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ing properties by certain date; whether assessor improperly imposed late filing penalties under § 12-63c (d) on plaintiffs retroactively, after assessor signed grand list, pursuant to statute (§ 12-60) that governs corrections to grand list due to clerical omission or mistake; whether trial court improperly concluded that although assessor had violated statute (§ 12-55 [b]) that requires assessor to make any assessment required by law prior to signing grand list, only redress for assessor's failure to comply with provisions of § 12-55 (b) was to postpone right of plaintiffs to appeal action to assessor until succeeding grand list, and that penalty prescribed for in § 12-63c (d) makes no provision for removal of penalty imposed by legislature, regardless of action taken by assessor; whether, pursuant to § 12-55 (b), imposition of late filing penalty constitutes assessment required by law and, as such, it must be made by assessor prior to taking oath; whether assessor lacked statutory authority to impose late filing penalties after he took oath; whether late adjustments were invalid and prevented any recovery of taxes based thereon; claim that language in § 12-55 (a) demonstrated legislative intent to exclude, by implication, late penalties under § 12-63c (d) as required assessment; whether trial court improperly concluded that delayed imposition of late filing penalties did not correct clerical omission or mistake, rendering § 12-60 inapplicable; claim that plaintiffs were not harmed by assessor's imposition of late filing penalties because plaintiffs were able to seek review of assessor's imposition of penalties by appealing to board.

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

U.S. BANK NATIONAL ASSOCIATION, TRUSTEE *v.* ROBIN BLOWERS ET AL.
(SC 20067)

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

Syllabus

The plaintiff bank, as trustee, sought to foreclose a mortgage on certain real property owned by, among others, the defendant P. Following P's default on the mortgage, the plaintiff, through its loan servicing agent, initiated loan modification negotiations with P, but the parties were unable to agree on a binding modification. P then contacted the state Department of Banking, which intervened on his behalf and initiated a modification, but the plaintiff shortly thereafter increased P's monthly mortgage payment. Subsequently, the plaintiff commenced a foreclosure action, and the parties participated in mediation but were unable to reach an agreement. P then asserted special defenses sounding in equitable estoppel and unclean hands, as well as certain counterclaims, contending that the plaintiff engaged in conduct after the note had been executed that wrongfully and substantially increased P's overall indebtedness, caused P to incur costs that impeded his ability to cure the default, and reneged on loan modifications. The plaintiff moved to strike the special defenses and counterclaims, contending that they were legally insufficient because they were not related to the making, validity or enforcement of the note or mortgage and were otherwise insufficient to state a claim on which relief could be granted. The trial court granted the motion to strike, concluding that the counterclaims did not have a reasonable nexus to the making, validity or enforcement of the note because the misconduct alleged related to activities that occurred subsequent to the execution of the note or mortgage. The court did not reach the issue of whether P's allegations were otherwise legally sufficient to support the counterclaims. The trial court found that P had alleged sufficient facts to support his special defenses of equitable estoppel and unclean hands, but, because P did not allege that the parties had agreed to a modification of the loan postforeclosure and could not rely on postforeclosure conduct to support his special defenses, they were legally insufficient, as they did not directly relate to the making, validity or enforcement of the note or mortgage. The trial court rendered judgment of strict foreclosure, from which P appealed to the Appellate Court. The Appellate Court rejected P's request to abandon the making, validity or enforcement test in favor of the transactional test, set forth in the rules of practice (§ 10-10), that requires that counterclaims must arise out of the transaction that is the subject of the plaintiff's complaint. The Appellate Court affirmed the trial court's judgment, and P, on the granting of certification, appealed to this court. *Held* that the Appellate Court incorrectly concluded that P's allegations, made in connection

with his special defenses and counterclaims, did not provide a legally sufficient basis for those defenses and counterclaims, as P's allegations involved the types of misconduct that bore a sufficient connection to the enforcement of the note or the mortgage, and to the extent that the pleadings could be construed to allege that the intervention by the Department of Banking resulted in a binding loan modification, the breach of such an agreement also provided a sufficient basis to withstand a motion to strike in a foreclosure action; accordingly, the judgment of the Appellate Court was reversed, and the case was remanded with direction to reverse the judgment of strict foreclosure and for further proceedings.

Argued December 11, 2018—officially released August 13, 2019

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., brought to the Superior Court in the judicial district of Hartford, where the defendant Farmington Valley Landscape, LLC, et al. were defaulted for failure to appear; thereafter, the defendant C&I Solutions, LLC, was defaulted for failure to plead; subsequently, the named defendant et al. filed special defenses and counterclaims; thereafter, the court, *Dubay*, *J.*, granted the plaintiff's motion to strike the special defenses and counterclaims; subsequently, the court, *Wahla*, *J.*, granted the plaintiff's motion for judgment on the counterclaims, the court, *Peck*, *J.*, granted the plaintiff's motion for summary judgment as to liability and the court, *Wahla*, *J.*, granted the plaintiff's motion for judgment of strict foreclosure and rendered judgment thereon, from which the defendant Mitchell Piper appealed to the Appellate Court, *Alvord* and *Pellegrino*, *Js.*, with *Prescott*, *J.*, dissenting, which affirmed the trial court's judgment, and the defendant Mitchell Piper, on the granting of certification, appealed to this court. *Reversed*; *further proceedings*.

Eli Jacobs and *Michael Linden*, certified legal interns, with whom were *Jeffrey Gentes* and, on the brief, *J.L. Pottenger*, *Jr.*, and *Jessica Lefebvre*, *Victoria Stilwell*, *Anderson Tuggle*, and *Emily Wanger*, certified legal interns, for the appellant (defendant Mitchell Piper).

Pierre-Yves Kolakowski, with whom was *Zachary Grendi*, for the appellee (plaintiff).

Opinion

McDONALD, J. This certified appeal calls upon the court to decide whether allegations that a mortgagee engaged in a pattern of misrepresentation and delay in postdefault loan modification negotiations before and after initiating a foreclosure action—thereby adding to the mortgagor's debt and frustrating the mortgagor's ability to avoid foreclosure—can establish legally sufficient special defenses and counterclaims in that action. The defendant mortgagor, Mitchell Piper,[1] appeals from the judgment of the Appellate Court affirming the trial court's judgment of strict foreclosure in favor of the plaintiff mortgagee, U.S. Bank National Association,[2] following the trial court's decision striking the defendant's special defenses and counterclaims. See *U.S. Bank National Assn.* v. *Blowers*, 177 Conn. App. 622, 638, 172 A.3d 837 (2017). The defendant's principal claim is that the Appellate Court incorrectly concluded that such allegations cannot establish legally sufficient special defenses or counterclaims because the misconduct alleged does not relate to the making, validity, or enforcement of the note or mortgage. We agree with the defendant and reverse the Appellate Court's judgment.

The record reveals the following undisputed background facts. In August, 2005, the defendant executed a promissory note in exchange for a loan in the original

[1] Robin Blowers, Farmington Valley Landscape, LLC (Farmington), Land Rover Capital Group (Land Rover), C&I Solutions, LLC, and Viking Fuel Oil Company, Inc. (Viking), also were named as defendants in this foreclosure action. Farmington, Land Rover and Viking were defaulted for failure to appear, and the remaining defendants other than Piper declined to appeal from the trial court's judgment. For convenience, we refer to Piper as the defendant.

[2] The full name of the plaintiff is U.S. Bank National Association, as Trustee for the Holders of the First Franklin Mortgage Loan Trust Mortgage Pass-Through Certificates, Series 2005-FF10.

principal amount of $488,000. The plaintiff subsequently became the holder of the note. The note was secured by a mortgage on the defendant's real property in Avon, and the mortgage was assigned to the plaintiff in 2010. The defendant defaulted on the note in January, 2010.

In February, 2014, the plaintiff commenced the present foreclosure action. Upon the defendant's election, the parties participated in the state's court-supervised foreclosure mediation program; see General Statutes §§ 49-31k through 49-31o;[3] but were unable to reach a loan modification agreement during that process. The defendant thereafter filed an answer, special defenses, and counterclaims. The special defenses sounded in equitable estoppel and unclean hands; the counterclaims sounded in negligence and violations of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq.[4]

The defendant alleged the following facts in support of all of his special defenses and counterclaims. In early 2010, the defendant fell behind on his mortgage payments due to decreased business revenue resulting from the "Great Recession."[5] Shortly thereafter, the plain-

[3] In 2008, the legislature established a court-administered and supervised foreclosure mediation program under which neutral mediators assist eligible homeowners facing foreclosure and their lenders or mortgage servicers to achieve a mutually agreeable resolution to a foreclosure action. See General Statutes §§ 49-31k through 49-31o. Mediation "shall . . . address all issues of foreclosure," including, but not limited to, restructuring of the mortgage debt. General Statutes § 49-31m. When a mortgagor elects to participate in the program, the mortgagee is obligated to engage in some form of loss mitigation review with the mortgagor before foreclosure proceedings can proceed. See General Statutes §§ 49-31*l* and 49-31n.

Although §§ 49-31k, 49-31*l* and 49-31n have been amended by the legislature since the events underlying the present case; see, e.g., Public Acts 2015, No. 15-124; those amendments have no bearing on the merits of this appeal.

[4] The defendant also asserted an unjust enrichment special defense and counterclaim but subsequently withdrew both.

[5] "The Great Recession began in December 2007 and ended in June 2009, which makes it the longest recession since World War II. Beyond its duration, the Great Recession was notably severe in several respects. . . . Home prices fell approximately 30 percent, on average, from their mid-2006 peak

tiff, through its servicing agent,[6] reached out to the defendant and offered him a rate reduction that would result in a monthly mortgage payment of $1950.[7] After the defendant successfully completed a three month trial modification period, the plaintiff informed the defendant that the reduced monthly amount previously offered was too low. Thereafter, over an approximately two year period, the plaintiff similarly offered and reneged on at least four additional modifications after accepting trial payments from the defendant. Each successive modification offer sharply increased the defendant's monthly payment, rising from the initial proposal of $1950 to approximately $3445.

In April, 2012, the defendant contacted the state's Department of Banking,[8] which intervened on the defendant's behalf, "resulting in an immediate modification being received." Within months, however, the plaintiff notified the defendant that his monthly payment was increasing nearly 20 percent from that modified payment. The defendant was unable to afford the increased payments but continued to make the monthly payment set by the April modification until October, 2012, when the plaintiff rejected them as " 'partial' " payments.

to mid-2009, while the S&P 500 index fell 57 percent from its October 2007 peak to its trough in March 2009." R. Rich, "The Great Recession," available at https://www.federalreservehistory.org/essays/great recession of 200709 (last visited July 23, 2019). As foreclosure actions soared; see generally *Equity One, Inc.* v. *Shivers*, 310 Conn. 119, 145 n.7, 74 A.3d 1225 (2013) (*McDonald, J.*, dissenting) (noting mortgage foreclosure crisis during this period); state and federal legislators stepped in to attempt to staunch the tide. See footnote 3 of this opinion (addressing Connecticut's legislative response).

[6] Because there is no dispute that the plaintiff's servicing agent was acting within the scope of its agency with respect to the conduct alleged, we impute all of the servicer's conduct to the plaintiff in this opinion.

[7] Nothing in the record indicates the amount of the defendant's mortgage payment at the time of default.

[8] The defendant alleges that he contacted the state "banking commission." Because Connecticut does not have a banking commission, we construe the defendant's allegation to mean that he contacted the state's Department of Banking.

In late 2013, the plaintiff erroneously informed the defendant's insurance company that the Avon property was no longer being used as the defendant's residence. As a result, the defendant's insurance policy was cancelled, and the defendant was forced to replace coverage at premium costs that increased from his prior rate of $900 to $4000 per year.

The defendant also alleged that the following conduct occurred after the February, 2014 commencement of the foreclosure action, during the parties' participation in court-supervised mediation. In the course of approximately ten months of mediation, the plaintiff regularly ignored agreed upon deadlines, arrived late to mediation sessions, made duplicative, exhaustive, and ever changing requests, and provided the defendant with conflicting or incomplete information. Due to the plaintiff's tardiness, little was accomplished during mediation sessions given the time constraints of the program's scheduling. Although the plaintiff offered a modification at one point, it could not be finalized because the financial information on which it rested was more than four months out of date by the time it was presented to the defendant.

The defendant alleged that the foregoing preforeclosure and postforeclosure misconduct not only frustrated his ability to obtain a proper modification but also caused thousands of dollars in additional accrued interest, attorney's fees, escrow advances, and other costs to be added to the debt claimed by the plaintiff in the foreclosure action. In his negligence counterclaim, the defendant further alleged that the unnecessary and negligent prolonging of this process had ruined his credit score, which adversely impacted his business and personal affairs, and had caused him to incur significant expenses for legal representation and other professional services. The defendant claimed that the plaintiff should be equitably estopped from collecting the dam-

ages it caused by its own misconduct and that the plaintiff's attempt to foreclose should be barred by the doctrine of unclean hands. He further sought compensatory and punitive damages, injunctive relief, and attorney's fees under his counterclaims.

The plaintiff moved to strike all of the special defenses and counterclaims. It contended that they were legally insufficient because they were not related to the making, validity, or enforcement of the note, as required under appellate precedent, and also were otherwise insufficient to state a claim upon which relief may be granted. The trial court, *Dubay*, *J.*, granted the motion to strike in its entirety.

With respect to the counterclaims, the trial court explained that the proper application of Practice Book § 10-10, which dictates that counterclaims must "[arise] out of the transaction [that] is the subject of the plaintiff's complaint," requires, in the foreclosure context, consideration of whether the counterclaim has some reasonable nexus to the making, validity, or enforcement of the note. The court concluded that this test was not met in the present case because all of the misconduct alleged related to activities that took place subsequent to the execution of the note or mortgage. The court acknowledged that a foreclosure sought after a modification had been reached during mediation could have the requisite nexus to enforcement of the note, but found that there had been no such modification in the present case. In light of its conclusion that the allegations did not establish this nexus, the court did not reach the issue of whether they were otherwise legally sufficient to support the CUTPA and negligence counterclaims.

Conversely, with respect to the special defenses, the trial court found that the defendant had alleged sufficient facts to support equitable estoppel and unclean hands defenses. It cited, however, Appellate Court case law under which "[a] valid special defense at law to a

foreclosure proceeding must be legally sufficient *and* address the making, validity or enforcement of the mortgage, the note or both." (Emphasis added; internal quotation marks omitted.) *TD Bank, N.A.* v. *J & M Holdings, LLC*, 143 Conn. App. 340, 343, 70 A.3d 156 (2013). As with the counterclaims, the court concluded that, because the defendant did not allege that the parties had agreed to a modification of the loan postforeclosure, he could not rely on postforeclosure conduct to support his special defenses. Therefore, the trial held that the special defenses were legally insufficient because they did not directly relate to the making, validity or enforcement of the note. The trial court, *Wahla, J.*, subsequently rendered a judgment of strict foreclosure.

The defendant appealed from the judgment of strict foreclosure to the Appellate Court, challenging the trial court's decision granting the plaintiff's motion to strike. The Appellate Court panel, with one judge dissenting, affirmed the judgment. *U.S. Bank National Assn.* v. *Blowers*, supra, 177 Conn. App. 638. The Appellate Court majority agreed that the special defenses and counterclaims did not satisfy the making, validity, or enforcement test as required under its precedent. Id., 627–32. It rejected the defendant's request to abandon this test in favor of a straightforward application of the standard transactional test applied in other settings. Id., 633–34. The majority reasoned that "automatically allowing counterclaims and special defenses in foreclosure actions that are based on conduct of the mortgagee arising during mediation and loan modification negotiations would serve to deter mortgagees from participating in these crucial mitigating processes" and would thwart judicial economy. Id., 634. It disagreed that its test was inconsistent with the equitable nature of foreclosure, noting that exceptions to the test's application had been recognized when traditional notions of equity would not be served thereby. Id., 633–34. The majority further noted that mortgagors who do not meet such limited exceptions are not without a remedy for a mort-

gagee's postdefault misconduct because a mortgagor could bring a separate action for damages. Id., 634 n.5. The dissenting judge contended that the court's precedent did not stand for the sweeping proposition that allegations of improper conduct during mediation and modification negotiations lack a reasonable nexus to the making, validity, or enforcement of the note or mortgage. Id., 647 (*Prescott*, *J.*, dissenting). The dissenting judge recognized that the court previously had concluded that allegations of misconduct during the court-sponsored mediation program lacked such a nexus. Id., 647 (*Prescott*, *J.*, dissenting). The present case, however, also alleged preforeclosure misconduct, including that the defendant had "received" an "immediate" modification as a result of the intervention of the Department of Banking, an allegation that should have been accepted as true for purposes of the motion to strike. Id., 646–47 (*Prescott*, *J.*, dissenting).

The defendant's certified appeal to this court followed. The defendant challenges the propriety of the making, validity, or enforcement test, the proper scope of "enforcement" under that test if it does apply to foreclosure actions, and the sufficiency of the allegations to establish that the parties had entered into a binding modification if such allegations are necessary to seek equitable relief on the basis of postorigination conduct.[9]

[9] We granted the defendant's petition for certification to appeal, limited to the following issues:

"1. Did the Appellate Court properly hold that (a) special defenses to a foreclosure action must 'directly attack' the making, validity, or enforcement of the note or mortgage, and (b) counterclaims in a foreclosure action must also satisfy the 'making, validity, or enforcement' requirement? See Practice Book § 10-10.

"2. If the Appellate Court properly addressed the issues in the first question, did it properly hold that alleged postorigination misconduct concerns a plaintiff's 'enforcement' of a note or mortgage only if the plaintiff breaches a loan modification or other similar agreement that affects the enforceability of the note or mortgage?

"3. If the Appellate Court properly addressed the issues in the first and second questions, did it properly hold that the [defendant's] allegations of the plaintiff's misconduct and breach relating to a 'received' 'immediate

At its essence, the defendant's position is that, given the equitable nature of a foreclosure action, a mortgagee's misconduct that hinders a mortgagor's efforts to cure a default, such as through obtaining a modification agreement, and adds to the mortgagor's debt while the mortgagor is making such good faith efforts, is a proper basis for special defenses or counterclaims in that action. Although the defendant suggests that the standard test set forth in our rules of practice should be the sole measure of legal sufficiency, he contends that such misconduct sufficiently relates to enforcement of the note or mortgage if the making, validity, or enforcement test is applied. We conclude that the Appellate Court's judgment must be reversed.

We begin with the observation that the "making, validity, or enforcement test" is a legal creation of uncertain origin, but it has taken root as the accepted general rule in the Superior and Appellate Courts over the past two decades.[10] Its scope, however, has been

modification' did not amount to an allegation that the plaintiff had agreed to a 'final, binding loan modification' that affected the plaintiff's ability to enforce the note or mortgage?" *U.S. Bank National Assn.* v. *Blowers*, 328 Conn. 904, 904–905, 177 A.3d 1160 (2018).

[10] Our research reveals that the limitation applied in the present case first appeared in Connecticut jurisprudence in a Superior Court case. In *Connecticut Savings Bank* v. *Reilly*, 12 Conn. Supp. 327, 327–28 (1944), a foreclosure action, the defendant asserted abuse of process as a special defense, due to the excessiveness of attachment with which suit was commenced. With regard to that special defense, the trial court, in a brief two paragraph decision, noted that abuse of process did not fall within the ambit of defenses this court had recognized at common law—payment, discharge, release, satisfaction or invalidity of the lien. Id., 327. The trial court determined, in a separate memorandum of decision in that same foreclosure action, that the defendant's counterclaim "sounds in tort and its subject matter has no connection with the making, validity or enforcement of the mortgage. This makes it an improper matter for adjudication in this litigation." *Connecticut Savings Bank* v. *Reilly*, 12 Conn. Supp. 328, 329 (1944). In support of this proposition, the trial court cited *Schaefer* v. *O. K. Tool Co.*, 110 Conn. 528, 148 A. 330 (1930), a case in which this court simply had held that it is not permissible to file a counterclaim sounding in tort in a contract action unless the subject matter of the counterclaim is so connected with the matter in controversy under the original complaint that its consideration is necessary for a full determination of the rights of the parties. Id., 531; see *Connecticut Savings Bank* v. *Reilly*, supra, 329. Our research has not revealed any reference to, or application of, the making, validity, or

the subject of some debate in those courts.[11] This court has never expressly endorsed this test. Our lone reference to it was in a case in which we acknowledged that the mortgagee had argued that the mortgagor's equitable special defense did not meet this test; see

enforcement test until almost five decades later. In a 1990 foreclosure action, the trial court concluded that special defenses and counterclaims alleging tortious interference with a contract to sell the subject property could not proceed because they did not involve the validity and enforcement of promissory notes, a guarantee and mortgages. See *Citytrust* v. *Kings Gate Developers, Inc.*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-90-0106448-S (October 18, 1990) (2 Conn. L. Rptr. 639). That case did not rely on either *Reilly* decision but, instead, relied on *Wallingford* v. *Glen Valley Associates, Inc.*, 190 Conn. 158, 161, 459 A.2d 525 (1983), a case that makes no reference to a making, validity, or enforcement test. *Citytrust* v. *King Gate Developers, Inc.*, supra, 2 Conn. L. Rptr. 639; see *Wallingford* v. *Glen Valley Associates, Inc.*, supra, 159, 160–61 (applying transaction test set forth in what is now Practice Book § 10-10 to conclude that counterclaim alleging tort claim for property damage resulting from surface water diversion did not involve same factual and legal issues as plaintiff's sewer and tax lien foreclosure action, which involved "enforcement of a lien acquired by operation of law").

It appears that this test first entered our appellate foreclosure jurisprudence in 1999. See *Southbridge Associates, LLC* v. *Garofalo*, 53 Conn. App. 11, 17–19, 728 A.2d 1114, cert. denied, 249 Conn. 919, 733 A.2d 229 (1999). The Appellate Court in *Garofalo* did not provide insight into the origins or appropriateness of the making, validity, or enforcement test. Since then, the Appellate Court has applied this test in numerous foreclosure actions.

[11] "There have been many and varied interpretations of the making, validity and enforcement requirement by Connecticut Superior Court decisions. There is a line of cases which interprets the phrase very strictly to mean the execution and delivery of an enforceable instrument, and not the occurrences that may arise between the parties during the course of their loan relationship. . . . A second line of cases, however, interprets the making, validity, and enforcement requirement less rigidly. . . . This court does not subscribe to the literal, chronological test of making, validity and enforcement . . . . [P]ostexecution actions or positions of a lender can relate to the enforcement of a note and mortgage. Each counterclaim or special defense therefore requires a case-by-case analysis, by the court acting as a court of equity, to assess the extent to which the facts alleged relate to the original transaction and not to any different or subsequent transaction." (Citations omitted; internal quotation marks omitted.) *Bank of America, N.A.* v. *Groton Estates, LLC*, Docket No. CV-09-6001697-S, 2010 WL 3259815, *5 (Conn. Super. July 13, 2010); see also *U.S. Bank National Assn.* v. *Blowers*, supra, 177 Conn. App. 648 n.7 (*Prescott, J.*, dissenting) ("I recognize that our jurisprudence is somewhat opaque with regard to the meaning of enforcement in this context and that there can be reasonable and differing views about how to interpret that term in the foreclosure context. For example, enforcement could be construed narrowly to refer only to the

Thompson v. *Orcutt*, 257 Conn. 301, 312, 777 A.2d 670 (2001); but we resolved the case in favor of the mortgagor by application of a different standard. Id., 313.

In reaching our decision, we presume that the Appellate Court did not intend for the making, validity, or enforcement test to require mortgagors to meet a more stringent test than that required for special defenses and counterclaims in nonforeclosure actions. We therefore interpret the test as nothing more than a practical application of the standard rules of practice that apply to all civil actions to the specific context of foreclosure actions. See *CitiMortgage, Inc.* v. *Rey*, 150 Conn. App. 595, 605, 92 A.3d 278 ("a counterclaim must simply have a sufficient relationship to the making, validity or enforcement of the subject note or mortgage in order to meet the transaction test as set forth in Practice Book § 10-10 and the policy considerations it reflects"), cert. denied, 314 Conn. 905, 99 A.3d 635 (2014). We agree with the defendant and the dissenting Appellate Court judge that a proper construction of "enforcement" includes allegations of harm resulting from a mortgagee's wrongful postorigination conduct in negotiating loan modifications, when such conduct is alleged to have materially added to the debt and substantially prevented the mortgagor from curing the default.[12]

I

Appellate review of a trial court's decision to grant a motion to strike is plenary. See, e.g., *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 398, 119 A.3d 462 (2015); *Kumah* v. *Brown*, 307 Conn. 620,

ability of a mortgagee to enforce the note or mortgage or, more broadly, to include a mortgagee's actions related to such enforcement.").

[12] Although the dissenting Appellate Court judge relied in part on a distinction between defenses at law and defenses in equity as a basis for a more expansive meaning of enforcement for the latter; *U.S. Bank National Assn.* v. *Blowers*, supra, 177 Conn. App. 644 (*Prescott, J.*, dissenting); our focus in the present case is on equitable defenses. As such, we have no occasion to address whether legal defenses would be subject to the same broad view.

626, 58 A.3d 247 (2013). This is because "a motion to strike challenges the legal sufficiency of a pleading . . . and, consequently, requires no factual findings by the trial court . . . . In ruling on a motion to strike, the court must accept as true the facts alleged in the special defenses and construe them in the manner most favorable to sustaining their legal sufficiency." (Internal quotation marks omitted.) *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, supra, 398; see also *Kaminski* v. *Fairfield*, 216 Conn. 29, 31, 578 A.2d 1048 (1990). "The allegations of the pleading involved are entitled to the same favorable construction a trier would be required to give in admitting evidence under them and if the facts provable under its allegations would support a defense or a cause of action, the motion to strike must fail." *Mingachos* v. *CBS, Inc.*, 196 Conn. 91, 108–109, 491 A.2d 368 (1985).

The defendant's allegations are not a model of clarity. The ambiguity in the defendant's pleadings is exacerbated by the fact that the defendant has alleged the very same facts in support of various special defenses and counterclaims that require different elements. On one hand, the defendant may be asserting that he satisfied all of the conditions necessary to transition from temporary modifications to permanent modifications but that no such permanent modification was executed. On the other hand, he may be asserting that, even though the plaintiff was not obligated to execute a permanent modification, it induced the defendant to believe that a permanent modification would be executed and engaged in the negotiations in bad faith because it delayed foreclosure with the purpose or effect of extracting additional funds from the defendant, or increasing the defendant's debt.[13] It is also possible

[13] Diane E. Thompson, then counsel for the National Consumer Law Center, explains the financial incentives for a mortgage servicer to draw out a delinquency without a modification or a foreclosure. See D. Thompson, "Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications," 86 Wash. L. Rev. 755 (2011). According to Thompson, servicers'

that the defendant may be advancing both of these arguments as alternative theories. Given the posture of the case, an early stage of litigation, and the obligation to construe the pleadings in the defendant's favor, we assume that the defendant is advancing all of these theories.

Finally, before turning to the merits of the appeal, we emphasize the narrow scope of the issue before us.

"income stream comes primarily from their monthly servicing fee, which is a fixed percentage of the outstanding principal balance." Id., 767. Servicers face competing incentives when deciding whether to offer a modification or proceed with foreclosure. Id., 776–80. She posits that "the true sweet spot lies in stretching out a delinquency without either a modification or a foreclosure. While financing advances is a large expense for servicers, one they will want to end as soon as possible, late fees and other [default related] fees can add significantly to a [servicer's] bottom line, and the longer a homeowner is in default, the larger those fees can be. The nether-world status between a foreclosure and a modification also boosts the monthly servicing fee (because monthly payments are not reducing principal) and slows down servicers' largest [noncash] expense: the amortization of mortgage servicing rights (because homeowners who are in default are unlikely to prepay via refinancing). Finally, foreclosure or modification, not delinquency by itself, usually triggers loss recognition in the pool under the accounting rules. Waiting to foreclose or modify postpones the day of reckoning for a servicer." (Footnotes omitted.) Id., 777. "Servicers do not make binary choices between modification and foreclosure. Servicers may offer temporary modifications, modifications that recapitalize delinquent payments, modifications that reduce interest, modifications that reduce principal, or combinations of all of the above. Servicers may demand upfront payment of fees or waive certain fees. Or servicers may simply postpone a foreclosure, hoping for a miracle. Once a servicer chooses a modification, the servicer must further choose between types of modifications. Servicers will often, if they can, choose a short-term forbearance or repayment agreement over a permanent modification of the loan terms. A permanent modification of the loan terms might involve capitalizing arrears, extending the term, reducing the interest, and reducing or merely forbearing the obligation to repay principal. . . . [T]he weight of servicer incentives is always against principal reductions and weighs heavily in favor of short-term agreements. Principal reductions cut into the servicer's main source of income—the monthly [principal based] servicing fee—without offering any additional income. Short-term modifications delay loss recognition and preserve cash flow to the residual interests held by many servicers. Interest rate reductions are only slightly more favorable from a servicer's standpoint than principal reduction or forbearance: they will still, ultimately, result in a drop in the principal as borrowers pay down principal more quickly over time at a lower interest rate. While the incentives are mixed for a foreclosure, there are more incentives in favor of a foreclosure than against." (Footnote omitted.) Id., 780.

The trial court concluded that the allegations in support of both special defenses of unclean hands and equitable estoppel were legally sufficient, but for the requisite direct connection to the making, validity, or enforcement of the note or mortgage. The court never decided whether the counterclaims adequately stated a claim upon which relief may be granted, resting its conclusion solely on the lack of the requisite connection to enforcement of the note or mortgage. We assume, for purposes of this opinion, that both the defenses and counterclaims would otherwise be legally sufficient and limit our review to the question of whether the allegations bear a sufficient connection to enforcement of the note or mortgage.[14] The meaning of enforcement in this context presents an issue of law over which we also exercise plenary review. See *CitiMortgage, Inc.* v. *Rey*, supra, 150 Conn. App. 602 (plenary review applies to question of which legal standard controls and whether proper standard was applied).

II

Our view of the scope of "enforcement" of the note or mortgage is informed by the following principles. An action for foreclosure is "peculiarly an equitable action . . . ." *Hartford Federal Savings & Loan Assn.* v. *Lenczyk*, 153 Conn. 457, 463, 217 A.2d 694 (1966); accord *New Milford Savings Bank* v. *Jajer*, 244 Conn. 251, 256,

[14] The trial court found that the defendant's allegations that the plaintiff's misleading conduct was calculated to induce the defendant to believe that he was going to get a loan modification and that the defendant acted on the information provided by making payments under the May, 2012 modification were legally sufficient to satisfy the elements of equitable estoppel. The court did not explain why it distinguished the May, 2012 modification from the other modifications previously offered and withdrawn. The court also found that those same allegations, as well as further allegations that the plaintiff conducted itself in wilful or reckless disregard of the harmful consequences of its solicitations and that it failed to conduct itself in an honest and equitable manner were legally sufficient to establish the elements of an unclean hands defense.

708 A.2d 1378 (1998). "A party that invokes a court's equitable jurisdiction by filing an action for foreclosure necessarily invites the court to undertake . . . an inquiry [into his conduct]." *Willow Funding Co., L.P.* v. *Grencom Associates*, 63 Conn. App. 832, 849, 779 A.2d 174 (2001); accord *Basak* v. *Damutz*, 105 Conn. 378, 385, 135 A. 453 (1926) (in court of equity, "the conduct of the plaintiff is subject to scrutiny, since he who claims equity must do equity"). "Equity will not afford its aid to one who by his conduct or neglect has put the other party in a situation in which it would be inequitable to place him." *Glotzer* v. *Keyes*, 125 Conn. 227, 231–32, 5 A.2d 1 (1939). A trial court conducting an equitable proceeding may therefore "consider all relevant circumstances to ensure that complete justice is done." *Reynolds* v. *Ramos*, 188 Conn. 316, 320, 449 A.2d 182 (1982). When a mortgagee's conduct is inequitable, "a trial court in foreclosure proceedings has discretion . . . to withhold foreclosure or to reduce the amount of the stated indebtedness." *Hamm* v. *Taylor*, 180 Conn. 491, 497, 429 A.2d 946 (1980); accord *Southbridge Associates, LLC* v. *Garofalo*, 53 Conn. App. 11, 15, 728 A.2d 1114, cert. denied, 249 Conn. 919, 733 A.2d 229 (1999).

This court previously has declined to take a narrow view of the circumstances under which equitable defenses may be asserted in a foreclosure action. In *Thompson* v. *Orcutt*, supra, 257 Conn. 318, the court held that the mortgagor's special defense of unclean hands, which rested on actions by the mortgagee subsequent to the execution of the note and mortgage, was legally sufficient. In that case, the mortgagee was alleged to have engaged in fraudulent conduct in a bankruptcy proceeding, which, in turn, enabled the mortgagee to pursue the foreclosure action. Id., 304–305. Specifically, the mortgagee was alleged to have intentionally overstated the extent to which the mortgage

encumbered the property, which caused the bankruptcy trustee to abandon the property as an asset of the bankruptcy estate. Id., 304. Before this court, the mortgagee argued that an unclean hands defense should not apply in a mortgage foreclosure action unless the wrongful conduct relates to the making, validity, or enforcement of the mortgage or note. Id., 312. It contended, therefore, that the mortgagor could not assert this defense because the mortgage transaction was not premised on fraud but, rather, the alleged fraud had been undertaken in the bankruptcy action. Id. This court rejected the mortgagee's narrow view. Id., 312–14. It concluded that the mortgagee's alleged misconduct was " 'directly and inseparably connected' " to the foreclosure action and, therefore, was sufficient to support the unclean hands defense to the foreclosure action. Id., 313, 318. In so concluding, this court explained that, although "[t]he original transaction creating the . . . mortgage was not tainted with fraud . . . the plaintiff's ability to foreclose on the defendants' property . . . depended upon his fraudulent conduct in the bankruptcy proceeding." Id., 313–14.

Although *Thompson* is silent on precisely when the alleged misconduct occurred, appellate case law recognizes that conduct occurring after the origination of the loan, after default, and even after the initiation of the foreclosure action may form a proper basis for defenses in a foreclosure action. See *McKeever* v. *Fiore*, 78 Conn. App. 783, 789–90, 829 A.2d 846 (2003) (applying doctrine of unclean hands to reduce interest accrued and attorney's fees incurred over nine year period between plaintiff's initial commencement of foreclosure action and final prosecution of action); *Federal Deposit Ins. Corp.* v. *Voll*, 38 Conn. App. 198, 211, 660 A.2d 358 (concluding that equitable defense of laches, based on delay between commencement of foreclosure action and motion for judgment of foreclosure, could have been asserted in responsive pleading or in objection to calculation of debt when plaintiff moved for judgment of

foreclosure, and, therefore, laches argument could not be raised in proceeding for deficiency judgment), cert. denied, 235 Conn. 903, 665 A.2d 901 (1995).

This broader temporal scope is consistent with the principle that, in equitable actions, "the facts determinative of the rights of the parties are those in existence at the time of final hearing." *Greenwich Trust Co.* v. *Tyson*, 129 Conn. 211, 215, 27 A.2d 166 (1942); accord *E. M. Loew's Enterprises, Inc.* v. *International Alliance of Theatrical Stage Employees*, 127 Conn. 415, 419, 17 A.2d 525 (1941) (whether plaintiff is entitled to equitable relief is determined "not by the situation existing when [the action] is begun, but by that which is developed at the trial"); *Duessel* v. *Proch*, 78 Conn. 343, 350, 62 A. 152 (1905) ("[i]n equitable proceedings, any events occurring after their institution may be pleaded and proved which go to show where the equity of the case lies at the time of the final hearing"). "Equitable proceedings rest upon different foundations [than actions at law], and in them the parties can always rely on new matter, if properly pleaded." *Woodbridge* v. *Pratt & Whitney Co.*, 69 Conn. 304, 334, 37 A. 688 (1897); see Practice Book § 10-10 ("[s]upplemental pleadings showing matters arising since the original pleading may be filed in actions for equitable relief by either party").

This broader temporal scope is not inconsistent with a requirement that a defense sufficiently relates to enforcement of the note or mortgage. The various rights of the mortgagee under the note and mortgage (or related security instruments) are not finally or completely "enforced" until the foreclosure action is concluded. See General Statutes § 49-1 (setting forth general rule that "[t]he foreclosure of a mortgage is a bar to any further action upon the mortgage debt, note or obligation against the person or persons who are liable for the payment thereof who are made parties to the foreclosure"); *JP Morgan Chase Bank, N.A.* v. *Winthrop Properties, LLC*, 312 Conn. 662, 673–74, 94

A.3d 622 (2014) ("The purpose of the foreclosure is to extinguish the mortgagor's equitable right of redemption that he retained when he granted legal title to his property to the mortgagee following the execution of the mortgage. . . . The mortgagee's title does not become absolute, however, until all eligible parties have failed to exercise their rights to redeem the property." [Citations omitted.]); *RAL Management, Inc.* v. *Valley View Associates*, 278 Conn. 672, 685 n.12, 899 A.2d 586 (2006) (amended affidavit of debt filed on day that court reentered judgment of foreclosure, when it set new law days).

The mortgagor's rights and liabilities thus depend not only on the validity of the note and mortgage but also on the amount of the debt. That debt will determine whether strict foreclosure or foreclosure by sale is ordered, and, in turn, whether a deficiency judgment may be recovered and the amount of that deficiency. See *Equity One, Inc.* v. *Shivers*, 310 Conn. 119, 131, 74 A.3d 1225, 1233 (2013) ("under Practice Book § 23-18, the court was required to review the note, mortgage and affidavit of debt before finding that the debt exceeded the value of the property and ordering strict foreclosure"); *Federal Deposit Ins. Corp.* v. *Voll*, supra, 38 Conn. App. 207 (deficiency judgment allows note holder to "recover the difference between the amount due on the underlying debt and the amount received upon foreclosure" [internal quotation marks omitted]); see also *TD Bank, N.A.* v. *Doran*, 162 Conn. App. 460, 468, 131 A.3d 288 (2016) ("the strict foreclosure hearing establishes the amount of the debt owed by the defendant"); *Federal Deposit Ins. Corp.* v. *Voll*, supra, 211 ("[d]efenses that could have been raised during the foreclosure proceedings may not be raised at the deficiency hearing"); *Connecticut National Bank* v. *N. E. Owen II, Inc.*, 22 Conn. App. 468, 472, 578 A.2d 655 (1990) ("in a mortgage foreclosure action, a fundamental allegation that must be proved by the plaintiff is the amount of the debt"). The debt may include principal,

interest, taxes, and late charges owed. See, e.g., *New England Savings Bank* v. *Bedford Realty Corp.*, 238 Conn. 745, 748 and n.3, 680 A.2d 301 (1996); *Suffield Bank* v. *Berman*, 228 Conn. 766, 769 and n.9, 773, 639 A.2d 1033 (1994); *Burritt Mutual Savings Bank of New Britain* v. *Tucker*, 183 Conn. 369, 374, 439 A.2d 396 (1981); *Connecticut National Bank* v. *N. E. Owen II, Inc.*, supra, 469; see also General Statutes § 49-2 (a); Practice Book § 23-18. The terms of the note or mortgage may also permit an award of reasonable attorney's fees for expenses arising from any controversy relating to the note or mortgage, which may be collected in connection with the foreclosure action. See *Connecticut National Bank* v. *N. E. Owen II, Inc.*, supra, 470–71 and n.3; 1 D. Caron & G. Milne, Connecticut Foreclosures (9th Ed. 2019) § 6-2:1.2k, p. 419.

These equitable and practical considerations inexorably lead to the conclusion that allegations that the mortgagee has engaged in conduct that wrongly and substantially increased the mortgagor's overall indebtedness, caused the mortgagor to incur costs that impeded the mortgagor from curing the default, or reneged upon modifications are the types of misconduct that are " 'directly and inseparably connected' "; *Thompson* v. *Orcutt*, supra, 257 Conn. 313; to enforcement of the note and mortgage. To the extent that the pleadings reasonably may be construed to allege that the April, 2012 intervention by the Department of Banking resulted in a binding modification, there can be no doubt that the breach of such an agreement would bear the requisite nexus.[15] See *U.S. Bank National Assn.* v. *Blowers*, supra, 177 Conn. App. 630 (acknowledging

[15] The defendant alleged that the Department of Banking "intervened on [his] behalf, resulting in an immediate modification being received." We agree with Judge Prescott that, in light of the liberal construction that the trial court was required to give the pleadings, the defendant's allegations were sufficient to support a claim that a binding modification had been reached prior to the commencement of the foreclosure action. As such, the defendant's pleadings should not have been stricken in their entirety on that basis alone.

this point). Such allegations, therefore, provide a legally sufficient basis for special defenses in the foreclosure action. Insofar as the counterclaims rest, at this stage, upon the same allegations as the special defenses, judicial economy would certainly weigh in favor of their inclusion in the present action. See *Connecticut National Bank* v. *Voog*, 233 Conn. 352, 368, 659 A.2d 172 (1995) ("[b]ecause th[ese] counterclaim[s] paralleled his special defense, [they were] also correctly pleaded in this case rather than as a separate action for damages").

We express no opinion as to whether all of the defendant's allegations necessarily have a sufficient nexus to enforcement of the note or mortgage. Because the trial court, the Appellate Court, and the parties have generally addressed the allegations in toto, we do the same.[16]

Nor do we intend to suggest, at this stage of the litigation, that the allegations in the present case are suffi-

[16] The only distinction that has been made focuses on allegations of conduct during the course of court-supervised mediation. The plaintiff suggested at oral argument before this court that statutory sanctions are the proper remedy to address misconduct during mediation. The mediation scheme acknowledges "an expectation" that the parties will participate in the mediation process "in good faith, but without unreasonable and unnecessary delays" in an effort to reach an agreement to avoid foreclosure or to expedite or facilitate the foreclosure with reasonable speed and efficiency. General Statutes § 49-31k (7). It authorizes the court to impose sanctions on any party or counsel for engaging in "intentional or a pattern or practice of conduct during the mediation process that is contrary to the objectives of the mediation program" and provides that available sanctions "shall include, but not be limited to, terminating mediation, ordering the mortgagor or mortgagee to mediate in person, forbidding the mortgagee from charging the mortgagor for the mortgagee's attorney's fees, awarding attorney's fees, and imposing fines." General Statutes § 49-31n (c) (2).

The present case involves an alleged pattern of misconduct that commenced long before the filing of the foreclosure action and continued during mediation. We have no occasion, therefore, to consider whether the availability of those sanctions reflects a legislative intent to occupy the field when the misconduct is limited to the mediation period. Moreover, the plaintiff has provided no analysis on the issue of whether the legislature intended these sanctions to supplant or otherwise limit the court's inherent power to impose sanctions or otherwise afford equitable relief. Cf. *Mingachos* v. *CBS, Inc.*, supra, 196 Conn. 109–10 ("[b]ecause the [Workers' Compensation Act] provides the exclusive remedy to the employee for conduct alleged in

cient to justify the remedy of withholding foreclosure or reducing the debt. Even if the defendant is able to prove all of his allegations, the trial court would have to be mindful that "[t]he equitable powers of the court are broad, but they are not without limit. 'Equitable power must be exercised equitably.' *Hamm* v. *Taylor*, supra, 180 Conn. 497." *McKeever* v. *Fiore*, supra, 78 Conn. App. 793; see also *Wells Fargo Bank, N.A.* v. *Meyers*, 108 App. Div. 3d 9, 23, 966 N.Y.S.2d 108 (2013) (it was improper for trial court to order mortgagee to execute final loan modification patterned after trial loan modification proposal as remedy for mortgagee's failure to negotiate loan modification in good faith and to direct dismissal of complaint, and "courts must employ appropriate, permissible, and authorized remedies, tailored to the circumstances of each given case" when no sanction is specifically directed). It would be premature for us to express an opinion on that matter at this juncture.

We are not persuaded that our decision today will have the adverse consequences envisioned by the plaintiff and the Appellate Court that would require a different result as a matter of public policy. On this record, we have no basis to conclude that mortgagees will be deterred from engaging in modification negotiations. Under the state's mediation program, when a mortgagor elects to participate in the program, a mortgagee is required to engage in loss mitigation review with the mortgagor before foreclosure proceedings can proceed and faces sanctions for conduct that amounts to a lack of good faith.[17] See General Statutes §§ 49-31*l* and 49-31n. This statutory obligation provides an incentive for the parties to negotiate prior to the filing of a foreclosure action, as do ordinary financial incentives. Our decision serves as a deterrent to wrongful conduct only.

the original complaint, the trial court's denial of the plaintiff's motion to strike the special defense was not clearly erroneous").

[17] A litigation hold is placed on the case, during which time a mortgagee is prohibited from making any motion, request or demand of a mortgagor, except as it may relate to the mediation program; General Statutes § 49-31*l*

Insofar as the mortgagee is conducting itself fairly and within the bounds of the law, we agree with the dissenting Appellate Court judge's confidence that "our trial courts will be able to discern efficiently between claims that are well pleaded and supported by specific factual allegations and those that are merely frivolous and intended only to create unneeded delay." *U.S. Bank National Assn.* v. *Blowers*, supra, 177 Conn. App. 649 (*Prescott*, *J.*, dissenting).

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgment of strict foreclosure and to remand the case to the trial court for further proceedings in accordance with this opinion.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* EUGENE L. WALKER (SC 20101)

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

Syllabus

Convicted of the crimes of felony murder, manslaughter in the first degree with a firearm, attempt to commit robbery in the first degree, and criminal possession of a pistol or revolver in connection with the shooting death of the victim, the defendant appealed to the Appellate Court, claiming that his federal constitutional right to confront the witnesses against him had been violated by the admission of certain evidence connecting him to the shooting. At trial, a supervisory forensic analyst employed by the state, D, testified that the defendant was a major contributor to the DNA on a bandana that had been found at the crime scene and that allegedly had been worn by the person who shot the victim. In conjunction with D's testimony, the state also introduced into evidence a written report signed by D containing specific numerical DNA profiles from the bandana and a postarrest buccal swab of the defendant's mouth that had previously been conducted pursuant to a court order. D testified that, although she analyzed the DNA on the

(c) (6); and no judgment of strict foreclosure or foreclosure by sale may be rendered against the mortgagor during the mediation period. General Statutes §§ 49-31*l* (c) (6) and 49-31n (c) (9).

bandana and conducted the ultimate comparison, the numerical DNA profile from the defendant's buccal swab had been generated by another forensic analyst or analysts. Although D had neither participated in nor observed the analysis of the defendant's buccal swab, D testified that she had received paperwork showing that standard laboratory procedures had been followed and explicitly swore to the accuracy of the resulting numerical DNA profile. On appeal to the Appellate Court, the defendant claimed that the evidence regarding the numerical DNA profile that had been presented through D contained testimonial hearsay and that he had been deprived of his right to confrontation because the state had failed to call a witness with personal knowledge of the testing of the buccal swab. The Appellate Court rejected that claim, concluding that, because D had conducted the ultimate analysis and made the resulting findings that connected the defendant's DNA to the bandana, and because D testified and was subjected to cross-examination at trial, the defendant's right to confrontation had not been violated. Although the Appellate Court vacated the defendant's manslaughter conviction on a separate ground, it affirmed the trial court's judgment in all other respects. On the granting of certification, the defendant appealed to this court, claiming that the introduction of evidence concerning his numerical DNA profile through D's testimony violated his right to confrontation. *Held* that the Appellate Court incorrectly concluded that the admission of D's testimony concerning the numerical DNA profile from the defendant's buccal swab did not violate the defendant's right to confrontation, and, because the state did not advance a claim of harmless error, the defendant was entitled to a new trial: D's testimony, which did not consist merely of her own independent opinion, introduced to the jury the other analyst's or analysts' out-of-court statements about the defendant's numerical DNA profile, as D had explicitly referred to, relied on, and vouched for the accuracy of work by the other analyst or analysts that she did not perform or otherwise observe, and such evidence constituted hearsay in light of the state's concession that it was offered to prove the truth of the matter asserted; moreover, the evidence relating to the defendant's numerical DNA profile was testimonial in nature because it was created for the primary purpose of establishing the defendant's guilt at trial, as the buccal swab was performed after the defendant had been arrested and charged with various crimes, was obtained by court order for comparison with any DNA found on the bandana discovered at the crime scene, and was processed in such a way that the evidentiary purpose of the buccal swab analysis would have been readily apparent to the analyst or analysts who conducted it; furthermore, although all analysts who participate in the process of generating a DNA profile need not testify, the state must call as a witness an analyst with personal knowledge concerning the accuracy of a numerical DNA profile, and, because D simply relayed to the jury the DNA profile that had been provided to her by the analyst or analysts

and did not possess such knowledge with respect to the processing of the defendant's buccal swab, D was not a sufficient substitute witness for purposes of the right to confrontation.

