 'recklessly engag[ing] in conduct which creates a risk of death'—do not relate to the same result. Moreover, under both provisions, the resulting serious physical injury is an element of the offenses that is separate and distinct from the mens rea requirements." Id., 668–69. The court then held: "Because the defendant's convictions for intentional and reckless assault in the first degree required the jury to find that the defendant acted intentionally and recklessly with respect to different results, the defendant cannot prevail on his claim that those convictions are mutually exclusive and, therefore, legally inconsistent.[9]" Id., 669.

The court in *Nash* provided an example of where a single act, directed to a single victim, could result in a conviction of both intentional and reckless assault in the first degree: "For example, if A shoots B in the arm intending only to injure B, A nevertheless may recklessly expose B to a risk of death if A's conduct also gave rise to an unreasonable risk that the bullet would strike B in the chest and thereby kill him. In such circumstances, a jury could find both that A intended

[9] "We emphasize that our conclusion that the defendant's convictions of intentional and reckless assault in the first degree were not mutually exclusive does not mean that a defendant lawfully may be punished for both offenses. . . . [T]he trial court in the present case merged the two assault convictions for purposes of sentencing and sentenced the defendant only on his intentional assault conviction. The defendant has not claimed that this approach violates his right against double jeopardy." (Citation omitted.) *State* v. *Nash*, supra, 316 Conn. 669–70 n.19.

to injure B and, in doing so, recklessly created an undue risk of B's death." Id., 666 n.15. We conclude that the same analysis applies in the present case.[10]

Intentional manslaughter in violation of § 53a-55 (a) (1) requires proof that the defendant (i) had the *intent to cause serious physical injury* to a person, and (ii) caused the death of such person or of a third person. Reckless manslaughter in violation of § 53a-55 (a) (3) requires proof that the defendant (i) acted under circumstances evincing an extreme indifference to human life, (ii) *recklessly engaged in conduct that created a grave risk of death* to another person, and (iii) caused the death of another person. Guided by our Supreme Court's analysis in *Nash*, we conclude that the mens rea elements in the two provisions, namely, the "intent to cause serious physical injury" and "recklessly engag[ing] in conduct which creates a grave risk of death"; General

[10] We recognize that the differences between *King*, *Chyung*, and *Nash* are subtle. For example, in *King*, the jury necessarily would have to have found that the defendant acted with the specific intent to cause the death of the victim (attempted murder), and, at the same time, acted without the conscious objective to create a risk of death for the victim (reckless assault). See *State* v. *King*, supra, 216 Conn. 585. It is impossible to possess both mental states simultaneously.

In *Chyung*, the jury necessarily would have to have found that the defendant had the specific intent to kill the victim (murder), and simultaneously, that the defendant acted without the conscious objective to create a grave risk of death for the victim (reckless manslaughter). See *State* v. *Chyung*, supra, 325 Conn. 236. Again, it is impossible to have both intents simultaneously.

In *Nash*, however, the jury would have to have found that the defendant intended to cause *serious physical injury* to the victim (intentional assault), and, at the same time, that the defendant acted without the conscious objective of creating a *grave risk of death* for the victim, resulting in the victim's serious physical injury (reckless assault). See *State* v. *Nash*, supra, 316 Conn. 666–67. Intentional assault requires *a specific intent to cause serious physical injury*; reckless assault requires *recklessly creating a grave risk of death*, which results in serious physical injury. One can intend to cause serious physical injury to a victim, while, at the same time, consciously disregarding the fact that he or she is putting that victim's life in grave danger, ultimately resulting in serious physical injury to the victim.

Statutes § 53a-55 (a); do not relate to the same result. In finding the defendant guilty of both intentional and reckless manslaughter, the jury in the present case reasonably could have found that the defendant *specifically intended to cause serious physical injury to Agyei* and that, in doing so, she *consciously disregarded* a substantial and unjustifiable risk *that her actions created a grave risk of death to Agyei*. See *State* v. *Nash*, supra, 316 Conn. 666–67.

Because the jury's guilty verdicts on the charges of intentional and reckless manslaughter required findings that the defendant simultaneously acted intentionally and recklessly with respect to *different results*, we conclude that the defendant cannot prevail on her claim that the verdicts on those charges were legally inconsistent.

B

Intentional Manslaughter and Criminally Negligent Operation

The defendant also claims that the verdicts on the counts of intentional manslaughter and criminally negligent operation were legally inconsistent. We disagree.

As stated previously in this opinion: intentional manslaughter in violation of § 53a-55 (a) (1) requires proof that the defendant (i) had the *intent to cause serious physical injury* to a person, and (ii) caused the death of such person or of a third person.

Criminally negligent operation in violation of § 53a-57 (a) provides: "A person is guilty of misconduct with a motor vehicle when, with criminal negligence in the operation of a motor vehicle, he causes the death of another person." General Statutes § 53a-3 (14) provides that "[a] person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive

a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation . . . .'' (Internal quotation marks omitted.) See *State* v. *Gonsalves*, 137 Conn. App. 237, 244, 47 A.3d 923, cert. denied, 307 Conn. 912, 53 A.3d 998 (2012).

''Under § 53a-57, the state was required to prove that the defendant was operating a motor vehicle, that [s]he caused the death of another person, and that [s]he *failed to perceive a substantial and unjustifiable risk that the manner in which* [*s*]*he operated* [*her*] *vehicle would cause that death.* The failure to perceive that risk must constitute a gross deviation from the standard of care that a reasonable person would observe in the situation. . . . Further, [t]o prove causation, the state is required to demonstrate that the defendant's conduct was a proximate cause of the victim's death—i.e., that the defendant's conduct contributed substantially and materially, in a direct manner, to the victim's injuries and that the defendant's conduct was not superseded by an efficient intervening cause that produced the injuries.'' (Citation omitted; emphasis added; internal quotation marks omitted.) *State* v. *Jones*, 92 Conn. App. 1, 7–8, 882 A.2d 1277 (2005).

Considering the plain language of each statute, we are persuaded that, as in *Nash*; see part I A of this opinion; the mental state requirements for each statute are not mutually exclusive. One can *intend to cause serious physical injury to another*, while, at the same time, *failing to perceive a substantial and unjustifiable risk* that the manner in which she operated her vehicle would cause the victim's death. The mental state elements in the two provisions—*failing to perceive a substantial and unjustifiable risk that your manner of operation would cause death* and an *intent to cause*

serious physical injury—do not relate to the same result. Because the defendant's convictions of intentional manslaughter and criminally negligent operation required the jury to find that the defendant acted intentionally and criminally negligent with respect to different results (*failing to perceive a substantial and unjustifiable risk of death* and *intending to cause serious physical injury*), the defendant cannot prevail on her claim that the mental states required for those crimes are mutually exclusive and, therefore, that the verdicts are legally inconsistent. See *State* v. *Nash*, supra, 316 Conn. 668–69.

C

Reckless Manslaughter and Criminally Negligent Operation

The defendant also claims that the jury's verdicts with respect to the crimes of reckless manslaughter and criminally negligent operation are legally inconsistent. The state argues on appeal that the jury could have viewed each strike of Agyei's vehicle as a separate act, with a separate mental state. It conceded during oral argument before this court, however, that if we view both strikes of the collision as one act, the mental elements of these two counts are mutually exclusive. We are not persuaded by the state's argument that the jury could have viewed each strike as a separate act because the state never made such an argument to the jury; rather, it consistently argued that this was one continuous act. As our Supreme Court repeatedly has stated, the state is bound by the theory it presented to the jury; on appeal, it may not rely on a theory of the case that differs from the theory that was presented to the jury. See *State* v. *Chyung*, supra, 325 Conn. 256 ("[c]onstitutional [p]rinciples of due process do not allow the state, on appeal, to rely on a theory of the case that was never presented at trial" [internal quotation marks omitted]);

State v. *King*, 321 Conn. 135, 149, 136 A.3d 1210 (2016) (same). We agree with the defendant that the state of mind element in each of these charges is mutually exclusive and, therefore, that the verdicts of guilty as to both of these charges were legally inconsistent.

For the defendant to be found guilty of reckless manslaughter, the state needed to prove that she *was aware of and consciously disregarded a substantial and unjustifiable risk* that her actions would create *a grave risk of death* to another person, namely Agyei. See General Statutes § 53a-55 (a) (3). For her to be found guilty of criminally negligent operation, the state needed to prove that she *failed to perceive a substantial and unjustifiable risk* that the manner in which she operated her vehicle *would cause Agyei's death*. See General Statutes § 53a-57; *State* v. *Jones*, supra, 92 Conn. App. 7–8. We conclude that the mental states required under these two provisions are mutually exclusive.

"The [penal] code . . . distinguishes reckless from criminally negligent conduct. A person acts *recklessly* if he is aware of and *consciously disregards* a substantial and unjustifiable risk, and acts with *criminal negligence* . . . when he *fails to perceive* a substantial and unjustifiable risk." (Emphasis altered; internal quotation marks omitted.) *State* v. *Bunkley*, 202 Conn 629, 639, 522 A.2d 795 (1987). In the Commission to Revise the Criminal Statutes, Penal Code Comments, Conn. Gen. Stat. Ann. § 53a-3 (West 2007), commission comments, the commission briefly explains the difference between reckless conduct and criminal negligence under our penal code. As to reckless conduct, the commission stated: "This concept, much like the concept of recklessness under the present reckless driving statute, requires *conscious disregard* of a substantial and unjustifiable risk. But this disregard must be a gross deviation from the standard of a reasonable man." (Emphasis

added.) Commission to Revise the Criminal Statutes, Penal Code Comments, supra, § 53a-3, commission comment. As to criminal negligence, the commission comments provide: "This concept involves a *failure to perceive* a substantial and unjustifiable risk. And, as in the concept of recklessness, the failure to perceive must be a gross deviation from the standard of a reasonable man; thus it requires a greater degree of culpability than the civil standard of negligence." (Emphasis added.) Id.

Considering the plain language of both §§ 53a-55 (a) (3) and 53a-57 (a), we are persuaded that the mental state element for each statute is mutually exclusive when examined under the facts and theory of the state in the present case. The defendant could not have *consciously disregarded* a substantial and unjustifiable risk that her actions would cause Agyei's death, while, simultaneously, *failing to perceive* a substantial and unjustifiable risk that her actions would cause Agyei's death. The mental state elements in the two provisions relate to the same result. Accordingly, the verdicts of guilty as to the crimes of reckless manslaughter and criminally negligent operation were legally inconsistent.

II

TESTIMONIAL HEARSAY

The defendant next claims that the court erred in failing to exclude testimonial hearsay. She argues that the testimony of now former Bridgeport Detective Paul Ortiz, relying on statements made by someone at the BMW dealership, amounted to testimonial hearsay. Because this claim was not preserved at trial, the defendant seeks review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 120 A.3d 1188 (2015).[11] We

[11] Pursuant to *Golding*, a defendant may prevail on a claim of constitutional error not preserved at trial only if all four of the following conditions are satisfied: "(1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . .

conclude that the record is adequate for review, but that the claim is unreviewable under *Golding*'s second prong because it is not of constitutional magnitude. See *State* v. *Carpenter*, 275 Conn. 785, 820–21, 882 A.2d 604 (2005) (defendant's claim not reviewable under *Golding*'s second prong because admission of out-of-court statements for purposes other than their truth raises no confrontation clause issues), cert. denied, 547 U.S. 1025, 126 S. Ct. 1578, 164 L. Ed. 2d 309 (2006).

The following additional facts inform our analysis. As part of their investigation of the collision involving Agyei's vehicle, the police obtained a video of the incident from Harding High School, which had surveillance cameras in the area. The footage from the video showed a white sport utility vehicle (SUV) hitting a darker colored vehicle. Detective Arthur Calvao of the Bridgeport Police Department printed out several still photographs from certain relevant frames of the video, which depict a white SUV striking a dark colored vehicle from the side and then from the rear. Although the investigators were unable to identify the make and model of the white SUV from the video or the photographs, Ortiz, the lead detective on this matter, interviewed Agyei's son, who insisted that the vehicle that hit his mother's vehicle was a white BMW.

deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40; see also *In re Yasiel R.*, supra, 317 Conn. 781 (modifying third prong of Golding by eliminating word "clearly" before words "exists" and "deprived" [internal quotation marks omitted]).

We note that, although raising a claim for the first time on appeal can amount to an ambush on the state and the trial court, "our Supreme Court has reviewed a confrontation claim under the bypass rule of *State* v. *Golding*, [supra, 213 Conn. 233], even when there was a claim of waiver. *State* v. *Smith*, 289 Conn. 598, 619, 960 A.2d 993 (2008); see also *State* v. *Holley*, 327 Conn. 576, 590, 175 A.3d 514 (2018)." *State* v. *Walker*, 180 Conn. App. 291, 301, 183 A.3d 1, cert. granted, 328 Conn. 934, 183 A.3d 634 (2018).

One of the Bridgeport police detectives then went to a BMW dealership and showed the still photographs to personnel there, who identified the white SUV as a newer model BMW X3. The police, thereafter, obtained a list of the owners of all 2000-2014 BMW X3s and X5s registered in Connecticut from the Department of Motor Vehicles, and they began visiting the homes of the people on the list, asking to inspect their BMWs. If the vehicle had no damage, the police crossed it off their list. If the vehicle had front end damage, the police spoke further with the owner, and towed the vehicle to the police department for further inspection.

One of the vehicles examined by the police belonged to the defendant. Ortiz observed that the defendant's vehicle had damage to its front end that was consistent with the collision being investigated. The defendant admitted to Ortiz that she had driven west on Boston Avenue between 6 a.m. and 6:30 a.m. on December 4, 2014.[12] Ortiz then called for a tow truck, which took the defendant's BMW to the police department. The front bumper of the vehicle was sent to the state forensic laboratory for testing.

Alison Gingell, a forensic examiner at the state laboratory, performed testing on the bumper, and she compared a paint sample from Agyei's Subaru with a paint particle she found stuck on the bumper of the defendant's BMW. After analysis, Gingell concluded that the samples were similar in color, texture, structure, chemical type, and elemental composition.

The defendant argues that "Ortiz testified that a Bridgeport police detective visited a [BMW] dealership

[12] The defendant's location at or near the scene of the collision also was confirmed by Special Agent James Wines, from the Federal Bureau of Investigation, who, after investigating the defendant's cell phone records, concluded that the defendant was in a cellular phone tower area that included the scene of the collision at the time of the collision on December 4, 2014.

. . . and showed members of the staff there [photographs] of the BMW. Those individuals '*determined that it was an X3 BMW, a new model.*' . . . This statement by an employee of [the dealership] is testimonial hearsay." (Citation omitted; emphasis added.) She also argues: "The admission of this testimony violated the defendant's right of confrontation because she never had the chance to cross-examine the person from the dealership to test the basis of this information." The state responds that the statement of the dealership employee was not hearsay because it was not offered for the truth of the matter asserted. It argues: "Because the purpose of the statement was not to show that the vehicle in the [photograph] was, in fact, a BMW X3 but, instead, [was] merely to show how the police investigation proceeded, it was not hearsay and raised no legitimate confrontation clause issue." We agree with the state.

"It is fundamental that the defendant's rights to confront the witnesses against him and to present a defense are guaranteed by the sixth amendment to the United States constitution. . . . A defendant's right to present a defense is rooted in the compulsory process and confrontation clauses of the sixth amendment . . . . Furthermore, the sixth amendment rights to confrontation and to compulsory process are made applicable to state prosecutions through the due process clause of the fourteenth amendment." (Internal quotation marks omitted.) *State* v. *Holley*, 327 Conn. 576, 593, 175 A.3d 514 (2018).

"Under *Crawford* v. *Washington*, [541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)], hearsay statements of an unavailable witness that are testimonial in nature may be admitted in accordance with the confrontation clause only if the defendant previously has had

the opportunity to cross-examine the unavailable witness. Nontestimonial statements, however, are not subject to the confrontation clause and may be admitted under state rules of evidence. *Davis* v. *Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). Thus, the threshold inquiries that determine the nature of the claim are whether the statement was hearsay, and if so, whether the statement was testimonial in nature, questions of law over which our review is plenary." *State* v. *Smith*, 289 Conn. 598, 618–19, 960 A.2d 993 (2008).

"As a general matter, a testimonial statement is typically [a] solemn declaration or affirmation made for the purpose of establishing or proving some fact. . . . Although the United States Supreme Court did not provide a comprehensive definition of what constitutes a testimonial statement in *Crawford*, the court did describe three core classes of testimonial statements: [1] ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially . . . [2] extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions [and] . . . [3] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial . . . .

"Subsequently, in *Davis* v. *Washington*, supra, 547 U.S. 822, the United States Supreme Court elaborated on the third category and applied a primary purpose test to distinguish testimonial from nontestimonial statements given to police officials, holding: Statements are nontestimonial when made in the course of police

interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. . . .

"In *State* v. *Slater*, [285 Conn. 162, 172 n.8, 939 A.2d 1105, cert. denied, 553 U.S. 1085, 128 S. Ct. 2885, 171 L. Ed. 2d 822 (2008)], we reconciled *Crawford* and *Davis*, noting: We view the primary purpose gloss articulated in *Davis* as entirely consistent with *Crawford*'s focus on the reasonable expectation of the declarant. . . . [I]n focusing on the primary purpose of the communication, *Davis* provides a practical way to resolve what *Crawford* had identified as the crucial issue in determining whether out-of-court statements are testimonial, namely, whether the circumstances would lead an objective witness reasonably to believe that the statements would later be used in a prosecution. . . . We further emphasized that this expectation must be reasonable under the circumstances and not some subjective or far-fetched, hypothetical expectation that takes the reasoning in *Crawford* and *Davis* to its logical extreme." (Citations omitted; internal quotation marks omitted.) *State* v. *Smith*, supra, 289 Conn. 622–24.

In the present case, the defendant asserts that the statement of the dealership employee or employees, as offered by Ortiz, was testimonial hearsay under the third category recognized in *Crawford*. See id. Before we consider whether the statement was testimonial, however, we first must determine whether it amounted to hearsay. See id., 618–19 (threshold inquiry that determines nature of claim is whether statement was hearsay); see also *State* v. *Carpenter*, supra, 275 Conn.

820–21 (if statement is not hearsay, defendant not entitled to review of unpreserved claim under *Golding*).

The Connecticut Code of Evidence defines hearsay as "a statement, other than one made by the declarant while testifying at the proceeding, offered in evidence to establish the truth of the matter asserted." Conn. Code Evid. § 8-1 (3). "An out-of-court statement is hearsay when it is offered to establish the truth of the matters contained therein. . . . A statement offered solely to show its effect upon the hearer, [however], is not hearsay." (Internal quotation marks omitted.) *State* v. *Colon*, 272 Conn. 106, 195, 864 A.2d 666 (2004), cert. denied, 546 U.S. 848, 126 S. Ct. 102, 163 L. Ed. 2d 116 (2005). We conclude that the statement was not hearsay because it was not offered for the truth of the matter asserted, but, rather, it was offered to show its effect on the listener.

During Ortiz' testimony at the defendant's trial, the following colloquy occurred on direct examination:

"[Prosecutor]: Did you know . . . whether . . . you were looking for any particular model type [of vehicle]?

"[Ortiz]: Well, a little while after, we did, yes.

"[Prosecutor]: And . . . what led you to that conclusion?

"[Ortiz]: We had one of our detectives go to the BMW dealership and show the photos to personnel at the . . . Helmut's BMW, and *they were able to—they determined it was an X3 BMW, a newer model.*

"[Prosecutor]: Now, in relation to that investigation, what, if anything, did your detective bureau take in terms of steps of locating this particular vehicle?

"[Ortiz]: We were able to obtain a list of all the BMWs in the state of Connecticut; all the X3s, the X5s from years 2000 to 2014."[13] (Emphasis added.)

The defendant argues that the statement of the dealership employee was offered for the truth, and it served to bolster the state's claim "that the BMW in the picture was the defendant's BMW." She contends that "[t]he defense was unable to find out how certain the employee . . . was that the car in the still photograph was a BMW X3. The defense was not able to find out whether the BMW resembled an earlier model, though they thought it was a later model.[14] Had the defense been able to ascertain this information, it may have helped convince the jury that the BMW in the video was not the defendant's vehicle." (Footnote added.) We conclude that the statement was not hearsay.

[13] On cross-examination by defense counsel, the following colloquy occurred:

"[Defense Counsel]: Now . . . in response to questions from the state, you talked about efforts made to locate the vehicle involved in this collision, correct?

"[Ortiz]: That's correct, sir.

"[Defense Counsel]: And your efforts were informed at least on December 4th, primarily by two sources of information; your . . . interview with the young man at the hospital—with [Agyei's son], the eleven year old?

"[Ortiz]: Yes, the victim.

"[Defense Counsel]: Who told you that he thought . . . a white BMW had collided with the car, correct?

"[Ortiz]: He was certain it was a BMW, yes.

"[Defense Counsel]: And you saw, also, a videotape with a white vehicle as well, correct?

"[Ortiz]: That's correct, sir.

"[Defense Counsel]: And you testified here today that you went to a BMW dealer to identify the vehicle, correct?

"[Ortiz]: I didn't go, but one of the detectives went there and interviewed someone that works there, yes."

[14] The defendant does not explain why she "was not able to find out whether the BMW resembled an earlier model, though [the personnel at this dealership] thought it was a later model." We can ascertain no reason why she could not have showed the still photographs to an expert to ascertain an opinion on the year, make, and model of the white vehicle in the photos.

In the present case, Ortiz was testifying as to the procedure that the police used to conduct their investigation. As part of their investigation, after producing still photographs of the collision and interviewing Agyei's son, learning from him that the vehicle that hit his mother's vehicle was a white BMW, the police took those still photographs to a BMW dealership to see if someone could ascertain the year, make, and model of the vehicle from the photos. They then used that information to obtain a list of similar vehicles from the Department of Motor Vehicles. The statement that personnel at the dealership "*were able to—they determined it was an X3 BMW, a newer model*"; (emphasis added); was offered to demonstrate, not that the vehicle, in fact, was a newer model X3 or that it was the defendant's vehicle. Rather, it was used to demonstrate the route that the police took in deciding to obtain a list of 2000-2014 X3 and X5 BMWs and in conducting their investigation, which included investigating fifteen model years of X3s and X5s, and not just newer model X3s.

We conclude, therefore, that the defendant's evidentiary claim fails under *Golding*'s second prong because the admission of an out-of-court statement for purposes other than its truth raises no confrontation clause issue. See *State* v. *Carpenter*, supra, 275 Conn. 821, citing *Crawford* v. *Washington*, supra, 59–60 n.9 (citing *Tennessee* v. *Street*, 471 U.S. 409, 414, 105 S. Ct. 2078, 85 L. Ed. 2d 425 [1985]).

III

CONCLUSION

We have determined, under the facts of this case as pursued by the state that (1) the jury's verdicts of guilty on the charges of intentional manslaughter and reckless manslaughter are not legally inconsistent, (2) the jury's verdicts of guilty on the charges of intentional manslaughter and criminally negligent operation are not

legally inconsistent, (3) the jury's verdicts of guilty on the charges of reckless manslaughter and criminally negligent operation are legally inconsistent, and (4) the defendant's testimonial hearsay claim fails under *Golding*'s second prong.

We next consider the remedy and whether this case must be remanded to the trial court, and, if so, the appropriate remand order. Because of the inconsistency in the verdicts, we have no way of knowing whether the jury, if it properly had considered the mental elements of each crime, would have found the defendant guilty of reckless manslaughter or criminally negligent operation. Setting aside one of the convictions, therefore, will not cure the problem. Moreover, it is not for this court, on appeal, to make a factual determination as to the defendant's mental state or states at the time the collision occurred. The inconsistent verdicts, therefore, require that we vacate the defendant's convictions on the charges of reckless manslaughter and criminally negligent operation, and order a new trial thereon.[15] See *State* v. *King*, supra, 216 Conn. 594–95. On retrial, if properly supported by the evidence and pursued by the state pursuant to the same theory, the trial court may submit both counts to the jury, but it should instruct the jury that criminally negligent operation and reckless manslaughter can be found only in the alternative. The court also should make clear to the jury that it may find the defendant guilty of either criminally negligent operation or reckless manslaughter, but it may not convict her of both. See id.

