CONNECTICUT LAW JOURNAL

Published in Accordance with General Statutes Section 51-216a

VOL. LXXXI No. 2 July 9, 2019 177 Pages

Table of Contents

CONNECTICUT REPORTS

Aronow *v.* Freedom of Information Commission (Order), 332 C 910 . . . 74
Burg *v.* Northeast Specialty Corp. (Order), 332 C 910 . . . 74
De Almeida-Kenney *v.* Kennedy (Order), 332 C 909 . . . 73
Fisk *v.* Redding (Order), 332 C 911 . . . 75
Leon *v.* Commissioner of Correction (Order), 332 C 909 . . . 73
Murphy *v.* Darien, 332 C 244 . . . 42
Negligence; summary judgment; claim that defendant railroad company negligently operated train on track immediately adjacent to boarding platform when another track was available; whether trial court correctly concluded that claim of negligent track selection was preempted under Federal Railroad Safety Act of 1970 (49 U.S.C. § 20101 et seq.); federal preemption of state laws, discussed.
Oudheusden *v.* Oudheusden (Order), 332 C 911 . . . 75
Stamford Hospital *v.* Schwartz (Order), 332 C 911 . . . 75
State *v.* Marcus H. (Order), 332 C 910 . . . 74
State *v.* Sinclair, 332 C 204 . . . 2
Possession of narcotics with intent to sell by person who is not drug-dependent; claim that defendant's constitutional right to confrontation was violated; claim of prosecutorial improprieties; certification from Appellate Court; whether certain statements to which police officer testified at trial in discussing public motor vehicle inspection record constituted testimonial hearsay resulting in constitutional violation or were nontestimonial and evidentiary in nature; testimonial statements and nontestimonial statements, distinguished; whether Appellate Court correctly concluded that certain improper remarks by prosecutor during closing argument did not deprive defendant of due process right to fair trial.
Wells Fargo Bank, N.A. *v.* Fitzpatrick (Order), 332 C 912 . . . 76
Presidential Village, LLC *v.* Perkins (replacement pages), 332 C 51–54 . . . v
Volume 332 Cumulative Table of Cases . . . 77

CONNECTICUT APPELLATE REPORTS

Clasby *v.* Zimmerman, 191 CA 143 . . . 3A
Arbitration; whether trial court improperly denied application to confirm arbitration award; whether, pursuant to statute (§ 52-417), trial court lacked discretion to deny timely application to confirm arbitration award where award had not been timely vacated, modified or corrected; whether trial court correctly denied request that it vacate subsequent arbitration award that reduced certain costs of cabinetry work and hold plaintiffs responsible for cost of cabinetry work as set forth in original arbitration award.
In Re Skylar F., 191 CA 200 . . . 60A
Child neglect; whether trial court properly denied respondent father's motion to open judgment of neglect concerning father's minor child that was rendered after father was defaulted for failing to attend case status conference; whether father's rights to due process were violated; claim that this court should exercise de novo review of claim that father was denied due process of law as result of trial court's rendering default judgment at case status conference; claim that trial court abused its discretion in denying father's motion to open default judgment.

(continued on next page)

Marvin *v.* Board of Education, 191 CA 169 . . . . . 29A
Negligence; summary judgment; governmental immunity; claim that trial court improperly rendered summary judgment in favor of defendant on ground of government immunity pursuant to statute (§ 52-557n [a] [2] [B]) that provides immunity for discretionary acts of employees, agents and officers of political subdivisions of state; claim that genuine issue of material fact existed as to whether inspection and maintenance of school locker room floor by defendant's employees constituted ministerial duty; claim that there remained genuine issue of material fact as to whether plaintiff was identifiable person subject to imminent risk of harm and, thus, whether identifiable person, imminent harm exception to defense of governmental immunity applied; whether plaintiff fell within identifiable class of foreseeable victims or was identifiable person for purposes of exception.
McGinty *v.* Stamford Police Dept., 191 CA 163 . . . . . 23A
Workers' compensation; whether Compensation Review Board properly affirmed decision of Workers' Compensation Commissioner that plaintiff employee's claim for benefits under Heart and Hypertension Act (§ 7-433c) was compensable; whether commissioner's finding that plaintiff suffered from heart disease was supported by record.
State *v.* Chavez, 191 CA 184 . . . . . 44A
Manslaughter in first degree; claim that trial court improperly deprived defendant of constitutional right to fair trial when it failed to instruct jury, sua sponte, about inherent shortcomings of simultaneous foreign language interpretation of trial testimony; claim that trial court improperly deprived defendant of constitutional right to fair trial when it instructed jury that it could consider as consciousness of guilt evidence that defendant changed shirt shortly after victim was stabbed; whether defendant was presented with meaningful opportunity to review and comment on trial court's jury instructions; whether defendant waived right to challenge constitutionality of jury instruction under State *v.* Golding *(213 Conn. 233); whether jury reasonably could have found from evidence that defendant's act of changing shirt was motivated by desire to avoid detection by law enforcement.*
State *v.* Clark, 191 CA 191 . . . . . 51A
Assault in second degree; whether trial court properly denied motion to suppress oral statement defendant made to police officer during alleged custodial interrogation in defendant's apartment before defendant was advised of constitutional rights pursuant to Miranda *v.* Arizona *(384 U.S. 436); whether trial court properly determined that defendant was not in custody at time statement was made; whether reasonable person in defendant's position would have believed that her freedom of movement was restrained to degree associated with formal arrest.*
Volume 191 Cumulative Table of Cases 75A

SUPREME COURT PENDING CASES

Summaries 1B

(continued on next page)

CONNECTICUT LAW JOURNAL
(ISSN 87500973)

Published by the State of Connecticut in accordance with the provisions of General Statutes § 51-216a.

Commission on Official Legal Publications
Office of Production and Distribution
111 Phoenix Avenue, Enfield, Connecticut 06082-4453
Tel. (860) 741-3027, FAX (860) 745-2178
www.jud.ct.gov

RICHARD J. HEMENWAY, *Publications Director*

Published Weekly – Available at https://www.jud.ct.gov/lawjournal

Syllabuses and Indices of court opinions by
ERIC M. LEVINE, *Reporter of Judicial Decisions*
Tel. (860) 757-2250

The deadline for material to be published in the Connecticut Law Journal is Wednesday at noon for publication on the Tuesday six days later. When a holiday falls within the six day period, the deadline will be noon on Tuesday.

MISCELLANEOUS

Notice of Closure of G.A. 17 Courthouse. 1C
Posting Dates for the Dockets and Assignments for the 2019-2020 Court Year 1C

"RE: PAST DUE RENT

Inv. No	Inv. Date	Due Date	Inv. Amount	Balance
	08/27/2013	08/27/2013	$1,797.56	$1,797.56
10	09/01/2013	09/11/2013	$93.00	$93.00
CHFA201321	10/01/2013	10/11/2013	$93.00	$93.00
2014-1232	11/01/2014	11/11/2014	$1,402.00	$1,402.00
2014-1340	12/01/2014	12/11/2014	$1,402.00	$1,402.00
2014-1455	01/01/2015	01/11/2015	$1,402.00	$1,402.00

Total Rental Obligation: **$6,189.56**"

"You have violated the terms of your lease in that you failed to pay your *rent*, *in the total rental obligation of $6,189.56*. Your failure to pay such *rent* constitutes a material noncompliance with the terms of your lease.

"We hereby notify you that your lease agreement may be subject to termination and an immediate eviction proceeding, initiated by our office. We value our tenants and request that you immediately contact our office, regarding full payment of your rental obligations. *Your rental obligations will include the delinquent rent*, *late fees*, *utilities*, *legal fees*, *and any other eviction proceeding sundry cost.*

"You have the right within ten days after receipt of this notice or within ten days after the date following the date this notice was mailed whichever is earlier to discuss the proposed termination of your tenancy with your landlord's agent[7] . . . .

"If you remain in the premises on the date specified for termination, we may seek to enforce the termination by bringing judicial action at which time you have a right to present a defense." (Emphasis added.)

The defendant filed a motion to dismiss the plaintiff's summary process complaint on the ground that the pretermination notice was defective and, therefore, that the court lacked subject matter jurisdiction. The alleged defects were (1) a variance in the cure amount requested in the pretermination notice ($6189.56) and the alleged nonpayment that is the basis of the com-

[7] In a footnote in its memorandum of decision, the trial court acknowledged that the parties disputed whether the defendant had discussed, or attempted to discuss, this matter with the plaintiff during the ten day period.

plaint ($1402), which contravenes federal laws regulating the pretermination notice, as articulated in the HUD Handbook and state case law, and (2) the notice's allegations of violations of leases that are no longer in effect, which violate Connecticut summary process law.

In its opposition to the motion, the plaintiff argued that the pretermination notice was not defective. It asserted that there was nothing defective about a pretermination notice that lists the total financial obligations owed by the defendant to the plaintiff. The plaintiff further contended that a federal pretermination notice fully complies with the law if it includes the specific information supporting the landlord's right to termination; a notice does not become defective simply because it contains more information than strictly necessary.

The trial court granted the defendant's motion to dismiss. The court determined that the notice was defective because it contained legally impermissible and factually inaccurate grounds for termination. The trial court explained that one purpose of the pretermination notice is to provide the tenant with the opportunity to cure. The present notice did not provide this opportunity because it was misleading in at least two ways. First, the notice informed the defendant that she had to pay $6189.56 in order to prevent eviction when, under state summary process law, payment of a far lesser amount, $2804 (rent for December, 2014, and January, 2015), would have prevented the only eviction that could have been initiated based on that particular notice.[8] See General Statutes § 47a-23 (d). Second, the

The court explained that it had declined to hold an evidentiary hearing to resolve this dispute because its resolution of the case on other grounds rendered it unnecessary. The Appellate Court did not address this footnote when it stated that the defendant "did not discuss the possible termination of her tenancy with the plaintiff's agent during the ten day period . . . ." *Presidential Village, LLC* v. *Perkins*, supra, 176 Conn. App. 496.

[8] As of March 1, 2011, the defendant's one year lease converted to a month-to-month lease. In a month-to-month tenancy, "[t]he tenancy for each month is separate and distinct from that of every other month. *Welk* v. *Bidwell*, 136 Conn. 603, 607, 73 A.2d 295 [(1950)]. There is a new contract of leasing for each successive month; *DiCostanzo* v. *Tripodi*, 137 Conn. 513, 515, 78

notice included charges as "rental obligations" that did not qualify as "rent." The trial court noted that the plaintiff had conceded that the $6189.56 in "rental obligations" included approximately $1300 in attorney's fees for which the defendant was not even liable,[9] and that it could not account for another portion of one of the charges listed. The trial court concluded that the defective notice deprived it of subject matter jurisdiction and rendered a judgment of dismissal.

The plaintiff appealed to the Appellate Court. The Appellate Court reversed the judgment, holding that the pretermination notice was not jurisdictionally defective. *Presidential Village* v. *Perkins*, supra, 176 Conn. App. 494. The Appellate Court determined that the trial court improperly incorporated state summary process law in determining that the notice was defective. Id., 499–500. The Appellate Court held that the notice must be assessed solely in relation to the requirements of federal law; id., 500; under which a pretermination notice for nonpayment of rent required only "the dollar amount of the balance due on the rent account and the date of such computation . . . ." (Internal quotation marks omitted.) Id., 502, quoting 24 C.F.R. § 247.4 [e] (2017). The Appellate Court determined that the

A.2d 890 [(1951)]; and the right of tenancy ends with that month for which the rent has been paid." *Kligerman* v. *Robinson*, 140 Conn. 219, 221, 99 A.2d 186 (1953). Each month is a separate contract. Id. Our summary process law modifies the common law by permitting a landlord to terminate a month-to-month tenancy based on nonpayment of rent not only for the month in which the notice to quit is served but also for the immediately preceding month. See General Statutes § 47a-23 (d). In the present case, because the plaintiff served the notice to quit in January, 2015, it had the right to claim nonpayment of rent for December, 2014, but not for prior months.

[9] According to the trial court's decision, the plaintiff conceded during oral argument before that court that the attorney's fees were from a prior, unsuccessful action that should not have been charged to the defendant. At oral argument before this court, the plaintiff's counsel suggested that perhaps the defendant was liable for the attorney's fees. As this statement is in direct conflict with the trial court's decision, the proper time and means to have raised this matter would have been through the filing of a motion for rectification in the trial court. See Practice Book § 66-5. In the absence of any such rectification, we presume that the plaintiff did make, and is bound by, such a concession.

plaintiff complied with this requirement because all of the charges listed in the pretermination notice were amounts for either past due rent or other financial obligations due under the lease. Id., 502–503.

The Appellate Court rejected the defendant's argument that the balance due on the "rent account" was limited to the amount of unpaid rent that supported the nonpayment of rent ground alleged in the complaint. Id., 503–504. It agreed with the plaintiff that, irrespective of whether the notice may have misled the defendant as to the amount needed to cure the violation of the lease agreement, the federal notice requirement is intended only to allow the tenant to prepare a defense against the summary process action, not to afford an opportunity to cure noncompliance and thereby avoid such an action.[10] Id. Finally, the Appellate Court noted that, even if it were to agree with the trial court that

[10] By drawing a clear distinction between curing a default and preparing a defense, the Appellate Court appears to have implicitly rejected the possibility that the opportunity to cure may be relevant to preparing a defense to present in an eviction action. For example, equitable nonforfeiture is a defense that may apply to a summary process action premised on nonpayment of rent. See *19 Perry Street, LLC* v. *Unionville Water Co.*, 294 Conn. 611, 630, 987 A.2d 1009 (2010). "[T]he doctrine against forfeitures applies to a failure to pay rent in full when that failure is accompanied by a good faith intent to comply with the lease or a good faith dispute over the meaning of a lease." (Internal quotation marks omitted.) Id. "[T]he conduct of the [lessee] after he was informed of the nonpayment . . . is conclusive of the good faith of the [lessee] . . . and his continuous desire to avoid a forfeiture . . . ." *Thompson* v. *Coe*, 96 Conn. 644, 657, 115 A. 219 (1921). "[M]any courts have also taken into consideration the tenant's actions after receiving notice by the landlord of the termination of the lease, *looking favorably on any actions by the tenant to cure the default or evidencing an intent to prevent the forfeiture* . . . ." (Emphasis added; internal quotation marks omitted.) *19 Perry Street, LLC* v. *Unionville Water Co.*, supra, 634. Thus, if the lack of specificity in a notice discourages the tenant from taking steps to cure the default, it also could impair the tenant's ability to establish an equitable defense to eviction. In light of our conclusion that the inclusion of nonrent charges rendered the notice defective, we need not determine whether a notice could be jurisdictionally defective if it is so misleading as to impair the opportunity to cure.

CONNECTICUT REPORTS

Vol. 332

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* CASEY SINCLAIR (SC 19932)

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

Syllabus

Convicted, after a jury trial, of the crime of possession of narcotics with intent to sell by a person who is not drug-dependent, the defendant appealed to the Appellate Court, claiming that the admission of hearsay testimony used to establish that he was the de facto owner of a motor vehicle in which the narcotics were found violated his constitutional right to confront a witness against him and that certain improper statements by the prosecutor during closing argument violated his constitutional right to a fair trial. At the defendant's trial, a police officer, G, testified that he had conducted organized surveillance in a certain area of Waterbury on the basis of an anonymous tip that there would be drug activity there. G also testified that he had stopped a Jeep in which the defendant was a passenger and his girlfriend, L, was the driver, it having matched the description of the vehicle that had been provided in the tip. According to G, the defendant appeared unusually nervous as G approached the Jeep during the stop. A narcotics detection canine subsequently alerted to the presence of narcotics in the Jeep. L testified that, before the motor vehicle stop, the defendant had directed her to drive the Jeep that he had driven to her home in New York, where L lived, to a specific location in Waterbury, where he opened a hidden compartment in the Jeep and removed two white packages. He then walked to a black vehicle nearby, gave the packages to someone inside that vehicle, and started walking back to the Jeep with money in his hand. Before he got back to the Jeep, he noticed a police cruiser and threw the money into a nearby bush. The defendant then returned to the Jeep and directed L to drive to a nearby gas station with an attached convenience store, where he made a cell phone call, asking an individual to meet him so that he could retrieve the money. Surveillance video from the gas station was introduced at trial and showed the same black vehicle that L claimed had been involved in the drug transaction arriving at the gas station moments later, the defendant entering the back seat of that vehicle, and the vehicle driving away. The video also showed that the black vehicle returned to the gas station approximately ten minutes later and that the defendant then reentered the Jeep, which L then drove away. The video then showed the driver of the black vehicle exiting that vehicle and entering the convenience store. From that video, G identified the driver of the black vehicle as a known heroin dealer

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

in Waterbury. G further testified that the Jeep was registered to an individual in Bronx, New York, and, over defense counsel's objection, testified that a New York vehicle inspection record indicated that the Jeep had been inspected at M Co., a business located in the Bronx adjacent to the defendant's business. G explained that certain of the inspection information had been relayed to him by an individual in the Waterbury Police Department, who had received that information from an employee with the New York State Police. The Appellate Court concluded that any violation of the defendant's constitutional rights with respect to the hearsay testimony regarding the inspection information for the Jeep was harmless beyond a reasonable doubt and that three acts of prosecutorial impropriety did not deprive the defendant of a fair trial. On the granting of certification, the defendant appealed to this court. *Held*:

1. This court concluded that the out-of-court statements to which G testified in support of the fact that the Jeep was inspected at M Co. were hearsay but were nontestimonial, the improper admission of that hearsay evidence therefore was not of constitutional magnitude, and the defendant did not meet his burden of proving that the evidentiary error was harmful:

a. Although it was undisputed that the out-of-court statements were admitted for the truth of the matter asserted and, thus, constituted hearsay, and that there were no applicable hearsay exceptions, the statements were not testimonial in nature, as the underlying vehicle inspection record was created solely for administrative or regulatory purposes rather than for the purpose of proving some fact at trial, and as the statements by the New York State Police and Waterbury Police Department employees connecting the inspection record to M Co. did not certify the inspection record's substance or effect because an objective declarant would not reasonably have believed that those statements would be used for the purpose of creating a record for use at a later criminal trial; accordingly, any error in the admission of the out-of-court statements was not of constitutional magnitude.

b. The defendant failed to prove that any evidentiary error in the admission of the out-of-court statements to which G testified was harmful, as the information conveyed through those statements was not of sufficient consequence, when viewed in the light of the state's relatively strong case against the defendant, so as to persuade this court that it had a significant effect on the jury's verdict; additional evidence, other than the defendant's presence in the Jeep, linked him to the crime of possession of narcotics with intent to sell, including L's testimony regarding the defendant's actions, which the jury could have found credible, the defendant's inconsistent trial testimony explaining his presence in Waterbury at the time of the drug transaction, the surveillance video, which appeared to contradict the defendant's testimony regarding his version of the events, and G's testimony that the individual who exited the black vehicle was a known heroin dealer in Waterbury, that the defendant appeared unusually nervous during the motor vehicle stop, that it was

common for drug dealers to register vehicles that they use for the sale of drugs to another individual, as the defendant had done with the Jeep, and that most heroin sold in Waterbury has its source in the Bronx, where the defendant lived and owned a business.

2. The Appellate Court correctly concluded that, although three remarks by the prosecutor during closing argument were improper, they did not deprive the defendant of his due process right to a fair trial, there having been no reasonable likelihood that the jury would have returned a different verdict in the absence of those improprieties; the state's case was relatively strong, one of the prosecutor's improper remarks was invited by defense counsel's comments during closing argument and was an attempt to explain, in response to those comments, why L had difficulty with defense counsel's questions, the improprieties were not frequent or particularly severe, as the defendant's theory hinged on attacking the credibility of L, and none of the improper remarks significantly undercut that theory, defense counsel objected to only one of the improper remarks, and, although two of the improper remarks related to a critical issue in the case, the credibility of L versus the credibility of the defendant, the comments only indirectly bolstered L's credibility or undercut the defendant's credibility.

(*One justice concurring separately*)

Argued April 3, 2018—officially released July 9, 2019

Procedural History

Substitute information charging the defendant with the crime of possession of narcotics with intent to sell by a person who is not drug-dependent, brought to the Superior Court in the judicial district of Waterbury and tried to the jury before *Crawford*, *J.*; verdict and judgment of guilty, from which the defendant appealed to the Appellate Court, *Lavine* and *Keller*, *Js.*, with *Beach*, *J.*, concurring in part and dissenting in part, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

John L. Cordani, *Jr.*, assigned counsel, with whom, on the brief, was *Damian K. Gunningsmith*, assigned counsel, for the appellant (defendant).

Jennifer F. Miller, assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Don E. Therkildsen*, *Jr.*, senior assistant state's attorney, for the appellee (state).

McDONALD, J. Police officers discovered bricks of heroin and a large sum of cash in a vehicle registered to a third party in which the defendant, Casey Sinclair, was the passenger. Following a jury trial at which the driver of the vehicle testified against him, the defendant was convicted of one count of possession of narcotics with intent to sell by a person who is not drug-dependent in violation of General Statutes (Rev. to 2013) § 21a-278 (b). The Appellate Court thereafter rejected the defendant's claim that he was entitled to a new trial because (1) the admission of hearsay statements used to establish that he was the de facto owner of the vehicle—based on vehicle inspection records—violated his constitutional right to confront a witness against him, and (2) improper statements in the prosecutor's closing argument violated his constitutional right to a fair trial. *State* v. *Sinclair*, 173 Conn. App. 1, 7, 24, 162 A.3d 43 (2017). We granted the defendant's petition for certification to appeal to this court. We affirm the Appellate Court's judgment, albeit under different reasoning on the first issue. We conclude that admission of the hearsay statement was not an error of constitutional dimension and that the defendant did not meet his burden of proving that the evidentiary error was harmful.

I

At trial, the state proved its case against the defendant largely though the testimony of three witnesses: the defendant's girlfriend, Winsome Lawrence, who was the driver of the vehicle; Lawrence's cousin, Charmaine Henriques; and Sergeant Gary Angon of the Waterbury Police Department. In addition, the state introduced into evidence a surveillance video reflecting the defendant's conduct preceding his arrest.

Lawrence offered the following account of the events leading to that arrest. The defendant lives in the Bronx,

New York, where he operates a used car business under the name of Sinclair Enterprise. On multiple occasions between October, 2012, and February, 2013, the defendant and Lawrence drove to Connecticut for various purposes. On each such occasion, the defendant drove a tan Jeep to Lawrence's house in Mount Vernon, New York, and then directed Lawrence to drive while the defendant sat in the passenger seat.[1]

On February 5, 2013, the defendant had Lawrence drive the Jeep to Waterbury, purportedly to go to a shopping mall. When they arrived in Waterbury, the defendant instructed Lawrence to exit the highway and eventually directed her to a side street, where he told her to stop the car. Shortly thereafter, when a black vehicle came toward the Jeep, the defendant directed Lawrence to sound the horn. The driver of the black vehicle made a U turn and parked a few cars ahead of the Jeep. To Lawrence's surprise, the defendant then accessed a hidden compartment within the center console of the Jeep and removed two white packages of drugs. He took the packages to the black vehicle, gave them to someone inside, and walked back toward the Jeep with money in hand. Just then a marked police car slowly drove down the street toward the Jeep. When the defendant got into the Jeep, Lawrence saw that he no longer had the money in hand and asked him where it was. The defendant said that he had thrown it into a bush. He then directed Lawrence to drive to a nearby gas station.

After they arrived at the gas station, the defendant called someone on his cell phone and said, "Jay, come and pick me up, I'm going for the money, I'm going to pick up the money." The defendant then told Lawrence that he needed to get a bag, and he went into the gas

[1] On one occasion, the defendant brought a different color Jeep, but the driving arrangement was the same.

station convenience store. After he returned to the Jeep, the same black vehicle involved in the earlier transaction pulled into the gas station. The defendant exited the Jeep and got into the black vehicle. The vehicle departed and then returned soon afterward. When the defendant returned to the Jeep, he had a black bag filled with money, which he placed in the Jeep's hidden compartment. He then directed Lawrence to drive to the mall in Waterbury.

Sergeant Angon offered the following account of the circumstances that followed. Waterbury police organized surveillance of the area near the Brass Mill Mall on the basis of an anonymous tip that the department received earlier in the day regarding drug activity that allegedly was going to occur that evening. At approximately 8 p.m., Angon saw a tan Jeep coming off the exit ramp of Interstate 84 near the mall, which fit the description of the vehicle that the department had been given. He and his partner conducted a motor vehicle stop. Upon approaching the Jeep, Angon observed that the defendant appeared unusually nervous. When Angon asked the defendant who owned the Jeep, the defendant replied that it was his "friend's."

A police detective from the department arrived with a narcotics detection canine and conducted a detection sweep of the Jeep. The dog alerted to the driver's side door and then to the center console. Angon and another officer then inspected the center console and discovered the hidden compartment beneath it. Therein they found a black bag containing $12,248 and ten bricks of what was later established to be heroin; each brick comprised of approximately 1000 prepackaged bags of heroin. The heroin had an estimated street value of between $45,000 and $60,000. The cash recovered from the compartment was consistent with the price of two

bricks of heroin. The police officers placed the defendant and Lawrence under arrest.[2]

Henriques, Lawrence's cousin, testified that the defendant provided money to help pay Lawrence's bond after the defendant and Lawrence were arrested. She further testified that when she met with the defendant to ask for his help, he told her that he "was trying a thing and [got] fucked."

In addition to this testimony, the jury viewed a surveillance video from the gas station for the period at issue. In the video, the defendant enters the convenience store and returns to the Jeep, carrying a beverage; no bag is in view. A black vehicle then arrives, and the defendant immediately gets into the rear right passenger seat of that vehicle. The vehicle leaves and then returns approximately ten minutes later. The defendant gets back into the Jeep, and the Jeep departs. The driver of the black vehicle exits that vehicle and enters the convenience store. Angon identified that person, Terence Saunders, as a heroin dealer in Waterbury. Angon also testified that most of the heroin sold in Waterbury comes from the Bronx.

In addition to this evidence regarding the incident in question, the state attempted to demonstrate that the defendant was the de facto owner of the Jeep. Angon testified that he had run a law enforcement query, which revealed that the Jeep was registered to a third party, Victor A. Manana, at an address in the Bronx.[3] Angon testified that, in his experience, drug dealers commonly register their vehicles in someone else's name and have

[2] Lawrence admitted that, in exchange for her testimony against the defendant, she hoped to have the state dismiss the charge (unidentified) filed against her. Lawrence is a citizen of Jamaica and had a green card permitting her to be in the United States. She disclaimed any knowledge that a conviction could result in her deportation.

[3] Manana was not called as a witness, and no further evidence was adduced as to his identity or connection to the defendant.

someone else drive, so that if they come in contact with the police, they are not directly linked to the vehicle. Over the defendant's objections, Angon then was permitted to testify that the Jeep had been inspected at Manny's Auto. He testified that a Google search revealed an address for Manny's Auto and a photograph of that location, which showed Manny's Auto to be located adjacent to Sinclair Enterprise, the defendant's used car business. Angon explained that certain inspection information had been elicited by someone in his department from the New York State Police Department.

The defendant testified on his own behalf. According to the defendant, the tan Jeep belonged to Lawrence, and she was the "friend" to whom he was referring when responding to Angon's question of who owned the Jeep. He claimed that he had accompanied Lawrence to Connecticut on only one other occasion prior to this incident and was unaware that there were drugs in the Jeep. He admitted that he had asked Lawrence to stop at the gas station but claimed that it was for the purpose of meeting someone named Paul, who was interested in selling a vehicle to the defendant. According to the defendant, Paul was a passenger in the black vehicle that came to the gas station. The defendant joined Paul in the black vehicle, along with two individuals not known to the defendant, and drove to look at the vehicle Paul wished to sell. When they could not agree on a price, they returned to the gas station. Lawrence then drove the Jeep toward the mall.

The defendant's inculpation of Lawrence was lent marginal support by DNA testing performed by the state forensic laboratory on the packaging of the heroin and a strap used as a component of the hidden compartment in the Jeep. The defendant was excluded as a contributor to any of the DNA samples they were able to recover. Lawrence was excluded as a contributor to all but one

sample, which had insufficient material to rule her out as a contributor.

The jury found the defendant guilty of the charge of possession of narcotics with intent to sell by a person who is not drug-dependent. The court subsequently sentenced him to an eight year term of imprisonment.

The defendant appealed from the trial court's judgment to the Appellate Court, claiming that (1) the admission of Angon's hearsay testimony concerning the Jeep's inspection site violated the defendant's rights under the confrontation clause of the sixth amendment to the United States constitution, and (2) numerous improprieties during the prosecutor's closing argument violated the defendant's due process right to a fair trial.[4] A divided Appellate Court affirmed the judgment of conviction. *State* v. *Sinclair*, supra, 173 Conn. App. 28. The majority held that, even if it were to assume that the admission of the inspection testimony was a confrontation clause violation, any such error would be harmless beyond a reasonable doubt. Id., 16. The majority further held that, although a few of the prosecutor's comments during closing argument were improper, those improprieties did not deprive the defendant of a fair trial. Id., 24. Judge Beach dissented in part, concluding that the admission of the inspection testimony was in fact a violation of the confrontation clause and that this error was not harmless beyond a reasonable doubt.[5] Id., 28–32.

This court granted the defendant's petition for certification to appeal, initially limited to the issues of

[4] The defendant raised an additional evidentiary claim, which the Appellate Court rejected; *State* v. *Sinclair*, supra, 173 Conn. App. 24–28; that is not at issue in this certified appeal.

[5] In light of this conclusion, Judge Beach declined to reach the issue of whether the conviction should have been reversed due to the prosecutorial improprieties. *State* v. *Sinclair*, supra, 173 Conn. App. 32 n.2 (*Beach*, *J.*, concurring in part and dissenting in part).

whether the Appellate Court correctly concluded that any "presumed violation" of the defendant's confrontation clause rights was harmless beyond a reasonable doubt and that acts of prosecutorial impropriety did not deprive the defendant of a fair trial. *State* v. *Sinclair*, 326 Conn. 904, 163 A.3d 1205 (2017). In his brief to this court, the defendant addressed the threshold issue that the Appellate Court majority assumed but did not decide, asserting that the improperly admitted evidence amounted to constitutional, not merely evidentiary, error. In its responsive brief, the state asserted that this issue is outside the scope of the certified question and declined to address it. At oral argument, the state suggested that if we were to disagree with the Appellate Court's assessment of harm, that court could address the substantive issue on remand.

This court subsequently issued an order directing the parties to file supplemental briefs addressing the following issues: (1) "Did the evidence establishing that the Jeep had been inspected at a repair shop located adjacent to the defendant's business constitute testimonial hearsay for purposes of *Crawford* v. *Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)? See *United States* v. *Mendez*, 514 F.3d 1035, 1045 (10th Cir. 2008) (discussing public records under *Crawford*)." And (2) "[i]f not, can the defendant meet his burden of proving that admission of this evidence was harmful error?"

II

We begin with the defendant's challenge to the admission of Angon's testimony regarding the Jeep's inspection. The defendant claims that this evidence constituted testimonial hearsay admitted in violation of his constitutional rights. The defendant further contends that the improper admission of this evidence was harmful, irrespective of whether it is reviewed under the standard of

harm for constitutional error or evidentiary error. The state concedes that the inspection testimony was hearsay but contends that it is nontestimonial. The state further contends that its erroneous admission was not harmful, no matter what standard is applied.

Whether the admission of the contested testimony was constitutional error or merely evidentiary error will dictate which party bears the burden of proof as to harm and the extent of that burden. "[I]f an [evidentiary] impropriety is of constitutional proportions, the state bears the burden of proving that the error was harmless beyond a reasonable doubt. . . . When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful." (Internal quotation marks omitted.) *State* v. *Osimanti*, 299 Conn. 1, 16, 6 A.3d 790 (2010).

On the basis of the record before this court, we are compelled to conclude that the statements regarding the inspection were nontestimonial. We further conclude that the improper admission of the hearsay evidence was not harmful.

A

The following testimony regarding the Jeep was elicited from Angon on direct examination:

"[The Prosecutor]: And showing you what's been marked State's Exhibit 4—I'll show you on—up on the screen—let me just zoom in there for you. Could you tell the jury what you're seeing here?

"[Angon]: That is a printout from the law enforcement query of the vehicle registration number, New York F X L 3 7 5 4, which was the license plate on the Jeep Liberty. And it shows that it was registered to a Victor A. Manana, 1178 Washington Avenue, 5C, Bronx, New York.

* * *

"[The Prosecutor]: During your investigation, did you . . . determine if there were any inspections on that vehicle?

"[Angon]: Yes, there was a—for a vehicle to be registered in New York, New York state requires a vehicle inspection. I'm not sure exactly what the period between inspections is, but they have periodic inspections where they have to meet certain standards in order for the vehicle to be registered and remain registered in the state.

"[The Prosecutor]: And where was that done?

[Objections raised and overruled.]

"[The Prosecutor]: Where was the inspection done?

"[Angon]: The inspection was done at Manny Auto at 3 5 3 0—well, I'm not sure exact—I know it was a 3000 block of Webster Avenue in the Bronx, New York.

"[The Prosecutor]: And there's a—is there a business located adjacent to the Manny's Auto?

"[Angon]: Manny Auto is actually part of a fenced in lot that has one large business name over the front of it that I just got from a Google search of that address.[6]

"[The Prosecutor]: Do you know the name of that business?

[Objections raised and overruled.][7]

"[The Prosecutor]: What business is it next to?

"[Angon]: Sinclair Enterprise."

[6] The defendant does not challenge the admission of the information yielded from Angon's Google search, only the statements that led to that search.

[7] In response to a hearsay objection, the state initially argued that the inspection information was admissible as a business record and then later argued that Angon could testify as to his personal knowledge of the record. The court initially overruled defense counsel's objection and told Angon: "You can testify as to what you know and indicate how you know it."