Argued January 23—officially released August 13, 2019

Procedural History

Substitute information charging the defendant with the crimes of felony murder, manslaughter in the first degree with a firearm, attempt to commit robbery in the first degree, conspiracy to commit robbery in the first degree, and criminal possession of a pistol or revolver, brought to the Superior Court in the judicial district of Ansonia-Milford and tried to the jury before *Markle*, *J.*; verdict and judgment of guilty of felony murder, manslaughter in the first degree with a firearm, attempt to commit robbery in the first degree, and criminal possession of a pistol or revolver, from which the defendant appealed to the Appellate Court, *Alvord*, *Kahn* and *Bear*, *Js.*, which affirmed in part and reversed in part the judgment of the trial court and remanded the case for resentencing, and the defendant, on the granting of certification, appealed to this court. *Reversed in part*; *new trial.*

John L. Cordani, *Jr.*, assigned counsel, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Margaret E. Kelley*, state's attorney, *Cornelius Kelly*, senior assistant state's attorney, and *Rocco A. Chiarenza*, assistant state's attorney, for the appellee (state).

Opinion

MULLINS, J. The sole issue in this certified appeal is whether the Appellate Court correctly concluded that the defendant, Eugene L. Walker, failed to establish a violation of his right under the sixth amendment to the United States constitution to confront witnesses against him. Specifically, the defendant asserts that the state

violated his right to confrontation by introducing evidence at trial that his DNA profile, which had been generated from a postarrest buccal swab, matched the DNA found on evidence from the crime scene without calling as a witness the analyst who processed the buccal swab and generated the DNA profile used in that comparison.

The defendant's DNA profile was created after his arrest in aid of an ongoing criminal investigation and under circumstances objectively indicating that it was created for the primary purpose of being used as evidence in the defendant's criminal case. In addition, the sole analyst who testified about the DNA evidence at trial neither performed nor observed the analysis of the buccal swab that produced the DNA profile and, therefore, was not a sufficient substitute witness to satisfy the defendant's right to confrontation. We conclude that, under the specific circumstances of this case, the defendant has established a violation of his right to confrontation. As a result, we reverse in part the judgment of the Appellate Court.

The Appellate Court's decision sets forth the following relevant facts, which the jury reasonably could have found. "On the night of October 28, 2012, Anthony Adams, the codefendant in this consolidated trial, telephoned Alexis Morrison to ask if she knew 'somebody that could sell him some weed.' Morrison called Neville Malacai Registe, the victim, to arrange for him to meet with Adams in the parking lot of her West Haven residence. When the victim received Morrison's telephone call, he was with his friend, Stephon Green, at his mother's home in New Haven. After some time, the victim and Green left in the victim's Acura. As they approached the designated parking lot, the victim called Morrison. Morrison then telephoned Adams to tell him that the victim 'was there.' Adams replied that he had already left because the victim 'took too long . . . and that

Day-Day and GZ [were] going to get the weed.' 'Day-Day' and 'GZ' were nicknames for Daquane Adams, who is Anthony Adams' cousin, and the defendant, respectively, both of whom Morrison knew.

"When the victim and Green arrived in the parking lot, the victim backed his car into a parking space. Green, who was rolling a marijuana joint in the front passenger seat, looked up and noticed two men approaching the Acura. He returned his attention to his task, and the victim opened the driver's door to talk to one of the men. [That] man, who was wearing a black bandana and who was later identified as the defendant, held a revolver inside the car and said, 'run it,' meaning, 'give me it. It's a robbery . . . .' A physical altercation ensued. The second man, later identified as Daquane Adams, stepped away from the Acura and placed a cell phone call to someone. A Toyota arrived, and a third man exited that car and asked the defendant for the gun.[1] The struggle over the gun continued inside the victim's Acura, and someone knocked Green into the backseat. Daquane Adams and the third man pulled the defendant out of the [Acura] and, as Green was climbing back into the front passenger seat, a shot was fired. Green heard the victim say, 'oh, shit,' and then heard a second shot.

"The defendant, Daquane Adams, and the third man got in the Toyota and drove toward the parking lot exit. With the victim slumped over in the driver's seat, Green pursued the Toyota. He caught up to it at the end of the street and rammed the Acura into the back of the Toyota. The victim's Acura was disabled, but the Toyota was able to be driven away. The victim died of a gunshot wound to his head." (Footnote in original.) *State* v. *Walker*, 180 Conn. App. 291, 296–97, 183 A.3d 1 (2018).

[1] "The Toyota was [determined] to belong to Ronja Daniels, Daquane Adams' girlfriend. Daniels testified that earlier that night, Daquane Adams had dropped her off at work and borrowed her car." *State* v. *Walker*, 180 Conn. App. 291, 296 n.1, 183 A.3d 1 (2018).

The record reveals the following additional relevant facts and procedural history. In December, 2012, the defendant was arrested and charged with felony murder in violation of General Statutes (Rev. to 2013) § 53a-54c, conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-134, and attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-134 (a) (2). Anthony Adams and Daquane Adams also were arrested in December, 2012, and were subsequently charged with various offenses.

After the defendant's arrest, the state continued its investigation into the respective roles played by the defendant, Anthony Adams, and Daquane Adams in the shooting. During their initial investigation, the police recovered from the Acura the black bandana that Green identified as having been worn by the man who shot the victim. The police sent the bandana to a laboratory run by the Division of Scientific Services of the Department of Emergency Services and Public Protection to be analyzed for DNA. In June, 2013, the state filed a motion in the present case requesting that the defendant submit to a buccal swab of his mouth[2] "for purposes of obtaining a DNA sample." The state argued that the DNA "will be of material aid in determining whether the defendant committed the crime of felony murder." The court granted the state's motion, and Tammy Murray, a detective in the West Haven Police Department, took the defendant's buccal swab on June 19, 2013. Murray also took buccal swabs from Anthony Adams and Daquane Adams.[3] Those three buccal swabs, as well as a sample of the victim's blood, were then sent to the laboratory to be analyzed.

[2] A buccal swab involves rubbing a Q-tip like instrument along the inside of the cheek to collect epithelial cells.

[3] At trial, Murray testified that she followed the standard procedures when taking the buccal swabs from the defendant, Daquane Adams, and Anthony Adams.

At the laboratory, Heather Degnan, a supervisory forensic analyst, received the three buccal swabs and the victim's blood sample and sent them to the "known processing group"—a group within the laboratory that processes all known DNA samples to be used in comparisons—to be analyzed. The known processing group generated a DNA profile from each sample and provided the profiles to Degnan. Degnan generated DNA profiles from the bandana, which she then compared with the known profiles that had been provided to her. As a result of that comparison, Degnan determined that the defendant was a major contributor to the DNA on the bandana. The victim, Anthony Adams, and Daquane Adams were eliminated as potential contributors. Degnan memorialized her findings in a "DNA Report" dated August 28, 2013 (report).

After Degnan issued her report linking the defendant to the bandana believed to have been worn by the shooter, the state filed an amended substitute information charging the defendant with the additional crimes of manslaughter in the first degree with a firearm in violation of General Statutes §§ 53a-55 (a) (1) and 53a-55a (a), and criminal possession of a pistol or revolver in violation of General Statutes (Rev. to 2013) § 53a-217c (a) (1).

The envelope containing the defendant's buccal swab that Murray submitted to the laboratory was admitted into evidence. A review of that exhibit reveals that the envelope is labeled with the defendant's name, his right thumbprint, and the words "DNA Buccal Swab Kit." The envelope lists "West Haven P.D." as the submitting agency and displays a notation reading "Incident: Homicide." The envelope identifies the defendant's address as the MacDougall-Walker Correctional Institution.

Following Murray's testimony, the state called Degnan to testify. She began by explaining the standard

DNA typing techniques used by the laboratory in generating DNA profiles. She testified that the process involves four steps: (1) extracting DNA from the sample and purifying it of contaminants; (2) quantitating the DNA, i.e., determining the amount of DNA that has been extracted; (3) amplifying the DNA using a thermal cycler machine, i.e., creating many copies of different regions of the DNA; and (4) interpreting the data generated from these steps and constructing the numerical DNA profile, which consists of a series of numbers to designate the "alleles."[4]

Degnan further testified about her analysis and findings. Degnan testified that she personally analyzed the bandana using standard DNA typing techniques. She isolated DNA from both sides of the bandana and generated DNA profiles of at least two contributors, a major contributor and a minor contributor. With respect to the buccal swabs and the victim's blood sample, however, Degnan testified that she did not generate those DNA profiles herself. Degnan explained that the swabs and blood sample were sent to the known processing group, which generated DNA profiles from the samples and then "provided" those profiles to her for comparison with the DNA from the bandana.

Before Degnan testified as to the results of her comparison, defense counsel objected to the admission of this evidence on the ground that Degnan had not been qualified as an expert. During voir dire examinations conducted in the jury's presence, Degnan admitted that she neither participated in the known processing group's analysis of the defendant's buccal swab nor observed the analysis being conducted.

Nonetheless, when asked whether she was "swearing to the accuracy" of the DNA profile provided to her,

[4] "An allele is defined as one or two or more alternative forms of a gene." (Internal quotation marks omitted.) *State* v. *Pappas*, 256 Conn. 854, 880 n.7, 776 A.2d 1091 (2001).

Degnan responded by saying "[y]es." Degnan further testified that, in addition to the profile itself, the known processing group provided her with "paperwork" indicating that "all of the checkboxes were check[ed]"—that is, that the analyst or analysts who processed the known samples "did it properly, followed standard operating procedures." Degnan confirmed, however, that she "wasn't there" when the known processing group analyzed the defendant's buccal swab.

Ultimately, the trial court overruled the objection and permitted Degnan to testify to the results of her analysis. Degnan testified that, based on her analysis and DNA comparison, the defendant was a major contributor to the DNA found on both sides of the bandana. Degnan's report was admitted into evidence.[5] In the report, Degnan explained that the buccal swab was analyzed in accordance with standard laboratory procedures. The report also contains a table setting forth the numerical profiles generated from the defendant's buccal swab, the bandana, and the victim's blood sample. On the basis of a comparison of these profiles, Degnan concluded that the defendant "is included as a contributor to the DNA profiles" obtained from the bandana. The report was signed by Degnan and Dahong Sun, a "technical reviewer" who reviewed Degnan's work and confirmed the accuracy of her conclusions. The final page of the report, just above Degnan's and Sun's signatures, provides: "This report reflects the test results, conclusions, interpretations, and/or the findings of the analyst as indicated by their signature below."[6] No one from the known processing group testified at trial.

[5] References to Anthony Adams and Daquane Adams were redacted from the report.

[6] Degnan also entered the numerical DNA profile of the major contributor to the DNA found on the bandana into the Connecticut and national DNA databases, which returned a "hit" on the defendant because the defendant's DNA had previously been entered into the database as a result of a prior felony conviction. Evidence of this match, however, was not offered into evidence at trial.

The jury found the defendant guilty of felony murder, manslaughter in the first degree with a firearm, attempt to commit robbery in the first degree, and criminal possession of a pistol or revolver.[7] *State* v. *Walker*, supra, 180 Conn. App. 297. The court imposed a total effective sentence of forty-five years incarceration to be followed by ten years of special parole. Id.

The defendant then appealed to the Appellate Court, claiming, inter alia, that he was deprived of his sixth amendment right to confront witnesses against him because the trial court admitted the evidence of Degnan's comparison without requiring an analyst from the known processing group who generated the known DNA profile used in that comparison to testify. Id., 297–98. The Appellate Court first concluded that, despite the defendant's failure to raise the confrontation clause as an objection at trial, the claim was reviewable under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). *State* v. *Walker*, supra, 180 Conn. App. 301–302.

The Appellate Court further concluded, however, that the defendant's claim failed under *Golding* because the admission of the DNA evidence did not violate his constitutional right to confrontation. Id., 302. The Appellate Court reasoned principally that Degnan, the analyst who "conducted the critical analysis and made the resulting findings" that connected the defendant to the bandana from the crime scene, testified and was available for cross-examination at trial regarding her analysis and findings. Id.[8]

[7] The defendant was acquitted of the charge of conspiracy to commit robbery.

[8] The Appellate Court also concluded that "the defendant's conviction of felony murder and manslaughter violate[d] his constitutional protections against double jeopardy" and remanded the case with direction to vacate the defendant's conviction with respect to the latter. *State* v. *Walker*, supra, 180 Conn. App. 330–31. This aspect of the Appellate Court's decision, however, is not at issue in the present appeal.

Upon our grant of certification to appeal, the defendant claims that the Appellate Court incorrectly concluded that the introduction of the evidence concerning his DNA profile did not violate his confrontation rights.[9] Because the defendant failed to raise a confrontation clause objection in the trial court, we review this claim pursuant to *Golding*. See, e.g., *State* v. *Smith*, 289 Conn. 598, 620–21, 960 A.2d 993 (2008). Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; internal quotation marks omitted.) *State* v. *Newton*, 330 Conn. 344, 353, 194 A.3d 272 (2018); see also *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying third prong of *Golding*).

The first two prongs of *Golding* are satisfied here. The record is adequate for review, and the defendant's claim is of constitutional magnitude because it implicates his sixth amendment right to confrontation. Furthermore, the state does not attempt to meet its burden of establishing that the error was harmless beyond a reasonable doubt. Accordingly, the sole issue in this appeal concerns the third prong of *Golding*—namely, whether the defendant has established a violation of his sixth amendment confrontation rights.

[9] Specifically, we granted the defendant's petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly determine that the defendant's sixth amendment right to confrontation was not violated by testimony from a lab analyst regarding a known DNA profile generated from a swab processed by another analyst who did not testify at trial?" *State* v. *Walker*, 328 Conn. 934, 183 A.3d 634 (2018).

The defendant claims that his right to confrontation was violated because the DNA profile generated from his postarrest buccal swab and provided to Degnan for use in a comparison was testimonial hearsay, and the analyst who generated the profile was not made available for cross-examination at trial. As support for this claim, the defendant contends that the evidence of his DNA profile was offered for its truth and was generated for the primary purpose of providing evidence against him in his criminal case. In response, the state contends that the evidence admitted concerning Degnan's DNA comparison was neither hearsay nor testimonial in nature. Alternatively, the state contends that, even if the DNA profile were testimonial hearsay, the defendant's right to confrontation was satisfied because he had the opportunity to cross-examine Degnan, who personally processed the bandana and made the comparison, and who was familiar with the laboratory's standard procedures for conducting DNA analyses. We agree with the defendant that, under the circumstances of this case, the admission of the evidence concerning his DNA profile violated his sixth amendment right to confrontation.

The sixth amendment to the United States constitution, applicable to the states through the fourteenth amendment,[10] provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const., amend. VI. "In *Crawford* v. *Washington*, [541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)], the [United States] Supreme Court substantially revised its approach to confrontation clause claims. Under *Crawford*, testimonial hearsay is admissible against a criminal defendant at trial only if the defendant had a prior opportunity for cross-examination and the witness is unavailable to testify at trial. . . . In adopting this 'categorical' approach, the court overturned existing precedent that had applied an 'open-ended balancing

[10] *Pointer* v. *Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

[test]' . . . conditioning the admissibility of out-of-court statements on a court's determination of whether the proffered statements bore 'adequate indicia of reliability.' . . . Although *Crawford*'s revision of the court's confrontation clause jurisprudence is significant, its rules govern the admissibility only of certain classes of statements, namely, testimonial hearsay." (Citations omitted.) *State* v. *Buckland*, 313 Conn. 205, 212–13, 96 A.3d 1163 (2014), cert. denied, U.S. , 135 S. Ct. 992, 190 L. Ed. 2d 837 (2015). Accordingly, the threshold inquiries in a confrontation clause analysis "are whether the statement was hearsay, and if so, whether the statement was testimonial in nature . . . ." *State* v. *Smith*, supra, 289 Conn. 618–19. These are questions of law over which our review is plenary. Id., 619.

With these principles in mind, we address the three components of the defendant's confrontation clause claim: (1) whether the evidence was hearsay, (2) whether the evidence was testimonial, and (3) whether the defendant's cross-examination of Degnan was sufficient to satisfy the confrontation clause.

I

The defendant first contends that the evidence of his known DNA profile, which Degnan testified she utilized in making her comparison to the DNA on the bandana, was hearsay. The defendant notes that Degnan neither participated in nor observed the analysis of his buccal swab that yielded the profile but, instead, relied upon the profile provided to her by the known processing group in conducting her comparison. Therefore, the defendant maintains, Degnan's testimony necessarily introduced the known processing group's hearsay statements about the numerical profile.

In response, the state concedes that the evidence of the defendant's DNA profile was offered for its truth but nonetheless contends that the evidence was not

hearsay because Degnan, an expert witness, testified in court to her own independent opinion that the DNA profile was accurate. In other words, the state contends that Degnan's testimony did not introduce any *out-of-court* statements concerning the profile because Degnan adopted any such statements as her own and was cross-examined about them at trial. We agree with the defendant that the evidence of his DNA profile was hearsay.

"Hearsay" is "a statement, *other than one made by the declarant while testifying at the proceeding*, offered in evidence to establish the truth of the matter asserted." (Emphasis added.) Conn. Code Evid. § 8-1 (3). The confrontation clause "does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." *Crawford* v. *Washington*, supra, 541 U.S. 60 n.9.

Because the state concedes that the evidence of the numerical DNA profile generated from the defendant's buccal swab was offered for its truth, the sole issue in our hearsay analysis is whether Degnan's testimony introduced into evidence the known processing group's out-of-court statements about the profile, as the defendant contends, or merely presented her own, independent opinion that the profile provided to her was accurate.

As a general matter, we acknowledge that expert witnesses such as Degnan may base their testimony on information provided to them by other sources without their testimony necessarily being regarded as introducing hearsay. Indeed, § 7-4 (b) of the Connecticut Code of Evidence provides in relevant part: "The facts in the particular case upon which an expert bases an opinion may be those perceived by or made known to the expert at or before the proceeding. The facts need not be admissible in evidence if of a type customarily relied

on by experts in the particular field in forming opinions on the subject. . . .'' The ''[i]nadmissible facts upon which experts customarily rely in forming opinions can be derived from sources such as conversations, informal opinions, written reports and data compilations.'' (Internal quotation marks omitted.) *Milliun* v. *New Milford Hospital*, 310 Conn. 711, 726, 80 A.3d 887 (2013), quoting Conn. Code Evid. (2009) § 7-4 (b), commentary. Accordingly, ''[w]hen the expert witness has consulted numerous sources, and uses that information, together with his own professional knowledge and experience, to arrive at his opinion, *that opinion is regarded as evidence in its own right and not as hearsay in disguise*.'' (Emphasis added; internal quotation marks omitted.) *Milliun* v. *New Milford Hospital*, supra, 726–27.

Nonetheless, the underlying information upon which the expert's opinion is based may not itself be admitted into evidence for its truth. Indeed, § 7-4 (b) of the Connecticut Code of Evidence further provides in relevant part: ''The facts relied on [by the expert] pursuant to this subsection are not substantive evidence, unless otherwise admissible as such evidence.'' This language ''expressly forbids the facts upon which the expert based his or her opinion *to be admitted for their truth* unless otherwise substantively admissible under other provisions of the Code. Thus, [§ 7-4] (b) does not constitute an exception to the hearsay rule or any other exclusionary provision of the Code.'' (Emphasis in original; internal quotation marks omitted.) *Milliun* v. *New Milford Hospital*, supra, 310 Conn. 726, quoting Conn. Code Evid. (2009) § 7-4 (b), commentary. Accordingly, the testimony of an expert witness improperly introduces hearsay when the out-of-court statements upon which it is based are themselves admitted into evidence to prove the truth of what they assert. See, e.g., id., 728 (observing that physician's report offered for substan-

tive purposes would be barred if it "include[d] hearsay statements"); *Farrell* v. *Bass*, 90 Conn. App. 804, 817–19, 879 A.2d 516 (2005) (concluding that trial court properly precluded expert witness from testifying about hearsay contents of article that supported his opinion where article itself was not admitted into evidence).

In criminal cases, the admission of expert testimony that is based upon an out-of-court statement may implicate the confrontation clause if the underlying statement itself is testimonial. Acknowledging these concerns, courts have held that expert witnesses may base their opinions on the testimonial findings of other experts without violating the confrontation clause if those underlying findings are not themselves put before the jury. See *Williams* v. *Illinois*, 567 U.S. 50, 71, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012) (plurality opinion) (no confrontation clause violation where testifying expert "made no . . . reference to the [nontestifying analyst's] report, which was not admitted into evidence and was not seen by the trier of fact," and did not testify to "anything that was done at the [nontestifying expert's] lab [or] vouch for the quality of [the] work"); *Bullcoming* v. *New Mexico*, 564 U.S. 647, 673, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011) (Sotomayor, J., concurring in part) (concluding that admission of testimonial report violated confrontation clause but noting that "[w]e would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence"); *United States* v. *Locascio*, 6 F.3d 924, 937–38 (2d Cir. 1993) (expert's opinion that was based upon information gleaned from "countless nameless informers and countless tapes *not in evidence*" did not violate hearsay bar or confrontation clause [emphasis added; internal quotation marks omitted]), cert. denied, 511 U.S. 1070, 114 S. Ct. 1645, 128 L. Ed. 2d 365 (1994);

State v. *Griep*, 361 Wis. 2d 657, 682–83, 863 N.W.2d 567 (2015) (no confrontation clause violation where nontestifying analyst's "testimonial statements do not come into evidence, i.e., where the testimonial forensic report is not admitted and the expert witness who testifies at trial gives his or her independent opinion after review of laboratory data"), cert. denied, U.S. , 136 S. Ct. 793, 193 L. Ed. 2d 709 (2016); *Paredes* v. *State*, 439 S.W.3d 522, 526 (Tex. App. 2014) ("a testifying expert may rely on unadmitted data generated by a [nontestifying] analyst . . . without violating the [c]onfrontation [c]lause"), aff'd, 462 S.W.3d 510 (Tex.), cert. denied, U.S. , 136 S. Ct. 483, 193 L. Ed. 2d 354 (2015).

On the other hand, where the testifying expert explicitly refers to, relies on, or vouches for the accuracy of the other expert's findings, the testifying expert has introduced out-of-court statements that, if offered for their truth and are testimonial in nature, are subject to the confrontation clause. As the District of Columbia Court of Appeals explained in *Young* v. *United States*, 63 A.3d 1033 (D.C. 2013), a testifying expert "relayed hearsay" when she testified "that she matched a DNA profile derived from [the defendant's] buccal swab with male DNA profiles derived from [the victim's] vaginal swabs and her discarded tissue. Because [the testifying expert] was not personally involved in the process that generated the [DNA] profiles, she had no personal knowledge of how or from what sources the profiles were produced. She was relaying, for their truth, the substance of out-of-court assertions by absent lab technicians that, employing certain procedures, they derived the profiles from the evidence furnished by [the victim] or [the defendant]. Those assertions were hearsay." Id., 1045; see also *United States* v. *Pablo*, 696 F.3d 1280, 1288 (10th Cir. 2012) ("[i]f an expert simply parrots another individual's out-of-court statement,

rather than conveying an independent judgment that only incidentally discloses the statement to assist the jury in evaluating the expert's opinion, then the expert is, in effect, disclosing that out-of-court statement for its substantive truth; the expert thereby becomes little more than a backdoor conduit for an otherwise inadmissible statement"); *United States* v. *Dukagjini*, 326 F.3d 45, 59 (2d Cir. 2003) (expert's opinion about interpretation of coded language in recorded conversations violated hearsay bar and confrontation clause because testimony explicitly referred to conversations between expert and informants as bases for expert's opinion), cert. denied sub nom. *Griffin* v. *United States*, 541 U.S. 1092, 124 S. Ct. 2832, 159 L. Ed. 2d 259 (2004); *Commonwealth* v. *Barbosa*, 457 Mass. 773, 783–86, 933 N.E.2d 93 (2010) (confrontation rights were violated by analyst's testimony that other analyst agreed with testifying analyst's opinion regarding DNA testing, and by admission into evidence of table showing nontestifying analyst's findings), cert. denied, 563 U.S. 990, 131 S. Ct. 2441, 179 L. Ed. 2d 1214 (2011).

Therefore, as courts consistently have recognized, expert witnesses cannot be used as conduits for the admission into evidence of the testimonial statements of others. This would permit testifying experts to simply relay the findings of other experts while immunizing those underlying findings from scrutiny on cross-examination. The state cannot "rely on [the testifying witness'] status as an expert to circumvent the [c]onfrontation [c]lause's requirements." *Williams* v. *Illinois*, supra, 567 U.S. 126 (Kagan, J., dissenting); see *United States* v. *Johnson*, 587 F.3d 625, 635 (4th Cir. 2009) ("[a]llowing a witness simply to parrot out-of-court testimonial statements of cooperating witnesses and confidential informants directly to the jury in the guise of expert opinion would provide an end run around *Crawford*" [internal quotation marks omitted]); *Common-*

wealth v. *Barbosa*, supra, 457 Mass. 784 (admission of second expert's opinion through testifying expert would violate confrontation clause "because the opinion of the second expert would not be subject to cross-examination"); *People* v. *John*, 27 N.Y.3d 294, 309, 52 N.E.3d 1114, 33 N.Y.S.3d 88 (2016) ("[T]hese critical analysts who engaged in an independent and qualitative analysis of the data during the DNA typing tests—none of whom was claimed to be unavailable—were effectively insulated from cross-examination. [The testifying analyst], instead, was permitted to parrot the recorded findings that were derived from the critical witnesses' subjective analyses."); see also *United States* v. *Meises*, 645 F.3d 5, 22 (1st Cir. 2011) (prosecutors "cannot be permitted to circumvent the [c]onfrontation [c]lause by introducing the same substantive testimony in a different form" [internal quotation marks omitted]).

In the present case, Degnan testified at trial to her opinion that the defendant was a contributor to the DNA on the bandana recovered from the crime scene. She based this testimony on her comparison of the DNA profiles she derived from the bandana to the DNA profile generated by the known processing group from the defendant's buccal swab. Degnan performed the analysis of the bandana and conducted the ultimate comparison herself. She was not, however, involved in the analysis of the buccal swab, which was an essential component of the comparison making her opinion possible. There was no comparison without the buccal swab analysis. Rather, the known processing group conducted this analysis and provided the resulting DNA profile to Degnan for her to use in her comparison. Degnan neither participated in nor observed this analysis. There is also no evidence contained within the record indicating that the known processing group provided Degnan with the raw machine data generated from the preliminary stages of the analysis such that

Degnan could independently verify that the DNA profile had accurately been constructed.[11] Despite having been uninvolved in the analysis, Degnan relied on that known profile in order to complete her analysis and testified that she was "swearing to the accuracy" of the DNA profile that the known processing group had provided to her.

We agree with the defendant that Degnan's testimony at trial necessarily introduced the out-of-court statements of the known processing group and did not consist merely of her own independent opinion. To be clear, Degnan's testimony about the DNA profiles she generated from the bandana was not hearsay because she conducted these analyses herself. Rather, Degnan explicitly referred to, relied on, and vouched for the quality of work that she did not perform and, in so doing, relayed to the jury the known processing group's out-of-court statements about the defendant's numerical DNA profile. See *People* v. *Austin*, 30 N.Y.3d 98, 105, 86 N.E.3d 542, 64 N.Y.S.3d 650 (2017) ("Although the criminalist [who testified at trial] may have had some level of involvement in [the laboratory's] handling of some of the . . . crime scene swabs, he had no role whatsoever in the testing of [the] defendant's post-accusatory buccal swab. His testimony was, therefore, merely a conduit for the conclusions of others . . . ." [Citation omitted; internal quotation marks omitted.]). These assertions were hearsay.

Moreover, Degnan introduced the known processing group's out-of-court statements by including in her report, which was admitted into evidence without limi-

[11] Although Degnan testified that the known processing group provided her with "paperwork" indicating that the group had "followed standard operating procedures," there is no evidence that Degnan independently verified the accuracy of the profile beyond simply relying on the group's representation that they adhered to standard protocol. See part III of this opinion.

tation, the allele numbers comprising the defendant's DNA profile that the known processing group had provided to her. See *Commonwealth* v. *McCowen*, 458 Mass. 461, 482–83, 939 N.E.2d 735 (2010) (concluding that testifying analyst introduced hearsay by admitting chart into evidence that compared alleles from DNA taken from victim, which analyst generated herself, and alleles from defendant's known sample, which were generated by another analyst). The report provides that the DNA was extracted from the defendant's buccal swab and analyzed according to standard laboratory procedure. The report then states that "[t]he following results were obtained on the amplified items" and lists the alleles generated by the known processing group. The report further contains Degnan's conclusion that, based on the comparison of the alleles from the buccal swab and the profiles she generated from the bandana, the defendant was a contributor to the DNA on the bandana. Finally, just above Degnan's signature, the report contains the following language: "This report reflects the test results, conclusions, interpretations, and/or the findings of the analyst as indicated by their signature below," with no disclaimer that Degnan was not involved in generating the known profile.

We therefore do not agree with the state's contention that Degnan's testimony did not introduce any out-of-court statements. In order for Degnan to reach her conclusion that the defendant was a match to the DNA found on the bandana, she had to rely on and incorporate the known processing group's findings into her own. Moreover, the underlying findings of the known processing group upon which she relied were themselves admitted into evidence in multiple forms. Because the state concedes that this evidence was offered for its truth—a concession we think unavoidable—it is hearsay and, if testimonial in nature; see part II of this opinion; implicates the defendant's confronta-

tion rights. Concluding otherwise merely because Degnan is an expert witness would immunize from cross-examination the analyst or analysts of the known processing group who made the critical findings upon which Degnan's comparison was based.

Finally, we note that the Appellate Court concluded that the evidence of the defendant's DNA profile was not offered for its truth but, rather, to explain the assumptions upon which Degnan based her opinion that the defendant's DNA profile matched the DNA found on the bandana. *State* v. *Walker*, supra, 180 Conn. App. 307. As support for this conclusion, the Appellate Court cited the plurality opinion in *Williams* v. *Illinois*, supra, 567 U.S. 50, and, specifically, the plurality's observation that "[o]ut-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the [c]onfrontation [c]lause." Id., 58. We have recognized this evidentiary principle in other contexts. See *State* v. *Copas*, 252 Conn. 318, 328, 746 A.2d 761 (2000) ("[a]lthough some of the facts considered by the experts . . . may not [be] substantively admissible . . . the parties [are] not precluded from examining the experts about those facts insofar as they related to the basis for the experts' opinions" [citations omitted]).

As previously noted, however, on appeal to this court the state has conceded, and we agree, that the evidence of the defendant's known DNA profile *was* offered for its truth. The present case therefore does not involve a situation in which the evidence was offered "solely" for the purposes of explaining an expert's assumptions, as the plurality believed to be the case in *Williams*. We note, moreover, that five justices in *Williams* rejected the plurality's hearsay analysis and instead concluded that the evidence of the DNA profile used as part of a comparison was offered for its truth because it lacked

any relevance to the case apart from its truth. See *Williams* v. *Illinois*, supra, 567 U.S. 106 (Thomas, J., concurring in judgment); id., 126–27 (Kagan, J., dissenting); see also *United States* v. *James*, 712 F.3d 79, 95 (2d Cir. 2013) ("[t]he *Williams* plurality's first rationale—that the laboratory report there was offered as basis evidence, and not for its truth—was roundly rejected by five [j]ustices"), cert. denied, 572 U.S. 1134, 134 S. Ct. 2660, 189 L. Ed. 2d 208 (2014); *Young* v. *United States*, supra, 63 A.3d 1045 (evidence of known DNA profiles necessarily were offered for their truth because, without nontestifying analysts' assertions regarding accuracy of profiles, "what would have been left of [the testifying analyst's] testimony—that she matched two DNA profiles she could not herself identify—would have been meaningless"). Because the evidence was offered for its truth, we need not address the question of whether such DNA evidence could, in other circumstances, be admitted for a nonhearsay purpose.

II

The defendant next contends that the evidence of his numerical DNA profile was testimonial because it was created for the primary purpose of establishing his guilt at trial. We agree with the defendant that, under the circumstances of this case, the known DNA profile was testimonial.

We begin with the general principles governing our analysis. "[T]he confrontation clause applies only to statements that are testimonial in nature. . . . As a general matter, a testimonial statement is typically [a] solemn declaration or affirmation made for the purpose of establishing or proving some fact. . . . Although the United States Supreme Court did not provide a comprehensive definition of what constitutes a testimonial statement in *Crawford*, the court did describe three

core classes of testimonial statements: [1] ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially . . . [2] extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions [and] . . . [3] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial . . . .'' (Citations omitted; internal quotation marks omitted.) *State* v. *Smith*, supra, 289 Conn. 622–23. The present case concerns only this third category form of testimonial statements.

''[I]n *Davis* v. *Washington*, [547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)], the United States Supreme Court elaborated on the third category and applied a 'primary purpose' test to distinguish testimonial from nontestimonial statements given to police officials, holding: 'Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.' . . .

''In *State* v. *Slater*, [285 Conn. 162, 172 n.8, 939 A.2d 1105, cert. denied, 553 U.S. 1085, 128 S. Ct. 2885, 171 L. Ed. 2d 822 (2008)], we reconciled *Crawford* and *Davis*, noting: 'We view the primary purpose gloss articulated in *Davis* as entirely consistent with *Crawford*'s focus on the reasonable expectation of the declarant. . . .

[I]n focusing on the primary purpose of the communication, *Davis* provides a practical way to resolve what *Crawford* had identified as the crucial issue in determining whether out-of-court statements are testimonial, namely, whether the circumstances would lead an objective witness reasonably to believe that the statements would later be used in a prosecution.' " (Citations omitted.) *State* v. *Smith*, supra, 289 Conn. 623–24.

With these background principles in mind, our analysis of the testimonial nature of the DNA evidence at issue in the present case requires a review of the trilogy of United States Supreme Court cases applying these principles in the context of forensic evidence—*Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), *Bullcoming* v. *New Mexico*, supra, 564 U.S. 647, and *Williams* v. *Illinois*, supra, 567 U.S. 50.

In *Melendez-Diaz*, during the defendant's trial on narcotics violations, the prosecution introduced into evidence three laboratory " 'certificates of analysis' " stating that the substance seized from the defendant was cocaine. *Melendez-Diaz* v. *Massachusetts*, supra, 557 U.S. 308. The United States Supreme Court held that the certificates were within the "core class of testimonial statements" because they 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." (Internal quotation marks omitted.) Id., 310. The court explained that the analysts' reports were "quite plainly" affidavits, that is, "declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths," and were "functionally identical to live, in-court testimony." (Internal quotation marks omitted.) Id., 310–11. The court also noted that, under Massachusetts law, the "sole purpose" of the affidavits was to establish the composition, quality and weight of the substance

believed to be cocaine and that it could be "safely assume[d]" that the analysts "were aware of the affidavits' evidentiary purpose, since that purpose . . . was reprinted on the affidavits themselves." Id., 311.

In *Bullcoming* v. *New Mexico*, supra, 564 U.S. 663, the court held that the admission at trial of a lab report certifying that the defendant's blood alcohol content exceeded the threshold for the offense of aggravated driving while intoxicated violated the confrontation clause. Emphasizing that "[a] document created solely for an 'evidentiary purpose' . . . made in aid of a police investigation, ranks as testimonial," the court concluded that the report, although not sworn or notarized, closely resembled the reports at issue in *Melendez-Diaz*. Id., 664. That is, law enforcement had provided seized evidence to a state laboratory for testing, an analyst tested the evidence and prepared a certificate concerning the results, and the certificate was formalized in a signed document entitled " 'report,' " which contained a reference to local rules concerning the admission of certified blood alcohol test results. Id., 665. These circumstances, the court concluded, were "more than adequate" to qualify the analyst's report as testimonial. Id. Furthermore, the court held that the testimony of a surrogate witness, who was familiar with the device used in the test and the laboratory's testing procedures but who did not conduct or observe this particular test, was insufficient to satisfy the confrontation clause. Id., 661–62.

Finally, in *Williams* v. *Illinois*, supra, 567 U.S. 59, an outside laboratory provided the police with a DNA profile generated from semen found on a vaginal swab of the victim of a rape. The police entered the profile into its DNA database and received notification of a cold hit with the defendant's DNA profile, which had been entered into the database due to an unrelated arrest. Id. The defendant was arrested and charged with

the victim's rape. Id., 59–60. At trial, the prosecution called the analyst who prepared the defendant's DNA profile in connection with the unrelated arrest, as well as the analyst who compared that profile to the DNA generated by the outside laboratory from the victim's vaginal swab. Id., 60–62. No one from the outside laboratory who generated the profile from the vaginal swab, however, testified at trial. Id., 62.

Five justices agreed that the profile from the vaginal swabs relied upon by the analyst to make her comparison was not testimonial but the fifth justice rejected the plurality's "flawed analysis"; id., 104 (Thomas, J., concurring in judgment); as did the four dissenting justices. Id., 135–38 (Kagan, J., dissenting). The plurality opinion, written by Justice Alito, concluded that the evidence was not testimonial because "the primary purpose of the [outside laboratory's] report, viewed objectively, was not to accuse [the defendant] or to create evidence for use at trial. When the [police] sent the sample to [the outside laboratory], its primary purpose was to catch a dangerous rapist who was still at large, not to obtain evidence for use against [the defendant], who was neither in custody nor under suspicion at that time." Id., 84. The plurality reasoned that, because no one from the outside laboratory could have known the profile would inculpate the defendant—or anyone else whose DNA profile was in the police database—"there was no prospect of fabrication and no incentive to produce anything other than a scientifically sound and reliable profile."[12] (Internal quotation marks omitted.) Id., 84–85.

[12] As an independent basis for concluding that the admission of the DNA evidence did not violate the confrontation clause, the plurality reasoned that, to the extent the substance of the outside laboratory's report was admitted into evidence—the report itself was not offered as an exhibit—it was offered not for its truth but, rather, to explain the assumptions upon which the testifying analyst based her expert opinion that the DNA profile from the vaginal swabs matched the defendant's DNA. *Williams* v. *Illinois*, supra, 567 U.S. 57–58. The plurality concluded that the out-of-court state-

Justice Thomas authored a separate opinion concurring in the judgment reiterating his view that the confrontation clause covers only "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 articulated in *Davis*, was a necessary but insufficient criterion to render a statement testimonial because statements often serve more than one purpose. Id., 114. He concluded that the report at issue was not sufficiently formal to be testimonial because it was not sworn or certified. Id., 111. Justice Thomas and the four dissenting justices, however, rejected the plurality's view that a statement must have the primary purpose of accusing a targeted individual of criminal conduct in order to be testimonial. Id., 114. (Thomas, J., concurring in judgment); id., 135 (Kagan, J., dissenting).

Justice Kagan, writing for the four dissenting justices, concluded that the court's prior decisions in *Melendez-Diaz* and *Bullcoming* compelled the conclusion that the DNA profile in the outside laboratory's report was testimonial 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." (Internal quotation marks omitted.) Id., 135. The dissenting justices rejected Justice Thomas' view that the

ments were not hearsay and, therefore, that they fell outside the scope of the confrontation clause. Id., 58. Five justices, however, disagreed with this reasoning. Id., 104–109 (Thomas, J., concurring in judgment); id., 125–32 (Kagan, J., dissenting). The state concedes that this aspect of *Williams* is not relevant in the present case because the out-of-court statements made by the known processing group concerning the defendant's known DNA profile were offered for their truth and not merely to explain the basis for Degnan's opinion that the defendant's DNA matched the DNA found on the bandana.

statements were not testimonial because they were not sworn or certified, arguing that, similar to the reports deemed testimonial in the court's prior cases, the report was "an official and signed record of laboratory test results, meant to establish a certain set of facts in legal proceedings." Id., 139 (Kagan, J., dissenting).

Due to the fractured nature of the *Williams* decision, courts have struggled to determine the effect of *Williams*, if any, on the legal principles governing confrontation clause claims. See *United States* v. *James*, supra, 712 F.3d 95–96 (applying previous case law because *Williams* yielded no single, useful holding); 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"). In ascertaining the effect of *Williams*, we note that, "[w]hen a fragmented Court 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 [m]embers 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). As we recently observed, the court in *Williams* "made it impossible to identify the narrowest ground because the analyses of the various opinions are irreconcilable." *State* v. *Sinclair*, 332 Conn. 204, 225, A.3d (2019). Consequently, we explained in *Sinclair* 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." (Internal quotation marks omitted.) *State* v. *Sinclair*, supra, 225, quoting *United States* v. *James*, supra, 712 F.3d 95–96; see also *United States* v. *Duron-Caldera*, 737 F.3d 988, 994 and n.4 (5th Cir. 2013).

The issue in the present case does not concern the testimonial nature of Degnan's report or DNA comparison. Degnan made the comparison herself and was cross-examined about it at trial. Instead, we must determine whether the defendant's known DNA profile, which was obtained from a postarrest buccal swab and provided to Degnan for her to use in making a comparison to DNA found on crime scene evidence, ranks as testimonial.

As to this specific question, we find persuasive a series of decisions from the New York Court of Appeals. In *People* v. *John*, supra, 27 N.Y.3d 297–98, the defendant was charged with illegal possession of a firearm arising from an incident in which he allegedly pointed a gun at another individual. The police swabbed the firearm found in the basement of the defendant's apartment building and submitted the swabs to the crime laboratory to be analyzed for DNA. Along with the swabs, the police sent an evidence request listing the defendant as the arrestee and providing, as the reason for the request, " 'PERP HANDLED THE FIREARM.' " Id., 298. Following his indictment, the defendant submitted to a court-ordered buccal swab. Id., 299. The laboratory generated a report listing the numerical DNA profiles from the firearm and the buccal swab in a comparison table, showing an identical match. Id.

The New York Court of Appeals concluded: "[T]he laboratory reports as to the DNA profile generated from the evidence submitted to the laboratory by the police in a pending criminal case were testimonial. The DNA profiles were generated in aid of a police investigation of a particular defendant charged by an accusatory instrument and created for the purpose of substantively proving the guilt of a defendant in his pending criminal action." Id., 308. In addition, the court observed that "the primary purpose of the laboratory examination on the gun swabs could not have been lost on the . . .

analysts" in light of the accompanying evidence request indicating that the basis for the request was that the firearm had been handled by the defendant. Id.

The New York Court of Appeals' subsequent decision in *People* v. *Austin*, supra, 30 N.Y.3d 98, is squarely analogous to the present case. In that case, the crime laboratory generated DNA profiles from blood recovered from the scene of multiple burglaries. Id., 100. The police uploaded one of the profiles into their database and returned a "match" for the defendant. Id., 100–101. The defendant was subsequently charged with the burglaries. Id., 101. At trial, the prosecutor opted not to call as a witness the analyst who prepared the profile from the database. Instead, the prosecutor had the defendant submit to a buccal swab, which yielded a DNA profile determined to match the DNA from the crime scene evidence. Id. At trial, the prosecution's sole forensic witness was a criminalist who testified that he reviewed the DNA profiles prepared by the analysts and determined that they matched. Id. The analysts who generated the DNA profiles from the buccal swab and the crime scene evidence did not testify. Id.

The New York Court of Appeals held that the admission of the criminalist's testimony concerning the DNA profile generated from the defendant's postarrest buccal swab "easily satisfies the primary purpose test." Id., 104. The court reasoned that, in establishing that the defendant's DNA matched the DNA from the crime scene, the prosecution relied "solely on the evidence of the DNA profile generated from [the] buccal swab, which was developed during the course of a pending criminal action and was created in order to prove [the defendant's] guilt at trial. . . ." (Citation omitted.) Id. Therefore, the court explained, "the buccal swab was obtained and the resulting profile was compared with the DNA profile generated from the . . . burglaries, with the primary (truly, the sole) purpose of proving

a particular fact in a criminal proceeding—that [the] defendant . . . committed the crime [with] which he was charged . . . .'' (Citation omitted; internal quotation marks omitted.) Id.

We also find instructive the decision of the Supreme Judicial Court of Massachusetts in *Commonwealth* v. *McCowen*, supra, 458 Mass. 461, which involves facts nearly identical to those of the present case. In *McCowen*, the defendant, who was a suspect in a rape and murder investigation, submitted to a buccal swab, which yielded a DNA profile that the police later determined matched the DNA derived from swabs taken from the victim. Id., 465. At trial, the sole analyst called to testify had developed the DNA profiles from the samples taken from the victim and conducted the comparative analysis but had not been involved in the generation of the profile from the defendant's buccal swab. Id., 482–83. The analyst testified to her opinion that the defendant was a contributor to the DNA found on the victim, and illustrated her analysis with a chart that made a side-by-side comparison of the allele numbers generated from the victim and those from the defendant's buccal swab. Id., 483.

The Supreme Judicial Court concluded that ''the allele numbers derived from the testing of the known samples by another analyst that were included in [the testifying analyst's] chart were testimonial hearsay, because these were factual findings made by a nontestifying witness for the purpose of investigating the murder.'' Id., 483; see also *Young* v. *United States*, supra, 63 A.3d 1047–48 (The court held that a DNA profile generated from the defendant's buccal swab, which was taken after the defendant was identified as a suspect, was ''generated for the primary purpose of establishing or proving a past fact relevant to later criminal prosecution, namely the identity of [the victim's] assailant.

Under the basic 'evidentiary purpose' test, that is enough to render the test results testimonial.").[13]

In light of the foregoing case law, we conclude that the DNA profile was generated from the defendant's buccal swab for "the primary purpose of creating a record for use at a later criminal trial." (Internal quotation marks omitted.) *State* v. *Sinclair*, supra, 332 Conn. 225. The police took the buccal swab after the defendant was arrested and charged with various crimes in connection with his participation in the murder. The state obtained court authorization to conduct the buccal swab by filing a motion in the defendant's criminal case representing that the buccal swab and resulting DNA profile "will be of material aid in determining whether the defendant committed the crime of felony murder."

The purpose of obtaining the defendant's known DNA profile was to compare it with DNA from the bandana found at the crime scene, which Green indicated had been worn by the person who shot and killed the victim. The defendant's DNA profile was, therefore, generated in aid of an ongoing police investigation for the primary—indeed, the sole—purpose of proving a fact in his criminal trial, namely, that his DNA was found on

[13] The state relies on *State* v. *Ortiz*, 238 Ariz. 329, 360 P.3d 125 (App. 2015), *State* v. *Lui*, 179 Wn. 2d 457, 315 P.3d 493, cert. denied, 573 U.S. 933, 134 S. Ct. 2842, 189 L. Ed. 2d 810 (2014), and *State* v. *Deadwiller*, 350 Wis. 2d 138, 834 N.W.2d 362 (2013), in support of its claim that the defendant's DNA profile was not testimonial. In each of those cases, however, the courts decided the testimonial question by applying the three *Williams* rationales to the facts of the case to determine how five justices would have ruled. See *State* v. *Ortiz*, supra, 341; *State* v. *Lui*, supra, 478–79; *State* v. *Deadwiller*, supra, 162–63. As previously explained in this opinion, however, we decline to apply *Williams* in this manner, as that case resulted in no controlling holding. See *State* v. *Sinclair*, supra, 332 Conn. 225. Instead, we "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." (Internal quotation marks omitted.) Id. Accordingly, given our decision in *Sinclair*, we do not find the cases cited by the state persuasive.

the bandana worn by the shooter. Indeed, after Degnan received the defendant's DNA profile from the known processing group and determined that it matched the DNA from the bandana, thereby implicating the defendant as the shooter, the state charged the defendant with the additional crimes of manslaughter in the first degree with a firearm and criminal possession of a pistol or revolver.