The state, citing to *State* v. *Polanco*, 308 Conn. 242, 262–63, 61 A.3d 1084 (2013), argues, in a footnote in its brief, that if we conclude that the reckless manslaughter and misconduct with a motor vehicle convictions are inconsistent, we should remand with direction to reinstate the intentional manslaughter conviction. To the

[15] The defendant's convictions of risk of injury to a child and evasion of responsibility in the operation of a motor vehicle remain intact.

extent that the state is asking for the conviction of intentional manslaughter to be reinstated, and not simply that the state be permitted to retry the defendant on that charge, we decline to do so. The state moved at sentencing to vacate the conviction on that charge partly because doing so went "along with the spirit of the state's intent during the beginning of this case." See footnote 3 of this opinion. Under these circumstances, the most the state can ask for is what the defendant has requested—a retrial on all three of the charges related to Agyei's death. In the concluding paragraph of her appellate brief, the defendant requests "that she be granted a new trial on all the charges. Alternatively, she requests a new trial on the charges of intentional manslaughter [first], reckless manslaughter [first], and misconduct with a motor vehicle." Accordingly, we order a retrial on all three charges.

The judgment is reversed in part, the convictions of reckless manslaughter and criminally negligent operation are vacated, and a new trial is ordered as to those counts and the count of intentional manslaughter consistent with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

THOMAS G. STONE III *v.* EAST COAST SWAPPERS, LLC
(AC 40855)

Alvord, Bright and Norcott, Js.

Syllabus

The plaintiff sought to recover damages from the defendant motor vehicle repair shop for violation of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.) in connection with the purchase and installation of a modified engine in a car owned by K. The plaintiff had loaned K the money to pay the defendant for the requested work, however, the engine was never installed because K did not want to pay

for certain additional costs. When K failed to repay the loan, the plaintiff obtained a judgment against K and secured a lien on K's car, which remained in the defendant's possession. The plaintiff informed the defendant of his status as a second position lienholder on the car's title and his claim related to the car. Subsequently, S, a co-owner of the defendant, sold the car at an auction on the advice of counsel. S provided notice of the auction to K and the company that had financed K's purchase of the car, and published notice in a local newspaper, but he did not provide notice to the plaintiff. In his complaint, the plaintiff alleged that the defendant had violated CUTPA by refusing to perform the work that had been paid for and by failing to provide the plaintiff with statutory notice of the auction. Following a trial, the trial court concluded that the plaintiff had proven a CUTPA violation and awarded him $8300 in damages. The court, however, declined to award punitive damages and attorney's fees, concluding that the plaintiff had not proven the evil motive or malice necessary to award punitive damages, and that he was not entitled to attorney's fees. On appeal to this court, the plaintiff claimed that the trial court erred by failing to award him attorney's fees. *Held*:

1. The plaintiff could not prevail on his claim that this court should recognize a rebuttable presumption in the context of attorney's fees for CUTPA violations, whereby the prevailing plaintiff should ordinarily recover attorney's fees unless special circumstances would render such an award unjust; this court was not persuaded by the plaintiff's arguments in support of such a rebuttable presumption and was bound by the plain language of the statute (§ 42-110g [d]) that provides for the award of attorney's fees under CUTPA and by *Staehle* v. *Michael's Garage, Inc.* (35 Conn. App. 455), in which this court held that the language of § 42-110g (d) is clear and unambiguous that the decision to award attorney's fees is within the sole discretion of the trial court.
2. The trial court did not abuse its discretion in declining to award attorney's fees to the plaintiff; contrary to the plaintiff's claim that the trial court erred by conflating the analyses for awarding attorney's fees and punitive damages, nothing in the court's memorandum of decision or articulation suggested that it improperly required the plaintiff to show, in order to be entitled to recover attorney's fees, that the defendant acted with malice, reckless disregard or evil intent, and, therefore, this court could not conclude that there was a manifest abuse of discretion by the trial court or that injustice appeared to have been done.

Argued January 31—officially released July 2, 2019

Procedural History

Action to recover damages for, inter alia, a violation of the Connecticut Unfair Trade Practices Act, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Huddleston, J.*,

granted in part the defendant's motion to strike; thereafter, the matter was tried to the court, *Noble*, *J.*; judgment for the plaintiff, from which the plaintiff appealed to this court; subsequently, the court, *Noble*, *J.*, issued an articulation of its decision. *Affirmed*.

William J. O'Sullivan, with whom was *Michelle M. Seery*, for the appellant (plaintiff).

Juri E. Taalman, with whom, on the brief, was *Joseph R. Serrantino*, for the appellee (defendant).

Opinion

ALVORD, J. The plaintiff, Thomas G. Stone III, appeals from the judgment of the trial court, rendered after a trial to the court, finding that the defendant, East Coast Swappers, LLC, had violated the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and awarding the plaintiff compensatory damages, but declining to award punitive damages and attorney's fees. On appeal, the plaintiff claims that the court erred when it failed to award him attorney's fees. We affirm the judgment of the trial court.

The following facts, as found by the trial court, and procedural history are relevant to our resolution of this appeal. Patrick Keithan, at the time, the plaintiff's son-in-law, purchased a 2008 Mitsubishi Lancer Evolution in February, 2010, from a dealership in Savannah, Georgia. Keithan was in the military service and stationed in Georgia. He financed the purchase of the car, in part, through a loan from Wachovia Dealer Services, Inc.,[1] in the amount of approximately $24,362.49.

Shortly thereafter, the car's engine experienced performance issues, for reasons not disclosed at trial. Keithan towed the car from Georgia to Windsor Locks,

[1] It is undisputed that Wells Fargo Auto Finance succeeded in interest to Wachovia Dealer Services, Inc., and that it subsequently acquired the debt.

Connecticut, where the defendant, a motor vehicle repair shop, was located. The defendant first replaced the car's turbocharger for $2000, which Keithan paid for by credit card. Following the replacement of the turbocharger, the engine still was found to be inoperable. Keithan returned to Georgia to fulfill his military service obligations and left the car with the defendant.

Keithan ultimately decided that he wanted the defendant to install a Buschur Racing short block.[2] Paul Scott, a co-owner of the defendant, drafted an estimate for this work, which he forwarded to Keithan. The estimate, dated August 17, 2010, referenced the purchase of the Buschur Racing short block and its installation, and estimated a cost of $9028.89.

The plaintiff loaned Keithan $9000 to pay the defendant. The plaintiff's wife prepared a promissory note for the loan, which contemplated the title and car being held by the plaintiff while the note remained unpaid. The note, dated September 14, 2010, was executed by Keithan and his wife, the plaintiff's daughter. Keithan's wife then forwarded a check to the defendant in the amount of $9028.89.

On October 11, 2010, the defendant shipped the car's engine to Buschur Racing, which performed the requested work on the engine and returned the modified engine to the defendant. The modified engine, however, was never installed in the car.[3] As Scott started to prepare the modified engine for installation, his foreman

[2] A short block is a component of an engine upon which other components are assembled. Prior to the plaintiff's request for a Buschur Racing short block, the defendant had provided an estimate for an original equipment manufacturer short block. This estimate contained a waiver of advanced estimate. At trial, the defendant argued that the original equipment manufacturer estimate, containing the waiver and Keithan's signature, constituted authorization to undertake any repair without regard for the statutory requirements. The trial court was not persuaded. See footnote 11 of this opinion.

[3] At trial, Scott testified that, although the $9028.89 estimate stated that it included installation, he intended the word "installation" on the estimate

came to him with an additional parts request to discuss with Keithan. These were components that the foreman had learned were damaged as he took the original engine apart to prepare it for transmittal to Buschur Racing. When this request was communicated to Keithan,[4] he did not want to pay the extra money. The car continued to remain in the defendant's possession.

Keithan never repaid the plaintiff any portion of the loan. The plaintiff first attempted to obtain title to the car to identify him as a second position lienholder by filing a title application with the Motor Vehicle Division of the Georgia Department of Revenue.[5] In February and April, 2011, the plaintiff traveled from Maryland, where he resided, to the defendant's location in Connecticut. Scott refused to allow the plaintiff to look at the car or the modified engine. On September 1, 2011, Victoria L. Abalan, a co-owner of the defendant, sent a letter to Keithan, in which she indicated that she had been contacted by the plaintiff and had received a copy of the plaintiff's title application. The letter from Abalan to Keithan referenced the sum of $14,151.71 being owed to the defendant, which represented the costs of additional shipping, engine parts,[6] and storage over the previous year.

The plaintiff filed an action against Keithan in Maryland and obtained a judgment in the amount of $10,348. This judgment permitted him to eventually secure a lien on the car subsequent in right to that of Wells Fargo

to include the removal of the car's original engine and not the subsequent installation of the modified engine.

[4] The record is unclear as to when the additional parts request was communicated to Keithan.

[5] This was unsuccessful because the title application required the signature of Keithan, which was missing. The plaintiff did, however, subsequently obtain a judgment lien on the car, securing his position as a second position lienholder.

[6] There was no evidence that the defendant actually purchased or installed the additional parts referenced in the letter.

Auto Finance (Wells Fargo). See footnote 1 of this opinion. The lien was reflected in a certificate of title, dated June 29, 2012, which was issued by the Georgia Department of Revenue.

On July 13, 2012, the defendant filed a "Notice of Intent to Sell" or an "Artificer's Lien"[7] with the Connecticut Department of Motor Vehicles, which claimed a lien of $1792. In December, 2012, the Connecticut Department of Motor Vehicles issued to the defendant a form H-76, an "Affidavit of Compliance and Ownership Transfer," for use in providing valid title to a purchaser for a vehicle subject to an artificer's lien.

In December, 2012, extensive communications took place between the plaintiff, the plaintiff's wife, and the defendant's owners, regarding the plaintiff obtaining the car in satisfaction of his lien. During these communications, the plaintiff informed the defendant that he had secured status as a second position lienholder on the Georgia title. The plaintiff, however, had not provided the defendant with a copy of the new Georgia title.

Keithan filed for bankruptcy in Maryland and secured the discharge of the plaintiff's judgment. The security interest of Wells Fargo was identified as $10,700 at the time of the bankruptcy petition. The bankruptcy petition, which was obtained by the defendant's counsel, identified the plaintiff as an unsecured creditor.

By June, 2013, both parties had retained counsel who exchanged communications regarding their clients' respective claims related to the vehicle. In September,

[7] A motor vehicle repair shop may apply to obtain an artificer's lien if it claims a lien on a motor vehicle in its custody upon which it has completed authorized work that is properly recorded on an invoice and if there is no application pending to dissolve the lien within thirty days after completion of the work. See Form H-100A, Connecticut Department of Motor Vehicles, available at https://www.ct.gov/dmv/lib/dmv/20/29/h-100a.pdf (last visited June 26, 2019).

2013, the plaintiff commenced the underlying action against the defendant, setting forth a claim of unjust enrichment[8] and alleging that the defendant had violated CUTPA.[9]

On November 9, 2013, Scott, on the advice of his counsel, sold the car at an auction for $19,000. Although he had provided notice to Keithan and Wells Fargo, and published notice in a local newspaper, Scott did not provide notice of the auction to the plaintiff.

In December, 2016, the plaintiff filed the operative single count complaint[10] alleging that the defendant had violated CUTPA by refusing to perform the work that had been paid for, i.e., by failing to install the modified engine in the car and by failing to provide the plaintiff, a lienholder, with statutory notice of the auction. A trial to the court took place on January 24, 25 and 26, 2017.

In its memorandum of decision, the court concluded that "[the plaintiff] has proven a violation of CUTPA,[11]

[8] In March, 2014, the defendant moved to strike both counts of the plaintiff's complaint. In September, 2014, the trial court granted the defendant's motion with respect to the plaintiff's unjust enrichment claim.

[9] Specifically, the plaintiff alleged that the defendant had violated General Statutes § 14-65f (a) when it "obtained payment from Keithan, using [the plaintiff's] funds, through the artifice of falsely promising to install a new [e]ngine in the [v]ehicle, and sought to perpetuate this ruse in its communications with [the plaintiff's] agent, by deliberately attempting to pass off a used engine as new."

[10] The plaintiff's second amended complaint is the operative complaint in this matter.

[11] The court found that the defendant violated General Statutes §§ 14-65f and 49-61. Section 14-65f provides in relevant part: "Prior to performing any repair work on a motor vehicle, a motor vehicle repair shop shall obtain a written authorization to perform the work . . . that includes an estimate in writing of the maximum cost to the customer of the parts and labor necessary for the specific job authorized. . . . If the repair shop is unable to estimate the cost of repair because the specific repairs to be performed are not known at the time the vehicle is delivered to the repair shop, the written authorization required by this section need not include an estimate of the maximum cost of parts and labor. In such a case, prior to commencing any repairs, the repair shop shall notify the customer of the work to be performed and the estimated maximum cost to the customer of the necessary

has not proven the evil motive or malice necessary to award punitive damages and exercises its discretion by finding that the plaintiff is not entitled to an award of attorney's fees. Damages are awarded in the amount of $8300."

In declining to award punitive damages and attorney's fees, the court reasoned: "The court finds as a matter of fact that the plaintiff has not proven that [the defendant's] actions constituted a reckless indifference to the rights of [the plaintiff], an intentional and wanton violation of his rights, malice or evil. [The defendant] had been given an application for a title listing [the plaintiff] as a second position lienholder but had never been provided with the actual title. [The defendant] did make the effort to review Keithan's bankruptcy filing, which listed [the plaintiff] as an unsecured creditor. [The defendant] did consult with counsel before selling the

parts and labor, obtain the customer's written or oral authorization and record such information on the invoice. . . ." The court found that, although an oral authorization was provided by Keithan with respect to the defendant's estimate for the Buschur Racing short block, the estimate's explicit inclusion of a fixed cost for the "installation" of the modified engine was a misrepresentation on the part of the defendant.

In addition, § 49-61 provides in relevant part: "Within ten days of receipt of such information relative to any lienholder, the bailee shall mail written notice to each lienholder by certified mail, return receipt requested, stating that the motor vehicle is being held by such bailee and has a lien upon it for repair and storage charges. . . . [I]f the last usual place of abode of the bailor is known to or may reasonably be ascertained by the bailee, *notice of the time and place of sale shall be given by mailing the notice to* him by certified mail, return receipt requested, at least ten days before the time of the sale, and similar notice shall be given to any officer who has placed an attachment on the property and, *if the property is a motor vehicle . . . any lienholder*." (Emphasis added.) The court found that the defendant violated § 49-61 by failing to provide written notice of the auction to the plaintiff. The court concluded that the foregoing conduct, which destroyed the plaintiff's lien, violated CUTPA.

Although, in its brief to this court, the defendant challenges the trial court's determination as to its liability under CUTPA, the defendant did not file a cross appeal. Therefore, this appeal relates solely to the issue of whether the court erred by failing to award attorney's fees to the plaintiff.

vehicle at auction. The court cannot find, therefore, that [the defendant's] actions warrant punitive damages. For similar reasons, the court exercises its discretion and does not award [attorney's] fees to the plaintiff." This appeal followed.

On January 25, 2018, after filing the present appeal, the plaintiff filed a motion for articulation in which he requested that the trial court articulate the factual and legal basis for its decision declining to award attorney's fees. Specifically, the plaintiff requested that the court clarify its use of the phrase "for similar reasons" in its memorandum of decision.[12]

The court issued an articulation on February 15, 2018, in which it stated: "The use of the phrase 'similar reasons' was meant to signify that the court relied on the *same* reasons enumerated in the preceding sentences, to wit, '[the defendant] had been given an application for a title listing [the plaintiff] as a second position lienholder but had never been provided with the actual title. [The defendant] did make the effort to review Keithan's bankruptcy filing, which listed [the plaintiff] as an unsecured creditor. [The defendant] did consult with counsel before selling the vehicle at auction.' " (Emphasis in original.)

We begin by setting forth the standard of review and legal principles that guide our analysis of the plaintiff's claim. General Statutes § 42-110g (d) provides in relevant part: "In any action brought by a person under this section, the court *may* award, to the plaintiff, in addition to the relief provided in this section, costs and

[12] In his motion, the plaintiff stated that "[t]he foregoing language suggests, though imprecisely, that the court relied upon the same facts for its decision to decline [attorney's] fees as for its conclusion that the defendant's actions did not warrant [punitive damages]. . . . [I]t is necessary that the trial court clarify . . . whether its decision flowed from the same factual findings that underlie its decision regarding [punitive damages] or whether the court relied on other, similar but as yet unidentified, reasons."

reasonable [attorney's] fees based on the work reasonably performed by an attorney and not on the amount of recovery. . . ." (Emphasis added.)

"Awarding . . . attorney's fees under CUTPA is discretionary; General Statutes § 42–110g (a) and (d) . . . and the exercise of such discretion will not ordinarily be interfered with on appeal unless the abuse is manifest or injustice appears to have been done. . . . The salient inquiry is whether the court could have reasonably concluded as it did. . . . [T]he term abuse of discretion does not imply a bad motive or wrong purpose but merely means that the ruling appears to have been made on untenable grounds." (Internal quotation marks omitted.) *MedValUSA Health Programs, Inc.* v. *MemberWorks, Inc.*, 109 Conn. App. 308, 315, 951 A.2d 26 (2008).

The plaintiff first argues that this court should recognize a rebuttable presumption in the context of attorney's fees for CUTPA violations, whereby the prevailing plaintiff "should ordinarily recover attorney's fees unless special circumstances would render such an award unjust." We decline to recognize such a presumption.

The plaintiff, citing *Gill* v. *Petrazzuoli Bros., Inc.*, 10 Conn. App. 22, 32, 521 A.2d 212 (1987), argues that this court should recognize such a presumption because "the legislative history [of CUTPA] reflects the force of the legislature's opinion that plaintiff's fees are 'extremely necessary' to make CUTPA an effective mechanism to accomplish its policy to encourage plaintiffs to pursue private-attorney-general actions," and the United States Supreme Court has interpreted a "private-attorney-general discretionary fee-shifting provision" in the context of Title VII cases as creating a rebuttable presumption that attorney's fees should be awarded to the prevailing party. See *Newman* v. *Piggie Park*

Enterprises, *Inc.*, 390 U.S. 400, 402, 88 S. Ct. 964, 19 L. Ed. 2d 1263 (1968). The plaintiff also notes that our Supreme Court has applied this presumption in the context of a claim under 42 U.S.C. § 1983. See *New England Estates*, *LLC* v. *Branford*, 294 Conn. 817, 857, 988 A.2d 229 (2010).

Consequently, he argues: "The rationale supporting the presumption that the prevailing plaintiff should ordinarily be awarded an attorney's fee [in Title VII cases] applies with equal force to fee awards under CUTPA, given that CUTPA's purpose to encourage private-attorney-general actions is like that of Title VII and similar federal statutes. The rationale is particularly true to Connecticut's legislative understanding and intent that plaintiff's fees are 'extremely necessary,' as a tool for overcoming hesitancy to pursue CUTPA litigation." We are not persuaded.

Title VII protects civil rights, which hold an especially valued status in our law. See *Newman* v. *Piggie Park Enterprises*, *Inc.*, supra, 390 U.S. 402 (stating that plaintiff who brings civil rights action is "vindicating a policy that Congress considered of the highest priority"). The plaintiff has identified no authority that suggests that any court has ever put protection from unfair trade practices on the same plane. Furthermore, the presumption in favor of an award of prevailing party attorney's fees in Title VII cases has existed since 1968, yet our legislature did not include such a presumption when it first provided for the remedy of attorney's fees in 1973, nor has it amended the statute to incorporate the Title VII presumption over the last forty-five years. Finally, courts review a failure to award attorney's fees to a prevailing party in a Title VII case under a plenary standard. See *New England Estates*, *LLC* v. *Branford*, supra, 294 Conn. 857. By contrast, our jurisprudence is clear that the decision to award attorney's fees to a prevailing CUTPA plaintiff is reviewed under an abuse

of discretion standard. See *MedValUSA Health Programs, Inc.* v. *MemberWorks, Inc.*, supra, 109 Conn. App. 315.

The plaintiff also contends that recognizing such a presumption is appropriate because "Connecticut courts . . . have imposed judicial guidance on the exercise of discretion in determining the *amount* of fee awards under CUTPA . . . ." (Emphasis in original.) Specifically, the plaintiff points to this court's decision in *Steiger* v. *J. S. Builders, Inc.*, 39 Conn. App. 32, 663 A.2d 432 (1995), which applied a twelve factor test, that had been developed by federal courts for use in Title VII cases, for calculating attorney's fees under CUTPA. The court's initial decision of whether to award attorney's fees, however, is distinct from its subsequent calculation of the award of attorney's fees. We are, therefore, not persuaded.

In *Staehle* v. *Michael's Garage, Inc.*, 35 Conn. App. 455, 461, 646 A.2d 888 (1994), also a CUTPA action, this court concluded that "[§ 42-110g (d)] contains *no standard* by which a court is to award attorney's fees, thus leaving it to the *sole discretion* of the trial court to determine if attorney's fees should be awarded and the amount of such an award." (Emphasis added.)

As this court noted in *Staehle*, the use of the word "may" in § 42-110g (d) "indicates that the statute does not provide a mandatory award of fees to the plaintiff; rather, the court has the discretion to award attorney's fees. The language of the statute is clear and unambiguous; the awarding of attorney's fees is within the discretion of the trial court." Id., 459.

The rebuttable presumption that the plaintiff contends that we should recognize, whereby a plaintiff "should ordinarily recover attorney's fees unless special circumstances would render such an award unjust," is in conflict with this court's holding in *Staehle* and

contrary to the plain language of the statute. With the operation of such a presumption, the trial court would lose its statutory discretion in determining whether to award attorney's fees.

We are bound by this court's decision in *Staehle* and the plain language of the statute.[13] To the extent that the plaintiff's claims raise legitimate policy concerns that warrant a different outcome, it is the role of the legislature, not this court, to address those policy considerations. See *Bennett* v. *New Milford Hospital, Inc.*, 117 Conn. App. 535, 549, 979 A.2d 1066 (2009), aff'd, 300 Conn. 1, 12 A.3d 865 (2011).

The plaintiff next argues that, even if this court does not recognize a presumption in the award of attorney's fees under CUTPA, the trial court's failure to assess attorney's fees in this case constituted an abuse of discretion. Specifically, the plaintiff argues that the court erred by conflating the analyses for awarding attorney's fees and punitive damages, thereby improperly requiring the plaintiff to show, in order to be entitled to attorney's fees, that the defendant acted with malice, reckless disregard, or evil intent.[14] We disagree.

In its articulation, the trial court listed the following factual findings to support its decision not to award attorney's fees: "[The defendant] had been given an application for a title listing [the plaintiff] as a second position lienholder but [the defendant] had never been

[13] Moreover, we note that the legislature has not amended the language of § 42-110g (d) subsequent to this court's decision in *Staehle* to indicate that it intends attorney's fees to be awarded in a manner other than in accordance with the trial court's discretion.

[14] "In order to award punitive or exemplary damages [under CUTPA], evidence must reveal a reckless indifference to the rights of others or an intentional and wanton violation of those rights. . . . In fact, the flavor of the basic requirement to justify an award of punitive damages is described in terms of wanton and malicious injury, evil motive and violence." (Internal quotation marks omitted.) *Ulbrich* v. *Groth*, 310 Conn. 375, 446, 78 A.3d 76 (2013).

provided with the actual title. [The defendant] did make the effort to review Keithan's bankruptcy filing which listed [the plaintiff] as an unsecured creditor. [The defendant] did consult with counsel before selling the vehicle at auction."