Angon's source for the inspection information became clearer when the following testimony was elicited on cross-examination:

"[Defense Counsel]: [B]y the way, the registration you can get that information from the police department, correct, from—

"[Angon]: From—

"[Defense Counsel]: your police computers.

"[Angon]: Yes, I can run a—the law enforcement query of a license plate. So I can punch the numbers in on a computer terminal, and they'll give me the registration.

"[Defense Counsel]: Okay. And you can get an official documentation as to registration, things like that?

"[Angon]: Yes.

"[Defense Counsel]: Okay. And you've also now indicated on direct examination that you ran the—some sort of inspection record of the vehicle also.

"[Angon]: *My office contacted* [*the*] *New York State Police to see if they could translate, for lack of a better word, a lot of the information that's on the printout, because different states have different ways of recording things. One of the numbers on the New York query is an inspection number that gets issued because that's part of them getting registrations for the car. And then whoever issues that inspection number has a number.*[8]

[8] A printout of the Jeep's registration record was admitted into evidence without objection. That printout does not contain any inspection information. No other printout relating to the Jeep was admitted into evidence. We assume that Angon's reference to inspection numbers on a printout, which needed translation, refers to information obtained in a different computer query.

"[Defense Counsel]: And then when was that inquiry made?

"[Angon]: Sometime in the last two days." (Emphasis added; footnotes added.)

Defense counsel later moved to have Angon's testimony relating to the inspection stricken from the record. He argued that cross-examination had revealed that Angon did not obtain the information firsthand but, rather, secondhand from an unidentified person. As such, he submitted that this testimony was double hearsay "at best" and that its admission violated the defendant's rights under *Crawford* to confront witnesses against him. The trial court denied the motion, stating that the jury could determine what weight to give the testimony.

We begin our analysis of the importance of Angon's testimony with the observation that there are three layers of potential hearsay imbedded in it: (1) the New York inspection record itself; (2) the statement by a New York State Police employee relaying information in that record to a Waterbury Police Department employee; and (3) the statement by the Waterbury police employee relaying this information to Angon. There is no dispute that these out-of-court statements were admitted for the truth of the matter asserted and therefore constitute hearsay.[9] See Conn. Code Evid.

[9] Although the state concedes that Angon's inspection testimony contains hearsay, we note the possibility that the inspection record itself may not be hearsay. We cannot ascertain from the record whether the inspection numbers are assigned to inspection sites by computer or whether there is some aspect of human input involved. "Generally, mechanically generated records don't qualify as 'statements' for hearsay purposes, but when those records are developed with human input, they can become hearsay statements." *United States* v. *Bates*, 665 Fed. Appx. 810, 814 (11th Cir. 2016); see *State* v. *Buckland*, 313 Conn. 205, 221, 96 A.3d 1163 (2014) (machine generated data is not subject to restrictions imposed by *Crawford* and its progeny), cert. denied, U.S. , 135 S. Ct. 992, 190 L. Ed. 2d 837 (2015); see also *Bullcoming* v. *New Mexico*, 564 U.S. 647, 660, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011) (contrasting "raw, machine-produced data" or "a

§ 8-1 (3); see also *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 390, 119 A.3d 462 (2015) ("[s]uch statements generally are inadmissible unless they fall within an exception to the hearsay rule"). Each layer of hearsay would have to independently satisfy an exception to the hearsay rule in order to be admissible. See Conn. Code Evid. § 8-7.

Our concern in the present case is not, however, whether there are applicable hearsay exceptions to avoid evidentiary error; the state concedes there are not. Rather, our concern is that, "[i]n the context of a criminal trial . . . the admission of a hearsay statement against a defendant is further limited by the confrontation clause of the sixth amendment." *State* v. *Smith*, 289 Conn. 598, 618, 960 A.2d 993 (2008). The confrontation clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const., amend. VI.[10]

"Under *Crawford* v. *Washington*, supra, 541 U.S. 59, 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

machine-generated number" with certifications relating to past events and human actions, latter being appropriately tested by cross-examination).

[10] The right to confrontation guaranteed by the sixth amendment is made applicable to the states through the due process clause of the fourteenth amendment. See, e.g., *Pointer* v. *Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

was testimonial in nature, questions of law over which our review is plenary." *State* v. *Smith*, supra, 289 Conn. 618–19.

"[A] testimonial statement is typically [a] solemn declaration or affirmation made for the purpose of establishing or proving some fact. . . . *Crawford* v. *Washington*, supra, 541 U.S. 51. 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* . . . . Id., 51–52." (Emphasis added; internal quotation marks omitted.) *State* v. *Smith*, supra, 289 Conn. 622–23. It is this third category into which the defendant contends that Angon's testimony falls.

In *Davis* v. *Washington*, supra, 547 U.S. 822, the United States Supreme Court elaborated on the third category, applying a "primary purpose" test to distinguish between testimonial and nontestimonial statements made to police officials. In the context of considering hearsay statements made to a 911 operator, the court in *Davis* held: "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.*"[11] (Emphasis added.) Id.

"In *State* v. *Slater*, [285 Conn. 162, 172 n.8, 939 A.2d 1105 (2008), this court] 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.' " *State* v. *Smith*, supra, 289 Conn. 623–24.

Crawford's progeny indicates that a significant factor in ascertaining whether the primary purpose of the communication is testimonial, i.e., whether the declarant reasonably would believe that the statement would be used in a subsequent prosecution, is the relative formality or informality of the manner in which the statement was given or elicited. See, e.g., *Bullcoming* v. *New Mexico*, 564 U.S. 647, 665, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011) (concluding that "the formalities attending the 'report of blood alcohol analysis' are more than adequate to qualify [the declarant's] assertions as testimo-

[11] In *Davis*, the court held that the victim's statements to the 911 operator while the emergency was unfolding were nontestimonial and could be admitted because they were given for the primary purpose of responding to the emergency. *Davis* v. *Washington*, supra, 547 U.S. 829. In contrast, statements given after the defendant fled, in response to targeted questions by the 911 operator, were testimonial and, therefore, inadmissible because they were provided after the emergency had passed for the primary purpose of developing evidence against an accused. Id., 828–29.

nial" because declarant's certificate was " 'formalized' in a signed document," was "headed a 'report,' " and report form refers to courts' rules that provide for admission of this type of report); id., 671 (Sotomayor, J., concurring in part) ("The formality inherent in the certification further suggests its evidentiary purpose. Although [f]ormality is not the sole touchstone of our primary purpose inquiry, a statement's formality or informality can shed light on whether a particular statement has a primary purpose of use at trial." [Internal quotation marks omitted.]); *Michigan* v. *Bryant*, 562 U.S. 344, 366, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011) (concluding that Michigan Supreme Court did not sufficiently account for importance of informality in encounter between victim and police in assessing whether statement was testimonial but acknowledging that "informality does not necessarily indicate . . . the lack of testimonial intent"); *Melendez–Diaz* v. *Massachusetts*, 557 U.S. 305, 308, 310, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) ("certificates of analysis" completed by employees of State Laboratory Institute of the Massachusetts Department of Public Health were testimonial because they were "incontrovertibly . . . solemn declaration[s] or affirmation[s] made for the purpose of establishing or proving some fact" [internal quotation marks omitted]); *Melendez–Diaz* v. *Massachusetts*, supra, 310–11 (" 'certificates' are functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination' "); *Davis* v. *Washington*, supra, 547 U.S. 827 (emphasizing difference in level of formality between interviews in case before it and in *Crawford*); *Davis* v. *Washington*, supra, 830 (determining that act of separating declarant from defendant in order to conduct investigation was "formal enough" under circumstances to render statement testimonial); *United States* v. *Smalls*, 605 F.3d 765, 778 (10th Cir. 2010) ("[s]ynthesizing *Crawford* and *Davis*, we might

today formulate a definition of a testimonial statement which reads: a formal declaration made by the declarant that, when objectively considered, indicates the primary purpose for which the declaration was made was that of establishing or proving some fact potentially relevant to a criminal prosecution").

The United States Supreme Court's most recent foray into confrontation clause jurisprudence, however, calls into question the continuing vitality of the primary purpose test, at least as articulated in *Davis*. In *Williams* v. *Illinois*, 567 U.S. 50, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012), an expert had testified that a DNA profile produced by an outside laboratory matched a profile produced by the state police laboratory using a sample of the petitioner's blood. Id., 56 (plurality opinion). Five justices agreed that the profile relied on by the expert was nontestimonial, but the fifth justice rejected the plurality's "flawed analysis"; id., 104 (Thomas, J., concurring in the judgment); as did the four dissenting justices.[12] Id., 135–38 (Kagan, J., dissenting). Justice Alito, writing for the plurality, reasoned that "[t]he abuses that the court has identified as prompting the adoption of the [c]onfrontation [c]lause shared the following two characteristics: (1) [t]hey involved out-of-court statements having the primary purpose of accusing *a targeted individual* of engaging in criminal conduct and (2) they involved formalized statements such as affidavits, depositions, prior testimony, or con-

[12] The plurality rested its holding on two independent grounds. See *Williams* v. *Illinois*, supra, 567 U.S. 58, 86. The first ground, irrelevant to the present case, was that the out-of-court statements were not hearsay under traditional rules of evidence. Id., 57–58 (plurality opinion). It reasoned that the expert relayed those statements solely for the purpose of explaining the assumptions on which the expert's opinion rested. Id., 56–58 (plurality opinion). The plurality thus concluded that the statements were not offered for their truth and therefore would fall outside the scope of the confrontation clause. Id., 58. Five justices disagreed with this reasoning. Id., 104–109 (Thomas, J., concurring in the judgment); id., 125–33 (Kagan, J., dissenting).

fessions." (Emphasis added.) Id., 82. The plurality noted that all but one of the court's cases involving testimonial hearsay post-*Crawford* had both characteristics, the one exception having only the second characteristic. Id., 82–83. The plurality reasoned that the DNA profile at issue lacked the first characteristic because no one at the laboratory producing it could know that it would inculpate the petitioner, let alone any other person who might currently be in a law enforcement database. Id., 84–85. "Under these circumstances, there was no prospect of fabrication and no incentive to produce anything other than a scientifically sound and reliable profile." (Internal quotation marks omitted.) Id., 85 (plurality opinion); see also id., 86–87, 89 (Breyer, J., concurring) (agreeing with plurality's reasoning but emphasizing administrative burden of requiring every person working on reports to testify).

In his concurrence, Justice Thomas reiterated his previously expressed view that the confrontation clause only "reaches formalized testimonial materials, such as depositions, affidavits, and prior testimony, or statements resulting from formalized dialogue, such as custodial interrogation." (Internal quotation marks omitted.) Id., 111. He reasoned that the primary purpose test, as originally articulated in *Davis*, was a necessary, but not sufficient, criterion to render a statement testimonial because a statement may serve more than one purpose. See id., 114 (Thomas, J., concurring in the judgment) ("Statements to police are often made both to resolve an ongoing emergency and to establish facts about a crime for potential prosecution. The primary purpose test gives courts no principled way to assign primacy to one of those purposes." [Emphasis omitted.]). He noted that "[t]he shortcomings of the original primary purpose test pale in comparison, however, to those plaguing the reformulated version that the plurality suggests today." Id. (Thomas, J., concurring in the judg-

ment). Both he and the four dissenting justices agreed that a requirement that the statement must have the primary purpose of accusing a targeted individual did not derive from either the text or the history of the confrontation clause. Id. (Thomas, J., concurring in the judgment); id., 135 (Kagan, J., dissenting).

Justice Kagan, writing for the four dissenting justices, argued that application of the court's precedent compelled the conclusion that the DNA profile in the laboratory report was testimonial hearsay, because it was "a statement [that] was made for the primary purpose of establishing 'past events potentially relevant to later criminal prosecution'—in other words, for the purpose of providing evidence." Id., 135. With regard to Justice Thomas' view that the laboratory report did not qualify as testimonial because it was neither a sworn nor certified declaration of fact, Justice Kagan observed that there was no material difference between the degree of formality in the reports at issue and those in its prior cases deemed testimonial: "Each report is an official and signed record of laboratory test results, meant to establish a certain set of facts in legal proceedings." Id., 139. Justice Kagan noted that, in those prior cases, "a law enforcement officer provided evidence to a state laboratory assisting in police investigations," "the analyst tested the evidence and prepared a certificate concerning the result[s]," and "the certificate was formalized in a signed document . . . headed a report. . . . That was enough." (Citation omitted; internal quotation marks omitted.) Id.

In considering what to make of *Williams*, we are mindful of the Supreme Court's direction that, "[w]hen a fragmented [c]ourt decides a case and no single rationale explaining the result enjoys the assent of five [j]ustices, the holding of the [c]ourt may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds . . . ." (Internal

quotation marks omitted.) *Marks* v. *United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977). But see *Grutter* v. *Bollinger*, 539 U.S. 306, 325, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003) (acknowledging that there are cases in which *Marks* test "is more easily stated than applied to the various opinions supporting the result" [internal quotation marks omitted]). The problem with *Williams*, as the Second Circuit Court of Appeals has aptly observed, is that the court made it impossible to identify the narrowest ground because the analyses of the various opinions are irreconcilable. See *United States* v. *James*, 712 F.3d 79, 95 (2d Cir. 2013), cert. denied, 572 U.S. 1134, 134 S. Ct. 2660, 189 L. Ed. 2d 208 (2014); see also *Williams* v. *Illinois*, supra, 567 U.S. 141 (Kagan, J., dissenting) ("[t]he five [j]ustices who control the outcome of today's case agree on very little" and "have left significant confusion in their wake"). Like the Second Circuit, we "think it sufficient to conclude that we must rely on Supreme Court precedent before *Williams* to the effect that a statement triggers the protections of the [c]onfrontation [c]lause when it is made with the primary purpose of creating a record for use at a later criminal trial." *United States* v. *James*, supra, 712 F.3d 95–96; see also *State* v. *Lebrick*, 179 Conn. App. 221, 244, 178 A.3d 1064 ("[g]iven that no readily applicable rationale for the court's holding in *Williams* obtained the approval of a majority of the justices, its precedential value seems, at best, to be confined to the distinct factual scenario at issue in that case"), cert. granted, 328 Conn. 912, 179 A.3d 218 (2018). The one thread of *Williams* that is consistent with the court's earlier precedent is that there is agreement among all of the justices that the formality attendant to the making of the statement must be considered.

With this framework in mind, we turn to Angon's hearsay testimony in the present case. We begin with the New York vehicle inspection record, which purport-

edly indicated that Manny's Auto had been assigned the inspection number revealed by Angon's law enforcement query. Public records, such as the inspection records at issue, also are governed by the primary purpose test. The United States Supreme Court has explained that "[b]usiness and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial." *Melendez–Diaz* v. *Massachusetts*, supra, 557 U.S. 324; see also *United States* v. *Mendez*, 514 F.3d 1035, 1044–1045 (10th Cir.) ("As a public record, the [Immigration and Customs Enforcement] Central Index System is not testimonial. . . . Where records are not prepared for litigation or criminal prosecution, but rather administrative and regulatory purposes, the 'principal evil at which the [c]onfrontation [c]lause was directed' is not implicated." [Citations omitted.]), cert. denied, 553 U.S. 1044, 128 S. Ct. 2455, 171 L. Ed. 2d 250 (2008); *United States* v. *Vidrio-Osuna*, 198 Fed. Appx. 582, 584 (9th Cir. 2006) (admission of record that is " 'routine, objective, cataloging of an unambiguous factual matter,' " such as birth certificate, is not testimonial). Nonetheless, such records will be deemed testimonial if they were created for the purpose of establishing or proving some fact at trial. See, e.g., *Melendez–Diaz* v. *Massachusetts*, supra, 324. Compare *United States* v. *Feliz*, 467 F.3d 227, 236–37 (2d Cir. 2006) (concluding that autopsy report is public record and is not testimonial even though medical examiner may understand that report may be available for use at trial), cert. denied sub nom. *Erbo* v. *United States*, 549 U.S. 1238, 127 S. Ct. 1323, 167 L. Ed. 2d 132 (2007), with *United States* v. *James*, supra, 712 F.3d 99, 101–102 (concluding that court must consider circumstances of death to determine whether pri-

mary purpose of autopsy was for use in criminal prosecution).

State vehicle inspection records are created solely for administrative or regulatory purposes. Therefore, the information in the New York inspection record was not testimonial hearsay. See footnote 9 of this opinion (acknowledging possibility that inspection record was not hearsay).

The fact that the underlying record is nontestimonial does not, however, end our inquiry. Just as every layer of hearsay must independently satisfy a hearsay exception to be admissible, a subsequent recitation of a nontestimonial statement may itself be testimonial. See, e.g., *United States* v. *Brooks*, 772 F.3d 1161, 1167–68 (9th Cir. 2014) (court determined that there was *Crawford* violation when postal inspector testified that postal supervisor provided inspector with tracking number and mailing information on package, which was used to prove that it was same package that defendant had mailed earlier that day, when supervisor would have understood that purpose of inquiry was investigative and supervisor's statement reported past event); *United States* v. *Bustamante*, 687 F.3d 1190, 1194 (9th Cir. 2012) (court determined that there was *Crawford* violation when affidavit of official from Philippines' Office of Civil Registrar General was admitted, which attested that defendant's birth record indicated that he was born in Philippines, to prove that defendant was not United States citizen for purposes of various criminal charges); *United States* v. *Weiland*, 420 F.3d 1062, 1076–1077 (9th Cir. 2005) (court considered whether *Crawford* was violated by admission of documents in " 'penitentiary packet,' " which "incorporate two layers of hearsay, and, correspondingly, two potential [c]onfrontation [c]lause problems: [1] the records themselves, and [2] the statements of [the Oklahoma records custodian] and the Secretary of State . . . providing the foundation

to establish their authenticity," and then considered whether second layer was testimonial after concluding that first layer was public record and nontestimonial), cert. denied, 547 U.S. 1114, 126 S. Ct. 1911, 164 L. Ed. 2d 667 (2006); see also *Tapke* v. *Brunsman*, 565 Fed. Appx. 430, 435, 436 (6th Cir.) (court considered whether *Crawford* was violated by admission of social worker's report regarding child sexual abuse, which contained double hearsay, and determined that first level of hearsay, child's statement, was nontestimonial because primary purpose of interview was to assist physicians in conducting medical examination, and then examined second level of hearsay, social worker's report recounting child's statement, to determine whether it was testimonial), cert. denied sub nom. *Tapke* v. *Moore*, U.S. , 135 S. Ct. 486, 190 L. Ed. 2d 367 (2014); *Jones* v. *Basinger*, 635 F.3d 1030, 1040–1043 (7th Cir. 2011) (concluding that confrontation clause was violated by admission of police officer's testimony because second layer of hearsay was testimonial, when officer testified that informant stated that his brother had confessed to him that he, along with defendant and others, had committed murder and that defendant's need for money was motive).

The United States Supreme Court has distinguished between a statement by a custodian "certify[ing] to the correctness of a copy of a record kept in his office," which historically has been admissible and thus deemed nontestimonial, and a declarant's statement "furnish-[ing], as evidence for the trial of a lawsuit, his interpretation of what the record contains or shows, or to certify to its substance or effect," which is testimonial. (Internal quotation marks omitted.) *Melendez–Diaz* v. *Massachusetts*, supra, 557 U.S. 322. If a nontestimonial record is used to create a new record for the purpose of providing evidence for a criminal prosecution, that new record is testimonial. See id., 322–23 ("[a] clerk could by affi-

davit authenticate or provide a copy of an otherwise admissible record, but could not do what the analysts did here: create a record for the sole purpose of providing evidence against a defendant" [emphasis omitted]); see also *United States* v. *Bustamante*, supra, 687 F.3d 1194 (The court explained why an affidavit from an official attesting that the defendant's birth record indicated that he was born in the Philippines, offered to prove that the defendant was not a United States citizen for purposes of various criminal charges, was testimonial: The affidavit was created for the purpose of an investigation into the defendant's citizenship and was "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. . . . Rather than simply authenticating an existing [nontestimonial] record, [the official] created a new record for the purpose of providing evidence against [the defendant]." [Citations omitted.]).

The statements in the present case by the New York State Police and Waterbury Police Department employees plainly do not certify to the correctness of the New York inspection record (or a copy thereof). Nor do they *interpret* what the record contains or shows. The question is whether the statements *certify* the record's substance or effect.

We observe that the informal manner in which the information was elicited and communicated bears no indicia of a " 'solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " *Crawford* v. *Washington*, supra, 541 U.S. 51. In other words, the declarant did not take the information in the public record and create a new record for use at trial. The information was obtained through a telephone call. There is no indication that the call was recorded (e.g., a 911 call) or that the information was memorialized *in any manner*. There is nothing in the record to

indicate whether the identity (name and position) of the declarant was elicited or offered. Nor does the record indicate how the information was in turn conveyed by the Waterbury Police Department employee to Angon.[13]

Although the pre-*Williams* case law indicates that a lack of formality will not necessarily deprive a statement of its testimonial character, *Williams* suggests that this fact would be dispositive. Even if we were permitted to look beyond the casual manner in which these statements were elicited and conveyed, *Crawford*'s first principles require proof that an objective declarant reasonably would believe that his or her statement would be used for prosecutorial purposes. Such proof is not evident in the present record. Neither the substance nor the form of the statements at issue objectively demonstrates that they were made with the primary purpose of creating a record for use at a later

[13] Although Angon presumably could have identified the Waterbury Police Department employee from his "office" who relayed the inspection information to him, he was not asked to identify that person. It is unclear whether this information was elicited, and in turn communicated, by someone serving in a law enforcement capacity or in a purely administrative capacity. Angon also was not asked whether this person was aware of the potential relevance of this information.

We note that neither party has provided this court with any case law addressing testimonial hearsay in the context of one police officer relaying the statement of a third party to another officer. Nonetheless, we are mindful of the United States Supreme Court's admonition that "we do not think it conceivable that the protections of the [c]onfrontation [c]lause can readily be evaded by having a [note taking] policeman recite the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition." (Emphasis omitted.) *Davis* v. *Washington*, supra, 547 U.S. 826. In *Williams*, the four dissenting justices acknowledged Justice Thomas' view that "the [c]onfrontation [c]lause reaches [bad faith] attempts to evade the formalized process"; *Williams* v. *Illinois*, supra, 567 U.S. 113 (Thomas, J., concurring in the judgment); but noted that he "provides scant guidance on how to conduct this novel inquiry into motive." Id., 140 n.7 (Kagan, J., dissenting). There is nothing in the record before us, or in logic, tending to suggest that Angon or any other police officer intentionally elicited the inspection information informally to avoid the confrontation issue. A certified copy of the record would have avoided both the confrontation and hearsay issues.

criminal trial. The inspection information conveyed (i.e., inspection number X is assigned to Manny's Auto) is neutral. It bears no overt relevance to any criminal activity or even any individual. There is no basis in the record to infer that the New York State Police employee was informed about the potential relevance of this information to a criminal prosecution. See *Gregor* v. *Franklin*, 466 Fed. Appx. 709, 711 (10th Cir. 2012) (The court, in determining that it was reasonable to conclude that, because the declarant's statement to the officer did not inculpate the defendant in criminal activity, its introduction did not amount to a *Crawford* violation, noted that "not every statement made in response to an interrogation is testimonial for purposes of confrontation clause analysis . . . . Rather, the emphasis must be on the responses generated. . . . *Crawford* itself deals with witnesses against the accused bearing inculpatory testimonial statements. [Citations omitted; internal quotation marks omitted.]). In fact, the information was not even necessarily relevant to the defendant's case. It became relevant only because the name associated with the number subsequently was linked by Angon to an address that happened to be in close proximity to the defendant's business. Our review of *Crawford* cases reveals no instance in which such neutral information was deemed testimonial.

The cases on which the defendant relies, as well as others revealed by our independent research, are consistent with our conclusion in the present case that the statements relaying the information in the inspection record are nontestimonial hearsay. By contrast, in each such case, the manner in which the information was conveyed or elicited provided an objective indication that the declarant would have believed that his or her statement could be used in a criminal prosecution. See *United States* v. *London*, 746 Fed. Appx. 317, 319–20 (5th Cir. 2018) (notarized documents containing state-

ments from Assistant Executive Secretary at Federal Deposit Insurance Corporation [FDIC] regarding bank's FDIC status in relation to query indicating that such status was relevant to robbery charge); *United States* v. *Brooks*, supra, 772 F.3d 1167–68 (postal supervisor provided information in response to investigation directed at individual); *United States* v. *Bustamante*, supra, 687 F.3d 1194 (affidavit attesting to entry in defendant's birth record); *United States* v. *Smith*, 640 F.3d 358, 362–63 (D.C. Cir. 2011) (letters from court clerk, containing seal and clerk's signature, stating that "it appears from an examination of the records on file in this office" that defendant had been convicted of felony); *Cascen* v. *Virgin Islands*, 60 V.I. 392, 399, 411 (2014) (forms generated by firearms supervisor for Virgin Islands Police Department indicating that her search of firearm registry revealed that defendant did not have license to possess firearm in Virgin Islands).

The record before us does not establish that any declarant objectively would have believed that his or her statement relaying that the inspection number revealed by Angon's query corresponded to Manny's Auto would be used as evidence in a prosecution. Most of the concerns articulated with respect to the statement by the New York State Police employee apply equally to the relaying of that statement to Angon by the Waterbury Police Department employee. See footnote 13 of this opinion. Therefore, neither of those statements was testimonial, and the admission of the hearsay was not an error of constitutional magnitude.

B

Our conclusion in the preceding section requires us to consider whether the defendant has established that the evidentiary error in admitting Angon's hearsay statement regarding the Jeep's inspection site was harmful error. We conclude that he has not.

The law governing harmless error for nonconstitutional evidentiary claims is well settled. "[W]hether [an improper ruling] is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the [defendant's] case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the . . . evidence on the trier of fact and the result of the trial. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Favoccia*, 306 Conn. 770, 808–809, 51 A.3d 1002 (2012).

In order for the jury to have found the defendant guilty in the present case, the state had to prove that the defendant knowingly possessed and intended to sell the narcotics found in the Jeep. See General Statutes (Rev. to 2013) § 21a-278 (b). Because both the defendant and Lawrence were in the vehicle at the time of the police stop and the drugs were in a hidden compartment, the state had to prove the defendant's constructive possession of the narcotics at trial. "Where the defendant is not in exclusive possession of the premises where the narcotics are found, it may not be inferred that [the defendant] knew of the presence of the narcotics and had control of them, unless there are other incriminating statements or circumstances tending to buttress such an inference. . . . [Although] mere presence is not enough to support an inference of domin-

ion or control, where there are other pieces of evidence tying the defendant to dominion and control, the [finder of fact is] entitled to consider the fact of [the defendant's] presence and to draw inferences from that presence and the other circumstances linking [the defendant] to the crime." (Internal quotation marks omitted.) *State* v. *Bruno*, 293 Conn. 127, 136–37, 975 A.2d 1253 (2009).

There were plenty of circumstances other than the defendant's presence in the Jeep linking him to the crime of possession with intent to sell. Although Lawrence and the defendant pointed the finger at the other at trial, the jury reasonably could have found Lawrence credible as to the defendant's actions, even if it did not credit her testimony that she had no knowledge that the drugs were in the Jeep. See, e.g., *State* v. *Brown*, 299 Conn. 640, 648, 11 A.3d 663 (2011) ("[t]he trier of fact may credit part of a witness' testimony and reject other parts" [internal quotation marks omitted]). Her testimony was corroborated by many facts independent of the inspection information.

The defendant admitted to Henriques, in so many words, that he was the one who was selling the narcotics. He provided $4000 to help Lawrence make bail. The defendant was in the company of a known Waterbury heroin dealer just before a large quantity of heroin, packaged for sale, was discovered in the car in which he was a passenger. As we explain later, it was clear that the defendant was well acquainted with this person. During the motor vehicle stop, the defendant appeared more nervous than the average person who is subject to such a stop.

The defendant's own account of the events on the night in question was manifestly not credible. He initially testified on direct examination that the purpose of the February 5, 2013 trip was to go to "the casino"

with Lawrence, a trip that he claimed they had made before. The defendant later admitted that he had never been to a casino in Connecticut and did not know how to get there from Waterbury. Thereafter, the defendant offered a different explanation for the February 5 trip. He testified that he and Lawrence had driven to Connecticut that night to look at a used car owned by a man named Paul. The defendant testified that he had never previously spoken to Paul and only learned about him through Lawrence, who had informed the defendant that Paul wanted to sell him a used car. The defendant also claimed not to know any of the other occupants of the black vehicle.

The surveillance video tells a different story. It shows a black vehicle arriving at the gas station approximately three minutes after the defendant is seen on his cell phone. The vehicle is being driven by a Waterbury heroin dealer. The defendant walks up to the vehicle as it is pulling into the gas station and, without hesitation, enters the rear passenger seat the moment it stops. The vehicle immediately departs. It strains credulity to believe that neither the defendant nor three purported strangers would take a moment to confirm the identity of the other or to introduce themselves.[14] The video also reflects that the black vehicle returned to the gas station approximately eleven minutes after it left with the defendant. That brief period of time would be consistent with the time it would take to retrieve something from a known location nearby (the cash in the bush). That period does not seem consistent with the time that it would take to drive the "mile and a-half [or] two miles down the road" where the defendant claimed Paul's vehicle was located, to conduct a sufficiently

[14] It also seems implausible that the four strangers would have driven off together to allow the defendant to view Paul's vehicle rather than meet where Paul's car purportedly was located a short distance away or have Paul's car brought to the gas station.

thorough inspection of the vehicle to decide to make an offer, to engage in a failed negotiation on price, and then to return to the gas station.

Finally, we observe that evidence independent of the inspection testimony pointed to the defendant as the person having control over the Jeep. The defendant mentioned an unnamed "friend" as the Jeep's owner when Angon inquired during the vehicle stop. His post facto claim that the friend to whom he was referring was Lawrence was manifestly not credible given that she was present when he identified the purported owner. Angon testified that it was common for drug dealers to register a vehicle they use for the sale of drugs to another person. The defendant had a used car business, which would provide ready access to vehicles, including those registered to third parties. The Jeep was registered in the name of a person who purportedly lives in the Bronx. The defendant's business is in the Bronx. Angon testified that most heroin sold in Waterbury comes from the Bronx.

We conclude that the inspection testimony, while not unimportant, was not of sufficient consequence when viewed in light of the state's relatively strong case against the defendant to persuade us that the improper admission of this evidence had a significant effect on the verdict. Therefore, the defendant has not proved harmful error.

III

Finally, we turn to the defendant's claim that the Appellate Court incorrectly concluded that, although the prosecutor made certain improper statements during closing argument, those improprieties did not deprive the defendant of his due process right to a fair trial. We disagree.

"In analyzing claims of prosecutorial impropriety, we engage in a two step analytical process. . . . We first

examine whether prosecutorial impropriety occurred. . . . Second, if an impropriety exists, we then examine whether it deprived the defendant of his due process right to a fair trial." (Internal quotation marks omitted.) *State* v. *Maguire*, 310 Conn. 535, 552, 78 A.3d 828 (2013). "[T]he defendant has the burden to show both that the prosecutor's conduct was improper and that it caused prejudice to his defense." *State* v. *A. M.*, 324 Conn. 190, 199, 152 A.3d 49 (2016).

In determining whether the defendant was deprived of his due process right to a fair trial, "we are guided by the factors enumerated by this court in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987). These factors include [1] the extent to which the [impropriety] was invited by defense conduct or argument, [2] the severity of the [impropriety], [3] the frequency of the [impropriety], [4] the centrality of the [impropriety] to the critical issues in the case, [5] the strength of the curative measures adopted, and [6] the strength of the state's case. . . . [A] reviewing court must apply the *Williams* factors to the entire trial, because there is no way to determine whether the defendant was deprived of his right to a fair trial unless the [impropriety] is viewed in light of the entire trial. . . . The question of whether the defendant has been prejudiced by prosecutorial [impropriety] . . . depends on whether there is a reasonable likelihood that the jury's verdict would have been different absent the sum total of the improprieties." (Citations omitted; internal quotation marks omitted.) *State* v. *Martinez*, 319 Conn. 712, 736, 127 A.3d 164 (2015); see also *State* v. *Gould*, 290 Conn. 70, 77, 961 A.2d 975 (2009) (court looks to cumulative effect of all improprieties).

In the present case, the Appellate Court identified three improprieties that occurred during closing argu-

ment.[15] In the first instance, the prosecutor argued to the jury that, to find the defendant not guilty, the jury had to disbelieve the testimony of Angon, Henriques, and another state witness (*Singh* violation). See *State* v. *Singh*, 259 Conn. 693, 712, 793 A.2d 226 (2002) ("[A] witness may not be asked to characterize another witness' testimony as a lie, mistaken or wrong. Moreover, closing arguments providing, in essence, that in order to find the defendant not guilty, the jury must find that witnesses had lied, are similarly improper." [Footnote omitted.]).