We further conclude that the analyst or analysts of the known processing group who processed the defendant's buccal swab reasonably could have expected that the resulting DNA profile would later be used for prosecutorial purposes. See *Ohio* v. *Clark*, U.S. , 135 S. Ct. 2173, 2181–82, 192 L. Ed. 2d 306 (2015) (analyzing primary purpose of individuals who elicited statements, as well as primary purpose of declarant, in determining whether statements were testimonial); *State* v. *Slater*, supra, 285 Conn. 172 (analysis of testimonial nature of statement "focuse[s] on the reasonable expectation of the declarant that, under the circumstances, his or her words later could be used for prosecutorial purposes"). The known processing group is a component of the Division of Scientific Services, which is required by statute to assist law enforcement in ongoing investigations. General Statutes § 29-7b; see also *Bullcoming* v. *New Mexico*, supra, 564 U.S. 665 (relying on laboratory's legal obligation to assist law enforcement in concluding that its report was testimonial). More directly, the envelope containing the buccal swab that Murray submitted to the laboratory was labeled with the defendant's name and fingerprint; listed "West Haven P.D." as the submitting agency, listed the MacDougall Walker Correctional Institution as the defendant's address, and displayed a notation reading "Incident: Homicide." The investigatory and, thus, evidentiary purpose of the buccal swab analysis would therefore have been readily apparent to the analyst who conducted it.

Additionally, Degnan testified that the known processing group generates DNA profiles for all known samples submitted to the laboratory and then provides those profiles to other analysts who then make the comparisons. In light of this standard practice, it is safe to assume that the analyst who processed the defendant's buccal swab was aware of the likelihood that the resulting DNA profile would be used as part of a comparison with other evidence and, therefore, potentially utilized in a criminal proceeding. Put simply, the police sought the DNA profile as part of an ongoing criminal investigation, and we do not believe that that fact would have been lost on the known processing group.

Finally, a word about formality. We observed in *State* v. *Sinclair*, supra, 332 Conn. 225, that "[t]he one thread of *Williams* that is consistent with . . . earlier precedent is that . . . the formality attendant to the making of the statement must be considered." In the present case, the precise level of formality surrounding the known processing group's submission of the profile to Degnan is not entirely clear from the record. Under the circumstances, however, we do not believe that this consideration compels a different result. We note that the formality attending a particular statement, although relevant in the primary purpose analysis, is not dispositive. See *Bullcoming* v. *New Mexico*, supra, 564 U.S. 671 (Sotomayor, J., concurring in part) ("[a]lthough [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) ("although formality suggests the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution . . .

informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent" [citation omitted; internal quotation marks omitted]).

Indeed, strict adherence to formality requirements may be especially problematic in the context of scientific evidence, as this requirement "can be easily subverted by . . . simple omission in the format of the documents, with a design to facilitate their use as evidence in a criminal trial." *People* v. *John*, supra, 27 N.Y.3d 312; see also *Davis* v. *Washington*, supra, 547 U.S. 826 (confrontation clause cannot "readily be evaded" by parties' keeping written product of interrogation informal "instead of having the declarant sign a deposition"). At any rate, the buccal swab and DNA profile were obtained pursuant to a postarrest court order. The known processing group provided the DNA profile to Degnan along with "paperwork" indicating that the sample was analyzed according to accepted laboratory procedures. These facts are suggestive of a certain level of formality that, together with the circumstances set forth previously in this opinion, are sufficient to render the statement testimonial.

The state, relying on the plurality opinion in *Williams*, contends that the defendant's known DNA profile was not testimonial because it did not directly accuse the defendant of any criminal conduct but became accusatory only when compared with the DNA found on the bandana. In *Williams*, the plurality concluded that the DNA profile generated from vaginal swabs of the victim was not to accuse the defendant or create evidence at trial because "no one at [the laboratory] could have possibly known that the profile that it produced would turn out to inculpate [the defendant]—or for that matter, anyone else whose DNA profile was in a law enforcement database." *Williams* v. *Illinois*, supra, 567 U.S. 84–85.

We disagree. This line of reasoning was foreclosed by *Melendez-Diaz*, which, as previously explained,

remains controlling in the present case due to the lack of any definitive holding in *Williams*. See *State* v. *Sinclair*, supra, 332 Conn. 225. In *Melendez-Diaz*, the state asserted that the certificates of analysis stating that the seized substances were narcotics were not subject to confrontation because the analysts who prepared them were not " 'accusatory' " witnesses. *Melendez-Diaz* v. *Massachusetts*, supra, 557 U.S. 313. The state argued that the certificates did not "directly accuse [the defendant] of wrongdoing" but were "inculpatory only when taken together with other evidence . . . ." Id. The United States Supreme Court rejected this argument, reasoning that the analysts "certainly provided testimony *against* [the defendant], proving one fact necessary for his conviction—that the substance he possessed was cocaine." (Emphasis in original.) Id. The court explained that the text of the confrontation clause "contemplates two classes of witnesses—those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter. [T]here is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." (Emphasis in original; footnote omitted.) Id., 313–14.

Indeed, citing this portion of *Melendez-Diaz*, five justices in *Williams* rejected the plurality's rationale and concluded that DNA analyses may be testimonial regardless of whether they are inherently inculpatory. *Williams* v. *Illinois*, supra, 567 U.S. 116 (Thomas, J., concurring); id., 135–36 and n.5 (Kagan, J., dissenting); see also *Washington* v. *Griffin*, 876 F.3d 395, 407 n.10 (2d Cir. 2017) ("[The lower court] erred insofar as it held that DNA profiles, as a categorical matter, are [nontestimonial] because standing alone, [they] shed no light on the issue of the defendant's guilt. As previously noted . . . five [j]ustices in *Williams* . . . agreed that the introduction of DNA profiles could, under proper circumstances, run afoul of the [c]onfron-

tation [c]lause." [Citation omitted; internal quotation marks omitted.]), cert. denied, U.S. , 138 S. Ct. 2578, 201 L. Ed. 2d 299 (2018); *United States* v. *Duron-Caldera*, supra, 737 F.3d 994–95 (declining to adopt inherently inculpatory rationale because it was rejected by five justices as well as *Melendez-Diaz*). Accordingly, statements are not rendered nontestimonial merely because the content of the statements does not directly accuse the defendant of criminal wrongdoing.

The state further contends, again relying on the plurality opinion in *Williams*, that the DNA profile is not testimonial because "numerous technicians" worked on the defendant's known DNA profile and that, "[w]hen the work of a lab is divided up in such a way, it is likely that the sole purpose of each technician is simply to perform his or her task in accordance with accepted procedures." *Williams* v. *Illinois*, supra, 567 U.S. 85. The plurality opinion in *Williams* observed that, under such circumstances, there is no "prospect of fabrication and no incentive to produce anything other than a scientifically sound and reliable profile." (Internal quotation marks omitted.) Id., 85.

We are not persuaded. As a factual matter, nothing in the record indicates whether multiple analysts from the known processing group analyzed the buccal swab, as opposed to a single analyst. This aspect of *Williams* is, therefore, not implicated in the present case. Moreover, as a matter of law, not only are we not bound by the result in *Williams*; see *State* v. *Sinclair*, supra, 332 Conn. 225; we disagree with the underlying proposition that the right to confrontation categorically does not apply to forensic evidence whenever there is no incentive to fabricate or falsify evidence.

To be sure, "[c]onfrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well." *Melendez-Diaz* v. *Massachusetts*, supra, 557 U.S. 319. "[C]onfrontation protects against a wide

range of witness reliability concerns beyond personal bias, such as perception, memory, narration, and sincerity." *United States* v. *Duron-Caldera*, supra, 737 F.3d 996; see *Melendez-Diaz* v. *Massachusetts*, supra, 320 ("an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination"); see also *Williams* v. *Illinois*, supra, 567 U.S. 135–36 (Kagan, J., dissenting) ("[S]urely the typical problem with laboratory analyses—and the typical focus of cross-examination—has to do with careless or incompetent work, rather than with personal vendettas. And as to that predominant concern, it makes not a whit of difference whether, at the time of the laboratory test, the police already have a suspect."). The absence of an incentive to fabricate does not foreclose the potential for honest mistakes, which is independently sufficient to trigger the right to confrontation.

Accordingly, we conclude that the evidence of the DNA profile generated by the known processing group from the defendant's postarrest buccal swab was testimonial hearsay.

III

Finally, the state contends that the defendant's right to confrontation was satisfied in this case because Degnan, the laboratory supervisor who was familiar with the standard DNA testing procedures, testified and was subject to cross-examination. We disagree.

The state's argument that Degnan was a sufficient substitute witness is incompatible with *Bullcoming* v. *New Mexico*, supra, 564 U.S. 647. In that case, the analyst who conducted the defendant's blood test and prepared the lab report certifying to his blood alcohol content did not testify at trial. Instead, the prosecution called a different analyst who did not conduct or observe the test but " 'qualified as an expert witness' " with respect to the device used in the test and the

laboratory's testing procedures. Id., 661. Concluding that such surrogate testimony was insufficient to satisfy the confrontation clause, the court reasoned that, despite the analyst's qualifications, "surrogate testimony of the kind [the analyst] was equipped to give could not convey what [the nontestifying analyst] knew or observed about the events his certification concerned, i.e., the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part." (Footnote omitted.) Id., 661–62. The court emphasized that the confrontation clause "does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." Id., 662.

Degnan, although familiar with the devices used to process DNA and the laboratory's standard testing procedures, did not conduct the analysis of the defendant's buccal swab or observe the analysis being conducted. Accordingly, although defense counsel cross-examined Degnan about the methods she used when analyzing the bandana and comparing the profiles, he could not cross-examine her about the analysis of the buccal swab or the methods employed by the known processing group in generating that profile. See *People* v. *Austin*, supra, 30 N.Y.3d 104–105 ("in order to satisfy the [c]onfrontation [c]lause, [the] defendant was entitled to cross-examine the analyst who either performed, witnessed or supervised the generation of the critical numerical DNA profile or who used his or her independent analysis on the raw data to arrive at his or her own conclusions"); see also *Young* v. *United States*, supra, 63 A.3d 1048 ("without evidence that [the testifying analyst] performed or observed the generation of the DNA profiles . . . herself, her supervisory role and independent evaluation of her subordinates' work product are not enough to satisfy the [c]onfrontation [c]lause

because they do not alter the fact that she relayed testimonial hearsay"); D. Kaye et al., The New Wigmore: A Treatise on Evidence (Cum. Supp. 2014) § 4.12.4, p. 50 ("Permitting a supervisor [to testify] is a superficially attractive approach, but it is not supported by careful scrutiny unless . . . the supervisor observed the analyst conducting the test. If not, the supervisor has no greater connection to *this specific test* than does any other qualified laboratory employee." [Emphasis in original.]).

The state relies on a line of cases from other jurisdictions generally holding that the confrontation clause can be satisfied through the testimony of a supervisory analyst who reviewed the data prepared by the nontestifying analyst and formed his or her own opinion concerning that analyst's conclusions. See, e.g., *Commonwealth* v. *Yohe*, 621 Pa. 527, 561, 79 A.3d 520 (2013) (testifying expert's analysis "did not simply parrot another analyst . . . rather, he was involved with reviewing all of the raw testing data, evaluating the results, measuring them against lab protocols to determine if the results supported each other, and writing and signing the report" [citation omitted]), cert. denied, 572 U.S. 1135, 134 S. Ct. 2662, 189 L. Ed. 2d 209 (2014); *State* v. *Michaels*, 219 N.J. 1, 6, 95 A.3d 648 (confrontation clause was satisfied by testimony of supervisory analyst who had "reviewed the [machine generated] data from the testing, had determined that the results demonstrated that [the] defendant had certain drugs present in her system, and had certified the results in a report"), U.S. , 135 S. Ct. 761, 190 L. Ed. 2d 635 (2014); *State* v. *Griep*, supra, 361 Wis. 2d 683 ("when a [nontestifying] analyst documents the original tests with sufficient detail for another expert to understand, interpret, and evaluate the results, that expert's testimony does not violate the [c]onfrontation [c]lause" [internal quotation marks omitted]).

In the present case, the record provides no basis for the claim that Degnan was provided with the raw data prepared by the known processing group and came to her own conclusion concerning the defendant's DNA profile. Degnan did testify that the known processing group provided "paperwork" to her so that she "could see that all of the checkboxes were check[ed], that they did it properly, followed standard operating procedures." This testimony merely establishes, however, that the known processing group represented to Degnan that they followed proper procedures during testing. As to the numerical profile produced from that testing, there is no evidence Degnan did anything at trial other than simply relay to the jury the profile that had been provided to her. Degnan was, therefore, not a sufficient substitute witness to satisfy the defendant's right to confrontation.

We observe that this opinion does not conclude that all analysts who participate in the process of generating a DNA profile necessarily must testify. We simply conclude that, where the generation of a DNA profile is testimonial, "at least one analyst with the requisite personal knowledge must testify." *People* v. *John*, supra, 27 N.Y.3d 313. In this regard, we agree with the New York Court of Appeals that "the analysts involved in the preliminary testing stages, specifically, the extraction, quantitation or amplification stages," are not necessary witnesses. Id. Rather, "it is the generated numerical identifiers and the calling of the alleles at the final stage of the DNA typing that effectively accuses [the] defendant of his role in the crime charged." Id. Accordingly, to satisfy the confrontation clause, the state need only call as a witness an analyst with personal knowledge concerning the accuracy of the numerical DNA profile generated from the preliminary stages of testing.

Because the state did not do so in the present case, we conclude that the defendant has established a violation of his sixth amendment right to confront the wit-

nesses against him. As the state has not asserted that this error is harmless beyond a reasonable doubt, the defendant is entitled to a new trial under *Golding*.

The judgment of the Appellate Court is reversed insofar as that court upheld the defendant's conviction as to the charges of felony murder, attempt to commit robbery in the first degree, and criminal possession of a pistol or revolver, and the case is remanded to that court with direction to reverse the trial court's judgment with respect to those charges and to remand the case to the trial court for a new trial.

In this opinion the other justices concurred.

BRENDA SNELL *v.* NORWALK YELLOW CAB, INC., ET AL.
(SC 19929)

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

Syllabus

The plaintiff sought to recover damages from the defendants, a taxicab company, its owner, and its employee, S, for personal injuries she sustained when she was struck by a taxicab that had been stolen and driven by two teenagers. The plaintiff alleged that S's negligence in leaving the taxicab unattended with the key in the ignition in a high crime area created the reasonably foreseeable risk that the taxicab would be stolen, driven in an unsafe manner, and cause injury. The defendants raised as a special defense the doctrine of superseding cause, claiming that the intentional, criminal, or reckless acts of the two teenagers had broken the chain of causation between S's alleged negligence and the plaintiff's injuries and, thus, relieved them of liability. After the close of evidence, the trial court held a charging conference at which it solicited comments from counsel regarding its proposed charge on superseding cause, which instructed the jury that, if it found that the theft of the taxicab and the resulting accident involved intentional acts that were outside the scope of the risk created by S's conduct, the defendants could not be held liable for the plaintiff's injuries. The court also proposed a related interrogatory asking the jury whether the defendants had proven that the accident was outside the scope of the risk created by S's conduct. The plaintiff objected to the instruction and interrogatory regarding the scope of the risk, but the court overruled the plaintiff's objection and instructed the

jury on superseding cause. Thereafter, the jury returned a verdict for the defendants, indicating in two separate interrogatories that, although S's negligence was a proximate cause of the plaintiff's injuries, the accident that ensued was outside the scope of the risk created by S's negligence and, therefore, that the defendants were not liable for the plaintiff's injuries. Subsequently, the plaintiff filed a motion to set aside the verdict and for a new trial on the grounds that the court should not have submitted the doctrine of superseding cause to the jury because it was inapplicable and that the jury's answers to the interrogatories were inconsistent. The trial court denied the motion and rendered judgment in accordance with the verdict, from which the defendants appealed to the Appellate Court. On appeal to that court, the defendants claimed, inter alia, that the doctrine of superseding cause was not applicable because the teenagers were merely criminally reckless and the doctrine applies only to intervening acts that are unforeseeable and intended to cause harm, and that the trial court improperly denied her motion to set aside the verdict and for a new trial because the jury's responses to the interrogatories that S's conduct was a proximate cause of the plaintiff's injuries but that the manner in which her injuries occurred was outside the scope of the risk created by S's negligence were inconsistent. The Appellate Court affirmed the judgment of the trial court, concluding that, although this court in *Barry* v. *Quality Steel Products, Inc.* (263 Conn. 424) abrogated the doctrine of superseding cause in cases in which intervening acts merely were negligent, it retained the doctrine for unforeseeable intentional torts, forces of nature, and criminal events, which encompassed the acts of the teenagers. The Appellate Court also rejected the plaintiff's contention that the jury's answers to the interrogatories were inconsistent. On the granting of certification, the plaintiff appealed to this court. *Held*:

1. The Appellate Court correctly concluded that the doctrine of superseding cause applies in cases in which the conduct of a third party is criminally reckless: a review of the case law addressing the doctrine of superseding cause and the history of tort reform in this state led this court to conclude that the doctrine applies to criminally reckless conduct, as the concerns that led this court in *Barry* to abrogate the doctrine in cases in which a defendant alleges that his negligent conduct is superseded by a third party's subsequent negligent act were not implicated in cases, like the present one, involving a third party's subsequent criminally reckless act, because apportionment of liability is unavailable under such circumstances pursuant to statute (§ 52-572h [o]); accordingly, the doctrine of superseding cause is not limited to a third party's intervening act that was intended to cause harm and remains a viable defense in cases in which apportionment is unavailable, but a negligent defendant will not be relieved of liability by virtue of a third party's reckless or intentional conduct if the type of harm sustained by the plaintiff is within the scope of the risk that was created by the defendant's negligent conduct.

2. The Appellate Court incorrectly determined that that the jury's responses to the interrogatories were legally consistent and, therefore, improperly upheld the trial court's denial of the plaintiff's motion to set aside the verdict and for a new trial: under this court's precedent, a finding that a third party's conduct constitutes a superseding cause precludes the defendant's negligence from being deemed a proximate cause of those injuries, and, because the jury found in its interrogatories both that S's negligence was a proximate cause of the plaintiff's injuries and that the teenagers' actions were a superseding cause of those injuries, this court could not conclude that the jury followed the trial court's instructions with respect to the issue of causation; accordingly, the plaintiff was entitled to a new trial.

(*One justice concurring separately*)

Argued September 13, 2018—officially released August 13, 2019

Procedural History

Action to recover damages for the alleged negligence of the defendant Johnley Sainval, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the jury before *Povodator*, *J.*; verdict for the defendants; thereafter, the court, *Povodator*, *J.*, denied the plaintiff's motion to set aside the verdict and for a new trial, and rendered judgment in accordance with the verdict, from which the plaintiff appealed to the Appellate Court, *Keller*, *Prescott* and *Harper*, *Js.*, which affirmed the trial court's judgment, and the plaintiff, on the granting of certification, appealed to this court. *Reversed*; *new trial.*

Adam J. Blank, with whom was *Sarah Gleason*, for the appellant (plaintiff).

Laura Pascale Zaino, with whom were *Gregory S. Kimmel* and, on the brief, *Kevin M. Roche*, *Logan A. Carducci* and *Zachary M. Dunn*, for the appellees (named defendant et al.).

Jeffrey R. Babbin and *Christopher P. Kriesen* filed a brief for the Connecticut Defense Lawyers Association as amicus curiae.

Opinion

PALMER, J. The plaintiff, Brenda Snell, brought this negligence action against the defendants, Johnley Sainval, a taxicab driver, his employer, Norwalk Yellow Cab, Inc. (Yellow Cab), and Vito Bochicchio, Jr., the sole shareholder of Yellow Cab, seeking damages for serious injuries she sustained when she was struck by a taxicab that had been stolen from Sainval by two teenagers after Sainval left the vehicle unattended with the key in the ignition in a Norwalk neighborhood known to have a higher than average crime rate. A jury trial ensued at which the defendants claimed, inter alia, that the conduct of the two thieves was a superseding cause that relieved Sainval of any liability to the plaintiff for his alleged negligence. At the conclusion of the trial, the jury, in response to interrogatories submitted to it by the trial court, found that Sainval was negligent in leaving the taxicab unattended with the key in the ignition; that, in light of the surrounding neighborhood, it was reasonably foreseeable that the vehicle would be stolen and operated in an unsafe manner; and that Sainval's negligence was a proximate cause of some or all of the plaintiff's injuries. The jury also found, nevertheless, that the defendants were not liable for the plaintiff's injuries because the accident that occurred was not within the scope of the risk created by Sainval's negligence.

The plaintiff thereafter filed a motion to set aside the verdict and for a new trial claiming, inter alia, that the jury's finding that Sainval's negligence constituted a proximate cause of the accident was legally inconsistent with its finding that the accident was outside the scope of the risk created by Sainval's negligence. The court denied the motion and rendered judgment in accordance with the jury's verdict. The plaintiff then appealed to the Appellate Court, claiming that (1) it was improper for the trial court to instruct the jury on the doctrine of superseding cause, (2) even if the

doctrine were properly submitted to the jury, the court's instructions and interrogatories misled the jury, and (3) the trial court improperly denied the plaintiff's motion to set aside the verdict and for a new trial on the ground that the jury's verdict was irreconcilable with its responses to the interrogatories. *Snell* v. *Norwalk Yellow Cab, Inc.*, 172 Conn. App. 38, 41, 158 A.3d 787 (2017). The Appellate Court rejected the plaintiff's claims; id., 41–42; and we granted the plaintiff's petition for certification to appeal, limited to the following issues: (1) "Did the Appellate Court correctly determine that the judgment of the trial court should be affirmed on the basis that the doctrine of superseding cause applies in cases in which the conduct of a third party is criminally reckless?" *Snell* v. *Norwalk Yellow Cab, Inc.*, 325 Conn. 927, 927–28, 169 A.3d 232 (2017). And (2) "Did the Appellate Court correctly determine that the trial court did not abuse its discretion when it denied the plaintiff's motion to set aside the verdict and for a new trial?" Id., 928. Although we answer the first question in the affirmative, we answer the second in the negative and, accordingly, reverse the judgment of the Appellate Court.

The opinion of the Appellate Court sets forth the following relevant facts, which the jury reasonably could have found, and procedural history. "On December 3, 2009, Sainval, who was employed by Yellow Cab as a taxicab driver, was operating a taxicab owned by Yellow Cab in Norwalk. In the early evening, he drove the taxicab to Monterey Village, a housing complex located in an area of the city with significant criminal activity. Sainval parked the taxicab and went inside one of the apartments, leaving the taxicab unlocked and unattended with the keys in the ignition.

"Two teenagers, Shaquille Johnson and Deondre Bowden, who that afternoon had been consuming alcohol and smoking marijuana, noticed the parked taxicab. Although they initially intended to steal anything of

value that they could find inside the unlocked taxicab, once they observed the keys in the ignition, the two teens decided to steal the taxicab and to go on a 'joy-ride.' They drove the taxicab from Norwalk to Stamford, making one brief stop in between, with each of the teens taking a turn driving the vehicle.

"When they reached Stamford, they [encountered] traffic. At that time, Bowden was driving the taxicab. He 'kind of nodded off' and rear-ended the vehicle in front of him. Bowden, who was both 'tipsy' and 'high,' then attempted to flee the scene. In order to maneuver the taxicab around the vehicle he had struck, Bowden drove the taxicab up over the curb of the road and onto the adjoining sidewalk. In doing so, Bowden first hit a fire hydrant before striking the plaintiff with the taxicab.

"The plaintiff sustained severe physical injuries, particularly to her midsection, requiring millions of dollars in medical expenditures as of the time of trial, with additional treatments and surgeries expected. After hitting the plaintiff, Bowden never attempted to stop the vehicle; he and Johnson exited the stolen taxicab while it was still moving and fled the scene on foot, returning home by train. The police later identified the teens as the individuals involved in the hit and run of the plaintiff and arrested them.[1]

"The plaintiff initially commenced this action solely against Sainval and Yellow Cab.[2] Johnson and Bowden

[1] "Bowden admitted during his trial testimony that he had pleaded guilty to larceny, assault in the first degree, reckless endangerment, and evading responsibility with death or serious injury resulting." *Snell* v. *Norwalk Yellow Cab, Inc.*, supra, 172 Conn. App. 43 n.3.

[2] "The plaintiff filed a separate civil action alleging negligent security practices by the companies that purportedly owned and managed Monterey Village. That action was consolidated with the present case but later was settled and withdrawn prior to trial. The jury nevertheless heard evidence pertaining to one of those companies, Vesta Management Corporation, and was instructed that it could consider for apportionment purposes whether and to what extent its negligence was also a cause of the plaintiff's injuries." *Snell* v. *Norwalk Yellow Cab, Inc.*, supra, 172 Conn. App. 43 n.4.

were not named by the plaintiff as defendants in the civil action. Although the defendants filed an apportionment complaint against the two teens, the court later granted the plaintiff's motion to strike the apportionment complaint, agreeing with the plaintiff that apportionment was unavailable in the present case because the misconduct of the teenagers was not pleaded as mere negligence but as reckless or intentional conduct. See General Statutes § 52-572h (o) ('there shall be no apportionment of liability or damages between parties liable for negligence and parties liable on any basis other than negligence including, but not limited to, intentional, wanton or reckless misconduct'); *Allard* v. *Liberty Oil Equipment Co.*, 253 Conn. 787, 801, 756 A.2d 237 (2000) (recognizing that § 52-575h [o] was enacted to expressly overrule in part *Bhinder* v. *Sun Co.*, 246 Conn. 223, 234, 717 A.2d 202 [1998], in which [this court] had recognized [common-law] extension of statutory apportionment liability for parties whose conduct was reckless, wilful and wanton).

"The operative second amended complaint contains two counts relevant to the issues on appeal.[3] Count one sounds in negligence against Sainval. According to the plaintiff, Sainval acted negligently by leaving his taxicab in an unguarded public parking lot in a high crime area with the keys in the ignition, which created the reasonably foreseeable risk that the taxicab would be stolen and that a thief would drive the taxicab in an

[3] "The operative complaint contained four additional counts directed at Yellow Cab and its owner and sole shareholder, [Bochicchio]. These additional counts alleged that Bochicchio had, among other things, misdirected assets away from Yellow Cab's accounts in an effort to keep funds away from the plaintiff. The counts sounded in fraud and fraudulent transfer, and sought to 'pierce the corporate veil' between Yellow Cab and Bochicchio in the event Yellow Cab was found vicariously liable to the plaintiff for damages. The parties agreed with the court's decision to proceed with a bifurcated trial in which the additional counts would be presented to the jury only if the jury returned a verdict for the plaintiff on the negligence counts and awarded damages." *Snell* v. *Norwalk Yellow Cab, Inc.*, supra, 172 Conn. App. 44 n.5.

unsafe manner and cause injury to a person or to property. Count two alleges that Yellow Cab was vicariously liable for Sainval's negligence on a theory of respondeat superior. Prior to trial, Yellow Cab conceded that it would be liable to the same extent that Sainval was found liable on count one.

"In their amended answer, the defendants, by way of a special defense, raised the doctrine of superseding cause. The defendants pleaded that, '[i]f the plaintiff sustained the injuries and losses as alleged in her complaint, said injuries and losses were the result of the intentional, criminal, reckless and/or negligent conduct of a third party, which intervened to break the chain of causation between [Sainval's] alleged negligence and/or carelessness and the plaintiff's alleged injuries and losses.' " (Footnotes altered; footnote in original, footnotes omitted.) *Snell* v. *Norwalk Yellow Cab, Inc.*, supra, 172 Conn. App. 42–45.

"[T]he court initially indicated to the parties that it was not inclined to give a superseding cause instruction to the jury because, on the basis of its reading of . . . *Barry* v. *Quality Steel Products, Inc.*, [263 Conn. 424, 820 A.2d 258 (2003)], superseding cause was no longer part of our tort jurisprudence except in limited circumstances, specifically, cases involving either an intervening intentional tort, act of nature, or criminal event that was unforeseeable to the defendant. The court suggested that the exception was not at issue in the present case because, under the plaintiff's theory of liability, the intervening theft of the car was entirely foreseeable.

"The defendants, however, argued that the court was focusing on the wrong criminal act. They indicated that it was not necessarily the theft of the taxicab in this case that warranted an instruction on superseding cause but the unforeseeability of the thieves' subsequent criminal

conduct, namely, intentionally driving the taxicab up onto a sidewalk to evade responsibility for a rear-end collision and the ensuing criminal assault on the plaintiff. Furthermore, the defendants noted that part of the court's rationale in *Barry* for abandoning the doctrine of superseding cause in cases alleging that an intervening negligent act or acts contributed to a plaintiff's injuries was that apportionment of liability between tortfeasors was permitted, which would prevent a less culpable defendant from inequitably shouldering full responsibility for injuries that resulted from multiple negligent acts. The defendants contended that, unlike *Barry*, this case involved intervening actions of other tortfeasors that were not merely negligent but reckless and criminal. In such a case, the defendants argued, apportionment of liability is unavailable by statute; see General Statutes § 52-572h (o); and, thus, the primary policy rationale underlying the abolishment of the doctrine of superseding cause was absent. The court indicated that it would review the case law and give the issue further consideration in light of these arguments.

"[Subsequently], the court provided counsel with the latest draft of its jury instructions and also with copies of draft interrogatories that the court intended to submit to the jury. The court indicated that the current version of the instructions included a new paragraph that the court had decided to add after further consideration of the case law concerning superseding cause and its discussions with the parties. That paragraph instructed the jury to consider whether the theft of the taxicab and the resulting accident involved intentional acts that were outside the scope of the risk created by Sainval's conduct, and that if the jury found this to be so, then the defendants should not be found responsible for the plaintiff's injuries because the conduct of the two teens would have been the proximate cause of those injuries, thus relieving the defendants of any liability. The court

also drafted a new, related interrogatory that asked the jury to state whether the 'accident' that occurred was outside the scope of the risk created by Sainval's act of leaving the keys in the ignition of the taxicab. The court directed the jury to return a verdict for the defendants if the answer to that inquiry was yes.

"Following the close of evidence later that day, the court held a charging conference. At the charging conference, the plaintiff stated that it believed the additional paragraph added by the court to its latest draft instructions was unnecessary and confusing and that, in defining and explaining the concept of proximate cause, the court adequately had covered both foreseeability and whether Sainval's conduct was a substantial factor in causing the plaintiff's injuries. The plaintiff also stated that she did not think there was any evidence from which the jury could construe that the teens had intentionally sought to harm her. The court suggested that the additional instruction was necessary to comport with case law, referring in particular to *Sullivan* v. *Metro-North Commuter Railroad Co.*, 292 Conn. 150, 971 A.2d 676 (2009). It indicated its belief that foreseeability for purposes of determining negligence and scope of the risk for purposes of applying superseding cause, although closely related, were slightly different concepts.[4] The court agreed that there was nothing in

[4] As we explain more fully in part II of this opinion, the trial court determined that "foreseeability" for purposes of determining negligence and "scope of the risk" for purposes of applying superseding cause were different concepts, in part, on the basis of § 440 of the Restatement (Second) of Torts, and the notes accompanying Connecticut Civil Jury Instruction 3.1-5, which describe "superseding cause" as "any cause intervening between the time of the defendant's allegedly tortious conduct and that of the plaintiff's claimed injury [that], although not disproving that the defendant's conduct proximately caused the plaintiff's claimed injury, prevented the defendant's conduct from being considered a legal cause of that injury." Connecticut Civil Jury Instructions 3.1-5, available at http://www.jud.ct.gov/JI/Civil/Civil.pdf (last visited August 5, 2019). Specifically, the trial court understood the latter statement to mean that the superseding cause doctrine is a special defense that admits the truth of the allegations contained in the plaintiff's

the record to support a finding that the assault on the plaintiff was intentional but noted that the two teens had also engaged in other criminal conduct, including intentionally stealing the taxicab and intentionally fleeing the scene to evade responsibility after striking the plaintiff.

"The defendants noted that, although the court's proposed jury instruction made reference to a special defense, it never identified that defense; in fact, the term 'superseding cause' was never used by the court. The defendants argued that they intended to reference that term in . . . closing arguments and that they were entitled to a separate charge addressing their superseding cause defense. The defendants also took the position that, unlike in criminal law, tort law made no meaningful distinction between reckless and intentional conduct, and, thus, they asserted that it was inconsequential whether the criminal assault on the plaintiff was the result of intentional or reckless conduct for purposes of applying the doctrine of superseding cause.

"On December 11, 2014, prior to closing arguments, the plaintiff requested that the court change the order of the proposed interrogatories. The interrogatory that the court had added regarding scope of the risk, which the court indicated related to the special defense of superseding cause, was, at the time, interrogatory number four. Interrogatory number five at that time asked whether the plaintiff had proven that some or all of her injuries were proximately caused by Sainval. The plaintiff argued that because proximate cause was an element of her prima facie case, it made more sense for the jury to answer that interrogatory and fully establish a prima facie case before turning to any consider-

complaint, including the plaintiff's contention that the defendant's negligence proximately caused the plaintiff's injuries, but seeks to demonstrate that the plaintiff cannot prevail against the defendant.

ation of a special defense. According to the plaintiff, this would also negate the need for a retrial in the event there was a defendants' verdict on the special defense that was overturned later on appeal; all that would be required would be a hearing in damages. The defendants did not agree that a switch was necessary. The court nevertheless indicated that it would most likely make the switch and later incorporated the change in the interrogatories it submitted to the jury. The court also indicated that it had made some additional changes based [on] the positions of the parties at the charging conference, including referring to the doctrine of superseding cause by name.

"After the parties concluded their closing arguments, the court read its instructions to the jury. The relevant portions of the court's instructions for purposes of the present appeal are those addressing proximate causation, which provided in relevant part as follows: 'Once you've gotten past factual causation, you need to address proximate cause. Proximate cause means that there must be a sufficient causal connection between the act or omission alleged, and any injury or damage sustained by the plaintiff.

" 'An act or omission is a proximate cause if it was a substantial factor in bringing about or actually causing the injury. That is, if the injury or damage was a direct result, or a reasonable and probable consequence of the defendant's act or omission, it was proximately caused by such an act or omission.

" 'In other words, if an act had such an effect in producing the injury that reasonable persons would regard it as being a cause of the injury, then the act or omission is a proximate cause. In order to recover damages for any injury, the plaintiff must show by a preponderance of the evidence that such injury would not have occurred without the negligence of the defendant.

" 'If you find that the plaintiff complains about an injury which would have occurred even in the absence of the defendant's conduct, or is not causally connected to this accident, you must find that the defendant did not proximately cause that injury.

" 'Under the definitions I have given you, negligent conduct can be a proximate cause of an injury, if it is not the only cause, or even the most significant cause of the injury, provided it contributes materially to the production of the injury, and thus is a substantial factor in bringing it about.

" 'Therefore, when a defendant's negligence combines together with one or more other causes to produce an injury, such negligence is a proximate cause of the injury if its contribution to the production of the injury, in comparison to all other causes, is material or substantial.

" 'When, however, some other causal causes contributes so powerfully to the production of an injury, as to make the defendant's negligent contribution to the injury merely trivial or inconsequential, the defendant's negligence must be rejected as a proximate cause of the injury, for it has not been a substantial factor in bringing the injury about.[5]

" 'Or to put it another way, if you find that the injury would have been sustained, whether or not the defendant had been negligent, his negligence would not have been a proximate cause of the accident. It is your responsibility to determine which, if any, of the injuries and damages claimed by the plaintiff were proximately caused by the conduct of the defendant.

[5] This paragraph of the jury charge, along with the four paragraphs of the charge that follow, represents the trial court's instructions on superseding cause, even though the court did not expressly use the term "superseding cause" in those paragraphs.

" 'The defendants have claimed that the theft and operation of the car by [Johnson] and [Bowden], and the resulting accident, constituted such an event, an event that was so overpowering in consequence as to render any possible negligence on the part of defendant Sainval relatively insignificant, and therefore not a proximate cause of the injuries sustained by plaintiff.

" 'Foreseeability of the car being stolen, something you would have considered in connection with determining whether [Sainval] was negligent, also may be considered in this regard. It is for you to decide whether the theft of the car and subsequent manner of operation [were] so overwhelming in significance, or whether they constituted a concurrent proximate cause but not of sufficient magnitude as to render [Sainval's] negligence inconsequential.

" 'To put it another way, if you find that the theft of the car and subsequent driving of the vehicle and resulting accident were intentional acts that were not within the scope of the risk which was created by [Sainval's] conduct, then the defendant[s] could not be found responsible for the injuries to the plaintiff as the conduct of [Johnson] and [Bowden] would have been the proximate cause of the injuries sustained by the plaintiff, thereby relieving the defendant[s] of any liability.

" 'To the extent that you find that the plaintiff has proven, by a preponderance of the evidence, that the negligence of defendant Sainval was a proximate cause of any or all of the injuries and damages claimed to have been sustained by the plaintiff, as I have defined proximate cause to you, you are to proceed to determine the issues as to the amount of damages, following the rules I'm about to give you.'

"Following the jury charge, the court inquired whether the parties had any additional objections to the charge other than those raised at the charge conference.

Neither party raised any additional objections. A written copy of the court's charge was made an exhibit and provided to the jury.

"The following day, the jury returned a verdict in favor of the defendants. The relevant interrogatories submitted to the jury, and the jury's response[s], are as follows: '1. Did [the] plaintiff . . . prove, by a preponderance of the evidence, that . . . Sainval failed to exercise reasonable care when he left the keys to his taxicab in the vehicle, when he went inside the apartment complex at Monterey Village on the evening of December 3, 2009? [Answer] Yes . . . [If the answer is 'YES,' go to interrogatory #2; if the answer is 'NO,' sign and date this form and the defendants' verdict form, and then report that you have reached a verdict.] 2. Did [the] plaintiff prove that it was reasonably foreseeable that a motor vehicle, left in a parking area of Monterey Village with the key in the ignition on the evening of December 3, 2009, might be stolen? [Answer] Yes . . . [If the answer is 'YES,' go to interrogatory #3; if the answer is 'NO,' sign and date this form and the defendants' verdict form, and then report that you have reached a verdict.] 3. Did [the] plaintiff prove that it was reasonably foreseeable that if a motor vehicle were to be stolen from the parking area at Monterey Village, it might be in an accident, causing injury? [Answer] Yes . . . [If the answer is 'YES,' go to interrogatory #4; if the answer is 'NO,' sign and date this form and the defendants' verdict form, and then report that you have reached a verdict.] 4. Did [the] plaintiff . . . prove that some or all of the injuries she sustained on the evening of December 3, 2009, were proximately caused by the negligence of . . . Sainval? [Answer] Yes . . . [If the answer is 'YES,' go to interrogatory #5; if the answer is 'NO,' sign and date this form and the defendants' verdict form, and then report that you have reached a verdict.] 5. Did [the] defendant[s] prove that the acci-

dent that occurred on December 3, 2009 was outside the scope of risk created by [Sainval's] leaving his key in the ignition of a car parked at Monterey Village? [Answer] Yes . . . .'[6] The directions contained in the interrogatories instructed the jury to return a defendants' verdict if it answered interrogatory five in the affirmative, and, therefore, the jury did not respond to the remainder of the interrogatories submitted. The court accepted the jury's verdict.

"The plaintiff filed a postjudgment motion asking the court to set aside the verdict and to order a new trial. The plaintiff argued that, despite the jury having found that the theft of the taxicab and the subsequent accident resulting in injuries were foreseeable and that Sainval's actions were a proximate cause of her injuries, the jury instructions and attendant interrogatories permitted the jury to simultaneously and inconsistently find that her being struck by the taxicab in the manner that occurred nevertheless was outside the scope of the risk created by Sainval's negligence.

"The court issued a detailed and thorough memorandum of decision denying the plaintiff's motion. The court found that there was no basis for concluding that it should not have submitted the doctrine of superseding cause to the jury in this case or that the resulting verdict and interrogatories were fatally inconsistent. The court explained that it saw 'nothing inherently inconsistent with a jury finding a "standard" proximate cause instruction satisfied, while also later finding superseding cause established when viewed from the [alternative] perspective of a charge on that point.' " (Footnotes added; footnotes omitted.) *Snell* v. *Norwalk Yellow Cab, Inc.*, supra, 172 Conn. App. 46–54.

On appeal to the Appellate Court, the plaintiff claimed that the doctrine of superseding cause should not have

[6] Although the fifth interrogatory contains no express reference to the term "superseding cause," it is that doctrine that is the subject thereof.

been submitted to the jury because it applies only to superseding acts that were unforeseeable and intended to cause harm, and Bowden's reckless operation of the taxicab satisfied neither of those requirements. Id., 54–55. The plaintiff also argued that, even if the superseding cause doctrine were applicable, the trial court's instructions misled the jury by failing to adequately define the phrase "scope of the risk" in the context of determining whether Bowden's actions were a superseding cause of the plaintiff's injuries. Id., 68–70. Finally, the plaintiff maintained that the trial court improperly had denied her motion to set aside the verdict and for a new trial on the ground that the jury's finding of a superseding cause was irreconcilable with its finding that Sainval's negligence was the proximate cause of some or all of the plaintiff's injuries. Id., 71–73.

The Appellate Court rejected the plaintiff's claims. Id., 41–42. With respect to her contention that the doctrine of superseding cause applies only to intervening acts that were intended to cause harm, the Appellate Court explained that when this court abolished the superseding cause doctrine in cases involving intervening acts of negligence, it expressly exempted from its holding, among other types of intervening forces, unforeseeable "criminal event[s]"; *Barry* v. *Quality Steel Products, Inc.*, supra, 263 Conn. 439 n.16; a category that, in the view of the Appellate Court, included the actions of Bowden and Johnson. *Snell* v. *Norwalk Yellow Cab, Inc.*, supra, 172 Conn. App. 64–65. With respect to the plaintiff's claim that the doctrine should not have been submitted to the jury because it applies only to superseding acts that were unforeseeable, and Bowden's recklessness represented the kind of risk that made Sainval's conduct negligent in the first place, the Appellate Court responded that, "even in cases in which the risk of a third party's intervention is a generally foreseeable consequence of a defendant's actions, it is

a question of fact whether the third party's intervening actions fall somewhere within the hazard created by the defendant's negligence, i.e., within the scope of the risk. Only if the answer to that question is so abundantly clear as to be determinable as a matter of law should the court decline to give an instruction on superseding cause. Otherwise, the inquiry is a factual issue that should be presented to and decided by a jury." Id., 61.

The Appellate Court also rejected the plaintiff's contention that the trial court's instructions on superseding cause were so misleading as to necessitate a new trial; id., 68; concluding that, "although perhaps not perfect in all respects, the instructions were sufficient to inform the jury of the doctrine of superseding cause as pleaded and to guide the jury through its deliberation to a proper verdict." Id., 71. Finally, the Appellate Court disagreed with the plaintiff that the trial court improperly denied her motion to set aside the verdict and for a new trial on the ground that the jury's response to the fourth interrogatory, that is, that some or all of the plaintiff's injuries were proximately caused by Sainval's negligence, was irreconcilable with its response to the fifth interrogatory, that is, that the accident that occurred was outside the scope of risk created by Sainval's negligence. Id., 71–73. In reaching its determination, the Appellate Court relied on the definition of superseding cause set forth in § 440 of the Restatement (Second) of Torts, which "defines a superseding cause as 'an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another *which his antecedent negligence is a substantial factor in bringing about*.' . . . 2 Restatement (Second), Torts § 440, p. 465 (1965)." (Emphasis in original.) *Snell* v. *Norwalk Yellow Cab, Inc.*, supra, 172 Conn. App. 58.

The Appellate Court also relied on § 442 B of the Restatement (Second) of Torts; id., 59–61; which states that, "[if] the negligent conduct of the actor creates or

increases the risk of a particular harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability, *except where the harm is intentionally caused by a third person and is not within the scope of the risk created by the actor's conduct*." (Emphasis added.) 2 Restatement (Second), supra, § 442 B, p. 469. Reading §§ 440 and 442 B together, the Appellate Court reasoned that, because the test for proximate cause is whether the defendant's conduct was "a substantial factor" in producing the plaintiff's injury; (internal quotation marks omitted) *Ruiz* v. *Victory Properties, LLC*, 315 Conn. 320, 329, 107 A.3d 381 (2015); the jury properly could have found both that Sainval's negligence was a proximate cause of the plaintiff's injuries, that is, it was a substantial factor in producing them, and that the accident that occurred was outside the scope of the risk created by Sainval's negligence. *Snell* v. *Norwalk Yellow Cab, Inc.*, supra, 172 Conn. App. 61; see id. ("even in cases in which the risk of a third party's intervention is a generally foreseeable consequence of a defendant's actions, it is a question of fact whether the third party's intervening actions fall somewhere within the hazard created by the defendant's negligence, i.e., within the scope of the risk").

In reaching its determination, the Appellate Court recognized the inherent tension between the Restatement's definition of superseding cause, which this court has never formally adopted,[7] and our statement in *Barry* that, "[i]f a third person's [negligence] is found to be the superseding cause of the plaintiff's injuries, that

[7] Although we have never adopted the Restatement's definition of superseding cause, we note that it has appeared as dicta in a handful of this court's opinions. See, e.g., *Levesque* v. *Bristol Hospital, Inc.*, 286 Conn. 234, 243 n.12, 943 A.2d 430 (2008); *Barry* v. *Quality Steel Products, Inc.*, supra, 263 Conn. 434; *Board of Education* v. *St. Paul Fire & Marine Ins. Co.*, 261 Conn. 37, 46, 801 A.2d 752 (2002).

[negligence], rather than the negligence of the party attempting to invoke the doctrine of superseding cause, *is said to be the sole proximate cause of the injury*." (Emphasis added; internal quotation marks omitted.) Id., 58–59 and n.15, quoting *Barry* v. *Quality Steel Products, Inc.*, supra, 263 Conn. 434–35. The Appellate Court reasoned, however, that, because "[c]omment (b) of § 440 of the Restatement (Second) of Torts clarifies that '[a] superseding cause relieves the actor of liability, irrespective of whether his antecedent negligence was or was not a substantial factor in bringing about the harm' "; (emphasis omitted) *Snell* v. *Norwalk Yellow Cab, Inc.*, supra, 172 Conn App. 59 n.15; it was reasonable to construe the "sole proximate cause" language in *Barry* "not as a repudiation of the Restatement's broader definition but simply as a recognition that, in some cases involving a superseding cause, the superseding event may so diminish the impact of the initial negligence of the defendant that that negligence can no longer be viewed as a substantial factor in bringing about the plaintiff's injury, thus transforming the superseding cause into the sole proximate cause of the harm. This iteration of the doctrine, however, does not expressly preclude that, in certain cases factually distinct from that considered by the court in *Barry*, the impact of the defendant's initial negligence will not be so diminished by the later intervening act as to fully negate the initial negligence as a substantial factor in causing the harm at issue. In such cases, application of the doctrine of superseding cause may nonetheless be justified to prevent an otherwise inequitable determination regarding liability." Id.