Although the court relied on the same factual findings in its decision not to award punitive damages, nothing in the court's memorandum of decision or articulation suggests that the court improperly required the plaintiff to show, in order to be entitled to recover attorney's fees, that the defendant acted with malice, reckless disregard, or evil intent. We, therefore, cannot conclude that "abuse [of discretion] is manifest or [that] injustice appears to have been done." See *MedValUSA Health Programs, Inc.* v. *MemberWorks, Inc.*, supra, 109 Conn. App. 315; *Thames River Recycling, Inc.* v. *Gallo*, 50 Conn. App. 767, 800, 720 A.2d 242 (1998). Accordingly, we conclude that the trial court did not abuse its discretion in declining to award attorney's fees to the plaintiff.

The judgment is affirmed.

In this opinion the other judges concurred.

DEUTSCHE BANK NATIONAL TRUST COMPANY, TRUSTEE *v.* JOSEPH R. PONGER ET AL.
(AC 41014)

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

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain real property owned by the defendant T and her former spouse, P. T and P had executed a mortgage deed, and P had executed a note in favor of a predecessor in interest of the plaintiff. The note was later assigned to the plaintiff. After P failed to make payments pursuant to the note, the plaintiff advised him that the note and mortgage were in default, and mailed notice of the default addressed to him, but not to T, at the address of the property at issue, at which P no longer lived at the time that the plaintiff mailed the notice to him there. In the absence of a cure of the

default, the plaintiff thereafter elected to accelerate the amount due under the note. T claimed that the plaintiff had failed to provide her with proper notice of the default and acceleration of the note when it sent notice to the property that was addressed to P. The trial court rendered judgment of strict foreclosure for the plaintiff, concluding, inter alia, that the notice of default and acceleration was sent to T as a joint tenant of the mortgaged property and a joint obligor on the mortgage deed. On T's appeal to this court, *held* that the trial court properly rendered judgment of strict foreclosure for the plaintiff, as that court correctly concluded that the notice requirement under the mortgage was satisfied because notice to one joint tenant or joint obligor constitutes notice to the other; because T conceded that, at all relevant times, she and P were joint tenants with respect to the subject property, it was not in dispute that T and P continued as joint obligors under the mortgage, and T did not dispute that her signature was on the mortgage, notice to P constituted notice to T.

Argued November 29, 2018—officially released July 2, 2019

Procedural History

Action to foreclose a mortgage on certain real property of the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Mintz*, *J.*, granted the plaintiff's motion for summary judgment as to liability as against the named defendant; thereafter, the court, *Hon. A. William Mottolese*, judge trial referee, accepted the parties' stipulation of facts, and the matter was tried to the court, *Hon. A. William Mottolese*, judge trial referee; judgment of strict foreclosure, from which the defendant Theresa Ponger appealed to this court. *Affirmed.*

Colin B. Connor, for the appellant (defendant Theresa Ponger).

Christopher J. Picard, for the appellee (plaintiff).

Opinion

SULLIVAN, J. The defendant Theresa Ponger appeals from a judgment of strict foreclosure rendered by the

trial court.[1] On appeal, the defendant's principal claim is that the court erred when it concluded that the plaintiff, Deutsche Bank National Trust Company, as Trustee, in Trust, for Registered Holders of Long Beach Mortgage Loan Trust 2006-WL3, Asset-Backed Certificates, Series 2006-WL3, had provided notice of default and acceleration to her when it sent notice to the subject property addressed to her former spouse, Joseph R. Ponger (Ponger), who no longer resided at the property. Because the court correctly held that the notice requirement under the mortgage was satisfied because notice to one joint tenant or joint obligor constitutes notice to the others, we affirm the judgment of the trial court.

The parties stipulated to the following relevant facts. On September 7, 2005, Ponger executed a note in favor of Long Beach Mortgage Company in the principal amount of $420,000. The note was endorsed in blank and supplied to the plaintiff prior to the commencement of this action. Also on September 7, 2005, Ponger and the defendant executed a mortgage deed in favor of Long Beach Mortgage Company on property located at 23 Macintosh Road, Norwalk. The mortgage was recorded in the Norwalk land records on September 13, 2005.[2] The plaintiff is the present holder of the note.

On or about December 6, 2013, by letter addressed to Ponger at 23 Macintosh Road, Norwalk, Connecticut

[1] Joseph R. Ponger was also a defendant at trial but does not appeal from the judgment of strict foreclosure. In this opinion, we refer to Theresa Ponger as the defendant and to Joseph R. Ponger as Ponger. Several subsequent encumbrancers also were named as defendants, but they are not parties to this appeal.

[2] By virtue of assignments of the mortgage from Long Beach Mortgage Company to Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Trust 2006-WL3, dated April 7, 2010, and recorded June 11, 2010, in volume 7200 at page 113 of the Norwalk land records, and thereafter from Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Trust 2006-WL3 to the plaintiff, dated August 20, 2015, and recorded October 9, 2015, in volume 8244 at page 101 of the Norwalk land records, the plaintiff became the mortgagee of record.

06857, the plaintiff advised him that the note and mortgage were in default due to his failure to make the required monthly payments.[3] Notice of the aforementioned default was not addressed to the defendant.[4] In the absence of a cure of the default, the plaintiff elected to accelerate the amount due under the note. On April 15, 2014, the plaintiff provided Ponger and the defendant notice of their rights under the General Statutes as they relate to the Emergency Mortgage Assistance Program. See General Statutes § 8-265cc et seq. The record further indicates that Ponger failed to make payments pursuant to the note from July 1, 2013, to the date of the joint stipulation, May 9, 2017.

The present action was commenced on October 13, 2015, approximately eighteen months after the Emergency Mortgage Assistance Program notice was mailed to the subject property. On May 5, 2016, after the expiration of the court approved foreclosure mediation period, the defendant filed a timely answer asserting, as a special defense, that the plaintiff had failed to provide her with proper notice of default and acceleration. Thereafter, on June 2, 2016, the plaintiff filed a motion for summary judgment as to both Ponger and the defendant. The court granted the motion with respect to Ponger but denied the motion with respect to the defendant. On May 16, 2017, the parties filed a joint stipulation of facts with the court as to the remaining

[3] The notice provision of the subject mortgage provides in relevant part: "Any notice to Borrower provided for in this Security Instrument shall be given by delivering it or by mailing it by first class mail unless applicable law requires use of another method. The notice shall be directed to the Property Address or any other address Borrower designates by notice to Lender." The subject mortgage defines the "[b]orrower" as "Joseph Ponger and Theresa Ponger."

[4] Relatedly, the defendant claims that the court erred when it concluded that the plaintiff's admission that notice was not individually addressed to the defendant did not preclude judgment of strict foreclosure. Because the plaintiff's admission is not legally significant as to the defendant's claim on appeal, we decline to address it.

issues in dispute. On September 6, 2017, the court issued its memorandum of decision finding in favor of the plaintiff. The court determined that "[r]esolution of this issue is controlled squarely by *Citicorp Mortgage, Inc.* v. *Porto*, 41 Conn. App. 598, 600–604, 677 A.2d 10 (1996),"[5] and, thus, concluded in relevant part that the "notice of default and acceleration was sent to [the defendant] as a joint tenant of the mortgaged property and a joint obligor on the mortgage deed." Thereafter, the court rendered judgment of strict foreclosure against both Ponger and the defendant, and set the law day for January 16, 2018. This appeal followed. Additional facts and procedural history will be set forth as necessary.

The defendant's principal claim on appeal is that the court erred when it concluded that the notice requirement provision of the subject mortgage had been satisfied as to the defendant when the plaintiff provided notice addressed exclusively to Ponger.[6] Specifically, the defendant claims that, because she is a "[b]orrower" under the terms of the mortgage, and because the notice provision of the mortgage requires notice of default and acceleration to be given to the "[b]orrower," the

[5] The principal issue before the trial court essentially was identical to the issue now presented on appeal, namely, whether the plaintiff was required to provide the defendant with individual notice of default and acceleration pursuant to the notice provision in the subject mortgage.

[6] In addition, the defendant claims that, even assuming arguendo that she received the notice sent by the plaintiff to Ponger, the notice failed to comply with certain requirements set forth in the mortgage deed and, thus, was deficient. The defendant failed to raise this distinct claim before the trial court and, therefore, we decline to review it. See *DiMiceli* v. *Cheshire*, 162 Conn. App. 216, 229–30, 131 A.3d 771 (2016) ("Our appellate courts, as a general practice, will not review claims made for the first time on appeal. We repeatedly have held that [a] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one . . . . [A]n appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. . . . [B]ecause our review is limited to matters in the record, we [also] will not address issues not decided by the trial court." [Internal quotation marks omitted.]).

plaintiff was required to provide her individually with notice. The defendant further claims that the court improperly applied the legal principles set forth in *Citicorp Mortgage, Inc.* v. *Porto*, supra, 41 Conn. App. 600, because the present case is distinguishable, and, as a result of the improper application of *Citicorp Mortgage, Inc.*, a necessary condition precedent to the foreclosure action was not met.[7] We disagree.

As an initial matter, we note that the defendant's claim presents a mixed question of law and fact. "Where the question whether proper notice was given depends upon the construction of a written instrument or the circumstances are such as lead to only one reasonable conclusion, it will be one of law, but where the conclusion involves the effect of various circumstances capable of diverse interpretation, it is necessarily one of fact for the trier." (Internal quotation marks omitted.) *Sunset Mortgage* v. *Agolio*, 109 Conn. App. 198, 202, 952 A.2d 65 (2008). Because the plaintiff claims "that the facts found were insufficient to support the court's legal conclusion, this issue presents a mixed question of law and fact to which we apply plenary review." *Winchester* v. *McCue*, 91 Conn. App. 721, 726, 882 A.2d 143, cert. denied, 276 Conn. 922, 888 A.2d 91 (2005).

We begin by addressing the defendant's claim that the court erred when it applied the legal principles set forth in *Citicorp Mortgage, Inc.*, to the present case. In *Citicorp Mortgage, Inc.*, this court addressed whether notice to one joint tenant constituted notice to the others under similar, but not identical, circumstances. There, the defendant and his spouse were living apart, and neither the defendant nor the spouse resided at the subject property at the time notice was delivered.

[7] Additionally, in her brief the defendant argues that the court erred when it concluded that she and Ponger were joint tenants as to the subject property. At oral argument, however, the defendant conceded that, at all relevant times, she remained a joint tenant to the subject property.

Similar to the notice provision in the present case, the relevant notice provision provided: "Unless applicable law requires a different method, any notice that must be given to me under this note will be given by delivering it or by mailing it first class to me at the property address above or at a different address if I give the note holder notice of my different address." (Internal quotation marks omitted.) *Citicorp Mortgage, Inc.* v. *Porto*, supra, 41 Conn. App. 600 n.4. Unlike like the present case, in which the defendant is a signatory only on the subject mortgage, the defendant in *Citicorp Mortgage, Inc.*, was both a signatory on the note and a signatory on the corresponding mortgage.

This court concluded that, although "proper notice of acceleration is a necessary condition precedent to an action for foreclosure . . . the plaintiff provided the defendant with proper notice by mailing the notice of acceleration to [a joint tenant of the defendant]." Id., 603. This court further concluded that, "[w]hile it appears that service of a notice upon one tenant in common is not usually regarded as binding upon the others, unless they are engaged in a common enterprise, the rule is different where the relation is that of a joint tenancy. In such a case, it is said that notice to one of them is binding upon all. 20 Am. Jur. 2d, Cotenancy and Joint Ownership § 113 (1995)." (Internal quotation marks omitted.) *Citicorp Mortgage, Inc.* v. *Porto*, supra, 41 Conn. App. 603.

Largely informed by our Supreme Court's decision in *Katz* v. *West Hartford*, 191 Conn. 594, 600, 469 A.2d 410 (1983), which reaffirmed long-standing precedent that "[i]n the case of cofiduciaries [and joint tenants] notice to one is deemed to be notice to the other," this court's decision in *Citicorp Mortgage, Inc.*, also restated the long-standing principle that "[n]otice to one of two *joint obligors* conveys notice to the other with respect to matters affecting the joint obligation.

United States v. *Fleisher Engineering & Construction Co.*, 107 F.2d 925, 929 (2d Cir. 1939)." (Emphasis added.) *Citicorp Mortgage, Inc.* v. *Porto*, supra, 41 Conn. App. 603–604. Despite the foregoing, the defendant claims that the trial court misapplied the aforementioned standards because, unlike the defendant in *Citicorp Mortgage, Inc.*, who was both a signatory on the note and corresponding mortgage, she was not a signatory on the subject note. We find the defendant's claim unpersuasive.

In a recent decision, this court addressed a similar claim. See *Citibank, N.A.* v. *Stein*, 186 Conn. App. 224, 199 A.3d 57 (2018), cert. denied, 331 Conn. 903, 202 A.3d 373 (2019).[8] In *Citibank, N.A.*, the defendant argued that, because he was a signatory on the subject mortgage but not a signatory on the corresponding note, notice to his former spouse, who was the sole signatory on the note, was not effective as to him. Id., 250 n.21. This court held that, because the defendant signed the mortgage instrument, thereby pledging the property as security for the debt obligation created by the note, which was signed by the former spouse, the defendant was a joint obligor as to the mortgage and that the notice provided to his former spouse, despite their contrasting endorsements, satisfied the notice requirements under the mortgage. Id., 249–50, 250 n.21.

Critically, at oral argument before this court, the defendant conceded that, at all relevant times, she and Ponger were joint tenants with respect to the subject property.[9] See *Katz* v. *West Hartford*, supra, 191 Conn. 600. Furthermore, it is not in dispute that the defendant

[8] *Citibank, N.A.* v. *Stein*, supra, 186 Conn. App. 224, was officially released two days prior to oral argument. We note that neither the plaintiff nor the defendant chose to submit invited post argument memoranda to address its relevancy. See Practice Book § 67-10.

[9] See footnote 7 of this opinion.

and Ponger continued as joint obligors under the subject mortgage. See *Citicorp Mortgage, Inc.* v. *Porto*, supra, 41 Conn. App. 603–604. Further still, the defendant has not challenged the stipulation or otherwise disputed that her signature is on the mortgage. Accordingly, we conclude that the present case falls squarely within the ambit of this court's decision in *Citicorp Mortgage, Inc.*, and, therefore, the notice to Ponger constituted notice to the defendant.

The judgment is affirmed and the case is remanded for the purpose of setting new law days.

In this opinion the other judges concurred.

TREVELLE DINHAM *v.* COMMISSIONER OF CORRECTION
(AC 41625)

Keller, Elgo and Harper, Js.

Syllabus

The petitioner, who had been convicted, on a plea of guilty, of manslaughter in the first degree with a firearm, sought a writ of habeas corpus. The habeas court rendered judgment dismissing the habeas petition for lack of subject matter jurisdiction and for the failure to state a claim on which habeas relief could be granted, from which the petitioner, on the granting of certification, appealed to this court. On appeal, he claimed, inter alia, that the habeas court improperly dismissed his claims that the respondent, the Commissioner of Correction, misconstrued and misapplied the statute (§ 54-125a) pertaining to parole suitability hearings and the application of risk reduction credit toward the advancement of a parole eligibility date, and the statute (§ 18-98e) pertaining to risk reduction credit. Specifically, the petitioner claimed that the respondent had misinterpreted and misapplied certain 2013 amendments to § 54-125a, as set forth in No. 13-3 of the 2013 Public Acts (P.A. 13-3) and No. 13-247 of the 2013 Public Acts (P.A. 13-247), which made a parole suitability hearing discretionary rather than mandatory and eliminated the use of risk reduction credits to advance the parole eligibility date of inmates convicted of certain crimes, including manslaughter in the first degree with a firearm, and certain 2015 amendments to § 18-98e, as set forth in No. 15-216 of the 2015 Public Acts (P.A. 15-216), which

prohibited inmates who committed certain crimes, including manslaughter in the first degree with a firearm, from earning any risk reduction credit in the future. *Held*:

1. The petitioner could not prevail on his claim that the habeas court improperly dismissed his claim that, when he pleaded guilty in 2012 to manslaughter in the first degree with a firearm, he relied on governmental representations that he would receive risk reduction credits to advance his parole eligibility date and reduce the total length of his sentence: although the petitioner claimed in his appellate brief that he had pleaded guilty to manslaughter in the first degree with a firearm, which carried a twenty-eight year term of imprisonment, rather than murder, which carried a twenty-five year term of imprisonment, on the basis of representations by either the trial court or the prosecutor that, if he pleaded guilty to the manslaughter charge, he would be eligible to earn risk reduction credits that would advance his parole eligibility date and would reduce the total length of his sentence to under twenty-five years, the petitioner failed to plead in his amended habeas petition any factual basis on which his claim relied, as the petitioner only broadly alleged that he had a liberty interest in being able to rely on governmental representations when deciding how to resolve his pending criminal case, without any factual allegations of what the representations were or who made them; accordingly, the habeas court did not err in dismissing the petitioner's claim for failure to state a claim on which habeas relief could be granted.

2. The habeas court properly dismissed the petitioner's claim that the respondent misconstrued and misapplied P.A. 13-247, P.A. 13-3 and P.A. 15-216, which was based on his claim that those public acts amending the applicable statutes were substantive rather than procedural in nature and, therefore, should not apply retroactively to him; the petitioner's claim related to P.A. 13-247 was not ripe for adjudication because the petitioner had not yet been denied a hearing and, thus, it was impossible to determine whether a hearing would take place in the future, and with respect to P.A. 13-3 and P.A. 15-216, the petitioner had to assert a cognizable liberty interest sufficient to invoke the habeas court's subject matter jurisdiction, which he failed to do, as he did not have a constitutionally protected liberty interest in certain benefits, such as good time credits, risk reduction credits, and early parole consideration, because the statutory scheme pursuant to which the respondent was authorized to award those benefits was discretionary in nature, and, therefore, the habeas court lacked subject matter jurisdiction over the petitioner's claims.

3. The petitioner could not prevail on his claim that the habeas court improperly dismissed certain counts in his petition for lack of subject matter jurisdiction and for the failure to state a claim on which habeas relief could be granted, which was based on his assertion that his claims established a cognizable liberty interest by alleging that the respondent,

through his customary practices, had created a liberty interest: there is no liberty interest in earning risk reduction credit or having it applied to further an inmate's parole eligibility date due to the discretionary nature of the respective statutory schemes, there is no liberty interest in parole or the procedure by which parole is granted or denied, and it would be contrary to our case law to hold in the present case that the petitioner has a vested liberty interest in earning future risk reduction credits, in having those credits utilized to advance his parole eligibility date, and in having a mandatory parole suitability hearing, when those interests were not assured by statute, judicial decree, or regulation; moreover, the legislature has made it clear in its amendments to §§ 54-125a and 18-98e that the respondent is no longer authorized to utilize risk reduction credits to advance an inmate's parole eligibility date and that he may no longer issue risk reduction credits to inmates such as the petitioner, and this court will not interfere with the legislature's clear mandate.

Argued February 5—officially released July 2, 2019

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Hon. Edward J. Mullarkey*, judge trial referee, sua sponte, rendered judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

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

Zenobia G. Graham-Days, assistant attorney general, with whom, on the brief, was *George Jepsen*, former attorney general, for the appellee (respondent).

Opinion

HARPER, J. The petitioner, Trevelle Dinham, appeals from the judgment of the habeas court dismissing his petition for a writ of habeas corpus. On appeal, the petitioner argues that the court improperly dismissed his claims for lack of subject matter jurisdiction and for the failure to state a claim upon which habeas relief can be granted. Specifically, the petitioner argues that the court improperly dismissed his claims that (1) he

relied on "governmental representations" that he would receive risk reduction credit when he pleaded guilty to manslaughter in the first degree with a firearm, (2) the respondent, the Commissioner of Correction, misconstrued and misapplied several statutes pertaining to the petitioner receiving a parole suitability hearing, earning risk reduction credit in the future, and applying risk reduction credit toward the advancement of the petitioner's parole eligibility date, and (3) the respondent's customary practices have created a vested liberty interest in receiving a parole suitability hearing, earning future risk reduction credits, and applying risk reduction credits to advance his parole eligibility date. We disagree and, accordingly, affirm the judgment of the habeas court.

The following facts and procedural history are relevant to the resolution of this appeal. On April 2, 2012, the petitioner pleaded guilty to one count of manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55a, which he committed on or about September 24, 1999,[1] and for which he was sentenced to twenty-eight years of imprisonment. Thereafter, the then self-represented petitioner commenced this action by filing a petition for a writ of habeas corpus. On November 15, 2017, the petitioner, after obtaining counsel, filed an eighteen count amended habeas petition. On March 19, 2018, the court, sua sponte, dismissed the amended petition for lack of subject matter jurisdiction and for the failure to state a claim upon which habeas relief may be granted.[2] See

[1] The court's memorandum of decision states that the offense occurred on or before August 29, 2009. This appears to be an error that does not affect the propriety of the court's judgment.

[2] Prior to dismissing the amended petition, the court notified the parties that they should be prepared to present arguments, at any time, addressing the court's subject matter jurisdiction.

Practice Book § 23-29.[3] Instead of addressing the petitioner's claims individually, the court broadly determined that it lacked subject matter jurisdiction over the habeas petition and that the petition had failed to state a claim upon which habeas relief can be granted.[4] The court granted the petitioner's petition for certification to appeal.[5] The petitioner timely filed the present appeal, challenging the dismissal of ten of his claims. Additional facts will be set forth as necessary.

Before addressing the petitioner's individual claims, we first set forth the standards of review and relevant legal principles applicable to the petitioner's appeal. "Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Internal quotation marks omitted.) *Pentland* v. *Commissioner of Correction*, 176 Conn. App. 779, 784–85, 169 A.3d 851, cert. denied, 327 Conn. 978, 174

[3] Practice Book § 23-29 provides in relevant part: "The judicial authority may, at any time, upon its own motion . . . dismiss the [habeas] petition, or any count thereof, if it determines that . . . (1) the court lacks jurisdiction . . . (2) the petition, or a count thereof, fails to state a claim upon which habeas corpus relief can be granted . . . ."

[4] The court concluded in its memorandum of decision that "[b]ecause the petitioner has no right to earn and receive discretionary [risk reduction credit], and any changes, alterations and even the total elimination of [risk reduction credit] at most can only revert the petitioner to the precise measure of punishment in place at the time of the offense, the court concludes that it lacks subject matter jurisdiction over the habeas corpus petition and that the petition fails to state a claim for which habeas corpus relief can be granted."

[5] Specifically, the court certified the appeal on two grounds: "(1) Did the habeas court err in concluding that it lacked subject matter jurisdiction?; and (2) Did the habeas court err in concluding that the petition failed to state a claim upon which habeas corpus relief can be granted?"

A.3d 800 (2017). "[I]n order to invoke successfully the jurisdiction of the habeas court, a petitioner must allege an interest sufficient to give rise to habeas relief. . . . We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary." (Citation omitted; internal quotation marks omitted.) *Perez* v. *Commissioner of Correction*, 326 Conn. 357, 368, 163 A.3d 597 (2017). "With respect to the habeas court's jurisdiction, [t]he scope of relief available through a petition for habeas corpus is limited. In order to invoke the trial court's subject matter jurisdiction in a habeas action, a petitioner must allege that he is illegally confined or has been deprived of his liberty. . . . In other words, a petitioner must allege an interest sufficient to give rise to habeas relief. . . . In order to . . . qualify as a constitutionally protected liberty [interest] . . . the interest must be one that is assured either by statute, judicial decree, or regulation." (Internal quotation marks omitted.) *Boria* v. *Commissioner of Correction*, 186 Conn. App. 332, 342, 199 A.3d 1127 (2018).

"Likewise, [w]hether a habeas court properly dismissed a petition pursuant to Practice Book § 23-29 (2), on the ground that it fails to state a claim upon which habeas corpus relief can be granted, presents a question of law over which our review is plenary." (Internal quotation marks omitted.) *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 368. "In reviewing whether a petition states a claim for habeas relief, we accept its allegations as true." *Coleman* v. *Commissioner of Correction*, 137 Conn. App. 51, 55, 46 A.3d 1050 (2012). For ease of discussion, we next provide a brief summary of the relevant laws pertaining to the petitioner's ability to receive a parole suitability hearing, to earn future risk reduction credit, and to apply his earned risk reduction credit toward the advancement of his parole eligibility date.