In the second and third instances, the prosecutor improperly disparaged the integrity and role of defense counsel. See *State* v. *Outing*, 298 Conn. 34, 82–83, 3 A.3d 1 (2010) ("[T]he prosecutor is expected to refrain from impugning, directly or through implication, the integrity or institutional role of defense counsel. . . . [I]t is improper for a prosecutor to tell a jury, explicitly or implicitly, that defense counsel is employing standard tactics used in all trials, because such argument relies on facts not in evidence and has no bearing on the issue before the jury, namely, the guilt or innocence of the defendant." [Citation omitted; internal quotation marks omitted.]), cert. denied, 562 U.S. 1225, 131 S. Ct. 1479, 179 L. Ed. 2d 316 (2011). Specifically, during his rebuttal argument, in response to defense counsel's assertion that the lack of DNA evidence linking the

[15] In his brief, the defendant devotes the majority of his argument addressing whether the Appellate Court correctly concluded that only three of eleven actions on the part of the prosecutor constituted prosecutorial impropriety. Although the state asserted in its brief that the certified issue before this court is limited to whether the three improprieties identified by the Appellate Court deprived the defendant of his right to a fair trial, the state conceded at oral argument that this court may review all of the defendant's additional claims that were raised and rejected, by the Appellate Court. We agree with the Appellate Court that the eight additional claims of prosecutorial impropriety are without merit and do not warrant further analysis. See *State* v. *Sinclair*, supra, 173 Conn. App. 16 and n.2.

defendant to the drugs was significant, the prosecutor first stated, "[s]o here's the state's Hobson's choice, our conundrum, if we don't put the evidence up to the lab, defense can argue, oh my God, they didn't test anything. Oh, my God, what are they doing? Just like he did with the black bag, right, and then we do send the stuff up there, we know we're not gonna get stuff, *usually they use that against us*, right, it's a Hobson's choice." (Emphasis added.) Then, in response to defense counsel's argument that Lawrence had no difficulty understanding the prosecutor's questions but intentionally failed to understand defense counsel's questions, the prosecutor stated, "[w]hen you think about [Lawrence's] testimony, think about the manner in which I ask questions, even consider how I was talking. And think about the rocket fire questions from defense counsel. *Was he trying to trip her up? Was he trying to put words in her mouth?*" (Emphasis added.)

Applying the *Williams* factors to the present case, we agree with the Appellate Court that they do not collectively weigh in favor of the defendant. First, defense counsel invited one of the three prosecutorial improprieties regarding his cross-examination of Lawrence. Specifically, defense counsel stated in his closing argument that Lawrence deployed a strategy of claiming she did not understand defense counsel's questions or could not recall the answers, even though she had no difficulty understanding the prosecutor or recalling information necessary to answer his questions. The prosecutor's comment regarding defense counsel's cross-examination technique was an attempt to explain why Lawrence had difficulty with defense counsel's questions.

Second, the improprieties were not particularly severe. The defendant's theory hinged on attacking the credibility of Lawrence, not of the police. None of the improper comments significantly undercuts that theory.

Although one of the problems arising from a *Singh* violation is that it risks distorting the state's burden of proof; see *State* v. *Singh*, supra, 259 Conn. 709–10 ("such comments excluded possibility that jury could have concluded only that witnesses were probably truthful and defendant was probably lying, thereby preventing jury from 'return[ing] a verdict of not guilty because the evidence might not be sufficient to convict the defendant beyond a reasonable doubt' " [emphasis omitted]), the fact that it was not directed at the state's key witness and had no impact on the critical video evidence renders it less serious. Defense counsel objected to only one of the comments—the prosecutor's comment concerning defense counsel's cross-examination of Lawrence—which suggests that the other comments were not viewed as particularly serious. See, e.g., *State* v. *Medrano*, 308 Conn. 604, 620–21, 65 A.3d 503 (2013) ("[w]hen defense counsel does not object, request a curative instruction or move for a mistrial, he presumably does not view the alleged impropriety as prejudicial enough to jeopardize seriously the defendant's right to a fair trial" [internal quotation marks omitted]). The court sustained that objection, although it declined a subsequent request for a curative instruction.

Third, there were only three brief improper comments, all during rebuttal argument. Cf. *State* v. *Singh*, supra, 259 Conn. 724 (finding it noteworthy that improper comments occurred in both cross-examination and closing arguments). Those comments can hardly be properly characterized as frequent in the totality of the closing argument.

Fourth, although two of the comments related to a critical issue in the case, namely, the credibility of Lawrence and the defendant, the comments only indirectly bolstered Lawrence's credibility or undercut the defendant's credibility. Defense counsel had been able

to strongly argue to the jury that Lawrence's testimony was not credible in light of certain impeachment evidence. Although the defendant did rely on the lack of DNA evidence tying him to the narcotics, DNA was not critical to the case, and the comment regarding typical defense strategies regarding such evidence did not place such argument in doubt.

Fifth, the strength of any curative measures does not weigh in favor of either party. The trial court sustained defense counsel's only objection in the presence of the jury but denied his request for a curative instruction. The court properly instructed the jury that nothing the attorneys said was evidence. Further, the court properly instructed the jury that it was free to credit all, some, or none of each witness' testimony.

Finally, the state's case was relatively strong. Despite inconsistencies in Lawrence's testimony, which undoubtedly was critical to the case, the video provided neutral evidence that sufficiently corroborated her account of the defendant's conduct. Moreover, the defendant's own testimony, which was internally inconsistent and objectively inconsistent with the video, was strong evidence of his guilt.

We conclude that there was no reasonable likelihood that the jury would have returned a different verdict in the absence of the three relatively inconsequential improprieties. Therefore, the defendant has not met his burden of establishing that he was deprived of his due process right to a fair trial.

The judgment of the Appellate Court is affirmed.

In this opinion PALMER, ROBINSON, MULLINS and KAHN, Js., concurred.

D'AURIA, J., concurring in the judgment. I agree with the majority of this court that the Appellate Court's judgment should be affirmed.

However, like the majority of the Appellate Court, I would not reach the thorny constitutional issue that the majority of this court addresses concerning the application of *Crawford* v. *Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). In fact, for my purposes, I do not feel the need even to reach the question of whether the trial court committed error as a purely evidentiary matter, although I do not necessarily disagree with the majority on that score.

Rather, my review of the record leads me to conclude that any error in the trial court's admission into evidence of the Jeep's inspection information was harmless beyond a reasonable doubt, as there was overwhelming evidence that the defendant, Casey Sinclair, constructively possessed the narcotics found in that vehicle. Thus, even if I were to assume that the admission of the inspection information gave rise to a constitutional violation, I would hold that the defendant is not entitled to a reversal of the judgment against him.

"[T]o prove illegal possession of a narcotic substance, it is necessary to establish that the defendant knew the character of the substance, knew of its presence and exercised dominion and control over it. . . . [When] . . . the [narcotics are] not found on the defendant's person, the state must proceed on the theory of constructive possession, that is, possession without direct physical contact." (Internal quotation marks omitted.) *State* v. *Mangual*, 311 Conn. 182, 215, 85 A.3d 627 (2014). To prove constructive possession of the narcotics, however, the state did not have the burden of proving that the defendant actually owned the vehicle in which the narcotics were found. See, e.g., *State* v. *Winfrey*, 302 Conn. 195, 210–13, 24 A.3d 1218 (2011) (that defendant's wife owned vehicle he was driving that contained contraband was among circumstances from which jury could infer defendant was in constructive possession of narcotics). Stated differently, although ownership of

the vehicle may be probative of constructive possession of the contraband found in the vehicle, it is not determinative. See, e.g., *State* v. *Delossantos*, 211 Conn. 258, 277–78, 559 A.2d 164 (ownership of vehicle relevant to constructive possession analysis), cert. denied, 493 U.S. 866, 110 S. Ct. 188, 107 L. Ed. 2d 142 (1989). Rather, in situations in which contraband is found in a place owned by someone other than the defendant, this court has observed that what matters with respect to determining constructive possession is not "the defendant's dominion and control over [the] place," but rather "the defendant's dominion and control over the *contraband*." (Emphasis in original.) *State* v. *Johnson*, 316 Conn. 45, 61, 111 A.3d 436 (2015).

For largely the same reasons detailed by Judge Lavine in his opinion for the Appellate Court majority; see *State* v. *Sinclair*, 173 Conn. App. 1, 162 A.3d 43 (2017); I conclude that the state met its burden of demonstrating that any error in the admission of the evidence concerning the Jeep's inspection information was harmless beyond a reasonable doubt.[1] The state having sustained this burden, in my view, I would not reach the constitutional issue.[2]

I therefore respectfully concur in the judgment.

[1] An additional reason that the majority of this court did not include, however, which also persuades me that the admission of the inspection information was harmless, is the fact that the inspection of the vehicle at a location next to the defendant's business, Sinclair Enterprise, was of limited probative value as to whether the defendant exercised control over the vehicle at the time the police discovered the contraband. Unlike much of the evidence the state presented, the vehicle inspection evidence did not directly connect the defendant to the narcotics, nor even directly connect him to the Jeep. Rather, it only connected the Jeep to the garage next to his business. The defendant contends that the jury could have inferred that he actually controlled the vehicle because it was inspected near his business. However, given the testimony of Winsome Lawrence, the defendant's girlfriend, that her Oldsmobile was serviced at Manny's Auto, the jury could also have inferred that Lawrence would have had all her cars serviced or inspected at the same garage, and that Lawrence controlled the Jeep.

[2] I also agree with part III of the majority's opinion in which it concluded that the defendant did not meet his burden to establish that he was deprived of his due process right to a fair trial as a result of alleged prosecutorial improprieties during closing argument to the jury.

JAMEY MURPHY ET AL. *v.* TOWN OF DARIEN ET AL. (SC 19983)

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

Syllabus

Pursuant to the Federal Railroad Safety Act of 1970 (49 U.S.C. § 20106 [a] [2]) and United States Supreme Court precedent, *CSX Transportation, Inc.* v. *Easterwood* (507 U.S. 664), interpreting that act, a state law negligence claim relating to the operation of a railroad may be preempted when "federal regulations" prescribed by the Secretary of Transportation or the Secretary of Homeland Security "substantially subsume the subject matter of the relevant state law" on which the negligence claim is based.

The plaintiff, individually and on behalf of the estate of her late husband, K, sought damages from the defendant railroad company, M Co., alleging, inter alia, that M Co. had negligently caused K's death. K had slipped on a train station boarding platform and had fallen onto the track immediately adjacent to the platform. Shortly thereafter, a train that M Co. was operating on that track and that was passing through the station on its way to another destination struck K, even though, the plaintiff alleged, M Co. could have operated that train on another track. M Co. filed a motion for summary judgment in the trial court, claiming that the plaintiff's negligence claim was preempted under the act. The trial court granted that motion, concluding that, notwithstanding the absence of a federal regulation specifically covering the question of track selection, extensive federal regulations relating to railroad track safety substantially subsumed the subject matter of the plaintiff's claim. The trial court rendered judgment for M Co., and the plaintiff appealed, claiming that the trial court incorrectly had concluded that her claim was preempted by the act. *Held* that the trial court improperly granted M Co.'s motion for summary judgment, M Co. having failed to meet its burden of demonstrating that the plaintiff's claim of negligent track selection was preempted under the act, and, accordingly, the judgment was reversed and the case was remanded for further proceedings: a review of case law from other jurisdictions indicated that a state law negligence claim is preempted under the act only when there is a federal regulation that thoroughly addresses the safety concern raised in the plaintiff's complaint, rather than one that merely mentions or tangentially relates to that concern, the federal regulations (49 C.F.R. §§ 213.53, 213.57, 213.109 and 213.121 [2012]) on which the trial court relied in concluding that the plaintiff's claim was preempted address topics such as the measurement of gage size, the elevation of outer rails on a curve, and the components of a rail, including crossties and rail joints, but do not address the subject matter of the plaintiff's operative complaint, namely,

a railroad company's selection of an interior versus an exterior track for a train passing through a station, and, therefore, this court could not conclude that the regulatory scheme substantially subsumed the subject matter of the plaintiff's negligence claim; moreover, although the plaintiff's claim tangentially related to the speed of the train passing through the station, the federal regulation (49 C.F.R. § 213.9 [2012]) prescribing the maximum speed at which trains may operate on certain classes of track did not require preemption of the plaintiff's claim, as nothing in that regulation addressed the question of track selection.

Argued November 5, 2018—officially released July 9, 2019

Procedural History

Action to recover damages for, inter alia, the alleged wrongful death of the named plaintiff's husband, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Kamp, J.*, granted the motion for summary judgment filed by the defendant Metro-North Commuter Railroad Company and rendered judgment thereon, from which the plaintiffs appealed. *Reversed*; *further proceedings*.

James J. Healy, with whom were *Joel T. Faxon* and, on the brief, *John P. D'Ambrosio*, for the appellants (plaintiffs).

Robert O. Hickey, with whom, on the brief, were *Beck S. Fineman* and *Kerianne E. Kane*, for the appellee (defendant Metro-North Commuter Railroad Company).

Opinion

MULLINS, J. The sole issue in this appeal is whether the Federal Railroad Safety Act of 1970 (railroad act), 49 U.S.C. § 20101 et seq., preempts the negligence claims brought by the plaintiff, Jamey Murphy, individually and as executrix of the estate of her late husband, Kevin Murphy (decedent), against the defendant Metro-North Commuter Railroad Company.[1] We conclude that the

[1] Although the plaintiff also brought claims against the town of Darien and Wilton Enterprises, Inc., she has subsequently withdrawn those claims. For the sake of simplicity, we refer to Metro-North Commuter Railroad Company as the defendant.

railroad act does not preempt the plaintiff's negligence claims and, accordingly, reverse the judgment of the trial court rendered in favor of the defendant on that ground.[2]

The following facts and procedural history are relevant to this appeal. On March 4, 2013, at approximately 6:30 a.m., the decedent, was walking on the platform adjacent to the westbound tracks at the Noroton Heights train station in Darien. The decedent was awaiting his commuter train to New York City. On that morning, there was a patch of ice on the platform, which measured approximately nine feet long and approximately one foot wide. As the decedent was walking on the platform, he encountered the ice patch, slipped and fell onto the westbound track closest to the platform.

At that time, one of the defendant's trains was coming around a curve and approaching the Noroton Heights station on the track closest to the westbound platform. This train was scheduled to travel through the Noroton Heights station without stopping and to do the same through four other commuter stations before completing its express route to Stamford. This type of train is referred to as a "through train."

As the train approached the Noroton Heights station, the engineer sounded the train's horn. He then saw an object on the track. When the engineer realized it was a person, he sounded the horn again and applied the emergency brake. Nevertheless, the train struck the decedent. As a result of the collision, the decedent suffered severe trauma and was pronounced dead at the scene.

The plaintiff subsequently brought this action against the defendant. See footnote 1 of this opinion. Specifi-

[2] During the underlying proceedings, the defendant asserted that the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10101 et seq., also preempted the plaintiff's negligence claims. The defendant has withdrawn that claim, and, therefore, we do not address it in the present appeal.

cally, the operative complaint[3] alleges that the decedent's injuries and death were proximately caused by the negligence of the defendant when "it violated practices and customs with respect to track selection by moving a through train traveling in excess of seventy miles per hour on the track immediately adjacent to the platform when reasonable care and general practice of [the defendant] required that train to be on an interior track away from the platform." The plaintiff also alleges that the defendant's negligence caused her to suffer loss of spousal consortium. After discovery, the defendant filed a motion for summary judgment, and the plaintiff filed an objection.

In support of that motion, the defendant asserted that the plaintiff's negligence claims were preempted by federal law. Specifically, the defendant asserted, in pertinent part, that the plaintiff's claims were barred by the railroad act. The trial court agreed with the defendant, concluding that, "[t]o the extent that the plaintiff's claim is viewed as relating to rail safety, it is preempted by the [railroad act]." Accordingly, the trial court granted the motion for summary judgment and rendered judgment thereon in favor of the defendant. This appeal followed.[4]

On appeal, the plaintiff asserts that the trial court incorrectly concluded that her claims were preempted by the railroad act. Specifically, the plaintiff asserts that the railroad act only preempts claims where a federal regulation covers the subject matter, and no such regulation exists for track selection. In response, the defendant asserts that the trial court properly granted its motion for summary judgment because the plaintiff's

[3] We note that the plaintiff amended her complaint five times. The operative complaint was filed on March 21, 2017.

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

claims are preempted by the railroad act. Specifically, the defendant asserts that the subject matter of the plaintiff's claim is covered by federal regulation—namely, regulations addressing speed and track classification. We agree with the plaintiff.

"The standard of review of a trial court's decision granting summary judgment is well established. Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Citation omitted; internal quotation marks omitted.) *Lucenti* v. *Laviero*, 327 Conn. 764, 772–73, 176 A.3d 1 (2018). "[T]he use of a motion for summary judgment to challenge the legal sufficiency of a complaint is appropriate when the complaint fails to set forth a cause of action and the defendant can establish that the defect could not be cured by repleading." (Internal quotation marks omitted.) *Ferri* v. *Powell-Ferri*, 317 Conn. 223, 236, 116 A.3d 297 (2015).

In the present case, the trial court granted the defendant's motion for summary judgment on the ground that the plaintiff's complaint was insufficient because the negligence claims raised therein were preempted by the railroad act. Accordingly, resolution of this appeal requires us to examine the trial court's conclusion that the plaintiff's negligence claims are preempted by the railroad act.

In doing so, we note that the question of whether the plaintiff's negligence claims are preempted by the

railroad act is one of law, and, therefore, our review is plenary. "Whether state causes of action are preempted by federal statutes and regulations is a question of law over which our review is plenary." *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, 314 Conn. 433, 447, 102 A.3d 32 (2014); see also *Hackett* v. *J.L.G. Properties, LLC*, 285 Conn. 498, 502–504, 940 A.2d 769 (2008) (whether trial court's conclusion that municipal zoning regulations were preempted by federal law was a question of law over which court exercised plenary review). "[T]here is a strong presumption against federal preemption of state and local legislation. . . . This presumption is especially strong in areas traditionally occupied by the states . . . ." (Citation omitted; internal quotation marks omitted.) *Dowling* v. *Slotnik*, 244 Conn. 781, 794, 712 A.2d 396, cert. denied sub nom. *Slotnik* v. *Considine*, 525 U.S. 1017, 119 S. Ct. 542, 142 L. Ed. 2d 451 (1998).

"The ways in which federal law may [preempt] state law are well established and in the first instance turn on congressional intent. . . . Congress' intent to supplant state authority in a particular field may be express[ed] in the terms of the statute. . . . Absent explicit [preemptive] language, Congress' intent to supersede state law in a given area may nonetheless be implicit if a scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the [s]tates to supplement it, if the [a]ct of Congress . . . touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject, or if the goals sought to be obtained and the obligations imposed reveal a purpose to preclude state authority. . . .

"The question of preemption is one of federal law, arising under the supremacy clause of the United States constitution. . . . Determining whether Congress has

exercised its power to preempt state law is a question of legislative intent. . . . [A]bsent an explicit statement that Congress intends to preempt state law, courts should infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the [s]tates to supplement federal law . . . or where the state law at issue conflicts with federal law, either because it is impossible to comply with both . . . or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives . . . .'' (Citation omitted; internal quotation marks omitted.) *Hackett* v. *J.L.G. Properties, LLC*, supra, 285 Conn. 503–504.

Furthermore, the United States Supreme Court has explained that ''[w]here a state statute conflicts with, or frustrates, federal law, the former must give way. U.S. Const., [a]rt. VI, cl. 2; *Maryland* v. *Louisiana*, 451 U.S. 725, [746, 101 S. Ct. 2114, 68 L. Ed. 2d 576] (1981). In the interest of avoiding unintended encroachment on the authority of the [s]tates, however, a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find [preemption]. Thus, [preemption] will not lie unless it is 'the clear and manifest purpose of Congress.' *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, [230, 67 S. Ct. 1146, 91 L. Ed. 1447] (1947). Evidence of [preemptive] purpose is sought in the text and structure of the statute at issue. *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, [95, 103 S. Ct. 2890, 77 L. Ed. 2d 490] (1983). If the statute contains an express [preemption] clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' [preemptive] intent.'' *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658, 663–64, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993); see also id., 673–75 (concluding that negligence claim relating to failure to maintain adequate warning

devices at rail crossing was not preempted by railroad act, but negligence claim alleging excessive speed was preempted by railroad act).

A brief review of the railroad act provides context for our analysis. The railroad act "was enacted in 1970 to promote safety in all areas of railroad operations and to reduce [railroad related] accidents, and to reduce deaths and injuries to persons . . . . [Under the railroad act], the Secretary [of Transportation] is given broad powers to prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety . . . ." (Citations omitted; internal quotation marks omitted.) Id., 661–63; see also 49 U.S.C. § 20101 (2012) (statement of legislative purpose); 49 U.S.C. § 20103 (a) (2012) (delegating regulatory authority to Secretary of Transportation).

The railroad act contains an express preemption clause, codified at 49 U.S.C. § 20106, entitled "Preemption." That statute provides in relevant part: "(a) National Uniformity of Regulation.—(1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.

"(2) A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order—

"(A) is necessary to eliminate or reduce an essentially local safety or security hazard;

"(B) is not incompatible with a law, regulation, or order of the United States Government; and

"(C) does not unreasonably burden interstate commerce." 49 U.S.C. § 20106 (a) (2012).

In 2007, Congress amended the railroad act preemption clause by adding subsection (b). See Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1528, 121 Stat. 266, 453. That subsection, which is entitled "Clarification Regarding State Law Causes of Action," provides in relevant part: "Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party—

"(A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

"(B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

"(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a) (2)." 49 U.S.C. § 20106 (b) (1) (2012).

As a result of this amendment, federal courts have concluded that "the preemption analysis under the amended [railroad act] requires a two step process. We first ask whether the defendant allegedly violated either a federal standard of care or an internal rule that was created pursuant to a federal regulation. If so, the plaintiff's claim avoids preemption. [See 49 U.S.C. § 20106 (b) (1) (A) and (B) (2012)]. Otherwise, we move to the second step and ask whether any federal regulation

covers the plaintiff's claim. [See 49 U.S.C. § 20106 (a) (2) (2012)]. A regulation covers—and thus preempts—the plaintiff's claim if it 'substantially subsume[s] the subject matter' of that claim. [*CSX Transportation, Inc.* v. *Easterwood*, supra, 507 U.S. 664] (noting that the regulation must do more than 'touch upon or relate to [the] subject matter')." *Zimmerman* v. *Norfolk Southern Corp.*, 706 F.3d 170, 178 (3d Cir.), cert. denied, 571 U.S. 826, 134 S. Ct. 164, 187 L. Ed. 2d 41 (2013); see also *Grade* v. *BNSF Railway Co.*, 676 F.3d 680, 686 (8th Cir. 2012); *Henning* v. *Union Pacific Railroad Co.*, 530 F.3d 1206, 1214–16 (10th Cir. 2008).[5]

The parties agree that the plaintiff's claim does not allege that the defendant violated any regulation or order, or failed to comply with its own plan, rule, or standard of care that it adopted pursuant to a federal regulation. Accordingly, the parties agree that the appropriate preemption analysis is contained within 49 U.S.C. § 20106 (a) (2). This provision provides that a state law cause of action is preempted if the Secretary of Transportation or the Secretary of Homeland Security has "prescribe[d] a regulation or issue[d] an order *covering the subject matter* of the State requirement" on which the plaintiff's negligence claim is based. (Emphasis added.) 49 U.S.C. § 20106 (a) (2) (2012). Thus, the issue before this court is whether the Secretary of Transportation or the Secretary of Homeland Security has promulgated regulations covering the same subject matter as Connecticut negligence law pertaining to the selection of an interior track for a through train.

[5] To the extent that the trial court's decision can be read to conclude that the plaintiff's negligence claim relating to track selection is preempted by the railroad act solely because "there is no federal standard of care for the defendant to have violated," we disagree. Instead, we conclude that, under the two part test adopted by federal courts, if there is no express regulation governing the subject area of the plaintiff's complaint, the court must next consider whether there is a federal regulation or order covering the subject matter of state law related to the plaintiff's claim in order to resolve the question of preemption. Indeed, both parties agree on the applicable test.

As the United States Supreme Court has explained, "[t]o prevail on the claim that the regulations have [preemptive] effect, [a] petitioner must establish more than that they 'touch upon' or 'relate to' that subject matter . . . for 'covering' is a more restrictive term which indicates that [preemption] will lie only if the federal regulations substantially subsume the subject matter of the relevant state law. [See Webster's Third New International Dictionary (1961) p. 524] (in the phrase 'policy clauses covering the situation,' cover means 'to comprise, include, or embrace in an effective scope of treatment or operation'). The term 'covering' is in turn employed within a provision that displays considerable solicitude for state law in that its express [preemption] clause is both prefaced and succeeded by express saving clauses." (Citation omitted.) *CSX Transportation, Inc.* v. *Easterwood*, supra, 507 U.S. 664–65.

In the present case, the plaintiff's claim alleges that the defendant was negligent in selecting the track immediately adjacent to the platform to run a "through train." As we have explained, in order to resolve the plaintiff's appeal, we must determine whether there is a federal regulation that covers, or substantially subsumes, the plaintiff's claim. The defendant does not point to any federal regulation that expressly governs track selection. Indeed, the trial court recognized that, "[a]s both parties have conceded, there is no federal rule or regulation that specifically governs track selection."

Nevertheless, the trial court reasoned that, "[al]though there is not a federal regulation that specifically covers track selection, the federal regulations in regards to tracks is extensive and, therefore, subsume the subject matter of the plaintiff's claim." In support of its conclusion, the trial court relied on several specific regulations contained within part 213 of title 49 of the Code of Federal Regulations, which is entitled "Track Safety Standards." See 49 C.F.R. § 213.9 (2012) (setting speed

limits for trains operating on each class of track); 49 C.F.R. § 213.53 (2012) (measuring gage of track); 49 C.F.R. § 213.57 (2012) (establishing speed limitations based on curvature and elevation of track); 49 C.F.R. § 213.109 (2012) (establishing requirements for crossties); 49 C.F.R. § 213.121 (2012) (establishing requirements for rail joints); 49 C.F.R. § 213.231 et seq. (2012) (establishing requirements for track inspection). The trial court reasoned that, "[a]s part of an overall scheme to standardize railroad transportation and specifically as a scheme that expansively covers railroad track safety . . . the subject matter of the plaintiff's claim is clearly 'covered' and 'substantially subsumed' by these federal regulations." (Citation omitted; emphasis omitted.) We disagree.

We first turn to the regulations on which the trial court relied, namely, part 213 of title 49 of the Code of Federal Regulations. The scope of these regulations is explained as follows: "This part prescribes minimum safety requirements for railroad track that is part of the general railroad system of transportation. In general, the requirements prescribed in this part apply to specific track conditions existing in isolation. Therefore, a combination of track conditions, none of which individually amounts to a deviation from the requirements in this part, may require remedial action to provide for safe operations over that track. This part does not restrict a railroad from adopting and enforcing additional or more stringent requirements not inconsistent with this part." 49 C.F.R. § 213.1 (a) (2012). Accordingly, part 213 of title 49 of the Code of Federal Regulations expressly states that it provides minimum safety requirements and that conditions may be present that require a greater standard of care.

Indeed, although the regulations cited by the trial court touch upon tracks, nothing in those regulations indicates that they subsume the subject matter of select-

ing tracks for through trains. Those regulations set forth how the gage of a track is to be measured and the required size for various tracks. See 49 C.F.R. § 213.53 (2012). Another regulation regulates the maximum elevation of the outer rail on a curve. See 49 C.F.R. § 213.57 (2012). Other regulations regulate the components of a rail—i.e. crossties and rail joints. See 49 C.F.R. §§ 213.109 and 213.121 (2012). Yet another regulation delineates the speed a train can travel on tracks of various classes. See 49 C.F.R. § 213.9 (2012). Each of these regulations covers a different subject matter than that raised by the plaintiff's claim—namely, selection of an interior or exterior track for operation of a through train. None of the regulations relied on by the defendant or cited by the trial court even mentions selection of an interior or exterior track. Accordingly, the express terms of these provisions support a conclusion that the plaintiff's claim is not covered by the regulations.

Although no court has addressed a track selection claim similar to the plaintiff's claim in this case, a review of the case law regarding preemption of state law claims under the railroad act is instructive. For instance, in *CSX Transportation, Inc.* v. *Easterwood*, supra, 507 U.S. 667–68,[6] the United States Supreme Court held that the railroad act did not preempt a state common-law negligence claim regarding the railroad's duty to maintain warning devices at a railroad crossing. In doing so, the United States Supreme Court rejected the railroad's claim that the subject matter of the plaintiff's claim was covered by regulations requiring that all traffic control devices installed comply with the Federal Highway Administration's manual on uniform traffic control

[6] We recognize that *CSX Transportation, Inc.* v. *Easterwood*, supra, 507 U.S. 661–65, was decided prior to the 2007 amendment to the preemption provision in the railroad act. Nevertheless, it is well established that the interpretation of the preemption provision in *Easterwood* remains good law for the purpose of interpreting 49 U.S.C. § 20106 (a). See, e.g., *Zimmerman* v. *Norfolk Southern Corp.*, supra, 706 F.3d 177–78.

devices. Id., 665–66. Instead, the United States Supreme Court explained that, although the states were required to employ warning devices that conformed to standards set forth in the regulations in order to obtain federal funding, state negligence law always played a role in maintaining safety at railroad crossings, and "there is no explicit indication in the regulations . . . that the terms of the [f]ederal [g]overnment's bargain with the [s]tates require modification of this regime of separate spheres of responsibility." Id., 668. Accordingly, the United States Supreme Court reasoned that, "[i]n light of the relatively stringent standard set by the language of [the railroad act's preemption provision] and the presumption against preemption, and given that the regulations provide no affirmative indication of their effect on negligence law, [the court is] not prepared to find [preemption] solely on the strength of the general mandates of [regulations governing warning devices at railroad crossings]." Id.

On the other hand, in *Norfolk Southern Railway Co.* v. *Shanklin*, 529 U.S. 344, 352–53, 120 S. Ct. 1467, 146 L. Ed. 2d 374 (2000), the United States Supreme Court did conclude that a state law negligence claim alleging that there were inadequate warning signs at a railroad crossing was preempted when the federal regulations applicable to that railroad crossing required the installation of a particular warning device at a particular railway crossing. Accordingly, the United States Supreme Court concluded that, "[b]ecause those regulations establish requirements as to the installation of particular warning devices . . . when [those regulations] are applicable, state tort law is [preempted]. . . . Unlike the [regulations at issue in *Easterwood*, these regulations], displace state and private [decision-making] authority by establishing a [federal law] requirement that certain protective devices be installed or federal approval obtained. . . . As a result, those regulations

effectively set the terms under which railroads are to participate in the improvement of crossings." (Citations omitted; internal quotation marks omitted.) Id.[7]

The United States Court of Appeals for the Second Circuit also has examined whether a state law claim was preempted by the railroad act. In *Island Park, LLC* v. *CSX Transportation*, 559 F.3d 96, 108 (2d Cir. 2009), the Second Circuit concluded that a state agency order to close a private rail crossing was not preempted by the railroad act. Although it concluded that the closure order implicated railroad safety, it concluded that it was not preempted by the railroad act because the railroad act "allows states to impose rail safety requirements as long as they are not inconsistent with federal mandates. [The plaintiff] points to no federal rail safety regulation that covers rail crossing closures. Accordingly, the state closure order is not [preempted] by [the railroad act]." Id.

In *Strozyk* v. *Norfolk Southern Corp.*, 358 F.3d 268, 269 (3d Cir. 2004), the United States Court of Appeals for the Third Circuit concluded that a state common-law negligence claim against a railroad alleging poor visibility at a railroad crossing was not preempted by the railroad act. The railroad asserted that the plaintiff's claim was preempted by the regulations because the regulations addressing the installation of warning devices at railroad crossings mentioned limited visibility. Id., 273. The Third Circuit rejected the railroad's claim and concluded that a regulation's "bare mention" of limited visibility did "not indicate an intent to regulate" that condition. Id.

Similarly, the United States Court of Appeals for the Sixth Circuit concluded that a state law negligence

[7] As noted subsequently in this opinion, a separate claim that the railroad had failed to remove excessive vegetation from the area surrounding the crossing was the subject of further proceedings on remand. See *Shanklin* v. *Norfolk Southern Railway Co.*, 369 F.3d 978, 987 (6th Cir. 2004).

claim alleging that vegetative growth on railroad property obstructed the motorist's view of an oncoming train was not preempted. *Shanklin* v. *Norfolk Southern Railway Co.*, 369 F.3d 978, 987 (6th Cir. 2004); see also footnote 8 of this opinion. The railroad asserted that the plaintiff's claim was preempted by regulations under the railroad act that addressed the installation of warning devices and one that provided that "[v]egetation on railroad property which is on or immediately adjacent to [the] roadbed shall be controlled so that it does not . . . [o]bstruct visibility of railroad signs and signals," preempted the plaintiff's claim. (Internal quotation marks omitted.) Id. The Sixth Circuit explained that the regulation regarding vegetation preempts any state law claim "regarding vegetative growth that blocks a sign immediately adjacent to a crossing, but it does not impose a broader duty to control vegetation so that it does not obstruct a motorist's visibility of oncoming trains." (Internal quotation marks omitted.) Id. Accordingly, the Sixth Circuit concluded that the plaintiff's claim was not preempted because, although these regulations touched upon vegetation, they did not substantially subsume the subject matter of the plaintiff's claim. Id., 988; see also 49 C.F.R. § 213.37 (b) (1993).

The Third Circuit addressed preemption under the railroad act again in *MD Mall Associates, LLC* v. *CSX Transportation, Inc.*, 715 F.3d 479, 491 (3d Cir. 2013), cert. denied, 571 U.S. 1126, 134 S. Ct. 905, 187 L. Ed. 2d 778 (2014). In that case, the Third Circuit concluded that a mall owner's state law claim against a railroad owner alleging negligence and storm water trespass was not preempted by the railroad act. Id., 490–91. In doing so, the Third Circuit rejected the railroad owner's claim that a regulation promulgated under the railroad act, which requires that a railroad's drainage facilities "under or immediately adjacent" to the track "be maintained and kept free of obstruction" preempted the

mall owner's state law claims. (Internal quotation marks omitted.) Id.; see also 49 C.F.R. § 213.33 (2010). The Third Circuit explained that it could not "read the silence of [49 C.F.R.] § 213.33 on a railroad's duties to its neighbors when addressing track drainage as an express abrogation of state storm water trespass law. Given that the [railroad act] provides no express authorization for disposing of drainage onto an adjoining property, the presumption must be that state laws regulating such action survive . . . ." (Citation omitted.) *MD Mall Associate, LLC* v. *CSX Transportation, Inc.*, 491.