On appeal following our grant of certification, the plaintiff contends that the Appellate Court incorrectly held that the doctrine of superseding cause applies to criminally reckless conduct. In support of this contention, the plaintiff asserts that the Appellate Court's

determination conflicts with § 442 B of the Restatement (Second) of Torts, which this court has adopted, and with the Judicial Branch's model civil jury instruction on superseding causes; Connecticut Civil Jury Instructions 3.1-5, available at http://www.jud.ct.gov/JI/Civil/Civil.pdf (last visited August 5, 2019);[8] both of which,

[8] Connecticut Civil Jury Instruction 3.1-5 provides: "The defendant claims that he did not legally cause the plaintiff's alleged injury because that injury was produced, in material part, by a superseding cause. A superseding cause is any intentionally harmful act, force of nature, or criminal event, unforeseeable by the defendant, [that] intervenes in the sequence of events leading from the defendant's alleged negligence to the plaintiff's alleged injury and proximately causes that injury. Under our law, the intervention of such a superseding cause prevents the defendant from being held liable for the plaintiff's injury on the theory that, due to such superseding cause, the defendant did not legally cause the injury even though (his/her) negligence was a substantial factor in bringing the injury about. Therefore, when a claim of superseding cause is made at trial, the plaintiff must disprove at least one essential element of that claim by a fair preponderance of the evidence in order to prove, by that standard, its own conflicting claim of legal causation.

"In this case, the defendant claims, more particularly, that <*describe alleged intervening conduct or event claimed to constitute a superseding cause*> was a superseding cause of the plaintiff's alleged injury, and thus that (his/her) own negligence did not legally cause that injury. Because such intentionally harmful (conduct / force of nature / criminal event), if unforeseeable by the defendant, would constitute a superseding cause of the plaintiff's alleged injury if it occurred as claimed by the defendant and if it proximately caused the plaintiff's injury, the plaintiff must disprove at least one essential element of that claim by a fair preponderance of the evidence in order to prove that the defendant legally caused that injury. The plaintiff can meet this burden by proving either 1) that the conduct claimed to constitute a superseding cause did not occur as claimed by the defendant, either because it did not occur at all or because it was not engaged in with the intent to cause harm; or 2) that such conduct was foreseeable by the defendant, in that the injury in question was within the scope of the risk created by the defendant's conduct; or 3) that such conduct was not a substantial factor in bringing about the plaintiff's alleged injury. These, of course, are questions of fact for you to determine based on the evidence. Keep in mind, however, that the defendant does not have any burden to prove the existence of a superseding cause. The burden at all times rests [on] the plaintiff to disprove the defendant's claim of superseding cause as a necessary part of (his/her) proof that the defendant legally caused the plaintiff's injury." (Emphasis in original.)

the plaintiff maintains, indicate that, for a third party's conduct to qualify as a superseding cause, he or she must have acted with the specific intent to cause injury. The plaintiff further contends that the Appellate Court incorrectly determined that the trial court properly denied the plaintiff's motion to set aside the verdict and for a new trial on the basis of its determination that an intervening force can be foreseeable for purposes of determining proximate cause but not within the scope of the risk for purposes of applying the superseding cause doctrine. The plaintiff argues that, under this state's well established precedent—precedent on which the trial court's jury instructions were predicated—if Sainval's negligence proximately caused some or all of the plaintiff's injuries, then the accident was, by definition, within the scope of the risk created by his negligence. See, e.g., *Sapko* v. *State*, 305 Conn. 360, 373, 44 A.3d 827 (2012) ("[t]he fundamental inquiry of proximate cause is whether the harm that occurred was within the scope of foreseeable risk created by the defendant's negligent conduct" [internal quotation marks omitted]).

The defendants counter that the Appellate Court correctly determined that the jury's interrogatory responses can be reconciled by applying §§ 440 and 442 B of the Restatement (Second) of Torts, pursuant to which the jury reasonably could have found that Sainval's negligence proximately caused the plaintiff's injuries *and* that Bowden's and Johnson's actions were a superseding cause of the accident. The defendants further argue that, because superseding cause is a special defense that admits the allegations of a complaint but seeks to establish that the plaintiff cannot prevail; see *Coughlin* v. *Anderson*, 270 Conn. 487, 501, 853 A.2d 460 (2004) ("[a]s a general rule, facts must be pleaded as a special defense when they are consistent with the allegations of the complaint but demonstrate, nonethe-

less, that the plaintiff has no cause of action" [internal quotation marks omitted]); it makes sense that "a jury must first determine that a defendant's negligence is a proximate cause of a plaintiff's injuries before it can consider whether a superseding cause . . . intervened to absolve that negligent defendant of liability for those injuries." For the reasons set forth hereinafter, we conclude, contrary to the contention of the plaintiff, that the superseding cause doctrine is applicable to the present case. We also conclude, however, that the plaintiff is entitled to a new trial because the interrogatory responses on which the jury verdict was based are inconsistent as a matter of law.

I

Whether the superseding cause doctrine applies to criminally reckless conduct presents a question of law, over which we exercise plenary review. See, e.g., *Barry* v. *Quality Steel Products, Inc.*, supra, 263 Conn. 433–46 (reviewing de novo trial court's decision regarding applicability of superseding cause doctrine). To properly analyze this question, it is necessary to review the legal underpinnings of the doctrine. As both the trial court and the Appellate Court observed, few other areas of tort law have consistently proven as challenging for courts to explain and for juries to apply as the principles underlying the doctrines of proximate cause and superseding cause. See, e.g., *Cuneo* v. *Connecticut Co.*, 124 Conn. 647, 651–52, 2 A.2d 220 (1938) ("Few subjects have caused more trouble to courts and legal philosophers than [the question of proximate cause]. The cases on the subject are innumerable and the discussions interminable."); *Snell* v. *Norwalk Yellow Cab, Inc.*, supra, 172 Conn. App. 56 ("although the concepts underlying the doctrine of superseding cause may be easy to identify, their application to the specifics of a particular case can be a far more difficult task"). It is well settled that a negligence action consists of four elements: duty, breach, causation, and actual injury. See, e.g., *Murdock*

v. *Croughwell*, 268 Conn. 559, 566, 848 A.2d 363 (2004) (identifying essential elements of negligence action). For purposes of this appeal, the defendants do not dispute that Sainval owed a duty to the plaintiff, that he breached that duty, and that the plaintiff was seriously injured. They do dispute, however, that Sainval's negligence caused the plaintiff's injuries.[9] Causation in a negligence action has two components, both of which must be satisfied for the plaintiff to prevail. The first, "[c]ause in fact, occasionally referred to as actual cause, asks whether the defendant's conduct 'caused' the plaintiff's injury. Thus, if the plaintiff's injury would not have occurred 'but for' the defendant's conduct, then the defendant's conduct is a cause in fact of the plaintiff's injury. Conversely, if the plaintiff's injury would have occurred regardless of the defendant's conduct, then the defendant's conduct was not a cause in fact of the plaintiff's injury. [W. Keeton et al., Prosser and

[9] Although the legal question of whether Sainval owed a duty to the plaintiff is not before us, we previously have stated that, when a defendant claims that an independent intervening force superseded his own negligence, "the question of legal causation is practically indistinguishable from an analysis of the extent of the tortfeasor's duty to the plaintiff." (Internal quotation marks omitted.) *Ruiz* v. *Victory Properties, LLC*, supra, 315 Conn. 345. This is so because, in determining whether a duty exists, "our threshold inquiry has always been whether the specific harm alleged by the plaintiff was foreseeable to the defendant"; (internal quotation marks omitted) *Mirjavadi* v. *Vakilzadeh*, 310 Conn. 176, 191, 74 A.3d 1278 (2013); which is the same inquiry a jury makes in deciding whether a defendant's actions were the proximate cause of the harm. Id., 192. As this court, quoting Prosser and Keeton on the Law of Torts, has explained: " '[T]he question whether there is a duty has most often seemed helpful in cases [in which] the only issue is in reality whether the defendant stands in any such relation to the plaintiff as to create any legally recognized obligation of conduct for the plaintiff's benefit. Or, reverting again to the starting point, whether the interests of the plaintiff are entitled to legal protection at the defendant's hands against the invasion [that] has in fact occurred. Or, again reverting, whether the conduct is the "proximate cause" of the result. The circumlocution is unavoidable, since all of these questions are, in reality, one and the same.' [W. Keeton et al., Prosser and Keeton on the Law of Torts (5th Ed. 1984)] § 42, p. 274; see also id., § 53, p. 358." *RK Constructors, Inc.* v. *Fusco Corp.*, 231 Conn. 381, 388 n.4, 650 A.2d 153 (1994).

Keeton on the Law of Torts] (5th Ed. 1984) § 41, p. 266." *Stewart* v. *Federated Dept. Stores, Inc.*, 234 Conn. 597, 605, 662 A.2d 753 (1995). In the present case, it is undisputed that Sainval's conduct was a cause in fact of the plaintiff's injuries because, if he had not left the taxicab unattended with the key in the ignition, the vehicle would not have been stolen and the plaintiff would not have been injured.

The second component of causation is proximate cause. "Philosophically, cause in fact is limitless; but for the creation of this world, no crime or injury would ever have occurred. [W. Keeton, supra, § 41] p. 264. The philosophical sense of causation includes the great number of events without which any happening [of an injury] would not have occurred . . . yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes. 2 Restatement (Second), [supra] § 431, comment (a) [p. 429]." (Internal quotation marks omitted.) *Stewart* v. *Federated Dept. Stores, Inc.*, supra, 234 Conn. 605. "Because actual causation . . . is virtually limitless, the legal construct of proximate cause serves to establish how far down the causal continuum tortfeasors will be held liable for the consequences of their actions. . . . The test for proximate cause is whether the defendant's conduct was a substantial factor in producing the plaintiff's injury. . . . This substantial factor test reflects the inquiry fundamental to all proximate cause questions, namely, whether the harm [that] occurred was of the same general nature as the foreseeable risk created by the defendant's negligence." (Citation omitted; internal quotation marks omitted.) *Ruiz* v. *Victory Properties*, LLC, supra, 315 Conn. 329.

We often have observed that "[p]roximate cause results from a sequence of events unbroken by a superseding cause, so that its causal viability continued until the moment of injury or at least until the advent of the

immediate injurious force. . . . The terms 'intervening cause' and 'superseding cause' have been used interchangeably. . . . The Restatement [Second] of Torts makes clear that the doctrine is properly referred to as 'superseding cause,' and that it embodies within it the concept of an 'intervening force.' 2 Restatement (Second), [supra] §§ 440 through 453 [pp. 465–91]." (Citations omitted; internal quotation marks omitted.) *Wagner* v. *Clark Equipment Co.*, 243 Conn. 168, 178–79, 700 A.2d 38 (1997). As we also have explained previously, "[c]auses traced clear to the end [that] become of trivial consequences, mere incidents of the operating cause, may be, in a sense, factors, but are so insignificant that the law cannot fasten responsibility [on] one who may have set them in motion. They are not substantial factors as operative causes. To be factors of this degree they must have continued down to the moment of the damage, or, at least, down to the setting in motion of the final active injurious force [that] immediately produced (or preceded) the damage." (Internal quotation marks omitted.) *Birnie* v. *Electric Boat Corp.*, 288 Conn. 392, 411 953 A.2d 28 (2008); see also *Paige* v. *St. Andrew's Roman Catholic Church Corp.*, 250 Conn. 14, 25, 734 A.2d 85 (1999) ("[r]emote or trivial [actual] causes are generally rejected because the determination of the responsibility for another's injury is much too important to be distracted by explorations for obscure consequences or inconsequential causes" [internal quotation marks omitted]).

Thus, "[p]roximate cause establishes a reasonable connection between an act or omission of a defendant and the harm suffered by a plaintiff. . . . Proximate cause serves to [temper] the expansive view of causation [in fact] . . . by the pragmatic . . . shaping [of] rules [that] are feasible to administer, and yield a workable degree of certainty." (Citation omitted; internal quotation marks omitted.) *Stewart* v. *Federated Dept. Stores, Inc.*, supra, 234 Conn. 606.

"[A]lthough nearly every treatise involving the law of torts acknowledges the existence of the doctrine of superseding cause, it is defined differently by various scholars. For example, one treatise notes that the problem of superseding cause is not primarily one of causation but, rather, 'one of policy as to imposing legal responsibility.' [W. Keeton, supra] § 44, p. 301. . . . [O]ther treatises support the view that the doctrine of superseding cause is merely a more complicated analysis of whether the defendant's actions were the proximate cause of the plaintiff's injuries. For example, one treatise states: '[Superseding] cause is merely proximate cause flowing from a source not connected with the party sought to be charged. While the term may have some descriptive value, unduly elaborate discussion of [superseding] cause as such tends to becloud rather than clarify the relatively simple idea of causal connection. When it is determined that a defendant is relieved of liability by reason of [a superseding] cause, it would appear to mean simply that the negligent conduct of someone else—and not that of the defendant—is the proximate cause of the event.' . . . 1 T. Shearman & A. Redfield, Negligence (Rev. Ed. 1941) § 37, pp. 99–100." (Emphasis omitted.) *Barry* v. *Quality Steel Products, Inc.*, supra, 263 Conn. 439–40.

Accordingly, "[i]f the third person's negligence is determined to be a superseding cause of the plaintiff's injury, that negligence, rather than the negligence of the party attempting to invoke the doctrine of superseding cause, is said to be the sole proximate cause of the injury. . . . The circumstances under which this shifting may take place have been well-defined in our case law. Even if a plaintiff's injuries are in fact caused by a defendant's negligence, a superseding cause may break that causal connection if it so entirely supersedes the operation of the defendant's negligence that it alone, without his negligence contributing thereto in any

degree, produces the injury; or it must be the nonconcurring culpable act of a human being who is legally responsible for such act. . . . If a defendant's negligence was a substantial factor in producing the plaintiff's injuries, the defendant would not be relieved from liability for those injuries even though another force concurred to produce them. . . . Whether a superseding cause was of such a character as to prevent an act of negligence of the defendant from being a substantial factor in producing a plaintiff's injury is ordinarily a question of fact [for the jury]." (Citations omitted; internal quotation marks omitted.) *Wagner* v. *Clark Equipment Co.*, supra, 243 Conn. 179–80.

In *Barry*, this court determined that the doctrine of superseding cause had outlived its usefulness in cases in which "a defendant claims that a subsequent negligent act by a third party cuts off its own liability for the plaintiff's injuries." *Barry* v. *Quality Steel Products, Inc.*, supra, 263 Conn. 436. *Barry* was decided after the legislature's enactment of No. 86-338 of the 1986 Public Acts (Tort Reform I) and No. 87-227 of the 1987 Public Acts (Tort Reform II), prior to which "this state followed the rules of joint and several liability with no contribution among joint tortfeasors. [Under that system, if] the illegal conduct of each of the defendants was a proximate cause of [an injury], they would be liable jointly and severally, the plaintiff would have a right to recover the entire amount of damages awarded from either, and, if he did so, the defendant paying them would have no right of contribution against the other [defendants] . . . .

"Under the common law of joint and several liability, therefore, even a defendant whose degree of fault was comparatively small could be held responsible for the entire amount of damages, [as] long as his negligence was a proximate cause of the plaintiff's injuries. Thus, the plaintiff could collect the entire amount of his judg-

ment from the richest defendant, or from the defendant with the deepest pocket. . . .

"In response largely to these concerns, the legislature undertook to reform the tort recovery provisions of our civil system, by enacting [Tort Reform I], which took effect October 1, 1986. Tort Reform I replaced the common-law rule of joint and several liability with a system of apportioned liability, holding each defendant liable for only his or her proportionate share of damages." (Citations omitted; internal quotation marks omitted.) *Collins* v. *Colonial Penn Ins. Co.*, 257 Conn. 718, 729–30, 778 A.2d 899 (2001).

Prior to *Barry*, the superseding cause doctrine was applied to any intervening force—be it of nature, man or beast—that a defendant claimed had superseded his own tortious conduct to such a degree that it alone was the sole proximate cause of the plaintiff's injuries. See, e.g., *Lombardi* v. *Wallad*, 98 Conn. 510, 518, 120 A. 291 (1923) ("the intervening cause either must be a cause, whether intelligent or not, [that] so entirely supersedes the operation of the defendant's negligence that it alone, without his negligence contributing thereto in any degree, produces the injury"); *Mahoney* v. *Beatman*, 110 Conn. 184, 205, 147 A. 762 (1929) (*Maltbie*, *J.*, dissenting) ("the circumstances [that] intervene may be natural phenomena, or the involuntary and unlawful act of a third person, or his negligent conduct, or his voluntary but lawful act, or his voluntary and wilfully wrong act; or some act of the injured party himself may intervene and it may be a negligent act on his part or a wilfully wrong act").

In light of the significant changes to our tort system implemented by tort reform, however, this court determined in *Barry* "that the doctrine of superseding cause no longer serves a useful purpose in our jurisprudence when a defendant claims that a subsequent negligent

act by a third party cuts off its own liability for the plaintiff's injuries. [In such] circumstances, superseding cause instructions serve to complicate what is fundamentally a proximate cause analysis. . . . [B]ecause our statutes allow for apportionment among negligent defendants; see General Statutes § 52-572h; and because Connecticut is a comparative negligence jurisdiction; General Statutes § 52-572o; the simpler and less confusing approach to cases . . . [in which] the jury must determine which, among many, causes contributed to the [plaintiff's] injury, is to couch the analysis in proximate cause rather than allowing the defendants to raise a defense of superseding cause." (Footnote omitted.) *Barry* v. *Quality Steel Products, Inc.*, supra, 263 Conn. 436–39; see also id., 443 n.18 ("[T]he doctrine of superseding cause is already incorporated into the test for proximate cause. Repeating the test for superseding cause, then, merely adds confusion to an already confusing subject, and serves no meaningful purpose in a jurisdiction, such as ours, [in which] a defendant will be liable only for his or her proportion of the plaintiff's damages.")

Under this approach, "the fact finder need only determine whether the allegedly negligent conduct of any actor was a proximate cause, specifically, whether the conduct was a substantial factor in contributing to the plaintiff's injuries. If such conduct is found to be a proximate cause of the plaintiff's foreseeable injury, each actor will pay his or her proportionate share pursuant to our apportionment statute, regardless of whether another's conduct also contributed to the plaintiff's injury. Put differently, the term superseding cause merely describes more fully the concept of proximate cause when there is more than one alleged act of negligence, and is not functionally distinct from the determination of whether an act is a proximate cause of the injury suffered by the plaintiff." Id., 440.

In reaching our determination in *Barry*, we expressly limited our holding to cases in which "a defendant claims that its tortious conduct is superseded by a subsequent negligent act or there are multiple acts of negligence," stating that our decision did "not necessarily affect those cases [in which] the defendant claims that an unforeseeable intentional tort, force of nature, or criminal event supersedes its tortious conduct." Id., 439 n.16. Later, we made clear that our holding in *Barry* did not affect those types of cases. E.g., *Sapko* v. *State*, supra, 305 Conn. 377 ("the superseding cause doctrine was largely abandoned in *Barry* in favor of comparative and contributory negligence . . . subject . . . to certain narrow exceptions, namely, situations in which an unforeseeable intentional tort, force of nature or criminal event supersedes the defendant's tortious conduct" [citation omitted; internal quotation marks omitted]); *Sullivan* v. *Metro-North Commuter Railroad Co.*, supra, 292 Conn. 167 (*Barry* "specifically limited our abolishment of the doctrine to the situation in cases . . . [in which] a defendant claims that its tortious conduct is superseded by a subsequent negligent act or there are multiple acts of negligence" [internal quotation marks omitted]).

Although we did not expressly say so at the time, we exempted unforeseeable intentional torts, forces of nature and criminal events from our holding in *Barry* because, even under our modern tort system, apportionment of liability is not available between parties liable for negligence and parties liable on any other basis. See General Statutes § 52-572h (o) ("there shall be no apportionment of liability or damages between parties liable for negligence and parties liable on any basis other than negligence including, but not limited to, intentional, wanton or reckless misconduct"); *Sapko* v. *State*, supra, 305 Conn. 377 (*Barry* "abrogated the superseding cause doctrine for negligence cases only

because, in those cases, a jury is tasked with apportioning liability in accordance with our comparative fault and apportionment statutes"); *Sapko* v. *State*, supra, 378 ("we abrogated the superseding cause doctrine in *Barry* not because the concept of superseding cause is inherently incompatible with our proximate cause jurisprudence but out of concern that a separate instruction concerning the doctrine might confuse jurors by causing them to ignore or discount the comparative fault and apportionment principles underlying §§ 52-572h and 52-572o"). In *Sapko*, we expanded the exceptions enumerated in *Barry* to include certain workers' compensation cases in which apportionment is unavailable and an employer claims that an intervening force—in that case, an employee's accidental overdose on prescription pain medicine—broke the chain of proximate causation between an employee's compensable work injury and his death.[10] Id., 364–65, 386;

[10] We note that several years before we decided *Sapko*, in *Archambault* v. *Soneco/Northeastern, Inc.*, 287 Conn. 20, 37, 946 A.2d 839 (2008), we rejected a nearly identical claim to that which we found persuasive in *Sapko*, namely, that the trial court improperly had denied the defendant's request to charge the jury on the doctrine of superseding cause, when the defendant had argued that the negligence of the plaintiff's employer was the sole proximate cause of the plaintiff's injuries. In that case, the exclusivity provision of the Workers' Compensation Act had prevented the defendant from citing in the plaintiff's employer as an apportionment defendant. See id., 26. In support of its claim that the trial court improperly had denied its request to charge the jury on the superseding cause doctrine, the defendant argued "that our holding in *Barry* is restricted to cases in which the jury is charged with apportioning liability between multiple defendants and that . . . the doctrine remains viable when, as in the present case, contributory negligence and apportionment of liability between two or more defendants are not at issue." Id., 44. In rejecting this claim, we relied solely on the fact that the doctrine had been abandoned in *Barry*, "subject only to certain narrow exceptions," which did not include intervening acts of negligence. Id. We agreed with the defendant, however, that the trial court improperly had precluded it from presenting evidence and argument to the jury that the plaintiff's employer was the sole proximate cause of the plaintiff's injuries. See id., 33 ("[t]his court has determined that a defendant has the right, under a general denial, to introduce evidence that the negligence of another was the sole proximate cause of the plaintiff's injury"). Specifically, we

see id., 377 ("[W]e simply did not consider [in *Barry*] whether the doctrine should be abolished in workers' compensation cases. Upon consideration of that question in the present case, we agree with the [Compensation Review Board] that the concerns that caused us to abrogate the doctrine in *Barry* simply are not implicated in our workers' compensation scheme, which, in contrast to our comparative negligence tort scheme, is a no-fault compensation system that imposes a form of strict liability on employers.").

In light of the foregoing, the plaintiff cannot prevail on her claim that the doctrine of superseding cause applies only to intervening acts that were intended to cause harm. As our discussion of the relevant case law

concluded that, "if the [nonparty] employer's actions are the sole proximate cause of the [plaintiff's] injuries, then it follows that the defendant's conduct is not a proximate cause, and the defendant should be entitled to argue and have the jury instructed accordingly . . . ." (Internal quotation marks omitted.) Id., 38, quoting *Steele* v. *Encore Manufacturing Co.*, 7 Neb. App. 1, 8, 579 N.W.2d 563 (1998). Of course, it was a legal distinction without a difference to conclude, on the one hand, that the defendant was prohibited from arguing that the plaintiff's employer was a superseding cause of the plaintiff's injuries and, on the other hand, that the defendant properly could argue that the employer was the sole proximate cause of the plaintiff's injuries and was entitled to an instruction with respect to this claim. This is so because, as our discussion of the case law makes clear, when a defendant is relieved of liability on the basis of a superseding cause, "it . . . mean[s] simply that the negligent conduct of someone else—and not that of the defendant—is the proximate cause of the event." (Emphasis omitted; internal quotation marks omitted.) *Barry* v. *Quality Steel Products, Inc.*, supra, 263 Conn. 440; see also, e.g., *Craig* v. *Driscoll*, 262 Conn. 312, 333, 813 A.2d 1003 (2003) ("[t]o act as an intervening cause, the conduct must entirely [break] the causal connection between the defendant's conduct and the plaintiff's injuries so as to be the sole proximate cause of those injuries" [internal quotation marks omitted]); *Wagner* v. *Clark Equipment Co.*, supra, 243 Conn. 182 (same); *Oberempt* v. *Egri*, 176 Conn. 652, 655, 410 A.2d 482 (1979) (trial court's instruction that intervening negligence "would discharge the defendants [of liability] only if [it] was found to have been the sole proximate cause of the . . . accident . . . was entirely proper" [emphasis omitted]); *Virelli* v. *Benhattie, Inc.*, 146 Conn. 203, 209–10, 148 A.2d 760 (1959) (explaining that superseding cause and sole proximate cause are indistinguishable concepts).

makes clear, the superseding cause doctrine has been applied historically to any independent, intervening force that a defendant claims was the sole proximate cause of a plaintiff's injury. Following tort reform, this court prohibited the use of the doctrine in cases in which apportionment of liability is available, not because it was incompatible with the causation principles applicable to such cases; see *Barry* v. *Quality Steel Products, Inc.*, supra, 263 Conn. 443 n.18 ("the doctrine of superseding cause is already incorporated into the test for proximate cause"); but because we deemed it unnecessary in light of the statutory apportionment scheme adopted some fifteen years earlier. See id. ("[r]epeating the test for superseding cause . . . merely adds confusion to an already confusing subject, and serves no meaningful purpose in a jurisdiction, such as ours, wherein a defendant will be liable only for his or her proportion of the plaintiff's damages"). As we have explained, because apportionment was unavailable prior to tort reform, ameliorative principles such as the superseding cause doctrine were developed to mitigate the harshness of a tort system that would hold a defendant liable for all of a plaintiff's damages even though his or her degree of fault may have been relatively small in comparison to other defendants. See id., 441 (superseding cause doctrine "was . . . shaped in response to the harshness of contributory negligence and joint and several liability").

When applicable, the doctrine merely allows a defendant to argue, and to have the jury instructed, that it is the defendant's position that some other actor is the sole legal cause of the plaintiff's injury such that, even though the defendant's conduct may have been a cause in fact of the injury in a "but for" sense, its conduct did not contribute to the production of the injury in any meaningful sense—that is, the defendant's conduct was not a substantial factor in producing the injury

and, thus, it was not a proximate cause of that injury. Furthermore, under our precedent, to say that the defendant's conduct was not a substantial factor in producing an injury is simply another way of saying that the injury was not within the scope of the risk created by the defendant's conduct.[11] E.g., *Sapko* v. *State*, supra, 305 Conn. 373 (" '[t]he fundamental inquiry of proximate cause is whether the harm that occurred was within the scope of foreseeable risk created by the defendant's negligent conduct' "). We agree with the Appellate Court that, as long as apportionment of liability is unavailable in cases in which a defendant claims that an intervening force is the sole legal cause of the plaintiff's injuries, the doctrine of superseding cause will continue to play a legitimate ameliorative role in our tort system.[12] In such cases, a request to charge on

[11] Thus, in light of our precedent and the trial court's instructions predicated on that precedent, we disagree with the Appellate Court that the jury properly could find simultaneously that Sainval's actions were a proximate cause of the plaintiff's injuries and that Bowden's and Johnson's actions were a superseding cause of those same injuries. As we explain more fully in part II of this opinion, under our case law, a finding that conduct constitutes a superseding cause renders the original negligence so insignificant in relation to that superseding cause that the original negligence cannot be deemed to be a proximate cause of the injuries and, therefore, cannot be deemed to be a substantial factor in producing the injuries.

[12] We note that the plaintiff urges us to adopt § 34 of the Restatement (Third) of Torts, published in 2010, which she asserts "merges the viable concepts related to superseding cause (foreseeability and proximate cause) officially into a [single] proximate cause (or scope of liability) analysis without the confusion and prejudice related to use of the superseding cause doctrine." Section 34 of the Restatement (Third) provides: "When a force of nature or an independent act is also a factual cause of harm, an actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious." 1 Restatement (Third), Torts, Liability for Physical and Emotional Harm § 34, p. 569 (2010). Because the plaintiff did not raise this claim in either the trial court or the Appellate Court, it is not properly before us. Even if it were, however, as the Appellate Court noted, our recent case law "reflects a jurisprudential move toward embracing" the more modern approach to superseding cause prescribed in § 34 of the Restatement (Third) of Torts. *Snell* v. *Norwalk Yellow Cab, Inc.*, supra, 172 Conn. App. 57 n.13. Indeed, the reporters' notes to that section cite this court as one of several courts that *have* embraced the modern approach. See, e.g., 1

the doctrine "that is relevant to the issues in [the] case and . . . accurately states the applicable law must be honored . . . ." (Internal quotation marks omitted.) *State* v. *Devalda*, 306 Conn. 494, 506, 50 A.3d 882 (2012).

The plaintiff asserts, nonetheless, that our conclusion that the doctrine retains vitality in such cases is inconsonant with our past adoption of the negligence principles contained in § 442 B of the Restatement (Second) of Torts, which, as we previously indicated, states that, "[if] the negligent conduct of the actor creates or increases the risk of a particular harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability, except where the harm is intentionally caused by a third person and is not within the scope of the risk created by the actor's conduct." 2 Restatement (Second), supra, § 442 B, p. 469. Specifically, the plaintiff argues that, "under § 442 B, in order for another force to relieve the defendant of liability, that force must be both (1) intentionally caused by a third person and (2) not within the scope of the risk." To be sure, this court has applied § 442 B in cases in which a defendant has claimed that his

Restatement (Third), supra, § 34, reporters' note to comment (c), p. 579. For the reasons previously set forth, however, we are not prepared to abandon the superseding cause doctrine even in cases in which apportionment of liability is statutorily prohibited, and we do not read the Restatement (Third) as advocating its abandonment in such circumstances. To the contrary, comment (c) to § 34 provides that "the advent of comparative principles has *reduced the role for superseding cause*" such that "when third persons . . . are negligent or commit intentional torts, the need for aggressive use of superseding cause to absolve a tortfeasor from liability has subsided *in light of the modification of joint and several liability and of the trend toward permitting comparative responsibility to be apportioned among negligent and intentional tortfeasors*. Comparative responsibility permits liability to be apportioned among multiple tortfeasors and to take account of the causal relationship between each tortfeasor's conduct and the harm as well as the culpability of each tortfeasor." (Emphasis added.) 1 Restatement (Third), supra, § 34, comment (c), pp. 571–72.

or her negligence was superseded by the intentionally harmful acts of a third party. In all of the cases in which we have applied § 442 B, however, we relied on it solely for the proposition that the plaintiff could still prevail if he or she were able to establish that the intentionally harmful act was within the scope of the risk created by the defendant's negligence. See, e.g., *Stewart* v. *Federated Dept. Stores, Inc.*, supra, 234 Conn. 608 ("the plaintiff must show, by a fair preponderance of the evidence, that harm intentionally caused by a third person is within the scope of the risk created by the defendant's negligent conduct"); *Doe* v. *Manheimer*, 212 Conn. 748, 759–60, 563 A.2d 699 (1989) (same), overruled in part on other grounds by *Stewart* v. *Federated Dept. Stores, Inc.*, 234 Conn. 597, 608, 662 A.2d 753 (1995); *Tetro* v. *Stratford*, 189 Conn. 601, 605–606, 458 A.2d 5 (1983) ("[our cases applying § 442 B] make it clear that the [intervening acts] of [a third party do] not [necessarily] relieve the [defendant] of liability because the trier of fact may find that the plaintiff's injury falls within the scope of the risk created by [the defendant's] negligent conduct"). As the Appellate Court explained in rejecting the plaintiff's argument predicated on § 442 B, however, "[none of these cases supports] the proposition that a superseding cause 'can only exist' in the face of conduct by a third party intended to cause harm . . . [because none of them] considered or held that a specific intent to cause harm is a necessary prerequisite to raising the doctrine of superseding cause. The cases merely recited the standard contained in § 442 B of the Restatement (Second) of Torts."[13] *Snell* v. *Norwalk Yellow Cab, Inc.*, supra, 172 Conn. App. 65–66.

[13] We note that the plaintiff's argument also founders on *Kiniry* v. *Danbury Hospital*, 183 Conn. 448, 439 A.2d 408 (1981), in which we rejected a claim that the trial court, by instructing the jury in accordance with § 442 B, had misled the jury into believing "that only intentional conduct on the part of [a third party] would discharge the defendants [of liability for their own negligent conduct]." Id., 456; see id. ("[t]hose portions of the court's charge . . . rebut the defendants' claim that the court charged that only intentional conduct on the part of [the third party] would discharge the defendants");

We note, moreover, that, although § 442 B is the Restatement section most often cited in cases involving intentionally harmful intervening acts, it does not itself govern when such acts constitute superseding causes. Sections 302 B,[14] 448[15] and 449[16] of the Restatement

see also id., 455 ("[t]he court's charge does not, as the defendants argue, make the intervenor's intentional conduct the sole determinant of the liability of the defendants"). We rejected the defendant's claim because the trial court, in addition to instructing the jury in accordance with § 442 B, also had instructed the jury that "[*a*]*ny intervening negligence by* [*the third party*] *would discharge* [*the defendant of liability*] *if you were to find that* [*the third party's*] *negligence was the sole proximate cause of* [*the decedent's*] *death*. . . . Therefore, even though you might find that the defendant . . . was negligent in one or more of the particulars alleged in the complaint, if you find that [the defendant's] negligence ceased to be a substantial factor in producing [the decedent's] death and that the negligence of [the third party] had so superseded that of [the defendant], that [the third party], without the negligence of [the defendant] contributing to any material degree, was the real cause for [the decedent's] death, then the negligence of [the defendant] would not be a proximate cause of [the decedent's] death . . . ." (Emphasis added; internal quotation marks omitted.) Id., 455–56 n.2. Thus, because the trial court's instructions made clear to the jury that a superseding cause could be *either* an intentional *or* a negligent act under the defendants' theory of defense, we affirmed the judgment in favor of the plaintiff.

[14] Section 302 B of the Restatement (Second) of Torts provides: "An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal." 2 Restatement (Second), supra, § 302 B, p. 88.

[15] Section 448 of the Restatement (Second) of Torts provides: "The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime." 2 Restatement (Second), supra, § 448, p. 480.

[16] Section 449 of the Restatement (Second) of Torts provides: "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby." 2 Restatement (Second), supra, § 449, p. 482.

(Second) do. Comment (a) to § 442 B provides that the "rule stated in this [s]ection is a special application of the principle stated in § 435 (1),[17] [namely] that the fact that the actor neither foresaw nor could have foreseen the manner in which a particular harm is brought about does not prevent his liability where the other conditions necessary to it exist." (Footnote added.) 2 Restatement (Second), supra, § 442 B, comment (a), p. 469. Comment (c) to § 442 B, however, provides that "[t]he rule stated in this [s]ection *does not apply* where the harm of which the risk has been created or increased by the actor's conduct is brought about by the intervening act of a third person which is intentionally tortious or criminal, and is not within the scope of the risk created by the original negligence. Such tortious or criminal acts may in themselves be foreseeable, and so within the scope of the created risk, in which case the actor may still be liable for the harm, *under the rules stated in §§ 448 and 449*." (Emphasis added.) Id., comment (c), p. 471.

Thus, contrary to the plaintiff's contentions, § 442 B establishes that a defendant is liable "if the plaintiff's harm results from a hazard because of which the defendant's conduct was negligent"; *Cuneo* v. *Connecticut Co.*, supra, 124 Conn. 651; even if the harm is brought about through the intervention of a third party. As the commentary to § 442 B makes clear, however, this principle is merely an extension of the rule contained in § 435 (1) of the Restatement (Second) of Torts, namely, that, as long as the defendant's conduct was a substantial factor in producing the harm, the fact that the defendant neither foresaw nor could have foreseen the extent of the harm, or the manner in which it occurred, does

[17] Section 435 of the Restatement (Second) of Torts, entitled "Foreseeability of Harm or Manner of Its Occurrence," provides in relevant part: "If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable." 2 Restatement (Second), supra, § 435 (1), p. 449.

not prevent him from being liable.[18] 2 Restatement (Second), supra, § 442 B, comment (a), p. 469; see also *Pisel* v. *Stamford Hospital*, 180 Conn. 314, 333, 430 A.2d 1 (1980) ("[as] long as harm of the general nature as that which occurred is foreseeable there is a basis for liability even though the manner in which the accident happens is unusual, bizarre or unforeseeable"); see also

[18] *Ruiz* v. *Victory Properties, LLC*, supra, 315 Conn. 320, presents an apt example of the principle set forth in § 442 B. In *Ruiz*, a small child was injured when an older child unintentionally dropped a piece of concrete on her head from the third floor landing of the apartment building where the children resided. Id., 323. The older child had obtained the concrete from the backyard of that apartment building, where he and the victim had been playing. Id. The trial court granted the defendant landlord's motion for summary judgment, concluding that the defendant owed the victim no duty of care "because no reasonable juror could find that her injuries were a foreseeable consequence of the defendant's [failure to maintain the property in a clean and safe condition by leaving loose pieces of concrete in the backyard] and because imposing liability on the defendant would be contrary to overriding public policy considerations." Id. The Appellate Court reversed the judgment of the trial court, and we affirmed the Appellate Court's judgment; id., 323–24; explaining that the defendant "does not dispute that the risk of harm created by its failure to remove the buckets, trash, broken concrete pieces and other debris from the backyard was that children playing in the area might trip on them or throw them at other children. The types of injuries one would expect to result from this type of behavior run the gamut from cuts and bruises to broken bones, concussions and even fractured skulls. [The child's] injuries, although severe, fall squarely along this continuum of harm. That they occurred in an unusual manner, namely, by a child dropping a piece of concrete into the backyard playground from a third floor balcony instead of throwing it while in the backyard, does not alter this fundamental fact. We therefore agree with the Appellate Court that [the child's] injuries were sufficiently foreseeable that it was inappropriate for the trial court to foreclose the foreseeability question as a matter of law." Id., 336.

As § 442 B of the Restatement (Second) of Torts indicates, however, if all of the facts were the same except that an adult intentionally had dropped the concrete on the child's head, the defendant's liability would turn on whether an adult committing such an act was within the scope of the risk created by the defendant's failure to remove the accumulated debris from its property. Such a case undoubtedly would be resolved in the defendant's favor on a motion for summary judgment because it seems clear that a jury reasonably could not find that such an act was a foreseeable risk of the defendant's negligence.

Lodge v. *Arett Sales Corp.*, 246 Conn. 563, 587, 717 A.2d 215 (1998) (*Berdon, J.*, dissenting) (focus of foreseeability inquiry should be "on the general nature of the harm and not the specific manner in which the injury occurred or the conduct of a third party"). As the commentary also makes clear, however, the manner in which a particular harm occurred matters greatly when the harm results from the intentionally harmful act of a third party. In those circumstances, under the rules set forth in §§ 302 B, 448 and 449 of the Restatement (Second), the defendant will be liable only if the risk created by the defendant's negligence included the hazard that the defendant's conduct would induce a third party to commit such an act.[19]

[19] Section 442 B provides a good illustration of this principle. "A negligently leaves an excavation in a public sidewalk, creating the risk that a traveler on the sidewalk will fall into it. B, passing C on the sidewalk, negligently bumps into him, and knocks him into the excavation. A is subject to liability to C." 2 Restatement (Second), supra, § 442 B, illustration (5), p. 471. If, however, all of the facts are the same except that B intentionally pushes C into the hole, A would not be liable. Id., illustration (7), p. 471. This is true even though the injuries sustained by C in the second example are identical to the injuries sustained in the first. A is not liable in the second instance because the hazard that made A's conduct negligent did not include the risk that a third party would be induced to push someone into the excavated area. Cf. *Stewart* v. *Federated Dept. Stores, Inc.*, supra, 234 Conn. 600–601, 612–13 (when department store negligently failed to provide adequate lighting and security in store parking garage located in high crime area, store may be held liable for murder of customer during botched robbery because risk that made store's conduct negligent was opportunity that it presented to criminals to commit such crimes); *Doe* v. *Manheimer*, supra, 212 Conn. 750, 762 (private landowner was not liable for sexual assault that occurred behind overgrown vegetation on landowner's property because it was not reasonably foreseeable that such vegetation would provide incentive and shield for commission of such assault when "there was no evidence tending to demonstrate that the [landowner] had had any past experience that might reasonably have led him to perceive and act on the atypical association between 'natural shields' such as overgrown vegetation and violent criminal activity"); *Burns* v. *Gleason Plant Security, Inc.*, 10 Conn. App. 480, 486, 523 A.2d 940 (1987) ("When [the driver] left the keys in the unlocked car in a high crime area, it may well have been a foreseeable risk that the car would be stolen by a third party and negligently operated so as to cause harm to an innocent party. . . . It was not also foreseeable, however, that

Finally, although §§ 302 B, 448 and 449 of the Restatement (Second) delineate when a defendant may be liable for a third party's intentionally harmful acts, those sections merely reiterate the principle set forth in §§ 442 B and 435 (1), which is the same principle that governs every section of the Restatement (Second) of Torts relating to proximate causation: liability will attach if the defendant knew or should have known that his conduct created or increased the risk that the third party would act in such a manner. See, e.g., *Doe* v. *Saint Francis Hospital & Medical Center*, 309 Conn. 146, 190–91 n.37, 72 A.3d 929 (2013) ("[Section] 302 B of the Restatement (Second) of Torts does not establish a foreseeability standard that is . . . different from the standard of foreseeability applicable to [other] general negligence claims. That standard does not differ from negligence case to negligence case, and there is no difference in the nature of that test for purposes of a general negligence claim, on the one hand, and a claim under § 302 B, on the other. . . . Like all negligence claims, § 302 B is predicated on the same general principles that govern other negligence actions, with liability in such cases depending on the foreseeability of the third party's criminal misconduct." [Internal quotation marks omitted.]).

We also disagree with the plaintiff that the Judicial Branch's model civil jury instructions on superseding cause support the conclusion that the doctrine applies only to acts that were intended to cause harm. As the Appellate Court stated in rejecting this contention, "[t]he model instructions are not intended to be authoritative. As provided on their title page, the model instruc-

a third party would steal the car, drive elsewhere, leave the car, enter a store, commit an armed robbery, and assault an innocent person in the course of that robbery. To hold otherwise would be to convert the imperfect vision of reasonable foreseeability into the perfect vision of hindsight." [Citation omitted.])

tions are only meant to provide guidance; their legal sufficiency is not guaranteed. See Connecticut Civil Jury Instructions [supra] ('This collection of Civil Jury Instructions is intended as a guide for judges and attorneys in constructing charges and requests to charge. The use of these instructions is entirely discretionary and their publication by the Judicial Branch is not a guarantee of their legal sufficiency.' . . .) Rather than adhering to any particular format, jury instructions must be appropriately tailored to reflect the circumstances of the particular case and to adequately guide the jury. See *Sullivan* v. *Norwalk*, 28 Conn. App. 449, 457, 612 A.2d 114 (1992). The language used in the model jury instructions, although instructive in considering the adequacy of a jury instruction; see *State* v. *Sanchez*, 84 Conn. App. 583, 592 n.10, 854 A.2d 778, cert. denied, 271 Conn. 929, 859 A.2d 585 (2004); is not binding on this court." (Emphasis omitted.) *Snell* v. *Norwalk Yellow Cab, Inc.*, supra, 172 Conn. App. 66–67.

We note, moreover, that the model jury instructions on superseding cause found on the Judicial Branch website are revised only to 2008 and, consequently, do not reflect our subsequent cases clarifying that the superseding cause doctrine remains a viable defense in any case in which apportionment is unavailable, and that even an act of negligence can constitute a superseding cause in such a case. It is for reasons like these that we previously have cautioned that the civil jury instructions found on the Judicial Branch website are intended as a guide only, and that their publication is no guarantee of their adequacy. See, e.g., *State* v. *Reyes*, 325 Conn. 815, 821–22 n.3, 160 A.3d 323 (2017) ("The Judicial Branch website expressly cautions that the jury instructions contained therein '[are] intended as a guide for judges and attorneys in constructing charges and requests to charge. The use of these instructions is entirely discretionary and their publication by the Judi-

cial Branch is not a guarantee of their legal sufficiency.' " [Emphasis omitted.]) We therefore reiterate that litigants and trial courts alike should review the relevant case law when fashioning a jury charge, whether on the basis of the instructions set forth on the Judicial Branch website or otherwise, to ensure that it conforms to any recent changes in the law.

II

Having concluded that the Appellate Court correctly determined that the doctrine of superseding cause applies to criminally reckless conduct, we now must consider whether that court also was correct in concluding that the jury's responses to the fourth and fifth interrogatories are legally consistent and, therefore, that the trial court properly denied the plaintiff's motion to set aside the verdict and for a new trial. Although we ordinarily review the denial of a motion to set aside a verdict under an abuse of discretion standard; e.g., *Label Systems Corp.* v. *Aghamohammadi*, 270 Conn. 291, 303, 852 A.2d 703 (2004); our review is plenary when, as in the present case, the trial court's decision turned on a question of law. *Klein* v. *Norwalk Hospital*, 299 Conn. 241, 250–51 and n.9, 9 A.3d 364 (2010). Furthermore, it is axiomatic that, when a party claims that the verdict should have been set aside due to the jury's inconsistent answers to interrogatories, "the court has the duty to attempt to harmonize the answers." *Norrie* v. *Heil Co.*, 203 Conn. 594, 606, 525 A.2d 1332 (1987).

As we previously indicated, in concluding that the jury's interrogatory responses were reconcilable, the Appellate Court relied primarily on §§ 440 and 442 B of the Restatement (Second) of Torts, which it interpreted as establishing that an injury could be proximately caused by an actor's negligent conduct but not be within the scope of the risk created by that conduct. Although the Appellate Court acknowledged that its interpreta-

tion of these provisions of the Restatement (Second) was at odds with this court's statement in *Barry* that "superseding cause" is simply another way of saying "sole proximate cause," the court ultimately concluded that the "sole proximate cause" language in *Barry* was not intended "as a repudiation of the Restatement's broader definition" of the term and that *Barry's* "iteration of the doctrine . . . does not expressly preclude that in certain cases factually distinct from that considered by the court in *Barry*, the impact of the defendant's initial negligence will not be so diminished by the later intervening act as to fully negate the initial negligence as a substantial factor in causing the harm at issue." *Snell* v. *Norwalk Yellow Cab, Inc.*, supra, 172 Conn. 59 n.15.

We do not disagree with the Appellate Court that the fundamental policy underlying the superseding cause doctrine is essentially the same under the Restatement's explication of the doctrine and under the exposition of the doctrine found in the governing precedent of this court. As we explained, however, the terminology employed by the Restatement (Second) and by this court in explaining the doctrine are materially different. In particular, under the Restatement (Second), negligent conduct that is *found to be a proximate cause of the injuries sustained* may nevertheless be rendered so relatively inconsequential in light of a later superseding cause that that superseding cause is deemed to relieve the original tortfeasor of liability. Under our precedent, by contrast, a finding that conduct constitutes a superseding cause renders the original negligence so insignificant in relation to that superseding cause that the original negligence cannot be deemed to be a proximate cause of the injuries. Thus, our precedent simply does not contemplate a situation in which the original negligence may be found to be a substantial factor in producing the injuries if there is a finding of a superseding

cause. Indeed, we consistently have described a superseding cause as an intervening force that "*prevent*[*s*] *an act of negligence of the defendant from being a substantial factor in producing a plaintiff's injury* . . . ." (Emphasis added; internal quotation marks omitted.) *Craig* v. *Driscoll*, 262 Conn. 312, 335, 813 A.2d 1003 (2003); see also *Virelli* v. *Benhattie, Inc.*, 146 Conn. 203, 209, 148 A.2d 760 (1959) ("the determination whether negligence of [a third party] was such a superseding cause *as to prevent the antecedent negligence of the defendant from being a substantial factor in producing the plaintiff's injuries* was essential to a finding [of superseding cause]" [emphasis added]); *Colligan* v. *Reilly*, 129 Conn. 26, 30, 26 A.2d 231 (1942) (same). Accordingly, we consistently have held that, "[i]f a defendant's negligence was a substantial factor . . . in producing the plaintiff's injuries, the defendant would not be relieved from liability for those injuries even though another force concurred to produce them." (Emphasis omitted; internal quotation marks omitted.) *Craig* v. *Driscoll*, supra, 335; accord *Wagner* v. *Clark Equipment Co.*, supra, 243 Conn. 180.