Pursuant to No. 04-234 of the 2004 Public Acts, codified at General Statutes § 54-125a (e), the Board of Pardons and Paroles (board) was *required* to hold a parole suitability hearing for any person eligible for parole who had completed 85 percent of his or her sentence. General Statutes (Rev. to 2013) § 54-125a (e) subsequently was amended by No. 13-247 of the 2013 Public Acts (P.A. 13-247), to make the board's parole suitability hearing discretionary, rather than mandatory.[6] If the board declines to hold a hearing, however, § 54-125a (e) requires the board to document specific reasons for declining to hold a hearing and to provide those reasons to the person denied a hearing.

As to risk reduction credits, our Supreme Court has summarized the relevant statutes as follows: "In July, 2011 . . . General Statutes § 18-98e[7] became effective, pursuant to which the respondent had discretion to award risk reduction credit toward a reduction of an inmate's sentence, up to five days per month, for positive conduct. General Statutes § 18-98e (a) and (b). The respondent also was vested with discretion to revoke such credit, even credit yet to be earned, for good cause. See General Statutes § 18-98e (b). At the same time, the legislature amended the parole eligibility provision to provide: 'A person convicted of . . . an offense . . . where the underlying facts and circumstances of the offense involve the use, attempted use or threatened

[6] General Statutes (Rev. to 2013) § 54-125a (e), as amended by P.A. 13-247, § 376, provides in relevant part: "The Board of Pardons and Paroles *may* hold a hearing to determine the suitability for parole release of any person whose eligibility for parole release is subject to the provisions of subdivision (2) of subsection (b) of this section upon completion by such person of eighty-five per cent of such person's definite or aggregate sentence. . . . If a hearing is not held, the board shall document the specific reasons for not holding a hearing and provide such reasons to such person. . . ." (Emphasis added.)

[7] Section 18-98e was amended by No. 15-216 of the 2015 Public Acts, as subsequently addressed in this opinion. Section 18-98e was also amended in 2018. See footnote 9 of this opinion.

use of physical force against another person shall be ineligible for parole under subsection (a) of this section until such person has served not less than eighty-five per cent of the definite sentence imposed *less any risk reduction credit earned under the provisions of section 18-98e.*' . . . General Statutes (Rev. to 2011) § 54-125a (b) (2), as amended by Public Acts 2011, No. 11-51, § 25 (P.A. 11-51). The subsection of § 54-125a addressing parole hearings was similarly amended to account for earned risk reduction credit. General Statutes (Rev. to 2011) § 54-125a (e), as amended by P.A. 11-51, § 25. Accordingly, under the 2011 amendments, earned risk reduction credit was to be applied to an inmate's definite sentence to advance the inmate's end of sentence date, and the parole eligibility date calculated as a percentage of the sentence would advance in similar measure. . . .

"Under the 2011 amendments to § 54-125a and § 18-98e, any risk reduction credit earned by an inmate, and not subsequently revoked, would have both reduced his sentence and rendered him eligible for a hearing to determine whether he should be granted parole after he had served 85 percent of that reduced sentence.

"Effective July 1, 2013, the legislature again amended § 54-125a. Specifically, with regard to offenses like one of those of which the petitioner was convicted, the legislature eliminated the language that permitted the parole eligibility date to be advanced by the application of any earned risk reduction credit. See [Public Acts 2013, No. 13-3, § 59 (P.A. 13-3)]." (Emphasis in original; footnote altered.) *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 363–65.

General Statutes (Rev. to 2015) § 18-98e (a) subsequently was amended by No. 15-216 of the 2015 Public

Acts (P.A. 15-216),[8] so that inmates convicted of certain violent crimes, including manslaughter in the first degree with a firearm, were ineligible to earn risk reduction credits in the future.[9] Mindful of the foregoing legal principles, we now turn to the specific claims raised by the petitioner in this appeal.

I

The petitioner's first argument is that the court improperly dismissed his claims that, when he pleaded guilty in 2012 to manslaughter in the first degree with a firearm, he relied on "governmental representations"[10] that he would receive risk reduction credits to advance his parole eligibility date and reduce the total length of his sentence.[11] Specifically, the petitioner claims in his appellate brief that he pleaded guilty to manslaughter in the first degree with a firearm, which carried a twenty-eight year term of imprisonment, rather than

[8] General Statutes § 18-98e (a), as amended by P.A. 15-216, § 9, provides in relevant part: "Notwithstanding any provision of the general statutes, any person sentenced to a term of imprisonment for a crime committed on or after October 1, 1994, and committed to the custody of the Commissioner of Correction on or after said date, *except a person sentenced for a violation of section . . . 53a-55a . . .* may be eligible to earn risk reduction credit toward a reduction of such person's sentence, in an amount not to exceed five days per month, at the discretion of the Commissioner of Correction for conduct as provided in subsection (b) of this section occurring on or after April 1, 2006." (Emphasis added.)

[9] Additional amendments were made to § 18-98e pursuant to No. 18-155 of the 2018 Public Acts, but they are of no consequence to the matters raised in this appeal.

[10] We note that the petitioner, at points in his appellate brief, utilizes "representations" and "promise" interchangeably. We do not believe these words to be synonymous. Although either the prosecutor or the court may have in fact represented that the petitioner would be eligible to earn risk reduction credits, which would have been an accurate statement of the law at the time the petitioner pleaded guilty, such statements cannot reasonably be construed as a promise, which would imply that the prosecutor or the court had entered into a binding agreement with the petitioner.

[11] In his brief, the petitioner frames the issue as "whether [the habeas court] improperly dismissed counts twelve and sixteen of" his operative petition.

murder, which carried a twenty-five year term of imprisonment, because either the court or the prosecutor represented that, if he pleaded guilty to the manslaughter charge, he would be eligible to earn risk reduction credits that would advance his parole eligibility date and would reduce the total length of his sentence to under twenty-five years. The petitioner, relying on *Santobello* v. *New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971),[12] argues that his operative petition states a cognizable liberty interest by virtue of his "right to rely on governmental representations," which confers subject matter jurisdiction on the court. Moreover, he asserts that the facts pleaded in his petition state a claim upon which habeas relief can be granted. We disagree.

The petitioner failed to plead in his amended petition any factual basis upon which his claim relies. The petitioner only broadly alleged, citing to *Santobello*, that he has a liberty interest in "being able to rely on governmental representations in the decision how to resolve his pending case," without any factual allegations of what the representations were or who made them. "It is well settled that [t]he petition for a writ of habeas corpus is essentially a pleading and, as such, it should conform generally to a complaint in a civil action. . . . The principle that a plaintiff may rely only upon what

[12] In *Santobello* v. *New York*, supra, 404 U.S. 258, the defendant had reached a plea agreement with the prosecutor in which the prosecutor would permit him to plead guilty to a lesser offense and would not make a recommendation as to the length of the sentence. At the defendant's sentencing, a different prosecutor who did not negotiate the plea agreement recommended the maximum sentence, which the court imposed, in violation of the agreement. Id., 259–60. The United States Supreme Court held that, "the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to [e]nsure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Id., 262.

he has alleged is basic." (Internal quotation marks omitted.) *Arriaga* v. *Commissioner of Correction*, 120 Conn. App. 258, 262, 990 A.2d 910 (2010), appeal dismissed, 303 Conn. 698, 36 A.3d 224 (2012). "[A] habeas petitioner is limited to the allegations in his petition, which are intended to put the [respondent] on notice of the claims made, to limit the issues to be decided, and to prevent surprise." (Internal quotation marks omitted.) *Moye* v. *Commissioner of Correction*, 316 Conn. 779, 789, 114 A.3d 925 (2015). Accordingly, we conclude that the court did not err in dismissing the petitioner's claims for failure to state a claim upon which habeas relief can be granted.[13]

II

The petitioner next argues that the court improperly dismissed several counts of his operative habeas petition, which allege that three public acts amending §§ 54-125a or 18-98e are substantive rather than procedural in nature and, therefore, should not apply retroactively to him.[14] Specifically, the petitioner claims that the respondent has misinterpreted and misapplied (1) P.A. 13-247, which amended General Statutes (Rev. to 2013) § 54-125a (e) to make a parole suitability hearing discretionary rather than mandatory, (2) P.A. 13-3, which

[13] In the petitioner's appellate brief, he insinuates that we should look to the facts pleaded in his initial petition, which he believes sets forth the factual basis for his claim. We are mindful, however, that "[w]hen an amended pleading is filed, it operates as a waiver of the original pleading. The original pleading drops out of the case and although it remains in the file, it cannot serve as the basis for any future judgment . . . ." (Internal quotation marks omitted.) *Lund* v. *Milford Hospital, Inc.*, 326 Conn. 846, 850, 168 A.3d 479 (2017). Thus, the petitioner's amended petition supersedes his initial petition and, accordingly, he cannot rely on the factual allegations made solely in his initial petition. See, e.g., *Wesley* v. *DeFonce Contracting Corp.*, 153 Conn. 400, 404, 216 A.2d 811 (1966) (amended complaint "entirely supersedes" original complaint).

[14] The petitioner framed the issue in his appellate brief as whether "the habeas court improperly dismissed counts two, six, and eighteen of the petitioner's amended petition for a writ of habeas corpus."

amended General Statutes (Rev. to 2013) § 54-125a to eliminate the use of risk reduction credits to advance the parole eligibility date of inmates convicted of certain crimes, including manslaughter in the first degree with a firearm, and (3) P.A. 15-216, which amended General Statutes (Rev. to 2015) § 18-98e to prohibit inmates who committed certain crimes, including first degree manslaughter with a firearm, from earning any further risk reduction credit. We disagree.

As to the petitioner's claim regarding P.A. 13-247, even though it is unclear on what basis the court relied in concluding that it lacked subject matter jurisdiction and that the petition had failed to state a claim upon which habeas relief could be granted, our plenary review leads us to conclude that, as argued by the respondent in his principal brief, there is another basis for finding a lack of subject matter jurisdiction, namely, that the petitioner's claim is not ripe for adjudication. "The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Internal quotation marks omitted.) *Pentland* v. *Commissioner of Correction*, supra, 176 Conn. App. 785. "[A] trial court must be satisfied that the case before [it] does not present a hypothetical injury or a claim contingent [on] some event that has not and indeed may never transpire. . . . [R]ipeness is a sine qua non of justiciability . . . ." (Internal quotation marks omitted.) *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 387–88. In *Perez*, our Supreme Court stated that, even if the petitioner in that case had stated a statutory claim upon which habeas relief could be granted, his challenge to P.A. 13-247 would not be ripe for adjudication because it was impossible to determine whether the board would decline to conduct a hearing on the petitioner's parole

eligibility date.[15] Id. In the present case, the petitioner also has not yet been denied a hearing, and it is impossible to determine whether a hearing will take place in the future.[16] Accordingly, the petitioner's claim related to P.A. 13-247 is not ripe for review.

Turning to P.A. 13-3 and P.A. 15-216, in his appellate brief, the petitioner cites to *Johnson* v. *Commissioner of Correction*, 258 Conn. 804, 786 A.2d 1091 (2002), for the proposition that this court must hold that the public acts relevant to his claim are substantive in nature and, therefore, cannot be applied retroactively to him.[17] In *Johnson*, our Supreme Court determined that the petitioner had made a cognizable *ex post facto claim*, which

[15] Our Supreme Court first determined that the petitioner in that case had failed to state a claim upon which habeas relief could be granted. *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 387.

[16] The petitioner, citing *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 152–53, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967), argues that, even if an injury has not yet been suffered, the case is ripe for review because the respondent's interpretation of P.A. 13-247 impacts his present actions while incarcerated. In *Abbott Laboratories*, the United States Supreme Court held that a challenge to a *federal regulation* before it was enforced was ripe for adjudication where a drug manufacturer either had to comply with the regulation or wait until it was a defendant in an enforcement action, where it would face serious civil and criminal penalties for failing to comply, before challenging the regulation. Id., 153. We do not find these considerations applicable in the present case.

[17] Even if we were to acquiesce to the petitioner's request to engage in a statutory analysis of the pertinent public acts to determine if they are substantive or procedural in nature and, thus, whether they should apply retroactively to the petitioner, he has not adequately briefed the issue. The petitioner simply distinguishes a substantive statute from a procedural statute and concludes that the relevant public acts are substantive statutes without providing any analysis of the language at issue in the statutes and without citing to any legislative history to evince the legislature's intent. See, e.g., *Andersen Consulting, LLP* v. *Gavin*, 255 Conn. 498, 517–18, 767 A.2d 692 (2001) (discussing test to determine whether statute applies retroactively or prospectively). "Claims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion. . . . Claims are also inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record . . . ." (Internal quotation marks omitted.) *Estate of Rock* v. *University of Connecticut*, 323 Conn. 26, 33, 144 A.3d 420 (2016).

invoked the habeas court's subject matter jurisdiction. Id., 818–19. An ex post facto claim, however, is not dependent on the existence of a cognizable liberty interest. See *Breton* v. *Commissioner of Correction*, 330 Conn. 462, 471, 196 A.3d 789 (2018) ("[t]he presence or absence of an affirmative, enforceable right is not relevant . . . to the ex post facto prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred" [internal quotation marks omitted]); see also *Baker* v. *Commissioner of Correction*, 281 Conn. 241, 261, 914 A.2d 1034 (2007).

In the present case, the petitioner has stated that his claim is *not* an ex post facto claim but, rather, a statutory interpretation claim. Accordingly, *Johnson* is materially distinguishable from the present case. Citing to *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 387–88, the petitioner asserts that his claim is not controlled by the question of whether he has alleged a cognizable liberty interest in receiving risk reduction credit. In essence, the petitioner asks for this court to reach the merits of his claim without him first alleging a cognizable liberty interest sufficient to establish a basis for the court's subject matter jurisdiction. Such a reading of *Perez* would run contrary to our jurisprudence, which has consistently held that "[i]n order to invoke the trial court's subject matter jurisdiction in a habeas action, a petitioner must allege that he is illegally confined or has been deprived of his liberty." (Internal quotation marks omitted.) *Boria* v. *Commissioner of Correction*, supra, 186 Conn. App. 342. Accordingly, the petitioner must assert a cognizable liberty interest sufficient to invoke the habeas court's subject matter jurisdiction.

"Our appellate courts have concluded, consistently, that an inmate does not have a constitutionally protected liberty interest in certain benefits—such as good

time credits, risk reduction credits, and early parole consideration—if the statutory scheme pursuant to which the [respondent] is authorized to award those benefits is discretionary in nature." *Green* v. *Commissioner of Correction*, 184 Conn. App. 76, 86–87, 194 A.3d 857, cert. denied, 330 Conn. 933, 195 A.3d 383 (2018); see *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 370–73 (no liberty interest in risk reduction credits or application of risk reduction credits to advance parole eligibility date); see also *Rivera* v. *Commissioner of Correction*, 186 Conn. App. 506, 514, 200 A.3d 701 (2018), cert. denied, 331 Conn. 901, 201 A.3d 402 (2019), and cases cited therein. Because the petitioner has failed to assert a cognizable liberty interest in his claims, we conclude that the court lacked subject matter jurisdiction over them.

III

Finally, the petitioner claims that the court improperly dismissed five counts in his petition for lack of subject matter jurisdiction and for the failure to state a claim upon which habeas relief can be granted because his claims established a cognizable liberty interest by alleging that the respondent, through his customary practices, has created a liberty interest.[18] We are not persuaded.

As previously mentioned, our Supreme Court has held that, "[i]n order to . . . qualify as a constitutionally protected liberty [interest] . . . the interest must be one that is assured either by statute, judicial decree, or regulation." (Internal quotation marks omitted.) *Boria* v. *Commissioner of Correction*, supra, 186 Conn. App. 342. There is no liberty interest in earning risk reduction credit or having it applied to further an

[18] The petitioner claims in his appellate brief that "the habeas court improperly dismissed counts three, four, seven, nine, and seventeen of the petitioner's amended petition for a writ of habeas corpus."

inmate's parole eligibility date due to the discretionary nature of the respective statutory schemes. See part II of this opinion. Furthermore, there is no liberty interest in parole or the procedure by which parole is granted or denied. See *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 373 ("[w]here . . . an inmate has no vested liberty interest in parole itself, then it follows that the procedure by which the board exercises its discretion to award or deny the petitioner parole does not implicate a vested liberty interest"). Thus, it would be contrary to our case law to hold in the present case that the petitioner has a vested liberty interest in earning future risk reduction credits, in having those credits utilized to advance his parole eligibility date, and in having a mandatory parole suitability hearing, all of which are not assured either by statute, judicial decree, or regulation.

The petitioner primarily relies on two federal cases to support the proposition that the respondent's customary practices created a cognizable liberty interest sufficient to confer subject matter jurisdiction over his petition. First, he cites to *Vitek* v. *Jones*, 445 U.S. 480, 487–88, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980), in which the United States Supreme Court held that an inmate had a cognizable liberty interest in not being transferred to a mental health facility for treatment. Specifically, the court found that such a liberty interest was created from an expectation based on Nebraska statutes and the prison's practice that an inmate would not be transferred unless he suffered from a mental disease or defect that could not be treated at the prison. Id., 489–90. Importantly, the court also factored into its conclusion the stigma created by an involuntary confinement to a mental health institution, which it opined could negatively impact the inmate. Id., 492.

Second, the petitioner cites to *Arsberry* v. *Sielaff*, 586 F.2d 37, 47 (7th Cir. 1978), in which the plaintiffs

claimed that, on the basis of prison policy and customs, they were entitled to earn good time credit during their segregation from the general prison population. The court acknowledged that, absent a liberty interest protected by the United States constitution, it must look primarily to state law to determine if a liberty interest was created. Id., 45–46. In addition to state statutes and prison administrative regulations, the court determined that a liberty interest may also be found in official policies or practices if a prisoner could show "some restriction upon the prison officials' discretion to remove the benefit sought." Id., 46–48. In light of new evidence that four prison directives provided guidelines for denying good time credit in the event a prisoner was segregated from the general prison population, the court remanded the case to the trial court for an evidentiary hearing as to whether the directives created a state law entitlement. Id., 47.

A key distinction between the cases relied on by the petitioner and the present case is that, when looking to our state law, the *legislature* has barred the respondent from awarding further risk reduction credits to the petitioner or from applying the credits the petitioner has earned to advance his parole eligibility date. Indeed, the legislature has made it clear in its amendments to §§ 54-125a and 18-98e that the respondent is no longer authorized to utilize risk reduction credits to advance an inmate's parole eligibility date and that he may no longer issue risk reduction credits to inmates such as the petitioner. In other words, if we were to hold in this case that a liberty interest has been created in the earning of future risk reduction credit, the application of risk reduction credit to advance the petitioner's parole eligibility date, and in receiving a parole suitability hearing, we would usurp the power vested in the legislature, which broadly dictates to the respondent, a member of the executive branch, how to administer

and apply risk reduction credit and conduct parole suitability hearings. "Because the ultimate power rests in the people and has been allocated to the separate branches of government, it is our duty to ensure that each branch, including the judiciary, does not usurp the power of its coequal branches. It is especially important that we take pains to restrain *this branch*, because a usurpation of legislative or executive power is, in effect, a usurpation of the people's power." (Emphasis in original.) *State* v. *Peeler*, 321 Conn. 375, 464, 140 A.3d 811 (2016) (*Zarella*, *J.*, dissenting). Therefore, we decline to interfere with the legislature's clear mandate. Accordingly, the court properly dismissed the petitioner's operative habeas petition for lack of subject matter jurisdiction and for the failure to state a claim upon which habeas corpus relief can be granted.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ERNEST FRANCIS (AC 41183)

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

Syllabus

The defendant, who previously had been convicted of the crime of murder and sentenced to fifty years of incarceration, appealed to this court from the judgment of the trial court denying his motion to correct an illegal sentence. Prior to sentencing, the sentencing court was provided with a presentence investigation report detailing the defendant's prior criminal history, including that he previously had been convicted of conspiracy to sell cocaine and assault in the second degree. During the sentencing hearing, the prosecutor advised the court that the report was not accurate and that the defendant in fact previously had been convicted of conspiracy to possess cocaine and assault in the third degree. In reciting the facts on which it based its sentence, the sentencing court stated, inter alia, that the defendant had inflicted a graze wound on the victim before he fatally stabbed him in the chest. In his motion to correct, the defendant alleged that his sentence was illegal because

the court substantially relied on materially false information regarding his prior criminal history and misconstrued the evidence at trial surrounding the underlying crime. In denying the motion, the trial court concluded that there was no indication that the sentencing court substantially relied on materially inaccurate information. On the defendant's appeal to this court, *held* that the trial court properly denied the defendant's motion to correct an illegal sentence, as neither the purported inaccuracies contained in the presentence investigation report nor the sentencing court's account of the manner in which the underlying murder occurred supported the conclusion that the defendant's sentence was imposed in an illegal manner: although the sentencing court incorrectly noted that the defendant had been convicted of conspiracy to sell cocaine, this error was not a substantial factor in its determination of the appropriate sentence, as the court expressly considered the fact that the defendant had incurred three separate felony convictions by the age of nineteen, that he was involved in drugs and that he was on probation when he murdered the victim, and those considerations were not impugned by any discrepancy between the defendant's actual criminal record and the record that was provided in the report, and, therefore, the record demonstrated that the court did not substantially rely on those inaccuracies in imposing its sentence; moreover, the sentencing court's recitation of the evidence regarding the manner in which the defendant committed the underlying offense was not materially inaccurate, nor was the disputed fact that the victim sustained a graze wound substantially relied on by the court, as the defendant's sentence clearly was predicated on his killing the victim by stabbing him in the chest and not on the graze wound.

Argued March 13—officially released July 2, 2019

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford, and tried to the jury before *Miano*, *J.*; verdict and judgment of guilty, from which the defendant appealed to the Supreme Court, which affirmed the judgment; thereafter, the court, *Dewey*, *J.*, denied the defendant's motion to correct an illegal sentence, and the defendant 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 (defendant).

Ronald G. Weller, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, *Rita M. Shair*, senior assistant state's attorney, and *Elizabeth S. Tanaka*, former assistant state's attorney, for the appellee (state).

Opinion

DiPENTIMA, C. J. The defendant, Ernest Francis, appeals from the judgment of the trial court denying his motion to correct an illegal sentence filed pursuant to Practice Book § 43-22. On appeal, the defendant claims that his sentence was imposed in an illegal manner because the court substantially relied on materially inaccurate information concerning his prior criminal history and the manner in which he had committed the underlying crime. We disagree and, thus, affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. The defendant was convicted of murder in violation of General Statutes § 53a-54a (a), and, on April 15, 1992, was sentenced to fifty years of incarceration. See *State* v. *Francis*, 228 Conn. 118, 635 A.2d 762 (1993). Prior to sentencing, the court, *Miano*, *J.*, was provided with a presentence investigation report (presentence report) detailing the defendant's prior criminal history. The presentence report indicated that the defendant had been convicted previously of conspiracy to sell cocaine and assault in the second degree. During sentencing, the prosecutor informed the court of the details surrounding the apparent conviction of conspiracy to sell cocaine and noted that there seemed to be a discrepancy between the offense of which he was charged initially, conspiracy to sell cocaine, and the offense of which he was convicted, conspiracy to possess cocaine. The prosecutor also advised the court that the defendant had not been convicted of assault

in the second degree, as indicated in the report, but, rather, assault in the third degree.

In discussing the reasons for its sentence, the court, *Miano*, *J.*, reviewed the events that transpired on the day the defendant murdered the victim. In so doing, the court indicated that the defendant had stabbed the victim more than once during the underlying altercation. After recounting the relevant facts based on the evidence at trial, the court noted that the defendant, at the age of nineteen, had three felony convictions. After noting that one of "[t]he purposes of sentencing" is deterrence, the court sought to send a message to "the young men like the defendant that appear macho, that are involved in drugs, that have cars, attractive new cars, that have jewelry, that have money, [and] that have attractive ladies," that "[they] have to think before they commit such an act like this." Thereafter, the court sentenced the defendant to fifty years of incarceration.