Another instructive case is *Haynes* v. *National Railroad Passenger Corp.*, 423 F. Supp. 2d 1073 (C.D. Cal. 2006). In *Haynes*, the estate and children of a passenger who suffered a deep vein thrombosis after traveling on an Amtrak train from Chicago to Los Angeles brought an action in state court alleging that Amtrak violated common-law and statutory duties of care that common carriers must exercise with respect to their passengers. Id., 1077. Specifically, the plaintiffs alleged that dangerous seats and seating configurations in Amtrak trains and Amtrak's failure to warn passengers about deep vein thrombosis caused the decedent to suffer deep vein thrombosis and die. Id., 1078.

The railroad filed a motion to dismiss for failure to state a claim on which relief can be granted. Id., 1077. In its motion, the railroad claimed, inter alia, that the plaintiffs' claims were preempted by the railroad act. Id., 1081. Specifically, the railroad claimed that the federal regulations addressing seats and their configuration on passenger trains covered the subject matter of the plaintiffs' complaint, thereby rendering the plaintiff's claim preempted by the railroad act. Id., 1082. The United States District Court for the Central District of California explained that federal regulations addressed safe passenger seats, how seats must be fastened to

the car body, the load the seats must be able to withstand, and the inspection process for train seats. Id., 1082.

Nevertheless, the court explained that "[t]he regulations relied upon by the [railroad] govern seat safety for circumstances involving train crashes and broken seats. There is no discussion in the regulations of leg room, seat pitch, or ensuring that seats do not contribute to discomfort or illnesses like [deep vein thrombosis]. The [c]ourt finds that there are no federal safety or security regulations that substantially subsume state tort actions regarding potential of [deep vein thrombosis] from poorly designed seats or seating arrangements." Id.

The court also concluded that there were no federal regulations that substantially subsumed the plaintiffs' claims based on a duty to warn passengers about deep vein thrombosis. Id. The court reasoned that, although there are federal regulations regarding passenger safety on trains in an emergency situation, because deep vein thrombosis arises in nonemergency situations, the safety regulations did not subsume the subject matter of deep vein thrombosis warnings. Id.

The rationale employed in *Haynes* is instructive in the present case because it demonstrates that, even when courts have found an extensive regulatory scheme in a particular area—such as passenger seating on trains—the breadth of regulation does not mean that the subject matter of a complaint is substantially subsumed by the regulations.[8]

[8] In *Haynes* v. *National Railroad Passenger Corp.*, supra, 423 F. Supp. 2d 1073, the railroad also asserted that the plaintiffs' claims were preempted under the commerce clause of the United States constitution because allowing states to regulate these areas would place an undue burden on the flow of commerce across state borders. See U.S. Const., art. I, § 8, cl. 3. The court concluded that the plaintiffs' claims regarding seats and seat configuration were preempted under a dormant commerce clause analysis but that the plaintiffs' claims relating to the railroad's duty to warn passengers were not. *Haynes* v. *National Railroad Passenger Corp.*, supra, 1083–84.

A review of the case law regarding preemption under the railroad act demonstrates that courts have been reticent to find that a regulatory scheme covers or substantially subsumes the subject matter of a plaintiff's claim. Indeed, even when regulations form a broad regulatory scheme or mention the subject of a plaintiff's claim, courts have not found preemption unless the subject matter is clearly subsumed by the regulations. This construction of the railroad act is consistent with the principle that, "[i]n the interest of avoiding unintended encroachment on the authority of the [s]tates . . . a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find [preemption]. Thus, [preemption] will not lie unless it is 'the clear and manifest purpose of Congress.' " *CSX Transportation, Inc.* v. *Easterwood*, supra, 507 U.S. 663–64. Furthermore, the limited application of preemption of the railroad act is also consistent with the express preemption provision contained in the railroad act, which "displays considerable solicitude for state law . . . ." Id., 665.

In the present case, the defendant asserts that the trial court correctly concluded that, although there is no regulation expressly addressing the selection of an interior or exterior track for trains, the general regulatory scheme of track classification substantially subsumes the subject matter of the plaintiff's claim. We disagree.

The defendant claims, and trial court concluded, that *Zimmerman* v. *Norfolk Southern Corp.*, supra, 706 F.3d 170, supports the defendant's contention that the plaintiff's claim is preempted by the act. In *Zimmerman*, the plaintiff was a motorcyclist who was partially paralyzed in a collision with a train at a railroad crossing. Id., 175. The plaintiff claimed, inter alia, that the railroad should have been liable for misclassification of the track. Id., 186–87. Specifically, the plaintiff claimed that

the railroad violated a federal standard of care established by part 213 of title 49 of the Code of Federal Regulations, which contains regulations for each class of tracks. Id., 187. The plaintiff claimed that, under these regulations, the railroad was obligated to classify the track as class two or higher due to the limited sight distance on the track. Id. The Third Circuit rejected the plaintiff's claim that there was a federal standard of care regarding classification of the tracks based on sight distance. Id. Instead, the Third Circuit concluded that no regulation established the sight distance necessary for each class of tracks, so no relevant federal standard of care existed. Id.

The Third Circuit further explained that, "[d]espite the absence of a federal standard of care, [the plaintiff] may still avoid preemption if his claim falls outside the scope of the original [railroad act] preemption provision. . . . As we have previously made clear, state claims are within the scope of this provision if federal regulations 'cover' or 'substantially subsume' the subject matter of the claims. . . . The regulations must do more than 'touch upon or relate to that subject matter.' " (Citations omitted.) Id. The Third Circuit then concluded that the regulations in part 213 of title 29 of the Code of Federal Regulations "subsume[d] [the plaintiff's] misclassification claim. These regulations establish varying requirements for each class of tracks —governing everything from gage, alinement, and elevation, to crossties, curve speed, and rail joints." Id.

The trial court in this case relied on the following language from *Zimmerman*: "The regulations are part of a broad scheme to standardize railroad tracks. Admittedly, there is no regulation that classifies tracks based on sight distance. But the breadth of the scheme implies a decision not to classify on that basis. At the very least, it implies that the federal government did not want states to decide how tracks would be classified. We

doubt that the federal government would create a detailed system with the expectation that states would impose extra classification requirements—especially given the risk that the requirements would vary from state to state. This regulatory scheme preempts [the plaintiff's] misclassification claim." Id. The trial court in this case then concluded that, "[a]s in *Zimmerman*, the plaintiff's track selection claim is subsumed by this regulatory scheme. Although there is no regulation that classifies tracks on the basis of track selection, such as the choice of using an exterior or interior track, 'the breadth of the scheme implies a decision not to classify on that basis.' . . . As part of an overall scheme . . . that expansively covers railroad track safety . . . the subject matter of the plaintiff's claim is clearly 'covered' *and* 'substantially subsumed' by these federal regulations. . . . The plaintiff's track selection claim is therefore preempted by this regulatory scheme." (Citations omitted; emphasis in original.)

We disagree that the foregoing analysis from *Zimmerman* is applicable to the plaintiff's claim in the present case. Unlike *Zimmerman*, the claim in this case is not based on an area that is clearly covered by the federal regulations. In *Zimmerman*, it was undisputed that the regulations dictate whether a track is classified as class one, two or three on the basis of various factors set forth in those regulations. *Zimmerman* v. *Norfolk Southern Corp.*, supra, 706 F.3d 179. It was also undisputed in *Zimmerman* that the basis of the claim at issue was whether the defendant properly classified the track. Id., 187. In *Zimmerman*, the plaintiff's claim essentially sought to impose another factor into the decision of how to classify tracks—namely, the sight distance of a particular track. Id. In concluding that the claim in *Zimmerman* was preempted, the Third Circuit concluded that the regulations already covered and subsumed the factors by which a track should be classified as class one, two or three. Id.

Indeed, as the United States Court of Appeals for the Fifth Circuit has explained, preemption under the railroad act "is even more disfavored than preemption generally. . . . The restrictive terms of its preemption provision [indicate] that [preemption] will lie only if the federal regulations *substantially subsume* the subject matter of the relevant state law. . . . When applying [railroad act] preemption, the [c]ourt eschews broad categories such as railroad safety, focusing instead on the specific subject matter contained in the federal regulation. . . . In sum, when deciding whether the [railroad act] preempts state laws designed to improve railroad safety, we interpret the relevant federal regulations narrowly to ensure that the careful balance that Congress has struck between state and federal regulatory authority is not improperly disrupted in favor of the federal government." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *United Transportation Union* v. *Foster*, 205 F.3d 851, 860 (5th Cir. 2000).

In the present case, the regulations do not differentiate between interior or exterior tracks and, most certainly, do not provide a set of factors by which interior or exterior tracks are chosen. Accordingly, the regulations do not cover the selection of interior or exterior tracks. Unlike the trial court, we are not persuaded that the failure to address the selection of interior or exterior tracks implies a decision not to differentiate between the two. As the case law we have discussed herein demonstrates, in light of the limited preemption provision in the railroad act, the mere exclusion of a topic from the federal regulations does not imply an intent to preempt state law on that topic.

On the basis of the foregoing, although we agree with the trial court that there are extensive federal regulations that address various topics related to tracks, we cannot conclude that the subject matter of the plaintiff's negligence claim—namely, the selection of an

exterior track for operating a through train—is "covered by" a federal regulation. To the contrary, the federal regulations relating to tracks touch upon, but do not substantially subsume, the subject matter of the plaintiff's complaint.[9]

Our conclusion is further buttressed by a review of cases in which a court has found that a federal regulation covers, or substantially subsumes, the subject matter of a complaint. For instance, in *In re Derailment Cases*, 416 F.3d 787, 794 (8th Cir. 2005), the United States Court of Appeals for the Eighth Circuit concluded that the plaintiff's claim alleging negligent inspection of freight cars was preempted by the railroad act. The Eighth Circuit concluded that the plaintiff's claim was preempted under the railroad act because "[i]t is clear that the [federal railway administration's] regulations are intended to prevent negligent inspection by setting forth minimum qualifications for inspectors, specifying certain aspects of freight cars that must be inspected, providing agency monitoring of the inspectors, and establishing a civil enforcement regime. These intentions are buttressed by the [federal railway administration] inspection manual for federal and state inspectors." Id.; see also *BNSF Railway Co.* v. *Swanson*, 533 F.3d 618, 619–20 (8th Cir. 2008) (concluding that state statute making it illegal to, inter alia, "discipline, harass or intimidate [a railroad] employee to discourage the employee from receiving medical

[9] We also note that, in California, the California High-Speed Train Project regulates track selection for through trains and has done so for almost ten years. See California High-Speed Train Project, "Technical Memorandum 2.2.4: High-Speed Train Station Platform Geometric Design" (2010) p. 11, available at http://www.hsr.ca.gov/docs/programs/eir_memos/Proj_Guidelines_TM2_2_4R01.pdf (last visited July 3, 2019). This memorandum provides that, "[w]here practical, do not locate the platform adjacent to mainline high-speed tracks. If this is not possible, passenger access to platforms adjacent to tracks where trains may pass through stations without stopping may require mitigation . . . ." Id. The existence of the regulatory scheme in California further supports our conclusion that the railroad act does not preempt state law governing track selection.

attention" was preempted by federal regulation mandating that railroads adopt policy statement declaring that "harassment or intimidation of any person that is calculated to discourage or prevent such person from receiving proper medical treatment or from reporting such accident, incident, injury or illness will not be permitted or tolerated" [emphasis omitted; internal quotation marks omitted]), citing 49 C.F.R. § 225.33 (a) (1) (2008). As these cases demonstrate, courts have found preemption under the railroad act only when there is a federal regulation that thoroughly addresses the safety concern raised in the plaintiff's complaint, not merely mentions it or tangentially relates to it. See *CSX Transportation, Inc.* v. *Easterwood*, supra, 507 U.S. 664–65 (regulations cover subject matter of plaintiff's complaint when they "comprise, include, or embrace [that concern] in an effective scope of treatment or operation" [internal quotation marks omitted]).

The defendant further asserts that the plaintiff's claim is preempted because, although framed as a claim relating to track selection, it is essentially an excessive speed claim, which is preempted by the railroad act. We disagree.

It is well established that there are federal regulations that cover the subject matter of train speed with respect to track conditions. See id., 675 ("concluding that relevant regulation "should be understood as covering the subject matter of train speed with respect to track conditions, including the conditions posed by grade crossings"), citing 49 C.F.R. § 213.9 (a) (1992). To be clear, the plaintiff in this case does not assert that the defendant violated a federal standard of care because the train was not traveling above the speed limit. Cf. *Zimmerman* v. *Norfolk Southern Corp.*, supra, 706 F.3d 179. Accordingly, if the plaintiff's claim was based on the speed of the train, it would be preempted by the railroad act

because all parties agree that the train was traveling within the established speed limit.[10]

The plaintiff claims that the defendant "violated practices and customs with respect to track selection by moving a through train traveling in excess of seventy miles per hour on the track immediately adjacent to the platform when reasonable care and general practice of [the defendant] required that train to be on an interior track away from the platform." The defendant asserts that this "can only be characterized as a speed claim." We disagree.

We find *Dresser* v. *Union Pacific Railroad Co.*, 282 Neb. 537, 809 N.W.2d 713 (2011), instructive. In *Dresser*, a motor vehicle passenger who was injured in a collision with a train brought a state law negligence action against the railroad company. Id., 538. The complaint alleged that the train crew was negligent in failing to maintain a proper lookout, failing to slow or stop the train to avoid the collision, and failing to sound the horn. Id., 540. The trial court concluded that the plaintiff's claim was preempted. Id., 541. The trial court reasoned that the engineer's failure to exercise ordinary care to avoid the accident by failing to slow or stop the train was essentially an excessive speed claim, which was preempted by the railroad act. Id., 549.

The Supreme Court of Nebraska reversed the judgment of the trial court. Id., 553. In doing so, the Supreme Court of Nebraska reasoned: "We do not agree with

[10] The plaintiff's initial complaint included a claim that the defendant "failed to maintain a proper operating speed of the train . . . ." The defendant subsequently filed motions in limine seeking to preclude the plaintiff from offering any evidence, testimony, or argument regarding a claim of negligence based on the speed of the train and any evidence, testimony, or argument regarding any claim preempted by the railroad act or the Interstate Commerce Commission Termination Act. The trial court granted the defendant's motions. Thereafter, the plaintiff filed the operative complaint, which does not contain any claim related to the speed of the train. Indeed, the plaintiff concedes that "the sole remaining theory of negligence is limited to track selection."

the [trial] court that appellants' state law negligence claim based on [the railroad's] alleged failure to exercise ordinary care once it appeared that a collision would probably occur is speed based and thus preempted. State tort law is not preempted 'until' a federal regulation 'cover[s]' the same subject matter, and we are not presented with any federal regulations that cover a railroad's duty to exercise ordinary care in situations where collisions are imminent. The mere fact that the speed the train is traveling is tangentially related to how quickly it can be stopped does not transform the claim into an excessive speed claim. Nebraska tort law duties to exercise reasonable care could be violated even if the federal train speed limits are being followed." (Footnote omitted.) Id.

Similarly, in *Bashir* v. *National Railroad Passenger Corp.*, 929 F. Supp. 404, 412 (S.D. Fla. 1996), aff'd sub nom. *Bashir* v. *Amtrak*, 119 F.3d 929 (11th Cir. 1997), the United States District Court for the Southern District of Florida concluded that a plaintiff's state law negligence claims based on a failure to stop was not preempted by the railroad act. The railroad had asserted that the failure to stop claims were covered by the federal regulations on excessive speed. Id. The court rejected that claim, reasoning that the railroad was "quite correct" that the relevant regulation; see 49 C.F.R. § 213.9 (1993); "preempts inconsistent state laws regarding speed. As the [c]ourt understands [the] [p]laintiff's negligent failure to stop claims, however, they are not necessarily inconsistent with [that regulation]. This section simply prescribes the maximum speed at which trains may operate given certain track types and conditions. It is silent as to the instances in which a train must stop to avoid colliding with an obstruction on the tracks. State laws that direct a train to stop when, for instance, a child is standing on the tracks do not conflict with federal speed limits that prescribe the speed at which the same train may travel in normal circumstances on the same track. Indeed, if

[the railroad's] position were correct, railroads would be insulated from state tort liability regardless of whether a train attempted to stop to avoid even the most obvious obstructions, simply because federal law prescribes the speed at which they may travel absent obstructions. *Easterwood* does not support this result." *Bashir* v. *National Railroad Passenger Corp.*, supra, 412.

Like the claims in *Dresser* and *Bashir*, the speed of the train in the present case is tangentially related to the plaintiff's claim. In other words, the plaintiff's claim alleges that the defendant was negligent in choosing to operate a train that did not stop at the Noroton Heights station on the track immediately adjacent to the platform. Because the plaintiff's claim relates to the fact that the train did not stop at the Noroton Heights station, the speed of that train is tangentially related to the plaintiff's claim. As the courts in *Dresser* and *Bashir* explained, title 49 of the Code of Federal Regulations, § 213.9, prescribes only the maximum speed at which trains may operate on certain track classifications. Nothing in that regulation covers the subject of the plaintiff's claim—namely, whether it is negligent to operate a through train on a track immediately adjacent to the platform when another track is available. Accordingly, we disagree that the plaintiff's claim is essentially an excessive speed claim that is preempted by the railroad act.

In light of the presumption against preemption, the narrow preemption provision in the railroad act, the express acknowledgment in title 49 of the Code of Federal Regulations, § 213.1, that the federal regulations provide the minimum safety standards, and the lack of a regulatory provision expressly addressing track selection, we cannot conclude that the defendant has met its burden of demonstrating that the plaintiff's claim was preempted under the railroad act. Accordingly, we

conclude that the trial court improperly granted the defendant's motion for summary judgment.

The judgment is reversed and the case is remanded with direction to deny the defendant's motion for summary judgment and for further proceedings according to law.

In this opinion the other justices concurred.

ORDERS

CONNECTICUT REPORTS

VOL. 332

FATIMA K. DE ALMEIDA-KENNEDY *v.*
JAMES KENNEDY

The defendant's petition for certification to appeal from the Appellate Court, 188 Conn. App. 670 (AC 40997), is denied.

James Kennedy, self-represented, in support of the petition.

Decided June 26, 2019

EDWIN LEON, JR. *v.* COMMISSIONER
OF CORRECTION

The petitioner Edwin Leon, Jr.'s petition for certification to appeal from the Appellate Court, 189 Conn. App. 512 (AC 41039), is denied.

Mark Rademacher, assistant public defender, in support of the petition.

Laurie N. Feldman, special deputy assistant state's attorney, in opposition.

Decided June 26, 2019

MICHAEL ARONOW *v.* FREEDOM OF INFORMATION COMMISSION

The plaintiff's petition for certification to appeal from the Appellate Court, 189 Conn. App. 842 (AC 41297), is denied.

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

Michael Aronow, self-represented, in support of the petition.

Kathleen K. Ross, in opposition.

Decided June 26, 2019

JUDITH BURG *v.* NORTHEAST SPECIALTY CORPORATION

The plaintiff's petition for certification to appeal from the Appellate Court, 189 Conn. App. 904 (AC 41903), is denied.

Clifford Thier, in support of the petition.

Dawn D. McDonald, in opposition.

Decided June 26, 2019

STATE OF CONNECTICUT *v.* MARCUS H.

The defendant's petition for certification to appeal from the Appellate Court, 190 Conn. App. 332 (AC 39379/AC 40796), is denied.

Lisa J. Steele, assigned counsel, in support of the petition.

Jennifer F. Miller, assistant state's attorney, in opposition.

Decided June 26, 2019

GREGG FISK *v.* TOWN OF REDDING ET AL.

The named defendant's petition for certification to appeal from the Appellate Court, 190 Conn. App. 99 (AC 40216), is granted, limited to the following issue:

"Did the Appellate Court correctly determine that the jury's verdict should be set aside because the jury's response to the first special interrogatory, that the condition of an unfenced retaining wall was inherently dangerous, was fatally inconsistent with its response to the third special interrogatory, that the defendant's use of the land nevertheless was not unreasonable?"

Thomas R. Gerarde, in support of the petition.

A. Reynolds Gordon and *Frank A. DeNicola, Jr.*, in opposition.

Decided June 26, 2019

STAMFORD HOSPITAL *v.* CHAIM SCHWARTZ ET AL.

The petition by the defendants Chaim Schwartz and Rena Gelb for certification to appeal from the Appellate Court, 190 Conn. App. 63 (AC 40870), is denied.

Chaim Schwartz, self-represented, and *Rena Gelb*, self-represented, in support of the petition.

Decided June 26, 2019

PENNY OUDHEUSDEN *v.* PETER OUDHEUSDEN

The plaintiff's petition for certification to appeal from the Appellate Court, 190 Conn. App. 169 (AC 41050), is granted, limited to the following issues:

"1. Did the Appellate Court correctly conclude that the trial court had erroneously engaged in 'double dipping' by awarding the plaintiff alimony from income generated by the defendant's businesses and also awarding the plaintiff a percentage of those businesses in its division of property?

"2. Did the Appellate Court correctly conclude that the trial court had abused its discretion by failing to enter financial orders that equitably divided the marital estate?"

Scott T. Garosshen and *Kenneth J. Bartschi*, in support of the petition.

Yakov Pyetranker, in opposition.

Decided June 26, 2019

WELLS FARGO BANK, N.A. *v.* JAMES R. FITZPATRICK ET AL.

The petition by the defendants James R. Fitzpatrick and Marsha A. Fitzpatrick for certification to appeal from the Appellate Court, 190 Conn. App. 231 (AC 41113), is denied.

Bryan L. LeClerc, in support of the petition.

J. Patrick Kennedy and *David Bizar*, in opposition.

Decided June 26, 2019

Cumulative Table of Cases
Connecticut Reports
Volume 332

(Replaces Prior Cumulative Table)

Aronow *v.* Freedom of Information Commission (Order) . . . 910
Bank of America, N.A. *v.* Grogins (Order) . . . 902
Benjamin *v.* Commissioner of Correction (Order) . . . 906
Boisvert *v.* Gavis. . . . 115
Third-party petition for visitation; motion to dismiss for lack of subject matter jurisdiction; claim that defendant's postjudgment offer of visitation deprived court of subject matter jurisdiction; whether defendant established that his postjudgment offer of visitation was made in good faith and with intention of allowing visitation; whether trial court's contempt order was void for lack of subject matter jurisdiction; claim that statute (§ 46b-59) implicitly required trial court to include provision in visitation order directing third party to abide by fit parent's decisions regarding minor child's care during visitation; claim that due process clause compels trial court ordering third-party visitation to include provision requiring third party to abide by all of fit parent's decisions regarding minor child's care during visitation; whether § 46b-59 was unconstitutional as applied to facts of case; reviewability of claim that amount of visitation ordered by trial court violated defendant's fundamental parental rights under due process clause of fourteenth amendment to United States constitution.
Brewer *v.* Commissioner of Correction (Order) . . . 903
Burg *v.* Northeast Specialty Corp. (Order) . . . 910
Cancel *v.* Commissioner of Correction (Order) . . . 908
De Almeida-Kenney *v.* Kennedy (Order) . . . 909
Deroy *v.* Reck (Order) . . . 907
Deutsche Bank National Trust Co. *v.* Speer (Order) . . . 907
Doe *v.* Dept. of Mental Health & Addiction Services (Order) . . . 901
Fiano *v.* Old Saybrook Fire Co. No. 1, Inc.. . . . 93
Negligence; summary judgment; vicarious liability; certification from Appellate Court; claim that Appellate Court improperly upheld trial court's granting of summary judgment in favor of defendant fire company and defendant town on ground that there was no genuine issue of material fact as to whether individual defendant was acting within scope of his employment with fire company at time of motor vehicle accident giving rise to plaintiff's action; claim that individual defendant, by being in close proximity to fire company's premises, provided benefit to fire company; interplay between workers' compensation law and doctrine of respondeat superior, discussed.
Fields *v.* Commissioner of Correction (Order) . . . 904
Fisk *v.* Redding (Order) . . . 911
Fletcher *v.* Lieberman (Order) . . . 909
Gaffney *v.* Commissioner of Correction (Order) . . . 903
Geriatrics, Inc. *v.* McGee . . . 1
Breach of contract; claim under Connecticut Uniform Fraudulent Transfer Act (CUFTA) (§ 52-552a et seq.); unjust enrichment; agency principles in context of power of attorney, discussed; whether trial court improperly rejected plaintiff's fraudulent transfer claim on ground that defendant's transfer of debtor's assets pursuant to power of attorney was not transfer made by debtor under CUFTA; whether trial court improperly failed to consider agency relationship between defendants and to apply agency principles in its analysis of plaintiff's CUFTA claim; whether trial court improperly rendered judgment for defendant on plaintiff's unjust enrichment claim.
Girolametti *v.* Michael Horton Associates, Inc. . . . 67
Construction; arbitration; res judicata; privity; summary judgment; certification from Appellate Court; whether Appellate Court properly reversed trial court's denial of defendant subcontractors' motions for summary judgment on ground that defendant subcontractors were in privity with defendant general contractor for purposes of res judicata; whether Appellate Court correctly concluded that

plaintiffs' claims were barred by res judicata because they could have been raised during prior arbitration between plaintiffs and general contractor; whether Appellate Court properly adopted rebuttable presumption that subcontractors are in privity with general contractor on construction project for purposes of res judicata; claim that application of presumption of privity would be unfair; claim that Appellate Court improperly concluded, on basis of parties' contractual relationships, that defendant subcontractors were in privity with general contractor; claim that presumption of privity was ill suited for complexities of commercial construction industry; whether presumption of privity should apply under facts of present case; claim that Appellate Court's conclusion that general contractor was in privity with defendant subcontractors was inconsistent with arbitrator's factual finding that contract did not obligate general contractor to perform or to be responsible for all design and engineering aspects of construction project.

Girolametti *v.* VP Buildings, Inc. (See Girolametti *v.* Michael Horton Associates, Inc.) . . 67
Guijarro *v.* Antes (Order) . . . 901
Harvey *v.* Department of Correction (Order) . . . 905
In re Probate Appeal of Fumega-Serrano (Order) . . . 906
Leon *v.* Commissioner of Correction (Order) . . . 909
Murphy *v.* Darien . . . 244

Negligence; summary judgment; claim that defendant railroad company negligently operated train on track immediately adjacent to boarding platform when another track was available; whether trial court correctly concluded that claim of negligent track selection was preempted under Federal Railroad Safety Act of 1970 (49 U.S.C. § 20101 et seq.); federal preemption of state laws, discussed.

Northrup *v.* Witkowski . . . 158

Negligence; claim that municipal defendants' failure to properly repair and maintain municipal catch basin caused flooding of plaintiffs' property; certification from Appellate Court; whether Appellate Court correctly concluded that trial court properly had granted motion for summary judgment filed by defendants on basis of governmental immunity; whether municipal duties with respect to storm drainage system are ministerial or discretionary in nature; Spitzer *v.* Waterbury *(113 Conn. 84), to extent that it held that repair and maintenance of municipally owned drainage systems are ministerial rather than discretionary functions, overruled.*

Office of Chief Disciplinary Counsel *v.* Miller (Order) . . . 908
Oudheusden *v.* Oudheusden (Order) . . . 911
Praisner *v.* State (Order) . . . 905
Presidential Village, LLC *v.* Perkins . . . 45

Summary process; motion to dismiss; certification from Appellate Court; whether inclusion of undesignated charges for obligations other than rent in pretermination notice that asserted only nonpayment of rent as ground for termination of tenancy in federally subsidized housing rendered notice jurisdictionally defective; whether Appellate Court improperly reversed trial court's judgment of dismissal; claim that defect in pretermination notice was not jurisdictional; federal regulations (24 C.F.R. § 247) governing use and occupancy of federally subsidized housing and their relationship to protection of low income tenants, discussed.

Stamford Hospital *v.* Schwartz (Order) . . . 911
State *v.* Bethea (Order) . . . 904
State *v.* Gonzalez (Order) . . . 901
State *v.* Marcus H. (Order) . . . 910
State *v.* Montanez (Order) . . . 907
Sutera *v.* Natiello (Order) . . . 908
State *v.* Sinclair . . . 204

Possession of narcotics with intent to sell by person who is not drug-dependent; claim that defendant's constitutional right to confrontation was violated; claim of prosecutorial improprieties; certification from Appellate Court; whether certain statements to which police officer testified at trial in discussing public motor vehicle inspection record constituted testimonial hearsay resulting in constitutional violation or were nontestimonial and evidentiary in nature; testimonial statements and nontestimonial statements, distinguished; whether Appellate Court correctly concluded that certain improper remarks by prosecutor during closing argument did not deprive defendant of due process right to fair trial.

U.S. Bank National Assn. *v.* Kupczyk (Order) . . . 904
U.S. Bank National Assn. *v.* Robles (Order) . . . 906
Wells Fargo Bank, N.A. *v.* Fitzpatrick (Order) . . . 912

Williams *v.* State (Order) 902
Wilmington Trust Co. *v.* Bachelder (Order) 903
Yuille *v.* Parnoff (Order) 902

CONNECTICUT APPELLATE REPORTS

Vol. 191

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

ROBERT CLASBY ET AL. *v.* EDWARD ZIMMERMAN ET AL.

(AC 41463)

Lavine, Prescott and Elgo, Js.

Syllabus

The defendant general contractor, B Co., appealed to this court from the judgment of the trial court denying its application to confirm an arbitration award made in connection with a prior action the plaintiff homeowners had brought against B Co. and its owners, the defendants E and L. The plaintiffs had hired B Co. to raise and remodel their home, and, after becoming dissatisfied with B Co.'s work, they commenced the underlying action seeking damages for, inter alia, breach of contract. Prior to trial, the parties, in an effort to settle their issues and allow B Co. to complete the project, signed a stipulation that included an agreement to resolve their disputes through arbitration, and the plaintiffs

thereafter withdrew their action. The arbitration agreement provided, inter alia, that the parties would submit their issues regarding the renovations to an arbitration panel, which was given broad oversight authority to determine what work remained to be done on those issues and the price to be paid for that work, and that the plaintiffs agreed to pay the amount determined by the panel to be due for the completion of the project. In February, 2017, the panel issued an award, which expressly stated that it was final as to those costs that had been proven but that it was interim as to those costs yet to be proven to complete the project. The award further specified that the cost to complete certain cabinetry work was $76,500, of which $24,643.50 had been paid to date by the plaintiffs, and noted the remaining balance due for the cabinetry. Neither party filed a motion to vacate, modify or correct the February, 2017 award. Thereafter, in light of an ongoing dispute between the parties concerning B Co.'s claim that, pursuant to the February, 2017 award, it was entitled to be paid the entire $76,500 for the cabinetry work, the panel issued a second award in August, 2017. In the August, 2017 award, the panel found that the parties had agreed to a design change that had reduced the cost of the cabinetry by approximately $20,000 and clarified that, contrary to B Co.'s claim, because the cabinetry work had not been completed when the panel issued the February, 2017 award, the $76,500 cost it attributed to the cabinetry had not been a final determination, as the actual cost to complete the cabinetry had been unknown and unproven at the time. Neither party filed a motion to vacate, modify or correct the August, 2017 award. Subsequently, B Co. filed an application to confirm the February, 2017 award. B Co. also sought an order vacating the August, 2017 award, and an order that the plaintiffs pay B Co. the entire $76,500 cost of the cabinetry work as set forth in the February, 2017 award, rather than the reduced amount reflecting the actual cost of the cabinetry work as set forth in the August, 2017 award. The trial court denied B Co.'s application to confirm the award, and B Co. filed an amended appeal with this court. *Held*:

1. The trial court improperly denied B Co.'s application to confirm the February, 2017 award; where, as here, B Co. filed a timely application to confirm the February, 2017 award within one year after it was rendered, and the parties failed to timely file any motion to vacate, modify or correct that award as required by the thirty day statutory (§ 52-420) limitation period, the court was required, pursuant to statute (§ 52-417), to confirm the award unless it was vacated, modified or corrected.
2. The trial court correctly denied B Co.'s request that it vacate the August, 2017 award and hold the plaintiffs responsible for the cost of the cabinetry work as set forth in the February, 2017 award: because B Co. failed to timely file an application to vacate, modify or correct the August, 2017 award, which reduced the cost of the cabinetry work by more than $20,000 and clarified that the $76,500 for the cabinetry work in the February, 2017 award had been an interim placeholder pending the determination of the actual cost, B Co. thereby consented to its

terms, the trial court lacked any authority to invalidate the award, which was binding on the parties and not subject to judicial scrutiny, and the court was required to defer to the arbitration panel's clarification; moreover, the February, 2017 award expressly provided, with respect to the cost of the uncompleted cabinetry work, that it was an interim determination on the basis of the evidence available to that date, such that it was reasonable to conclude that the $76,500 cost was not intended to reflect a final and binding determination, and the parties were on notice that the cost was subject to modification by the arbitration panel, which had been granted broad authority by the parties in their submission.

Argued February 4—officially released July 9, 2019

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendants filed a counterclaim; thereafter, the plaintiffs withdrew the action in accordance with the parties' stipulation to enter into binding arbitration and the defendants withdrew their counterclaim; subsequently, the arbitrators issued certain awards and entered certain orders; thereafter, the court, *Genuario*, *J.*, denied the application to confirm the arbitration award filed by the defendant Bradford Estates, LLC, and rendered judgment thereon, from which the defendant Bradford Estates, LLC, appealed to this court; subsequently, the court denied the motion for reconsideration filed by the defendant Bradford Estates, LLC, and the defendant Bradford Estates, LLC, filed an amended appeal with this court. *Reversed in part*; *judgment directed.*

Lawrence F. Reilly, with whom was *James A. Alissi*, for the appellant (defendant Bradford Estates, LLC).