Although, as the Appellate Court noted, the trial court's jury instructions were imperfect, the jury nevertheless was instructed in accordance with this court's precedent on the doctrine of superseding cause. Thus, the jury was *not* instructed that it could find that Sainval's negligence was a substantial factor in producing the plaintiff's injuries *and* that Bowden's and Johnson's actions were a superseding cause of the injuries. To the contrary, the jury was instructed that only if it found that Sainval's negligence was *not* a substantial factor in producing the plaintiff's injuries could it find that Bowden's and Johnson's actions were a superseding cause of those injuries. See *Suarez* v. *Dickmont Plastics Corp.*, 242 Conn. 255, 270–71, 698 A.2d 838 (1997) ("[w]hen a claim is made that the jury's answers to

interrogatories in returning a verdict are inconsistent . . . we do not read the interrogatories in isolation, but, rather, in conjunction with the jury instructions" [citation omitted; footnote omitted; internal quotation marks omitted]); *Norrie* v. *Heil Co.*, supra, 203 Conn. 605 ("interrogatories are not vacuous words, but words which are amplified and defined in the charge"). Specifically, the trial court informed the jury that the "defendants have claimed that the theft and operation of the car by [Johnson] and [Bowden], and the resulting accident, constituted . . . an event . . . that was so overpowering in consequence as to render any possible negligence on the part of . . . Sainval relatively insignificant, *and therefore not a proximate cause of the injuries sustained by the plaintiff*." (Emphasis added.) The court further explained that, "[w]hen . . . some other causal causes [contribute] so powerfully to the production of an injury as to make the defendant's negligent contribution to the injury merely trivial or inconsequential, *the defendant's negligence must be rejected as a proximate cause of the injury, for it has not been a substantial factor in bringing the injury about*." (Emphasis added.)

To reinforce the latter point, the court explained that a finding of superseding cause "*precludes a finding that the defendant's conduct was a proximate cause of the plaintiff's injuries*" and that, "[t]o the extent that you find that the plaintiff has proven, by a preponderance of the evidence, that the negligence of . . . Sainval was a proximate cause of any or all of the injuries and damages claimed to have been sustained by the plaintiff, as I have defined proximate cause to you, *you are to proceed to determine the issues as to the amount of damages, following the rules I'm about to give you*." (Emphasis added.) Notwithstanding these instructions, the jury found *both* that Sainval's negligence was a proximate cause of some or all of the plaintiff's injuries *and* that Bowden's and Johnson's

actions were a superseding cause of the injuries. We cannot say with any confidence, therefore, that the jury followed the trial court's instructions with respect to the issue of causation.[20] For this reason, the judgment cannot stand. See, e.g., *Magnan* v. *Anaconda Industries, Inc.*, 193 Conn. 558, 577, 479 A.2d 781 (1984) (when verdict in civil case "rests [on] a factual finding contradictory to another finding of the same issue by the trier the judgment cannot stand"); *Belchak* v. *New York, New Haven & Hartford Railroad Co.*, 119 Conn. 630, 633, 179 A. 95 (1935) ("The verdict returned by the jury demonstrated conclusively that, in spite of the instructions of the court, [it] had made a mistake in the application of legal principles. Hence it was necessary to set aside [its] verdict." [Internal quotation marks omitted.]). Accordingly, we agree with the plaintiff that she is entitled to a new trial.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgment of the trial court and to remand the case to that court for a new trial.

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

[20] No doubt this problem stems, at least in part, from the admonition at the conclusion of the fourth interrogatory, which, in direct contradiction to the court's charge, effectively instructed the jury to consider, in connection with the fifth interrogatory, whether "the accident that occurred . . . was outside the scope of the risk created by [Sainval's] leaving his key in the ignition" only if it had found, in response to the fourth interrogatory, that the plaintiff had proven "that some or all of the injuries she sustained . . . were proximately caused by the negligence of . . . Sainval." In accordance with the court's charge, however, once the jury found that Sainval's negligence was a proximate cause of the accident, there could be no finding of a superseding cause. Thus, the interrogatories merely should have queried the jury whether the plaintiff had proven that Sainval's negligence was a proximate cause of the plaintiff's injuries *or*, *instead*, whether Bowden's recklessness in driving onto a sidewalk after striking a vehicle in front of him fell outside the scope of the risk created by Sainval's negligence because it was not reasonably foreseeable that someone stealing the taxicab would operate it in such a manner.

ECKER, J., concurring. I agree with the majority's well reasoned opinion and the result it reaches. I write separately for two reasons. First, and most significantly, I am troubled by the unnecessary and unfortunate prolixity of our superseding cause doctrine, or what remains of it. I understand that the majority is unable completely to escape the gravitational pull of existing doctrine, because the court's ability to chart a new course, even with respect to the common law, is constrained by the arguments raised by the parties, who themselves are constrained by the perceived limitations imposed by our own precedent. In my view, the majority opinion nonetheless makes progress, incomplete but not insignificant, toward a more sensible and simplified doctrine. This concurring opinion primarily is intended to highlight the particular aspects of the majority opinion that I believe can be built on in future cases so that the job of doctrinal reconstruction might be completed. The second reason I write is to note my disagreement with two minor points contained in the majority opinion.

I

The confusion generated by the superseding cause doctrine is easier to identify than to resolve. Causation, while a simple everyday word, is by no means a simple concept, in law or elsewhere, and its application to various questions of legal liability and damages has vexed our profession for at least the past one hundred years.[1] That vexation is reflected in an unruly doctrine

[1] See W. Keeton et al., Prosser and Keeton on the Law of Torts (5th Ed. 1984) § 41, pp. 263–64 ("There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion [than the issue of causation]. Nor, despite the manifold attempts [that] have been made to clarify the subject, is there yet any general agreement as to the best approach. Much of this confusion is due to the fact that no one problem is involved, but a number of different problems, which are not distinguished clearly, and that language appropriate to a discussion of one is carried over to cast a shadow upon the others."

marked by a proliferation of varying, partly overlapping, and partly incommensurable verbal formulations, none of which quite satisfies the powerful desire to capture the elusive concept in words.[2] The doctrine of superseding cause is marked by this confusion, and the tradition of stacking one unsatisfactory formulation on top of another has resulted in a jury instruction that requires an advanced degree in logic and linguistics to understand. A jury is subjected to wave after wave of abstractions like foreseeability, scope of the risk, proximate cause, substantial, material, trivial, relatively insignificant, and inconsequential causes, concurrent causes, overpowering events, and so forth, connected by unhelpful transitional phrases such as "[i]n other words," "[t]hat is," and "[t]o put it another way." It does no one any good to perpetuate a doctrine of this character.

The majority has done admirable work clarifying doctrinal connections, resolving doctrinal tensions, sorting through conflicting authorities, and bringing the light of common sense to its subject matter. Yet even after that work has been accomplished, the reader would be forgiven if he or she feels unprepared to submit a model jury instruction to replace Connecticut Civil Jury Instruction 3.1-5. If the doctrine remains challenging for lawyers and judges, moreover, one can only imagine what a lay jury will make of it. Perhaps the guidance

[Footnote omitted.]); id., p. 263 n.1 (citing authorities "attempt[ing] . . . to clarify the subject").

[2] The overwrought treatment of superseding cause contained in the Restatement (Second) of Torts—which devotes no less than fifteen separate sections to the topic—illustrates the point. See 2 Restatement (Second), Torts §§ 440 through 453, pp. 465–91 (1965); see also part I of the majority opinion (discussing relevant provisions of the Restatement [Second]). The Restatement (Third) of Torts contains a far more concise treatment of the topic. See 1 Restatement (Third), Torts, Liability for Physical and Emotional Harm § 34, p. 569 (2010). The question of whether to adopt the principles set forth in the Restatement (Third) of Torts is not presently before us. See footnote 12 of the majority opinion.

provided by the majority opinion will help produce more reliable trial outcomes in the future than the verdict in the present case.[3] As I have indicated, I believe that the majority has laid the groundwork to assist in the reconstruction of a simplified and more coherent doctrine. I wish to identify three principles in particular that may be especially useful in that endeavor.

First, the majority has clarified that the fundamental principle animating the doctrine of superseding cause is that a negligent actor will not be relieved of liability by the intervention of another force—in most cases, the reckless or intentional misconduct of a third party—if the type of harm sustained by the plaintiff is within the scope of the risk that made the actor's conduct negligent. This basic insight, in my opinion, best identifies the critical operative principle underlying the doctrine of superseding cause in terms that can be understood and applied without inordinate difficulty. As the majority notes, the Restatement (Third) of Torts evidently has reached this conclusion in its treatment of superseding cause by abandoning the traditional doctrine in favor of an analysis fundamentally based on a scope of the risk analysis. See footnote 12 of the majority opinion; see also 1 Restatement (Third), Torts, Liability for Physical and Emotional Harm § 34, p. 569 (2010).[4]

[3] I intend no criticism of the trial court or the jury in this case. The record demonstrates that the trial court did its best under difficult conditions to fashion a coherent jury instruction and useful jury interrogatories from the assorted pieces of the doctrinal jigsaw puzzle remaining in disarray on the table since tort reform was enacted; see Public Acts 1987, No. 87-227; Public Acts 1986, No. 86-338; and *Barry* v. *Quality Steel Products, Inc.*, 263 Conn. 424, 820 A.2d 258 (2003), was decided.

[4] Section 34 of the Restatement (Third) of Torts addresses the specific topic of superseding cause, but it must be read in conjunction with several other provisions of the Restatement (Third) that establish and explain the relevant principles of causation. See, e.g., 1 Restatement (Third), supra, § 29, p. 493 ("[a]n actor's liability is limited to those harms that result from the risks that made the actor's conduct [negligent]"). To be clear, although I believe that a transition to a "scope of the risk" analysis would simplify and clarify the superseding cause doctrine, such a modification would not eliminate all of the complexities and difficulties that arise in these cases.

My preliminary view, as yet untested in the adjudicatory setting in Connecticut to the best of my knowledge, is that the reformulated approach to causation set forth in the Restatement (Third) may hold promise. Time will tell.

Second, just as under ordinary negligence rules, the defendant is liable for harm as long as his or her negligence was a substantial factor in producing it, even if the defendant did not foresee, nor reasonably could have foreseen, the extent of the harm or the particular manner in which it occurred.[5] Thus, for example, the fact that the harm is brought about by the criminal or reckless act of a third party will not cut off the negligent party's liability if harm of the same general nature is within the scope of the risk that made the party's act or omission negligent. See footnotes 17 and 18 and accompanying text of the majority opinion; see also footnote 3 of this concurring opinion; 2 Restatement (Second), Torts § 442 B, p. 469 (1965). This principle serves as a complement to the one discussed in the preceding paragraph because its application also hinges on the scope of the risk. The principle is important in the present context because intervening intentional or reckless conduct not infrequently results in harm that may be unusual in degree or manner of infliction but nevertheless is within the scope of the risk that made the actor negligent. See 2 Restatement (Second), supra,

The primary remaining challenge is to determine the "appropriate level of generality or specificity to employ in characterizing the type of harm" that is within the scope of the risk or risks that made the actor negligent. Id., comment (i), p. 504 (entitled "Understanding and characterizing the risk of harm"); see also id., § 34, comments (d) and (e), pp. 572–74.

[5] See, e.g., *Ruiz* v. *Victory Properties, LLC*, 315 Conn. 320, 323, 107 A.3d 381 (2015); *Pisel* v. *Stamford Hospital*, 180 Conn. 314, 333, 430 A.2d 1 (1980); 2 Restatement (Second), supra, § 435 (1), p. 449; see also, e.g., Connecticut Civil Jury Instructions 3.1-4, available at http://www.jud.ct.gov/JI/civil/civil.pdf (last visited August 5, 2019) (entitled "Proximate Cause—Foreseeable Risk").

§§ 448 and 449, pp. 480–484; see also 1 Restatement (Third), supra, § 34, comment (d), p. 572.

Third, the possibility remains that the explicit equivalency the majority emphasizes between the doctrines of superseding cause and sole proximate cause may contain the seed for future development of a simplified doctrine. The majority makes a persuasive case that this court's repeated references to superseding cause as equivalent to sole proximate cause is not the result of loose language but actually means what it says: if a third party's conduct amounts to a superseding cause of a plaintiff's harm, then it is the sole proximate cause of that harm, and the negligent defendant is not a proximate cause at all. The question therefore arises why the superseding cause doctrine is needed at all, that is, why not simply ask the jury in such a case whether the intervening force was the sole proximate cause of the harm? It seems to me that this is a question worth asking, although I have no view about how it should be answered because it was neither raised nor briefed by the parties.[6]

II

My disagreement with the majority involves two minor aspects of its opinion. First, I see no reason to engage in the analysis appearing in footnote 10 of the majority opinion, which contains an extensive, and I

[6] In *Barry* v. *Quality Steel Products, Inc.*, 263 Conn. 424, 820 A.2d 258 (2003), this court determined that the superseding cause doctrine no longer serves a useful purpose in cases involving claims of negligence against multiple defendants, because "our system of comparative negligence and apportionment [ensures that] defendants are responsible solely for their proportionate share of the injury suffered by the plaintiff." Id., 446. We concluded that "the [jury] instruction on superseding cause complicates what is essentially a proximate cause analysis and risks jury confusion." Id. Whether an analogous argument could be made in the present context—i.e., that the sole proximate cause doctrine accomplishes the same result as the superseding cause doctrine, but with less confusion—is an open question. See, e.g., 1 Restatement (Third), supra, § 34, comment (f), p. 574 (opining that sole proximate cause is "a term best avoided" in this context).

believe unnecessary, discussion regarding *Archambault* v. *Soneco/Northeastern, Inc.*, 287 Conn. 20, 946 A.2d 839 (2008). *Archambault* involved the unusual situation in which there were two potentially negligent actors responsible for the plaintiff's injuries, but one of them, the plaintiff's employer, could not be brought into the case for apportionment purposes because it enjoyed immunity from liability under the exclusivity provision of the Workers' Compensation Act.[7] Id., 26; see General Statutes § 31-284 (a). This court held that the defendant, although precluded from seeking apportionment against the nonparty employer, was entitled to point to the employer as the sole proximate cause of the plaintiff's harm; *Archambault* v. *Soneco/Northeastern, Inc.*, supra, 37–41; but was not entitled to invoke the doctrine of superseding cause to accomplish the same purpose under this court's holding in *Barry* v. *Quality Steel Products, Inc.*, 263 Conn. 424, 820 A.2d 258 (2003). *Archambault* v. *Soneco/Northeastern, Inc.*, supra, 41–45. The majority criticizes this aspect of *Archambault* on the ground that its holding (1) relies on a misreading of *Barry*, (2) conflicts with this court's subsequent holding in *Sapko* v. *State*, 305 Conn. 360, 377, 44 A.3d 827 (2012), which held that the doctrine of superseding cause was applicable to a claim brought under the Workers' Compensation Act, and (3) creates a doctrinal "distinction without a difference" because the permitted defense of sole proximate cause and the precluded defense of superseding cause essentially

[7] I call the *Archambault* situation unusual because it falls between the cracks of the otherwise comprehensive apportionment scheme set forth in the comparative fault statute, General Statutes § 52-572h. On the one hand, unlike the nonparty intentional tortfeasors in the present case, the potentially at-fault nonparty in the *Archambault* scenario is not expressly excluded from the apportionment scheme pursuant to § 52-572h (o), because the claim against the plaintiff's employer, if it could be brought, would be based on a theory of negligence. On the other hand, the potentially at-fault nonparty in *Archambault* is not subject to apportionment as a "settled or released [person]" pursuant to §§ 52-572h (f) (4) and (n).

mean the same thing. See footnote 10 of the majority opinion.

My concern here is not with the substance of the majority's criticism of the *Archambault* analysis as it relates to *Barry* and the doctrines of sole proximate cause and superseding cause; it seems clear to me that *Archambault* misreads *Barry*. My point, rather, is that the current status of *Archambault* is not before us, and the context of that case is sufficiently unusual that I do not believe that we should suggest any corrections to its holding until we are presented with a live controversy raising the particular issues and considerations implicated by that unusual setting. Perhaps, as the majority appears to suggest, *Archambault* went off course by holding that the defendant was not entitled to raise a defense on the basis of superseding cause. But there are other possibilities as well, and I believe that we should not indicate a view on the subject in the present case because the scenario in *Archambault* is different and may be sui generis; see footnote 6 of this concurring opinion; and because the proper treatment of that scenario has not been briefed by the parties.

Second, although I agree with the majority's conclusion that the existing model civil jury instruction on superseding cause; see Connecticut Civil Jury Instructions 3.1-5, available at http://www.jud.ct.gov/JI/Civil/Civil.pdf (last visited August 5, 2019); provides an erroneous statement of the law and, therefore, does not assist the plaintiff's argument, I wish to add my gloss to ensure that the majority's message is not misunderstood as a wholesale disavowal of the model instructions. Although the model civil jury instructions are "not intended to be authoritative"; *Snell* v. *Norwalk Yellow Cab, Inc.*, 172 Conn. App. 38, 66, 158 A.3d 787 (2017); in the sense that they come with no guarantee of infallibility, we also must acknowledge and embrace the fundamental fact that, as a matter of routine practice

around the state, the model instructions are heavily relied on by trial lawyers and judges in most cases, certainly those garden variety cases being tried every day in virtually every courthouse hosting civil jury trials. In my view, the reminder of fallibility served today should not be understood to convey the view that the model instructions generally are unreliable, or that we lack confidence in them, or that the instructions should not continue to be relied on by trial lawyers and judges as containing an accurate statement of the law. The instructions are promulgated by a distinguished panel of committee members who have undertaken the Sisyphean task of synthesizing and articulating the law governing a broad variety of civil cases in a form readily understandable to a lay jury. They provide commendable guidance. But precisely because the task is so difficult—the law is not always certain, nor is it static, nor is it always produced or pronounced in "one size fits all" formulations—it is fair to suggest that trial lawyers are well advised to "trust but verify" these model instructions to ensure that they are correct, current, and properly crafted to fit the particular case at hand. This case presents one of those highly unusual situations in which one of our model civil jury instructions contains an error and, thus, illustrates why eternal vigilance is the watchword of our sometimes unforgiving profession. Fortunately, the inaccuracy was of no practical consequence here, because the parties did not rely on Connecticut Civil Jury Instruction 3.1-5 governing superseding cause at trial, and the trial court did not issue the inaccurate instruction. Going forward, the bench and bar are on notice of the inaccuracy contained in the existing version of Connecticut Civil Jury Instruction 3.1-5, and, undoubtedly, the Civil Jury Instruction Committee will rectify the inaccuracy by promulgating a new and improved version in due course.

I respectfully concur.

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

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

Syllabus

The plaintiff property owners filed six appeals from the decisions of the Board of Assessment Appeals of the defendant town of Wilton denying their appeals from the town's tax assessments of the plaintiffs' properties. Pursuant to statute (§ 12-63c [d]), the plaintiffs were required to provide the assessor with annual income and expense reports regarding their properties by June 1, 2014. The defendant received those reports past the deadline but failed to add any late filing penalties, pursuant to § 12-63c (d), before taking the oath in signing the grand list on January 1, 2015. Instead, as had been his practice, the assessor imposed late filing penalties on the plaintiffs retroactively, pursuant to the statute (§ 12-60) that governs corrections to the grand list due to clerical omission or mistake, and issued certificates of change for the subject properties in April, 2015. Thereafter, the plaintiffs appealed to the board, which denied their appeals, and the plaintiffs appealed to the Superior Court, where the six appeals were consolidated and tried together. Subsequently, the trial court rendered judgments in favor of the defendant, from which the plaintiffs appealed to this court. The trial court concluded that although the assessor had violated the statute (§ 12-55 [b]) that requires the assessor to make any assessment required by law prior to signing the grand list, the only redress for the assessor's failure to comply

with the provisions of § 12-55 (b) was to postpone the right of the plaintiffs to appeal the action to the assessor until the succeeding grand list, and that the penalty prescribed for in § 12-63c (d) makes no provision for the removal of the penalty imposed by the legislature, regardless of the action taken by the assessor. *Held:*

1. The trial court erred in concluding that although the assessor had no statutory authority to impose late penalties after the taking the oath, the plaintiffs were without redress beyond the postponement of the right to appeal because § 12-63c did not expressly provide for the removal of the unlawful penalties: pursuant to § 12-55 (b), the imposition of a late filing penalty constitutes an assessment required by law and, as such, it must be made by the assessor prior to taking the oath, and, therefore, because the assessor did not have the statutory authority to impose the late filing penalties after he took the oath, the late adjustments were invalid and prevented any recovery of taxes based thereon; moreover, the defendant's claim that the language in § 12-55 (a), which does not explicitly reference the penalties under § 12-63c (d) as being a required penalty that must be included in the grand list, demonstrated a legislative intent to exclude, by implication, a late penalty under § 12-63c (d) as a required assessment was unavailing, as § 12-55 (a) governs the publication of grand lists and specifies what they reflect for public inspection, whereas § 12-55 (b) governs the timing of when the assessor shall equalize the assessments of property in the town and make any assessment omitted by mistake or required by law, and the defendant's position was untenable because it assumed that the assessor had the authority to add § 12-63c (d) late penalties, at any time and for an indefinite period, after signing the grand list for a particular year, which would lead to an absurd or unworkable result.
2. The trial court properly concluded that the delayed imposition of the late filing penalties did not correct a clerical omission or mistake, and, therefore, § 12-60 did not apply so as to permit the retroactive adjustment to the assessments on the basis of the late filing penalties; because the assessor's omission of the late filing penalties from the 2014 grand list at the time he signed it was of a deliberate nature, in that the assessor's practice had been to assess, pursuant to § 12-60, any late filing penalties under § 12-63c (d) retroactively, and that at the time the assessor took the oath on the grand list, he knew that he had received the plaintiffs' 2013 income and expense reports after the June 1, 2014 deadline and delayed imposition of the late penalties until approximately three months after he signed the 2014 grand list, the omission, although mistaken, was deliberate and intentional, not clerical and, therefore, was an error of substance that could not be corrected under § 12-60.
3. The defendant could not prevail on its claim, raised as an alternative ground for affirming the judgment, that the plaintiffs were not harmed by the assessor's imposition of the late filing penalties because they were able to seek review of the assessor's imposition of the penalties by appealing to the board; because the assessor was without statutory authority after he signed the grand list to impose the late penalties, which were null and void, and because the assessor could not collect

a tax on an assessment that was untimely adjusted by the imposition of late filing penalties, this court could not conclude that the statutorily unauthorized delay of the imposition of the late filing penalties was a mere procedural irregularity that, if uncorrected, would result in no harm to the plaintiffs.

Argued October 15, 2018—officially released August 13, 2019

Procedural History

Appeals from the decisions of the defendant's Board of Assessment Appeals denying the plaintiffs' appeals from the allegedly improper retroactive assessment of tax penalties on certain of the plaintiffs' real property, brought to the Superior Court in the judicial district of New Britain, Tax Session, where the appeals were consolidated and tried to the court, *Hon. Arnold W. Aronson*, judge trial referee; judgments for the defendant, from which the plaintiffs filed a joint appeal to this court. *Reversed; judgments directed.*

Matthew T. Wax-Krell, with whom were *Marci Silverman* and, on the brief, *Denise P. Lucchio*, for the appellants (plaintiffs).

Barbara M. Schellenberg, with whom were *Jonathan S. Bowman* and, on the brief, *Joseph D. Szerejko*, for the appellees (defendants).

Opinion

MOLL, J. The principal issue in this real estate joint tax appeal is whether the trial court properly rendered judgments in favor of the defendant, the town of Wilton, despite having concluded that the defendant's tax assessor (assessor) violated General Statutes § 12-55 (b) when he added late filing penalties pursuant to General Statutes § 12-63c (d)[1] against the plaintiff prop-

[1] General Statutes § 12-63c provides in relevant part: "(a) In determining the present true and actual value in any town of real property used primarily for purposes of producing rental income, the assessor, which term whenever used in this section shall include assessor or board of assessors, may require in the conduct of any appraisal of such property pursuant to the capitalization of net income method, as provided in [General Statutes §] 12-63b, that the owner of such property annually submit to the assessor not later than the first day of June, on a form provided by the assessor not later than forty-

erty owners[2] three months after taking and subscribing to the oath on the 2014 grand list. The plaintiffs appeal from the judgments of the trial court rendered in favor of the defendant. In their joint appeal, the plaintiffs claim that the trial court erred by rendering judgments in favor of the defendant despite having properly concluded that the assessor acted without statutory authority when he added the late filing penalties to the 2014 grand list after taking and subscribing to the oath. We agree. Accordingly, we reverse the judgments of the trial court.

The record and the parties' stipulations of fact[3] reflect the following facts and procedural background. On or

five days before said first day of June, the best available information disclosing the actual rental and rental-related income and operating expenses applicable to such property. Submission of such information may be required whether or not the town is conducting a revaluation of all real property pursuant to [General Statutes §] 12-62. Upon determination that there is good cause, the assessor may grant an extension of not more than thirty days to submit such information, if the owner of such property files a request for an extension with the assessor not later than May first.

* * *

"(d) Any owner of such real property required to submit information to the assessor in accordance with subsection (a) of this section for any assessment year, who fails to submit such information as required under said subsection (a) . . . shall be subject to *a penalty equal to a ten per cent increase in the assessed value of such property for such assessment year*. Notwithstanding the provisions of this subsection, an assessor or board of assessment appeals shall waive such penalty if the owner of the real property required to submit the information is not the owner of such property on the assessment date for the grand list to which such penalty is added. Such assessor or board may waive such penalty upon receipt of such information in any town in which the legislative body adopts an ordinance allowing for such a waiver." (Emphasis added.)

[2] The plaintiffs are Wilton River Park 1688, LLC, Wilton Campus 1691, LLC, and Wilton River Park North, LLC, which own, respectively, the subject real properties located at 5 River Road, 15 River Road, and 7 Godfrey Place in Wilton. For ease of reference, we refer to the properties together as the "subject properties."

[3] The parties filed stipulations of fact in each of the six respective tax appeals filed in the Superior Court. With the exception of identifying the particular plaintiff and the related subject property, the stipulations of fact are identical.

before April 15, 2014, pursuant to § 12-63c (a), the assessor requested from the plaintiffs annual income and expense reports for the year 2013 for their respective subject properties and provided them with the requisite forms. At all times from April 15, 2014 through October 26, 2016,[4] including October 1, 2014, the date of the grand list at issue, the plaintiffs owned their respective subject properties. Pursuant to § 12-63c (a), the plaintiffs were required to submit their 2013 income and expense reports to the assessor on or before June 1, 2014. On June 2, 2014, the plaintiffs sent, by Federal Express overnight mail, their 2013 income and expense reports, along with a cover letter dated May 30, 2014, to the assessor, who received them on June 3, 2014.

On or before January 31, 2015, the assessor took the oath on the 2014 grand list,[5] at which time he (1) knew that he had received the plaintiffs' income and expense reports after the June 1, 2014 deadline, and (2) did not add any late filing penalties to the 2014 grand list with respect to the subject properties. The assessor's practice has been to assess, pursuant to General Statutes § 12-60,[6] any late filing penalties under § 12-63c (d)

[4] October 26, 2016, is the date of the parties' stipulations.

[5] The assessor did not receive a grand list filing extension for the 2014 grand list.

[6] General Statutes § 12-60 provides: "Any clerical omission or mistake in the assessment of taxes may be corrected according to the fact by the assessors or board of assessment appeals, not later than three years following the tax due date relative to which such omission or mistake occurred, and the tax shall be levied and collected according to such corrected assessment. In the event that the issuance of a certificate of correction results in an increase to the assessment list of any person, written notice of such increase shall be sent to such person's last-known address by the assessor or board of assessment appeals within ten days immediately following the date such correction is made. Such notice shall include, with respect to each assessment list corrected, the assessment prior to and after such increase and the reason for such increase. Any person claiming to be aggrieved by the action of the assessor under this section may appeal the doings of the assessor to the board of assessment appeals as otherwise provided in this chapter, provided such appeal shall be extended in time to the next succeeding board of assessment appeals if the meetings of such

retroactively, *after* signing the grand list for a given year.[7]

On April 29, 2015, the assessor issued certificates of change for the subject properties in connection with the 2014 grand list and sent them, respectively, to the plaintiffs' last known addresses. The certificates of change each contain the following prefatory language: "By authority of [§] 12-60 of the Connecticut General Statutes, the Assessor hereby adjusts the assessment list of 2014." Each certificate of change identifies, among other things, the "original" assessment amount, the "adjustment" amount reflecting the late filing penalty (i.e., approximately 10 percent of the original assessment),[8] and the "current" assessment amount (i.e., the original assessment amount plus the adjustment amount). The certificates of change reflect no exemptions.

Pursuant to General Statutes § 12-119, to the extent that it was necessary to do so, the plaintiffs timely filed respective appeals from the assessor's actions to the Superior Court.[9] See *Wilton River Park 1688, LLC* v.

board for the grand list have passed. Any person intending to so appeal to the board of assessment appeals may indicate that taxes paid by him for any additional assessment added in accordance with this section, during the pendency of such appeal, are paid 'under protest' and thereupon such person shall not be liable for any interest on the taxes based upon such additional assessment, provided (1) such person shall have paid not less than seventy-five per cent of the amount of such taxes within the time specified or (2) the board of assessment appeals reduces valuation or removes items of property from the list of such person so that there is no tax liability related to additional assessment."

[7] The record does not reflect any explanation for the assessor's practice.

[8] The specific penalties at issue (in the form of increases in assessed values) are as follows: (1) $1,424,520 for Wilton River Park 1688, LLC; (2) $2,712,190 for Wilton Campus 1691, LLC; and (3) $159,850 for Wilton River Park North, LLC.

[9] General Statutes § 12-119 provides in relevant part: "When it is claimed . . . that a tax laid on property was computed on an assessment which, under all the circumstances, was manifestly excessive and could not have been arrived at except by disregarding the provisions of the statutes for determining the valuation of such property, the owner thereof . . . prior

Wilton, Superior Court, judicial district of New Britain, Docket No. CV-15-6030507-S; *Wilton Campus 1691, LLC* v. *Wilton*, Superior Court, judicial district of New Britain, Docket No. CV-15-6030508-S; *Wilton River Park North, LLC* v. *Wilton*, Superior Court, judicial district of New Britain, Docket No. CV-15-6030509-S. Pursuant to General Statutes § 12-111,[10] the plaintiffs also timely

to the payment of such tax, may, in addition to the other remedies provided by law, make application for relief to the superior court for the judicial district in which such town or city is situated. Such application may be made within one year from the date as of which the property was last evaluated for purposes of taxation and shall be served and returned in the same manner as is required in the case of a summons in a civil action, and the pendency of such application shall not suspend action upon the tax against the applicant. In all such actions, the Superior Court shall have power to grant such relief upon such terms and in such manner and form as to justice and equity appertains, and costs may be taxed at the discretion of the court. If such assessment is reduced by said court, the applicant shall be reimbursed by the town or city for any overpayment of taxes in accordance with the judgment of said court."

[10] General Statutes § 12-111 provides in relevant part: "(a) Any person . . . claiming to be aggrieved by the doings of the assessors of such town may appeal therefrom to the board of assessment appeals. Such appeal shall be filed, in writing, on or before February twentieth. The written appeal shall include, but is not limited to, the property owner's name, name and position of the signer, description of the property which is the subject of the appeal, name and mailing address of the party to be sent all correspondence by the board of assessment appeals, reason for the appeal, appellant's estimate of value, signature of property owner, or duly authorized agent of the property owner, and date of signature. The board shall notify each aggrieved taxpayer who filed a written appeal in the proper form and in a timely manner, no later than March first immediately following the assessment date, of the date, time and place of the appeal hearing. Such notice shall be sent no later than seven calendar days preceding the hearing date . . . . The board shall determine all appeals for which the board conducts an appeal hearing and send written notification of the final determination of such appeals to each such person within one week after such determination has been made. Such written notification shall include information describing the property owner's right to appeal the determination of such board. Such board may equalize and adjust the grand list of such town and may increase or decrease the assessment of any taxable property or interest therein and may add an assessment for property omitted by the assessors which should be added thereto . . . . When the board increases or decreases the gross assessment of any taxable real property or interest therein, the amount of such gross assessment shall be fixed until the assessment year in which the municipality next implements a revaluation of all real property pursuant to [General Statutes §] 12-62, unless the assessor

filed appeals to the Wilton Board of Assessment Appeals (board), which, subsequent to a hearing on April 5, 2016, denied their appeals, making no changes to the certificates of change. Pursuant to General Statutes § 12-117a,[11] the plaintiffs filed timely appeals from the

increases or decreases the gross assessment of the property to (1) comply with an order of a court of jurisdiction, (2) reflect an addition for new construction, (3) reflect a reduction for damage or demolition, or (4) correct a factual error by issuance of a certificate of correction. Notwithstanding the provisions of this subsection, if, prior to the next revaluation, the assessor increases or decreases a gross assessment established by the board for any other reason, the assessor shall submit a written explanation to the board setting forth the reason for such increase or decrease. The assessor shall also append the written explanation to the property card for the real estate parcel whose gross assessment was increased or decreased.

"(b) If an extension is granted to any assessor or board of assessors pursuant to [General Statutes §] 12-117, the date by which a taxpayer shall be required to submit a written request for appeal to the board of assessment appeals shall be extended to March twentieth and said board shall conduct hearings regarding such requests during the month of April. The board shall send notification to the taxpayer of the time and date of an appeal hearing at least seven calendar days preceding the hearing date, but no later than the first day of April. If the board elects not to hear an appeal for commercial, industrial, utility or apartment property described in subsection (a) of this section, the board shall notify the taxpayer of such decision no later than the first day of April."

[11] General Statutes § 12-117a provides in relevant part: "Any person . . . claiming to be aggrieved by the action of . . . the board of assessment appeals, as the case may be, in any town or city may, within two months from the date of the mailing of notice of such action, make application, in the nature of an appeal therefrom, with respect to the assessment list for the assessment year commencing October 1, 1989, October 1, 1990, October 1, 1991, October 1, 1992, October 1, 1993, October 1, 1994, or October 1, 1995, and with respect to the assessment list for assessment years thereafter, to the superior court for the judicial district in which such town or city is situated, which shall be accompanied by a citation to such town or city to appear before said court. Such citation shall be signed by the same authority and such appeal shall be returnable at the same time and served and returned in the same manner as is required in case of a summons in a civil action. The authority issuing the citation shall take from the applicant a bond or recognizance to such town or city, with surety, to prosecute the application to effect and to comply with and conform to the orders and decrees of the court in the premises. Any such application shall be a preferred case, to be heard, unless good cause appears to the contrary, at the first session, by the court or by a committee appointed by the court. . . . If, during the pendency of such appeal, a new assessment year begins, the applicant may amend his application as to any matter therein, including an appeal for such new year, which is affected by the inception of such new year and such

actions of the board to the Superior Court. See *Wilton River Park 1688, LLC* v. *Wilton*, Superior Court, judicial district of New Britain, Docket No. CV-16-6034627-S; *Wilton Campus 1691, LLC* v. *Wilton*, Superior Court, judicial district of New Britain, Docket No. CV-16-6034566-S; *Wilton River Park North, LLC* v. *Wilton*, Superior Court, judicial district of New Britain, Docket No. CV-16-6034565-S.

The six appeals filed in the Superior Court were consolidated and adjudicated together. The parties submitted memoranda of law regarding the legal issues, as well as the stipulations of fact, accompanied by stipulated exhibits with numerous appended exhibits, which furnish the entire factual basis for the judgments of the trial court.

On July 12, 2017, the court issued its memorandum of decision, ruling in favor of the defendant. As an initial matter, the court rejected the defendant's argument that the assessor had the authority to impose the late filing penalties after signing the 2014 grand list pursuant to § 12-60, which provides in relevant part: "*Any clerical omission or mistake* in the assessment of taxes *may*

applicant need not appear before the board of tax review or board of assessment appeals, as the case may be, to make such amendment effective. The court shall have power to grant such relief as to justice and equity appertains, upon such terms and in such manner and form as appear equitable . . . . If the assessment made by the board of tax review or board of assessment appeals, as the case may be, is reduced by said court, the applicant shall be reimbursed by the town or city for any overpayment of taxes, together with interest and any costs awarded by the court, or, at the applicant's option, shall be granted a tax credit for such overpayment, interest and any costs awarded by the court. Upon motion, said court shall, in event of such overpayment, enter judgment in favor of such applicant and against such city or town for the whole amount of such overpayment, less any lien recording fees incurred under [General Statutes §§] 7-34a and 12-176, together with interest and any costs awarded by the court. The amount to which the assessment is so reduced shall be the assessed value of such property on the grand lists for succeeding years until the tax assessor finds that the value of the applicant's property has increased or decreased."

be corrected according to the fact by the assessors or board of assessment appeals, *not later than three years following the tax due date* relative to which such omission or mistake occurred, and the tax shall be levied and collected according to such corrected assessment." (Emphasis added.) Citing *National CSS, Inc.* v. *Stamford*, 195 Conn. 587, 595–96, 489 A.2d 1034 (1985), the court reasoned that § 12-60 applies only to clerical errors, and not to errors of substance, and that, because the omission of the late filing penalties from the 2014 grand list at the time the assessor signed it was intentional, the assessor's delayed imposition of the late filing penalties "was by no means a clerical error."

The court went on to consider § 12-55 (b), which provides in relevant part: "Prior to taking and subscribing to the oath upon the grand list, the assessor or board of assessors shall equalize the assessments of property in the town, if necessary, and make any assessment omitted by mistake or required by law. . . ." The court emphasized the requirement in § 12-55 (b) that the assessor make any assessment "required by law" prior to signing the grand list. Because § 12-63c (d) provides that a property owner who fails to submit timely income and expense reports, as required under § 12-63c (a), "shall be subject to a penalty equal to a ten per cent increase in the assessed value of such property for such assessment year," the court concluded that "[t]he act of imposing the 10% penalty was not discretionary on the part of the assessor; it was mandatory." Thus, applying § 12-55 (b) to the present case, the court concluded that "[i]t is clear that the penalty should have been imposed prior to the assessor signing the completion of the grand list" on or before January 31, 2015.

The court opined that "[c]ompliance with § 12-55 (b) is imperative because a late filing of the grand list by the assessor reduces the time given to the property

owner to appeal to the Board of Assessment Appeals for relief from the action of the assessor. See *Wysocki* v. *Ellington*, 109 Conn. App. 287, 299, 951 A.2d 598 ([I]n the context of statutes relating to property tax assessment, when the statutory provision is for the benefit and protection of the individual taxpayer . . . the provision is mandatory. . . . If the provision is mandatory it must be followed or the assessment will be invalid. . . . All provisions designed to give [the taxpayer] an opportunity of a review of the assessment, whether by the assessors themselves or on appeal from their conclusions, are exclusively in his interest. [Internal quotation marks omitted.]), cert. denied, 289 Conn. 934, 958 A.2d 1248 (2008)." The court found that the assessor's delay in imposing the late filing penalties deprived the plaintiffs of the opportunity to appeal for a period of three months following the assessor's signing of the grand list. Specifically, the court opined that, "[a]s noted in General Statutes § 12-111, the plaintiffs are required to challenge the action of the assessor by filing an appeal to the [board] 'in writing, on or before February twentieth.' The imposition of the penalty by the assessor on January 31, 2015,[12] left the plaintiffs with twenty days to take their appeals instead of three months." (Footnote added.)

Notwithstanding the foregoing conclusions, the court rendered judgments in favor of the defendant, reasoning that "[a]lthough the plaintiffs seek to avoid the 10 [percent] penalty for failure to comply with § 12-55 (b), the only redress for the assessor's failure to comply with the provisions of § 12-55 (b) is to postpone the right of the plaintiffs to appeal the action of the assessor until the succeeding grand list. See § 12-55 (c):

[12] We note that this date is an error; it is undisputed that the assessor imposed the late filing penalties on April 29, 2015. This error has no impact on our analysis.

" 'If any such assessment increase notice is sent later than the time period prescribed in this subsection, such increase shall become effective on the next succeeding grand list.' The penalty prescribed for in § 12-63c (d) makes no provision for the removal of the 10 [percent] penalty imposed by the legislature, regardless of the action taken by the assessor." This joint appeal followed.

On appeal, the plaintiffs claim that the trial court erred by rendering judgments in favor of the defendant despite having correctly concluded that, pursuant to § 12-55 (b), the assessor was required to add any late filing penalties pursuant to § 12-63c (d) prior to signing the 2014 grand list. The defendant presents three alternative grounds for affirmance of the trial court's judgments: (1) the assessor made no mistake in assessing the late filing penalties at issue; (2) if the assessor made a mistake, then it was a clerical mistake that was corrected pursuant to § 12-60; and (3) the plaintiffs were not harmed by the assessor's actions. We agree with the plaintiffs' claim and do not agree with any of the defendant's alternative grounds for affirmance.

Before reaching the plaintiffs' claim on appeal, we briefly address the applicable standard of review. Resolution of the principal issue in this joint appeal requires us to analyze specific sections of chapter 203 of the General Statutes, which governs "Property Tax Assessment." Because statutory interpretation involves a question of law, our review is plenary. *Bell Atlantic NYNEX Mobile, Inc.* v. *Commissioner of Revenue Services*, 273 Conn. 240, 249, 869 A.2d 611 (2005).

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case,

including the question of whether the language actually does apply. . . . In seeking to determine that meaning [General Statutes] § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Dish Network, LLC* v. *Commissioner of Revenue Services*, 330 Conn. 280, 291, 193 A.3d 538 (2018). "Moreover, it is well settled that the legislature is always presumed to have created a harmonious and consistent body of law . . . . [T]his tenet of statutory construction . . . requires [this court] to read statutes together when they relate to the same subject matter . . . . Accordingly, [i]n determining the meaning of a statute . . . we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of our construction." (Internal quotation marks omitted.) *Felician Sisters of St. Francis of Connecticut, Inc.* v. *Historic District Commission*, 284 Conn. 838, 850, 937 A.2d 39 (2008).

I

The plaintiffs claim that the trial court erred in allowing the assessor to impose late filing penalties *after* he signed the 2014 grand list, despite properly concluding that the assessor was statutorily obligated to add the late filing penalties *prior to* signing the grand list. In response, the defendant makes the fundamental contention, which it frames as its first alternative ground for affirmance, that the assessor made no mistake in assessing the late filing penalties after signing the grand list. We agree with the plaintiffs.

The fundamental principle that municipal tax assessors may act only pursuant to statute is well established.

"Municipalities have no powers of taxation except those expressly given to them by the legislature. . . . Their powers of taxation can be lawfully exercised only in strict conformity to the terms by which they were given. . . . When a taxing statute is being considered, ambiguities are resolved in favor of the taxpayer." (Citations omitted.) *Consolidated Diesel Electric Corp.* v. *Stamford*, 156 Conn. 33, 36, 238 A.2d 410 (1968). Stated differently, "strict compliance with the statutory provisions is a condition precedent to the imposition of a valid tax." (Internal quotation marks omitted.) *Sheridan* v. *Killingly*, 278 Conn. 252, 264, 897 A.2d 90 (2006); see also *Metropolitan District* v. *Burlington*, 241 Conn. 382, 398, 696 A.2d 969 (1997) ("[i]t is well settled in Connecticut that tax assessments may only be made in strict conformity with the taxation statutes"). "Before the broad authority conferred on them by the statutes is exhausted, assessors have abundant power to correct omissions or mistakes, clerical or otherwise, independently of [§ 12-60]. . . . Once assessors have completed their duties as prescribed by statute, however, they have no authority to alter a list except to remedy a clerical omission or mistake. . . . Evidently the purpose of [§ 12-60] was to give to assessors or board of relief a limited continuing authority to correct . . . clerical omission[s] or mistake[s] . . . irrespective of whether their larger jurisdiction had been terminated." (Citations omitted; internal quotation marks omitted.) *National CSS, Inc.* v. *Stamford*, supra, 195 Conn. 594; see also *Metropolitan District* v. *Burlington*, supra, 398; *Empire Estates, Inc.* v. *Stamford*, 147 Conn. 262, 264–65, 159 A.2d 812 (1960) ("The statutes relating to the assessment of property for taxation and to the duties of assessors comprise chapter 86 of the 1949 Revision (General Statutes, c. 203). It is clear from these enactments that the duties of assessors are prescribed with particularity. The manner in which real estate is to be

described and assessed is explicitly set out. Failure of the assessors to list real estate in a manner conforming to the statutes will result in an invalid assessment and prevent recovery of the tax based on it. . . . The power of assessors to alter assessments exists only during the lawful period for the performance of their duties, before the lists are completed and filed. . . . Once the assessors have completed their duties as prescribed by statute, they have no authority to alter a list except to remedy a clerical omission or mistake." [Citations omitted.]).

Mindful of these general principles, we turn to the relevant statutory provisions. We begin with the language of § 12-55 (b), which provides in relevant part: "Prior to taking and subscribing to the oath upon the grand list, the assessor or board of assessors shall equalize the assessments of property in the town, if necessary, and *make any assessment* omitted by mistake or *required by law*. . . ." (Emphasis added.)

The parties do not dispute that the imposition of the late filing penalties constitutes an "assessment" for purposes of § 12-55 (b). The question is, therefore, whether the assessor's imposition of the late filing penalties was "required by law." The trial court reasoned as follows: "[Section] 12-63c (d) requires that a property owner who fails to timely submit [income and expense] information (when provided with a form by the assessor as stated in subsection (a)), 'shall be subject to a penalty equal to a ten per cent increase in the assessed value of such property for such assessment year.' . . . The act of imposing the 10 [percent] penalty was not discretionary on the part of the assessor; it was mandatory. See *Chamber of Commerce of Greater Waterbury, Inc.* v. *Murphy*, 179 Conn. 712, 718–19, 427 A.2d 866 (1980)." We adopt such reasoning and conclude that the imposition of the late filing penalties constitutes an "assessment . . . required by law" under § 12-55 (b). As such,

it was required to be made by the assessor "[p]rior to taking and subscribing the oath upon the grand list . . . ."[13]

Furthermore, we note that the assessor did not receive a grand list filing extension for the 2014 grand list. Pursuant to subsection (a) of General Statutes § 12-117, which is titled "Extension of time for completion of duties of assessors and board of assessment appeals," "[t]he period prescribed by law for the completion of the duties of any assessor, board of assessors or board of assessment appeals may, for due cause shown, be extended by the chief executive officer of the town for a period not exceeding one month, and in the case of the board of assessment appeals in any town in the assessment year in which a revaluation, pursuant to section 12-62, is required to be effective, such period shall be extended by said chief executive officer for a period not exceeding two months. Not later than two weeks after granting an extension as provided under this subsection, the chief executive officer shall send written notice of the extension to the Secretary of the Office of Policy and Management." "By providing a particular method to procure extensions of time for [an assessor] to complete [his or her] duties, the legislature must have intended that the time limitations for action by the [assessor] be mandatory rather than merely directory. The provisions of § 12-117 delineating the method by which an extension may be obtained make little sense if [an assessor] may, without utilizing them, validly act beyond the time limit otherwise imposed." *Albert Bros., Inc.* v. *Waterbury*, 195 Conn. 48, 55, 485

[13] We note that the foregoing conclusion is in harmony with the language of § 12-63c (d), which provides that "[a]ny owner of such real property required to submit information to the assessor in accordance with subsection (a) of this section *for any assessment year*, who fails to submit such information as required under said subsection (a) . . . shall be subject to a penalty equal to a ten per cent increase in the assessed value of such property *for such assessment year*." (Emphasis added.)

A.2d 1289 (1985). Thus, where an assessor makes an adjustment to an assessment after its statutory authority has expired, as here, the adjustment is invalid. Id.