On December 30, 2016, the defendant filed the motion to correct an illegal sentence that is the subject of the present appeal.[1] In the memorandum of law accompanying his motion, the defendant alleged that his sentence was illegal because the trial court substantially

[1] The present motion is predicated on the same grounds as an earlier motion to correct an illegal sentence that the defendant, then self-represented, filed on July 12, 2010, and amended on October 12, 2010. That motion was denied by the trial court, *Gold*, *J.*, and the defendant appealed to this court, which reversed the trial court's judgment on the ground that the trial court was required to follow the procedure set forth in *Anders* v. *California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), before it properly could deny the defendant's request for the appointment of counsel. See *State* v. *Francis*, 148 Conn. App. 565, 590–91, 86 A.3d 1059 (2014), rev'd, 322 Conn. 247, 140 A.3d 927 (2016). The state appealed to our Supreme Court, which reversed the judgment of this court on the ground that the "*Anders* procedure is not strictly required to safeguard the defendant's statutory right to counsel in the context of a motion to correct an illegal sentence." *State* v. *Francis*, 322 Conn. 247, 250–51, 140 A.3d 927 (2016). The court concluded, however, that the trial court "improperly failed to appoint counsel to assist the defendant in determining whether there was a sound basis for him to file such a motion," and, thus, remanded the

relied on materially false information regarding his prior criminal history and misconstrued the evidence at trial surrounding the underlying crime. On August 10, 2017, the court, *Dewey*, *J.*, denied the defendant's motion, concluding, inter alia, that there was no indication that the sentencing court substantially relied on materially inaccurate information. This appeal followed. Additional facts will be set forth as needed.

The defendant claims that the trial court improperly concluded that the sentencing court did not substantially rely on materially inaccurate information regarding his prior criminal history and the manner in which the underlying offense was committed. We do not agree and, therefore, affirm the judgment of the trial court.

We begin our analysis of the defendant's claim by setting forth our standard of review and applicable legal principles. Practice Book § 43-22 provides that "[t]he judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner." "[A] claim that the trial court improperly denied a defendant's motion to correct an illegal sentence is reviewed pursuant to the abuse of discretion standard. . . . In reviewing claims that the trial court abused its discretion, great weight is given to the trial court's decision and every reasonable presumption is given in favor of its correctness. . . . We will reverse the trial court's ruling only if it could not reasonably conclude as it did." (Internal quotation marks omitted.) *State* v. *Bozelko*, 175 Conn. App. 599, 609, 167 A.3d 1128, cert. denied, 327 Conn. 973, 174 A.3d 194 (2017).

"[A]n illegal sentence is essentially one [that] either exceeds the relevant statutory maximum limits, violates

case to the trial court so that counsel could be appointed to represent the defendant. Id., 251.

a defendant's right against double jeopardy, is ambiguous, or is internally contradictory. By contrast . . . [s]entences imposed in an illegal manner have been defined as being within the relevant statutory limits but . . . imposed in a way [that] violates [a] defendant's right . . . to be addressed personally at sentencing and to speak in mitigation of punishment . . . *or his right to be sentenced by a judge relying on accurate information or considerations solely in the record*, or his right that the government keep its plea agreement promises . . . . These definitions are not exhaustive, however, and the parameters of an invalid sentence will evolve . . . as additional rights and procedures affecting sentencing are subsequently recognized under state and federal law." (Emphasis added; internal quotation marks omitted.) *State* v. *Jason B.*, 176 Conn. App. 236, 243–44, 170 A.3d 139 (2017).

"[D]ue process precludes a sentencing court from relying on materially untrue or unreliable information in imposing a sentence. . . . To prevail on such a claim as it relates to a [presentence report], [a] defendant [cannot] . . . merely alleg[e] that [his presentence report] contained factual inaccuracies or inappropriate information. . . . [He] must show that the information was materially inaccurate and that the [sentencing] judge relied on that information. . . . A sentencing court demonstrates actual reliance on misinformation when the court gives explicit attention to it, [bases] its sentence at least in part on it, or gives specific consideration to the information before imposing sentence." (Emphasis omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Petitpas*, 183 Conn. App. 442, 449–50, 193 A.3d 104, cert. denied, 330 Conn. 929, 194 A. 3d 778 (2018).

In claiming that his sentence was imposed in an illegal manner, the defendant points to several purported inaccuracies in the presentence report. Specifically, he

asserts that the report incorrectly indicated that he had been convicted of conspiracy *to sell* cocaine, when in fact he was convicted of conspiracy *to possess* cocaine. The defendant argues that the record demonstrates substantial reliance on this inaccuracy in light of the sentencing court's description of him as a drug dealer who had "new cars," "jewelry," "money" and "attractive ladies," despite the fact that he never had been convicted of selling drugs. Further, the defendant submits that, although the prosecutor informed the court of the inaccuracy in the presentence report concerning his assault conviction, the state failed to correct the portion of the report that erroneously indicated that the victim of that assault was an elderly person and that the defendant's sentence for this conviction had been illegal.[2] The defendant contends that the court substantially relied on these errors when it intimated that the defendant was a "violent predator attacking the weak and infirm," rather than just a child caught up in "a senseless and tragic neighborhood fight."

Additionally, the defendant claims that the court substantially relied on an inaccurate account of the manner in which the underlying murder offense occurred. In particular, the defendant argues that the evidence at trial indicated that the victim had sustained only a single stab wound during the altercation that resulted in his death. During its recitation of the evidence, however, the sentencing court stated that the victim had suffered a "graze" wound prior to being fatally stabbed in the chest. The defendant contends that this material inaccuracy was substantially relied on by the court and served to portray the defendant as a "more determined and violent individual than the evidence actually showed."

[2] The defendant argues that because he was convicted of assault in the third degree, which was a class A misdemeanor punishable by no more than one year in prison, the four year sentence he received was illegal and, thus, an inaccuracy that the court substantially relied on.

With respect to the presentence report, we conclude that the trial court did not abuse its discretion in concluding that the sentencing court did not substantially rely on the inaccuracies concerning the defendant's prior criminal history. Although the sentencing court incorrectly noted that the defendant had been convicted of conspiracy to sell cocaine, this error was not a substantial factor in the court's determination of the defendant's appropriate sentence. Rather, as it relates to the defendant's prior criminal history, the court expressly considered the fact that the defendant had incurred three separate felony convictions by the age of nineteen,[3] that he was "involved in drugs" and that he was on probation when he murdered the victim. None of those considerations is impugned by any discrepancy between the defendant's actual criminal record and the record that was provided in the presentence report. Similarly, the court made no mention at all of the defendant's purported prior assault of an elderly person. Thus, despite the state's failure to correct all of the errors in the presentence report relating to the defendant's criminal history, the record demonstrates that the court did not substantially rely on these inaccuracies in imposing its sentence.[4] See *State* v. *Petitpas*, supra, 183 Conn. App. 449–50.

[3] The defendant's three felony convictions were (1) possession of narcotics in violation of General Statutes (Rev. to 1989) § 21-279 (a), (2) conspiracy to possess cocaine in violation of General Statutes § 53a-48 (a) and General Statutes (Rev. to 1989) § 21-279 (a), and (3) murder in violation of § 53a-54a (a). Despite the fact that the court referred to the second conviction as conspiracy to sell cocaine, the actual conviction the defendant received nonetheless was a felony conviction.

[4] We also disagree with the defendant's assertion that because his previous sentence for assault in the third degree allegedly was illegal, the sentencing court was not permitted to rely on the fact that he was on probation when he committed the underlying murder. Regardless of the merits of the defendant's argument that his sentence for his conviction of assault in the third degree was illegal, the defendant does not dispute that he was on probation when he committed this murder; accordingly, this fact was not materially inaccurate when it was relied on by the sentencing court.

Further, we agree with the trial court that the sentencing court's summarization of the evidence regarding the manner in which the defendant committed the underlying offense was not materially inaccurate, nor was the disputed fact—namely, whether the victim sustained a "graze" wound—substantially relied on by the court. At trial, several witnesses testified that the defendant made multiple stabbing motions toward the victim prior to inflicting the lethal blow.[5] Although the defendant is correct that the evidence indicated that the victim sustained a single fatal injury, the court's statement that the victim was "grazed" prior to being stabbed to death was not without a modicum of support in the record. See *State* v. *Francis*, supra, 228 Conn. 121. Moreover,

[5] "On August 12, 1990, the defendant and the victim met again. At approximately 4 p.m. on that day, two witnesses, Jennifer Green and Sandra Brown, were on the porch of Brown's residence at 165 Homestead Avenue in Hartford. At that time, they saw a young man, later determined to be the victim, walking toward them on Homestead Avenue, holding an 'ice pop' in his hand. At the same time, two additional witnesses, Victor Lowe and Fred Faucette, were standing on the sidewalk of Homestead Avenue. They also noticed the victim.

"All four witnesses then observed a red Mitsubishi automobile drive up Homestead Avenue, pass the victim, stop suddenly, back up and halt near him. The defendant then emerged from the driver's side of the car and approached the victim. An argument ensuedbetween the two men. This confrontation occurred twenty to forty feet from Lowe and Faucette.

"While the defendant and victim exchanged words, the four witnesses observed, from different vantage points, that the defendant held his right hand behind his back. From where they were located, both Green and Brown observed that the defendant's hand, which was behind his back, was on the handle of a knife. Upon seeing the knife, Brown commented to Green, 'He wouldn't dare do that.'

"After further words had been exchanged, the victim agreed to fight the defendant. The victim did not, however, make any physical movement toward the defendant. The defendant then pulled the knife from behind his back and began to make stabbing motions at the victim. One of these stabbing motions cut the victim's ice pop in half as the victim was retreating.

"The victim ran into a nearby yard where he was pursued by the defendant. There, the defendant stabbed the victim in the upper left portion of his chest, causing his death. The defendant then reentered the car and left the scene. He was arrested in Miami, Florida, on August 17, 1990." *State* v. *Francis*, supra, 228 Conn. 120–21.

the defendant's sentence clearly was predicated on his killing the victim by stabbing him in the chest, not on the disputed graze wound.

Neither the purported inaccuracies contained in the defendant's presentence report nor the court's account of the manner in which the underlying murder occurred support the conclusion that the defendant's fifty year sentence was imposed in an illegal manner. Consequently, we conclude that the trial court did not abuse its discretion in denying the defendant's motion to correct an illegal sentence.

The judgment is affirmed.

In this opinion the other judges concurred.

SHARAY FREEMAN *v.* A BETTER WAY WHOLESALE AUTOS, INC.
(AC 41675)

Keller, Bright and Devlin, Js.

Syllabus

The plaintiff sought to recover damages from the defendant for, inter alia, violation of the Connecticut Unfair Trade Practices Act (§ 42-110a et seq.) for the defendant's failure to refund a deposit made by the plaintiff in connection with an attempted sale of a used vehicle. After the trial court rendered judgment in favor of the plaintiff, the defendant appealed to this court, which affirmed the trial court's judgment. Subsequently, the plaintiff filed a motion for supplemental attorney's fees and costs, which the trial court granted in part, and the defendant appealed to this court. The defendant claimed that the trial court erred in awarding the plaintiff supplemental attorney's fees and abused its discretion in the amount of attorney's fees it had awarded. *Held* that the trial court properly granted in part the plaintiff's motion for supplemental attorney's fees; that court having fully addressed the arguments raised in this appeal, this court adopted the trial court's concise and well reasoned memorandum of decision as a proper statement of the relevant facts and applicable law on the issues.

Argued May 29—officially released July 2, 2019

Procedural History

Action to recover damages for, inter alia, violation of the Connecticut Unfair Trade Practices Act, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the defendant was defaulted for failure to comply with a court order; thereafter, the court, *Huddleston*, *J.*, granted the defendant's motion to open the default; subsequently, the matter was tried to the court; judgment for the plaintiff, from which the defendant appealed to this court; thereafter, the court, *Huddleston*, *J.*, granted in part the plaintiff's motion for attorney's fees and costs; subsequently, this court dismissed in part and affirmed in part the judgment of the trial court; thereafter, the Supreme Court denied the defendant's petition for certification to appeal; subsequently, the court, *Huddleston*, *J.*, granted in part the plaintiff's motion for supplemental attorney's fees and costs, and the defendant appealed to this court. *Affirmed.*

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

Richard F. Wareing, with whom was *Daniel S. Blinn*, for the appellee (plaintiff).

Opinion

PER CURIAM. The defendant, A Better Way Wholesale Autos, Inc., appeals from the judgment of the trial court awarding supplemental attorney's fees to the plaintiff, Sharay Freeman. In the underlying action, the plaintiff brought a two count complaint in which she claimed a violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq., and fraudulent misrepresentation related to the defendant's failure to refund the plaintiff's $2500 deposit for an attempted sale of a used vehicle. The trial court found in favor of the plaintiff on both counts, and this court affirmed the judgment on appeal. See *Freeman* v. *A*

Better Way Wholesale Autos, Inc., 174 Conn. App. 649, 651, 166 A.3d 857, cert. denied, 327 Conn. 927, 171 A.3d 60 (2017). On August 17, 2017, the plaintiff filed with the trial court a motion for supplemental attorney's fees. After an evidentiary hearing, the trial court subsequently granted in part the plaintiff's motion for supplemental attorney's fees and awarded her $49,980.

In the present appeal, the defendant claims that the court (1) erred in awarding the plaintiff supplemental attorney's fees, and (2) abused its discretion in awarding attorney's fees in the amount of $49,980. We disagree.

Our examination of the record on appeal and the briefs and arguments of the parties persuades us that the judgment of the trial court should be affirmed. Because the trial court's memorandum of decision fully addresses the arguments raised in the present appeal, we adopt its concise and well reasoned decision as a proper statement of the relevant facts and the applicable law on the issues. See *Freeman* v. *A Better Way Wholesale Autos, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV-13-6045900-S (May 3, 2018) (reprinted at 191 Conn. App. 113, A.3d). It would serve no useful purpose for us to repeat the discussion contained therein. See, e.g., *Woodruff* v. *Hemingway*, 297 Conn. 317, 321, 2 A.3d 857 (2010); *National Waste Associates, LLC* v. *Travelers Casualty & Surety Co. of America*, 294 Conn. 511, 515, 988 A.2d 186 (2010); *Tuite* v. *Hospital of Central Connecticut*, 141 Conn. App. 573, 575, 61 A.3d 1187 (2013); *Nestico* v. *Weyman*, 140 Conn. App. 499, 500, 59 A.3d 337 (2013);*Green* v. *DeFrank*, 132 Conn. App. 331, 332, 33 A.3d 754 (2011).

The judgment is affirmed.

APPENDIX

SHARAY FREEMAN *v.* A BETTER WAY WHOLESALE AUTOS, INC.*

Superior Court, Judicial District of Hartford
File No. CV-13-6045900-S

Memorandum filed May 3, 2018

Proceedings

Memorandum of decision on plaintiff's motion for supplemental attorney's fees and costs. *Motion granted in part.*

Daniel S. Blinn, for the plaintiff.

Kenneth A. Votre, for the defendant.

Opinion

HUDDLESTON, J. The plaintiff, Sharay Freeman, seeks $65,791.24 in supplemental attorney's fees and costs pursuant to the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., incurred in defending an appeal by the defendant, A Better Way Wholesale Autos, Inc. The court previously found the defendant liable under CUTPA and common-law fraud for misleading the plaintiff about the refundability of a $2500 deposit on a used car. (# 132.) The plaintiff was awarded $2500 in compensatory damages, $7500 in punitive damages, and, in a subsequent decision, $26,101.50 in attorney's fees. (# 148.) The Appellate Court affirmed the judgment, and the Supreme Court denied the defendant's petition for certification to appeal. See *Freeman* v. *A Better Way Wholesale Autos, Inc.*, 174 Conn. App. 649, 166 A.3d 857, cert. denied, 327 Conn. 927, 171 A.3d 60 (2017).

* Affirmed. *Freeman* v. *A Better Way Wholesale Autos, Inc.*, 191 Conn. App. 110, A.3d (2019).

The defendant objects to the motion for supplemental attorney's fees. (# 153.) The court heard argument on the motion on April 3, 2018, and held an evidentiary hearing on April 13, 2018, at which the plaintiff's appellate attorney testified. For the reasons stated below, the court awards the plaintiff reasonable supplemental attorney's fees of $49,980.

The plaintiff's request for appellate attorney's fees is governed by General Statutes § 42-110g (d), which provides in relevant part: "In any action brought by a person under this section, the court may award, to the plaintiff, in addition to the relief provided in this section, costs and reasonable attorneys' fees based on the work reasonably performed by an attorney and not on the amount of recovery. . . ." As courts have often observed, "[t]he public policy underlying CUTPA is to encourage litigants to act as private attorneys general and to engage in bringing actions that have as their basis unfair or deceptive trade practices. . . . In order to encourage attorneys to accept and litigate CUTPA cases, the legislature has provided for the award of attorney's fees and costs." (Citation omitted; internal quotation marks omitted.) *Jacques All Trades Corp.* v. *Brown*, 42 Conn. App. 124, 130–31, 679 A.2d 27 (1996), aff'd, 240 Conn. 654, 692 A.2d 809 (1997).

Although § 42-110g (d) does not expressly state that attorney's fees may be awarded for appellate work, Connecticut's courts have consistently construed both contractual and statutory provisions for attorney's fees to encompass appellate attorney's fees unless the relevant language clearly indicates otherwise. See *Total Recycling Services of Connecticut, Inc.* v. *Connecticut Oil Recycling Services, LLC*, 308 Conn. 312, 333–38, 63 A.3d 896 (2013); id., 337 ("[w]e . . . will construe an attorney's fee provision that is silent with respect to appellate attorney's fees as encompassing such fees in the absence of contractual language to the contrary");

Gagne v. *Vaccaro*, 118 Conn. App. 367, 369–70, 984 A.2d 1084 (2009); id., 370–71 ("[a]lthough [General Statutes] § 52-249 . . . does not specifically provide for appellate attorney's fees . . . we construe the provision for attorney's fees in § 52-249 as extending to attorney's fees incurred on appeal as well as at the trial level" [citations omitted; internal quotation marks omitted]); *Crowther* v. *Gerber Garment Technology, Inc.*, 8 Conn. App. 254, 271–72, 513 A.2d 144 (1986) (allowing appellate attorney's fees under General Statutes § 31-72 in civil action to collect wages).

Whether any attorney's fees should be awarded in a CUTPA case is a matter of discretion for the trial judge. *Steiger* v. *J. S. Builders, Inc.*, 39 Conn. App. 32, 36, 663 A.2d 432 (1995). "A court has few duties of a more delicate nature than that of fixing counsel fees." (Internal quotation marks omitted.) *Krack* v. *Action Motors Corp.*, 87 Conn. App. 687, 694, 867 A.2d 86, cert. denied, 273 Conn. 926, 871 A.2d 1031 (2005).

After the trial, this court determined that an award of attorney's fees was warranted in this case. The defendant now argues that it would be unduly punitive to award *any* additional fees for the appeal.

The court disagrees. CUTPA's attorney's fee provision is intended to enable private parties to obtain counsel to enforce the statutory prohibition on unfair trade practices. That purpose could be thwarted if fees are not awarded for the successful defense of a CUTPA judgment on appeal. In consumer cases under CUTPA, there is often an imbalance of resources between the consumer plaintiff and the business defendant. If statutory fees were not available to such a plaintiff for an appeal, the defendant could exhaust the plaintiff's resources and force the plaintiff to abandon or severely compromise a meritorious claim. The court will therefore award reasonable supplemental attorney's fees for the appeal and for this fee proceeding.

The plaintiff was represented at trial by Daniel S. Blinn and on appeal by Blinn and Richard F. Wareing. In an affidavit, Blinn attested that he does not handle appellate work on a regular basis, and his two lawyer office lacks the resources to handle all the appeals arising from judgments obtained against this defendant. Blinn therefore recommended that the plaintiff engage Wareing, an experienced appellate advocate with whom Blinn had previously worked, as cocounsel with primary responsibility for the appeal. Wareing agreed that he would be paid for his services only if the plaintiff prevailed on appeal and that his fees would be limited to the amount, if any, awarded by the court after the appeal.

Both Blinn and Wareing submitted affidavits and billing records in support of the motion for supplemental attorney's fees. At the initial hearing on the motion, the defendant did not object to the court's consideration of Blinn's affidavit and billing record but did object to Wareing's affidavit as hearsay. The court subsequently held a hearing at which Wareing testified and was subjected to cross-examination. His billing record was submitted as an exhibit at the hearing.

Although the defendant does not argue that the plaintiff unreasonably engaged appellate counsel, the defendant does challenge the amount requested. More specifically, it argues that (1) Wareing's requested hourly rate is too high, (2) the amount requested is excessive and unreasonable in light of the actual damages of $10,000, (3) the plaintiff should not receive attorney's fees for her opposition to the petition for certification, and (4) some of the billing entries are questionable. Before deciding these specific claims, the court addresses the standard that applies to awards of attorney's fees under CUTPA.

"[T]he initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of

hours reasonably expended on the litigation times a reasonable hourly rate." (Internal quotation marks omitted.) *Carrillo* v. *Goldberg*, 141 Conn. App. 299, 317, 61 A.3d 1164 (2013). "The courts may then adjust this lodestar calculation by other factors [outlined in *Johnson* v. *Georgia Highway Express*, *Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974)]." (Internal quotation marks omitted.) *Carrillo* v. *Goldberg*, supra, 317; see *Steiger* v. *J. S. Builders*, *Inc.*, supra, 39 Conn. App. 35–39 (adopting *Johnson* analysis). "The *Johnson* court set forth twelve factors for determining the reasonableness of an attorney's fee award, and they are: the time and labor required; the novelty and difficulty of the questions; the skill requisite to perform the legal services properly; the preclusion of other employment by the attorney due to acceptance of the case; the customary fee; whether the fee is fixed or contingent; time limitations imposed by the client or the circumstances; the amount involved and the results obtained; the experience, reputation, and ability of the attorneys; the 'undesirability' of the case; the nature and length of the professional relationship with the client; and awards in similar cases." *Laudano* v. *New Haven*, 58 Conn. App. 819, 823 n.9, 755 A.2d 907 (2000). Although courts often describe the *Johnson-Steiger* factors as the basis for an "adjustment" of the lodestar, as a practical matter, most of these factors "usually are subsumed within the initial calculation of hours reasonably expended, at a reasonable hourly rate." *Hensley* v. *Eckerhart*, 461 U.S. 424, 434 n.9, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983).

In applying the *Johnson-Steiger* factors, the court should bear in mind the public policy underlying the statute that provides for the fee award at issue. See *Costanzo* v. *Mulshine*, 94 Conn. App. 655, 664–65, 893 A.2d 905, cert. denied, 279 Conn. 911, 902 A.2d 1070 (2006). A trial court abuses its discretion by "seizing from the full panoply of relevant factors merely one

factor to the exclusion and disregard of the others." *Rodriguez* v. *Ancona*, 88 Conn. App. 193, 203, 868 A.2d 807 (2005).

Turning to the task of determining reasonable supplemental fees in this case, the court considers the evidence of Blinn's affidavit and billing records, and Wareing's testimony and billing records. The court also takes judicial notice of the appellate pleadings.[1] This includes motions, briefs, appendices, and the petition for certification and opposition thereto, which this court has fully reviewed to determine the reasonableness of the time expended in discrete tasks. The court also considers its own knowledge of appellate practice and procedure and fees customarily charged in Connecticut.

The first step in determining reasonable attorney's fees is deciding upon a reasonable hourly rate for the lawyers involved. Blinn requests an hourly rate of $375, the rate the court previously approved for his work. The defendant does not challenge this rate. The court finds that $375 is an appropriate hourly rate for Blinn, an experienced and skillful consumer advocate, for the reasons stated in the court's decision of March 18, 2016.