Thomas B. Noonan, for the appellees (plaintiffs).

Opinion

PRESCOTT, J. The defendant, Bradford Estates, LLC,[1] is a general contracting business hired by the plaintiffs, Robert Clasby and Krista Clasby, to raise and remodel their shoreline home, which was extensively damaged by Hurricane Sandy. The parties agreed to arbitrate disputes that arose during the construction project, and the defendant now appeals from the judgment of the trial court denying its application to confirm a February 4, 2017 arbitration award.[2] The defendant contends that the February 4, 2017 award conclusively established that the defendant was entitled to collect from the plaintiffs a balance of $51,856.65 in materials and labor for certain cabinetry work.

The defendant's claim on appeal is essentially twofold. First, he claims that, because no timely application to vacate, modify or correct the February 4, 2017 award was ever filed, the court was obligated to grant the defendant's application to confirm the award. Second, the defendant claims that, by denying its application to confirm the February 4, 2017 award, the court effectively and improperly gave legal effect to a subsequent award issued by the arbitration panel on August 23, 2017, in which the arbitration panel clarified that the February 4, 2017 award was not a final determination with respect to the cost of the cabinetry work and reduced the amount that the defendant was entitled to collect for the cabinetry work by more than $20,000.

[1] Edward Zimmerman and Laurel H. Zimmerman own and operate Bradford Estates, LLC. They were named as additional defendants in the underlying action, but the appeal was filed only on behalf of Bradford Estates, LLC, and the Zimmermans have not personally participated in the appeal. Accordingly, we refer to Bradford Estates, LLC, as the defendant throughout this opinion.

[2] The defendant amended the appeal to challenge the court's denial of a motion for reconsideration. Because we conclude that the trial court should have granted the application to confirm, we do not address whether it abused its discretion in denying the motion for reconsideration.

We agree with the defendant that the trial court "had no choice" but to grant the defendant's timely application to confirm the award because neither party filed a timely application to vacate, modify or correct the February 4, 2017 arbitration award. See *Rosenthal Law Firm, LLC* v. *Cohen*, 165 Conn. App. 467, 472, 139 A.3d 774, cert. denied, 322 Conn. 904, 138 A.3d 933 (2016). Nevertheless, we do not agree with the remaining aspect of the defendant's claim that confirmation of the February 4, 2017 award necessarily invalidates or renders legally inoperative the arbitration panel's August 23, 2017 award, particularly with respect to its modification of the balance owed to the defendant for the cabinetry work. In other words, we conclude that the trial court properly denied the defendant's request for an order directing the plaintiffs to pay the defendant an additional $21,463 for cabinetry work.[3] For the reasons that follow, we affirm in part and reverse in part the judgment of the trial court, and remand the matter with direction to grant the application to confirm the February 4, 2017 award, but to deny the remainder of the relief requested in the application.

The record reveals the following facts, as found by the arbitration panel or as undisputed in the record.[4]

[3] In its principal appellate brief, the defendant asks this court for the following relief on appeal: to "reverse the decision of the trial court and direct that judgment enter confirming the February Arbitration Award's award of $51,856.65 for 'Cabinetry—labor and materials,' and order the plaintiffs' counsel to pay $21,463 to the defendant."

[4] The factual record before us includes the pleadings filed with the trial court and the transcript of the hearing on the defendant's application to confirm the arbitration award. No evidence was offered at that hearing. The defendant attached to its application redacted copies of the parties' stipulation and the February 4, 2017 arbitration award, and the plaintiffs attached unredacted copies of the same to their responsive pleading. The plaintiffs also attached copies of Schedule A, which is referenced in the stipulation, and the arbitration panel's August 23, 2017 award. Although the defendant moved to strike the unredacted versions of the stipulation and awards from the record for violating the confidentiality provisions of the parties' arbitration agreement, there is no indication in the record that the trial court acted on the motion to strike. In any event, the defendant does

The plaintiffs hired the defendant to renovate and remodel their shoreline home in Darien, which had suffered significant damage from Hurricane Sandy. The project included raising the home above the existing foundation and redesigning and strengthening the foundation to comply with new regulations. The relationship between the parties, however, soon deteriorated.[5] The plaintiffs became dissatisfied with many aspects of the project, including the cost, quality, and progress of the renovations. The defendant eventually withdrew from the project after it was halfway completed.

The plaintiffs commenced a civil action against the defendant in January, 2014. In their operative complaint, the plaintiffs alleged causes of action sounding in breach of contract, a violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq., fraud, conversion, breach of the covenant of good faith and fair dealing, and negligence. The plaintiffs also sought to pierce the corporate veil between the defendant and the Zimmermans. The defendants filed an answer, special defenses, and a counterclaim alleging defamation per se.

After several years of litigation, on April 29, 2016, the parties signed a stipulation that included an agreement to resolve their disputes through private arbitration in

not argue on appeal that the unredacted stipulation and awards are not part of the record or that this court should not rely on them in resolving this appeal.

[5] The arbitration panel made the following findings in its February 4, 2017 award regarding the root cause of the breakdown in the parties' relationship. "The arrangement that the [plaintiffs] say they relied on, that is a contract subject to modification during the construction, requires construction experience, agreement, trust, mutual interest, and great communication to be successful. These requirements were lacking between the parties. Even worse, the parties had no procedure for documenting any changes they made. From the outset, Ed Zimmermann's poor communication skills, coupled with the [plaintiffs'] inexperience, were a recipe for disaster. The parties had many misunderstandings, which gave rise to increasing anger and suspicion on all sides."

lieu of a trial. The plaintiffs withdrew their complaint, and the defendant withdrew its counterclaim. The parties agreed to submit their issues to a three member arbitration panel with the intent that the defendant would return to the project and finish the renovations to the plaintiffs' home under the direction and supervision of an engineer and a building professional, both of whom also would serve as members of the arbitration panel.[6] The stipulation refers to a "Schedule A," which was a chart that listed a variety of existing construction issues, the parties' positions relative to those issues, and any agreed upon resolution already reached by the parties. Pursuant to the stipulation, the plaintiffs agreed to pay "any remaining amounts determined by the [a]rbitrators to be due for the completion of the [p]roject" and to "place in escrow with their counsel an ever-

[6] The stipulation provided in relevant part: "2. The parties agree to appoint an arbitrator and two neutral supervisors . . . to adjudicate the building and structural issues submitted to them, and to supervise, monitor, manage and instruct (where applicable) [the defendant] and its subcontractors in their work as described herein.

* * *

"8. The [a]rbitrators shall have the authority to decide how [the] [p]laintiffs' [p]roject will be completed. In furtherance of that authority, the [a]rbitrators shall have the following duties: (1) determine what documents are controlling with regard to the parties' agreement and/or the [p]roject; (2) determine if the parties amended or changed the agreement and if so what were those changes; (3) determine whether such amendments are legally binding upon the parties; (4) determine, if the parties agreed to any changes, how those affect the price; (5) determine who should be responsible for any increase/decrease in cost for materials attributable to changes in market prices since 2013; (6) determine the standard to which the work is to be performed at the [plaintiffs'] home by [the defendant]; (7) resolve issues of credibility between the parties; (8) determine the price to be paid by the [plaintiffs] to [the defendant] for the completion of the [p]roject as decided under (1), (2), and (3) above; (9) resolve questions to be set forth in a Schedule A; (10) resolve any other issues that may arise concerning this stipulation; [and] (11) take any other action as may be deemed necessary to effectuate the intent of this stipulation.

"9. The [e]ngineering and [b]uilding [s]upervisors shall oversee [the defendant's] work and oversee the implementation of the [a]rbitrators' decisions as described herein and be responsible for answering any questions and resolving any problems that arise during the course of the [p]roject. . . ."

green $100,000 to secure payments to [the defendant] under [the] [s]tipulation . . . .”[7] The parties granted broad oversight authority to the arbitration panel, including the right to determine when the project was completed, at which time the parties agreed to exchange releases from liability.

The parties submitted evidence to the arbitration panel, and the panel conducted several days of hearings. The parties submitted simultaneous posthearing briefs on January 6, 2017. On February 4, 2017, the arbitration panel issued an award with the seemingly contradictory title “Interim Award/Final Award.” By way of explanation, the arbitrators expressly provided that the award should be viewed as final “as to allocations of costs of items proven to date,” but interim “as to costs to complete.” Later in the award, in a section addressing the costs to complete the project, the arbitrators again discussed, albeit in somewhat different terms, the interim aspects of the award. In particular, they stated that the award was interim “as to the attribution to the parties of costs to complete the project, but is a final award as to each credit and/or cost accounted for” in a spreadsheet appended to the award.[8]

The spreadsheet attached to the award listed a variety of specific items that remained to be completed. Associated with each enumerated item was (1) a “cost,” representing a total cost that the arbitrators assigned to

[7] The term “evergreen” is not defined in the stipulation but appears to reflect the parties’ intent that, as payments were made periodically to the defendant or its contractors from the escrow account, the plaintiffs would replenish the account with additional funds necessary to keep the balance of the escrow account at $100,000.

[8] The award indicates that the spreadsheet is “entitled 16 Plymouth Rd.—Costs to Complete.” Although the spreadsheet at the end of the award does not bear this designation, the parties have not raised that as an issue or provided us with any indication that the arbitrators were referring to a different spreadsheet other than the one provided.

complete the item, (2) a "paid to date" amount, reflecting the amount the plaintiffs already had paid toward completion of that item; and (3) a "balance," or the difference between the "cost" and the "paid to date" amount. Item 21 of the spreadsheet pertained to "Cabinetry—labor/material" and listed a cost of $76,500, a paid to date amount of $24,643.50, and a balance of $51,856.65.[9]

Neither party timely filed an application to vacate, modify or correct the February 4, 2017 award.[10] The defendant resumed its work completing the remaining renovations under the terms of the stipulation, including the cabinetry work.

On August 23, 2017, the arbitration panel issued another arbitration award titled "Interim Award (revised)." That award attempted to resolve the parties' ongoing dispute regarding payment for the cabinetry work referenced in item 21 of the spreadsheet appended to the February 4, 2017 award.[11] The August 23, 2017 award provided in relevant part: "Despite numerous discussions between the [supervising members of the arbitration panel] and the [defendant], [the defendant] continues to insist to the [arbitration panel] that its [February 4, 2017 award] requires that it be paid $76,500

[9] Although there appear to some be minor errors in the mathematical calculations on the spreadsheet, including with respect to the cabinetry work at issue on appeal, these technical defects were not raised by the parties.

[10] The plaintiffs filed a motion with the arbitration panel asking for reargument and reconsideration. The defendant filed an opposition in which it raised its own concerns with the award. The panel denied the motion on February 27, 2017. We need not decide whether the filing of such a motion acted to extend the thirty day statutory period set forth in General Statutes § 52-420 for filing an application to vacate, modify or correct an award because, even if it did, no such application was filed within thirty days following the denial of the motion by the arbitration panel.

[11] The item 21 cabinetry work referred to cabinets and vanities for the kitchen, bathrooms, and mudroom. Another one of the items listed on Schedule A concerned "Sun Room Cabinetry," an item that was resolved by the parties and is distinct from the cabinetry at issue in this appeal.

for cabinetry work, whether or not this amount is ever proven as the actual cost of the cabinetry. The [defendant's] position is groundless and untenable. While the [arbitration panel] found there was a contract between the parties, which included a 'total price,' because the actual costs were unknown, this price was only a placeholder for whatever the actual construction costs turned out to be." The arbitration panel explained that the spreadsheet containing the $76,500 figure representing the "cost" of cabinetry work was prepared "to show what the [plaintiffs] had already paid, as of the hearing, toward the construction's actual cost. This was the sole purpose of the [spreadsheet]. As to costs yet unknown, the [February 4, 2017 award] was interim, because it was subject to change, as any construction cost might be, for such items and events as change orders, unforeseen and/or hidden costs, and delay." The arbitration panel found that the defendant had agreed to a design change involving a reduction in the amount of cabinetry originally envisioned, noting that "had the parties added to the project, the [defendant] would have expected to be paid for additional cabinetry."

The defendant never filed a timely application to vacate, modify or correct the August 23, 2017 award. Rather, on November 22, 2017, the defendant filed an application to confirm the February 4, 2017 award, in which it also asked the court to vacate "any such subsequent order(s) from the arbitration panel which are contrary to the terms of the award originally rendered."[12] The plaintiffs filed an objection to the appli-

[12] Specifically, the defendant asked the court to issue the following order: "That any and all subsequent orders issued by one or more of the arbitrators [that] conflicts with or purports to reduce that portion of the February 4, 2017 award which awarded [the defendant] $76,500 (total) for 'Cabinetry—labor/material" is hereby declared illegal, null, and void pursuant to [General Statutes] § 52-416 et seq." (Emphasis omitted.) Additionally, the defendant sought an order from the court requiring the plaintiffs' counsel to release from escrow $21,463 to the defendant.

cation to confirm, arguing that the defendant had misinterpreted the February 4, 2017 award and, essentially, was seeking to be paid for work that it never provided.

The trial court, *Genuario*, *J.*, heard argument on January 22, 2018. It later issued an order on February 23, 2018, denying the application to confirm the February 4, 2017 award. The court's order stated: "The parties entered into an arbitration agreement intended to result in the orderly completion of the plaintiffs' home by the [defendant] under the jurisdiction of an arbitration panel. Indeed, two members of the panel were actually assigned to act as supervisors of the work. The arbitration submission is very broad, including granting the panel the power to 'take any action as may be deemed necessary to effectuate the intent of this stipulation.' The panel issued an Interim/Final award on February 4, 2017, which included a line item for cabinetry [that] the defendant claims by its terms was final and the plaintiff claims was interim. The parties returned to the panel, and, on August 23, 2017, the panel issued an award with regard to the cabinetry [that] reduced the amount after that work had been completed and the panel had been presented with additional evidence. The panel described the [defendant's] claim for the original amount as 'groundless.' The [defendant's] sole meaningful argument is that the time frame for appealing the initial award having passed, neither the parties [n]or the panel had the right to modify the award. But that argument begs the question. The issue is whether or not the February 4, [2017] award was a final or interim award, and the original submission grants the panel the authority to deal with such issues in order to 'effectuate the intent' of the parties. The [defendant], having agreed to grant the panel such broad authority and participated in the process accordingly, cannot now deprive the arbitrators of the very authority granted to them in anticipation of such disagreements. Accordingly, the

defendant's [application] to confirm the February 4, 2017 award is denied." This appeal followed.[13]

Before turning to our discussion of the defendant's claim, we remark briefly on the unusual nature of the stipulation entered into by the parties. As noted by the trial court, the parties used very broad language in their stipulation defining the powers of the arbitration panel, which included expansive authority to resolve, perhaps on a daily basis, any disputes arising from changes in costs and how those changes would affect the amount the plaintiffs owed the defendant for work performed. The broad and sometimes imprecise language used in the submission increases the difficulty of determining the proper legal effect to afford to the arbitration panel's arbitration awards, neither of which is characterized as having completely resolved the parties' disputes. Ordinarily, private arbitrators are utilized by parties as an alternative to litigation with the hope of expedited resolution of then-existing disputes with defined, articulable contours. It would seem to fall outside the usual role of an arbitrator to act not only as an adjudicator but, like in the present case, as a quasi-special master, with extensive powers to oversee and direct completion of a construction project in which factual and legal issues, potentially uncontemplated by the parties in drafting their submission, might later arise. This dual role, in which supervising members of the arbitration panel would make immediate, on-site decisions regarding the construction project and then potentially later would be asked to adjudicate the financial responsibilities with respect to those choices, creates a risk of conflicts of interest that render this type of arbitration

[13] On March 23, 2018, the defendant filed a motion for reconsideration and to reargue. The court denied the motion without comment the same day. The defendant amended the present appeal to include a challenge to the court's denial of the motion for reconsideration. See footnote 2 of this opinion.

agreement problematic. Nevertheless, as a creature of contract, the parties are largely in control of the type of submission by which they agree to be bound. Fortunately, although the unusual nature of the arbitration proceedings in this case challenges our review process, it does not thwart it.

I

We turn first to the defendant's claim that the court lacked the discretion to deny its application to confirm the arbitration award. The defendant argues that, pursuant to the statutory framework governing arbitrations in Connecticut, once an arbitration award is rendered, and the thirty day period for filing an application to vacate, modify or correct the award lapses, a timely application to confirm the award ordinarily must be granted by the court. We agree.[14]

We begin with general legal principles, including the standard that governs our review of the court's denial of the application to confirm the arbitration award. "Arbitration is favored by courts as a means of settling differences and expediting the resolution of disputes. . . . There is no question that arbitration awards are generally upheld and that we give great deference to an arbitrator's decisions since arbitration is favored as a means of settling disputes. . . . The limited scope of judicial review of awards is clearly the law in Connecticut." (Citations omitted; internal quotation marks omitted.) *Wolf* v. *Gould*, 10 Conn. App. 292, 296, 522 A.2d 1240 (1987). Whether the circumstances presented require a court to grant an application to confirm an arbitration award as a matter of law presents a legal question over which we exercise plenary review. See *HH East Parcel, LLC* v. *Handy & Harman, Inc.*, 287

[14] We recognize, of course, that if an award is not timely rendered in accordance with the provisions of General Statutes § 52-416, the award has no legal effect.

Conn. 189, 196, 947 A.2d 916 (2008) (determination of whether trial court engaged in correct level of review was question of law requiring plenary review).

The core principles of Connecticut's arbitration law are set forth in General Statutes §§ 52-408 through 52-424. "Under [General Statutes] § 52-417, a party may apply for the confirmation of an arbitration award within one year after it has been rendered."[15] *Directory Assistants, Inc.* v. *Big Country Vein, L.P.*, 134 Conn. App. 415, 420, 39 A.3d 777 (2012). "[Section] 52-417 provides that in ruling on an application to confirm an arbitration award [t]he court or judge *shall* grant such an order confirming the award unless the award is vacated, modified or corrected as prescribed in [General Statutes §§] 52-418[16] and 52-419.[17]. . . The trial

[15] General Statutes § 52-417 provides: "At any time within one year after an award has been rendered and the parties to the arbitration notified thereof, any party to the arbitration may make application to the superior court for the judicial district in which one of the parties resides or, in a controversy concerning land, for the judicial district in which the land is situated or, when the court is not in session, to any judge thereof, for an order confirming the award. The court or judge shall grant such an order confirming the award unless the award is vacated, modified or corrected as prescribed in sections 52-418 and 52-419."

[16] General Statutes § 52-418 (a) provides in relevant part: "Upon the application of any party to an arbitration, the superior court . . . shall make an order vacating the award if it finds any of the following defects: (1) If the award has been procured by corruption, fraud or undue means; (2) if there has been evident partiality or corruption on the part of any arbitrator; (3) if the arbitrators have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced; or (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

[17] General Statutes § 52-419 (a) provides in relevant part: "Upon the application of any party to an arbitration, the superior court . . . shall make an order modifying or correcting the award if it finds any of the following defects: (1) If there has been an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the award; (2) if the arbitrators have awarded upon a matter not submitted to them unless it is a matter not affecting the merits

court lacks any discretion in confirming the arbitration award unless the award suffers from any of the defects described in . . . §§ 52-418 and 52-419. . . . Furthermore, if [an application] to vacate, modify or correct is not made within the thirty day time limit specified in General Statutes § 52-420 [(b)],[18] the award may not thereafter be attacked on any of the grounds specified in §§ 52-418 and 52-419." (Emphasis added; footnotes added; internal quotation marks omitted.) *Stratek Plastics, Ltd.* v. *Ibar*, 120 Conn. App. 90, 91, 991 A.2d 577 (2010). "[Section] 52-420 (b) does not limit the thirty day filing period to applications arising out of the grounds for vacatur enumerated in § 52-418, but also applies to common-law grounds, such as a claimed violation of public policy. . . . If the motion [to vacate] is not filed within the thirty day time limit, the trial court does not have subject matter jurisdiction over the motion." (Citation omitted; internal quotation marks omitted.) *Rosenthal Law Firm, LLC* v. *Cohen*, supra, 165 Conn. App. 471.

In *Directory Assistants, Inc.* v. *Big Country Vein, L.P.*, supra, 134 Conn. App. 415, the plaintiff filed an application in the Superior Court to confirm an arbitration award. Id., 418. The defendants, who had failed to file a timely application to vacate, modify or correct the award, filed a motion to dismiss the application to confirm, arguing, inter alia, that the parties' dispute had not been arbitrable. Id. The trial court agreed with the defendant and dismissed the application to confirm the award. Id. The plaintiff appealed, and this court reversed the judgment of the trial court. Id., 422. We held that a party that failed to file a timely application

of the decision upon the matters submitted; or (3) if the award is imperfect in matter of form not affecting the merits of the controversy."

[18] General Statutes § 52-420 (b) provides: "No motion to vacate, modify or correct an award may be made after thirty days from the notice of the award to the party to the arbitration who makes the motion."

to vacate an arbitration award was barred from raising any claims challenging the award in a pleading filed in response to an application to confirm the award. Id. Further, we held that in the absence of a valid application to vacate, modify or correct an award, the court "lacked any discretion in confirming [the award] pursuant to § 52-417." Id.

This court applied the same rationale in *Rosenthal Law Firm, LLC* v. *Cohen*, supra, 165 Conn. App. 467. In that case, the self-represented defendant appealed from the judgment of the trial court granting an application to confirm an arbitration award, arguing that the trial court improperly had concluded that his responsive pleading, in effect, was an untimely motion to vacate the award, and that the court failed to consider the merits of his arguments.[19] Id., 468. The plaintiff argued that the court had been obligated to confirm the award because the defendant had not filed an application to vacate within thirty days of receiving notice of the arbitration award, as required by General Statutes § 52-420 (b), and, thus, the court lacked the authority to consider his arguments against confirmation. Id., 470. We agreed with the plaintiff and affirmed the judgment of the trial court. Id. We held that, because the defendant had not timely moved to vacate, modify or correct the arbitration award, "the defendant had lost the ability to raise any statutory or common-law grounds for vacating the award . . . [and] the trial court *had no choice* but to confirm the award." (Citation omitted; emphasis added.) Id., 472.

[19] Although courts have discretion to treat an opposition to a motion to confirm an arbitration award as a motion to vacate the award; see *Wu* v. *Chang*, 264 Conn. 307, 309–10, 823 A.2d 1197 (2003); it may do so only if the opposition is filed within the thirty day period prescribed in § 52-420 (b). Id., 312. "To conclude otherwise would be contrary not only to the clear intent of the legislature as expressed in §§ 52-417, 52-418 and 52-420 (b), but also to a primary goal of arbitration, namely, the efficient, economical and expeditious resolution of private disputes." Id., 313.

In the present case, the defendant filed its application to confirm the February 4, 2017 arbitration award on November 22, 2017, well within the one year period set forth in § 52-417. It is undisputed that neither party filed within the thirty day statutory time period an application with the Superior Court raising any ground to vacate, modify or correct the February 4, 2017 arbitration award. See General Statutes § 52-420 (b). Although the record shows that both parties were not fully satisfied with the arbitration panel's award, as reflected in the plaintiffs' motion for reconsideration and reargument and the defendant's opposition thereto, neither party pursued those issues further. Even if we treated the plaintiffs' objection to the defendant's application to confirm the February 4, 2017 award as an application to vacate, modify or correct the award, it was filed well outside the thirty day statutory time period for challenging the award and, therefore, could not have formed a proper basis for a decision by the trial court to deny confirmation of the award.

In denying the defendant's application to confirm the award, the trial court did not cite to any specific defect as justifying its ruling. Rather, it appears that the court was focused on the defendant's challenge to the arbitration panel's later modification and clarification of the award, which the court indicated was well within the broad authority the parties had granted to the arbitration panel in their submission. In the absence of a timely application to vacate, modify or correct the award, however, the court had no choice but to confirm the February 4, 2017 award. The court's decision to deny the application was, therefore, in error. This conclusion does not, however, fully resolve the claim on appeal.

II

The remaining aspect of the defendant's claim is that by denying its application to confirm the February 4,

2017 arbitration award, the court also improperly declined to order the plaintiffs to pay the defendant in accordance with that award and, instead, tacitly validated the arbitration panel's August 23, 2017 award, which, by its terms, modified the amount the plaintiffs owed the defendant for the cabinetry work. The premise underlying this argument is that confirmation of the February 4, 2017 award necessarily required the plaintiffs to pay any amounts listed in that award. We reject that premise for two reasons. First, the defendant failed to challenge the propriety of the August 23, 2017 award in a timely application to vacate, modify or correct the award, and, therefore, that award, which included clarification and modification of the February 4, 2017 award, is binding on the parties and not subject to judicial scrutiny. Second, by its own terms, the February 4, 2017 award was interim in nature with respect to the cost assigned to the cabinetry work, and the defendant has not directed our attention to any language in the parties' submission that limited the arbitration panel's authority to modify that initial cost estimate on the basis of evidence of the actual cost following completion of the cabinetry work. Accordingly, we reject this aspect of the defendant's claim.

By failing to timely challenge the August 23, 2017 award, the defendant consented to its terms. In its August 23, 2017 award, the arbitration panel acknowledged the defendant's claim that the February 4, 2017 award contained a final and binding determination that the defendant was entitled to be paid $76,500 for cabinetry work. The arbitration panel, however, rejected that construction of its February 4, 2017 award, describing the defendant's position as "groundless and untenable." The panel took the opportunity to clarify that, because the cabinetry work had not been completed at the time it rendered the February 4, 2017 award, the actual costs were unknown at that time, and, thus, the

$76,500 listed as the "cost" represented only "a placeholder for whatever the actual construction costs turned out to be." The panel maintained that the only figures on the spreadsheet that were final, and thus not subject to later modification, were the figures reflecting the amount the plaintiffs already had paid to date. Those figures were a final determination by the panel of the credit the plaintiffs would be due against the actual cost, which had yet to be finally determined.

In its application for confirmation of the February 4, 2017 award, the defendant argued that the court should declare the August 23, 2017 award "illegal, null, and void " because, according to the defendant, the panel lacked any authority to modify the February 4, 2017 award with respect to the cabinetry work. The defendant's arguments challenging the propriety of the August 23, 2017 award, however, could have been raised in a timely application to vacate the award. Because the defendant failed to do so, the trial court lacked any authority to invalidate the award. Instead, the court was required to give deferential treatment to the arbitration panel's own articulation and clarification of the February 4, 2017 award. See *All Seasons Services, Inc.* v. *Guildner*, 94 Conn. App. 1, 11, 891 A.2d 97 (2006) (holding that court improperly disregarded arbitrator's articulation of award and that "arbitrator's judgment that a clarification was warranted is to be given deference by the court").

Finally, even without the benefit of the panel's August 23, 2017 clarification, the February 4, 2017 award, although not a model of clarity, conveys by its terms that the "costs" set forth for the various items listed on the attached spreadsheet, including the cabinetry work, reflected only the arbitration panel's interim determination of cost on the basis of the evidence available to date. The arbitration panel stated that the award should not be viewed as final with respect to any "costs

to complete." In other words, the costs listed on the spreadsheet for items not yet completed were not final costs but, instead, were the panel's best estimate at that time based on the terms of the original contract and the defendant's initial proposal. The award was final only "as to each credit and/or cost accounted for," meaning the credit listed on the spreadsheet as representing the amount the plaintiffs had paid to date for particular items. On the basis of this language, it is reasonable to conclude that the costs listed on the spreadsheet were not intended to reflect a final and binding determination. In their submission, the parties broadly authorized the arbitration panel to determine the amount the plaintiffs would pay for the work done by the defendant and its subcontractors, and to resolve any disputes that might arise, which would include issues regarding costs and payments.

Accordingly, under any reasonable construction of the February 4, 2017 award, the parties were on notice that the amounts listed on the spreadsheet, other than those reflecting the plaintiffs' paid to date amounts, could be subject to revision or modification by the parties in consultation with the supervising arbitrators based on the actual work performed. The parties could have sought to modify or correct the award if they felt that it failed accurately to reflect the intent of the parties or improperly left issues open for further consideration. Instead, by failing to do so, they chose to be bound by the award as it was rendered. We conclude that the court correctly denied the defendant's request for an order holding the plaintiffs responsible for the cost of cabinetry work as set forth in the February 4, 2017 award, rather than pursuant to the updated determination as set forth in the unchallenged August 23, 2017 award.

The judgment is affirmed as to the trial court's denial of the defendant's request for an order directing the

plaintiffs to pay the defendant an additional amount for cabinetry work, the judgment is reversed as to the trial court's denial of the defendant's application to confirm the February 4, 2017 arbitration award, and the case is remanded with direction to grant the application to confirm that award but to deny any additional relief requested therein.

In this opinion the other judges concurred.

THOMAS MCGINTY *v.* STAMFORD POLICE DEPARTMENT ET AL.
(AC 41943)

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

Syllabus

The defendants, the Stamford Police Department and its workers' compensation insurer, appealed to this court from the decision of the Compensation Review Board, which affirmed the decision of the Workers' Compensation Commissioner that the plaintiff's claim for benefits as a result of heart disease was compensable under the Heart and Hypertension Act (§ 7-433c). The defendants claimed that the board improperly affirmed the commissioner's award because the plaintiff's condition was systemic and, therefore, not compensable heart disease pursuant to § 7-433c. The plaintiff, a police officer, had retired in 2011 with a service related disability pension due to injuries he sustained during the course of his employment. In April, 2009, he had been diagnosed with coronary artery disease and hypertension and, thereafter, filed a claim for benefits pursuant to § 7-433c. On the basis of the evidence presented at the hearing, the commissioner accepted the plaintiff's claim and found his testimony and that of his cardiologist to be credible and persuasive in support of a heart disease and hypertension claim pursuant to § 7-433c. She ordered the defendants to accept liability for the plaintiff's claim and all benefits under § 7-433c to which he was entitled. After the board affirmed the commissioner's decision, the defendants appealed to this court. *Held* that the board properly affirmed the commissioner's award, as the defendants failed to demonstrate that the commissioner's finding that the plaintiff suffered from heart disease was unsupported by the record; the commissioner heard testimony from two cardiologists and found that the plaintiff presented the more credible and persuasive evidence, and the role of this court was not to retry the facts, but to determine whether the commissioner's award could be sustained in view of the factual record.

Argued May 20—officially released July 9, 2019

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Seventh District finding that the plaintiff had sustained a compensable injury and awarding, inter alia, disability benefits; thereafter, the commissioner denied the defendants' motion to correct; subsequently, the defendants appealed to the Compensation Review Board, which affirmed the commissioner's decision, and the defendants appealed to this court. *Affirmed.*

Scott Wilson Williams, for the appellants (defendants).

David J. Morrissey, for the appellee (plaintiff).

Opinion

PER CURIAM. The defendants, the Stamford Police Department (police department), and PMA Management Corporation of New England, the workers' compensation liability insurer for the police department, appeal from the decision of the Compensation Review Board (board) affirming the finding and award (award) of the Workers' Compensation Commissioner for the Seventh District (commissioner) with respect to the claim filed by the plaintiff, Thomas McGinty, under General Statutes § 7-433c,[1] commonly referred to as the Heart and Hypertension Act.[2] On appeal, the defendants

[1] General Statutes § 7-433c (a) provides in relevant part: "Notwithstanding any provision of chapter 568 or any other general statute . . . in the event . . . a regular member of a paid municipal police department who successfully passed a physical examination on entry into such service, which examination failed to reveal any evidence of hypertension or heart disease, suffers either off duty or on duty any condition or impairment of heath caused by hypertension or heart disease resulting in his death or his temporary or permanent, total or partial disability, he . . . shall receive from his municipal employer compensation and medical care in the same amount and the same manner as that provided under chapter 568 . . . ."

[2] See *Pearce* v. *New Haven*, 76 Conn. App. 441, 443–44, 819 A.2d 878 (overruled in part by *Ciarelli* v. *Hamden*, 299 Conn. 265, 296, 8 A.3d 1093 [2017], cert. denied, 264 Conn. 913, 826 A.2d 1155 (2003).

principally claim that the board improperly affirmed the commissioner's award concluding that the plaintiff had suffered from compensable heart disease. Before the commissioner and on appeal, the defendants have argued that the plaintiff's condition, arterial sclerosis, is not a disease unique to the heart, but a systemic condition, and is, therefore, not compensable heart disease. We affirm the decision of the board.

In her May 24, 2017 award, the commissioner made the following findings of fact, which are relevant to our resolution of this appeal. The plaintiff was employed as a police officer from January 8, 1990 through April 15, 2011, when he retired with a service related disability pension due to injuries he sustained during the course of his employment.[3] The plaintiff passed a preemployment physical that did not reveal evidence of hypertension or heart disease. The plaintiff struggled to control his weight and high cholesterol. In 2007, he experienced left leg pain due to a blockage of his iliac artery, which was treated twice by angioplasty. The plaintiff was diagnosed with peripheral vascular disease. An electrocardiogram and nuclear stress test were negative for heart disease at that time.

In 2009, the plaintiff experienced shortness of breath and chest pain. The results of a stress test performed on April 2, 2009, were positive and, when compared with the prior study, revealed a new "defect." The plaintiff was diagnosed with coronary artery disease and hypertension, and medication was prescribed for the conditions. On April 24, 2009, the plaintiff underwent cardiac catheterization that revealed two vessel coronary artery disease. The plaintiff was diagnosed with atrial fibrillation on November 19, 2009, and he underwent an ablation on February 16, 2010. A cardiac catheterization performed on September 14, 2011, showed

[3] During the course of his employment with the police department, the plaintiff suffered injuries to his lower back, both knees, left shoulder, left hip, and both hands.

progression of the plaintiff's coronary artery disease, and he underwent bypass surgery in December, 2011.