In support of its argument that the assessor was not required to include the § 12-63c (d) late filing penalties at the time he took the oath on the 2014 grand list, the defendant relies on § 12-55 (a), which provides in relevant part: "On or before the thirty-first day of January of each year, except as otherwise specifically provided by law, the assessors or board of assessors shall publish the grand list for their respective towns. Each such grand list shall contain the assessed values of all property in the town, reflecting the statutory exemption or exemptions to which each property or property owner is entitled, and including, where applicable, *any assessment penalty added in accordance with* [*General Statutes §§*] *12-41 or 12-57a* for the assessment year commencing on the October first immediately preceding. . . ." (Emphasis added.) The defendant argues that by expressly providing that penalties added pursuant to §§ 12-41 or 12-57a shall be included in the grand list, the legislature necessarily meant to exclude penalties assessed pursuant to § 12-63c (d).

The defendant predicates its argument on the axiom "expressio unius est exclusio alterius," translated from Latin to mean "the expression of one thing is the exclusion of another." "Although the so-called canons of statutory construction may at times serve as useful tools in deciphering legislative meaning, to rely on any one of them as a compelling factor in the interpretive process is problematic, because as Professor Karl Llewellyn persuasively has demonstrated, 'there are two opposing canons on almost every point.' K. Llewellyn, 'Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed,' 3 Vand. L. Rev. 395, 401 (1950). The so-called 'canons' are not that, at least in the sense that any one

of them reliably can be determined to apply or not to apply in any given case. They are, instead, merely guides drawn from experience, to be employed or not to be employed carefully and judiciously, depending on the circumstances. See F. Frankfurter, 'Some Reflections on the Reading of Statutes,' 47 Colum. L. Rev. 527, 544–45 (1947); see also *United Illuminating Co.* v. *New Haven*, 240 Conn. 422, 455, 692 A.2d 742 (1997). 'To permit them to displace the conclusions that careful interpretation yields . . . would be a disservice to the legislative process, as well as to the judicial exercise of interpreting legislative language based upon the premise that the legislature intends to enact reasonable public policies.' *United Illuminating Co.* v. *New Haven*, supra, 455." *Burke* v. *Fleet National Bank*, 252 Conn. 1, 23–24, 742 A.2d 293 (1999). Although there are numerous cases in which certain statutory provisions have been interpreted "as demonstrating a legislative intent to exclude, by implication, other possible referents; see, e.g., *State* v. *Kish*, 186 Conn. 757, 766, 443 A.2d 1274 (1982) (statutory itemization demonstrates legislative intent to exclude unenumerated items);" courts should decline to employ the axiom "where there is no language, legislative history or statutory purpose suggesting . . . such a result." *Burke* v. *Fleet National Bank*, supra, 24. This case is such an instance. The defendant's argument in this regard also fails because it ignores that § 12-55 (a) governs the *publication* of grand lists and specifies what they reflect for "public inspection." In contrast, § 12-55 (b) governs the *timing* of when "the assessor or board of assessors shall equalize the assessments of property in the town, if necessary, and make any assessment omitted by mistake or required by law." The defendant's position is also untenable because it assumes that the assessor has the authority to add § 12-63c (d) penalties for a particular assessment year—at any time and for an indefinite

period—after he signed the grand list for that assessment year.[14] Such an interpretation yields an absurd or unworkable result in violation of General Statutes § 1-2z.

Because the assessor did not have the statutory authority to impose the late filing penalties after he took the oath on the 2014 grand list, the late adjustments are invalid and prevent any recovery of taxes based thereon. See *Empire Estates, Inc.* v. *Stamford*, supra, 147 Conn. 264. Accordingly, where the assessor had no statutory authority to act in the manner challenged, the trial court erred in its ultimate conclusion that because § 12-63c (d) does not expressly provide for the removal of unlawful penalties, the plaintiffs were without redress beyond the postponement of the right to appeal.

In sum, in the absence of the applicability of another statute permitting a later assessment, the assessor was required to add the late filing penalties "[p]rior to taking and subscribing to the oath upon the grand list . . . ." General Statutes § 12-55 (b). The assessor's failure to do so was fatal to the imposition of late penalties.

II

In addition to its first alternative ground for affirmance, which we discussed in part I of this opinion, the defendant claims, pursuant to Practice Book § 63-4 (a) (1), two additional alternative grounds on which the trial court's judgments should be affirmed, namely, (1) if the assessor made a mistake, it was a clerical mistake that was corrected pursuant to § 12-60, and (2) the plaintiffs were not harmed by the assessor's actions. We disagree with these alternative grounds for affirmance and address them in turn.

[14] Indeed, at oral argument before this court, the defendant's counsel confirmed that it is the defendant's position that the assessor may impose § 12-63c (d) penalties for a particular assessment year, where applicable, at any time for an indefinite period.

A

As its second alternative ground for affirmance, the defendant claims that, even if the assessor's delayed imposition of the late filing penalties were deemed a mistake, then it constitutes a clerical mistake that the assessor timely corrected pursuant to § 12-60. Although the defendant concedes that the omission of the late filing penalties from the 2014 grand list was intentional, it argues that any purported mistake "had [only] to do with the *administrative* procedure or method chosen to assess the penalty." (Emphasis added.) The plaintiffs contend, to the contrary, that the omission of the late filing penalties from the 2014 grand list at the time it was signed does not qualify as a clerical omission or mistake under § 12-60 because the assessor intended the omission at such time. We agree with the plaintiffs.

Section 12-60 provides in relevant part that "[a]ny *clerical omission or mistake* in the assessment of taxes may be corrected according to the fact by the assessors or board of assessment appeals, not later than three years following the tax due date relative to which such omission or mistake occurred, and the tax shall be levied and collected according to such corrected assessment. . . ." (Emphasis added.) For purposes of this statute, "the adjective 'clerical' qualifies 'mistake' as well as 'omission.' " *Reconstruction Finance Corp.* v. *Naugatuck*, 136 Conn. 29, 32, 68 A.2d 161 (1949) (construing statutory predecessor to § 12-60).

In at least two decisions, our Supreme Court has considered, and rejected, the reliance of a municipality or a taxpayer on § 12-60 (or its statutory predecessor) to correct a purported "clerical omission or mistake" in an assessment list. Those cases are particularly instructive. In *Reconstruction Finance Corp.* v. *Naugatuck*, supra, 136 Conn. 30, the plaintiff had filed with the board of assessors of the borough of Naugatuck a

list of the taxable property it owned in the borough on October 1, 1947, omitting certain machinery that was exempt from state and municipal taxation at the time of filing (which occurred prior to November 1, 1947). On May 25, 1948, the United States Congress enacted a statutory amendment, to be effective as of midnight on June 30, 1947, that eliminated the exemption on which the plaintiff had relied. Id., 30–31. On June 14, 1948, the board of assessors issued a certificate of error, adding the machinery to the October 1, 1947 tax list of the plaintiff. Id., 31. On a reservation for advice before the Supreme Court of Errors, the borough argued that the addition to the plaintiff's tax list was "but the correction of a clerical error or omission" pursuant to a predecessor to § 12-60, namely, General Statutes (1949 Rev.) § 1735, which provided: "Any clerical omission or mistake in the assessment of taxes may be at any time corrected according to the fact by the assessors or board of tax review, and the tax shall be levied and collected according to such corrected assessment." *Reconstruction Finance Corp.* v. *Naugatuck*, supra, 31–32. The Supreme Court of Errors disagreed, concluding that "[i]t was much more than that, for it concerned the very substance and extent of the assessment. . . . 'Clerical' errors are mentioned to distinguish them from, and exclude errors of substance, of judgment, or of law." Id.

In *National CSS, Inc.* v. *Stamford*, supra, 195 Conn. 587, our Supreme Court had occasion to revisit the meaning of the phrase "clerical omission or mistake" in General Statutes (Rev. to 1975) § 12-60.[15] In *National CSS, Inc.*, both the lessor and the lessee of certain computer equipment listed such equipment as taxable

[15] General Statutes (Rev. to 1975) § 12-60 provided: "Any clerical omission or mistake in the assessment of taxes may be at any time corrected according to the fact by the assessors or board of tax review, and the tax shall be levied and collected according to such corrected assessment."

personal property on the property lists they filed with the city of Stamford's tax assessor, which resulted in double taxation. Id., 588–89. Upon realizing that only the lessor was obligated under the lease agreement to pay property taxes on the computer equipment at issue, the plaintiff lessee demanded a refund of the taxes it paid on the equipment, which demand was denied by the city. Id., 588–90. The plaintiff lessee argued in relevant part that it was entitled to a refund under § 12-60. Id., 592. Our Supreme Court rejected the effort, holding that "[w]here an error is of a deliberate nature such that the party making it at the time actually intended the result that occurred, it cannot be said to be clerical. . . . Because the plaintiff's action in listing the property and paying the taxes, although mistaken, was deliberate and intentional, it is not clerical, but can only be characterized as an error of substance." (Citation omitted.) Id., 596. Therefore, § 12-60 did not apply. Id., 596–97.

Applying the principles articulated in *Reconstruction Finance Corp.* v. *Naugatuck*, supra, 136 Conn. 29, and *National CSS, Inc.* v. *Stamford*, supra, 195 Conn. 587, to the present case in considering whether the assessor properly invoked § 12-60 in issuing the certificates of change, we consider whether the assessor's delayed imposition of the late filing penalties corrected a clerical omission or mistake. By way of review, the parties stipulated that the assessor's practice has been to assess, pursuant to § 12-60, any late filing penalties under § 12-63c (d) retroactively, i.e., *after* signing the grand list for a given year.[16] The parties further stipulated that at the time the assessor took the oath on the 2014 grand list, he knew he had received the plaintiffs' 2013 income and expense reports after the June 1, 2014 deadline. Nevertheless, for whatever reason, he delayed

[16] The trial court's memorandum of decision states that the assessor adhered to such practice for over twenty years. The parties do not challenge that statement on appeal.

adding the late filing penalties until approximately three months after he signed the 2014 grand list. On the basis of the foregoing, we conclude that because the assessor's omission of the late filing penalties at issue from the 2014 grand list at the time he signed it was "of a deliberate nature such that [the assessor] at the time actually intended the results that occurred, it cannot be said to be clerical." *National CSS, Inc.* v. *Stamford*, supra, 596. Because such omission, "although mistaken, was deliberate and intentional, it is not clerical, but can only be characterized as an error of substance." Id. Accordingly, § 12-60 does not apply.[17]

In sum, we conclude that the trial court properly concluded that the delayed imposition of the late filing penalties did not correct a clerical omission or mistake; therefore, § 12-60 does not apply so as to permit the retroactive adjustment to the assessments on the basis of the late filing penalties. We reject, therefore, the defendant's second alternative ground for affirmance.

B

As its final alternative ground for affirmance, the defendant claims that the judgments should be affirmed because the plaintiffs were not harmed by the assessor's imposition of the late filing penalties. Specifically, the defendant contends that, because the plaintiffs were able to seek review of the assessor's imposition of the late filing penalties by appealing to the board, the plaintiffs have not suffered harm as a result of the timing of the assessor's actions, even if late. This argument warrants little discussion.

[17] Moreover, the fact that it has been the assessor's longtime practice to assess retroactively any late filing penalties under § 12-63c (d) provides the defendant no safe harbor. *Middletown* v. *Berlin*, 18 Conn. 189, 197 (1846) ("[a]ssessors are the officers of the law, and must obey the law; and no direction of the town, nor long continued usage, can justify a departure from the law").

In support of its argument, the defendant relies on *Murach* v. *Planning & Zoning Commission*, 196 Conn. 192, 205, 491 A.2d 1058 (1985), for the statement therein that "not all procedural irregularities require a reviewing court to set aside an administrative decision; material prejudice to the complaining party must be shown." (Internal quotation marks omitted.) The defendant's reliance on *Murach* is entirely misplaced. In *Murach*, our Supreme Court affirmed the trial court's upholding of a planning and zoning commission's unanimous decision to approve a zone reclassification, despite the fact that one of the seven voting members was a statutorily proscribed member of the commission who was, therefore, disqualified from voting. Id., 194–95. On appeal, the court reasoned that, because only five votes were required for passage of the zoning reclassification and there was no contention that the disqualified member swayed the commission in its decision making, the plaintiffs failed to show that the so-called procedural irregularity resulted in any material prejudice to them. Id., 205–206.

In contrast, in the present case, the crux of the plaintiffs' arguments on appeal is that, because the assessor was without the statutory authority to impose the late filing penalties after he signed the grand list, the late filing penalties are null and void. Because we agree and conclude that the assessor may not collect a tax on an assessment that is untimely adjusted by the imposition of late filing penalties (i.e., after the assessor signed the 2014 grand list), it can hardly be said that the statutorily unauthorized delay of the imposition of the late filing penalties was a mere procedural irregularity, which, if uncorrected, would result in no harm to the plaintiffs.[18]

[18] Relatedly, we briefly address the trial court's ultimate conclusion that "the only redress for the assessor's failure to comply with the provisions of § 12-55 (b) is to postpone the right of the plaintiffs to appeal the action of the assessor until the succeeding Grand List. See § 12-55 (c): 'If any such assessment increase notice is sent later than the time period prescribed in this subsection, such increase shall become effective on the next succeeding

The judgments are reversed and the case is remanded with direction to render judgments for the plaintiffs.

In this opinion, the other judges concurred.

GARDEN HOMES MANAGEMENT CORPORATION ET AL. *v.* TOWN PLAN AND ZONING COMMISSION OF THE TOWN OF FAIRFIELD (AC 40519)

Keller, Moll and Lavery, Js.

Syllabus

The defendant Town Plan and Zoning Commission of the Town of Fairfield appealed to this court from the judgment of the trial court sustaining the appeal of the plaintiffs, G Co. and R Co., from the decision of the commission denying G Co.'s application to construct an affordable housing development. The commission denied G Co.'s application on several grounds, including that the record indicated that the proposed single entry, twenty foot access way width was insufficient and that it would not provide fire trucks sufficient space to turn around on-site. The plaintiffs appealed from that decision to the trial court, which reviewed the record as to each of the commission's grounds for denial to determine whether the commission had satisfied its burden under the applicable statute (§ 8-30g). The court recognized that although a twenty-four foot wide access way and a secondary point of entrance would be desirable, they were not necessary or required. The court concluded that the commission's concerns as to the twenty foot access way width did not outweigh the town's need for affordable housing, but, in the absence of a secondary access way, it was concerned that the site contained no area with adequate turnaround space for large vehicles, including fire trucks, and that such vehicles could exit only by backing up the full length of the access way. The court acknowledged

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grant list.' " This conclusion was in error because the assessor's statutory violation in the present case does not relate to the mere timing of an assessment increase notice but, rather, the assessor's failure under § 12-55 (b) to "make any assessment . . . required by law" before "taking and subscribing to the oath upon the grand list." At a minimum, the applicability of § 12-55 (c) assumes that the assessor has otherwise complied with his or her assessment duties under § 12-55 (b) (i.e., made the assessment at a time when he or she had the statutory authority to do so).

that G Co. had attempted to assuage the commission's concerns regarding that issue by offering a sketch that proposed an expanded turnaround area, and it remanded the issue of G Co.'s most recent redesign of the access way and apartment building for due consideration by the commission. The commission accepted new evidence during the public hearing, and it denied G Co.'s revised site plans. Subsequently, the trial court rendered judgment sustaining the plaintiffs' appeal, from which the commission, on the granting of certification, appealed to this court. The commission claimed that it had satisfied its burden pursuant to § 8-30g on the basis of concerns as to fire, pedestrian and traffic safety, that G Co.'s revised site plans, viewed in their entirety, did not sufficiently address the commission's prior concerns and raised new concerns as to fire safety and pedestrian and traffic safety that outweighed the town's need for affordable housing and, thus, that its denial was necessary to protect public safety. *Held* that the trial court properly sustained the plaintiffs' appeal: the record was replete with evidence of the need for affordable housing in the town, which had persisted for decades, the trial court, in addressing G Co.'s initial application, properly concluded that concern as to the inability for large vehicles to turn around upon exiting the site was the only concern that potentially could have outweighed the town's need for affordable housing and that the remaining concerns did not outweigh the town's need for affordable housing, as the record reflected that an access way width of twenty feet was adequate to comply with national fire safety standards, the commission did not prove that its denial of G Co.'s application was necessary to protect substantial public interests, the commission's concern regarding the lack of sidewalks was merely theoretical, the commission's concern as to the ratio of parking spaces per dwelling unit was merely a concern as to the convenience of parking, and a secondary access way was not necessary to adhere to national fire safety standards; moreover, the trial court properly declined to review certain evidence that it determined exceeded the scope of its remand order, as the court had issued a limited remand order directing the commission to consider potential redesigns to the turnaround area and the commission had jurisdiction on remand only over that issue, and the commission's claim that it had satisfied its burden under § 8-30g to show that its concerns on remand as to G Co.'s revised application outweighed the town's need for affordable housing was unavailing, as the court, which, upon review of G Co.'s revised site plans, had characterized the commission's concerns as to emergency vehicle maneuverability within the turnaround area as mere concern that some maneuvering would be required before such vehicles can turn around, was not convinced by the commission's concern that an emergency vehicle might not be able to turn around successfully, was persuaded that the revised turnaround area constituted a health and safety improvement to the plan and, thus, concluded that the commission's concerns as to maneuverability within the turnaround area

did not outweigh the need for affordable housing, and this court would not disturb the trial court's determination as to the adequacy of the revised turnaround area.

Argued December 5, 2018—officially released August 13, 2019

Procedural History

Appeal from the decision of the defendant denying the named plaintiff's application for approval of an affordable housing development, brought to the Superior Court in the judicial district of Fairfield and transferred to the judicial district of Hartford, Land Use Litigation Docket, where the matter was tried to the court, *Bates*, *J.*, which issued a memorandum of decision reversing the decision of the defendant and remanding the matter to the defendant for further proceedings; thereafter, Garden Homes Residential, L.P., was substituted as a plaintiff; subsequently, the court rendered judgment sustaining the plaintiffs' appeal, from which the defendant, on the granting of certification, appealed to this court. *Affirmed*.

Melinda A. Powell, with whom were *Sarah L. Wilber* and, on the brief, *Cindy M. Cieslak*, for the appellant (defendant).

Daniel J. Krisch, with whom were *Mark K. Branse* and, on the brief, *Kenneth R. Slater*, *Jr.*, for the appellees (plaintiffs).

Opinion

LAVERY, J. The defendant, the Town Plan and Zoning Commission of the Town of Fairfield (commission), appeals from the judgment of the Superior Court sustaining the appeal of the plaintiffs Garden Homes Management Corporation (Garden Homes) and Garden Homes Residential, L.P.,[1] from the decision of the commission denying Garden Homes' application to construct an affordable housing development. On appeal,

[1] The original plaintiffs were Garden Homes, which filed an application for the approval of an affordable housing development that would be situated on two abutting parcels of land located at 92 and 140 Bronson Road in

the commission claims that (1) reversing the court's decision will serve the public interest; (2) the court improperly declined to review certain evidence presented to the commission on remand; (3) the commission has satisfied its burden under General Statutes § 8-30g on the basis of fire safety deficiencies in Garden Homes' site plans; and (4) the commission has satisfied its burden under § 8-30g on the basis of pedestrian and traffic safety concerns. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. Pursuant to the Connecticut Affordable Housing Land Use Appeals Act, General Statutes § 8-30g et seq., Garden Homes applied for permission to build a ninety-five unit apartment building that would accommodate affordable housing units.[2] The proposed development would be situated on a combined 2.9 acres of abutting lots located at 92 and 140 Bronson Road in the Southport section of Fairfield. This site is bounded to the north by Interstate 95, to the east by the Mill River, to the south by Metro-North Railroad tracks, and to the west by a private residence. Consequently, the buildable area is constrained by the nearby highway and by wetlands restrictions that prohibit encroaching upon the river.

Fairfield, Sandra Conner, who owned the parcel of land located at 140 Bronson Road, and Richard Irwin, acting by and through his conservator, Robert Russo, who owned the parcel of land located at 92 Bronson Road. Subsequently, on June 2, 2016, the court granted the original plaintiffs' motion to substitute Garden Homes Residential, L.P., as a plaintiff for Conner and Irwin on the ground that Conner and Irwin conveyed title of their properties to Garden Homes Residential, L.P., in December, 2015. For convenience, unless otherwise indicated, all references to the plaintiffs in this opinion are to Garden Homes and Garden Homes Residential, L.P.

[2] Fifteen units would accommodate families with income "less than or equal to 60 percent of the area or statewide median income, whichever is less," and fourteen units would accommodate families "whose income is greater than 60 percent but less than or equal to 80 percent of the area or statewide median income, whichever is less."

Cognizant of these limitations, Garden Homes consulted Fairfield's fire marshal, William Kessler, early in the design process for direction as to compliance with safety standards. Kessler confirmed that Garden Homes' projected twenty foot wide access way would be the "minimally acceptable parameter" to provide for fire truck safety and functionality. Garden Homes, thus, submitted to the commission initial site plans that proposed a single entry, twenty foot wide access way, among other features that would make the development suitable to accommodate all ninety-five units within the buildable area.

The commission held an initial public hearing on Garden Homes' application on July 8, 9, 15, and 16, 2014. Joseph Versteeg, Garden Homes' fire code expert, testified at the public hearing that the twenty foot wide access way was adequate for fire safety purposes. He stated in relevant part: "[According to] the Technical Committee of [National Fire Protection Association, Standard 1 (NFPA 1)] and [National Fire Protection Association (NFPA)] Technical Committee members, as well as the NFPA staff, the reason for the twenty foot road width is that it facilitates two-way traffic, it also will facilitate one fire truck to pass another fire truck that has stopped either to connect with a hydrant or for whatever reason."

Laura Pulie, Fairfield's senior civil engineer, cautioned that the proposed twenty foot wide access way could be "too narrow for an emergency vehicle to pass into the site/building location, should a vehicle park along the driveway despite 'No Parking or Fire Lane' signs." Accordingly, Pulie recommended increasing the proposed access way width by four feet.

An additional concern addressed at the public hearing pertained to the adequacy of the proposed fire truck turnaround area. The site plans proposed that the 300

foot long, twenty foot wide access way would be the only route to enter and exit the property, which dead-ended at the apartment building. The concern, therefore, was that fire trucks would be able to exit the site only by backing up the full length of the access way. David Spear, a traffic engineer retained by Joel Green, attorney for the Lower Bronson Neighborhood Alliance in opposition to Garden Homes' proposal, opined: "The turnaround right here is the weak link . . . once [a fire truck] get[s] in here, they're stuck. They have to back out and back all the way out of the site." Additionally, Richard Felner, Fairfield's former fire chief, testified: "[I]f other emergency vehicles get [to the proposed access way] first, for example, an ambulance should get there first, our rescue truck comes in second, to get the ambulance back out, we have to back a truck out, and we'd have to back the ambulance out. . . . To make that swing with our ladder truck is almost, as I see it in looking at the plan, [i]s almost impossible . . . ."

During its rebuttal on the final night of the public hearing, Garden Homes submitted a revised sketch that eliminated four parking spaces and three units to afford larger vehicles sufficient space to turn around at the end of the access way. The commission did not consider this submission in reaching its decision.

After the close of the public hearing, the commission voted to deny Garden Homes' application and unanimously granted a motion to adopt, as its collective grounds for denial, the recommendations set forth in a staff report presented to the commission, with the addition of a statement that Garden Homes had not demonstrated that its application reflected adequate sewage capacity. Subsequently, on July 24, 2014, a clerk for the commission sent Garden Homes' counsel a letter that memorialized the commission's statement. The letter noted, inter alia, that "the record indicates that the

[twenty] foot paved [access way] width is insufficient for the number of dwelling units proposed and for the length of the singular access point to the proposed development." The letter also indicated that the twenty foot width of the access way would not provide fire trucks sufficient space to turn around on-site. The clerk's letter stated that the commission expressly made the following three findings: "1. There is sufficient evidence in the record to support a finding that the proposed development would pose substantial risks to public interests in health and safety. 2. Those public interests clearly outweigh the need for affordable housing. 3. There are no reasonable conditions of approval that can be made to protect those public interests. Therefore the application is denied."[3]

The original plaintiffs, Garden Homes, Sandra Conner, and Richard Irwin; see footnote 1 of this opinion;

[3] Similarly, in a recent decision also involving the commission, "a clerk for the commission . . . wrote the plaintiff's counsel a letter providing the . . . purported reasons for the commission's denial . . . . Although our case law directs that we not rely on a letter that was not adopted by the commission to evince the commission's collective decision; see *Smith-Groh, Inc.* v. *Planning & Zoning Commission*, [78 Conn. App. 216, 224–26, 826 A.2d 249 (2003)] (concluding that letter to applicant's attorney [received] from town planner, purporting to state reasons for commission's denial of application for site plan approval and special permit, was not collective statement of commission's decision, given that commission had not adopted letter, and stating that '[a]lthough the reasons outlined in the letter were discussed by the commission during either the public hearing or the special meeting, the planner could not speak for the commission'); because the parties . . . agree[d] that the letter properly [set] forth the reasons for the commission's decision and [did] not claim that the . . . letter should not be considered, we . . . for purposes of [that] case, consider[ed] the reasons set forth in the letter." (Footnote omitted.) *American Institute for Neuro-Integrative Development, Inc.* v. *Town Plan & Zoning Commission*, 189 Conn. App. 332, 337–38, 207 A.3d 1053 (2019).

Although we will take the same approach in the present case and consider the reasons set forth in the letter from the clerk, we strongly urge the commission to be mindful that it ordinarily should not rely on a letter from a representative of the commission to represent the commission's collective statement in the absence of the commission adopting such statement.

timely appealed from that decision to the Superior Court. In its September 10, 2015 memorandum of decision, the court reviewed the record as to each of the commission's grounds for denial to determine whether the commission had satisfied its burden under § 8-30g. The court began by noting that each of the concerns set forth in the commission's letter pertained to " 'substantial public interests in health, safety, or other matters' that are generally 'supported by sufficient evidence in the record.' "

The court then reviewed the commission's concerns as to several specific features of Garden Homes' site plans to determine whether that given feature would pose such a health or safety hazard as to outweigh the need for affordable housing. The court first reviewed the adequacy of the proposed twenty foot wide access way. Recognizing that a twenty-four foot wide access way would be desirable, the court nonetheless concluded that such an access way was not required. It reasoned that under applicable fire codes twenty feet was "the minimum acceptable width . . . and that level of compliance should generally be sufficient for an affordable housing project."[4] It further reasoned that even if twenty feet deviated from applicable standards, such deviation would not "create a public health or safety concern that outweighs the need for affordable housing in the community." On balance, the court, therefore, concluded that the commission's concerns as to the twenty foot access way width did not outweigh Fairfield's need for affordable housing.

The court also assessed the commission's concerns as to the proposed single entrance drive onto the site.

[4] The record indicates that Connecticut adopted the 2003 edition of NFPA 1 as the 2010 Connecticut State Fire Prevention Code. NFPA 1 fire safety standards provides: "Fire department access roads shall have an unobstructed width of not less than 20 ft (6.1 m) and an unobstructed vertical clearance of not less than 13 ft 6 in. (4.1 m)." NFPA 1, Uniform Fire Code (2003 Ed.) § 18.2.2.5.1.1, p. 1-113.

As in its assessment of the access way width, the court acknowledged that a secondary point of entrance would be desirable but concluded that it would not be necessary. It noted that neither the NFPA nor the American Association of State Highway and Transportation Officials (AASHTO) codes would require multiple means of access to accommodate Garden Homes' proposed site plans.[5] Thus, on balance, the court concluded that "the single access [way] . . . should be sufficient for an affordable housing project." Although the court determined that a secondary access way was not necessary, it nonetheless was concerned that the site otherwise contained no area with adequate turnaround space for fire trucks, among other large vehicles. Such vehicles, therefore, could exit only by backing up the full length of the access way.

At the same time, the court acknowledged that Garden Homes had attempted to assuage the commission's concerns on this issue by offering a sketch that proposed an expanded turnaround area, as well as a decrease in the total number of units. The court opined that this concern adequately could be resolved with site plan revisions and, therefore, "remand[ed] the issue of the [plaintiffs'] most recent redesign of the access way and apartment building . . . for due consideration by the commission." The court additionally noted that Garden Homes "should submit to the commission a fully engineered site plan, indicating the provision of the turning radii necessary to allow these and other large vehicles to turn around and exit the site with minimal reverse travel, both via the elimination of four parking spaces and three units, as [Garden Homes had] pro-

[5] The NFPA standards provide that one access route is adequate for developments containing one to 100 "households." NFPA 1141, Standard for Fire Protection Infrastructure for Land Development in Wildland, Rural, and Suburban Areas (2012 Ed.) § 5.1.4.1, Table 5.1.4.1 (a), p. 1141-7.

posed [during rebuttal before the commission], and by alternative means."[6]

On remand, Garden Homes submitted revised site plans to the commission, in which it proposed (1) reducing the number of housing units from ninety-five to ninety-one, and (2) replacing four parking spaces with a fire lane that would serve as a turnaround area for fire trucks and other large vehicles. The revised site plans also contained engineered turning movement counts, indicating that the largest fire truck of the Fairfield Fire Department (department) could turn around in this area by making a four count W shaped turning movement.

At the outset of the public hearing that was held on May 24, 2016, before the commission on Garden Homes' revised application, Garden Homes contended that the court's remand limited the commission's review to the

[6] The court also ordered that the commission make it a condition of approval that Garden Homes receive final approval from Fairfield's Water Pollution Control Authority (WPCA). As part of its revised site plans, Garden Homes proposed installing a two foot reinforced grass shoulder along a portion of the access way that would run against the Mill River. Garden Homes represented to the commission that the WPCA had unanimously approved this feature.

After reviewing the commission's denial of Garden Homes' revised application, the court noted: "At the same time that [Garden Homes] proposed the [turnaround] for the fire truck, it also proposed placing concrete pavers on the sides of the [entryway], allowing some additional maneuvering area for the ladder trucks entering and exiting the site. The [commission] did not act on that proposal . . . . However, as the court found in [its] first [decision] that the twenty foot width was adequate for ingress and egress, there is no legal requirement for the pavers and, therefore, there is no need to mandate their installation. Further, it now appears that any such installation of pavers might require wetlands review. Given that the pavers and the increase of the width of the road are not necessary for the approved access way, there is no reason to revisit the offer of installing them."

Because the commission did not approve Garden Homes' revised application and site plans, it did not assign conditions for approval. Thus, this matter is not dispositive in the present appeal, and we will not consider it further.

issue of the revised turnaround area. The commission, however, noted that the court determined that the commission's concerns as to Garden Homes' initial site plans pertained to substantial interests in public health and safety. The commission, therefore, interpreted the court's remand order more broadly as direction to evaluate Garden Homes' revised plans for new health and safety concerns pertaining to the department's ability to access the proposed building and to enter and exit the site. Accordingly, the commission accepted new evidence during the public hearing on the basis of that interpretation.

Such new evidence included a report prepared by Scott Bisson (Bisson report), the department's assistant chief, on Garden Homes' revised site plans, which reiterated and elaborated on the department's prior concerns as to the access way width and lack of a secondary entrance to the development, matters upon which the court already had ruled. The Bisson report also considered several matters beyond the turnaround area.[7] Fire Chief Denis McCarthy spoke at the public hearing and elaborated on the opinions set forth in the Bisson report. In light of that evidence, the commission considered whether "there is support to make findings different from those made in the initial application and, if there is not, are there reasonable changes that could be made to protect public interests in health and safety."

A clerk for the commission sent Garden Homes' counsel a letter memorializing the commission's grounds

[7] As the plaintiffs note in their brief, new matters addressed in the Bisson report included (1) roof and attic safety; (2) space to deploy ladders on the rear side of the building; (3) proximity of ladders to nearby high voltage power lines; (4) concerns as to construction style; (5) lack of fire lanes; (6) no "exterior defensive firefighting positions"; (7) pedestrian traffic exiting during an emergency; and (8) the possibility of a gas leak, transportation incident, or chemical release. (Internal quotation marks omitted.)

for denial.[8] The commission listed several points from McCarthy's testimony arguing that Garden Homes' revised plans posed fire safety concerns, namely: the department must be able to access the building; lack of secondary access way; no area of refuge during an emergency; residents will flee the property during an emergency; up to ninety-five cars could be leaving at the same time; based on McCarthy's experience, he expects to respond to an emergency approximately twenty-four times annually, or about twice per month, and all five of Fairfield's fire stations would send responders; the department will be on-site for hours; the ladder truck will not be able to access the roof; the turnaround area will not help the department access the building; despite the revised turnaround area, McCarthy opined that the plans were not safe; and McCarthy did not believe there was any alternative way to address the department's concerns.[9] The commission, therefore,

[8] We reiterate that although we will, for the purposes of this case, consider the reasons set forth in the clerk's letter, parties should not rely on a letter from a representative of the commission to represent the commission's collective statement in the absence of the commission adopting such statement. See footnote 3 of this opinion.

[9] The letter provided: "At the May [24, 2016] hearing the [c]ommission heard from . . . McCarthy. [McCarthy] urged the [c]ommission to deny the revised plan and offered his testimony:

"The size, type of construction and configuration of the project requires the [department] to be able to access the building.

"A lack of secondary access and the revised plan significantly impair the [department's] ability to access the property and its operations.

"The [department] is responsible for all the occupants of the building during an emergency and there is no place for the residents to go or assemble during an emergency response.

"[I]n an emergency, residents will attempt to flee in their cars because they want to protect their investment and avoid being trapped [on-site] for extended time.

"Up to [ninety-five] cars will be attempting to leave at the same time that a half dozen emergency apparatus would be arriving.

"The [U]niform [F]ire [C]ode and the NFPA standards require a secondary access when in the opinion of the Authority Having Jurisdiction (AHJ) a single access road could be impaired or other factors necessitate it.

"The [department] has responded fourteen times since June 2014 to the Garden Homes development on Fairchild Avenue including a structure fire.

concluded that Garden Homes' revised plans would pose substantial risks to public interests in health and safety, which outweighed the need for affordable housing, and that no reasonable conditions of approval could protect those interests.[10] Accordingly, the commission denied Garden Homes' revised site plans.

The trial court addressed that denial in a memorandum of decision dated March 3, 2017, concluding that the commission's stated concerns pertained to matters upon which the court previously had ruled and did not pertain to the subject of the court's limited remand. Additionally, the court determined that none of those concerns outweighed the need for affordable housing. Accordingly, the court sustained the plaintiffs' appeal and ordered the commission to approve Garden Homes' revised application and issue the requested permit. The

That building has [fifty-four] units. For this building, the [department] expects to respond about twenty-four times annually or twice per month. All five stations would respond to this site due to its size. Due to the limited access and space for maneuvering, all of the required equipment could not be deployed properly. This opinion is based on [McCarthy's] experience and is not imagined or theoretical. He indicated there is 'no doubt' they would be there repeatedly.

"When the [d]epartment responds, it will be there for hours.

"The ladder truck cannot access the roof.

"The turnaround [area] does not help [department] operations nor improve access to the building and is only useful when it is time to leave.

"There was further testimony from others that it is questionable that the fire trucks could even make the required multiple maneuvers in the space provided.

"[McCarthy] was asked if he thought the revised plan was safe and his response was 'no.'

"In addition, the [c]ommission asked [McCarthy] if there was any alternative available to address the concerns of the department and his response was 'no.' "

[10] The commission concluded: "1. There is sufficient evidence in the record to support a finding that the proposed development would pose substantial risks to public interests in health and safety.

"2. Those public interests clearly outweigh the need for affordable housing.

"3. There are no reasonable conditions of approval that can be made to protect those public interests."

commission then filed a petition for certification to appeal pursuant to General Statutes § 8-8 (o), which this court granted. Additional facts and procedural history will be set forth as needed.

I

We begin by setting forth guiding principles of law as to our jurisdiction over the present appeal. "Because our jurisdiction over appeals . . . is prescribed by statute, we must always determine the threshold question of whether the appeal is taken from a final judgment before considering the merits of the claim. . . . Thus, unless the remand order of the trial court in [a] zoning appeal constitutes a final judgment, we are required to dismiss the commission's appeal to this court for lack of subject matter jurisdiction. . . . [I]t is the scope of the remand order in [a] particular case that determines the finality of the trial court's judgment." (Citations omitted; internal quotation marks omitted.) *Barry* v. *Historic District Commission*, 108 Conn. App. 682, 688, 950 A.2d 1, cert. denied, 289 Conn. 942, 959 A.2d 1008, and cert. denied, 289 Conn. 943, 959 A.2d 1008 (2008). "Determining the scope of a remand is a matter of law . . . [over which] our review is plenary." (Internal quotation marks omitted.) *State* v. *Tabone*, 301 Conn. 708, 713–14, 23 A.3d 689 (2011).

When the court's remand order dictates the outcome of the case, the court's decision "so concludes the rights of the parties that further proceedings cannot affect them. . . . A judgment of remand is not final, however, if it requires [the agency to make] further evidentiary determinations that are not merely ministerial." (Citations omitted; internal quotation marks omitted.) *Kaufman* v. *Zoning Commission*, 232 Conn. 122, 130, 653 A.2d 798 (1995). When the court's remand order does not decide the outcome of the case and allows the commission to retain discretion to deny the application,

a reviewing court does not have subject matter jurisdiction. *AvalonBay Communities, Inc.* v. *Zoning Commission*, 284 Conn. 124, 139–40, 931 A.2d 879 (2007) (because court remanded case to commission with instruction to consider certain factors and, therefore, implicitly required commission to conduct further evidentiary hearings, court order did not decide outcome of case, and commission retained discretion to grant or deny application and, therefore, initial memorandum of decision was not final judgment).

In the present case, the court, in its initial decision, expressly concluded that the twenty foot access way width and the single entrance complied with national fire safety standards and that neither of those two features posed concerns that outweighed the need for affordable housing. Additionally, the court expressly concluded that neither the lack of sidewalks nor the commission's concerns as to the ratio of parking spaces per unit outweighed Fairfield's need for affordable housing. As to the proposed turnaround area, however, the court determined that "[t]he ability of [fire trucks] to enter and turn around in the parking lot is an issue of health and safety. The ability of moving and large delivery trucks to do the same is an issue of health and safety to a lesser degree but should also be reviewed." The court, accordingly, issued a remand order that was limited in scope. It remanded the matter to the commission with direction to consider potential redesigns to the turnaround area that would "allow . . . large vehicles to turn around and exit the site with minimal reverse travel . . . ." At that point, the court had not issued a final judgment, as the commission was required to make evidentiary determinations as to the adequacy of potential redesigns to the turnaround area. See *Kaufman* v. *Zoning Commission*, supra, 232 Conn. 130 ("[a] judgment of remand is not final, however, if it requires [the agency to make] further evidentiary determinations

that are not merely ministerial" [internal quotation marks omitted]); *Barry* v. *Historic District Commission*, supra, 108 Conn. App. 690 (no final judgment when trial court remands for additional administrative evidentiary findings as precondition to final judicial resolution). Given the court's limited remand order, the only remaining matter for the commission to consider was the adequacy of the turnaround area at the end of the access way. See *West Haven Sound Development Corp.* v. *West Haven*, 207 Conn. 308, 312, 541 A.2d 858 (1988) (lower court should only review matters within scope of remand order).

Despite the court's limited remand order, the commission reevaluated Garden Homes' revised application for any potential health and safety risk that the turnaround area could pose. The commission also accepted evidence that raised issues beyond the turnaround area itself and then incorporated this new evidence into its collective statement of denial.

When the trial court addressed the decision of the commission on remand, it concluded that the commission exceeded the bounds of the limited remand and that none of these concerns outweighed Fairfield's need for affordable housing. The court stated: "To the extent the [c]ommission has raised any new health and safety concerns, the court finds those concerns do not outweigh [Fairfield's] need for affordable housing." The court, accordingly, remanded the case with instruction to grant Garden Homes' requested permit. Consequently, the court issued an appealable final judgment. See *Kaufman* v. *Zoning Commission*, supra, 232 Conn. 131 (court's judgment requiring commission to approve plaintiff's application was final judgment).

The commission now appeals from this final judgment, which encompasses both of the court's memoranda of decision. In reviewing the court's rulings pursuant to § 8-30g, we, therefore, will consider the evidence

before the commission during both the initial and remand hearings.

II

The commission claims that it has satisfied its burden pursuant to § 8-30g on the basis of concerns as to fire safety and pedestrian and traffic safety. It contends that Garden Homes' revised site plans, viewed in their entirety, did not sufficiently address the commission's prior concerns and raised new concerns as to fire safety and pedestrian and traffic safety that outweigh Fairfield's need for affordable housing. The commission, thus, contends that its denial was necessary to protect public safety. We disagree.

"[Although the] commission remains the finder of fact and any facts found are subject to the sufficient evidence standard of judicial review . . . th[e] application of the legal standards set forth in § 8-30g (g) . . . to those facts is a mixed question of law and fact subject to plenary review." (Internal quotation marks omitted.) *JAG Capital Drive, LLC* v. *Zoning Commission*, 168 Conn. App. 655, 668, 147 A.3d 177 (2016). "The parameters of our review of an affordable housing appeal are circumscribed by § 8-30g (g)." *Brenmor Properties, LLC* v. *Planning & Zoning Commission*, 162 Conn. App. 678, 693, 136 A.3d 24 (2016), aff'd, 326 Conn. 55, 161 A.3d 545 (2017). Section 8-30g (g)[11] provides: "Upon an appeal taken under subsection (f) of this section, the burden shall be on the commission to prove, based upon the evidence in the record compiled before such commission, that the decision from which such appeal is taken and the reasons cited for such decision are supported by sufficient evidence in the record. The

[11] Although § 8-30g (g) was the subject of technical amendments in 2017; see Public Acts 2017, No. 17-170, § 1; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

commission shall also have the burden to prove, based upon the evidence in the record compiled before such commission, that (1) (A) the decision is necessary to protect substantial public interests in health, safety or other matters which the commission may legally consider; (B) such public interests clearly outweigh the need for affordable housing; and (C) such public interests cannot be protected by reasonable changes to the affordable housing development, or (2) (A) the application which was the subject of the decision from which such appeal was taken would locate affordable housing in an area which is zoned for industrial use and which does not permit residential uses; and (B) the development is not assisted housing. If the commission does not satisfy its burden of proof under this subsection, the court shall wholly or partly revise, modify, remand or reverse the decision from which the appeal was taken in a manner consistent with the evidence in the record before it."

As the commission acknowledges in its brief, Garden Homes' application required the commission to weigh its concerns as to fire safety and pedestrian traffic against the need for affordable housing. The parties agree that both interests constitute matters of public concern. The central issue in this case, therefore, is whether Fairfield's need for affordable housing outweighs the health and safety concerns presented to the commission.

Section 8-30g (g) "requires the town, not the applicant, to marshal the evidence supporting its decision and to persuade the court that there is sufficient evidence in the record to support the town's decision and the reasons given for that decision." *JPI Partners, LLC* v. *Planning & Zoning Board*, 259 Conn. 675, 688, 791 A.2d 552 (2002). The commission maintains that it has satisfied its burden. The court was not convinced.

The commission's decision is subject to the twofold standard of review embodied in § 8-30g (g). *JAG Capital Drive, LLC* v. *Zoning Commission*, supra, 168 Conn. App. 667. "First, a reviewing court must determine whether the decision from which such appeal is taken and the reasons cited for such decision are supported by sufficient evidence in the record. . . . Specifically, the court must determine whether the record establishes that there is more than a mere theoretical possibility, but not necessarily a likelihood, of a specific harm to the public interest if the application is granted. . . . Because the sufficient evidence standard applicable to affordable housing appeals imposes a lesser burden than substantial evidence, that burden is minimal. A land use agency simply must establish that something more than a mere theoretical possibility of harm to the public interest exists." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *Brenmor Properties, LLC* v. *Planning & Zoning Commission*, supra, 162 Conn. App. 694–96.

"If that standard is met, the reviewing court then must conduct a plenary review of the record and determine . . . whether the commission's decision was necessary to protect substantial interests in health, safety or other matters that the commission legally may consider, whether the risk of such harm to such public interests clearly outweighs the need for affordable housing, and whether the public interest can be protected by reasonable changes to the affordable housing development." (Internal quotation marks omitted.) Id., 695. This presents a high bar for the commission, as "the test we must apply under § 8-30g is not whether the [commission's] decision was reasonable, but whether the decision was necessary." *Eureka V, LLC* v. *Planning & Zoning Commission*, 139 Conn. App. 256, 275, 57 A.3d 372 (2012).

To establish that its denial is necessary, the commission's decision must be predicated on evidence in the record of both the existence of a potential harm and the probability that such harm, in fact, would occur. See *Kaufman* v. *Zoning Commission*, supra, 232 Conn. 154–62. Essentially, the commission's decision must be supported by sufficient evidence, which is more than a mere possibility but not necessarily a preponderance of the evidence, that the public interest at stake will be harmed if the commission does not deny the application. *Christian Activities Council, Congregational* v. *Town Council*, 249 Conn. 566, 597, 735 A.2d 231 (1999). A commission is not entitled to reject an application on the basis of the mere possibility of harm or generalized concerns. *Carr* v. *Planning & Zoning Commission*, 273 Conn. 573, 608–609, 872 A.2d 385 (2005) (report suggesting possibility that no method of treating radionuclides would be feasible was not valid reason to deny plaintiff's application); *Kaufman* v. *Zoning Commission*, supra, 156 (denial not necessary on basis of mere possibility of harm to watershed without evidence quantifying probability of such harm); *Brenmor Properties, LLC* v. *Planning & Zoning Commission*, supra, 162 Conn. App. 703–704 (evidence of noncompliance with ordinance did not obviate need for commission to identify evidence of quantifiable probability of specific harm, without which evidence commission did not demonstrate that denial was necessary); *Eureka V, LLC* v. *Planning & Zoning Commission*, supra, 139 Conn. App. 276–77 (without evidence of likelihood that harm would occur, commission could not as matter of law determine that decision was necessary to protect interest); *Mackowski* v. *Zoning Commission*, 59 Conn. App. 608, 617, 757 A.2d 1162 (denial not necessary to prevent adverse traffic and sewer impact when record lacked specific supporting factual findings), cert. granted, 254 Conn. 949, 762 A.2d 902 (2000) (appeal withdrawn September 21, 2001). Accordingly, in determining whether

the commission has met its burden under § 8-30g, our courts review the record for specific factual findings and evidence quantifying the probability that harm will result. *Kaufman* v. *Zoning Commission*, supra, 156.

A

We begin our analysis by noting that the record is replete with evidence of the need for affordable housing in Fairfield. This need has persisted for decades. In 1989, the original Affordable Housing Plan for Fairfield acknowledged that "Fairfield's single population of unwed, divorced or widowed residents have extreme difficulties in securing affordable housing within the limits of their single income capacities." Yet, within the last ten years, Fairfield has seen little to no improvement in addressing its dire need for affordable housing. In 2011, the town's Affordable Housing Committee reported that since 1989, the town listed forty-seven affordable ownership units; 266 elderly/disabled units; nineteen permanent supportive units; and twenty-one multifamily rental units, only one of which was a one bedroom apartment. Altogether, in 2011, only 2.69 percent of the town's housing consisted of affordable housing units, down from 2.71 percent since 2000.

The record further reflects that, as of 2011, there are no affordable housing units in the Southport section of the town. As mentioned in Garden Homes' initial project description, "[a] multitude of town-produced documents over many years attests to the need for affordable housing in Fairfield," including indications that the community has been reluctant to accept "the [t]own's role in providing or supporting the development of rental or for sale housing at below market rate" and the need to provide affordable housing for young and single people. Other town documents indicated that the town "does not have a large supply of rental housing,

affordable or otherwise," and that the town particularly lacked affordable housing for persons with disabilities.

Based in part on such representations, Fairfield received a $383,457 block grant from the United States Department of Housing and Urban Development in 2012. Of the Connecticut municipalities receiving Community Development Block Grants, Fairfield has the lowest percentage of affordable housing. In 2013, the town sought public input in updating its Affordable Housing Plan. In its request, the town outlined its affordable housing situation and needs, stating: "The lack of affordable housing is a significant issue that many communities face. This is especially true in Fairfield, where the average cost of a single family home in 2012 topped $521,000. Rising housing costs and the lack of inventory among more modestly sized starter homes have meant that many young professionals and working class families are increasingly squeezed out of the local housing market. Additionally, many elderly homeowners that wish to [downsize] cannot find housing to suit their needs. Eighty-four percent of the [t]own's housing stock is comprised of single-family homes. . . . All communities thrive on diverse population; therefore the housing stock should reflect those different needs."