Wareing also requests an hourly rate of $375. If the only factors to be considered were his skill, experience, and reputation, that rate would be warranted. He has considerable appellate experience and is respected as

[1] At the hearing on April 13, 2018, the court advised the parties that it intended to take judicial notice of the appellate pleadings. The defendant objected on the ground of relevance, asserting that consideration of the appellate briefs would lead to this court's consideration of the merits of the arguments made to the Appellate Court. The court overruled the defendant's objection. In deciding an attorney's fee motion, the court is required to consider the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly, among other factors. The pleadings in the Appellate Court and Supreme Court are directly relevant to those factors.

an appellate lawyer, reflected in the fact that he has served on the faculty of the Connecticut Bar Association's Appellate Advocacy Institute. The hourly rate of $375 is within the range customarily charged by attorneys in Connecticut and is what Wareing charged at a previous firm, which he left in 2013. But Wareing testified that his usual hourly rate now is $225 to $275, depending on the nature of the matter and the relationship with the client. He explained, on cross-examination, that he and his current partners made a business decision to charge fees that were lower than rates they had previously charged at another firm. Their purpose in doing so was to avoid disputes with clients over fees, to avoid having to write off time to satisfy clients, and to avoid having to "chase" clients for fees. He testified that with the lower rates, his firm now requires a substantial retainer, and most clients pay their bills within thirty to sixty days.

From Wareing's testimony, the court infers that although higher hourly rates may be charged in the marketplace, such higher hourly rates also lead to disputes with clients about bills and result in some bills being reduced to maintain client relationships. The court concludes that the fees Wareing currently charges to clients—from $225 to $275 an hour—represent a reasonable range of hourly rates for his services in this case.

The plaintiff argues that Wareing should receive $375 per hour because his fee in this case was both contingent and likely to be delayed. In Wareing's usual practice, at the lower rates he now charges, his fees are generally fixed, not contingent, and he requires both a substantial retainer and prompt payment. In this case, he agreed that he would look solely to an award of statutory attorney's fees. In so doing, he assumed the risk of losing on appeal, the risk of the court denying or reducing his requested fees, and the risk that any

fees awarded might be long delayed. The court agrees that the contingent nature of his fees and the delay in recovering them warrant consideration, but it is not persuaded that those factors justify an hourly rate that is $100 to $150 more than the rate he charges to paying clients. In light of Wareing's testimony and the court's own knowledge of the wide range of reasonable rates and billing arrangements in this marketplace, the court concludes that an hourly rate of $275, which is at the upper end of Wareing's current rates, is a reasonable rate for his work on the appeal in this case.

Both Blinn and Wareing have paralegals who performed some tasks related to the appeal. The plaintiff is requesting the rate of $125 per hour for Blinn's paralegal, Lori Miner, the rate of $100 per hour for Wareing's paralegal, Josephine Salafia, who has twenty years experience as a litigation paralegal, and the rate of $40 per hour for Traci Parent, a legal assistant at Wareing's firm since September, 2014. The court finds these rates to be reasonable based on Blinn's affidavit, Wareing's testimony, and the court's own knowledge of fees customarily charged for paralegals and legal assistants. The defendant has not contested the rates sought for these individuals, but has contended that some of their time was not reasonably billed. The court will address those issues in relation to the various tasks challenged.

The court next examines the time reasonably spent on the appeal. The defendant does not challenge any of the time entries by Blinn. Blinn exercised billing judgment to delete charges for duplicative services, such as his attendance at oral argument. The charges he did request are for tasks that were reasonable. He attended the preargument conference, kept the plaintiff apprised of the status of the appeal, consulted with Wareing briefly as issues arose during the appeal, reviewed Wareing's drafts of motions, the brief, and

objections, mooted Wareing for oral argument, and prepared and presented the pending attorney's fee motion. Based on his fee affidavit and time records, the court concludes that Blinn reasonably spent 24.5 hours on the appeal and the fee motion. In addition, according to Wareing's testimony, both Wareing and Blinn spent five hours preparing for and attending the evidentiary fee hearing on April 13, 2018. The court finds that the lodestar for Blinn's attorney's fees is $11,062.50, based on 29.5 hours at $375 per hour.

The defendant argues that the time spent by Wareing in motion practice, in preparing the brief, and in preparing for argument was excessive. Wareing's billing record indicates that he spent eleven hours on motions and objections related to the defendant's failure to file its brief on time, 7.5 hours reviewing the trial court record, including the transcript and the court's decisions, 86.3 hours in legal research and writing the appellate brief, 22.8 hours preparing for and attending oral argument, 15.7 hours responding to the defendant's petition for certification, and 2.8 hours preparing his fee affidavit. In addition, he spent five hours preparing for and attending the hearing on this fee motion. His total time spent on the appeal and fee motion equaled 151.1 hours.

The time spent on the appellate motion practice requires some context. The defendant's brief was due on April 20, 2016. On that date, the defendant's attorney moved for an extension of seven days, to April 27, 2016, which was granted. That deadline came and went. The plaintiff's attorneys noted that the defendant's brief had not been filed. On July 7, 2016, the plaintiff moved to dismiss the appeal for failure to file a timely brief. In response, the defendant's counsel filed two improper motions to extend time, which were summarily denied by the appellate clerk, and subsequently filed the proper

motion, a motion for leave to file a late brief.[2] The plaintiff's attorneys objected to the motion. The court issued a nisi order, stating that the appeal would be dismissed if the defendant's brief was not filed by August 2, 2016. On August 2, 2016, the defendant filed a brief and appendix that was rejected by the appellate clerk for failure to number the pages of the appendix and failure to include a judgment file. The defendant then filed a motion for extension of time to file a corrected brief. The appellate clerk issued a second nisi order, stating that the appeal would be dismissed unless a complying appellant's brief and appendix were filed by August 17, 2016. The defendant filed a complying brief and appendix on August 16, 2016.

Each of the defendant's failures to comply with court rules and deadlines required the plaintiff's attorneys to consider the defendant's procedural misstep and decide whether and how to respond to it. The plaintiff's judgment was automatically stayed by Practice Book § 61-11 (a), and she could not enforce the judgment until the appeal was concluded. The plaintiff's attorneys reasonably moved to dismiss the appeal when the defendant's brief was more than two months late. Each motion subsequently filed by the defendant in an attempt to cure previous defects required the plaintiff's attorneys to read the motion and consider whether to object. The plaintiff's attorneys reasonably decided to object to the defendant's motion to file a late brief to rebut the defendant's assertion, in that motion, that the lapse was caused by a departing associate who had

[2] Practice Book § 66-1 governs appellate motions for extension of time. Practice Book § 66-1 (c) authorizes the appellate clerk to grant or deny motions for extension of time "promptly upon their filing." Practice Book § 66-1 (e) provides in relevant part that "[n]o motion under this rule shall be granted unless it is filed before the time sought to be extended by such motion has expired." If a deadline has been missed, as was the case here, Practice Book § 60-2 (5) authorizes the court having jurisdiction over the appeal to grant a motion for leave to file a late brief "for good cause shown."

failed to calendar the deadline correctly. As the plaintiff pointed out in the objection, the defendant's lead attorney had himself signed the motion for extension of time that requested the April 27 due date. The plaintiff also argued that the defendant's excuse represented gross negligence, not good cause for relief, because the defendant had offered the same excuse for missed deadlines in at least five other cases in 2016. Although ultimately unsuccessful, these were not frivolous arguments, and they had the effect of moving the appeal forward.

In total, Wareing spent eleven hours drafting the various motions and objections related to the defendant's failure to file a timely brief. For the objection to the motion to file a late brief, Blinn's paralegal, Miner, also spent an hour on a footnote that documented the five other recent cases in which the defendant had attributed a missed deadline to a departing associate's failure to calendar matters properly. The motion to dismiss is only two pages long and is not complicated. Similarly, the objection to the motion to file a late brief is only three pages long, and the footnote described above is a substantial portion of it. The court will reduce Wareing's time on this motion practice from eleven hours to four hours and Miner's time from one hour to a half hour for drafting the footnote.

The time Wareing spent reviewing the trial court record was reasonable, and the defendant does not argue otherwise. The defendant does argue that the time spent drafting the brief was unreasonable, claiming that no one would reasonably spend the time Wareing spent on the brief for a case with damages of only $10,000. The court credits Wareing's testimony to the contrary. He testified that some of his commercial clients are willing to spend substantial sums on appeals, even when the amount of money at issue is small, if the legal principle at issue is important to them. The court further observes that the defendant in this case

was willing to incur its own attorney's fees and to risk that it would be required to pay the plaintiff's attorneys as well, even though the amount at issue when the defendant filed its appeal was only $10,000.[3]

Wareing credibly testified that the time required to research and draft the appellate brief was driven largely by the fact that the defendant raised eight issues on appeal and claimed that there was "no evidence" to support the trial court's findings. Wareing had to analyze each of those eight issues, determine the appropriate standard of appellate review, research the relevant law, review the trial record to marshal the evidence that supported the court's findings, and provide a legal analysis of each issue. As Wareing testified, "the more arguments an appellant makes, the more work the appellee has to do to swat back those arguments."[4]

Moreover, our appellate courts frequently remind appellate litigators that "[w]riting a compelling legal argument is a painstaking, time-consuming task. Good legal analysis is premised on knowing the controlling rules of law. An effective appellate advocate must apply the rules of law to the facts at hand by applying or distinguishing existing legal precedent. . . . To write

[3] The court had not yet heard the attorney's fee motion when the defendant filed its appeal on October 30, 2015.

[4] Both state and federal appellate courts have frequently advised appellants to limit the number of issues raised on appeal to one, two, or three issues. See, e.g., *State* v. *Pelletier*, 209 Conn. 564, 566–67, 552 A.2d 805 (1989) (a "torrent of claimed error . . . serves neither the ends of justice nor the defendant's own purposes as possibly meritorious issues are obscured by the sheer number of claims"); *Mozell* v. *Commissioner of Correction*, 87 Conn. App. 560, 563, 867 A.2d 51 ("[e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible" [internal quotation marks omitted]), cert. denied, 273 Conn. 934, 875 A.2d 543 (2005); see also *Jones* v. *Barnes*, 463 U.S. 745, 752, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983) ("multiplying assignments of error will dilute and weaken a good case and will not save a bad one" [internal quotation marks omitted]).

a good brief and to comply with the rules of practice, counsel must state the rules of law, [and] provide citations to legal authority that support the claims made . . . .'' (Internal quotation marks omitted.) *State* v. *Buhl*, 321 Conn. 688, 729, 138 A.3d 868 (2016); see also *Desmond* v. *Yale-New Haven Hospital, Inc.*, 181 Conn. App. 201, 212–13, 185 A.3d 665 (quoting *Buhl*), cert. denied, 330 Conn. 902, 191 A.3d 1001 (2018). It was not inherently excessive to spend 86.3 hours performing the ''painstaking, time-consuming task'' of writing persuasive arguments for the eight appellate issues raised by the defendant. It averaged only 10.8 hours per issue.

Although the court does not find the time claimed by Wareing to be inherently excessive, there is nevertheless a discrepancy between Wareing's testimony and his time records. Wareing testified that he spent ''just north of'' two hours per page in drafting the brief. Including the counterstatement of the issues and the body of the brief, the brief was just over thirty-four pages. Based on Wareing's testimony, writing the brief would require slightly more than sixty-eight hours, but Wareing's billing records indicate that he actually spent 86.3 hours working on the brief. On cross-examination, he was asked if he would be surprised if his records showed that he spent 100 hours on the brief, and he said that he would be very surprised. The court infers from Wareing's testimony that the time spent on the brief was somewhat greater than he remembered and somewhat greater than he would ordinarily expect to spend. The court further notes that some of his time entries are vague. Taking into account these facts, the court finds that Wareing reasonably spent eighty hours preparing the brief.

Oral argument in the appeal was originally scheduled for March 20, 2017. Between March 10 and March 17, Wareing reasonably spent about ten hours preparing for oral argument, including time spent with Blinn in

mooting.[5] Two unforeseen circumstances then increased the time attributed to oral argument. First, the Appellate Court issued an order directing the parties to be prepared to address whether the court should dismiss the portion of the appeal challenging the award of attorney's fees because the plaintiff had not amended his appeal, which was filed before the attorney's fee decision was issued by this court, to include an appeal of the attorney's fee decision. This was an issue that all counsel in the case had overlooked, and Wareing spent about three hours on March 19 preparing to address it. Then, on March 20, 2017, while the parties were waiting to present their arguments, the Appellate Court's recording system malfunctioned. The attorneys had to wait while attempts were made to get it working, but eventually the argument was rescheduled for March 28, 2017. Wareing spent 2.7 hours on March 27, refreshing his preparation, and 3.6 hours on March 28, reviewing his notes, attending court, and presenting his argument. The defendant has objected to the time spent on March 27 and 28, claiming that Wareing unreasonably spent an additional 6.3 hours preparing for an argument that he had been prepared to give a week earlier. The court disagrees. The time spent on March 27 to refresh his preparation was reasonable, and the time spent on March 28 was primarily spent attending court, waiting for the case to be called, and presenting the argument. In the circumstances of this case, where an additional issue was raised by the court and where the argument had to be rescheduled through no fault of

[5] A "mooting," or "moot court," is a "practice session for an appellate argument in which a lawyer presents the argument to other lawyers, who first act as judges by asking questions and who later provide criticism on the argument." Black's Law Dictionary (8th Ed. 2004) p. 1029. "[A]n appellate advocate who does not participate in a moot court before oral argument is like an actor who skips dress rehearsal or a quarterback who sits out the preseason." (Internal quotation marks omitted.) D. Knibb, Federal Court of Appeals Manual (6th Ed. 2019) § 33:11.

any party, the time spent preparing for oral argument was reasonable.

After the Appellate Court issued its decision, affirming the judgment on the merits and dismissing the appeal as to the attorney's fee issue, the defendant filed a petition for certification to the Supreme Court. Wareing spent 15.7 hours preparing an opposition to the petition. The defendant did not challenge the amount of time spent opposing the petition, but it argued that time spent on the petition could not properly be considered because the Supreme Court had not decided the petition when the plaintiff filed the motion for supplemental fees. That argument is unavailing now because the Supreme Court denied certification while the fee motion was pending. The court finds that the time spent drafting the opposition to the petition was reasonable.

Finally, Wareing spent 2.8 hours preparing his fee affidavit. In addition, he spent five hours on April 13, 2018, preparing for and attending the hearing on the fee motion. The defendant has not challenged that time, and the court finds that it was reasonable.

Adding up all the components of the appellate process, the court finds that Wareing reasonably expended 137.8 hours in defending the judgment on appeal and pursuing this motion. The lodestar for Wareing is calculated to be $37,895.

Paralegals in Blinn's office and in Wareing's office assisted in posttrial work, including the appeal and the fee motion. Blinn's paralegal, Miner, drafted a bill of costs, part of the objection to the motion for leave to file a late brief, and portions of the fee motion. Such tasks are reasonably done by a paralegal. After excluding a half hour for the footnote, the court finds that Miner reasonably spent 4.5 hours on tasks requiring a paralegal's experience and knowledge. Her lodestar figure is $562.50.

Wareing claims $200 in fees for two hours spent by his paralegal, Salafia, who retrieved and analyzed pleadings filed in the Appellate Court and drafted correspondence to the court regarding oral argument dates. The defendant has not challenged any of Salafia's time. The court finds that Salafia's lodestar is $200.

Wareing also claims $260 for 6.5 hours spent by his legal assistant, Traci Parent, in preparing the appellee's appendix. The defendant challenges this time as spent on ministerial tasks. The court disagrees. Practice Book §§ 67-2, 67-4, 67-5 and 67-8 prescribe specific standards for the format and contents of an appendix. Failure to follow the rules can result in rejection of the appendix.[6] Under Practice Book § 67-8 (c), the appellee is required to analyze the appellant's appendix and to provide any required documents that the appellant has omitted from its appendix. The appellee may also include "any other portions of the proceedings below that the appellee deems necessary for the proper presentation of the issues on appeal." Practice Book § 67-8 (c). Wareing testified that the defendant's appendix did not include any of the transcripts and other portions of the record that Wareing deemed necessary to counter the defendant's argument that no evidence supported the trial court's judgment. However, Practice Book § 67-8 (b) (2) cautions that "[t]o reproduce a full transcript or lengthy exhibit when an excerpt would suffice is a misuse of an appendix." The preparation of an appendix thus requires the exercise of judgment to include enough, but not too much, of the trial court record. It is not unreasonable to assign the task of preparing the appendix to a legal assistant working under the supervision and review of the appellate attorney.[7] The court finds that Parent's lodestar is $260.

[6] In fact, the defendant's brief and appendix were rejected because the defendant's appendix was not properly paginated and did not include the judgment file. See Practice Book §§ 67-2 (c) and 67-8 (b) (1).

[7] Wareing reasonably spent 1.6 hours reviewing the appendix. This was included in the court's analysis of the time spent preparing the brief.

Combining the lodestars for all the timekeepers, the total lodestar for the appeal and this fee motion is $49,980. The court now considers the *Johnson-Steiger* factors to determine whether that lodestar should be adjusted.

The court has already addressed, in its analysis of the reasonable lodestar, several of the *Johnson-Steiger* factors, including the time and labor required, the customary fee for similar work in the community, whether the fee is fixed or contingent, and the experience, reputation, and ability of the attorneys. No adjustment is required because these factors are subsumed within the lodestar. See *Hensley* v. *Eckerhart*, supra, 461 U.S. 434 n.9.

As to the novelty or difficulty of the questions, Wareing testified that the appeal was "medium" in complexity. The defendant argues that the court previously found that the issues presented at trial were not novel or difficult, arguing that the appeal is no more complicated than the trial. Wareing testified, however, that the appeal presented challenges both because of the number of issues presented and because of inconsistencies in the defendant's appellate arguments that he had to address. No lodestar adjustment is needed for an appeal of average complexity.

As to the skill required to perform the legal service properly, the court finds that appellate practice requires knowledge of and attention to appellate rules and procedure in addition to knowledge of the substantive areas of law involved. Blinn appropriately sought to cocounsel with Wareing because Wareing had more extensive appellate experience than Blinn and because appeals are time-consuming endeavors. No adjustment is needed for this factor because it, too, is subsumed within the lodestar analysis.

There was little evidence on the preclusion of other employment, other than the obvious fact that there are only so many hours in a day and time spent on one client's case is time not spent on other clients' cases. Nor was there evidence of any time limitations imposed by the client or the circumstances. As to the nature and length of the professional relationship with the client, there was no evidence that Blinn had represented the plaintiff in other cases. Wareing testified that he had never met the plaintiff, but communicated with her through Blinn. No adjustment is warranted on the basis of these factors.

The defendant focuses on "the amount involved and the results obtained," arguing that the fees requested are so disproportionate to the damages awarded that a substantial reduction is required. The defendant has made this argument unsuccessfully earlier in this case and in other cases. See *Franco* v. *A Better Way Wholesale Autos*, *Inc.*, Civil Action No. 3:14-cv-00422 (VLB), 2016 WL 3064051, *3 (D. Conn. May 31, 2016) ("Defendants also argue that the attorney's fees are disproportionate to the damages awarded. This objection lacks an arguable basis in law"), aff'd, 690 Fed. Appx. 741 (2d Cir. 2017). Other than a perfunctory citation to *Steiger*, the defendant fails to cite any authority in support of its claim that the fee award should be limited in proportion to the award of damages. The failure to brief an argument adequately is, in itself, a reason to reject the argument. See *State* v. *Buhl*, supra, 321 Conn. 724–29 (discussing qualities of adequate briefing); see also *A Better Way Wholesale Autos*, *Inc.* v. *Rodriguez*, 176 Conn. App. 392, 407, 169 A.3d 292 (2017) (declining to review attorney's fee issue because of inadequate briefing), cert. denied, 327 Conn. 992, 175 A.3d 1248 (2018).

The defendant ignores the extensive body of law governing attorney's fee awards. First, it fails to address

the text of CUTPA, which expressly provides that a fee award is to be "based on the work reasonably performed by an attorney and not on the amount of recovery." General Statutes § 42-110g (d). It also fails to address the many cases in which our appellate courts have rejected a proportionality argument. For instance, in *Simms* v. *Chaisson*, 277 Conn. 319, 890 A.2d 548 (2006), the Supreme Court rejected a proportionality argument and affirmed an attorney's fee award of $65,286.80 pursuant to General Statutes § 52-571c[8] in a case where two plaintiffs had been awarded only nominal damages of $10 each under that statute. In that case, which involved racial intimidation by the defendants, the Supreme Court determined that "there is a strong public policy reason for giving courts discretion to award substantial attorney's fees when the plaintiff's claim for damages and recovery is not large. Courts have recognized that the cumulative effect of small violations of one's civil rights may not be minimal to society as a whole." Id., 334. This principle has been applied to support substantial awards of attorney's fees under other statutes to vindicate the purpose underlying the particular statute. For instance, in *Costanzo* v. *Mulshine*, supra, 94 Conn. App. 663–64, the Appellate Court held that the trial court had abused its discretion in awarding only $1500 in attorney's fees pursuant to General Statutes § 52-251a without determining whether the requested fees of $15,000 were reasonable. The trial court had reduced the requested fees in part because the damages awarded were only $1650. The Appellate Court concluded that the court had erred in its "consideration of the disputed amount as a gauge for the proper amount of attorney's fees"; id., 663; and that it had failed to consider the policy underlying § 52-251a, which

[8] Section 52-571c (a) authorizes a civil action for damages resulting from intimidation based on bigotry or bias. Subsection (b) of that section requires the court to award treble damages and permits it to award, in its discretion, a reasonable attorney's fee.

allows a prevailing plaintiff to recover attorney's fees if a defendant transfers a matter from the small claims division to the regular civil docket in Superior Court. The Appellate Court commented that the attorney's fee provision served to deter defendants from "turning a relatively clear-cut case into a pitched legal battle"; (internal quotation marks omitted) id., 665; *and* to "reward those attorneys who represent small claims plaintiffs even though the monetary value of the representation may be relatively insignificant for the time and effort required." Id., 665 n.7. In *Krack* v. *Action Motors Corp.*, supra, 87 Conn. App. 689, the Appellate Court affirmed an award of attorney's fees under § 52-251a that was ten times the amount originally in dispute in the small claims division. The rationale applies equally to CUTPA cases. The availability of statutory attorney's fees under CUTPA serves both to deter unfair trade practices and to compensate attorneys for taking on small cases to enforce the public policy of protecting consumers from unfair and deceptive conduct.

Moreover, the court considers the "amount at issue" in conjunction with the "results obtained." The plaintiff prevailed on all issues on appeal and successfully opposed a further appeal to the Supreme Court. The court also considers the economic "undesirability" of a case involving such a small monetary claim. Few lawyers are willing to take on such cases because payment for them is uncertain and is likely to be long delayed. The court finds that the success achieved and the economic undesirability of the case counterbalance the factor of the "amount involved." No adjustment to the lodestar is warranted on these factors.

The parties did not provide evidence about awards in similar cases. The court observes that in a somewhat similar case, *Creative Masonry & Chimney, LLC* v.

Johnson, Superior Court, judicial district of New Britain, Docket No. CV-09-5011943, 2013 WL 6131685 (October 23, 2013) (*Swienton*, *J.*), the court awarded appellate attorney's fees of $46,888,48. In the proceedings leading up to that decision, a jury had awarded the plaintiff $7700 in compensatory damages under CUTPA, and the trial court had awarded $23,100 in punitive damages and $56,380 in trial attorney's fees, as well as costs and prejudgment interest. *Creative Masonry & Chimney, LLC* v. *Johnson*, 142 Conn. App. 135, 138, 64 A.3d 359, cert. denied, 309 Conn. 903, 68 A.3d 658 (2013). As in this case, the defendant in that case appealed; the Appellate Court affirmed; and the Supreme Court denied certification. To the extent that awards in similar cases are a factor, no adjustment to the lodestar is warranted.