On May 27, 2009, the plaintiff filed a form 30C[4] claiming that he was entitled to benefits under § 7-433c as a result of hypertension and heart disease. On May 11, 2009, the police department timely filed a form 43 contesting the claim and also filed a supplemental form 43 on June 2, 2009.[5]

Joseph R. Anthony, a cardiologist, examined the plaintiff on September 3, 2010. Anthony reported that the plaintiff had both coronary heart disease and hypertension. On July 15, 2014, Anthony gave the plaintiff a 24 percent disability impairment due to his hypertensive cardiovascular disease and a 26 percent disability impairment for his coronary heart disease. The combined rating was 44 percent. Anthony also assigned an 11 to 13 percent disability impairment for the plaintiff's ventricular tachycardia, or arrhythmia.

Martin J. Krauthamer, a cardiologist, examined the plaintiff on behalf of the defendants. Krauthamer found no evidence of hypertension in the plaintiff more than a year prior to April, 2009. He testified at the formal hearing that in 2010, the plaintiff clearly had vascular disease, but that it had not yet impacted his heart, and, therefore, the plaintiff did not have cardiovascular disease at that time. Krauthamer opined that the disease process that resulted in a blockage of the plaintiff's

[4] A form 30C is the document prescribed by the Workers' Compensation Commission to be used when filing a notice of claim pursuant to the Workers' Compensation Act, General Statutes § 31-275 et seq.

[5] Form 43 is titled: "Notice to Compensation Commissioner and Employee of Intention to Contest Employee's Right to Compensation Benefits." It is a disclaimer form used by an employer to contest liability to pay compensation to an employee for a claimed injury. *Dubrosky* v. *Boehringer Intelheim Corp.*, 145 Conn. App. 261, 265 n.6, 76 A.3d 657, cert. denied, 310 Conn. 935, 78 A.3d 859 (2013).

coronary artery was the same process that resulted in a blockage of the peripheral arteries of his groin. According to Krauthamer, the atherosclerotic process occurs separately in different parts of the body as it is a systemic disease. He assigned the plaintiff a disability rating of 8 percent due to hypertension and an 11 percent disability rating due to his premature ventricular contractions.

On the basis of the evidence presented at the formal hearing, the commissioner accepted the plaintiff's claim. She found his testimony and medical evidence to be credible and persuasive in support of a heart disease and hypertension claim pursuant to § 7-433c. The commissioner found Anthony's opinion and reports to be more credible than Krauthamer's.[6] The commissioner concluded that the plaintiff had reached maximum medical improvement on September 3, 2010, and had disability ratings of 24 percent due to hypertension, 26 percent due to coronary artery disease, and 11 percent due to arrhythmia. She ordered the defendants to accept liability for the plaintiff's heart disease and hypertension claim and all benefits under § 7-433c to which he may be entitled.

The defendants filed a motion to correct, which the commissioner denied. The defendants appealed to the board, claiming that the plaintiff's claimed heart condition was systemic and, therefore, did not constitute compensable heart disease.[7] To support their position that atherosclerosis is a systemic disease and not a distinct heart disease, the defendants relied on *Estate of Patrick L. Brooks* v. *West Hartford*, No. 4907, CRB

[6] The defendants claimed that the plaintiff had refused reasonable and necessary medical treatment, but the commissioner found that not to be the case.

[7] The defendants did not contest the awards for the plaintiff's hypertension and arrhythmia.

6-05-1 (January 24, 2006).[8] The board issued its decision on July 17, 2018, affirming the commissioner's award. The board rejected the defendants' argument that the peripheral artery disease, atherosclerosis, from which the plaintiff suffered in 2007, was not heart disease and that it was the proximate cause of his subsequent coronary ailments in 2009. The defendants argued that the plaintiff's systemic atherosclerosis was indistinguishable from the systemic sarcoidosis, which in *Estate of Patrick L. Brooks*, was deemed not to be heart disease. The board did not undertake a medical or factual analysis of atherosclerosis and sarcoidosis. Rather, it relied on "one of the primary tenets of [its] standard of appellate review . . . that the trial commissioner has the right and the duty to decide how much of the medical evidence presented to [her] is persuasive and reliable. . . . A commissioner may choose to credit all, part or none of an expert's testimony. . . . On review, this board may not second-guess a commissioner's inferences of evidentiary credibility, and we may reverse factual findings only if they are unsupported by the evidence or if they fail to include undisputed material facts." (Citations omitted.) Id.; see also *Sanchez* v. *Edson Manufacturing*, 175 Conn. App. 105, 124-26, 166 A.3d 49 (2017); *Barron* v. *City Printing Co.*, 55 Conn. App. 85, 94, 737 A.2d 978 (1999). On the basis of its review of the record, the board concluded that there was an adequate basis for the commissioner's

[8] In *Estate of Patrick L. Brooks*, the deceased firefighter died on November 12, 2002, due to myocardial sarcoidosis. A cardiologist "testified that the decedent did not have 'heart disease,' but systemic sarcoidosis that involved multiple organs, one of which happened to be the heart. Sarcoidosis is a collagen vascular illness that affects multiple parts of the body. As a result of a secondary complication of sarcoidosis, nodules created electrical conduction problems in the decedent's heart tissue, causing the organ to stop functioning. [The cardiologist] explained that the analysis as similar to the progress of metastasized cancer. Although the heart was the final common pathway, as is often the case, the systemic illness of sarcoidosis caused the decedent's death." *Estate of Patrick L. Brooks* v. *West Hartford*, supra, 4907 CRB-6-05-1.

finding that the plaintiff suffered from heart disease in 2009 and that his heart disease was separate and distinct from the peripheral artery disease he experienced in 2007.

Our review of the record and the briefs and arguments of the parties persuades us that the board properly affirmed the commissioner's award. On appeal, the defendants have failed to demonstrate that the commissioner's finding that the plaintiff suffered from heart disease is unsupported by the record. The commissioner heard testimony from two cardiologists and found that the plaintiff presented the more credible and persuasive evidence. It is not the role of this court to retry the facts, but to determine whether the commissioner's award could be sustained in view of the factual record. See *Estate of Haburey* v. *Winchester*, 150 Conn. App. 699, 719, 92 A.3d 265, cert. denied, 312 Conn. 922, 94 A.3d 1201 (2014). We, therefore, affirm the decision of the board.[9]

The decision of the Compensation Review Board is affirmed.

MEGAN MARVIN *v.* BOARD OF EDUCATION OF THE TOWN OF COLCHESTER
(AC 40951)

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

Syllabus

The plaintiff, through her mother and next friend, sought to recover damages for negligence from the defendant, the Board of Education of the Town of Colchester. The plaintiff, who was a high school student and played

[9] In the conclusion of his brief on appeal, the plaintiff stated: "the commissioner's decision should be upheld in its entirety with statutory interest as prescribed by statute." The defendants responded in their reply brief, stating that the plaintiff did not file a motion pursuant to General Statutes § 31-301 (f), the issue was not addressed by the commissioner, and was raised for the first time on appeal. We decline to address the issue. See, e.g., *Hummel* v. *Marten Transportation, Ltd.*, 114 Conn. App. 822, 826, 970 A.2d 834 (commissioner entered § 31-301 [f] order), cert. denied, 293 Conn. 907, 978 A.2d 1109 (2009).

on the school's varsity softball team, sustained injuries to her knee when she slipped and fell on a puddle of water in the women's locker room upon returning to the school from an away softball game. The plaintiff alleged that the defendant, through its agents, failed to adequately inspect and maintain the locker room floor and failed to warn the plaintiff of the unsafe condition. The defendant filed a motion for summary judgment on the ground that the plaintiff's negligence claim was barred by government immunity pursuant to the statute (§ 52-557n [a] [2] [B]) that provides immunity for discretionary acts, but not ministerial acts, of employees, agents and officers of political subdivisions of the state. The trial court granted the defendant's motion for summary judgment on the ground of government immunity and rendered judgment thereon. On appeal to this court, the plaintiff claimed that the trial court improperly render summary judgment in favor of the defendant because there remained genuine issues of material fact with respect to her claim. *Held*:

1. The plaintiff could not prevail on her claim that a genuine issue of material fact existed as to whether the inspection and maintenance of the locker room floor by the defendant's employees constituted a ministerial function, the trial court having properly determined that such function was discretionary in nature: although the plaintiff asserted that D, the softball coach and physical education teacher at the school, who was in her office adjoining the women's locker room at the time the plaintiff fell, acknowledged in her deposition testimony that she was responsible for the students' safety at the school and that she knew that she had to pay attention to the locker room floor to ensure that it was safe, D's testimony did not indicate that there was a rule, policy or directive that required her to inspect and maintain the locker room floor, and in the absence of any proof of a rule, policy or directive prescribing how D was to inspect and maintain the locker room floor, it could not be determined that she had a ministerial duty to check the floor; moreover, contrary to the plaintiff's contention that the job description of the defendant's custodians and a monthly building safety checklist are policies or directives that demonstrate that there is no discretion in how the defendant's employees inspect and maintain the locker room floor, the plaintiff failed to produce a policy, procedure or schedule within the context of the job description that refers to inspecting and maintaining the school's floors, and the job description and safety checklist do not prescribe the manner in which the inspection and maintenance of the school's floors, particularly the locker room floor, is to be carried out.
2. The plaintiff could not prevail on her claim that there remained a genuine issue of material fact as to whether she was an identifiable person subject to an imminent risk of harm and, thus, whether the identifiable person, imminent harm exception to the defense of governmental immunity applied, as she did not fall within an identifiable class of foreseeable victims, nor was she an identifiable person for purposes of the exception:

this court declined the plaintiff's request to expand the narrow identifiable class of foreseeable victims to include not only schoolchildren attending school during school hours, but also schoolchildren participating in varsity sports after school hours, and because the plaintiff was not compelled to remain after school to play softball for the school or to use the women's locker room after the game, as there is no legal obligation to participate in any school sponsored extracurricular activities, she did not fall within an identifiable class of foreseeable victims, nor was she an identifiable person; accordingly, the identifiable person, imminent harm exception to governmental immunity was not applicable to the present case.

Argued March 13—officially released July 9, 2019

Procedural History

Action to recover damages for, inter alia, the defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of New London, where the court, *Cole-Chu*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

James V. Sabatini, for the appellant (plaintiff).

Gary Kaisen, for the appellee (defendant).

Opinion

CONWAY, J. The plaintiff, Megan Marvin, through her mother and next friend, Carole Marvin, appeals from the summary judgment rendered by the trial court in favor of the defendant, the Board of Education of the Town of Colchester, on the basis of governmental immunity. On appeal, the plaintiff claims that the court improperly rendered summary judgment because there remains a genuine issue of material fact with respect to (1) whether the defendant's inspection and maintenance of a locker room floor constitutes a ministerial duty for the purpose of governmental immunity, and (2) whether the plaintiff was an identifiable person subject to imminent harm, thus invoking the identifiable person, imminent harm exception to governmental immunity. We disagree and, accordingly, affirm the judgment of the trial court.

The record, viewed in the light most favorable to the nonmoving party, reveals the following facts and procedural history. The plaintiff was a student at Bacon Academy (school), the town of Colchester's public high school, where she played on the school's varsity softball team. On the evening of May 7, 2013, upon returning to the school from an away softball game, the plaintiff slipped and fell on a puddle of water in the women's locker room, causing her to sustain injuries to her left knee.

On April 29, 2015, the plaintiff commenced the present action against the defendant. The complaint alleged, inter alia,[1] one count of negligence against the defendant pursuant to General Statutes § 52-557n (a) (1) (A).[2] The crux of the plaintiff's negligence claim was that the defendant, through its agents, failed to adequately maintain and inspect the locker room floor and failed to warn the plaintiff of the unsafe condition.

The defendant filed an answer to the complaint on September 1, 2015, denying the negligence allegation and asserting as a special defense that the plaintiff's negligence claim was barred on the basis of governmental immunity pursuant to § 52-557n (a) (2) (B).[3]

On January 25, 2017, the defendant filed a motion for summary judgment on the ground that the plaintiff's

[1] The complaint also alleged public nuisance pursuant to General Statutes § 52-577n (a) (1) (C), but the plaintiff withdrew this claim before the court ruled on the defendant's motion for summary judgment. Accordingly, the plaintiff's claims on appeal relate only to the negligence count.

[2] General Statutes § 52-557n (a) (1) provides in relevant part: "Except 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 . . . ."

[3] General Statutes § 52-557n (a) (2) provides in relevant part: "Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by . . . (B) 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."

claim was barred by governmental immunity. In her objection to the motion, the plaintiff argued that there remained a genuine issue of material fact as to whether the inspection and maintenance of the locker room floor constituted a ministerial duty for the purpose of governmental immunity or, in the alternative, whether the plaintiff was an identifiable victim within the purview of the identifiable person, imminent harm exception to governmental immunity.

In its memorandum of decision, the court concluded that the defendant had met its burden of establishing that no genuine issue of material fact existed as to both grounds argued by the plaintiff, and, accordingly, it granted the defendant's motion for summary judgment on the basis of governmental immunity. This appeal followed. Additional facts will be set forth as necessary.

We begin our analysis by setting forth the standard of review applicable to an appeal from a trial court's ruling on a motion for summary judgment. "Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . ." (Internal quotation marks omitted.) *DeMiceli* v. *Cheshire*, 162 Conn. App. 216, 221–22, 131 A.3d 771 (2016). "Once the moving party has met its burden [of production] . . . the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . [I]t [is] incumbent [on] the party opposing summary judgment

to establish a factual predicate from which it can be determined, as a matter of law, that a genuine issue of material fact exists. . . . The presence . . . of an alleged adverse claim is not sufficient to defeat a motion for summary judgment. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Citations omitted; internal quotation marks omitted.) *Ferrari* v. *Johnson & Johnson, Inc.*, 190 Conn. App. 152, 156–57, A.3d (2019). We next address the plaintiff's claims on appeal in turn.

I

The plaintiff's first claim is that the court improperly concluded that she had not established a genuine issue of material fact as to whether the inspection and maintenance of the locker room floor by the defendant's employees was ministerial in nature rather than discretionary. We disagree.

As a preliminary matter, we note that it is undisputed that the defendant is a political subdivision of the state that may raise the defense of governmental immunity pursuant to § 52-557n. "With respect to governmental immunity, under . . . § 52-557n, a [political subdivision] may be liable for the negligent act or omission of [its] officer[s] acting within the scope of [their] employment or official duties. . . . The determining factor is whether the act or omission was ministerial or discretionary. . . . [Section] 52-557n (a) (2) (B) . . . explicitly shields a [political subdivision] from liability for damages to person or property caused by the 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. . . . In contrast . . . officers [of a political subdivision] 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." (Internal quotation marks omitted.) *Perez* v. *Metropolitan District Commission*, 186 Conn. App. 466, 473–74, 200 A.3d 202 (2018). "[Our Supreme Court], on numerous occasions, has stated unequivocally that the determination of whether a governmental or ministerial duty exists gives rise to a question of law for resolution by the court." *Ventura* v. *East Haven*, 330 Conn. 613, 634, 199 A.3d 1 (2019). "[A]lthough the ultimate determination of whether governmental immunity applies is typically a question of law for the court, there may well be disputed factual issues material to the applicability of the defense, the resolution of which are properly left to the trier of fact." Id., 636 n.11.

"In order to create a ministerial duty, there must be a city charter provision, ordinance, regulation, rule, policy, or any other directive [compelling an employee of a political subdivision] to [act] in any prescribed manner." (Internal quotation marks omitted.) *Washburne* v. *Madison*, 175 Conn. App. 613, 623, 167 A.3d 1029 (2017), cert. denied, 330 Conn. 971, 200 A.3d 1151 (2019). "In general, the exercise of duties involving inspection, maintenance and repair of hazards are considered discretionary acts entitled to governmental immunity. . . . A [political subdivision] necessarily makes discretionary policy decisions with respect to the timing, frequency, method, and extent of inspections, maintenance and repairs." (Citations omitted; internal quotation marks omitted.) *Grignano* v. *Milford*, 106 Conn. App. 648, 656, 943 A.2d 507 (2008). With these legal principles in mind, we consider the plaintiff's claim.

In the present matter, the plaintiff makes several arguments in support of her claim that there remains

a genuine issue of material fact as to whether the inspection and maintenance of the locker room floor constitutes a ministerial duty. First, the plaintiff argues that Anna DiPierro, the softball coach and physical education teacher at the school, who was in her office adjoining the women's locker room at the time the plaintiff fell, acknowledged in her deposition that she was responsible for the students' safety at the school and that she knew that she had to pay attention to the locker room floor to ensure that it was safe.[4] We disagree. Regardless of DiPierro's responsibility to keep her students safe, her testimony does not indicate that there was a rule, policy, or directive that required her to inspect and maintain the locker room floor. In fact, when asked at her deposition whether it was her responsibility to look at the locker room floor to see if an unsafe condition existed, she answered that she took it upon herself to check the floors and that it was not necessarily a responsibility assigned to her. In the absence of any proof of a rule, policy, or directive prescribing how DiPierro was to inspect and maintain the locker room floor, it could not be said that she had a ministerial duty to check the locker room floor.

Second, the plaintiff argues that the job description of the defendant's custodians and a monthly building safety checklist are policies or directives that demonstrate that there is no discretion in how the defendant's employees inspect and maintain the locker room floor.[5] We disagree. The custodians' job description only provides generally that the custodial staff "[p]erforms necessary work to maintain the cleanliness and appearance

[4] DiPierro testified at her deposition that she was unaware of any water on the locker room floor prior to the plaintiff's fall and that she cleaned up the water once the plaintiff told her that she slipped on a puddle.

[5] The plaintiff appended to her memorandum of law in opposition to the defendant's motion for summary judgment two job descriptions—one for a day custodian and one for a night custodian. Although the job descriptions vary slightly, they do not differ in any crucial respects for purposes of this appeal. For clarity, we refer to these documents solely as one job description.

of all hard surface flooring, including . . . mopping," and that the custodial staff is to maintain the cleanliness and sanitation of the building "by performing all work assignments in accordance with departmental policies, procedures and schedules . . . ." The plaintiff failed to produce a policy, procedure or schedule within the context of the job description that refers to inspecting and maintaining the school's floors. Further, Kendall Jackson, the director of educational operations for the Colchester public schools, testified at his deposition that he was not aware of any policies, procedures and schedules mentioned in the job description that had been put in writing. Jackson also testified that there was no specific policy, procedure, or directive that applied to the inspection and maintenance of the floors at the school, and that there existed only a general policy that the school should be maintained in a clean and safe condition.

As for the monthly building safety checklist, Raymond Watson, the head custodian at the school, testified at his deposition that the monthly building checklist does not specifically mention anything about floor safety.[6] Moreover, Jackson stated in an affidavit that "[t]he scheduling and the manner in which custodian[s] perform the tasks on the monthly maintenance checklist are left to the custodians' discretion."[7] In sum, the job description and monthly building safety checklist, according to Watson's and Jackson's deposition testimony, do not prescribe the manner in which the inspection and maintenance of the school's floors, particularly the locker room floor, is to be carried out and, therefore, do not create a genuine issue of material fact as to

[6] Watson also stated in his deposition that he never received anything in writing from the defendant detailing how to clean and maintain the floors at the school.

[7] We note that a copy of the building safety checklist was not before the trial court.

whether the inspection and maintenance of the floor is ministerial in nature.[8]

Finally, the plaintiff argues that her case is analogous to *Kolaniak* v. *Board of Education*, 28 Conn. App. 277, 610 A.2d 193 (1992), in which this court held that the removal of ice and snow from a school walkway was a ministerial function. In *Kolaniak*, an adult education student was injured after she fell on an icy walkway at a high school. Id., 278. Prior to the winter season, the Bridgeport Board of Education issued a bulletin to maintenance personnel at the school stating that the walkways were to be inspected and kept clean on a daily basis. Id., 279. In the present case, the defendant did not issue a comparable bulletin or directive to its custodial staff specifically instructing them to inspect and clean the locker room floor on a daily basis. Rather, the defendant only generally instructed that the school should be maintained in a clean and safe condition. Accordingly, *Kolaniak* is materially distinguishable from the present case.

We conclude that the trial court properly determined that the inspection and maintenance of the locker room floor by the defendant's employees was discretionary in nature. Accordingly, we reject the plaintiff's claim that a genuine issue of material fact exists as to whether

[8] We note that the plaintiff briefly mentions in her appellate brief that the defendant had written policies relating to "the kind of conduct or condition [the] plaintiff alleges caused the injury," but that the defendant has failed to produce these policies. Thus, she argues that a jury could draw an adverse inference against the defendant for failing to produce the written policies. The plaintiff makes only a conclusory statement and fails to cite to any legal authority. Accordingly, the plaintiff's claim is inadequately briefed. "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).

the inspection and maintenance of the locker room floor constituted a ministerial function.

II

The plaintiff's second claim is that, even if the inspection and maintenance of the locker room floor constituted a discretionary rather than ministerial function, there remains a genuine issue of material fact as to whether she was an identifiable person subject to an imminent risk of harm and, thus, whether the identifiable person, imminent harm exception to the defense of governmental immunity applies. The plaintiff argues that she is both a member of a defined class of foreseeable victims as well as an identifiable individual. We disagree.

"The imminent harm exception to discretionary act immunity [for political subdivisions and their employees] applies when the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm . . . . By its own terms, this test requires three things: (1) an imminent harm; (2) an identifiable [person]; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that [person] to that harm . . . . [Our Supreme Court has] stated previously that this exception to the general rule of governmental immunity for employees engaged in discretionary activities has received very limited recognition in this state." (Internal quotation marks omitted.) *Washburne* v. *Madison*, supra, 175 Conn. App. 628–29.

"With respect to the identifiable victim element, we note that this exception applies not only to identifiable individuals but also to narrowly defined identified classes of foreseeable victims. . . . [W]hether a particular plaintiff comes within a cognizable class of foreseeable victims for purposes of this narrowly drawn exception to qualified immunity ultimately is a question

of law for the courts, in that it is in effect a question of whether to impose a duty of care. . . . In delineating the scope of a foreseeable class of victims exception to governmental immunity, our courts have considered numerous criteria, including the imminency of any potential harm, the likelihood that harm will result from a failure to act with reasonable care, and the identifiability of the particular victim. . . . Other courts, in carving out similar exceptions to their respective doctrines of governmental immunity, have also considered whether the legislature specifically designated an identifiable subclass as the intended beneficiaries of certain acts . . . whether the relationship was of a voluntary nature . . . the seriousness of the injury threatened . . . the duration of the threat of injury . . . and whether the persons at risk had the opportunity to protect themselves from harm. . . . The only identifiable class of foreseeable victims that we have recognized for these purposes is that of school children attending public schools during school hours." (Citation omitted; internal quotation marks omitted.) *Perez* v. *Metropolitan District Commission*, supra, 186 Conn. App. 479–80. Mindful of these legal principles, we address the plaintiff's arguments.

The plaintiff first argues that she falls within an identifiable class of foreseeable victims. In essence, the plaintiff asks us to expand the narrow identifiable class of foreseeable victims to include not only schoolchildren attending school during school hours, but also schoolchildren participating in varsity sports after school hours. We decline the invitation to make such an alteration to our jurisprudence.

In *Durrant* v. *Board of Education*, 284 Conn. 91, 108–109, 931 A.2d 859 (2007), our Supreme Court held that the plaintiff in that case, a mother who was picking up her child from an after school program when she slipped on a puddle of water on a staircase, did not

fall within an identifiable class of foreseeable victims because she was not legally required to be present at the school. Important to the present case, the court also concluded that the *plaintiff's child* would likewise not fall within an identifiable class of foreseeable victims because he was not legally required to be at the school after school hours. Id., 104. The court further explained why schoolchildren attending school during school hours were within an identifiable class of foreseeable victims, but not the plaintiff or her child in that case. "In determining that such schoolchildren [attending school during school hours] were within such a class, we focused on the following facts: they were intended to be the beneficiaries of particular duties of care imposed by law on school officials; they were legally required to attend school rather than being there voluntarily; their parents were thus statutorily required to relinquish their custody to those officials during those hours; and, as a matter of policy, they traditionally require special consideration in the face of dangerous conditions. . . . In the present case, the plaintiff was not compelled statutorily to relinquish protective custody of her child. No statute or legal doctrine required the plaintiff to enroll her child in the after school program; nor did any law require her to allow her child to remain after school on that particular day. Contrast General Statutes §§ 10-157 and 10-220 (school boards and superintendents required to maintain schools for benefit of students); General Statutes §§ 10-184 and 10-220 (children statutorily compelled to attend school and parents statutorily obligated to send them to school). The plaintiff's actions were entirely voluntary, and none of her voluntary choices imposes an additional duty of care on school authorities pursuant to the . . . standards [set forth in *Burns* v. *Board of Education*, 228 Conn. 640, 638 A.2d 1 (1994)]." *Durrant* v. *Board of Education*, supra, 107–108.

Similarly, in the present case, the plaintiff was not legally obligated to remain after school nor were her

parents compelled statutorily to relinquish protective custody of her. The plaintiff argues that, although participation in varsity athletics is voluntary, participation in games and practices once a student is a member of a school sports team is mandatory according to the defendant's policies.[9] Although the defendant may require players to attend games and practices as a condition to participation on a school athletic team, a student's participation on an athletic team remains, at all times, purely voluntary. See *Costa* v. *Board of Education*, 175 Conn. App. 402, 408–409, 167 A.3d 1152 (plaintiff injured playing basketball during voluntary school picnic not within foreseeable class of victims), cert. denied, 327 Conn. 961, 172 A.3d 801 (2017); *Jahn* v. *Board of Education*, 152 Conn. App. 652, 668, 99 A.3d 1230 (2014) (member of school swim team injured in warm-up drill not required to participate in swim meet or swim team). Unlike school attendance, there is no legal obligation to participate in any school sponsored extracurricular activities. See *Jahn* v. *Board of Education*, supra, 668. (plaintiff failed to argue that he was legally compelled to join swim team or to participate in warm-up drills). In accordance with our prior case law, we conclude that the plaintiff does not fall within an identifiable class of foreseeable victims.[10]

The plaintiff also argues that, even if she is not within an identifiable class of foreseeable victims, she is an

[9] The plaintiff attached to her memorandum of law in opposition to the defendant's motion for summary judgment a copy of the school's student handbook, which stated that student athletes were required to attend all practices and games unless previously excused by the coach.

[10] The plaintiff also cites to *Strycharz* v. *Cady*, 323 Conn. 548, 578, 148 A.3d 1011 (2016), abrogated on other grounds by *Ventura* v. *East Haven*, supra, 330 Conn. 636–37, for the general proposition that the purpose of charging school officials with a duty of care is to ensure that schoolchildren are protected from imminent harm. At issue in *Strycharz* was whether a student who was injured after leaving school grounds *during school hours* remained a member of an identifiable class of foreseeable victims despite leaving school property. Id., 562. Because the present case involves an injury suffered on school property after school hours, *Strycharz* does not lend support to the plaintiff's argument.

identifiable individual subject to imminent harm. "Generally, we have held that a party is an identifiable person when he or she is compelled to be somewhere. See *Strycharz* v. *Cady*, [323 Conn. 548, 575–76, 148 A.3d 1011 (2016)] ('[o]ur decisions underscore . . . that whether the plaintiff was compelled to be at the location where the injury occurred remains a paramount consideration in determining whether the plaintiff was an identifiable person or member of a foreseeable class of victims' . . .) [abrogated on other grounds by *Ventura* v. *East Haven*, supra, 330 Conn. 636–37]. . . . Outside of the schoolchildren context, we have recognized an identifiable person under this exception in only one case that has since been limited to its facts.[11] Beyond that, although we have addressed claims that a plaintiff is an identifiable person or member of an identifiable class of foreseeable victims in a number of cases, we have not broadened our definition." (Footnote in original.) *St. Pierre* v. *Plainfield*, 326 Conn. 420, 436–37, 165 A.3d 148 (2017); see also *DeConti* v. *McGlone*, 88 Conn. App. 270, 274–75, 869 A.2d 271 (plaintiff injured when tree fell on car while driving not identifiable victim because no requirement for her to drive on portion of roadway where accident occurred), cert. denied, 273 Conn. 940, 875 A.2d 42 (2005).

In *St. Pierre* v. *Plainfield*, supra, 326 Conn. 423–25, the plaintiff, after participating in an aqua therapy session at a public pool, slipped on steps that were covered with water while he was on his way to the men's locker room. Our Supreme Court held that the plaintiff was not an identifiable person because he was not compelled to

[11] "Specifically, prior to the adoption of the current three-pronged identifiable person, imminent harm analysis, [our Supreme Court] concluded that an identifiable person subject to imminent harm existed among a group of intoxicated individuals who were arguing and scuffling in a parking lot when a police officer who spotted them failed to intervene until he heard a gunshot. *Sestito* v. *Groton*, 178 Conn. 520, 522–24, 423 A.2d 165 (1979). This holding, however, has been limited to its facts." *St. Pierre* v. *Plainfield*, 326 Conn. 420, 436 n.15, 165 A.3d 148 (2017).

attend the aqua therapy session. Id., 438 ("[T]he plaintiff was in no way compelled to attend the aqua therapy sessions. . . . Under established case law, this choice precludes us from holding that the plaintiff was an identifiable person or a member of an identifiable class of persons."). As we previously discussed in this opinion, the plaintiff in the present case was not compelled to play softball for the school nor was she compelled to use the women's locker room after the game. On the basis of our prior case law, we conclude that the plaintiff was not an identifiable person nor was she within an identifiable class of foreseeable victims. Accordingly, because the identifiable victim, imminent harm exception to governmental immunity is not applicable in the present case, we reject the plaintiff's claim that the court improperly rendered summary judgment in favor of the defendant. Because the plaintiff does not qualify as an identifiable person, we need not address whether an imminent harm existed.[12] See id.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MARIO CHAVEZ (AC 41424)

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

Syllabus

Convicted of the crime of manslaughter in the first degree in connection with the stabbing death of the victim, the defendant appealed to this court. He claimed that the trial court improperly deprived him of his constitutional right to a fair trial when it failed to instruct the jury, sua sponte, about the inherent shortcomings of simultaneous foreign language interpretation of trial testimony, and when it instructed the jury that it could consider as consciousness of guilt evidence that he changed his shirt shortly after the victim was stabbed. *Held*:

[12] Likewise, we do not reach the argument in the plaintiff's brief that the trial court erred in finding no genuine issue of material fact as to whether the defendant had actual notice of the unsafe condition.

1. The defendant's claim, raised for the first time on appeal, that the trial court improperly failed to instruct the jury, sua sponte, regarding the inherent shortcomings of translated testimony was unavailing: although the defendant requested review of his unpreserved claim pursuant to *State* v. *Golding* (213 Conn. 233), because both counsel provided the court with proposed jury instructions, attended an in-chambers charging conference, and had a subsequent opportunity to comment on the court's proposed instructions on the record before they were given to the jury, the defendant was presented with a meaningful opportunity to review and comment on the court's instructions, and because he failed to raise the claim asserted on appeal, he waived his right to challenge the constitutionality of the instruction under *Golding*; moreover, the defendant having conceded that the trial court's failure to instruct the jury on the inherent shortcomings of simultaneous foreign language interpretation of trial testimony was an issue of first impression, and having failed to cite to any authority that stands for the proposition that a court's failure to provide, sua sponte, such an instruction constitutes a reversible error, he could not demonstrate that the court's failure to instruct the jury in that respect was an error so clear and so harmful that it constituted plain error such that a failure to reverse would result in manifest injustice.
2. The trial court did not abuse its discretion by providing a consciousness of guilt jury instruction as to the defendant's act of changing his shirt after the incident; at trial, the defendant, in testifying on his own behalf, did not dispute that he returned to his apartment after the incident to change his shirt, and the evidence presented at trial reasonably could have permitted a jury to draw the inference that the defendant's act of changing his shirt was motivated by a desire to avoid detection by law enforcement because the shirt had blood or dirt on it from the altercation with the victim.

Argued May 20—officially released July 9, 2019

Procedural History

Information charging the defendant with the crimes of murder and manslaughter in the first degree, brought to the Superior Court in the judicial district of Fairfield, and tried to the jury before *E. Richards*, *J.*; verdict and judgment of guilty of manslaughter in the first degree, from which the defendant appealed to this court. *Affirmed.*

Joshua Michtom, assistant public defender, for the appellant (defendant).

Jennifer F. Miller, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Michael A. DeJoseph*, senior assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The defendant, Mario Chavez, appeals from the judgment of conviction, rendered following a jury trial, of manslaughter in the first degree in violation of General Statutes § 53a-55 (a) (1). On appeal, the defendant claims that the court improperly (1) deprived him of his constitutional right to a fair trial by failing to instruct the jury, sua sponte, about the "inherent shortcomings" of simultaneous foreign language interpretation of trial testimony, and (2) instructed the jury that it could consider, as consciousness of guilt evidence, that the defendant changed his shirt shortly after the victim was stabbed. We disagree and, accordingly, affirm the judgment of conviction.

On the basis of the evidence adduced at trial, the jury reasonably could have found the following facts. On the morning of May 27, 2012, the defendant drove a number of friends home after a night of drinking in Bridgeport. Upon arriving in the neighborhood of one of the friends, an argument developed and a physical altercation ensued between two of the passengers in the defendant's vehicle. During the fight, a small group of onlookers, who had observed the altercation from a nearby home, approached the combatants in the street. Thereafter, some of the onlookers attempted to break up the fight, while the victim approached the defendant.

The victim confronted the defendant and forcibly removed a chain worn around the defendant's neck. In response, the defendant drew a knife and stabbed the victim once in the chest. Shortly after stabbing the victim, the defendant fled the scene. Surveillance footage taken from the defendant's apartment complex showed

the defendant returning to his apartment a short time later. Surveillance footage also showed the defendant leaving the complex not long after wearing a different color shirt.

The following day, the defendant learned of the victim's death and fled the country. The defendant ultimately was apprehended and extradited to the United States where he was charged with murder and manslaughter in the first degree in connection with the victim's death.