Garden Homes initially proposed "setting aside 30 [percent] of the [proposed] units as affordable for a period of [forty] years." It would offer "[f]ifteen . . . [units] to families whose income is less than or equal to 60 percent of the area or statewide median income, whichever is less . . . [and] [f]ourteen . . . [units] to families whose income is greater than 60 percent but less than or equal to 80 percent of the area or statewide median income, whichever is less." The proposal, therefore, would help ameliorate Fairfield's dire need for affordable housing. The commission, in its letter denying Garden Homes' revised application, acknowledged

that "we all share the view that we need more affordable housing . . . ."

The court acknowledged that the proposal qualified as an affordable housing plan under § 8-30g. Accordingly, in reviewing both Garden Homes' initial and revised application and site plans, the court considered the evidence as to the state of affordable housing in Fairfield and weighed such need against the commission's concerns. The court ultimately determined that the commission's concerns did not outweigh Fairfield's need for affordable housing. We will review both of the court's decisions, in turn.

B

We now consider whether the commission's concerns as to Garden Homes' initial application and site plans outweighed the need for affordable housing. The court concluded that concern as to the inability for large vehicles to turn around upon exiting the site was the only concern that potentially could have outweighed Fairfield's need for affordable housing. The court ruled that the remaining concerns did not outweigh Fairfield's need for affordable housing. We conclude that the court's decision was proper.

In reviewing the propriety of the court's determinations, we are cognizant that the commission bore the burden of proving that its denial was necessary to protect its interests. Speculative concerns do not suffice. See *Brenmor Properties, LLC* v. *Planning & Zoning Commission*, supra, 162 Conn. App. 708 ("speculation . . . ha[s] no place in appellate review" [internal quotation marks omitted]). Moreover, the commission's denial must be based on a quantifiable probability that such harm will occur. See, e.g., *Eureka V, LLC* v. *Planning & Zoning Commission*, supra, 139 Conn. App. 276–77 (without evidence of likelihood that harm would occur, commission could not as matter of law determine

that decision was necessary to protect interest). With these principles in mind, we conclude that the court properly determined that the commission's concerns regarding the twenty foot access way width, lack of sidewalks, proposed number of parking spaces, and lack of a secondary access way do not outweigh Fairfield's need for affordable housing.

As to the access way width, the record reflects that twenty feet is adequate to comply with national fire safety standards. Although town staff have recommended adding four feet to the access way width, in light of evidence that a width of twenty feet is adequate to accommodate fire truck passage, any inability to expand the access way beyond this width does not necessitate the commission's denial. Moreover, even if twenty feet was not the minimally acceptable access way width, the commission still would be required to prove that its denial was necessary to protect substantial public interests. See *Brenmor Properties, LLC* v. *Planning & Zoning Commission*, supra, 162 Conn. App. 703–704 (mere noncompliance with municipal ordinance did not relieve commission of need to satisfy its burden under § 8-30g). Accordingly, we agree with the court's conclusion that, on balance, any concern as to the adequacy of the twenty foot wide access way, or the desirability of increasing the width by four feet, did not outweigh the need for affordable housing.

We additionally agree with the court's determination that concern as to the lack of sidewalks did not outweigh Fairfield's need for affordable housing. The commission cited concerns that during an emergency, pedestrians might attempt to flee in the twenty foot wide right of way, which would thereby endanger the pedestrians and impede emergency vehicles entering the property. The court was not persuaded. It determined that the entrance way would be located in close proximity to the Interstate 95 on-ramp and that there

would be no sidewalks on the east side of Bronson Road, as there would be no particular place for pedestrians to walk. Accordingly, the court opined that pedestrians would not necessarily crowd the entrance way during an emergency. Moreover, the court concluded that such concern was merely theoretical. We agree that the commission's concerns were merely theoretical, and, therefore, the court properly concluded that those concerns did not outweigh Fairfield's need for affordable housing. See id., 694–96.

We also agree with the court's determination that concern as to the ratio of parking spaces to dwelling units did not outweigh Fairfield's need for affordable housing. The court considered differing testimony as to the ratio of parking space per unit. Spear recommended 1.5 parking spaces per unit because it would reduce the need to search for parking spaces during peak hours. Kermit Hua, Garden Homes' traffic engineer, advised that 1.2 parking spaces per unit would be consistent with national standards set forth in the Institute of Transportation Engineers, Parking Generation (4th Ed. 2010). The court determined that the concerns as to the ratio of parking spaces per unit were merely concerns as to the convenience of parking. The commission bears the burden of proving that its denial was necessary, in that it must be predicated upon evidence in the record as to a quantifiable probability that harm would occur. See *Kaufman* v. *Zoning Commission*, supra, 232 Conn. 154–62. We, therefore, conclude that the court properly determined that concern as to the ratio of parking spaces per unit did not outweigh Fairfield's need for affordable housing.

We also agree with the court's determination that concern as to the lack of a second access way did not outweigh Fairfield's need for affordable housing. The court determined that a secondary access way was not necessary to adhere to national fire safety standards.

It, therefore, concluded that the lack of a secondary access way did not necessarily warrant the commission's denial. On our review of the record, we conclude that the court's determination was sound, and concerns as to the lack of a secondary access way did not necessitate the commission's denial.

On this point, however, the court acknowledged the need to afford fire trucks the ability to turn around onsite so that they could leave the site without backing up the full length of the access way. It noted, however, in light of Garden Homes' proposed redesign to the turnaround area, that it might be possible to accommodate this concern via alternative plans. The court, accordingly, remanded the case for consideration of the revised turnaround area. Neither party challenges the propriety of the court's decision to remand the case for this purpose. We will not review the propriety of the court's remand order.

We conclude that the court's determinations as to Garden Homes' initial application were proper.

C

We now consider whether the commission's concerns as to Garden Homes' revised application and site plans outweighed the need for affordable housing. After reviewing the commission's decision to deny Garden Homes' revised application, the court declined to consider certain evidence that it determined exceeded the scope of its remand order. It additionally concluded that the commission, nonetheless, raised no new concerns on remand that outweighed Fairfield's need for affordable housing. On appeal to this court, the commission claims that the court improperly declined to review certain evidence and further claims that it nonetheless satisfied its burden under § 8-30g. We disagree with the commission on both matters.

On remand, the commission "should examine the mandate and the opinion of the reviewing court and proceed in conformity with the views expressed therein." (Emphasis omitted; internal quotation marks omitted.) *West Haven Sound Development Corp.* v. *West Haven*, supra, 207 Conn. 312. A court or administrative body may consider matters that are "relevant to the issues upon which further proceedings are ordered," provided such matters are not "extraneous to the issues and purposes of the remand . . . ."[12] *Cioffoletti* v. *Planning & Zoning Commission*, 220 Conn. 362, 369, 599 A.2d 9 (1991) (concluding court did not exceed scope of remand by resolving issue on grounds not mentioned in previous decision); cf. *Bauer* v. *Waste Management of Connecticut, Inc.*, 239 Conn. 515, 524–25, 686 A.2d 481 (1996) (revised pleadings permitted to consider new facts that occurred since original trial that relate to matter relevant to remand). Nonetheless, the burden rests with the commission in an affordable housing appeal to demonstrate that its decision is supported by sufficient evidence in the record. General Statutes § 8-30g. To this end, "[i]t is well established that in administrative . . . cases, when the party charged with the burden of proof fails to satisfy that burden, it is not entitled to a second bite at the apple on remand." (Internal quotation marks omitted.) *Shelton* v. *Statewide Grievance Committee*, 277 Conn. 99, 111, 890 A.2d 104 (2006).

In the present case, the court had issued a limited remand order directing the commission to consider potential redesigns to the turnaround area. The purpose of the court's order, essentially, was to ensure that fire

[12] The commission indicates that our precedent does not fully address the scope of remand in the context of a land use administrative appeal. We see no reason to consider the scope of the commission's review on the Superior Court's remand of the commission's administrative decision differently than we would the scope of the Superior Court's review on remand from the Appellate Court.

trucks could exit the site without needing to back up the entire length of the access way. If Garden Homes could propose site plan revisions that allowed for this, then a secondary access way would not be necessary.

The commission, however, mistakenly interpreted the court's order in light of the court's determination that concern as to the inability of fire trucks to turn around on-site posed a considerable concern as to public health and safety. The commission, therefore, evaluated Garden Homes' revised site plans more broadly for any new concerns pertaining to the department's ability to access the building and enter and exit the site. In doing so, the commission, in effect, rehashed matters on which the court previously had ruled.

Significantly, a key submission to the commission was the Bisson report, in which the assistant fire chief essentially reiterated the department's prior concerns as to certain features in Garden Homes' proposed plans, including the twenty foot wide access way and the lack of a secondary entrance, and took issue with matters that did not pertain to the turnaround area. By incorporating the Bisson report and other recommendations from the department into its collective statement of denial, the commission evaluated matters well beyond the ability of fire trucks to turn around on-site.

For that reason, the court concluded that the commission went well outside the bounds of the limited remand. As it stated in its memorandum of decision: "The court is surprised by the [commission's] response to the limited remand. The court ordered the remand for consideration of the proposed redesign of the building and parking area to allow a ladder truck to leave the site without having to back up the full length of the access road. The [c]ommission had not considered this proposal due to its late introduction into the hearing

process and the absence of the engineered plan. However, the [commission], instead of focusing on the issue that was remanded, used the remand to bolster its previous objections, which had been ruled on and rejected, adding considerable time and expense to the affordable housing application and project."

Specifically, the court determined that the following considerations, on which the commission had based its denial, pertained to matters beyond the adequacy of the revised turnaround area: lack of secondary access way; lack of area of refuge during an emergency; possibility that residents will flee the site during an emergency; prospective ninety-five cars leaving the site during an emergency against a half dozen emergency vehicles arriving; McCarthy's predicted twenty-four annual emergency responses to the site; prediction that the department would be on-site for hours; ladder truck's ability to access the roof; turnaround area's suitability to accommodate incoming emergency vehicles; and McCarthy's opinion as to alternative site plans to address the department's concerns. The court declined to review this evidence.

"In carrying out a mandate of [the higher court], the [lower] court is limited to the specific direction of the mandate as interpreted in light of the opinion. . . . The [lower] court cannot adjudicate rights and duties not within the scope of the remand." (Citations omitted; internal quotation marks omitted.) *State* v. *Tabone*, supra, 301 Conn. 714–15; *Nowell* v. *Nowell*, 163 Conn. 116, 121, 302 A.2d 260 (1972). "When a case is remanded for a rehearing, the trial court's jurisdiction and duties are limited to the scope of the order. . . . The trial court should not deviate from the directive of the remand." (Citations omitted.) *Leabo* v. *Leninski*, 9 Conn. App. 299, 301, 518 A.2d 667 (1986), cert. denied, 202 Conn. 806, 520 A.2d 1286 (1987); see also *State Bar Assn.* v. *Connecticut Bank & Trust Co.*, 146 Conn. 556,

561, 153 A.2d 453 (1959) (lower court on remand is limited to specific direction of higher court mandate); *Manchester Modes, Inc.* v. *Ellis*, 2 Conn. App. 261, 262, 477 A.2d 164 (1984) (same). The same rules apply to a trial court's remand order to an administrative committee or board. See *Shelton* v. *Statewide Grievance Committee*, supra, 277 Conn. 111.

Accordingly, the court concluded that the commission "had no jurisdiction over those issues not specifically remanded to it." We agree with the court's determination that, on remand, the commission had jurisdiction only over those issues specifically remanded to it. The court correctly concluded that the commission was not entitled to treat the court's limited remand order as a second bite at the apple. See *Shelton* v. *Statewide Grievance Committee*, supra, 277 Conn. 111. Accordingly, the court properly declined to review evidence that exceeded the scope of its remand.

Turning now to the matter that properly was before the commission on remand, we agree with the court's conclusion as to the revised turnaround area. The commission remained concerned that the revised turnaround area would assist the department only upon exiting the development and would not improve access to the building in the event of an emergency. Additionally, the commission noted that in the revised turnaround area, an emergency vehicle would need to make, at a minimum, a W shaped turning movement, and not a hammerhead, Y, or K turn, as demonstrated in the Occupational Safety and Health Administration's 2006 Fire Service Features of Buildings and Fire Protection Systems manual. It, therefore, was concerned that an emergency vehicle might have difficulty making the required turning movements in that area.

The court, upon its review of Garden Homes' revised site plans, characterized the commission's concerns as

to emergency vehicle maneuverability within the turnaround area as mere concern that "some maneuvering will be required" before such vehicle can turn around. It, therefore, was not convinced by the commission's concern that an emergency vehicle might not be able to turn around successfully, or otherwise might require a number of different turning movements, in the revised turnaround area. The court was persuaded that the revised turnaround area satisfactorily addressed its previous concerns, such that the revision constituted "a health and safety improvement" to the plan. Accordingly, the court concluded that the commission's concerns as to maneuverability within the turnaround area did not outweigh the need for affordable housing.

We see no reason to disturb the court's determination as to the adequacy of the revised turnaround area. Garden Homes provided the commission with evidence of turning movement counts, which Garden Homes' engineer calculated using radius measurement provided by the manufacturer of the department's largest fire truck. According to those plans, the department's largest fire truck could turn around by making a four count W shaped turning movement in the proposed turnaround area. The possibility that this maneuver could be difficult or that a reverse in direction could require additional turning movements is just that, a possibility. The record does not contain evidence as to the probability that such a scenario will result in harm to health and safety. See *Eureka V, LLC* v. *Planning & Zoning Commission*, supra, 139 Conn. App. 276–77 (commission required to provide evidence as to likelihood that harm would occur).

We also agree with the trial court's conclusion that "[t]o the extent the [c]ommission has raised any new health and safety concerns . . . those concerns do not outweigh [Fairfield's] need for affordable housing." Fairfield remains in dire need of affordable housing, yet

largely has ignored this need. Although the commission had before it reasonable public health and safety concerns, the commission nonetheless bore the burden of demonstrating that its denial was necessary so as to outweigh the need for affordable housing. *JAG Capital Drive, LLC* v. *Zoning Commission*, supra, 168 Conn. App. 667–68. On the basis of our review of the record, we conclude that the commission has failed to satisfy its burden and that any concerns the commission raised do not outweigh Fairfield's long time and admitted need for affordable housing. We, therefore, conclude that the court properly sustained the plaintiffs' appeal.

The judgment is affirmed.

In this opinion the other judges concurred.

PETER WHITE *v.* LATIMER POINT CONDOMINIUM ASSOCIATION, INC., ET AL.
(AC 41345)

Keller, Bright and Flynn, Js.

Syllabus

The plaintiff, an owner of a condominium unit that is part of the defendant condominium association, sought, inter alia, a permanent injunction against the association and the defendants J and E, owners of a neighboring condominium unit, to prevent J and E from rebuilding their unit, pursuant to federal and town regulations, after the original unit sustained storm damage. The plaintiff alleged that the rebuilding plan, as approved by the association's board, would decrease the plaintiff's water views of Long Island Sound to a percentage not permitted by the association's bylaws. Although the initial rebuilding plans did project a decrease of the plaintiff's water views in violation of the bylaws, the plan that was approved actually projected an increase of the plaintiff's water views by over 2 percent with certain tree trimming and vegetation removal. After the plaintiff appeal to the association's board, which upheld the approval of the construction application, he filed an action in the Superior Court, which rendered judgment in favor of the defendants, concluding that the plaintiff had failed to establish that the actions of the association in approving the construction application of J and E were improper. The plaintiff then appealed to this court, claiming, inter alia,

that the court rendered a judgment that was neither legally correct nor factually supported by the record in that the court failed to make factual findings to support its decision. *Held* that the plaintiff failed to demonstrate that the court erred in rendering judgment in favor of the defendants, as the record could be read to support the court's conclusion that the plaintiff had failed to meet his burden; because the court's decision lacked detailed factual findings and a statement regarding its legal bases, there was no way for this court to determine whether the trial court found the plaintiff's testimony or evidence concerning the reduction in his primary water view not credible, whether it weighed the evidence and found the defendants' evidence more credible or simply more persuasive, or whether something else persuaded the court that the plaintiff had not met his burden, as the plaintiff, who argued that the court failed to make any factual findings but did not seek an articulation or rectification of the court's decision, did nothing to ensure that this court would have a record on appeal that included such factual findings and the legal bases for the court decision, there was no indication in the record that the trial court disregarded case law, as claimed by the plaintiff, and in the absence of an articulation, this court presumed that the trial court acted correctly and undertook a proper analysis of the law.

Argued March 18—officially released August 13, 2019

Procedural History

Action for, inter alia, a permanent injunction to prohibit the defendant home owners from continuing construction on a new condominium unit, and for other relief, brought to the Superior Court in the judicial district of New London and tried to the court, *Hon. Joseph Q. Koletsky*, judge trial referee; judgment for the defendants, from which the plaintiff appealed to this court. *Affirmed.*

Vincent John Purnhagen, for the appellant (plaintiff).

Robert B. Flynn, for the appellees (defendants).

Opinion

BRIGHT, J. The plaintiff, Peter White, appeals from the judgment of the trial court, ruling in favor of the defendants, Latimer Point Condominium Association, Inc., (association), and Gennaro Modugno and Elizabeth Modugno, whom we collectively refer to as the

Modugnos, on the plaintiff's complaint, which was brought pursuant to General Statutes § 47-278.[1] On

[1] General Statutes § 47-278 provides: "(a) A declarant, association, unit owner or any other person subject to this chapter may bring an action to enforce a right granted or obligation imposed by this chapter, the declaration or the bylaws. The court may award reasonable attorney's fees and costs.

"(b) Parties to a dispute arising under this chapter, the declaration or the bylaws may agree to resolve the dispute by any form of binding or nonbinding alternative dispute resolution, provided: (1) A declarant may agree with the association to do so only after the period of declarant control has expired; and (2) an agreement to submit to any form of binding alternative dispute resolution must be in a record authenticated by the parties.

"(c) (1) (A) Except as otherwise provided under subdivision (2) of this subsection, before an association brings an action or institutes a proceeding against a unit owner other than a declarant, the association shall schedule a hearing to be held during a regular or special meeting of the executive board and shall send a written notice by certified mail, return receipt requested, and by regular mail, to the unit owner at least ten business days prior to the date of such hearing. Such notice shall include a statement of the nature of the claim against the unit owner and the date, time and place of the hearing.

"(B) The unit owner shall have the right to give testimony orally or in writing at the hearing, either personally or through a representative, and the executive board shall consider such testimony in making a decision whether to bring an action or institute a proceeding against such unit owner.

"(C) The executive board shall make such decision and the association shall send such decision in writing by certified mail, return receipt requested, and by regular mail, to the unit owner, not later than thirty days after the hearing.

"(2) The provisions of subdivision (1) of this subsection shall not apply to an action brought by an association against a unit owner (A) to prevent immediate and irreparable harm, or (B) to foreclose a lien for an assessment attributable to a unit or fines imposed against a unit owner pursuant to section 47-258.

"(d) (1) Any unit owner other than a declarant, seeking to enforce a right granted or obligation imposed by this chapter, the declaration or the bylaws against the association or another unit owner other than a declarant, may submit a written request to the association for a hearing before the executive board. Such request shall include a statement of the nature of the claim against the association or another unit owner.

"(2) Not later than thirty days after the association receives such request, the association shall schedule a hearing to be held during a regular or special meeting of the executive board and shall send written notice by certified mail, return receipt requested, and by regular mail, to the unit owner at least ten business days prior to the date of such hearing. Such notice shall include the date, time and place of the hearing. Such hearing shall be held not later than forty-five days after the association receives such request.

"(3) The executive board shall make a decision on the unit owner's claim and the association shall send such decision in writing by certified mail,

appeal, the plaintiff claims that the court misapplied and disregarded relevant case law, that it failed to apply properly the 10 percent rule contained in the association's bylaws,[2] that it ignored overwhelming evidence that the association failed to comply with its tree trimming schedule, and that it rendered a judgment that is neither legally correct nor factually supported by the record. We affirm the judgment of the trial court.

The record reveals the following uncontested facts and procedural history, which are relevant to the plaintiff's appeal. The plaintiff is the owner of unit 23 at the Latimer Point Condominiums (Latimer), a common interest ownership community established pursuant to General Statutes § 47-200 et seq. Latimer is situated on Fishers Island Sound in Stonington. The Modugnos are owners of unit 7 at Latimer. Unit 7 is situated between unit 23 and Fishers Island Sound. All of the unit owners at Latimer are organized as the association, and the association is governed by a board of directors (board). The association, pursuant to Article XIV of its bylaws, has in place an Architectural Control Committee (committee) that is staffed and managed by volunteers.

Because of extensive storm damage to unit 7, the Modugnos applied for approval from the committee to build a new home, elevated in height, to meet the new Federal Emergency Management Agency building standards and the town of Stonington's zoning regulations. The plaintiff objected to the application on the ground

return receipt requested, and by regular mail, to the unit owner, not later than thirty days after the hearing.

"(4) The failure of the association to comply with the provisions of this subsection shall not affect a unit owner's right to bring an action pursuant to subsection (a) of this section."

[2] Specifically, § 14.1.2 of the bylaws provides, in relevant part, that the association "shall ensure that no member's water view shall ever be diminished by more than 10 [percent] due to cumulative constructions of other units and/or the association, without the written consent of such member(s) . . . ."

that the new home would interfere substantially with his water view, by obstructing that view by more than the 10 percent allowed under the bylaws. In particular, § 14.1.2 of the bylaws provides, in relevant part, that the association "shall ensure that no member's water view shall ever be diminished by more than 10 [percent] due to cumulative constructions of other units and/or the association, without the written consent of such member(s) . . . . In the event any unit's water view is increased by action pursuant to [§] 14.2, or other means, such increase shall be included in the 10 [percent] determination." Section 14.2 provides, in relevant part, that "in order to reasonably preserve trees and vegetation on members' properties; and to enhance members' . . . existing water views from their units; the board and the [committee] shall regulate the planting, cutting, trimming and removal of trees, shrubs, hedges, and vegetation."

The committee retained Arthur Hayward, a licensed land surveyor, to conduct a primary water view analysis to determine whether the Modugnos' proposed new home would obstruct the plaintiff's primary water view to a degree greater than allowed by the bylaws. Hayward concluded that the Modugnos' proposed house would decrease the plaintiff's water view by 15.4 percent if there was no offsetting vegetation removal and trimming. With various vegetation removal and trimming, however, Hayward concluded that the plaintiff's water view after construction of the Modugnos' new house actually would increase by 41.2 percent. The plaintiff offered no contrary evidence to the committee.

On the basis of Hayward's conclusions, the committee determined that it was obliged to approve the Modugnos' proposal. Nevertheless, it did not order all of the vegetation removal suggested by Hayward. In particular, it ordered one tree trimmed, instead of removed. As a result, Hayward recalculated the effect

on the plaintiff's water view and determined that the plaintiff's water view still would be increased by a net 2.1 percent with the Modugnos' proposed house and the vegetation removal and trimming ordered by the committee. Following the committee's approval, the plaintiff appealed to the board, which upheld the committee's decision. The construction plans later were approved by the Stonington Planning and Zoning Commission, and the Modugnos proceeded to build their home.

During this process, the plaintiff filed an action in the Superior Court, pursuant to § 47-278. In count one of his amended complaint, the plaintiff alleged that the committee and the association "failed to follow and enforce the provisions of Article XIV of the bylaws for construction projects as it pertains to unit owner water view protection when it approved [the] Modugnos construction application [(application)] thereby negatively impacting the primary water view of the plaintiff's unit in contravention of the bylaws." He also alleged, in count two, that the association was in violation of § 47-278 because "the tree trimmings [were] not being carried out by the [association] as it resolved in September, 2005."[3] The plaintiff sought a temporary and permanent

[3] On appeal, the plaintiff also claims a violation of General Statutes § 47-75 (a), which provides: "Each unit owner, and the association of unit owners, shall comply with this chapter, the condominium instruments, and the rules and regulations adopted pursuant thereto. Failure to so comply shall be ground for an action to recover damages or for injunctive relief, or for any other relief to which the party bringing such action may be entitled. Such action may be brought by the association of unit owners against any unit owner or owners or, in any proper case, by one or more aggrieved unit owners on their own behalf or as a class action. If any such action results in a final judgment or decree in favor of the party instituting such action, such judgment or decree may incorporate a provision for reasonable attorney's fees, as specified in such judgment or decree, to be paid by the party against whom such judgment or decree is entered." The plaintiff, however, did not allege such a violation in his complaint, nor did the trial court mention this statute in its decision. Accordingly, we do not consider it.

injunction enjoining the Modugnos from "commencing or continuing with the construction" of their home,[4] an order requiring the committee and the association to follow and enforce the bylaws, monetary damages, costs and attorney's fees, as well as any other legal or equitable relief appropriate.

The case was tried to the court over five days.[5] The plaintiff's only witness was himself. Relevant to this appeal, the plaintiff testified, among other things, that he, as a layperson, calculated the loss of his primary water view from construction of the Modugnos' house as 16.3 percent without vegetation trimming and removal and 15.4 percent with such trimming and removal. The plaintiff based his calculations on a photograph of his primary water view on which he overlaid grids to calculate the loss of his water view. He also testified about a 2002 dispute with another neighbor over the trimming of chokecherry trees, which resulted in the committee in 2005 adopting a trimming schedule for those trees. He further testified that the committee had failed to trim the trees according to that schedule.

The defendants called four witnesses, including Hayward. Hayward testified about his training and experience as a licensed professional land surveyor since

[4] The defendants argue, in part, as they did before the trial court, that the plaintiff was not entitled to the injunctive relief sought because the Modugnos had completed construction of their home, rendering their specifically requested relief moot, long before trial. They argue that the plaintiff never sought a temporary injunction to stop the construction, and that the plaintiff should be prohibited from modifying his requested relief to now include a request that the court order the Modugnos to tear down a portion of their completed home. The trial court did not rule on the mootness issue because it concluded that the plaintiff had failed to meet his burden on the issue of whether the association had failed to comply with its bylaws.

[5] The court consolidated for trial this case and a similar case in which owners of another Latimer unit alleged that the Modugnos' new house improperly decreased their water view. *Wojeck* v. *Latimer Point Condominium Assn. Inc.*, Superior Court, judicial district of New London, Docket No. CV-11-6010879-S (January 7, 2014).

1975. He then testified at length regarding the method he used to reach the conclusions he reported to the committee regarding the effect the Modugnos' construction of their new house would have on the plaintiff's primary water view. In particular, he explained how he determined that the house would reduce the plaintiff's water view by 15.4 percent without any vegetation removal or trimming and would increase the plaintiff's water view by 2.1 percent with vegetation trimming and removal as specified by the committee. He also testified regarding the differences between his methodology and that used by the plaintiff.

The defendants also presented Andrew Feinstein, the chairman of the committee. Feinstein testified that he was chairman during the period when the committee approved the Modugnos' application, and had been on the committee since 2008. He testified about the process by which the Modugnos' application was approved. He also testified about the committee's process for trimming trees, and specifically about the chokecherry trees on which the plaintiff testified. He testified as to when the trimmings of the chokecherry trees took place and testified that more extensive trimming of the trees has occurred since approval of the Modugnos' construction in order to ensure that the plaintiff's primary water view is maintained.

At the conclusion of the trial, the court rendered judgment orally in favor of the defendants, concluding that the plaintiff had failed to establish that the actions of the association in approving the defendants' construction application were improper. This appeal followed.

The plaintiff claims that the court failed to apply properly the 10 percent rule contained in the bylaws, ignored overwhelming evidence that the association failed to comply with its tree trimming schedule, and

rendered a judgment that is neither legally correct nor factually supported by the record. The plaintiff also complains throughout his appellate brief that the court failed to make any factual findings, including his argument that "[b]ecause the trial court made absolutely no findings of fact in its memorandum of decision, it is impossible to determine how exactly the trial court came to its conclusion that the defendants were in substantial compliance with the bylaws. By reaching its decision without making any findings of fact in support thereof, the trial court was able to completely disregard relevant case law . . . ." He also argues that "there was no specific finding of fact by the trial court that, due to the tree trimming and vegetation removal proposed by the [committee], the [Modugnos'] 2015 building application was brought into compliance with the bylaws' [10] percent rule." On the basis of the limited record before us, we conclude that the plaintiff's claims are fatally flawed.

When the facts underlying a claim on appeal are not in dispute and that claim is subject to plenary review, "the precise legal analysis undertaken by the trial court is not essential to the reviewing court's consideration of the issue on appeal." (Footnote omitted.) *Community Action for Greater Middlesex County, Inc.* v. *American Alliance Ins. Co.*, 254 Conn. 387, 396, 757 A.2d 1074 (2000). When, however, the plaintiff's claim necessarily challenges the court's factual determinations, we employ the clearly erroneous standard of review to the court's factual findings: "A finding of fact will not be disturbed unless it is clearly erroneous . . . . In applying the clearly erroneous standard to the findings of a trial court, we keep constantly in mind that our function is not to decide factual issues de novo." (Citations omitted; internal quotation marks omitted.) *MJM Landscaping, Inc.* v. *Lorant*, 268 Conn. 429, 436–37, 845 A.2d 382 (2004). Moreover, "[i]t is within the province

of the trial court, when sitting as the fact finder, to weigh the evidence presented and determine the credibility and effect to be given the evidence. . . . Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude." (Internal quotation marks omitted.) *Wyatt Energy, Inc.* v. *Motiva Enterprises, LLC*, 308 Conn. 719, 737, 66 A.3d 848 (2013).

At the outset, we observe that our review of the plaintiff's claims is not foreclosed completely but, rather, is restricted severely by the following circumstances. First, we note that there is no indication in the record before us that the trial court "completely disregard[ed] relevant case law." Although the court's decision in this case lacks detailed factual findings and a statement regarding its legal bases, and although the plaintiff raises this insufficiency throughout his appellate brief, the plaintiff did nothing to help ensure that we would have a record on appeal that included such factual findings and the legal bases for the court's decision. In this case, the trial court rendered a short oral decision, which stated in relevant part: "I find on all counts for the [Modugos] and the [association]. *The plaintiff has failed to prove* that there was other than substantial compliance with the bylaws in respect to the actions of the [b]oard in approving the . . . application for the Modugno[s'] 2015 construction—the 2015 [a]pplication. . . . [J]udgment . . . enters for the defendant[s]. . . . [T]he court finds that . . . *the plaintiff has failed to prove* that the [b]oard's action approving the 2015 application was in any way improper." (Emphasis added.)

Second, although rendering judgment in favor of the defendants on the entirety of the plaintiff's complaint, the court's decision did not mention the second count of the plaintiff's complaint, regarding the tree trimming schedule, in its decision. See *United Amusements &*

Vending Co. v. *Sabia*, 179 Conn. App. 555, 560–62, 180 A.3d 630 (2018) (Appellate Court unable to review claims of error because trial court made no factual findings related to claims and appellant did not request articulation).[6]

Third, the plaintiff did not seek an articulation or a rectification of the court's decision pursuant to Practice Book § 66-5, and he failed to alert the court to the fact that its oral decision did not comply with the requirements of Practice Book § 64-1.

Practice Book § 64-1 provides in relevant part: "(a) The trial court shall state its decision either orally or in writing, in all of the following: (1) in rendering judgments in trials to the court in civil and criminal matters . . . . *The court's decision shall encompass its conclusion as to each claim of law raised by the parties and the factual basis therefor.* . . .

"(b) If the trial judge fails to file a memorandum of decision or sign a transcript of the oral decision in any case covered by subsection (a), the appellant may file with the appellate clerk a notice that the decision has

[6] The defendants state in their brief that the plaintiff has appealed only from the court's judgment as to count one of his complaint, and that he has not appealed from the court's judgment in favor of the defendants on count two. The plaintiff did not dispute this contention in his reply brief. Although the plaintiff's appeal form does not limit his appeal to count one of his complaint, the plaintiff's briefs do not address substantively count two of his complaint, and the relief requested by the plaintiff on appeal relates solely to count one. Consequently, to the extent the plaintiff did appeal from the judgment rendered against him on count two of his complaint, we deem any claims regarding that portion of the judgment abandoned. See *Awdziewicz* v. *Meriden*, 317 Conn. 122, 125 n.3, 115 A.3d 1084 (2015) ("[when] an issue is merely mentioned, but not briefed beyond a bare assertion of the claim, it is deemed to have been waived" [internal quotation marks omitted]); *Harris* v. *Bradley Memorial Hospital & Health Center, Inc.*, 306 Conn. 304, 319, 50 A.3d 841 (2012) ("[a]n appellant who fails to brief a claim abandons it" [emphasis omitted; internal quotation marks omitted]), cert. denied, 569 U.S. 918, 133 S. Ct. 1809, 185 L. Ed. 2d 812 (2013).

not been filed in compliance with subsection (a). The notice shall specify the trial judge involved and the date of the ruling for which no memorandum of decision was filed. The appellate clerk shall promptly notify the trial judge of the filing of the appeal and the notice. The trial court shall thereafter comply with subsection (a)." (Emphasis added.)

Practice Book § 66-5 provides in relevant part: "A motion seeking corrections in the transcript or the trial court record or seeking an articulation or further articulation of the decision of the trial court shall be called a motion for rectification or a motion for articulation, whichever is applicable. Any motion filed pursuant to this section shall state with particularity the relief sought and shall be filed with the appellate clerk. Any other party may oppose the motion by filing an opposition with the appellate clerk within ten days of the filing of the motion for rectification or articulation. The trial court may, in its discretion, require assistance from the parties in providing an articulation. Such assistance may include, but is not limited to, provision of copies of transcripts and exhibits. . . ."[7]

Consequently, in the present case, we lack the benefit of any findings or legal bases for the decision of the trial court, other than the court's finding that "the plaintiff has failed to prove that there was other than substantial compliance with the bylaws in respect to the actions of the [b]oard in approving the . . . application for the Modugno[s'] 2015 construction—the 2015 [a]pplication." "Where an appellant has failed to avail himself

[7] Practice Book § 61-10 (b) provides in relevant part that "[t]he failure of any party on appeal to seek articulation pursuant to Section 66-5 shall not be the sole ground upon which the court declines to review any issue or claim on appeal." The commentary to that section explains, however, that "subsection (b) is not intended to preclude the court from declining to review an issue where the record is inadequate for reasons other than solely the failure to seek an articulation, such as, for example, the failure to procure the trial court's decision pursuant to Section 64-1 (b) . . . ."

of the full panoply of articulation and review procedures, and absent some indication to the contrary, we ordinarily read a record to support, rather than to contradict, a trial court's judgment." *Bell Food Services, Inc.* v. *Sherbacow*, 217 Conn. 476, 482, 586 A.2d 1157 (1991). Citing *Bell Food Services, Inc.*, this court recently reaffirmed that "our appellate courts often have recited, in a variety of contexts, that, in the face of an ambiguous or incomplete record, we will presume, *in the absence of an articulation*, a trial court acted correctly, meaning that it undertook a proper analysis of the law and made whatever findings of fact were necessary." (Emphasis in original) *Zaniewski* v. *Zaniewski*, 190 Conn. App. 386, 396, A.3d (2019); see also *Sunset Gold Realty, LLC* v. *Premier Building & Development, Inc.*, 133 Conn. App. 445, 456 n.7, 36 A.3d 243 ("[b]ecause neither of the parties requested an articulation to fortify the record, to the extent that it is unclear what the court relied on . . . we read an ambiguous trial record to support, rather than undermine, the judgment"), cert. denied, 304 Conn. 912, 40 A.3d 319 (2012).

The record in this case can be read in a number of ways to support the trial court's finding that the plaintiff failed to meet his burden of proof. The court may have found the plaintiff's testimony regarding the reduction in his primary water view not credible. Alternatively, the court simply may have found Hayward's testimony more persuasive than that of the plaintiff. As noted previously in this opinion, the plaintiff testified as a layperson. Hayward has been a licensed professional land surveyor for more than forty years. Furthermore, the court was not required to accept the plaintiff's proffered methodology over Hayward's.

Indeed, during oral argument before this court, the plaintiff's attorney specifically was asked by Judge Flynn: "Well, let me ask you something, there were two

views of the evidence, correct . . . one that the 10 percent rule was satisfied, and one that it was not?" Counsel responded: "Yes, Your Honor." Counsel then agreed that this required that he demonstrate clear error in the trial court's decision in order to be successful on appeal. Nevertheless, because there was conflicting evidence of compliance, and the court set forth no factual findings or legal bases in its decision, the plaintiff cannot demonstrate clear error, and we will not presume it. The same is true with respect to the plaintiff's argument that the committee, the board, and the court should not have relied on anticipated vegetation removal and trimming to conclude that there was compliance with the 10 percent rule. The court may have found the plaintiff's testimony and other evidence unpersuasive or it may have concluded that Feinstein's testimony was more believable.

In conclusion, the court found that the plaintiff did not prove his case; we know nothing more than that. There is no way for us to determine whether the court found the plaintiff's testimony and/or evidence completely noncredible, whether it weighed the evidence and found the defendants' evidence more credible or simply more persuasive, or whether something else persuaded the court that the plaintiff had not met his burden.

"This court will neither speculate with regard to the rationale underlying the court's decision nor, in the absence of a record that demonstrates that error exists, presume that the court acted erroneously. See, e.g., *State* v. *Milner*, 325 Conn. 1, 13, 155 A.3d 730 (2017); *Stacy B.* v. *Robert S.*, 165 Conn. App. 374, 382, 140 A.3d 1004 (2016)." *Rose B.* v. *Dawson*, 175 Conn. App. 800, 805; 169 A.3d 346 (2017). "It is well settled that [we] do not presume error; the trial court's ruling is entitled to the reasonable presumption that it is correct unless the party challenging the ruling has satisfied its burden

demonstrating the contrary." (Internal quotation marks omitted.) *Ellen S.* v. *Katlyn F.*, 175 Conn. App. 559, 565, 167 A.3d 1182 (2017). Because the record can be read to support the court's conclusion that the plaintiff failed to meet his burden, the plaintiff has failed to demonstrate that the court erred.

The judgment is affirmed.

In this opinion, the other judges concurred.

MICHAEL DEROSE *v.* JASON ROBERT'S, INC., ET AL. (AC 40715)

Keller, Prescott and Harper, Js.

Syllabus

The plaintiff sought to confirm an arbitration award in favor of the defendants, who filed a motion to vacate the award, which was issued in connection with an employment dispute and the defendants' alleged breach of a licensed dealer agreement between the parties regarding the defendants' concrete business. The trial court granted the plaintiff's application to confirm the award, denied the defendants' motion to vacate the award and rendered judgment thereon, from which the defendants appealed to this court. *Held*:

1. The defendants could not prevail on their claim that the trial court improperly found that the arbitrator effectively had defaulted them for their failure to appear at the final arbitration hearing, which they claim caused the court to fail to consider the merits of their challenges to the arbitration award: the arbitrator expressly found in the award that he had continued the final arbitration hearing to allow the defendants additional time to submit a rebuttal to the plaintiff's case and to present additional witnesses and that the final hearing proceeded even though the defendants did not submit their rebuttal or attend the hearing, which suggested that the arbitrator to some degree had relied on the plaintiff's unrebutted arguments as a result of the defendants' absence, and the trial court's finding that the arbitrator effectively had defaulted the defendants was supported by the evidence in the record and was not clearly erroneous; moreover, even if the trial court erred in finding that the defendants effectively had been defaulted, the defendants failed to establish that that finding affected the court's consideration of their claim on the merits.
2. The defendants could not prevail on their claim that the trial court improperly ruled on their motion to vacate the arbitration award without first providing them with an evidentiary hearing: the defendants failed to

cite any authority mandating that the court hold an evidentiary hearing prior to ruling on the motion to vacate the arbitration award, in the absence of an express statute or rule of practice requiring it, the determination of whether to hold an evidentiary hearing is within the discretion of the trial court, the relevant statute (§ 52-420 [a]) requires that any motion to vacate be heard in the manner provided by law for written motions at a short calendar session, and a party seeking a hearing on a short calendar motion generally must make that request on the short calendar claim form or by motion, which the defendants here failed to do; moreover, the defendants' claim to the contrary notwithstanding, the defendants were in fact afforded an evidentiary hearing, as the record showed that, although the court initially denied their motion without hearing evidence, it immediately reopened the proceedings after the defendants requested an opportunity for an evidentiary hearing, allowed them to create an evidentiary record by admitting into evidence four exhibits that they proffered, and permitted them to make additional legal arguments.

3. The defendants' claim that the trial court improperly granted the arbitrator's motion to quash a subpoena duces tecum, which sought to compel the arbitrator to testify and to produce his arbitration file, was not reviewable, that claim having been inadequately briefed; although the defendants' brief cited to cases for the proposition that an arbitrator may be required to testify at a hearing on a motion to vacate an arbitration award, the defendants did not provide any analysis as to how they were harmed by the granting of the motion to quash or how precluding the arbitrator's testimony constituted an abuse of discretion, especially given that the court nonetheless admitted into evidence certain correspondence between the parties and the arbitrator at the defendants' request.

4. The defendants could not prevail on their claim that the trial court erred in confirming the arbitration award because the arbitrator failed to address the entirety of the arbitration submission, which was based on their claim that the arbitrator ignored their special defenses, set-offs and counterclaim in issuing the award; although the submission was extremely broad and encompassed the defendants' special defenses, set-offs and counterclaim, and the arbitration award contained no express findings or conclusions specific to those pleadings, the defendants failed to establish that the arbitrator did not consider or decide the special defenses, set-offs and counterclaim, rather than tacitly considering and rejecting them prior to determining damages, particularly given that the defendants took no steps before the arbitrator to determine whether he had considered the entirety of the submission and presented no evidence to the trial court as to what they submitted to the arbitrator other than the pleadings in support of their special defenses, set-offs and counterclaim.

5. The trial court properly denied the defendants' motion to vacate the arbitration award on public policy grounds, which award was issued fourteen years after the parties' dispute initially arose and four years after arbitration commenced; although courts have described arbitration as an efficient system of alternative dispute resolution and the general policy favoring arbitration encompasses the concomitant policy that arbitrations proceed expeditiously, the attribution of promptness is aspirational and does not create an explicit, well-defined and dominant public policy that mandates that arbitrations be completed within a strict designated time period, and the award here did not violate a public policy of expedience as embodied by the doctrine of laches, as that doctrine is largely governed by the circumstances of the particular case and, therefore, is left to the discretion of the trial court, the defendants were unable to produce any case law in which a court vacated an arbitration award as violative of public policy because the arbitration was not completed in an expeditious manner, and even if the award here had violated a public policy of expedience in arbitration matters, the arbitrator expressly found that it was the defendants who had caused the delay in the arbitration proceedings.

6. The defendants' claim that the arbitrator's award should be vacated pursuant to statute (§ 52-418 [a] [4]) because it constituted a manifest disregard of the law was unavailing; the defendants having failed to meet their burden of demonstrating that the arbitrator ignored clearly applicable governing law or that the claimed manifest disregard of the law was anything more than their mere disagreement with the arbitrator's interpretation and application of established legal principles, it was unnecessary for this court to reach the merits of the defendants' claim.

Argued January 31—officially released August 13, 2019

Procedural History

Application to confirm an arbitration award, brought to the Superior Court in the judicial district of Ansonia-Milford, where the defendants filed a motion to vacate the award; thereafter, the matter was tried to the court, *Hon. Arthur A. Hiller*, judge trial referee; judgment granting the application to confirm and denying the motion to vacate, from which the defendants appealed to this court; subsequently, the court issued an articulation of its decision. *Affirmed.*

Lori Welch-Rubin, for the appellants (defendants).

Thomas J. Weihing, for the appellee (plaintiff).

PRESCOTT, J. The defendants, Jason Robert's, Inc., and Robert D. Hartmann, Sr., appeal from the judgment of the trial court denying their motion to vacate an arbitration award and granting an application to confirm the award filed by the plaintiff, Michael DeRose. On appeal, the defendants claim that the court improperly (1) found that the arbitrator effectively had defaulted the defendants for failing to appear at the final arbitration hearing, and that this allegedly erroneous factual finding colored the court's decision-making process with respect to the motion to vacate; (2) failed to provide the defendants with an evidentiary hearing before ruling on the motion to vacate; (3) granted a motion to quash a subpoena duces tecum directed at the arbitrator and his files; (4) failed to vacate the arbitration award on the ground that the arbitrator had not addressed the entirety of the submission; (5) confirmed an award that violated public policy; and (6) confirmed an award made in manifest disregard of the law in violation of General Statutes § 52-418 (a) (4).[1] We disagree and, accordingly, affirm the judgment of the trial court.

The facts underlying the parties' long-standing dispute are set forth in our decision in *Jason Robert's, Inc.* v. *Administrator, Unemployment Compensation*

[1] General Statutes § 52-418 (a) provides in relevant part: "Upon the application of any party to an arbitration, the superior court for the judicial district in which one of the parties resides . . . 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."

Act, 127 Conn. App. 780, 782–85, 15 A.3d 1145 (2011). Additional facts and procedural history are set forth in the arbitrator's award and in the trial court's oral decision and subsequent articulation. "[Jason Robert's, Inc.,] is a concrete business. During the years 1998, 1999 and 2000, [it] employed [DeRose] as a concrete artisan. While [DeRose] was working for [Jason Robert's, Inc.] as an employee, he asked for a raise in salary. In order to give [DeRose] the potential to earn more money, [Jason Robert's, Inc.,] directed [DeRose] to set up a business so that he could enter into an agreement with [it] as a licensed dealer. In or about 2001, after [DeRose] had set up his own business, [Jason Robert's, Inc.,] presented him with a licensed dealer authorization (agreement), and, on May 4, 2001, [DeRose] signed the agreement and became a licensed dealer for [Jason Robert's, Inc.]

* * *

"[DeRose] was a licensed dealer of [Jason Robert's, Inc.,] during the years 2001 and 2002. During those years, [Jason Robert's, Inc.,] classified [DeRose] as an independent contractor. At the end of 2002, [DeRose] terminated the agreement because the arrangement had become unprofitable for him. After terminating the agreement, [DeRose] filed a claim for benefits under the Unemployment Compensation Act (act), General Statutes § 31-222 et seq. This claim for benefits caused . . . the administrator of the act [administrator] to issue a missing wage assignment. . . . On April 25, 2003 . . . [a field auditor of the employment security division of the state department of labor] issued [a] written report, wherein he concluded that [DeRose] was an employee [of Jason Robert's, Inc.,] during the years 2001 and 2002. In a letter dated April 29, 2003, the [administrator] informed [Jason Robert's, Inc.,] of this determination and that there would be an assessment for the contributions due in the amount of

$4366.03 plus interest. On May 16, 2003, [Jason Robert's, Inc.,] appealed this determination to the appeals division . . . . On September 12, 2007 . . . the appeals referee affirmed the determination. In its decision, the appeals referee applied § 31-222 (a) (1) (B) (ii), more commonly known as the 'ABC test,' . . . and concluded that [DeRose] was an employee of [Jason Robert's, Inc.] The referee reached this conclusion after having determined that [Jason Robert's, Inc.,] failed to satisfy any of the three prongs of the ABC test." (Footnote omitted.) Id., 782–84.

Both the Worker's Compensation Review Board (board) and the Superior Court subsequently affirmed the decision of the appeals referee. Id., 784–85. Jason Robert's, Inc., then appealed to this court claiming that, in determining whether DeRose was an employee, the board should have applied General Statutes § 42-133e (b), rather than the "ABC test" to the underlying facts. Id., 785. We disagreed and affirmed the judgment of the trial court. Id.