Finally, the court addresses the plaintiff's request for costs. The plaintiff seeks $393.74 for Blinn, consisting of travel expenses for the preargument conference and transcript costs, and $337.50 for Wareing for copying the appeal brief and appendix. Costs on appeal are governed by General Statutes § 52-257 (d) and Practice Book § 71-2, which requires a bill of costs to be filed with the appellate clerk. The Appellate Court has held that nontaxable costs are not available under CUTPA. See *Taylor* v. *King*, 121 Conn. App. 105, 133–35, 994 A.2d 330 (2010) (no statutory authority for expert witness fees under CUTPA other than fees taxable under General Statutes § 52-260); *Metcoff* v. *NCT Group, Inc.*, 52 Conn. Supp. 363, 378–79, 50 A.3d 1004 (2011) (nontaxable costs not available under CUTPA), aff'd, 137 Conn. App. 578, 49 A.3d 282, cert. denied, 307 Conn. 924, 55 A.3d 566 (2012). Several trial court decisions have reasonably questioned whether CUTPA should be construed, as a remedial statute, to include nontaxable costs. See *Metcoff* v. *NCT Group, Inc.*, supra, 379 (collecting cases). This court is nevertheless bound by the decisions of the Appellate Court.

In summary, the plaintiff is awarded attorney's fees of $49,980 for the time reasonably expended by her attorneys on appeal and on the fee motion. The request for expenses is denied.

IN RE LEO L. ET AL.*
(AC 42478)

Elgo, Moll and Norcott, Js.

Syllabus

The intervenor, the maternal grandfather of the minor children, L and D, appealed to this court from the judgment of the trial court denying his motion to transfer to himself and his fiancée the guardianship of the children, who had been placed with nonrelative foster parents. The trial court also had terminated the parental rights of the children's parents. The intervenor claimed that the trial court abused its discretion and erroneously determined that the transfer of guardianship would not be in the children's best interests. *Held* that the trial court did not abuse its discretion in denying the intervenor's motion to transfer guardianship: that court, which made findings that were not challenged by the intervenor, that the children referred to their foster parents as "mom" and "dad," were succeeding in school, and were thriving with their foster family in a stable environment for the first time in their young lives, did not err in determining that the transfer of guardianship of the children to the intervenor would not be in the children's best interests, and although the trial court acknowledged the existence of evidence that weighed in favor of the intervenor's motion, it had the authority to weigh the evidence elicited in the intervenor's favor and, on the basis of all of the evidence before it, determined that transferring guardianship was not in the children's best interests, and it was not within the province of this court to second-guess that reasoned determination; moreover, the intervenor's claim that the court failed to acknowledge certain evidence of the foster father's alleged violence and abuse toward the children and the foster parents' move to Massachusetts with the children was unavailing, as the trial court explicitly stated that its decision to

* 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.

deny the intervenor's motion was made in light of all the facts before it, and that statement was entitled to deference.

Argued May 13—officially released June 26, 2019**

Procedural History

Petitions by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor children, brought to the Superior Court in the judicial district of Middlesex, Child Protection Session, where the court, *Woods*, *J.*, granted the maternal grandfather's motion to intervene; thereafter, the matter was tried to the court; judgments terminating the respondents' parental rights and denying the intervenor's motion to transfer guardianship, from which the intervenor appealed to this court. *Affirmed*.

Christopher DeMatteo, for the appellant (intervenor).

Evan O'Roark, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, *Clare Kindall*, solicitor general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (petitioner).

Opinion

MOLL, J. The intervening grandfather, Eugene L. (intervenor), appeals from the judgment of the trial court denying his motion to transfer the guardianship of his two minor grandchildren, Leo L. and Dakota F. H., to himself and his fiancée, Crystal H. On appeal, the intervenor contends that the court erroneously determined that the transfer of guardianship would not be in the children's best interests and, thus, abused its discretion in denying his motion. We disagree and, accordingly, affirm the judgment of the trial court.

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

The following procedural history and facts, as set forth in the trial court's memorandum of decision, are relevant to our disposition of the intervenor's claim. Leo L. and Dakota F. H. are the children of Monique L., and the intervenor is their maternal grandfather. On August 4, 2016, the children were committed to the care and custody of the Department of Children and Families (department) upon being adjudicated neglected. Shortly thereafter, on August 10, 2016, they were placed with nonrelative foster parents in whose care they have remained.

In September, 2017, the department changed its plan for the children from reunification with their mother to the termination of parental rights and eventual adoption. On September 27, 2017, after the intervenor had learned of the department's intentions, he successfully moved to intervene in the case. On December 21, 2017, Monique L. consented to the termination of her parental rights with respect to the children.[1] On January 8, 2018, pursuant to Practice Book § 35a-12A,[2] the intervenor

[1] On February 23, 2018, Leo L.'s father also consented to the termination of his parental rights by telephone. On July 19, 2018, the putative father of Dakota F. H. was defaulted for failure to appear.

[2] Practice Book § 35a-12A provides: "(a) Motions to transfer guardianship are dispositional in nature, based on the prior adjudication.

"(b) In cases in which a motion for transfer of guardianship seeks to vest guardianship of a child or youth in any relative who is the licensed foster parent for such child or youth, or who is, pursuant to an order of the court, the temporary custodian of the child or youth at the time of the motion, the moving party has the burden of proof that the proposed guardian is suitable and worthy and that transfer of guardianship is in the best interests of the child. In such cases, there shall be a rebuttable presumption that the award of legal guardianship to that relative shall be in the best interests of the child or youth and that such relative is a suitable and worthy person to assume legal guardianship. The presumption may be rebutted by a preponderance of the evidence that an award of legal guardianship to such relative would not be in the child's or youth's best interests and such relative is not a suitable and worthy person.

"(c) In cases in which a motion for transfer of guardianship, if granted, would require the removal of a child or youth from any relative who is the licensed foster parent for such child or youth, or who is, pursuant to an order of the court, the temporary custodian of the child or youth at the

moved to transfer guardianship of the children to himself and Crystal H. Following a four day trial during the period of February to June, 2018, the trial court issued a memorandum of decision denying the motion on the basis that, while the intervenor and his fiancée might be suitable and worthy guardians, the requested transfer of guardianship would not be in the children's best interests.[3]

In support of its ruling, the court made the following relevant factual findings. The children had transitioned well into their foster home. The current foster parents are seeking to adopt the children. The children refer to their foster parents as "mom" and "dad" and have maintained a close relationship with them. Although Leo L. initially expressed hesitation about being adopted, that reluctance was no longer present. Indeed, both children indicated a desire to be adopted by, or otherwise to remain with, their foster parents. The court also found that Leo L. was enjoying school and was "meeting grade level expectations" and that Dakota F. H. had "greatly improved her academic skills" while in the care of her foster parents. When concerns arose regarding the ability of Dakota F. H. to self-regulate, she engaged in therapy that improved her interactions with others.

time of the motion, the moving party has the initial burden of proof that an award of legal guardianship to, or an adoption by, such relative would not be in the child's or youth's best interest and that such relative is not a suitable and worthy person. If this burden is met, the moving party then has the burden of proof that the movant's proposed guardian is suitable and worthy and that transfer of guardianship to that proposed guardian is in the best interests of the child.

"(d) In all other cases, the moving party has the burden of proof that the proposed guardian is suitable and worthy and that transfer of guardianship is in the best interests of the child."

[3] The court's memorandum of decision on the intervenor's motion to transfer guardianship was issued simultaneously with a memorandum of decision on the department's petitions for termination of parental rights. The latter decision is not at issue in this appeal.

Additionally, the court found that the children had "grown, matured, and adjusted to their current living placement" and that they had lived with their foster parents for more than two years. They also had bonded with their foster sibling. Against these findings, the court emphasized the stability that the foster family had provided the children: "Although other living arrangements might also provide the children with love, affection, safety, and guidance, the court notes that the children's preadoptive placement provides all of these things and that disrupting their current placement would introduce great instability into their lives." Furthermore, the court noted that the intervenor had declined three prior opportunities to obtain guardianship of the children.[4] This appeal followed. Additional facts will be set forth as necessary.

On appeal, the intervenor generally does not challenge the factual findings underpinning the court's determination that a transfer of guardianship would not be in the children's best interests.[5] Rather, he maintains

[4] The court found that, prior to the birth of Dakota F. H., Monique L. took Leo L. to South Carolina where he was retrieved by the intervenor because of Monique L.'s physical neglect of Leo L. Monique L. eventually returned to Connecticut and regained care of Leo L. In February, 2016, the children moved in with the intervenor and Crystal H. but were removed after a few months as a result of Crystal H.'s inability to manage the children alone.

[5] The intervenor claims, however, that the court erred in finding that Leo L. wanted to be adopted by his foster parents. Specifically, the intervenor asserts that, although Leo L. stated that he wanted to be adopted by his foster parents, he also stated that he was considering living with the intervenor and Crystal H., such that he could not choose between them. As the department points out, Leo L.'s therapist testified at trial that, although Leo L. made these claims, it was her opinion that he did so because he thought that living with the intervenor would be the only way to maintain contact with him.

A trial court's factual findings will not be set aside unless they are clearly erroneous. *Kirwan* v. *Kirwan*, 185 Conn. App. 713, 726, 197 A.3d 1000 (2018). "A finding of fact is clearly erroneous when there is *no evidence* in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Emphasis in original; internal quotation marks omitted.) Id. Because there is evidence in the

that the court failed to consider certain evidence adduced at trial that undermined its determination that placement with the intervenor and Crystal H. would not be in the children's best interests. Specifically, the intervenor points to testimony from both Crystal H. and a department social worker regarding the foster father's alleged anger and use of violence toward the children. The intervenor also relies on evidence that the foster parents moved the children to Massachusetts during the trial, which he claims was "surprising and deceitful" and not in the children's best interests, particularly in light of a department policy that proscribes the removal of foster children from Connecticut without prior department approval. The intervenor submits that this evidence requires the conclusion that the court abused its discretion in denying his motion. We are not persuaded.

We begin our analysis with the standard of review and applicable legal principles. The adjudication of a motion to transfer guardianship pursuant to General Statutes § 46b-129 (j) (2)[6] requires a two step analysis.

record to support the trial court's factual finding, we do not disturb it on appeal. See *In re Janazia S.*, 112 Conn. App. 69, 92, 961 A.2d 1036 (2009).

[6] General Statutes § 46b-129 (j) (2) provides: "Upon finding and adjudging that any child or youth is uncared for, neglected or abused the court may (A) commit such child or youth to the Commissioner of Children and Families, and such commitment shall remain in effect until further order of the court, except that such commitment may be revoked or parental rights terminated at any time by the court; (B) vest such child's or youth's legal guardianship in any private or public agency that is permitted by law to care for neglected, uncared for or abused children or youths or with any other person or persons found to be suitable and worthy of such responsibility by the court, including, but not limited to, any relative of such child or youth by blood or marriage; (C) vest such child's or youth's permanent legal guardianship in any person or persons found to be suitable and worthy of such responsibility by the court, including, but not limited to, any relative of such child or youth by blood or marriage in accordance with the requirements set forth in subdivision (5) of this subsection; or (D) place the child or youth in the custody of the parent or guardian with protective supervision by the Commissioner of Children and Families subject to conditions established by the court."

"[T]he court must first determine whether it would be in the best interest[s] of the child for guardianship to be transferred from the petitioner to the proposed guardian. . . . [Second,] [t]he court must then find that the third party is a suitable and worthy guardian. . . . This principle is echoed in Practice Book § 35a-12A (d), which provides that the moving party has the burden of proof that the proposed guardian is suitable and worthy and that transfer of guardianship is in the best interests of the child." (Citation omitted; internal quotation marks omitted.) *In re Mindy F.*, 153 Conn. App. 786, 802, 105 A.3d 351 (2014), cert. denied, 315 Conn. 913, 106 A.3d 307 (2015).

"To determine whether a custodial placement is in the best interest of the child, the court uses its broad discretion to choose a place that will foster the child's interest in sustained growth, development, well-being, and in the continuity and stability of its environment. . . . We have stated that when making the determination of what is in the best interest of the child, [t]he authority to exercise the judicial discretion under the circumstances revealed by the finding is not conferred upon this court, but upon the trial court, and . . . we are not privileged to usurp that authority or to substitute ourselves for the trial court. . . . A mere difference of opinion or judgment cannot justify our intervention. Nothing short of a conviction that the action of the trial court is one which discloses a clear abuse of discretion can warrant our interference. . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it did. . . . [G]reat weight is given to the judgment of the trial court because of [the court's] opportunity to observe the parties and the evidence. . . . [Appellate courts] are not in a position to second-guess the opinions of witnesses, professional or otherwise, nor the observations and conclusions of the [trial

court] when they are based on reliable evidence." (Internal quotation marks omitted.) *In re Anthony A.*, 112 Conn. App. 643, 653–54, 963 A.2d 1057 (2009).

We have reviewed the evidence presented to the trial court that relates to the intervenor's specific claims on appeal. By way of summary, the parties submitted conflicting evidence regarding whether the foster father had exhibited anger and violence toward the children. The intervenor presented evidence that the foster father yelled and swore at the children in March, 2018. He further proffered testimony from Crystal H. that she overheard Leo L. describe physical abuse by his foster father in April and June, 2018. The department offered evidence of its investigation with respect to these allegations. This evidence included testimony that Leo L. had admitted to manufacturing the allegation of physical abuse by his foster father and that, following an inquiry into the claim, the department ultimately found it to be unsubstantiated.[7] Furthermore, a department social worker testified that the children appeared comfortable around, played with, and did not fear their foster father.

With respect to the foster parents' move from Connecticut to Massachusetts, the record reveals that the foster parents relocated with the children in May, 2018, without the department's knowledge and in violation of a department policy that requires foster parents to obtain department permission prior to moving foster children out of state. The record also shows, however, that, although the foster parents did not inform the department of the move at the time it occurred, the

[7] Testimony from trial also revealed complaints from Leo L. and Dakota F. H. that their foster father had struck them on the buttocks with a wooden spoon in early June, 2018. The foster father denied the claim and stated that he would hit a wooden spoon against his own hand in order to threaten discipline. A department social worker testified that when she observed the children with their foster father after these allegations, the children were affectionate and loving with him.

department knew in advance that it was the foster parents' intention to move from Connecticut. For their contravention of department policy, the department issued the foster parents a regulatory violation.

This court does not make credibility determinations, and it is the trial court's role to weigh the evidence presented and determine relative credibility when it sits as a fact finder. See *Zilkha* v. *Zilkha*, 167 Conn. App. 480, 495, 144 A.3d 447 (2016). Here, the trial court had the authority to weigh evidence elicited in the intervenor's favor. See *In re Bianca K.*, 188 Conn. App. 259, 270, 203 A.3d 1280 (2019) ("[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." [Internal quotation marks omitted.]). In addition, we have held that "a trial court may rely on the relationship between a child and the child's foster parents to determine whether a different placement would be in the child's best interest." *In re Athena C.*, 181 Conn. App. 803, 821, 186 A.3d 1198, cert. denied, 329 Conn. 911, 186 A.3d 14 (2018). The court made findings, unchallenged by the intervenor, that the children referred to their foster parents as "mom" and "dad," were succeeding in school, and were thriving with their foster family in a stable environment for the first time in their young lives. Although we acknowledge, as the trial court did, the existence of evidence that weighed in favor of the intervenor's motion, the court, on the basis of all of the evidence before it, decided that transferring guardianship was not in the children's best interests. It is not our province to second-guess that reasoned determination. See id., 820.

Finally, the intervenor contends that because the court failed to acknowledge the evidence of the foster

father's alleged violence and abuse toward the children and the foster parents' move to Massachusetts with the children in its memorandum of decision, it failed to consider that evidence in conducting the "best interests" analysis. We do not agree. The court explicitly stated that its decision to deny the intervenor's motion was made "[i]n light of all the facts before it . . . ." That statement is entitled to deference. See id. ("[T]he [trial] court considered all the evidence before it to decide whether immediately transferring guardianship to the grandmother would be in the best interest of the child. We will not, on appeal, second-guess the court's determination that it was not.").

In sum, we conclude that the court did not err in determining that the transfer of guardianship of Leo L. and Dakota F. H. to the intervenor and Crystal H. would not be in the children's best interests. Accordingly, the court did not abuse its discretion in denying the intervenor's motion to transfer guardianship.

The judgment is affirmed.

In this opinion the other judges concurred.

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SUPREME COURT PENDING CASES

JAMIE R. GOMEZ *v.* COMMISSIONER OF CORRECTION, SC 20089
Judicial District of Tolland at Rockville

Habeas; Whether Appellate Court Properly Found that State not Required to Correct State's Witnesses' False Testimony Concerning Agreements with the State Where State Disclosed Agreements; Whether Appellate Court Properly Rejected Petitioner's Claim that his Attorney Rendered Ineffective Assistance in Failing to Adequately Cross-Examine State's Witnesses Regarding their Agreements with State. The petitioner was convicted of murder and conspiracy to commit murder. He brought this habeas action claiming that his due process rights were violated by the state's suppression of material exculpatory evidence in violation of *Brady* v. *Maryland*. He alleged that the state failed to disclose that it had entered into agreements with two state's witnesses that, in exchange for the witnesses' testimony, it would assist in reducing their bonds and in seeking favorable dispositions of the criminal charges that were pending against them. The petitioner also alleged that the state violated his right to due process when the prosecutor failed to correct the false testimony of the two witnesses, who both testified that the state had not offered them any consideration in exchange for their testimony. Finally, the petitioner claimed that he was denied his right to the effective assistance of counsel by his trial counsel's failure to adequately impeach the witnesses regarding their agreements with the state. The habeas court denied the petition and granted the petitioner certification to appeal. The Appellate Court (178 Conn. App. 519) affirmed the judgment, concluding that the state was not required to correct the witnesses' false testimony because the evidence demonstrating that the testimony was false had been disclosed and it was available to the defense at the time of the petitioner's criminal trial. The court also rejected the petitioner's claim of ineffective assistance of counsel, concluding that, even assuming that the petitioner's trial counsel was deficient in failing to utilize certain impeachment evidence, the petitioner failed to demonstrate that he was prejudiced as a result of his attorney's allegedly deficient performance. The Appellate Court noted that the jury knew of the substantive terms of the state's agreements with the witnesses, that the jurors could have inferred a connection between their cooperation with the state and their reduced bonds, and that the jury was fully informed that the witnesses might have potential biases against the petitioner. The Supreme Court granted the petitioner certification to appeal, and it will decide (1) whether the Appellate Court properly concluded that the state did not

violate the petitioner's due process rights when it failed to correct false testimony at his criminal trial, and (2) whether the Appellate Court properly concluded that the petitioner was not prejudiced by his trial counsel's allegedly deficient performance.

MOMODOU JOBE *v.* COMMISSIONER OF CORRECTION, SC 20124
Judicial District of Tolland

Habeas Corpus; Whether Appellate Court Properly Declined to Consider Argument Raised in Reply Brief; Whether § 52-466 Jurisdictional "Custody" Requirement Should be Read to Include Detention by Federal Immigration Authorities of Individual who Served Sentence for Connecticut Conviction but Whose Federal Detention was Result of Expired Conviction. The petitioner, Momodou Jobe, is a citizen of Gambia. He lawfully entered the United States in 2003 and married a United States citizen. In January, 2010, the petitioner pleaded guilty to possession of less than four ounces of marijuana. After serving his sentence for the conviction, the petitioner traveled to Gambia to visit his family. On his return to the United States, the petitioner was detained by federal immigration officials, and an immigration judge ordered that he be deported on the ground that his Connecticut marijuana conviction served to bar his reentry to the United States. While the petitioner was detained by immigration officials, he filed a petition for a writ of habeas corpus, alleging that his attorney had provided ineffective assistance in connection with his decision to plead guilty to the marijuana charge. The habeas court dismissed the petition, finding that it lacked jurisdiction over it because the United States Supreme Court ruled that its decision in *Padilla* v. *Kentucky*, which held that criminal defense attorneys must advise noncitizen defendants about the deportation risks of a guilty plea, does not apply retroactively to cases such as the petitioner's. The petitioner appealed, and the respondent argued in its appellate brief that, while the habeas court had wrongly dismissed the petition for lack of jurisdiction on the basis of *Padilla*'s lack of retroactivity, the judgment of dismissal could nonetheless be affirmed on the alternative ground that the petitioner was not in "custody" for purposes of General Statutes § 52-466 when he filed the petition. In response, the petitioner urged in his reply brief that the Appellate Court hold that an individual, such as the petitioner, who has fully served a Connecticut sentence may nonetheless pursue state habeas relief where the individual was detained by federal immigration authorities, where the detention was the result of the Connecticut conviction, and where the individual could not have been aware of the need to challenge the constitutionality

of the Connecticut conviction until after he served his sentence. The Appellate Court declined to review that claim on the ground that the petitioner had raised it for the first time in his reply brief, and it affirmed the judgment of dismissal, finding that the habeas court lacked jurisdiction over the petition where the petitioner was not "in custody" for purposes of § 52-466 at the time he filed it. The Supreme Court granted the petitioner certification to appeal, and it will consider the following issues: "(1) Did the Appellate Court properly decline to review the petitioner's claim that the definition of 'custody' in General Statutes § 52-466 should include individuals in the petitioner's circumstances, when the first opportunity to raise that claim was in the petitioner's reply brief because the petitioner had no notice that the respondent would raise an unpreserved alternative ground to affirm the habeas court's judgment? (2) Does § 52-466 include habeas petitioners whose sentences have been fully served, who are in the custody of federal immigration authorities, and who could not have been aware of the need to challenge the constitutionality of their convictions until after serving their sentences?"

STATE *v.* JOSEPH C. ACAMPORA, SC 20125
Judicial District of Meriden at G.A. 7

Criminal; Whether Appellate Court Properly Determined that Defendant Waived Claim That Trial Court Required to Canvass him Concerning Right to Self-Representation Prior to February 23, 2012; Whether Appellate Court Properly Concluded that Canvass Sufficient and that Defendant Waived Right to Counsel. In August, 2011, the defendant was charged with assault of a disabled person in the third degree and disorderly conduct in connection with allegations that he slapped and punched his brother, who suffers from cerebral palsy, in the face and head. The defendant was convicted following a jury trial at which he represented himself. The defendant appealed, claiming that the trial court improperly permitted him to represent himself at arraignment and during plea negotiations without canvassing him concerning his waiver of his right to counsel. The defendant also claimed that the canvass conducted by the trial court at a pretrial proceeding that took place on February 23, 2012, was constitutionally inadequate. The Appellate Court (176 Conn. App. 202) affirmed the defendant's conviction, concluding that the trial court had no duty to canvass the defendant concerning his waiver of his right to counsel and his invocation of the right to self-representation until the defendant clearly and unequivocally invoked his right to self-representation. The Appellate Court found

that the defendant first clearly and unequivocally invoked his right to self-representation at the February 23, 2012, hearing and that, insofar as the defendant argued that he had clearly invoked his right to self-representation prior to that date, he had waived the claim by raising it for the first time in his reply brief. Finally, the Appellate Court rejected the defendant's claim that the canvass at the February 23, 2012, hearing was constitutionally inadequate because the court did not explain in sufficient detail the nature of the charges against him and did not advise him of the specific dangers and disadvantages of self-representation. In this certified appeal, the Supreme Court will decide whether the Appellate Court properly found that the defendant waived his claim that he invoked his right to represent himself prior to February 23, 2012, and, if not, whether the trial court erred in failing to canvass the defendant regarding his right to self-representation prior to that date. The Supreme Court will also decide whether the Appellate Court properly concluded that the trial court's February 23, 2012 canvass was sufficient and that the defendant effectively waived his right to counsel.