The case was tried before a jury in October and November, 2017. The defendant testified in his own defense with the assistance of a Spanish-English interpreter. The defendant asserted that he stabbed the victim accidentally while trying to defend himself.

The defendant was found not guilty of murder but was found guilty of manslaughter in the first degree. The court sentenced the defendant to a total effective sentence of seventeen years of incarceration followed by three years of special parole. This appeal followed. Additional facts and procedural history will be provided as necessary.

The defendant first claims that the court improperly failed to instruct the jury, sua sponte, regarding the "inherent shortcomings" of translated testimony. Specifically, the defendant argues that because his testimony was translated from Spanish to English, it may have appeared less coherent or credible than a witness who testified in English. According to the defendant, the court's failure to provide an instruction on "the limitations of interpreted testimony" denied him of his constitutional right to a fair trial. We disagree.

As a preliminary matter, we note that the defendant raises this claim for the first time on appeal, requesting 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).[1] He did not request that the court instruct the jury regarding the inherent limitations or flaws in translated foreign language testimony, nor did he comment on or object to a lengthy instruction given by the court on how the jury should evaluate translated foreign language testimony.

Despite the defendant's request for review pursuant to *Golding*, "when the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal." *State* v. *Kitchens*, 299 Conn. 447, 482–83, 10 A.3d 942 (2011). Our Supreme Court has held further that if a claim of instructional error has been waived under *Kitchens*, the defendant is not entitled to *Golding* review. See *State* v. *Bellamy*, 323 Conn. 400, 410, 147 A.3d 655 (2016).

In the present case, both counsel provided the court with proposed jury instructions, attended an in-chambers charging conference, and had a subsequent opportunity to comment on the court's proposed instructions on the record before they were given to the jury. Because the defendant was presented with a meaningful opportunity to review and comment on the court's instructions,[2] and having done so, failed to raise the

[1] Pursuant to *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.) *State* v. *Golding*, supra, 213 Conn. 239–40; see also *In re Yasiel R.*, supra, 317 Conn. 781.

[2] The defendant does not argue otherwise.

claim he now asserts on appeal, the defendant has waived his right to challenge the constitutionality of the instruction under *Golding*.[3] See *State* v. *Kitchens*, supra, 299 Conn. 482–83.

The defendant further argues that, even if his claim is not reviewable under *Golding*, it is reversible under the plain error doctrine. See *State* v. *McClain*, 324 Conn. 802, 812–14, 155 A.3d 209 (2017) (*Kitchens* waiver does not preclude plain error review). "[T]he plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . [An appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed *error* is both *so clear* and *so harmful* that a failure to reverse the judgment would result in manifest injustice. . . . Put another way, plain error review is reserved for only the most egregious errors." (Citations omitted; emphasis altered; footnote omitted; internal quotation marks omitted.) Id.

In the present case, the defendant concedes that a trial court's failure to instruct the jury on the "inherent shortcomings" of simultaneous foreign language interpretation of trial testimony is an issue of first impression, and he can cite to no authority, binding or otherwise, that stands for the proposition that a court's failure to provide, sua sponte, such an instruction constitutes a reversible error. Because the defendant cannot demonstrate that the claimed error is, in fact, *an error*, he is unable to demonstrate that failing to instruct the jury in this respect is an error so clear and so harmful that a failure to reverse would result in manifest injustice. See *State* v. *Fagan*, 280 Conn. 69, 88, 905 A.2d 1101 (2006) (defendant could not prevail under plain

[3] Even on appeal, the defendant has failed to provide a proposed instruction that he claims should have been given to the jury.

error doctrine in part because issue raised was matter of "first impression"), cert. denied, 549 U.S. 1269, 127 S. Ct. 1491, 167 L. Ed. 2d 236 (2007). Accordingly, the defendant's first claim must fail.[4]

Next, the defendant claims that the court abused its discretion by instructing the jury that it could consider, as consciousness of guilt, evidence that the defendant changed his shirt shortly after the victim was stabbed. We disagree. "We review a trial court's decision to give a consciousness of guilt instruction under an abuse of discretion standard." *State* v. *Vasquez*, 133 Conn. App. 785, 800, 36 A.3d 739, cert. denied, 304 Conn. 921, 41 A.3d 661 (2012). "In considering consciousness of guilt instructions, our Supreme Court has observed: Generally speaking, all that is required is that the evidence have relevance . . . the fact that ambiguities or explanations may exist which tend to rebut an inference of guilt . . . does not [by itself] make an instruction . . . erroneous." (Internal quotation marks omitted.) *State* v. *Mann*, 119 Conn. App. 626, 632–33, 988 A.2d 918, cert. denied, 297 Conn. 922, 998 A.2d 168 (2010).

At trial, the defendant, in testifying on his own behalf, did not dispute that he returned to his apartment after the incident to change his shirt and, after having done so, left the apartment soon after to investigate what had happened to the victim. Despite this testimony, the defendant objected to the court's proposed consciousness of guilt instruction, claiming that the act of changing his shirt after the stabbing was "a normal activity" given the circumstances. On the basis of our review of the court's charge and the evidence presented at trial, which reasonably could have permitted a jury to draw the inference that the defendant's act of changing his

[4] In the alternative, the defendant also requests that this court use its supervisory authority to order a new trial in order to cure the inherent harm associated with translated testimony. "Supervisory authority is an extraordinary remedy that should be used sparingly . . . ." (Internal quotation marks omitted.) *State* v. *Edwards*, 314 Conn. 465, 498, 102 A.3d 52 (2014). We decline to exercise our supervisory powers in the present case.

shirt was motivated by a desire to avoid detection by law enforcement because the shirt had blood or dirt on it from the altercation with the victim, the court did not abuse its discretion by providing the consciousness of guilt instruction as to the defendant's act of changing his shirt after the incident.

The judgment is affirmed.

STATE OF CONNECTICUT *v.* TERENE CLARK (AC 41175)

Alvord, Elgo and Moll, Js.

Syllabus

Convicted of the crime of assault in the second degree in connection with the stabbing of the victim during an altercation in their shared apartment, the defendant appealed to this court. She claimed that the trial court improperly denied her motion to suppress an oral statement that she had made to the police during an alleged custodial interrogation in her apartment, which occurred without the officer having first advised the defendant of her constitutional rights pursuant to *Miranda* v. *Arizona* (384 U.S. 436). *Held* that the trial court properly denied the defendant's motion to suppress her statement to the police and determined that the defendant was not in police custody at the time she made her statement; under the totality of the circumstances, a reasonable person in the defendant's position would not have believed that her freedom of movement was restrained to the degree associated with a formal arrest, as the interrogation took place in the defendant's own residence, she was questioned by only one officer, whom she voluntarily escorted around the apartment while explaining the events surrounding the altercation, the interview lasted less than one hour, the officer asked the defendant only two questions, there was no indication that the officer exercised any control over the defendant, who was not handcuffed or physically restrained, and the officer did not display his weapon or otherwise present a show or threat of force before or during the questioning to compel the defendant to speak, and because the defendant was not in custody when she gave her statement, she was not entitled to an advisement of her rights under *Miranda*.

Argued April 9—officially released July 9, 2019

Procedural History

Information charging the defendant with the crime of assault in the first degree, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Pavia*, *J.*; verdict and judgment of guilty of the lesser included offense of assault in the second degree, from which the defendant appealed to this court. *Affirmed.*

Glenn Formica, for the appellant (defendant).

Michael A. DeJoseph, senior assistant state's attorney, with whom, on the brief, was *John C. Smriga*, state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Terene Clark, appeals from the judgment of conviction, rendered following a jury trial, of one count of assault in the second degree in violation of General Statutes § 53a-60 (a) (3). On appeal, the defendant claims that the trial court erred by denying her motion to suppress her statement to the police, which she alleges was obtained in violation of her constitutional rights under *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). We affirm the judgment of the trial court.

The jury reasonably could have found the following facts.[1] In the early morning hours of June 18, 2015, the defendant and the victim were involved in an altercation at their shared apartment. At the time, the defendant and the victim had been in a relationship for approximately ten years. The victim became angry when he discovered that the defendant was in the bedroom talking on the phone to another man. The argument started

[1] We note that, although not necessary to our disposition of the defendant's claim on appeal, the defendant has not provided this court with the full trial transcript. Our recitation of the facts, therefore, is limited to the record before us.

in the bedroom and continued into the kitchen. While in the kitchen, the defendant grabbed a knife off the counter and, ultimately, stabbed the victim twice, once in the upper back and once in the leg. The victim fell to the floor and was unable to stand up. A neighbor drove the victim to the hospital while the defendant remained at the apartment.

At 2:19 a.m., Luis Moura, an officer with the Bridgeport Police Department, was dispatched to a multifamily home on Grand Street to respond to a report of a domestic dispute. Upon arrival, Officer Moura spoke to the second floor tenant, who had called the police. She reported that the dispute happened downstairs.

Officer Moura thereafter knocked on the door of the first floor apartment, and the defendant answered. Officer Moura asked her what had happened, and she responded that "he went to the hospital." Officer Moura did not know about whom the defendant was talking and again asked her what had happened. The defendant led Officer Moura to the bedroom, where she explained that she had been in that room on the phone with a male friend whom the victim did not like. The defendant stated that the victim then took her phone, knocked items off the dresser and onto the floor, and struck her twice.

After the defendant explained to Officer Moura what had happened in the bedroom, she left the bedroom and brought Officer Moura through the living room and into the kitchen. There, she explained that she feared for her life, so she had taken a knife off the counter and warned the victim to stay back. Finally, the defendant explained that the victim was injured when he walked away from her and slipped on water on the kitchen floor, falling backward onto the knife.

Officer Moura then received a phone call from Thomas Harper, an officer with the Bridgeport Police Department who had gone to the hospital to check

on the victim's condition. Officer Harper told Officer Moura that the victim had two stab wounds, one in the leg and one in the upper back, which had left the victim a paraplegic. Upon learning that the victim's injuries were inconsistent with the defendant's version of events,[2] Officer Moura placed the defendant under arrest.

The defendant subsequently was charged with assault in the first degree in violation of General Statutes § 53a-59 (a) (1). Prior to trial, the defendant filed a motion to suppress all statements that she had made to the police, including her statement to Officer Moura explaining what had happened to cause the victim's injuries.[3] At a pretrial suppression hearing, the trial court denied the defendant's motion with respect to her statement as to how the victim's injuries occurred on the ground that the defendant was not in custody at the time she made this statement.

[2] At the hearing on the motion to suppress, Officer Moura testified that he found the medical information that Officer Harper had given him to be inconsistent with the version of events given to him by the defendant to the extent that "[the defendant] stated that [the victim] turned and slipped on the wet floor when he was cut once. However, with two stab wounds and [the victim becoming] permanently paralyzed, it's more [of] a deliberate action."

[3] Along with her statement as to how the victim's injuries occurred, the defendant moved to suppress two additional statements that she made to the police. The court's rulings on these two additional statements are not at issue in this appeal.

First, after Officer Moura's conversation with Officer Harper, he told the defendant that the information he had received was inconsistent with her explanation of what had happened. The defendant responded: "I was just defending myself." The court granted the defendant's motion with respect to this statement on the basis of Officer Moura's testimony that he decided to arrest the defendant after speaking to Officer Harper.

Second, after she was arrested, the defendant gave a statement to a detective at the Bridgeport Police Department. The court denied the defendant's motion with respect to this statement on the ground that she had, at that point, been advised of her *Miranda* rights and had knowingly and voluntarily waived those rights. The state ultimately did not introduce this statement into evidence at trial.

After a jury trial, the defendant was convicted of the lesser included offense of assault in the second degree in violation of § 53a-60 (a) (3). The court rendered judgment in accordance with the jury's verdict and imposed a total effective sentence of seven years incarceration, execution suspended after one year, followed by five years of probation. This appeal followed.

On appeal, the defendant claims that her statement should have been suppressed because she was not advised of her rights under *Miranda* before she made it. "Under our well established standard of review in connection with a motion to suppress, we will not disturb a trial court's finding of fact unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [When] the legal conclusions of the court are challenged, [our review is plenary, and] we must determine whether they are legally and logically correct and whether they find support in the facts set out in the court's memorandum of decision . . . ." (Internal quotation marks omitted.) *State* v. *Arias*, 322 Conn. 170, 176–77, 140 A.3d 200 (2016).

"[P]olice officers are not required to administer *Miranda* warnings to everyone whom they question . . . rather, they must provide such warnings only to persons who are subject to custodial interrogation." (Internal quotation marks omitted.) *State* v. *Castillo*, 329 Conn. 311, 323, 186 A.3d 672 (2018). "As used in . . . *Miranda* [and its progeny], custody is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion. . . . In determining whether a person is in custody in this sense . . . the United States Supreme Court has adopted an objective, reasonable person test . . . the initial step [of which] is to ascertain whether, in light of the objective circumstances of the interrogation . . . a reasonable person [would] have felt [that] he or she was not at liberty to terminate the interrogation and [to] leave. . . . Determining whether an individual's freedom of movement

[has been] curtailed, however, is simply the first step in the analysis, not the last. Not all restraints on freedom of movement amount to custody for purposes of *Miranda*. [Accordingly, the United States Supreme Court has] decline[d] to accord talismanic power to the freedom-of-movement inquiry . . . and [has] instead asked the additional question [of] whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*. . . .

"Of course, the clearest example of custody for purposes of *Miranda* occurs when a suspect has been formally arrested. As *Miranda* makes clear, however, custodial interrogation includes questioning initiated by law enforcement officers after a suspect has been arrested or otherwise deprived of his freedom of action in any significant way. . . . Thus, not all restrictions on a suspect's freedom of action rise to the level of custody for *Miranda* purposes; in other words, the freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody. . . . Rather, the ultimate inquiry is whether a reasonable person in the defendant's position would believe that there was a restraint on [his] freedom of movement of the degree associated with a formal arrest. . . . Any lesser restriction on a person's freedom of action is not significant enough to implicate the core fifth amendment concerns that *Miranda* sought to address." (Citations omitted; emphasis omitted; footnotes omitted; internal quotation marks omitted.) *State* v. *Mangual*, 311 Conn. 182, 193–95, 85 A.3d 627 (2014).

"With respect to the issue of whether a person in the suspect's position reasonably would have believed that [he] was in police custody to the degree associated with a formal arrest, no definitive list of factors governs [that] determination, which must be based on the circumstances of each case . . . . Because, however, the

[court in] *Miranda* . . . expressed concern with protecting defendants against interrogations that take place in a police-dominated atmosphere containing [inherent] pressures [that, by their very nature, tend] to undermine the individual's [ability to make a free and voluntary decision as to whether to speak or remain silent] . . . circumstances relating to those kinds of concerns are highly relevant on the custody issue. . . . In other words, in order to determine how a suspect [reasonably] would have gauge[d] his freedom of movement, courts must examine all of the circumstances surrounding the interrogation." (Internal quotation marks omitted.) *State* v. *Castillo*, supra, 329 Conn. 324–25.

"In [*State* v. *Mangual*, supra, 311 Conn. 196–97], we set forth the following nonexclusive list of factors to be considered in determining whether a suspect was in custody for purposes of *Miranda*: (1) the nature, extent and duration of the questioning; (2) whether the suspect was handcuffed or otherwise physically restrained; (3) whether officers explained that the suspect was free to leave or not under arrest; (4) who initiated the encounter; (5) the location of the interview; (6) the length of the detention; (7) the number of officers in the immediate vicinity of the questioning; (8) whether the officers were armed; (9) whether the officers displayed their weapons or used force of any other kind before or during questioning; and (10) the degree to which the suspect was isolated from friends, family and the public." (Internal quotation marks omitted.) *State* v. *Arias*, supra, 322 Conn. 177.

After applying these factors to the present case, we conclude that the trial court properly determined that the defendant was not in custody when she made her statement. The record demonstrates that Officer Moura questioned the defendant at her apartment. In *Mangual*, our Supreme Court recognized that "an encounter with

police is generally less likely to be custodial when it occurs in a suspect's home." *State* v. *Mangual*, supra, 311 Conn. 206; see also *Miranda* v. *Arizona*, supra, 384 U.S. 449–50 ("[the suspect] is more keenly aware of his rights and more reluctant to tell of his indiscretions or criminal behavior within the walls of his home" [internal quotation marks omitted]).

Moreover, although Officer Moura initiated contact with the defendant, the defendant voluntarily showed him around her apartment.[4] The encounter lasted less than one hour and Officer Moura asked the defendant only two questions. Although Officer Moura did not explain to the defendant that she was free to leave and was not under arrest, nothing in the record suggests that she was under any compulsion to speak to the police at that point.[5] Rather, Officer Moura testified that, during this time, the defendant was free to walk

[4] The record is unclear as to how Officer Moura initially entered the defendant's apartment. We therefore find unpersuasive the defendant's arguments that "there was never a request to enter [the apartment] by Officer Moura or an invitation by [the defendant]" and that "[t]his case is distinguishable from cases in which police actually were invited into a residence."

[5] The defendant argues that the trial court used the seriousness of the victim's injuries to determine that she should have been advised of her *Miranda* rights only after Officer Moura spoke to Officer Harper. See footnote 3 of this opinion. The defendant argues that, in doing so, the court made "a critical error of law in this case." The defendant further argues that Officer Moura should have advised her of her *Miranda* rights upon his arrival at her door because "[he] knew at the time he arrived at [the defendant's] door that she was the prime suspect in a domestic violence incident that had resulted in someone being so significantly injured that they needed treatment at the hospital." We are not persuaded by either of these arguments.

First, there is nothing in the record to support the defendant's assertion that Officer Moura knew that someone had been transported to the hospital before the defendant told him, or that he knew of the seriousness of the victim's injuries prior to Officer Harper's call. Moreover, the trial court's determination that the defendant should have been advised of her *Miranda* rights after Officer Moura spoke to Officer Harper was not based on the seriousness of the victim's injuries. Rather, the trial court based its determination that the defendant should have been advised of her *Miranda* rights after Officer Moura spoke to Officer Harper on Officer Moura's testimony that the defendant was no longer free to leave after he learned, from Officer Harper, that the victim had sustained two stab wounds, injuries that were

out of the apartment and leave.[6] The defendant was not handcuffed or physically restrained. In fact, she moved freely throughout her apartment as she made her statement to Officer Moura. These facts do not suggest any restriction on the defendant's freedom of movement, much less to the degree associated with formal arrest.

Finally, Officer Moura was the only police officer present during the encounter with the defendant. Although Officer Moura was armed, he did not display his weapon to the defendant or use any force before or during the questioning. To the contrary, the record shows that Officer Moura exercised little, if any, control over the defendant. Cf. *State* v. *Mangual*, supra, 311 Conn. 201–202 (police exercised complete control over defendant and surroundings before, during, and after questioning).

After considering all of the circumstances surrounding the questioning of the defendant, we cannot

inconsistent with the defendant's explanation of what had happened during the altercation. See footnote 3 of this opinion.

[6] The defendant argues that she was not free to leave, in part because the encounter between her and Officer Moura took place at her apartment. With respect to this argument, she contends that the court should not apply the "free to leave" test, pursuant to which "*Miranda* warnings are required only if, under the circumstances, a reasonable person would believe that he or she was not free to leave the scene of the interrogation." *State* v. *Hasfal*, 106 Conn. App. 199, 206, 941 A.2d 387 (2008); see *State* v. *Mangual*, supra, 311 Conn. 195 n.12 (noting that it has not always clearly distinguished ultimate inquiry from threshold determination of whether reasonable person in suspect's position would feel free to terminate questioning and leave).

Our Supreme Court's decision in *State* v. *Castillo*, supra, 329 Conn. 311, which also involved a police encounter at the defendant's residence, provides us with guidance on this issue. The court noted: "[N]ot all restrictions on a suspect's freedom of action rise to the level of custody for *Miranda* purposes; in other words, the freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody." (Internal quotation marks omitted.) *State* v. *Castillo*, supra, 324; see also *State* v. *Mangual*, supra, 311 Conn. 194–95 n.12. Accordingly, as our Supreme Court did in *Castillo*, we use the nonexclusive list of factors set forth in *Mangual* to reach our conclusion on the ultimate issue of whether a reasonable person in the defendant's position would believe that there was a restraint on her freedom of movement to the degree associated with a formal arrest. See *State* v. *Castillo*, supra, 322.

conclude that a reasonable person in the defendant's position would have believed that her freedom of movement was restrained to the degree associated with a formal arrest. Because the defendant was not in custody when she gave her statement, we further conclude that she was not entitled to an advisement of her rights under *Miranda*.[7] See *State* v. *Arias*, supra, 322 Conn. 179. Accordingly, the trial court properly denied her motion to suppress.

The judgment is affirmed.

In this opinion the other judges concurred.

IN RE SKYLAR F.*

(AC 42499)

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

Syllabus

The respondent father appealed to this court from the judgment of the trial court denying his motion to open the judgment of neglect concerning the father's minor child that was rendered after the father was defaulted for his failure to attend a case status conference. On appeal, the father claimed that the trial court improperly denied his motion to open because the record did not support a finding that he received actual adequate notice of a case status conference in violation of his right to due process of law. *Held*:

[7] Because we conclude that the defendant was not in custody, we need not address her claim that she was subjected to interrogation. See *State* v. *Smith*, 321 Conn. 278, 288, 138 A.3d 223 (2016) ("[t]wo threshold conditions must be satisfied in order to invoke the warnings constitutionally required by *Miranda*: (1) the defendant must have been in custody; and (2) the defendant must have been subjected to police interrogation" [internal quotation marks omitted]). Moreover, because we conclude that there was no error, we need not conduct a harmless error analysis.

* 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.

1. The respondent father could not prevail in his claim that this court should exercise de novo review pursuant to the test articulated by the United States Supreme Court in *Mathews* v. *Eldridge* (424 U.S. 319), as he conflated the alleged due process violation in the court's rendering of a default judgment at the case status conference with the court's denial of his motion to open, from which he appealed to this court; the manifest purpose of a motion to open a default pursuant to the applicable rule of practice (§ 35a-18) and statute (§ 52-212) is to provide a mechanism by which a defaulted party has an opportunity to be heard, and because the father, by filing the motion to open, invoked his right to due process, specifically, the right to be heard as to why he failed to appear and whether he had a good defense, he was afforded a hearing and thereby exercised his right to due process, and, therefore, this court could not conclude that the father was deprived of his right to due process and reviewed the merits of his claim under the abuse of discretion standard applicable to the appeal of a denial of a motion to open a default judgment.
2. The trial court did not abuse its discretion in denying the respondent father's motion to open the default judgment: the father did not present a good defense, as the court had expressed concerns over the father's substance abuse and domestic violence, and the father addressed neither concern in his motion to open, and the father did not show that his failure to appear was the result of mistake, accident or other reasonable cause, nor did he particularly set forth the reason why he failed to appear, as the record demonstrated that the father's attorney was present when the case status conference was scheduled, had scheduled the case status conference at a particular time for the father's convenience, and did not assert that the father lacked notice of the scheduled court date, and there was no indication that the father and his attorney were unable to communicate with each other or that he was unaware of the outcome of a temporary custody hearing, at which the court scheduled the case status conference for a time requested by the father through his attorney and sustained the order of temporary custody; moreover, the father failed to abide by the requirement of the applicable rule of practice (§ 35a-18) that his written motion be verified by oath, and given that the father had actual notice of the fact that a petition of neglect was filed, was an active participant and was fully represented by counsel in a contested order of temporary custody hearing, and had elected to be absent on the day the court issued orders relating to custody of his child and the scheduling of subsequent proceedings, it was the father's burden to keep the court, his attorney and the department informed of his whereabouts and his intentions with respect to exercising responsibility for his child.

Argued May 16—officially released July 2, 2019**

** July 2, 2019, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Petition to adjudicate the respondents' minor chlid neglected, brought to the Superior Court in the judicial district of New Haven, Juvenile Matters, where the court, *Conway*, *J.*, issued an ex parte order of temporary custody and removed the minor child from the respondents' care; thereafter, the court, *Burke*, *J.*, sustained the order of temporary custody; subsequently, the respondent father was defaulted for failure to appear; thereafter, the court, *Conway*, *J.*, rendered judgment adjudicating the minor child neglected and committing the minor child to the custody of the petitioner; subsequently, the court, *Marcus*, *J.*, denied the respondent father's motion to open the judgment, and the respondent father appealed to this court. *Affirmed.*

Albert J. Oneto IV, assigned counsel, for the appellant (respondent father).

Renee Bevacqua Bollier, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (petitioner).

Opinion

ELGO, J. The respondent father appeals from the judgment of the trial court denying his motion to open the judgment of neglect that was rendered after the respondent was defaulted for his failure to attend a case status conference.[1] On appeal, the respondent claims that the court improperly denied his motion to open because the record does not support a finding that he received "actual adequate notice of the [case status] conference in violation of his rights to the due process of law." We disagree and, accordingly, affirm the judgment of the trial court.

[1] A default judgment also was rendered against Skylar's mother for her failure to appear at the case status conference, but she is not a party to this appeal. We therefore refer to the respondent father as the respondent in this opinion.

The following facts and procedural history are relevant to this appeal. Skylar was born in September, 2018. On September 28, 2018, the Department of Children and Families (department) assumed temporary custody of Skylar pursuant to a ninety-six hour administrative hold. On October 1, 2018, the petitioner, the Commissioner of Children and Families, filed a neglect petition on behalf of Skylar. On that same date, the department obtained an ex parte order of temporary custody. A trial on the order of temporary custody was heard by the court on October 12 and 19, 2018. At the close of the first day of trial, the respondent received permission to be excused from attending the second day of trial. At the close of the second day of trial, the court ruled from the bench and sustained the order of temporary custody.

After the court ruled from the bench, the parties scheduled a case status conference. The following colloquy occurred:

"The Clerk: November 27th at nine?

"[The Mother's Counsel]: I guess so.

"[The Department's Counsel]: Can [the respondent] be notified of that date, please, your honor?

"The Court: So ordered.

"[The Respondent's Counsel]: Actually, is it possible to get a three o'clock case status conference?

"[The Mother's Counsel]: That date? No. I have a trial from two to five.

"[The Respondent's Counsel]: He won't be able to make it that's a work day. He could lose his job.

"The Court: You try it for a different time?

"The Clerk: We can do December 4th at two.

"[The Respondent's Counsel]: Is it possible to do three? . . .

"The Clerk: Would nine o'clock work or no?

"[The Respondent's Counsel]: No, he'll be at work. He works until two so three is—

"The Clerk: So it doesn't matter what day?

"[The Respondent's Counsel]. Yes. It has to be three."

The case status conference then was scheduled for December 4, 2018, at 3 p.m. The respondent did not attend the scheduled case status conference, but his attorney was present. The department at that time asked the court to render a default judgment as to the adjudication of neglect against the respondent for his failure to appear and to proceed to the disposition of commitment. The respondent's attorney objected but did not indicate that the respondent did not have knowledge of the status conference. Instead, the respondent's attorney told the court that the respondent could still be at work and that he was unable to reach the respondent, who was not answering his phone. On that same date, the court adjudicated Skylar neglected and committed her to the care and custody of the petitioner.

On December 31, 2018, the respondent filed a motion for articulation in which he asked the court to articulate the factual basis for its order sustaining the ex parte order of temporary custody. On that same date, the court issued an articulation, in which it found the following relevant facts: "At the time of her birth, [Skylar's mother and the respondent] had a sibling of Skylar who had been committed to [the department] and [had] a pending termination of parental rights matter. Neither [Skylar's mother nor the respondent] addressed their issues that caused the sibling to be committed. . . . There were two expired orders of protection between [Skylar's mother and the respondent]. . . . Prior to

[the sibling's] removal, [the respondent] reportedly hit [Skylar's mother], giving her a bloody nose. Also, [Skylar's mother] sent [a department social worker] an e-mail, in June of 2018, stating that she wanted [the department] to know that she and [the respondent] had been lying and they had been living together and they have had domestic violence issues. [Skylar's mother] said that [the respondent] hit her and kicked her out of the home. [Skylar's mother] would have to sleep on the front porch or at the hospital [emergency room] areas. . . . [A department social worker] reported that for Skylar to be returned, [the respondent] would have to show that he completed an updated substance abuse evaluation and domestic violence program. He needs to avoid domestic violence. There was testimony concerning [the respondent] having a bottle in a paper bag in his car. [The respondent] testified that it was . . . nonalcoholic. The court [found] that not credible."

On the basis of the credible testimony and evidence elicited at trial, the court found that the petitioner had "sustained the burden to prove by a fair preponderance of the evidence that under the doctrine of predictive neglect, that as of the date of the ex parte [order of temporary custody], it was more likely or more probable than not, that if Skylar were allowed to be placed in the care of either [Skylar's mother or the respondent], independently or in the care of both of them, Skylar would have been in immediate physical danger from her surroundings and immediate removal was necessary and continues to be necessary to ensure her safety." (Emphasis omitted.) Accordingly, the court sustained the ex parte order of temporary custody.

On January 8, 2019, the respondent filed a motion to open the judgment committing the minor child to the petitioner's custody.[2] Following a hearing held on January 10, 2019, the court denied the respondent's motion

[2] The respondent's motion to open consisted in its entirety of the following: "Pursuant to Practice Book § 17-4 [the respondent] moves this court to open

to open. First, the court explained that the respondent had failed to comply with the requirements of Practice Book § 35a-18[3] for filing a motion to open in juvenile matters, as his motion was not verified by oath. Second, the court considered the transcript of the proceedings on October 19, 2018, and concluded that the respondent's attorney was responsible for providing the respondent with notice of the case status conference. Third, the court explained that, in its December 31, 2018 articulation, it had specified the reasons why the order of temporary custody was sustained, and the respondent's motion had not demonstrated how those things had changed. On January 22, 2019, the respondent filed the present appeal from the judgment denying his motion to open the judgment of neglect.[4]

On appeal, the respondent claims that he was "entitled to have the judgment opened as a matter of law because the record of the proceedings below did not support a finding that he received actual notice of the

the judgment by this [court] of committing the child to the care and custody of the department. In support of this motion, [the respondent] further states the following: 1. [The respondent] never received notice of the case status conference. 2. [The respondent] has a home and child care and is completely prepared to take the child home and into his care. 3. That it is in the best interests of the child to open the judgment and place the child with [the respondent]."

[3] Practice Book § 35a-18 provides in relevant part: "Any order or decree entered through a default may be set aside within four months succeeding the date of such entry of the order or decree upon the written motion of any party or person prejudiced thereby, showing reasonable cause, or that a defense in whole or in part existed at the time of the rendition of such order or of such decree, and that the party so defaulted was prevented by mistake, accident or other reasonable cause from prosecuting or appearing to make the same, except that no such order or decree shall be set aside if a final decree of adoption regarding the child has been issued prior to the filing of any such motion. Such written motion shall be verified by the oath of the complainant and shall state in general terms the nature of the claim or defense and shall particularly set forth the reason why the party failed to appear."

[4] Pursuant to Practice Book § 67-13, the attorney for the minor child filed a statement adopting the brief of the petitioner in this appeal.

status conference in violation of the due process of law." We disagree.

As a preliminary matter, the respondent contends that although ordinarily this court would be constrained to review a lower court's decision to deny a motion to open a default judgment as to whether the court acted in clear abuse of its discretion, this court should exercise de novo review pursuant to the test articulated by the United States Supreme Court in *Mathews* v. *Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).[5] The respondent argues that de novo review pursuant to *Mathews* is appropriate in cases like this one where the "lower court proceedings [show] that a litigant was denied the due process of law in a matter customarily left to the lower court's sound discretion . . . ." Specifically, the respondent contends that he was deprived of due process of law because he did not receive "actual adequate notice" of the case status conference and, thus, he was not given an opportunity to be heard. We are not persuaded.

To support his contention that this court should apply the balancing test in *Mathews* to this case, the respondent cites to this court's decision in *In Re Shaquanna M.*, 61 Conn. App. 592, 767 A.2d 155 (2001). In that case, the issue was "[w]hether the denial of a continuance [had] been shown by the respondent to have interfered with her basic constitutional right to raise her children, thereby depriving her of procedural due process . . . ."

[5] Our Supreme Court has recognized that "[t]he United States Supreme Court [in *Mathews* v. *Eldridge*, supra, 424 U.S. 335] [has] set forth three factors to consider when analyzing whether an individual is constitutionally entitled to a particular judicial or administrative procedure: First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (Internal quotation marks omitted.) *In re Jonathan M.*, 255 Conn. 208, 226 n.20, 764 A.2d 739 (2001).

Id., 600. The court in *In Re Shaquanna M.* explained that "the difference in the two analyses [of the abuse of discretion standard and the *Mathews* balancing test] relates to the lack of discretion involved in providing procedural safeguards to satisfy procedural due process when dealing with the irrevocable severance of a parent's rights, as opposed to the presence of discretion in granting or denying a continuance in the garden variety civil case with its lesser standard of proof." Id., 605.

The respondent's reliance on *In Re Shaquanna M.* is misplaced. The respondent claims that he did not receive "actual adequate notice" of the case status conference, at which the default judgment was rendered. The issue on appeal, however, is the trial court's denial of the respondent's motion to open. The respondent asserts that, as a matter of law, the trial court was required to grant the motion to open. As such, he conflates the alleged due process violation in the court's rendering a default judgment at the case status conference with the court's denial of his motion to open. The respondent contends that he "was given no opportunity to be heard in connection with the neglect petition," but that assertion is plainly incorrect. The manifest purpose of a motion to open a default pursuant to Practice Book § 35a-18 and General Statutes § 52-212 is to provide a mechanism by which a defaulted party has an opportunity to be heard. By filing the motion to open, the respondent invoked his right to due process, specifically, the right to be heard as to why he failed to appear and whether he had a good defense. Accordingly, the denial of a motion to open is inherently different from a denial of a motion for a continuance, which was the motion at issue in *In Re Shaquanna M.*, or a motion for an evidentiary hearing, which was the motion at issue in *Mathews*. *In Re Shaquanna M.*, supra, 61 Conn. App. 605.