STATE *v.* THOMAS WILLIAM SAWYER, SC 20132
Judicial District of Ansonia/Milford

Criminal; Search and Seizure; Whether Search Warrant Affidavit Established Probable Cause to Believe That Defendant Possessed Child Pornography; Whether Connecticut Constitution Requires "More Probable Than Not" Standard of Proof to Establish Probable Cause for Search. In July, 2015, the defendant was a member of the Holy Cross Brotherhood and living in a four-bedroom suite in the rectory of Saint Vianney Church in West Haven. Brother Lawrence Lussier, who also lived in the rectory, contacted the West Haven police to notify them that he believed that the defendant was viewing child pornography on his computer. Lussier told the police that he had observed the defendant looking at two images on his computer—one of a naked boy who appeared to be approximately eight or nine years old standing with his genitals exposed and one of a naked girl with her hands covering her genital area. Based on the information supplied by Lussier, the police obtained a warrant to search the defendant's residence, and the police seized the defendant's computers during the search. The defendant was arrested and charged with possession of child pornography in the second degree after a forensic analysis of his computers uncovered 427 still image files that appeared to depict child pornography as well as a number of video files. The defendant moved to suppress the evidence obtained in the

search, claiming that the search warrant affidavit failed to establish probable cause to believe that the images described by Lussier constituted "child pornography" in that they depicted individuals under sixteen years of age engaging in "sexually explicit conduct" as defined in General Statutes § 53a-193 (14). The trial court denied the motion to suppress, ruling that the judge who issued the warrant was entitled to draw a reasonable inference from Lussier's observations that the defendant was in fact in possession of child pornography. The trial court also ruled that the question of whether the pictures actually depicted "sexually explicit conduct" was not a relevant inquiry for the court that issued the warrant. Following the denial of his motion to suppress, the defendant pleaded nolo contendere to the child pornography charge, conditioned on his right to appeal and challenge the suppression ruling. On appeal, the defendant claims that the warrant affidavit did not establish probable cause to justify the issuance of the search warrant in violation of his constitutional right to be free from unreasonable search and seizure. The defendant claims that the judge who issued the search warrant unreasonably inferred that, based on Lussier's description of two images of nude children, illegal images of children would be found on the defendant's computers. The defendant also asserts that the trial court improperly found that the question of whether the pictures observed by Lussier actually constituted child pornography was not relevant to the determination of whether there was probable cause to justify issuance of the search warrant. Finally, the defendant urges that the Supreme Court should interpret our state constitution as requiring a "more probable than not" standard of proof for establishing probable cause justifying the issuance of a search warrant or, in the alternative, that such a heightened standard should apply in cases, like this one, where a search warrant issued even though it was not known at the time whether any criminal activity has occurred.

JENNIYAH GEORGES et al. *v.* OB-GYN SERVICES, PC, et al., SC 20170
Judicial District at New London

Appellate Jurisdiction; Final Judgment; Medical Malpractice; Whether Appellate Court Properly Dismissed Defendants' Appeal from Verdict as Untimely; Whether Appellate Court Abused its Discretion in Denying Defendants' Motion for Permission to File Late Appeal. The plaintiff, minor Jenniyah Georges, brought this medical malpractice action through her mother seeking to recover for injuries she sustained during childbirth. On October 28, 2016, a jury returned a $4.2 million verdict in the plaintiff's favor, and the trial court accepted the verdict that same day. On November 8,

2016, the plaintiff filed a motion seeking an award of General Statutes § 52-192a offer of compromise interest and, on December 12, 2016, the trial court awarded the plaintiff $1,639,496.55 in offer of compromise interest. The defendants filed an appeal on December 16, 2017, raising claims that challenged both the $4.2 million judgment and the subsequent award of offer of compromise interest. The plaintiff moved that the appeal be dismissed insofar as it challenged the $4.2 million judgment, claiming that the appeal was untimely as to that judgment because it was not filed within twenty days of the date that notice of that judgment was given as required by Practice Book § 63-1 (a). The defendants opposed the motion to dismiss, arguing that their appeal was timely in all respects. The defendants also filed a motion asking that, should the Appellate Court determine that their appeal was untimely, it nonetheless exercise its discretion to allow the late appeal. The defendants urged that, given confusion as to whether the trial court had rendered an appealable judgment on October 28, 2016, there was good cause to excuse any lateness. The Appellate Court denied the defendants' motion for permission to file a late appeal and granted the plaintiff's motion to dismiss, ordering that the defendants' appeal be dismissed insofar as it challenged the $4.2 million judgment. Subsequently, after briefing and oral argument on the defendants' remaining claim that the trial court had erred in awarding the plaintiff offer of judgment interest, the Appellate Court (182 Conn. App. 901) affirmed the judgment that awarded the plaintiff offer of judgment interest. The Supreme Court granted the defendants certification to appeal, and it will consider (1) whether the Appellate Court properly dismissed as untimely that portion of the defendants' appeal that challenged the judgment rendered on October 28, 2016, and (2) whether the Appellate Court abused its discretion in denying the defendants' motion for permission to file a late appeal. The defendants claim that, pursuant to Practice Book § 63-1 (c) (1), the plaintiff's filing of the motion for offer of compromise interest on November 8, 2016—within the twenty day appeal period for the October 28, 2016 judgment—operated to extend the appeal period until that motion was ruled on because the plaintiff's motion sought an "alteration of the terms of the judgment," and that their appeal was timely because it was filed within twenty days of the December 12, 2016 judgment awarding the plaintiff offer of judgment interest. The defendants claim, in the alternative, that the trial court did not render a final judgment on October 28, 2016, and that the court did not render an appealable final judgment until it ruled on the claim for offer of compromise interest.

HUGH F. HALL *v.* DEBORAH HALL, SC 20181

Judicial District of Stamford-Norwalk

Dissolution of Marriage; Contempt; Whether Appellate Court Properly Affirmed Judgments Finding Plaintiff in Contempt and Denying Parties' Joint Motion that Contempt Finding be Vacated. After the plaintiff brought this action for dissolution of the parties' marriage, the parties entered into stipulation that $533,588 that was being held in escrow be released to the parties for deposit into a joint bank account and that the joint account would require the signature of both parties prior to any withdrawals. The trial court approved the parties' stipulation and made it an order of the court. The defendant subsequently moved that the plaintiff be found in contempt, claiming that he had wilfully violated the court's order by unilaterally withdrawing $70,219.99 from the joint account and placing the money into a separate, personal account. The trial court granted the motion for contempt and ordered the plaintiff to return the money to the joint account. The parties subsequently entered into a separation agreement which provided, among other things, that the parties agreed that they would file a joint motion to open and vacate the finding of contempt, representing that they believed the finding "could interfere with the parties' future employment." The trial court incorporated the separation agreement into a judgment of dissolution, and the parties then moved that the order of contempt be vacated. The trial court denied that motion, and the plaintiff appealed, challenging the finding of contempt and the order denying the parties' joint motion to vacate that finding. The Appellate Court (182 Conn. App. 736) affirmed the judgments, rejecting the plaintiff's claim that the trial court wrongly found him in wilful violation of a court order where the plaintiff claimed that he had acted on the advice of his attorney when he withdrew the money from the joint account. The plaintiff was granted certification to appeal, and the Supreme Court will determine whether the Appellate Court properly concluded that the trial court did not abuse its discretion in finding the plaintiff in contempt or in denying the parties' joint motion to open and vacate the contempt judgment.

STATE *v.* TYQUAN TURNER, SC 20186
Judicial District of Hartford

Criminal; Murder; Whether Appellate Court Properly Refused to Review, Pursuant to *State* v. *Golding*, Defendant's Unpreserved Claim Concerning Admission of Cell Phone Evidence; Whether Appellate Court Properly Held that Admission of Cell Phone Evidence did not Constitute Plain Error. Miquel Rodriguez was shot and killed while he was standing on a sidewalk in Hartford. The police received information that the defendant and an accomplice were involved in the shooting and, shortly after the shooting, the police attempted to stop a vehicle in which the defendant and the alleged accomplice were riding. The two men abandoned the vehicle and fled on foot, and the defendant dropped his cell phone as he was exiting the vehicle. The police recovered the cell phone and subpoenaed the defendant's call records from his cell phone carrier and performed a call detail mapping analysis that detailed the movement of the cell phone on the day of the shooting. The defendant was charged with felony murder and robbery in connection with the shooting and, at trial, the defendant's cell phone records, along with the testimony of a police officer who had performed the call detail mapping analysis, were admitted into evidence without objection from the defendant. The defendant was convicted, and he appealed, arguing, among other things, that the trial court wrongly deemed the police officer qualified to testify as an expert on call detail mapping and wrongly admitted the cell phone coverage maps. The defendant argued that he was convicted on the basis of scientific evidence that did not satisfy the reliability safeguards established in *State* v. *Edwards*, 325 Conn. 97 (2017). In *Edwards*, the Supreme Court held that the trial court had improperly admitted cell phone data and cell tower coverage maps into evidence without qualifying the police officer who testified as to that evidence as an expert and without conducting a *Porter* hearing to determine whether the officer's testimony was based on reliable scientific methodology. The Appellate Court (181 Conn. App. 535) affirmed the defendant's conviction, declining to review his claim concerning the cell phone evidence on the ground that the claim was unpreserved for appellate review in that the defendant had not raised it before the trial court. The Appellate Court held that the unpreserved claim was not entitled to review pursuant to *State* v. *Golding* because the claim was evidentiary in nature and not truly of constitutional magnitude. The Appellate Court also rejected the defendant's claim that reversal of his conviction was warranted because the trial court's qualification of the officer as an expert witness and admission of cell

phone coverage maps constituted plain error. The court found that there was no manifest injustice warranting reversal under the plain error doctrine where defense counsel had made a strategic decision not to object to the cell phone evidence and where defense counsel had relied on that evidence during his closing argument to the jury. The defendant was granted certification to appeal, and the Supreme Court will consider (1) whether the Appellate Court properly determined that the defendant was not entitled to *Golding* review of his unpreserved claim that the trial court improperly admitted cell phone evidence, and (2) whether the Appellate Court properly refused to reverse the defendant's conviction on the ground that the admission of the cell phone evidence constituted plain error.

STATE *v.* JASMINE LAMANTIA, SC 20190
Judicial District of New London at G.A. 21

Criminal; Witness Tampering; Whether Evidence Sufficient to Prove that Defendant Intended to Induce Witness to Testify Falsely in Imminent or Pending Official Proceeding. The defendant and her boyfriend, Jason Rajewski, went to a party at a house in Preston. The defendant entered the house while Rajewski remained outside. David Moulson, the defendant's former boyfriend, arrived at the house, exited his car, and confronted Rajewski. Rajewski and Moulson engaged in a verbal and physical confrontation that ended with Rajewski striking Moulson and causing him to bleed. Moulson called the police, and Rajewski left after the defendant told him about the call. A police officer spoke to Moulson in the defendant's presence, and Moulson identified Rajewski as his assailant. The officer then went to Rajewski's residence, and Rajewski presented his cell phone to the officer. The phone contained text messages from the defendant stating that the police were coming, that she and Rajewski "needed to stick with the same story," that he should delete the messages, that he should "make sure [he was] bloody," and that he should tell the police that he had been involved in an altercation at a bar before the party and had come to the party because he was concerned for the defendant's safety in Moulton's presence. Rajewski replied to the defendant in the text messages that he was going to tell the truth. The defendant was subsequently charged with and convicted after a jury trial of tampering with a witness in violation of General Statutes § 53a-151, which provides that "[a] person is guilty . . . if, believing that an official proceeding is pending or about to be instituted, he induces or attempts to induce a witness to testify falsely [or] withhold testimony." The

defendant appealed, claiming that the evidence was insufficient to prove that she sent the text messages to Rajewski with the intent to induce him to testify falsely in an official proceeding. She argued that, at the time she sent the texts, it simply was not probable that a "criminal court proceeding" would occur in which Rajewski would be called to testify. The Appellate Court (181 Conn. App. 648) rejected that claim and affirmed the defendant's conviction. The Appellate Court noted that the term "official proceeding" in § 53a-151 was not limited to a prosecution of Rajewski and it found that the jury could have concluded that the defendant believed that an official proceeding against her or any of the other participants in the altercation was likely to result. The Appellate Court held that there was sufficient evidence for the jury to reasonably find that, at the time she sent the text messages, the defendant was aware of the police investigation, that she believed that an official proceeding would probably result therefrom, and that she tampered with Rajewski when she sent the text messages telling him to lie to the police. The defendant was granted certification to appeal from the Appellate Court's decision. The Supreme Court will decide whether the Appellate Court properly concluded that the evidence was sufficient to prove beyond a reasonable doubt that the defendant intended to induce a witness to testify falsely in an official proceeding that she believed to be pending or imminent in violation of General Statutes § 53a-151 (a).

MARY BETH FARRELL et al. *v.* JOHNSON AND JOHNSON et al.,
SC 20225
Judicial District of Waterbury

Personal Injury; Innocent Misrepresentation; Whether Appellate Court Correctly Determined that Trial Court Properly Excluded Journal Articles on Risks of Transvaginal Mesh Products as Inadmissible Hearsay; Whether Appellate Court Correctly Concluded that Theory of Innocent Misrepresentation Inapplicable in Personal Injury Action. The plaintiff brought this action against surgeon Brian J. Hines, M.D. and his medical practice (the defendants) seeking to recover damages for injuries the plaintiff suffered after the defendants implanted Prolift, a transvaginal mesh product used to treat pelvic organ prolapse, in her body. The plaintiff sought recovery under various theories, including lack of informed consent and innocent, negligent, and intentional misrepresentation. The plaintiff alleged that the defendants knew or should have known that Prolift was experimental and that the defendants failed to properly

advise her of the risks associated with it. The plaintiff also alleged that, in order to induce her to undergo the procedure, the defendants misrepresented the risks associated with using the product. At the conclusion of the trial, the trial court directed a verdict in favor of the defendants on the innocent misrepresentation claim, and the jury subsequently returned a verdict in favor of the defendants on the remaining claims. The plaintiff appealed, contending that the trial court improperly excluded from evidence two journal articles that discussed the experimental and risky nature of transvaginal mesh products on the ground that they constituted inadmissible hearsay. The plaintiffs argued that the articles were not hearsay because they had not been offered to prove the truth of the matters asserted therein, but rather to prove notice—that is, to establish that the defendants knew or should have known of the experimental and risky nature of Prolift. The plaintiffs also claimed that the trial court improperly concluded that innocent misrepresentation claims are not applicable in personal injury actions. The Appellate Court (184 Conn. App. 685) affirmed the judgment, holding that the trial court properly excluded the articles as inadmissible hearsay because they were offered for the truth of the facts asserted therein. The court explained that the plaintiff could not establish that Hines knew or should have known of the experimental and risky nature of the product without offering the articles for their truth, as that is precisely what the articles asserted. In addition, the Appellate Court concluded that the theory of innocent misrepresentation was not applicable in this case, noting that such claims are based on principles of warranty and that they primarily apply to business transactions, typically between a buyer and a seller. The court reasoned that the plaintiff and the defendants were not involved in a commercial transaction, that the plaintiff did not assert breach of warranty claims against the defendants, and that the plaintiff did not allege that the defendants received some benefit as a result her reliance on the alleged misrepresentation. In this certified appeal, the Supreme Court will decide (1) whether the Appellate Court properly determined that the trial court correctly excluded the journal articles as hearsay, and (2) whether the Appellate Court properly determined that the theory of innocent misrepresentation is not applicable in this case and that the trial court properly directed a verdict in favor of the defendants on the plaintiff's innocent misrepresentation claim.

JOE MARKLEY et al. *v.* STATE ELECTIONS ENFORCEMENT COMMISSION, SC 20305

Judicial District of New Britain

Campaign Financing; Whether Trial Court Properly Dismissed Administrative Appeal for Lack of Jurisdiction Because Appeal was not Filed Within 45 Days of Agency's Constructive Denial of Petition for Reconsideration. On February 14, 2018, the State Elections Enforcement Commission (SEEC) issued a final decision finding that, while they were candidates for office in the November 4, 2014 election, Joe Markley and Rob Sampson violated state campaign finance laws by attacking Governor Malloy's record in their campaign materials. Malloy was seeking reelection in 2014. The SEEC ordered that Markley pay a $2000 civil penalty and that Sampson pay a $5000 penalty. On the same day that the SEEC issued its final decision, Markley and Sampson (the plaintiffs) filed a petition for reconsideration of the decision. The SEEC denied the petition for reconsideration on March 23, 2018, and mailed notice of that denial to the plaintiffs on March 28, 2018. The plaintiffs filed an administrative appeal challenging the SEEC's decision on May 7, 2018, seemingly within the 45-day appeal period provided in General Statutes § 4-183 (c) (3). The SEEC moved that the appeal be dismissed on the ground that it was not timely filed. The trial court granted the motion to dismiss, finding that the plaintiffs' failure to file the appeal within the applicable statutory time limit deprived it of subject matter jurisdiction over the appeal. The court noted that General Statutes § 4-181a (a) (1) provides that an agency's failure to decide a petition for reconsideration within 25 days of its filing "shall constitute a denial of the petition" and accordingly that the plaintiffs' petition for reconsideration was denied by operation of the statute on March 11, 2018—25 days after it was filed. The trial court ruled that the plaintiffs' appeal was untimely because it was not filed within 45 days of March 11, 2018. The plaintiffs appeal, claiming that the trial court wrongly dismissed their administrative appeal as late where they filed the appeal within 45 days of the SEEC's actual—as opposed to constructive—denial of their petition for reconsideration. The plaintiffs also accuse the SEEC of misleading them, and they argue that principles of equity and fairness demand that their administrative appeal be deemed timely filed under the circumstances here. Finally, the plaintiffs argue that their administrative appeal has merit and that the campaign finance statutes that they were found to have violated are unconstitutional in that they impermissibly limit free speech by restricting a candidate's ability to speak about other, nonopposing candidates.

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

DEPARTMENT OF SOCIAL SERVICES
DEPARTMENT OF DEVELOPMENTAL SERVICES

NOTICE OF INTENT TO SEEK AMENDMENT OF MEDICAID WAIVERS FOR INDIVIDUAL AND FAMILY SUPPORT, EMPLOYMENT AND DAY SUPPORT and COMPREHENSIVE SUPPORTS

In accordance with the provisions of section 17b-8(c) of the Connecticut General Statutes, notice is hereby given that the Commissioner of Social Services intends to submit the following three applications to the Centers for Medicare and Medicaid Services (''CMS''), each to be effective January 1, 2020:

(1) Amendment of the Medicaid Waiver for Individual and Family Support;

(2) Amendment of the Medicaid Waiver for Employment and Day Supports; and

(3) Amendment of the Medicaid Waiver for Comprehensive Supports.

All of the above-referenced waivers are operated by the Department of Developmental Services. The Department of Social Services and the Department of Developmental Services are proposing the following changes to these waivers:

(1) Adding Vehicle Leases as a service to all waivers. Vehicle Leases provide waiver participants with a less expensive transportation alternative;

(2) Adding Remote Supports as a service to all waivers. Remote Supports will promote independent living through real-time two-way communication, while preserving the health and safety of waiver participants;

(3) Adding Eligibility Coordination as a service to all waivers. Eligibility Coordination will provide education and training on methods to obtain and maintain eligibility for Medicaid waiver services.

(4) Increasing the Assistive Technology limit from $5,000 to $15,000 over a five year period, per waiver participant and adding an assistive technology support cost to the Assistive Technology service array on all waivers. Increasing the limit for Assistive Technology will enhance or improve functional capabilities for waiver participants. An assistive technology support cost will assist waiver participants who pay regular fees for ongoing support through assistive technology;

(5) Increasing the Vehicle Modification limit on all waivers from $10,000 to $15,000 over the term of each waiver, per waiver participant;

(6) Increasing the Environmental Modification limit on all waivers from $15,000 to $25,000 over the term of each waiver, per waiver participant;

(7) Adding Personal Emergency Response system to the Medicaid Waiver for Employment and Day Supports. Personal Emergency Response system promotes general safety and provide an emergency alert option for waiver participants;

(8) Alignment of the Performance Measures across all waivers; and

(9) Technical and administrative clarifications including those revisions requested by CMS.

No current enrollees will be negatively impacted by the changes in these applications.

Copies of the complete text of the waiver applications are available upon request from: Nicholas Jerard, Manager of Medicaid Operations, DDS Central Office, 460 Capitol Avenue, Hartford, CT, 06106, or via email at Nicholas.Jerard@ct.gov. They are also available on the Department of Social Services' website, www.ct.gov/dss, under ''News and Press,'' as well as the following direct link: http://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-Waiver-Applications/Medicaid-Waiver-Applications, and the Department of Developmental Services' website, www.ct.gov/dds, under ''Latest News.''

All written comments regarding these applications must be submitted by July 31, 2019 to: Division of Waiver Services, DDS Central Office, 460 Capitol Avenue Hartford, Connecticut, 06106, Attention Nicholas Jerard, or via email at Nicholas.Jerard@ct.gov.

DEPARTMENT OF HOUSING

Notice of Petition for Declaratory Ruling

Please take notice that on June 4, 2019, Summit Saugatuck, LLC and Garden Homes Management Corporation filed a ''Petition for Declaratory Ruling Pursuant to Connecticut General Statutes Section 4-176 Regarding Legality of Moratorium from General Statutes Section 8-30g, as Issued to the Town of Westport by the Connecticut Department of Housing, March 2019.'' The Petition can be viewed in its entirety on the Policy and Research page of the Department of Housing website, at www.ct.gov/doh.

DEPARTMENT of SOCIAL SERVICES

Notice of Intent to Amend the Katie Beckett Medicaid Waiver

In accordance with Connecticut General Statutes § 17b-8, notice is hereby given that the Commissioner of Social Services intends to amend the Katie Beckett Waiver to increase the number of total waiver participants from 309, 310 and 311 to 337, 338 and 339 participants in fiscal years 2020, 2021 and 2022, respectively.

Pursuant to Public Act 19-117, additional funds were allocated to the Katie Beckett Waiver for the purpose of expanding the number of waiver participants. No other changes are being made to the waiver at this time.

A complete text of the waiver amendment is available, at no cost, upon request to the Community Options Unit, Department of Social Services, 55 Farmington Avenue, Hartford, Connecticut, 06106; email shirlee.stoute@ct.gov. It is also avail-

able on the Department's website, www.ct.gov/dss, under ''News and Press,'' as well as the following direct link https://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-Waiver-Applications/Medicaid-Waiver-Applications.

All written comments, questions, and concerns regarding these amendments may be submitted within 30 days of the publication of this notice to the Department of Social Services, Community Options Unit, 55 Farmington Avenue, Hartford, Connecticut, 06106, or to Kathy.a.bruni@ct.gov.

NOTICES

STATE OF CONNECTICUT
DIVISION OF CRIMINAL JUSTICE

JOB OPPORTUNITY

DCJ Deputy Assistant State's Attorney
New Haven Judicial District
G.A. 7 in Meriden

PLEASE FOLLOW THE SPECIFIC APPLICATION FILING INSTRUCTIONS ON THE LAST PAGE

LOCATION: 54 West Main Street, Meriden, CT 06451

HOURS: 8:00 a.m. – 5:00 p.m.

SALARY RANGE: $70,008 - $146,160 Yearly

PCN: 5202

CLOSING DATE: July 12, 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

2. Division of Criminal Justice Application for Employment - available online at **www.ct.gov/csao**

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.NewHaven@ct.gov.

All documents must be combined into a single pdf

Please include the PCN on the subject line

(This is the Preferred Method)

Or

Office of the Chief State's Attorney

300 Corporate Place

Rocky Hill, CT 06067

Attn: Human Resources, PCN 5202

Application packages must be received or postal stamped no later than the closing date

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

March 29, 2019: Jeffrey D. Cedarfield, West Hartford, Connecticut – 417470

Thomas John Lengyel, Milford, Connecticut – 417948

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 Certification as Authorized House Counsel

Upon recommendation of the Bar Examining Committee, in accordance with § 2-15A of the Connecticut Practice Book, notice is hereby given that the following individuals have been certified by the Superior Court as Authorized House Counsel for the organization named:

Certified as of June 17, 2019:

Vita V. Litvin	Connecticut State Colleges & Universities

Certified as of June 21, 2019:

Leah Sage Ponce	NBCUniversal
Jonathan Sokolowski	Gartner, Inc.

Hon. Patrick L. Carroll III
Chief Court Administrator