In his brief, the respondent launches into a *Mathews* balancing test analysis focused solely on the circumstances of the case status conference, but provides no analysis of the court's consideration and disposition of the motion to open, from which he has taken this appeal. With respect to the motion to open, the burden was on the respondent to show reasonable cause or that a defense existed in whole or in part, and that there was reasonable cause that prevented him from appearing. Practice Book § 35a-18; see also General Statutes § 52-212 (a). The respondent's failure to meet that burden, as discussed more fully later in this opinion, does not obviate the fact that, by filing the motion to open, he was afforded a hearing and, thereby, exercised his right to due process. Under such circumstances, we cannot conclude that the respondent was deprived of his right to due process. We, therefore, review the merits of the respondent's claim under the abuse of discretion standard applicable to the appeal of a denial of a motion to open a default judgment.

"To open a default judgment, a moving party must show reasonable cause, or that a good cause of action or defense in whole or in part existed at the time of the rendition of the judgment or the passage of the decree, and that the plaintiff or defendant was prevented by mistake, accident or other reasonable cause from prosecuting the action or making the defense. General Statutes § 52-212 (a). Furthermore, § 52-212 (b) requires that [t]he complaint or written motion shall be verified by the oath of the complainant or his attorney, shall state in general terms the nature of the claim or defense and shall particularly set forth the reason why the plaintiff or defendant failed to appear. It is thus clear that to obtain relief from a judgment rendered after a default, two things must concur. There must be a showing that (1) a good defense, the nature of which must be set forth, existed at the time judgment was ren-

dered, and (2) the party seeking to set aside the judgment was prevented from making that defense because of mistake, accident or other reasonable cause. . . . Since the conjunctive and meaning in addition to is employed between the parts of the two prong test, both tests must be met." (Citation omitted; internal quotation marks omitted.) *In re Ilyssa G.*, 105 Conn. App. 41, 45–46, 936 A.2d 674 (2007), cert. denied, 285 Conn. 918, 943 A.2d 475 (2008).

"Our review of a court's denial of a motion to open . . . is well settled. We do not undertake a plenary review of the merits of a decision of the trial court to grant or to deny a motion to open a judgment. . . . In an appeal from a denial of a motion to open a judgment, our review is limited to the issue of whether the trial court has acted unreasonably and in clear abuse of its discretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action. . . . The manner in which [this] discretion is exercised will not be disturbed so long as the court could reasonably conclude as it did." (Internal quotation marks omitted.) Id., 45.

As the trial court correctly observed, the respondent in the present case met neither of the two prongs required for the court to open the judgment of default. As to the first prong, the respondent did not present a good defense. In his motion to open, the respondent averred that he had "a home and child care and [was] completely prepared to take the child home and into his care." In its articulated decision sustaining the order of temporary custody, which was tried to the court just a few months prior to the date on which the respondent filed his motion to open, the court stated that there was evidence put on by the petitioner regarding concerns over the respondent's substance abuse and domestic violence. The respondent addressed neither concern in his motion to open.

As to the second prong, the respondent did not show that his failure to appear was the result of mistake, accident or other reasonable cause, nor did he "particularly set forth the reason why [he] failed to appear." Practice Book § 35a-18; see also General Statutes § 52-212 (a) and (c). Instead, the respondent simply asserted in his motion to open that he did not receive notice of the case status conference. The record before this court demonstrates that the respondent's attorney was present when the case status conference was scheduled; indeed, the respondent's attorney scheduled the case status conference for 3 p.m. for the respondent's convenience.[6] Furthermore, at the case status conference, the respondent's attorney did not assert that the respondent lacked notice of the scheduled court date. Rather, the reaction of the respondent's attorney, who asserted that the respondent could still be at work because the respondent was not answering his phone, suggests that he expected the respondent to be present at the case status conference. Moreover, the record is devoid of any indication that the respondent's attorney was unable to contact his client after the second day of trial, which the respondent specifically sought to be excused from

[6] The respondent acknowledges that, "[u]nder the law of agency, a court, under appropriate circumstances, may default a party for his failure to appear for a scheduled proceeding if the party's attorney had knowledge of the proceeding, on the theory that a party is presumed to know that which is known to his attorney." The respondent also acknowledges that the standing orders for juvenile matters direct that counsel "shall, as necessary, inform each client of the date and time of each court matter." (Emphasis omitted; internal quotation marks omitted.) The respondent nonetheless attempts to shift the burden of notice to the court and argues that it was the court's responsibility to notify the respondent of the case status conference date because, "[f]aced with an unclear and ambiguous order of notice, [the respondent's] counsel would have been justified in believing that he had been relieved of any obligation he may have had under the standing orders to notify his client of the status conference." We are not persuaded. We fail to see how the court's agreement that the respondent should be notified of the case status conference pursuant to the department's request relieves the respondent's attorney from his independent responsibility, under the theory of agency and pursuant to the standing orders for juvenile matters, to provide notice to his client.

attending. There is no indication that the respondent and his attorney were unable to communicate with each other or that the respondent was unaware of the outcome of the order of temporary custody hearing, at which time the court not only scheduled the case status conference for a time requested by the respondent through his attorney, but more importantly, sustained the order of temporary custody as to his child.

It is important to note that the circumstances of this case contrast with default judgments in which a party has never appeared in court following a finding of notice at the commencement of a case. This case is one in which the respondent had actual notice of the fact that a petition of neglect was filed, was an active participant and fully represented by counsel in a contested order of temporary custody hearing, and elected to be absent on the day the court issued orders relating to custody of his child and the scheduling of subsequent proceedings. Under such circumstances, it is the burden of the respondent to keep the court, his attorney and the department informed of his whereabouts and his intentions with respect to exercising responsibility for his child. See *In re Ilyssa G.*, supra, 105 Conn. App. 49 ("regardless of whether it was intentional or the result of negligence, the respondent's failure to keep the court, the department and his attorney informed of his whereabouts does not qualify for purposes of opening a default judgment as a mistake, accident or other reasonable cause that prevented the respondent from presenting a defense").[7] Accordingly, the respondent has

[7] To the extent that the respondent did not receive notice of the case status conference from his attorney because of his own negligence in not staying in contact with his attorney, "[n]egligence is no ground for vacating a judgment, and it has been consistently held that the denial of a motion to open a default judgment should not be held an abuse of discretion where the failure to assert a defense was the result of negligence. . . . Negligence of a party or his counsel is insufficient for purposes of § 52-212 to set aside a default judgment." (Internal quotation marks omitted.) *In re Ilyssa G.*, supra, 105 Conn. App. 48–49.

not demonstrated how his failure to appear was the result of mistake, accident or other reasonable cause.

Furthermore, the respondent failed to abide by the requirement that his motion be verified by oath. Practice Book § 35a-18 mandates that the written motion "shall be verified by the oath of the complainant." The respondent failed to meet that basic requirement. Because the respondent failed to meet either prong required for the court to open the judgment of default and further failed to have his motion verified by oath, we conclude that the court did not abuse its discretion in denying his motion to open the judgment.

The judgment is affirmed.

In this opinion the other judges concurred.

Cumulative Table of Cases
Connecticut Appellate Reports
Volume 191

(Replaces Prior Cumulative Table)

Clasby *v.* Zimmerman 143
Arbitration; whether trial court improperly denied application to confirm arbitration award; whether, pursuant to statute (§ 52-417), trial court lacked discretion to deny timely application to confirm arbitration award where award had not been timely vacated, modified or corrected; whether trial court correctly denied request that it vacate subsequent arbitration award that reduced certain costs of cabinetry work and hold plaintiffs responsible for cost of cabinetry work as set forth in original arbitration award.

Deutsche Bank National Trust Co. *v.* Ponger 76
Foreclosure; whether trial court properly rendered judgment of strict foreclosure; claim that plaintiff failed to provide defendant, who was joint tenant of mortgaged property and joint obligor on mortgage deed, with proper notice of default and acceleration of note, where plaintiff had sent notice to mortgaged property that was addressed to other joint tenant of mortgaged property and joint obligor on mortgage deed, but not to defendant.

Dinham *v.* Commissioner of Correction 84
Habeas corpus; manslaughter in first degree with firearm; whether habeas court improperly dismissed claims that respondent Commissioner of Correction misconstrued and misapplied statute (§ 54-125a) pertaining to parole suitability hearings and application of risk reduction credit toward advancement of parole eligibility date, and statute (§ 18-98e) pertaining to risk reduction credit; claim that respondent misinterpreted and misapplied 2013 amendments to § 54-125a, as set forth in No. 13-3 of 2013 Public Acts (P.A. 13-3) and No. 13-247 of 2013 Public Acts (P.A. 13-247), and 2015 amendments to § 18-98e, as set forth in No. 15-216 of 2015 Public Acts (P.A. 15-216); claim that amendments to statutes as set forth in public acts were substantive rather than procedural in nature and, therefore, should not apply retroactively to petitioner; whether habeas court improperly dismissed claim that when petitioner pleaded guilty in 2012 to manslaughter in first degree with firearm, he relied on governmental representations that he would receive risk reduction credits to advance his parole eligibility date and reduce total length of his sentence; whether habeas court improperly dismissed certain counts of habeas petition for lack of subject matter jurisdiction and for failure to state claim on which habeas relief could be granted; whether petitioner established cognizable liberty interest by alleging that respondent, through his customary practices, had created liberty interest.

Freeman *v.* A Better Way Wholesale Autos, Inc. 110
Attorney's fees; claim that trial court erred in awarding supplemental attorney's fees; claim that trial court abused its discretion in amount of attorney's fees awarded; adoption of trial court's memorandum of decision as proper statement of relevant facts and applicable law on issues.

In re Leo L. 134
Termination of parental rights; motion to transfer guardianship; claim that trial court abused its discretion in denying motion to transfer guardianship of minor children to intervening grandparent and erroneously determined that transfer of guardianship would not be in children's best interests; whether trial court had authority to weigh evidence elicited in intervenor's favor; whether trial court properly determined that transferring guardianship was not in children's best interests; claim that trial court failed to acknowledge certain evidence in making its decision.

In Re Skylar F. 200
Child neglect; whether trial court properly denied respondent father's motion to open judgment of neglect concerning father's minor child that was rendered after father was defaulted for failing to attend case status conference; whether father's rights to due process were violated; claim that this court should exercise de novo review of claim that father was denied due process of law as result of trial court's

rendering default judgment at case status conference; claim that trial court abused its discretion in denying father's motion to open default judgment.

Maria W. *v.* Eric W. 27

Dissolution of marriage; motion for contempt; claim that trial court abused its discretion by admitting plaintiff's testimony that defendant previously had been arrested and charged with certain criminal offenses; claim that trial court improperly found defendant in arrears on child support and alimony obligations and ordered him to make certain weekly payments; whether order appealed from was final where trial court resolved some, but not all, claims in motion for contempt and continued matter to later date for determination of whether defendant's failure to pay arrears was wilful or due to inability to pay; whether this court lacked jurisdiction to entertain claim on appeal due to lack of final judgment.

Marvin *v.* Board of Education 169

Negligence; summary judgment; governmental immunity; claim that trial court improperly rendered summary judgment in favor of defendant on ground of government immunity pursuant to statute (§ 52-557n [a] [2] [B]) that provides immunity for discretionary acts of employees, agents and officers of political subdivisions of state; claim that genuine issue of material fact existed as to whether inspection and maintenance of school locker room floor by defendant's employees constituted ministerial duty; claim that there remained genuine issue of material fact as to whether plaintiff was identifiable person subject to imminent risk of harm and, thus, whether identifiable person, imminent harm exception to defense of governmental immunity applied; whether plaintiff fell within identifiable class of foreseeable victims or was identifiable person for purposes of exception.

McGinty *v.* Stamford Police Dept. 163

Workers' compensation; whether Compensation Review Board properly affirmed decision of Workers' Compensation Commissioner that plaintiff employee's claim for benefits under Heart and Hypertension Act (§ 7-433c) was compensable; whether commissioner's finding that plaintiff suffered from heart disease was supported by record.

1916 Post Road Associates, LLC *v.* Mrs. Green's of Fairfield, Inc. 16

Landlord-tenant; guarantee of commercial lease; whether trial court properly granted motion for summary judgment; whether guarantor's letters to plaintiff created genuine issue of material fact as to whether guarantor was liable to plaintiff lessor for debts of lessee.

Smith *v.* Marshview Fitness, LLC 1

Fraudulent transfer; motion for summary judgment; claim that trial court improperly concluded that transfer of certain property to defendant company was not fraudulent under common law or Uniform Fraudulent Transfer Act (§ 52-552a et seq.) on ground that property did not constitute "assets" because it was encumbered by valid lien in excess of its value; claim that trial court improperly rendered summary judgment on claim alleging violation of Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.) because underlying conduct on which plaintiff claimed defendant company violated CUTPA was broader than facts supporting his fraudulent transfer claims; whether trial court abused its discretion in denying motion to reargue motion for summary judgment.

State *v.* Chavez. 184

Manslaughter in first degree; claim that trial court improperly deprived defendant of constitutional right to fair trial when it failed to instruct jury, sua sponte, about inherent shortcomings of simultaneous foreign language interpretation of trial testimony; claim that trial court improperly deprived defendant of constitutional right to fair trial when it instructed jury that it could consider as consciousness of guilt evidence that defendant changed shirt shortly after victim was stabbed; whether defendant was presented with meaningful opportunity to review and comment on trial court's jury instructions; whether defendant waived right to challenge constitutionality of jury instruction under State *v.* Golding *(213 Conn. 233); whether jury reasonably could have found from evidence that defendant's act of changing shirt was motivated by desire to avoid detection by law enforcement.*

State *v.* Clark. 191

Assault in second degree; whether trial court properly denied motion to suppress oral statement defendant made to police officer during alleged custodial interrogation in defendant's apartment before defendant was advised of constitutional rights pursuant to Miranda *v.* Arizona *(384 U.S. 436); whether trial court properly*

determined that defendant was not in custody at time statement was made; whether reasonable person in defendant's position would have believed that her freedom of movement was restrained to degree associated with formal arrest.

State *v.* Daniels 33

Intentional manslaughter in first degree; reckless manslaughter in first degree; misconduct with motor vehicle; claim that jury's guilty verdicts were legally inconsistent in that each of alleged crimes required mutually exclusive mental state; claim that trial court erred when it failed to exclude certain testimonial hearsay; whether verdicts required findings that defendant simultaneously acted intentionally and recklessly with respect to different results; whether jury reasonably could have found that defendant specifically intended to cause serious physical injury to victim and that, in doing so, consciously disregarded substantial and unjustifiable risk that actions created grave risk of death to victim; whether defendant's conviction required jury to find that defendant acted intentionally and criminally negligent with respect to different results; whether defendant could have intended to cause serious physical injury to victim while, at same time, failing to perceive substantial and unjustifiable risk that manner in which defendant operated vehicle would cause victim's death; whether mental state element for crimes of reckless manslaughter and misconduct with motor vehicle, or criminally negligent operation of motor vehicle, were mutually exclusive when examined under facts and state's theory that two strikes of victim's vehicle by defendant was one continuous act; whether defendant could have consciously disregarded substantial and unjustifiable risk that actions would cause victim's death while simultaneously failing to perceive substantial and unjustifiable risk that actions would cause victim's death; whether mental states required for reckless manslaughter and criminally negligent operation related to same result; whether admission of out-of-court statement for purposes other than its truth raised confrontation clause issue and was of constitutional magnitude under second prong of State *v.* Golding *(213 Conn. 233); whether statement at issue was hearsay.*

State *v.* Francis 101

Motion to correct illegal sentence; whether trial court properly denied motion to correct illegal sentence; claim that sentence was imposed in illegal manner because sentencing court substantially relied on materially inaccurate information in presentence investigation report concerning defendant's prior criminal history; whether record demonstrated that sentencing court did not substantially rely on certain inaccuracies in presentence investigation report in imposing sentence; whether disputed fact that victim sustained graze wound prior to sustaining fatal stab wound substantially relied on by sentencing court; claim that sentencing court misconstrued evidence concerning manner in which underlying crime of murder was committed.

Stone *v.* East Coast Swappers, LLC 63

Unfair trade practices; alleged violation of Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.); attorney's fees; claim that this court should recognize rebuttable presumption in context of attorney's fees for CUTPA violations, whereby prevailing plaintiff should ordinarily recover attorney's fees unless special circumstances would render such award unjust; whether trial court abused its discretion in declining to award plaintiff attorney's fees pursuant to statute (§ 42-110g [d]); claim that trial court erred by conflating analyses for awarding attorney's fees and punitive damages under CUTPA.

SUPREME COURT PENDING CASES

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

JPMORGAN CHASE BANK, N.A. *v.* ROGER ESSAGHOF et al., SC 20090
Judicial District of Stamford-Norwalk at Stamford

Foreclosure; Whether Trial Court Properly Ordered Mortgagors to Reimburse Mortgagee for Property Taxes and Homeowner's Insurance Premiums Paid by Mortgagee During Pendency of Appeal from Foreclosure Judgment. The defendants, Roger Essaghof and Katherine Marr-Essaghof, obtained a loan from the plaintiff's predecessor in interest that was secured by a mortgage on their property in Weston. The plaintiff brought this foreclosure action against the defendants after they defaulted on the loan, and the trial court rendered a judgment of strict foreclosure. The defendants appealed from the judgment of foreclosure and, during the pendency of the appeal, the plaintiff filed a motion asking the trial court to invoke its equitable powers and order the defendants to reimburse it for property taxes and homeowner's insurance premiums that it was paying while the appeal was pending. The plaintiff was covering the defendants' tax and insurance obligations in order to maintain its priority over other encumbrancers. The trial court granted the plaintiff's motion, and the defendants amended their appeal to also challenge that decision. The Appellate Court (177 Conn. App. 144) affirmed the trial court's judgment and rejected the defendants' claim that the trial court abused its discretion in ordering them to reimburse the plaintiff for its payments of property taxes and homeowner's insurance premiums made during the pendency of the appeal. The Appellate Court noted that a foreclosure action is an equitable proceeding in which "either a forfeiture or a windfall should be avoided if possible." It then concluded that the trial court here did not abuse its discretion where it was well within the trial court's equitable powers to address its concern that, absent an order granting the plaintiff's motion, the defendants "would experience a windfall because they would be allowed to live on their property for free at the plaintiff's expense until the conclusion of the foreclosure proceedings." The defendants were granted certification to appeal from the Appellate Court's decision. The Supreme Court will decide whether the trial court's order that the defendants reimburse the plaintiff for property taxes and homeowner's insurance violated General Statutes § 49-14, which governs deficiency proceedings in actions for foreclosure. The defendants argue that the property and insurance charges advanced by the plaintiff here constitute part of the mortgage debt and accordingly that those

charges can only be recovered by the plaintiff in § 49-14 deficiency judgment proceedings.

SHARON CLEMENTS *v.* ARAMARK CORPORATION et al., SC 20167
Compensation Review Board

Workers' Compensation; Whether Appellate Court Properly Determined that Plaintiff's Injury Compensable Where Condition that Caused the Injury not "Peculiar" to Plaintiff's Employment. The plaintiff was employed by the defendant, Aramark Corporation, as a mess attendant at the Coast Guard Academy in New London. Her duties included serving food and beverages and cleaning up after meals. One morning, the plaintiff was walking along a path at the academy after reporting for work when she became lightheaded and passed out, falling backward and hitting her head on the ground. The plaintiff had a history of heart disease and, after being taken to the hospital following her fall, she suffered a cardiac arrest. The plaintiff sought workers' compensation benefits for the injury she suffered to her head in the fall. A workers' compensation commissioner dismissed her claim, finding that the plaintiff's injury did not arise out of her employment with Aramark and that the cause of the fall was a cardiac episode that was unrelated to her employment. The Compensation Review Board affirmed the commissioner's finding and dismissal, and the plaintiff appealed to the Appellate Court. The Appellate Court (182 Conn. App. 224) reversed the decision of the Compensation Review Board, ruling that it had wrongly deemed the plaintiff's head injury noncompensable, and it remanded the case to the board with direction to sustain the plaintiff's appeal from the commissioner. The Appellate Court held that, while the personal infirmity that caused the plaintiff to fall did not arise out of her employment, the resultant injury that was caused by her head hitting the ground at her workplace *did* arise out of her employment such that it was compensable. In support of its conclusion that the plaintiff's injury was compensable, the Appellate Court cited Connecticut Supreme Court precedent for the proposition that a compensable injury may arise out of employment even though the risk of injury from that employment is no different in degree or kind from the risk of injury to which an employee may be exposed outside of his or her employment. The court noted, however, that, in *Labadie* v. *Norwalk Rehabilitation Services, Inc.*, 274 Conn. 219, 238 (2005), the Supreme Court had taken a contrary position when it cited a 1916 Connecticut Supreme Court case for the proposition that conditions that arise out of employment are "peculiar to [employment], and not such exposure as the ordinary person is subjected to." The

Appellate Court regarded that proposition in *Labadie* as anomalous, noting that, in two other decisions, the Supreme Court had held that an injury was compensable even though the risk the employee faced was no greater than what the employee would have been exposed to outside of work. The Supreme Court granted Aramark certification to appeal, and it will decide whether the Appellate Court properly determined that the plaintiff's head injury was compensable even though the condition that caused the plaintiff's injury was not "peculiar" to her employment.

ROGER SAUNDERS, TRUSTEE OF ROGER SAUNDERS MONEY PURCHASE PLAN *v.* KDFBS, LLC, et al., SC 20182
Judicial District of Danbury

Appellate Jurisdiction; Final Judgment; Foreclosure; Whether Appellate Court Properly Dismissed, for Lack of a Final Judgment, Appeal Taken from Judgment that Ordered Foreclosure by Sale and Determined Priority of Mortgages. The plaintiff brought this action by a two count complaint. With the first count, the plaintiff sought to foreclose a mortgage it held on a Ridgefield condominium owned by defendant KDFBS, LLC. The second count sought a declaratory judgment determining that the plaintiff's mortgage had priority over a mortgage on the property given to defendants Karen Davis and Daniel Davis. Following trial, the trial court issued a memorandum of decision ordering, as to the first count, that there be foreclosure by sale. The court ruled, as to the second count, that the plaintiff's mortgage had priority over the Davis mortgage, noting that the Davis mortgage could not be found in the chain of title. The Davises appealed to the Appellate Court, and the plaintiff moved that the appeal be dismissed, claiming that the Appellate Court lacked jurisdiction over it because the trial court's determination of the priority of the mortgages did not constitute an appealable final judgment. The plaintiff cited *Moran* v. *Morneau*, 129 Conn. App. 349 (2011), where the Appellate Court held that an order determining the priorities of mortgages is an interlocutory order and not a final judgment when, as here, it is rendered prior to the foreclosure sale and that a trial court does not render a final judgment as to priorities until the sale is approved and the court renders a supplemental judgment. The *Moran* court rejected the claim that an interlocutory order of priorities is a final judgment under the second prong of *State* v. *Curcio*, 191 Conn. 27, 31 (1983), because, barring an immediate appeal, the appellant would suffer an irreparable loss of her right to be declared first in

priority, noting that the appellant could vindicate her claim to priority in an appeal taken following the rendering of a supplemental judgment. Here, the Appellate Court simply granted the plaintiff's motion to dismiss with the notation that the appeal was being dismissed for lack of a final judgment. The Supreme Court granted the Davises certification to appeal the judgment of dismissal, and it will determine whether the Appellate Court properly dismissed their appeal challenging the determination of the priority of the mortgages for lack of a final judgment. The Davises claim that the determination of priorities was a final judgment because that finding was integral to determining whether the foreclosure should be strict or by sale, because the trial court rendered judgment on the entire complaint as contemplated by Practice Book § 61-2, and because General Statutes § 52-29 (a) provides that a Superior Court judgment declaring the rights and legal relations of the parties "shall have the force of a final judgment."

CHRISTOPHER BARKER *v.* ALL ROOFS BY DOMINIC et al., SC 20196
Compensation Review Board

Workers' Compensation; Whether Appellate Court Properly Concluded That City was § 31-291 "Principal Employer" of Worker Hired by Uninsured Subcontractor to Repair Roof of City-Owned Building. The plaintiff sought workers' compensation benefits for a compensable injury he suffered while working for an uninsured subcontractor on a project to repair the roof of the defendant city's transfer facility. The trial commissioner concluded that the city was liable for the plaintiff's benefits because it was his "principal employer" under § 31-29, which provides that "[w]hen any principal employer procures any work to be done wholly or in part for him by a contractor, or through him by a subcontractor, and the work so procured to be done is a part of process in the trade or business of such principal employer," the principal employer shall be liable for workers' compensation benefits. The Compensation Review Board, affirmed the commissioner's decision, ruling that the city was the plaintiff's principal employer under § 31-219 because building maintenance is an essential obligation of the city and, thus, part of the "business" of the city. The city appealed to the Appellate Court, claiming that § 31-291 was not intended to apply to governmental entities because such entities are not engaged in any "trade or business." The Appellate Court (183 Conn. App. 612) disagreed and affirmed the Compensation Review Board's decision, stating that the Supreme Court, in *Massolini* v. *Driscoll*, 114 Conn. 546 (1932), construed § 31-219 and determined that a municipality can be held liable as a principal

employer of an uninsured subcontractor's employee. The court also rejected the city's claim that *Massolini* was incorrectly decided in that it defined "business" in an overly broad manner, noting that, as an intermediate appellate court, it was bound by *Massolini* and could not alter or reinterpret that decision, especially given that the language of § 31-291 has not changed since *Massolini* was decided. The court also found unavailing the city's contention that the legislature abrogated the rule of *Massolini* by establishing the Second Injury Fund, which now has the statutory responsibility to pay workers' compensation benefits for all employees of uninsured employers. In support of its decision, the court noted that (1) the statute that created the fund contained no language that referred to or purported to modify § 31-291, and (2) the Supreme Court has cited *Massolini* in the years since the fund was created as the legal basis for holding governmental entities liable as principal employers under § 31-291. Finally, the city claimed that, even if § 31-291 can be applied to governmental entities, the board erred in affirming the commissioner's finding that the city was the plaintiff's principal employer because repairing roofs is not "a part or process" in the city's "trade or business." The court, however, determined that it was reasonable for the commissioner to conclude that because the city has a responsibility to manage, maintain, repair and control its property pursuant to General Statutes § 7-148, the work of repairing the roof of a city owned building is a part or process in the trade or business of the city. The city was granted certification to appeal, and the Supreme Court will consider whether the Appellate Court properly concluded that, under § 31-291, as construed by *Massolini*, the city was liable for workers' compensation benefits as the principal employer of a worker hired by an uninsured subcontractor to repair the roof of building owned by the city.

IN RE TRESIN J., SC 20267
Juvenile Matters at Hartford

Termination of Parental Rights; Whether, in Determining Whether Incarcerated Parent had Ongoing Relationship with Child, Trial Court Bound to Consider Parent's Positive Feelings Toward Child; Whether Appellate Court Properly Determined that Infancy Exception Inapplicable Where Interference with Parent-Child Relationship did not Begin Until Child was Five Years Old. Tresin was born in June, 2011. In May, 2013, Tresin's father (the respondent) was sentenced to a term of incarceration when his probation was revoked following his conviction on a charge of possession of marijuana. The respondent remained in custody until the fall

of 2017. In August, 2017, the Commissioner of Children and Families (the petitioner) filed a petition seeking termination of the respondent's parental rights, alleging that, pursuant to General Statutes § 17a-112 (j) (3) (D), the respondent had no ongoing parent-child relationship with Tresin. The trial court granted the termination petition, finding that there was no ongoing parent-child relationship between Tresin and his father. The court found that Tresin did not know who his father was and that he had no positive parental memories of his father. The respondent appealed, claiming that the trial court wrongly terminated his parental rights on finding no ongoing parent-child relationship where, the respondent alleged, the petitioner had interfered with his relationship with Tresin by, among other things, failing to allow him any contact with the child despite his requests for phone calls while he was incarcerated. The respondent also claimed that the trial court erred in failing to apply the law as set out in *In re Carla C.*, 167 Conn. App. 248 (2016). In that case, the Appellate Court ruled that the trial court wrongly granted a mother's petition that a father's parental rights be terminated on the ground of no ongoing parent-child relationship where (1) the father was incarcerated when the child was an infant, (2) the mother had interfered with the father's efforts to maintain contact with the child, and (3) there was undisputed evidence that the father had positive feelings for the child and expressed interest in her health and well-being. Here, the Appellate Court deemed *In re Carla C.* distinguishable and it affirmed the judgment terminating the respondent's parental rights. The court rejected the respondent's claim that, in accordance with *In re Carla C.*, the trial should have taken into consideration his positive feelings toward Tresin where Tresin was less than two years old at the time the respondent was incarcerated. The court noted that, in *In re Carla C.*, the mother's interference with the relationship between the child and the incarcerated father began when the child was two years old, whereas as here the petitioner's alleged interference did not begin until Tresin was five years old. The Appellate Court noted that the law provides that a child's positive feelings for a noncustodial parent generally are determinative except where the child is an infant or otherwise too young to have any discernable feelings and that only in the case of such infancy must the inquiry focus on the positive feelings of the parent. The respondent appeals, and the Supreme Court will consider whether the Appellate Court properly concluded that the trial court, in terminating the respondent's parental rights on the ground of lack of an ongoing parent-child relationship, was not required to apply the infancy exception recognized in *In re Carla C.*

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

Notice of Closure of the Courthouse for Superior Court Geographical Area No. 17 at Bristol and the Transfer of Pending Cases

Effective at the end of the business day on Friday, August 30, 2019, the Bristol Geographical Area No. 17 Courthouse, located at 131 North Main Street, Bristol, will permanently close. Effective Tuesday, September 3, 2019, all matters still pending in Bristol will be transferred to the New Britain Geographical Area No. 15 Courthouse, located at 20 Franklin Square, New Britain.

During the coming weeks, the arrangements necessary to effectuate these transfers will be made. Please contact Attorney Cynthia A. DeGoursey, Judicial District Chief Clerk, New Britain Superior Court, at 860-515-5180 with any questions.

Hon. Patrick L. Carroll III
Chief Court Administrator

Notice Regarding Posting Dates for the Dockets and Assignments for the 2019-2020 Court Year

Supreme Court Sessions

Notice is hereby given that the calendar of sessions for the next court year has been adopted.

Sessions last approximately two weeks and are subject to change. Any deviation from the calendar as adopted, will be noticed in the court's Docket.

The first day of each of the sessions for the 2019 - 2020 court year is as follows: September 16, 2019; October 15, 2019; November 12, 2019; December 9, 2019; January 13, 2020; February 18, 2020; March 23, 2020; and April 27, 2020.

Carolyn C. Ziogas
Chief Clerk

Appellate Court Sessions

Notice is hereby given that the calendar of sessions for the next court year has been adopted.

Sessions last approximately three weeks and are subject to change. Any deviation from the calendar as adopted, will be noticed in the court's Docket.

The first day of each of the sessions for the 2019 - 2020 court year is as follows: September 5, 2019; October 7, 2019; November 12, 2019; January 2, 2020; February 3, 2020; March 2, 2020; April 6, 2020; and May 11, 2020.

Carolyn C. Ziogas
Chief Clerk

Docket and case assignment information is available on the Judicial Branch website and at http://appellateinquiry.jud.ct.gov. The electronic posting on the Judicial Branch website is the official notice of the dockets and assignments except for incarcerated self-represented parties and individuals who have an exemption from e-filing who will continue to receive notice by mail. See Practice Book sections 69-1 and 69-3. Notice of the cases the Appellate Court determines should be considered on the court's motion calendar for dismissal or sanction will also be by mail. The information below provides docket and assignment posting dates for both courts for the 2019–2020 court year.

Supreme Court Docket	**Information available on or about**
First Term Docket	Posted to the website June 28, 2019
Second Term Docket	Posted to the website August 23, 2019
Third Term Docket	Posted to the website September 23, 2019
Fourth Term Docket	Posted to the website October 21, 2019
Fifth Term Docket	Posted to the website November 26, 2019
Sixth Term Docket	Posted to the website January 10, 2020
Seventh Term Docket	Posted to the website February 10, 2020
Eighth Term Docket	Posted to the website March 16, 2020
Supreme Court Assignment	**Information available on or about**
First Term Assignment	Posted to the website July 31, 2019
Second Term Assignment	Posted to the website September 16, 2019
Third Term Assignment	Posted to the website October 15, 2019
Fourth Term Assignment	Posted to the website November 8, 2019
Fifth Term Assignment	Posted to the website December 20, 2019
Sixth Term Assignment	Posted to the website January 31, 2020
Seventh Term Assignment	Posted to the website February 28, 2020
Eighth Term Assignment	Posted to the website April 6, 2020
Appellate Court Docket	**Information available on or about**
First Term Docket	Posted to the website July 15, 2019
Second Term Docket	Posted to the website August 22, 2019
Third Term Docket	Posted to the website September 26, 2019
Fourth Term Docket	Posted to the website November 7, 2019
Fifth Term Docket	Posted to the website December 16, 2019
Sixth Term Docket	Posted to the website January 24, 2020
Seventh Term Docket	Posted to the website February 28, 2020
Eighth Term Docket	Posted to the website April 2, 2020

(continued on next page)

Appellate Court Assignment	**Information available on or about**
First Term Assignment	Posted to the website August 14, 2019
Second Term Assignment	Posted to the website September 18, 2019
Third Term Assignment	Posted to the website October 24, 2019
Fourth Term Assignment	Posted to the website December 6, 2019
Fifth Term Assignment	Posted to the website January 15, 2020
Sixth Term Assignment	Posted to the website February 21, 2020
Seventh Term Assignment	Posted to the website March 26, 2020
Eighth Term Assignment	Posted to the website April 30, 2020