In 2007, during the pendency of the worker's compensation appeal, DeRose filed a civil action against the defendants.[2] The operative complaint contained seven counts in which DeRose alleged that the defendants (1) breached their agreement with him by failing to compensate him for various jobs, (2) breached the implied covenant of good faith and fair dealing, (3) made negligent misrepresentations, (4) made fraudulent misrepresentations, (5) violated several state labor statutes, (6) committed unfair trade practices, and (7) negligently inflicted emotional distress. In May, 2011,

[2] DeRose first commenced a civil action against the defendants in 2005. The 2007 action was filed with reference to the accidental failure of suit statute, General Statutes § 52-592. It is not clear from the record, however, precisely how the 2005 action was disposed of or whether it was consolidated into the 2007 action, as was requested by Jason Robert's, Inc., in a motion to consolidate.

the defendants filed an amended answer to the complaint raising a number of special defenses.[3] Jason Robert's, Inc., also filed a counterclaim against DeRose, alleging that he had breached the parties' agreement by failing to complete work or utilizing poor workmanship, and committed statutory theft by retaining funds belonging to Jason Robert's, Inc.

On June 6, 2012, the parties entered into an agreement to resolve their civil action through binding arbitration. DeRose subsequently withdrew his civil action from the Superior Court. The arbitration agreement contains a clause titled "Submission to Arbitration and Scope of Arbitration," which states as follows: "The controversy shall be submitted to a panel of one arbitrator (Attorney Daniel Portanova), who shall hear, settle and determine by arbitration the matters in controversy within the scope of the claim based upon the evidence and testimony presented. The arbitrator is permitted, but not required, to apply the rules of evidence in civil cases when considering the evidence presented. No party shall have the right or power to revoke the submission without the written consent of the other party except on the grounds as exist in law or equity for the rescission or revocation of any contract. All issues shall be submitted to and fully and finally adjudicated by the arbitrator including, but not limited to, the issue of coverage, liability, causation and damages. The arbitrator will apply the procedural and substantive law of Connecticut."

The arbitrator held hearings between July 1, 2012, and January 24, 2013, during which the parties submitted evidence, including testimony from DeRose and Hartmann. A period of inactivity then followed. By letter

[3] The defendants raised by way of special defense accord and satisfaction, failure to mitigate damages, statute of limitations, res judicata, and collateral estoppel.

dated September 25, 2014, the arbitrator notified the parties as follows: "Please be advised that I am holding [$2,100] in my trustee account regarding the above arbitration. I have attached my invoice showing that each respective party has paid [$4,500]; therefore, each party is owed a refund of [$1,050]."

DeRose sent the arbitrator a letter dated May 15, 2015, attached to which were additional documents that DeRose sought to file with the arbitrator "with the intention to restart the . . . arbitration matter." A copy of that letter and its attachments were also sent to the defendants' counsel. The defendants responded to DeRose by letter dated May 19, 2015. The defendants indicated that, because the last arbitration hearing had taken place on January 24, 2013, and DeRose, until he sent the May 15, 2015 letter, had not complied with the arbitrator's request "to submit everything," they considered the arbitration abandoned.[4] DeRose replied to the defendants by letter dated June 1, 2015. In the letter, he stated that the arbitration proceedings had never been closed, he had not abandoned the matter, and he intended to proceed to a final decision. He indicated that he had no more testimony or evidence to present and that, if the defendants failed to participate going forward, they did so at their own peril. A few days later, on June 4, 2015, DeRose sent a letter to the arbitrator stating: "It has come to my attention that [counsel for the defendants] will not file any more documents or bring any witnesses into arbitration. We therefore respectfully request that you declare the arbitration closed and issue a decision in this matter."

[4] Although the defendants state in their brief that nearly eight months passed between the time "the arbitrator had refunded his remaining retainer" and DeRose's May 15, 2015 letter, there is nothing in the record indicating whether the arbitrator ever issued a refund to the parties or whether the defendants sought any clarification or confirmation of whether the arbitrator deemed the arbitration proceedings closed or abandoned.

The arbitrator next met with the parties in March, 2016. He later sent notice to the parties by letter dated April 1, 2016, stating: "I have reviewed the file since our meeting of last week. This file will remain open for further consideration." The parties and the arbitrator met again in June, 2016. By that time, Hartmann had discharged the defendants' attorney and was proceeding as a self-represented party. Hartman made an oral motion to have the arbitration terminated, but the arbitrator denied the motion, continuing the matter until January 16, 2017.

Despite the arbitrator's decision that the arbitration would go forward, the defendants, who were now represented by their present counsel, sent DeRose a letter dated January 13, 2017, asserting that they intended to treat the arbitration as abandoned "by virtue of laches." The defendants did not attend the final January 16, 2017 arbitration hearing, despite having been duly served with subpoenas.

On February 1, 2017, the arbitrator issued a final award resolving the matter in favor of DeRose. Among other things, the arbitrator found that (1) DeRose was an employee of Jason Robert's, Inc., (2) DeRose never authorized the defendants to make deductions as was claimed by the defendants, and (3) Hartman was the individual who ultimately was responsible for the wage violations that had occurred. The arbitrator found that the defendants were liable to DeRose under General Statutes § 31-72,[5] and ordered them to pay DeRose dam-

[5] General Statutes § 31-72 provides in relevant part: "When any employer fails to pay an employee wages in accordance with the provisions of [General Statutes §§] 31-71a to 31-71i, inclusive, or fails to compensate an employee in accordance with [General Statutes §] 31-76k . . . such employee . . . shall recover, in a civil action, (1) twice the full amount of such wages, with costs and such reasonable attorney's fees as may be allowed by the court, or (2) if the employer establishes that the employer had a good faith belief that the underpayment of wages was in compliance with law, the full amount of such wages or compensation, with costs and such reasonable attorney's fees as may be allowed by the court. . . ."

ages, costs, and attorney's fees totaling $171,938.20.[6] Notice of the arbitrator's award issued on February 3, 2017.

On February 15, 2017, DeRose filed an application with the Superior Court for an order confirming the arbitration award. See General Statutes § 52-417.[7] On March 6, 2017, the defendants filed a motion to vacate the arbitration award pursuant to § 52-418. According to the defendants, the arbitrator's award violated clear public policy, as embodied in the equitable doctrine of laches, and contravened one or more of the statutory proscriptions set forth in § 52-418. The defendants also filed an objection to DeRose's application to confirm the arbitration award raising these same arguments. DeRose filed an objection to the motion to vacate the arbitration award, arguing that no legally cognizable reason existed to vacate the award.

The defendants served a subpoena duces tecum on the arbitrator ordering him to appear in court on July 17, 2017, and to produce the entire arbitration file maintained by him in his capacity as arbitrator. The arbitrator filed a motion to quash the subpoena, arguing that the contents of the arbitration file, which included his research and personal notes, were not relevant to any of the theories the defendants had advanced in support of their motion to vacate the arbitration award.

The parties argued the motion to quash before the court on July 17, 2017. After hearing from the parties,

[6] Specifically, the award consisted of $125,000 in damages, $45,000 in attorney's fees, and $1938.20 in costs.

[7] General Statutes § 52-417 provides in relevant part: "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 . . . 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 [General Statutes §§] 52-418 and 52-419."

the court granted the arbitrator's motion to quash the subpoena. The court also denied the defendants' motion to vacate the arbitration award and granted the application to confirm the award. The court explained as follows on the record: "The court has heard the arguments. The court has read all the papers in this file that have been filed. The court will grant the motion to quash the subpoena. The court will find that any delay in this arbitration was caused because the arbitrator gave the defendants extra time to present their case. The court finds no prejudice. The court finds that any delay [that] may have occurred did not cause any prejudice to the defendants and that the delay, if anything, was to their benefit. . . .

"The defendants were apprised of the final hearing date, and . . . Hartmann, both in his corporate and his personal capacity, [was] served by subpoenas on January 11, 2017. Hartmann and Jason Robert's, Inc., were in effect defaulted and failed to appear at the hearing. And as a result of their failure to appear at the hearing, Hartmann did not have another attorney filing an appearance on his behalf and he did not ask for a continuance and had a letter sent that the defendants were not coming to the hearing. . . . Hartmann, once again, did not appear at the final hearing, nor did any attorney representing him, and the arbitrator went forward after finding the defendants had notice of the hearing. The defendants have provided no valid reason that the arbitrator's decision should be vacated, and the [application] to confirm is granted."

The defendants immediately objected to the court having ruled without first affording them an evidentiary hearing at which, they assert, they would have called the arbitrator to testify[8] and would have offered additional

[8] The defendants never made an offer of proof as to what testimony they intended to elicit from the arbitrator.

documentary evidence. The court indicated that it would not allow the defendants to call the arbitrator to testify because "what [they were] asking for is irrelevant and improper." The court nevertheless agreed to open and reconsider its ruling and allowed the defendants an opportunity to make additional legal arguments and offer whatever documentary evidence that they believed supported their position that the award should be vacated. The defendants offered four documents, which were admitted into evidence as full exhibits, and made additional legal arguments with respect to those exhibits.[9] The defendants requested time to submit additional written briefs addressing the motion to quash and the motion to vacate the arbitration award, but the court indicated that briefs already had been filed and that it had heard enough. The court ordered that its prior rulings granting the motion to quash, denying the motion to vacate, and confirming the arbitration award would stand. This appeal followed.

On September 7, 2017, the defendants filed a motion for articulation pursuant to Practice Book § 66-5. DeRose filed an objection to the motion on November 1, 2017. The court, on November 21, 2017, granted in part the defendants' motion and articulated its decision further. Specifically, the court responded to the defendants' request that the court articulate the basis for its denial of their motion to vacate the arbitration award on the grounds that the award violated public policy and § 52-418 (a) (4). The court first indicated that the arbitration agreement at issue was unrestricted, that

[9] The exhibits were (1) the May 15, 2015 letter from DeRose's attorney to the arbitrator, (2) the June 4, 2015 letter from DeRose's attorney to the arbitrator, (3) a May 25, 2016 e-mail from the defendants' former attorney, David Volman, notifying the arbitrator that he was no longer representing Jason Robert's, Inc., and (4) the May 4, 2001 licensing agreement between DeRose and Jason Robert's, Inc.

both parties had acknowledged this fact in their respective pleadings, and that this severely limited the bases on which the court could set aside the award.[10]

With respect to the defendants' public policy argument, which was premised on the theory that recovery by DeRose in the arbitration was barred by laches, the court concluded that because "the delay at issue was the fault of the defendants, the doctrine of laches did not apply to the [present] matter." With respect to whether the award violated § 52-418 (a) (4) because the arbitrator allegedly had disregarded the procedural and substantive law of Connecticut, the court indicated that the defendants' claim, in essence, simply asserted that the arbitrator misapplied the law rather than acted with "manifest disregard of the law" in violation of § 52-418 (a) (4). The court denied the defendants' motion to vacate the award because they improperly "sought to retry the factual and legal determinations made by the arbitrator pursuant to a valid and unrestricted arbitration agreement."[11]

Before turning to our discussion of the specific claims raised by the defendants, we first set forth the very limited nature of judicial review regarding arbitration

[10] Although counsel for the defendants argued at the July 17, 2017 hearing that the parties' submission was not unrestricted because it contained a clause requiring the arbitrator to apply the substantive and procedural laws of Connecticut, counsel was not able to provide the court with any legal authority supporting that proposition. A submission is unrestricted unless it contains language that expressly restricts the breadth of the issues to be decided, reserves explicit rights, or conditions the award on court review. See *Industrial Risk Insurers* v. *Hartford Steam Boiler Inspection & Ins. Co.*, 258 Conn. 101, 109, 779 A.2d 737 (2001). Because the defendants have not raised as a distinct claim on appeal that the trial court improperly determined that the parties' submission to arbitration was unrestricted, we view the award in this case as arising out of an unrestricted submission.

[11] The defendants filed a motion for review of the court's articulation pursuant to Practice Book § 66-7. This court granted the motion for review but denied the defendants' request to order the court to further articulate the basis for its decision.

awards. "A party's choice to accept arbitration entails a trade-off. A party can gain a quicker, less structured way of resolving disputes; and it may also gain the benefit of submitting its quarrels to a specialized arbiter . . . . Parties lose something, too: the right to seek redress from the courts for all but the most exceptional errors at arbitration." (Internal quotation marks omitted.) *Bridgeport* v. *Kasper Group, Inc.*, 278 Conn. 466, 478–79, 899 A.2d 523 (2006). "The propriety of arbitration awards often turns on the unique standard of review and legal principles applied to decisions rendered in this forum. [Thus, judicial] review of arbitral decisions is narrowly confined. . . . Because we favor arbitration as a means of settling private disputes, we undertake judicial review of arbitration awards in a manner designed to minimize interference with an efficient and economical system of alternative dispute resolution. . . .

"[U]nder an unrestricted submission, the [arbitrator's] decision is considered final and binding; thus the courts will not review the evidence considered by the [arbitrator] nor will they review the award for errors of law or fact. . . . A submission is deemed restricted only if the agreement contains express language restricting the breadth of issues, reserving explicit rights, or conditioning the award on court review." (Internal quotation marks omitted.) *Board of Education* v. *New Milford Education Assn.*, 331 Conn. 524, 531, 205 A.3d 552 (2019).

"[Because] the parties consent to arbitration, and have full control over the issues to be arbitrated, a court will make every reasonable presumption in favor of the arbitration award and the arbitrator's acts and proceedings. . . . The party challenging the award bears the burden of producing evidence sufficient to invalidate or avoid it . . . . [Our Supreme Court has] . . . recognized three grounds for vacating an [arbitrator's] award:

(1) the award rules on the constitutionality of a statute . . . (2) the award violates clear public policy . . . or (3) the award contravenes one or more of the statutory proscriptions of § 52-418." (Citation omitted; internal quotation marks omitted.) *Bridgeport* v. *Kasper Group, Inc.*, supra, 278 Conn. 474. With these principles in mind, we now turn to the defendants' claims on appeal.

I

The defendants first claim that the court improperly found that the arbitrator effectively had defaulted the defendants for failing to appear at the final arbitration hearing. According to the defendants, this alleged erroneous factual finding "clouded [the court's] judgment when reviewing the many claims of error that formed the basis of the defendants' . . . motion to vacate." In other words, the defendants contend that, because the court found that the arbitrator's award amounted to a default judgment against the defendants in favor of DeRose, the court necessarily failed to consider properly the merits of the defendants' challenges to the arbitrator's award. We are not persuaded.

As the defendants recognize in their appellate brief, a "trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence . . . . We cannot retry the facts or pass on the credibility of the witnesses. . . . A finding of fact is clearly erroneous [if] there is no evidence in the record to support it . . . or [if] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Lussier* v. *Spinnato*, 69 Conn. App. 136, 141, 794 A.2d 1008, cert. denied, 261 Conn. 910, 806 A.2d 49 (2002).

In the award, the arbitrator expressly found that he had continued the arbitration proceedings to allow the

defendants an opportunity to finish their rebuttal of DeRose's case and to present additional witnesses, but that the defendants failed to appear for the final arbitration hearing in defiance of duly served subpoenas. The arbitrator elected to proceed with the arbitration proceedings despite the defendants' absence. Although the arbitrator does not describe his award as a default judgment, he notes as part of his findings that DeRose previously had submitted an exhibit summarizing all of the issues under submission and that the defendants had never provided a rebuttal to this summary. Because this suggests that the defendants' absence from the final hearing resulted in the arbitrator's reliance, at least in part, on the unrebutted arguments of DeRose, it is certainly a plausible inference for the trial court to have found that, as a result of the defendants' failure to appear at the final hearing, the defendants "were *in effect* defaulted" by the arbitrator. (Emphasis added.) The court's finding regarding the perceived effect of the defendant's absence, therefore, cannot be viewed as clearly erroneous because, as indicated, there is some evidence in the record to support such a characterization.

Moreover, even if we agreed with the defendants that the court mischaracterized them as having been "in effect defaulted," the defendants have not directed us to any portion of the court's decision, or anywhere in the record, that would support their assertion that this finding affected the court's consideration of the defendants' motion to vacate in any way deleterious to the defendants. The court never indicated, for instance, that it would not consider the substance of the motion to vacate because the defendants had been defaulted by the arbitrator. Instead, the court found, on the basis of its review of the record presented, that the defendants had failed to provide a valid reason to vacate the award, implying that the court fairly considered the defendants'

arguments on their merits and rejected them. Accordingly, we are not persuaded by this claim.

II

The defendants also claim that the court improperly failed to provide them with an evidentiary hearing before ruling on their motion to vacate the arbitration award. This claim is belied by the transcript of the hearing and is, thus, without merit.

"We consistently have held that, unless otherwise required by statute, a rule of practice or a rule of evidence, whether to conduct an evidentiary hearing generally is a matter that rests within the sound discretion of the trial court." (Internal quotation marks omitted.) *State* v. *Nguyen*, 253 Conn. 639, 653, 756 A.2d 833 (2000). "Under this standard of review, [w]e must make every reasonable presumption in favor of the trial court's action." (Internal quotation marks omitted.) *Metropolitan District Commission* v. *Connecticut Resources Recovery Authority*, 130 Conn. App. 132, 142, 22 A.3d 651 (2011).

The defendants have not cited to any statute, evidentiary rule, or rule of practice mandating that parties are entitled to an evidentiary hearing before a court rules on a motion to vacate an arbitration award. Furthermore, General Statutes § 52-420 (a) provides in relevant part that "[a]ny application [to confirm, vacate or modify an award] under [§§] 52-417, 52-418 or 52-419 shall be heard in the manner provided by law for hearing written motions at a short calendar session, or otherwise as the court or judge may direct, in order to dispose of the case with the least possible delay." A party wishing to have an evidentiary hearing on a short calendar motion generally must make such a request on the short calendar claim form or by motion. See *Ridgefield Bank* v. *Stones Trail, LLC*, 95 Conn. App. 279, 287, 898 A.2d 816, cert. denied, 279 Conn. 910, 902 A.2d 1069 (2006).

Unless there is an express statutory provision or rule of practice requiring an evidentiary hearing; see, e.g., General Statutes § 49-14 (a) (mandating motion for deficiency judgment "be placed on the short calendar for an evidentiary hearing"); which is absent here, whether to hold an evidentiary hearing in a particular case and the scope of such a hearing is left to the discretion of the court.

Although the court initially ruled on the defendants' motion to vacate after hearing arguments and ruling on the motion to quash, the record shows that, once the defendants requested an opportunity for an evidentiary hearing, the court agreed to open the proceedings for the purpose of reconsideration and to allow the defendants to make an evidentiary record. Although the court indicated, consistent with its ruling on the motion to quash, that it would not allow the defendants to call the arbitrator as a witness, the court admitted as full exhibits several documents that the defendants offered into evidence and permitted additional legal arguments. Accordingly, contrary to the defendants' claim, they were afforded an evidentiary hearing. To the extent that the defendants believe the court unfairly limited the scope of that hearing, the defendants have failed to brief any such claim on appeal except to challenge the ruling on the motion to quash, which we address in part III of this opinion. The defendants have not indicated what additional evidence they were precluded from presenting to the court or how it would have changed the outcome of the court's decision. Thus, they have failed even to attempt to demonstrate how they were harmed by the alleged error. On the basis of the record presented, we conclude that the defendants' claim that they were denied an evidentiary hearing is simply untenable.

III

We next turn to the defendants' claim that the court improperly granted the arbitrator's motion to quash the

subpoena duces tecum directed at him. We decline to review this claim because it is inadequately briefed.

"[A] trial court's decision to quash a subpoena is . . . reviewed on appeal under the abuse of discretion standard." (Internal quotation mark omitted.) *Cavolick* v. *DeSimone*, 88 Conn. App. 638, 654, 870 A.2d 1147, cert. denied, 274 Conn. 906, 876 A.2d 1198 (2005). "Discretion means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . The salient inquiry is whether the court could have reasonably concluded as it did. . . . It goes without saying that the term abuse of discretion does not imply a bad motive or wrong purpose but merely means that the ruling appears to have been made on untenable grounds. . . . In determining whether there has been an abuse of discretion, much depends upon the circumstances of each case." (Internal quotation marks omitted.) *Satchwell* v. *Commissioner of Correction*, 119 Conn. App. 614, 623–24, 988 A.2d 907, cert. denied, 296 Conn. 901, 991 A.2d 1103 (2010).

The subpoena duces tecum in the present case sought to compel the arbitrator's testimony and the production of the arbitrator's entire file, including but not limited to his legal research, personal notes, and correspondences with the parties.[12] The court granted the motion to quash

[12] In addition to commanding the arbitrator to appear to testify at the July 17, 2017 hearing, the July 7, 2017 subpoena duces tecum commanded that the arbitrator "produce at that time and place the complete and entire arbitration file maintained by you in your capacity as arbitrator . . . including but not limited to any and all written documents, such as personal notes, whether handwritten or typed made by [the arbitrator] after considering the testimony on hearing dates; all legal research conducted by [the arbitrator]; all correspondence from [the arbitrator] to the parties and their respective legal counsel, including letters, [e-mails] and the like; all submissions to [the arbitrator] from the parties or their respective legal counsel, including pleadings, correspondence, [e-mails], exhibits and the like; the billing records maintained by [the arbitrator]; [and] the return of the remaining retainers by [the arbitrator]."

the subpoena because it concluded that the contents of the arbitrator's file and his testimony were not relevant given the limited scope of the court's review of an arbitration award resulting from an unrestricted submission. The court later articulated that the defendants had not demonstrated a clear need for any additional evidence and that it was capable of deciding the motion to vacate on the basis of the record before it.

As previously indicated in part II of this opinion, even without the benefit of the subpoena, the defendants were able to admit into evidence certain correspondence between the parties and the arbitrator that were not part of the record and that they believed supported their arguments that the arbitration previously was abandoned by DeRose. Although the defendants cite to a few cases in their appellate brief supporting the general proposition that, under certain circumstances, it might be necessary for an arbitrator to testify at a hearing on a motion to vacate an award, they have failed adequately to analyze how the court abused its discretion by not allowing testimony in the present case or how they were harmed by the granting of the motion to quash. "Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.) *Shore* v. *Haverson Architecture & Design, P.C.*, 92 Conn. App. 469, 479, 886 A.2d 837 (2005), cert. denied, 277 Conn. 907, 894 A.2d 988 (2006). We deem this claim abandoned due to inadequate briefing and, accordingly, decline to review it.

IV

The defendants next claim that the court improperly failed to vacate the arbitration award on the ground that the arbitrator failed to address the entirety of the submission, which the defendants contend included their special defenses, set-offs, and counterclaim

pleaded in the underlying civil action. We are not persuaded.

The scope of arbitration, including the delineation of the issues to be decided, is determined and limited by the parties' submission to arbitration. See *Board of Education* v. *AFSCME*, 195 Conn. 266, 271, 487 A.2d 553 (1985). "A submission to arbitration, sometimes referred to as an agreement for submission, is a contract . . . whereby two or more parties agree to settle their respective legal rights and duties by referring the disputed matters to a third party, by whose decision they agree to be bound. . . . Technical precision in making a submission is not required and submissions are given a liberal construction in furtherance of the policy of deciding disputes by arbitration and in light of the surrounding facts and circumstance. . . . A submission to arbitrate must embrace everything necessary to give the arbitrators jurisdiction over the parties and the matter in dispute . . . . Since the award is limited by the submission, the submission agreement should show clearly what disputes are to be arbitrated. However, it will be presumed that the parties intended to grant to the arbitrators such powers as are reasonably necessary to settle the dispute fully." (Citation omitted; internal quotation marks omitted.) *Alderman & Alderman* v. *Pollack*, 100 Conn. App. 80, 82–83, 917 A.2d 60 (2007).

In the present case, the submission provided that "[a]ll issues shall be submitted to and fully and finally adjudicated by the arbitrator including, but not limited to, the issues of coverage, liability, causation and damages." This submission is very broad, evincing the parties' intent that the submission encompass not only DeRose's causes of action against the defendants, but any special defenses and counterclaims raised by the defendants as a result. The defendants argue on appeal that the arbitrator "simply chose to ignore those claims

in their entirety." Although we agree with the defendants that the arbitration award does not contain express findings or legal conclusions specifically addressing each special defense and counterclaim raised by the defendants, the defendants have failed to demonstrate that the arbitrator simply chose to ignore the special defenses and counterclaim, rather than having considered and rejected them, prior to awarding damages to DeRose.

Our standard of review requires that we make "every reasonable presumption in favor of the arbitration award and the arbitrator's acts and proceedings." (Internal quotation marks omitted.) *Bridgeport* v. *Kasper Group, Inc.*, supra, 278 Conn. 474. The party challenging the award, in this case the defendants, bears the burden "of producing evidence sufficient to invalidate or avoid it." Id. The defendants have failed to show beyond mere speculation that the arbitrator did not consider and fully resolve all issues properly submitted to him by the parties. The defendants do not argue on appeal that they were frustrated in doing so by the court's decision to quash the subpoena issued to the arbitrator. Moreover, they offered no other evidence before the trial court as to what evidence was submitted to the arbitrator on their counterclaim and set-off other than the pleadings. Finally, the defendants took no steps before the arbitrator after he had issued his award to ascertain whether the arbitrator had considered and decided all the defendants' special defenses, set-offs, and counterclaim. Stated another way, the defendants have failed to overcome the presumption that, by awarding damages to DeRose without awarding any express set-off or countervailing damages to the defendants, the arbitrator properly, yet tacitly, rejected any special defenses and counterclaim raised by the defendants. We conclude that the court properly rejected this claim as a basis for vacating the award.

V

The defendants next claim that the court improperly confirmed the award because the award violated public policy. The defendants identify two public policies potentially implicated by the award: the policy favoring arbitration as an efficient alternative to litigation and the equitable doctrine of laches. We are unconvinced that either provides a basis for vacating the arbitration award on the basis of "the stringent and narrow confines of the public policy exception." *MedValUSA Health Programs, Inc.* v. *MemberWorks, Inc.*, 273 Conn. 634, 665, 872 A.2d 423, cert. denied sub nom. *Vertrue, Inc.* v. *MedValUSA Health Programs, Inc.*, 546 U.S. 960, 126 S. Ct. 479, 163 L. Ed. 2d 363 (2005).

"A court's refusal to enforce an arbitrator's award . . . because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy. . . . This rule is an exception to the general rule restricting judicial review of arbitral awards." (Citation omitted; internal quotation marks omitted.) *C. R. Klewin Northeast, LLC* v. *Bridgeport*, 282 Conn. 54, 93, 919 A.2d 1002 (2007). "The public policy exception applies only when the award is clearly illegal or clearly violative of a strong public policy. . . . A challenge that an award is in contravention of public policy is premised on the fact that the parties cannot expect an arbitration award approving conduct which is illegal or contrary to public policy to receive judicial endorsement any more than parties can expect a court to enforce such a contract between them. . . . When a challenge to the arbitrator's authority is made on public policy grounds, however, *the court is not concerned with the correctness of the arbitrator's decision but with the lawfulness of enforcing the award*. . . . Accordingly, the public policy exception to arbitral authority should be narrowly construed and

[a] court's refusal to enforce an arbitrator's [award] is limited to situations where the contract as interpreted would violate some explicit public policy that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. . . .

"The party challenging the award bears the burden of proving that illegality or conflict with public policy is *clearly demonstrated*. . . . Therefore, given the narrow scope of the public policy limitation on arbitral authority, [a party] can prevail . . . only if it demonstrates that the [arbitrator's] award clearly violates an established public policy mandate." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *New England Health Care Employees Union*, 271 Conn. 127, 135–36, 855 A.2d 964 (2004). "[W]hen a challenge to a voluntary arbitration award rendered pursuant to an unrestricted submission raises a legitimate and colorable claim of violation of public policy, the question of whether the award violates public policy requires de novo judicial review." (Internal quotation marks omitted.) Id., 135.

In the present case, the defendants argue that the present arbitration was delayed for a number of years, and that a final award was not issued until more than fourteen years had passed since the parties' dispute initially arose. The defendants ask us to recognize that our oft-stated general policy favoring arbitration encompasses a concomitant policy that arbitrations proceed expeditiously, which the defendants contend did not happen here, as reflected by the record. It is true that courts in this state have often described arbitration as "an efficient and economical system of alternative dispute resolution"; (internal quotation marks omitted) *LaFrance* v. *Lodmell*, 322 Conn. 828, 851, 144 A.3d 373 (2016); and that arbitration is intended as a

means to "secure prompt settlement of disputes . . . ." (Internal quotation marks omitted.) *State* v. *Philip Morris, Inc.*, 279 Conn. 785, 796, 905 A.2d 42 (2006). The attribution of promptness with respect to an arbitration proceeding, however, is aspirational in nature, and in no way creates a public policy that mandates that arbitrations be completed within a strict designated time period. Private arbitration, after all, is a creature of contract; id.; and all aspects are controlled by the parties through their arbitration agreement. If parties wish to have their disputes resolved through arbitration within a particular time frame, they are free to do so contractually. In describing the expeditious nature of arbitration relative to litigation, our courts have never intimated that a protracted arbitration proceeding risked being found violative of a clearly defined and well established public policy.

The defendants similarly argue that the lengthy arbitration proceedings violate a public policy that they assert is embodied in the doctrine of laches. "Laches is purely an equitable doctrine, is largely governed by the circumstances, and is not to be imputed to one who has brought an action at law within the statutory period. . . . It is an equitable defense allowed at the discretion of the trial court in cases brought in equity." (Emphasis omitted; internal quotation marks omitted.) *Florian* v. *Lenge*, 91 Conn. App. 268, 282, 880 A.2d 985 (2005). Courts have recognized the defense of laches to preclude a plaintiff from pursuing equitable relief in the face of an inexcusable delay causing prejudice to the defendant. See *Caminis* v. *Troy*, 112 Conn. App. 546, 552, 963 A.2d 701 (2009), aff'd, 300 Conn. 297, 12 A.3d 984 (2011). But whether a delay violates the doctrine of laches is an issue left squarely to the discretion of the trial court, to be determined on the basis of the circumstances presented. Finally, it is important to note that the defendants have not directed us to any case

in which a court vacated an arbitration award as violative of public policy because the arbitration was not completed in an expeditious manner.

We conclude that neither of the purported "public policies" advanced by the defendants rises to the type of explicit, well-defined, and dominant public policy that would render an arbitrator's award unenforceable under the narrow public policy exception. Moreover, even if the defendants were able to demonstrate the existence of a public policy that would subject an arbitration award to vacatur upon a finding that an inequitable delay in the arbitration process occurred, the defendants' claim nevertheless would fail in the present case because the arbitrator attributed the primary cause of any delays in the present case to the defendants. Although we engage in plenary review of whether an explicit, well-defined, and dominant public policy is implicated by an award, we nonetheless must give deference to the factual findings of the arbitrator. See *HH East Parcel, LLC* v. *Handy & Harman, Inc.*, 287 Conn. 189, 201, 947 A.2d 916 (2008). We conclude that the court properly rejected the defendants' claim that the award should be vacated on public policy grounds.

VI

Finally, the defendants claim that the court improperly confirmed the arbitration award because it violated § 52-418 (a) (4). Specifically, the defendants contend that the arbitrator's award was in "manifest disregard of the law" because the arbitrator (1) applied the improper legal test in finding that DeRose was an employee of the defendants, (2) ignored the legal definition of wages as set forth in General Statutes § 31-71a (3), and (3) improperly awarded attorney's fees pursuant to General Statutes § 31-72. We conclude that the defendants have failed to demonstrate even a colorable claim that the award violates § 52-418 (a) (4).

As previously noted, § 52-418 (a) provides in relevant part that, "[u]pon the application of any party to an arbitration, the superior court . . . shall make an order vacating the award if it finds . . . (4) . . . 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." Our Supreme Court has indicated that subdivision (4) of § 52-418 (a) is also "commonly referred to as 'manifest disregard of the law.' " *Kellogg* v. *Middlesex Mutual Assurance Co.*, 326 Conn. 638, 649, 165 A.3d 1228 (2017), citing *Garrity* v. *McCaskey*, 223 Conn. 1, 10, 612 A.2d 742 (1992).[13] It is well settled, however, "that the manifest disregard of the law ground for vacating an arbitration award is narrow and should be reserved for circumstances of an arbitrator's extraordinary lack of fidelity to established legal principles. . . . [T]hree elements . . . must be satisfied in order for a court to vacate an arbitration award on the ground that the [arbitrator] manifestly disregarded the law: (1) the error was obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator; (2) the [arbitrator] appreciated the existence of a clearly governing legal principle but decided to ignore it; and (3) the governing law alleged to have been ignored by the [arbitrator] is [well-defined], explicit, and clearly

[13] In *Garrity* v. *McCaskey*, supra, 223 Conn. 2, our Supreme Court considered whether an arbitrator's alleged "manifest disregard for the law" should be recognized under Connecticut law as an independent ground for vacating an arbitration award resulting from an unrestricted submission. The court reiterated that Connecticut recognized only three grounds for vacating such an award: "(1) the award rules on the constitutionality of a statute . . . (2) the award violates clear public policy . . . or (3) the award contravenes one or more of the statutory proscriptions of § 52-418." (Citations omitted.) Id., 6. The first two grounds have their origins in our common law whereas the third ground is statutory in nature. Although our Supreme Court chose not to recognize manifest disregard for the law as an *independent* ground on which to seek vacatur of an arbitration award, the court held that such an argument was cognizable under the existing statutory ground set forth in § 52-418 (a) (4). Id., 7.

applicable." (Citation omitted; internal quotation marks omitted.) *Kellogg* v. *Middlesex Mutual Assurance Co.*, supra, 649–50. We will not decide the merits of a claimed manifest disregard of the law if the proponent of an application to vacate an award cannot demonstrate "anything more than his disagreement with the [arbitrator's] interpretation and application of established legal principals." *Garrity* v. *McCaskey*, supra, 13.

Here, as in *Garrity*, it is unnecessary for us to reach the merits of this claim because the defendants have demonstrated nothing more than a disagreement with the arbitrator's interpretation and/or application of established legal principles. Id. "Such a contention is a far cry from the egregious or patently irrational misperformance of duty that must be shown in order to prove a manifest disregard of the law under § 52-418 (a) (4). Acceptance of [the defendants'] argument would turn every disagreement with an arbitrators' rulings of law [which generally are not subject to review by the courts] into an allegation of manifest disregard of the law. We have never construed § 52-418 (a) (4) so broadly and we decline to do so today." Id.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JAQUWAN BURTON (AC 41807)

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

Syllabus

Convicted, after a jury trial, of the crimes of murder, criminal possession of a firearm and carrying a pistol without a permit, the defendant appealed, claiming, inter alia, that the trial court improperly denied his motion to suppress certain evidence seized by the police during a warrantless search of the bedroom of his girlfriend, J, which was located in the residence of her mother, N. The defendant's conviction stemmed from

an incident in which he was driven by a friend to the victim's residence to obtain marijuana, and, during the transaction, the defendant fatally shot the victim. Approximately two months later, the police went to N's residence to arrest the defendant pursuant to an outstanding arrest warrant unrelated to the homicide of the victim. N answered the door and permitted entry into the premises by the police, who proceeded upstairs to a locked bedroom where they found the defendant, who was taken into custody and brought outside to a patrol car. J, who also was in the bedroom, was escorted downstairs by the police. N initially had declined to give the police consent to search the premises, but, after the defendant told her that a gun was in the bedroom and that she should let the police get it, she signed a consent form allowing the police to search the bedroom. J signed a similar consent form. The police proceeded to search the bedroom and seized a two-tone chrome and black nine millimeter handgun, an ammunition magazine and fifteen rounds of nine millimeter ammunition from inside a dresser drawer. Thereafter, it was determined that a nine millimeter shell casing that was found at the crime scene was in substantial agreement with the nine millimeter handgun seized from the dresser in the bedroom. Prior to trial, the defendant filed a motion to suppress the evidence seized from the bedroom, asserting that the warrantless search violated his constitutional rights and, therefore, the fruit of that illegal search had to be suppressed. Following an evidentiary hearing, the trial court denied the motion. *Held*:

1. The trial court properly denied the defendant's motion to suppress the evidence seized by the police from J's bedroom, as that court's finding that N and J voluntarily had consented to the search of the bedroom by the police was not clearly erroneous: although the defendant claimed that N and J had been coerced by the police to give their consent, in making that claim the defendant relied on certain testimony of J, N and himself that the police allegedly threatened to arrest J if she refused to consent and that the police informed N and J that, if they did not consent, the police would obtain a search warrant anyway, which the court explicitly found to be not credible, and this court had to defer to the trial court's credibility assessments; moreover, the remaining evidence presented supported the court's voluntariness finding, as it showed that although there were eight to ten armed police officers at the subject premises early in the morning seeking to arrest the defendant, who was a convicted felon, potentially a gang member, had been involved in shootings and was suspected to have a weapon, there was no evidence that the officers forcibly entered the residence of N, who had granted them access, there was no evidence that two police officers who had pointed their weapons at the defendant and J when entering the bedroom used their weapons for any other purpose, including when they asked for consent, and N and J both completed and signed a consent to search form that contained disclaimers, including that the consent was given

voluntarily and without duress, threats or promises of any kind; furthermore, the fact that N initially declined to consent to a search did not render the court's voluntariness finding clearly erroneous, as it showed that N possessed the ability and the will to make that decision despite what the defendant claimed were coercive conditions, and it was a strong indication of voluntariness that N and J decided to give the police consent only after the defendant had told N that there was a handgun in the bedroom and that she should let the police get it.

2. The defendant could not prevail on his claim that the trial court improperly excluded evidence concerning the inability of two potential eyewitnesses to identify the defendant in a photographic array as the shooter, which was based on his assertion that the court improperly determined that § 8-5 (2) of the Connecticut Code of Evidence was the hearsay exception applicable to such nonidentification evidence: because W, the lead investigator in connection with the victim's homicide, was not present when the witnesses reviewed the photographic array and the defendant sought to introduce the witnesses' nonidentification of the defendant in an assertive manner as evidence that they could not identify the defendant as the shooter, the trial court correctly concluded that W's testimony was hearsay and was admissible only if it fell within a hearsay exception, and that § 8-5 (2) of the Connecticut Code of Evidence was not applicable to W's testimony where, as here, the witnesses were not available to be cross-examined, and, therefore, in light of the defendant's failure to identify any other hearsay exception that would have applied to W's testimony, there was no basis to conclude that the trial court erred in excluding W's testimony regarding the nonidentifications by the witnesses; moreover, because certain photographic array documents that were offered into evidence by the defendant were offered for the inference of the witnesses' nonverbal assertive acts drawn from the documents, the business records exception to the hearsay rule did not apply to the inference that the witnesses could not identify the defendant from the photographic array because that fact was not contained in the documents themselves and was based on hearsay implied from a combination of the documents and the witnesses' assertive actions or inactions, and in light of the defendant's failure to identify any other hearsay exception that would have allowed for the admission of the photographic array documents, the court properly excluded them.

3. The trial court did not abuse its discretion in concluding that a video recording of an interview between an eyewitness and the police was not sufficiently reliable or trustworthy to support its admission under the residual exception to the hearsay rule set forth in § 8-9 of the Connecticut Code of Evidence: the reliability and trustworthiness of the interview was undermined by the inability of the state to question the witness as to her ability to perceive the shooter and the events on the evening of the shooting and to cross-examine her as to the critical uncertainties contained within the interview, and the evidence presented at trial failed

to corroborate in many material respects, and actually contradicted, the witness' version of the events; moreover, because the trial court properly excluded the video recording of the interview, the defendant's constitutional claim necessarily failed.

Argued February 13—officially released August 13, 2019

Procedural History

Substitute information charging the defendant with the crimes of murder, criminal possession of a firearm and carrying a pistol without a permit, brought to the Superior Court in the judicial district of New Haven, where the court, *Alander*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the matter was tried to the jury; verdict and judgment of guilty, from which the defendant appealed. *Affirmed*.

Alice Osedach, assistant public defender, for the appellant (defendant).

Rocco A. Chiarenza, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *John P. Doyle, Jr.*, senior assistant state's attorney, for the appellee (state).

Opinion

BRIGHT, J. The defendant, Jaquwan Burton, appeals[1] from the judgment of conviction, rendered after a jury trial, of murder in violation of General Statutes §§ 53a-54a (a) and 53a-8, criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1), and carrying a pistol without a permit in violation of General Statutes § 29-35 (a). On appeal, the defendant claims that the trial court improperly (1) denied his motion to suppress items of evidence seized from his girlfriend's bedroom located at her mother's residence because neither his girlfriend nor her mother provided voluntary

[1] The defendant originally appealed to our Supreme Court pursuant to General Statutes § 51-199 (b) (3). The appeal subsequently was transferred to this court pursuant to Practice Book § 65-1.

consent to search therein, (2) excluded evidence concerning the inability of two eyewitnesses to identify extrajudicially the defendant from a photographic array as the shooter, and (3) excluded from evidence a video recording of an interview between an eyewitness and the police. We affirm the judgment of the trial court.

The relevant facts, as reasonably could have been found by the jury, and procedural history, are as follows. On the evening of February 10, 2014, the defendant called his friend, John Helwig, and indicated that he wanted a ride to buy some marijuana. Helwig, in his gray or "greenish" car, picked up the defendant at a house on Valley Street in New Haven, at which the defendant's girlfriend, Laneice Jackson, resided with her mother, Patrice Nixon. Helwig then picked up two other males, and the defendant instructed Helwig to drive to an address in the proximity of 31 Kossuth Street in New Haven and to park on a side street. When they arrived, the defendant exited the vehicle alone and was talking on his cell phone to the victim, Kyle Brown-Edwards, about a marijuana transaction. The defendant stated to the victim that he was "right around the corner," and then the defendant walked away behind the vehicle.

Meanwhile, the victim and his friends, Joseph Cordy and Perry,[2] were present on the second floor of the victim's residence at 31 Kossuth Street. After speaking with the defendant on his cell phone, the victim, at approximately 8:30 p.m., with marijuana in his possession, proceeded to go downstairs to the front entrance of the residence. While standing in the doorway of the front entrance, the victim was shot in the face by the defendant. Cordy heard the gunshot, observed the victim at the bottom of the stairs, and then called the

[2] It is unclear whether "Perry" was this individual's first or last name because he only was referred to as Perry throughout the trial.

police. At the same time, the victim's cousin, Jeremy Brown, and Jeremy's girlfriend, Morgan Brown, were somewhere outside the residence at 31 Kossuth Street.

Approximately five minutes after he left Helwig's vehicle, the defendant sprinted back to the vehicle with a gun in his hand and, after entering the vehicle, pointed the gun at Helwig and told him to drive. Helwig then drove to his grandmother's residence. There, the defendant told Helwig that he had planned to rob the victim, but, after the victim declined "to give it up" and gave him "a weird look," he shot the victim in the face. The defendant also asked Helwig for some cleaner to remove the blood from his sneakers.

At approximately 8:30 p.m., New Haven police were dispatched to 31 Kossuth Street in response to a report of someone being shot and, upon arrival, observed that the victim had a gunshot wound to his head. The victim was transported to a hospital, and he died as a result of his injuries. Later that same night, New Haven police investigated the crime scene and seized a single nine millimeter shell casing from the floor at the bottom of the staircase near the doorway inside 31 Kossuth Street. New Haven police also seized the victim's cell phone, which was provided to them by Cordy. An examination of the victim's cell phone revealed one missed call and two completed calls on February 10, 2014, between 8:21 p.m. and 8:31 p.m., from the defendant's cell phone.

On the morning of April 3, 2014, several law enforcement officers went to 461 Valley Street to arrest the defendant pursuant to an outstanding arrest warrant unrelated to the homicide of the victim. Nixon answered the door and permitted State Trooper Chris McWilliams and New Haven Police Sergeant Karl Jacobson and Detective Martin Podsiad to enter the premises. McWilliams and Podsiad proceeded upstairs to a locked bedroom, and, after they had knocked, the defendant opened the door. The defendant was taken into custody and brought outside to a patrol car. Jackson, who also

was in the bedroom, was escorted downstairs. The officers did not have a search warrant, but they received written consent to search the bedroom from both Jackson and Nixon. The officers searched the bedroom and seized, among other things, a two-tone chrome and black nine millimeter handgun, an ammunition magazine, and fifteen rounds of nine millimeter ammunition from inside a dresser drawer.

Further investigation revealed that the nine millimeter shell casing that was found at the crime scene was in "substantial agreement" with the nine millimeter handgun seized from the dresser in the bedroom. Furthermore, the defendant's friends had seen him always carrying a particular nine millimeter gun that matched the two-tone appearance of the gun found in the dresser. Also as part of their investigation, law enforcement seized the defendant's cell phone. Thereon, they discovered a video of the defendant reacting to a television news report of the victim's murder, and pictures of himself, prior to the shooting, holding a two-tone handgun matching the one found in the dresser. The defendant thereafter was charged with murder, criminal possession of a firearm, and carrying a pistol without a permit. He pleaded not guilty and elected a jury trial.

On March 31, 2016, before trial, the defendant filed a motion to suppress the evidence seized from the bedroom at 461 Valley Street, specifically including the nine millimeter handgun, tests performed thereon, and any testimony related thereto. The defendant maintained that the warrantless search of the bedroom at 461 Valley Street violated his rights under the fourth amendment to the constitution of the United States and article first, § 7, of the constitution of Connecticut and, thus, he argued that the fruit of those searches must be suppressed. In contrast, the state argued that the searches and seizures did not violate the defendant's constitutional rights because both Jackson and Nixon provided voluntary consent to search the bedroom.

On January 30, 2017, after a two day evidentiary hearing, the court issued a memorandum of decision in which it denied the defendant's motion to suppress. Therein, the court found that the credible evidence established that the state proved that the warrantless search of the bedroom at 461 Valley Street and seizure of the handgun therein did not violate the defendant's constitutional rights because consent to search was freely and voluntarily given by Jackson and Nixon, who were the individuals with the requisite authority to do so.

Thereafter, the defendant's case proceeded to a jury trial. During the state's case-in-chief, the defendant sought to introduce testimony and documentary evidence to establish that Morgan Brown and Jeremy Brown (collectively, the Browns), who were potential eyewitnesses to the murder and not available to testify at trial, each previously had been unable to identify the defendant in a photographic array. The defendant first asked Detective Michael Wuchek, who was the lead investigator in connection with the homicide of the victim, whether the Browns were able to identify the defendant in a photographic array. The state objected, and the court excused the jury. The court heard argument and sustained the state's objection on the ground that Wuchek's testimony as to whether the Browns were able to identify the defendant was hearsay and, because they were unavailable to testify, the pretrial identification exception to the hearsay rule; see Conn. Code Evid. § 8-5 (2);[3] did not apply to his testimony. Second, still outside the presence of the jury, defense counsel made an offer of proof as to the photographic array documents shown to the Browns. Those documents included

[3] Section 8-5 of the Connecticut Code of Evidence provides in relevant part: "The following are not excluded by the hearsay rule, provided the declarant is available for cross-examination at trial . . . (2) The identification of a person made by a declarant prior to trial where the identification is reliable."

a single sheet containing eight photographs of individuals, including the defendant, and two instruction sheets, one purportedly signed by Morgan Brown and one purportedly signed by Jeremy Brown. Defense counsel argued that these documents were admissible pursuant to the business records exception to the hearsay rule. See Conn. Code Evid. § 8-4 (a).[4] The state objected, and the court sustained the objection on the ground that the inference drawn from the documents that the Browns were unable to identify the defendant constituted hearsay that was not excepted from the hearsay rule pursuant to § 8-5 (2) of the Connecticut Code of Evidence.

Several days later, in the course of the state's case-in-chief, the defendant filed a motion to admit into evidence the video recording of an interview between Morgan Brown and the police on the night of the victim's murder because he believed that Morgan Brown's description of the events that night contradicted the state's evidence in certain important respects. In his memorandum of law in support of his motion to admit, the defendant maintained that the video recording was admissible pursuant to the residual exception to the hearsay rule. See Conn. Code Evid. § 8-9.[5] The next day, the court, after it heard argument from both parties,

[4] Section 8-4 (a) of the Connecticut Code of Evidence provides: "Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of the act, transaction, occurrence or event, if the trial judge finds that it was made in the regular course of any business, and that it was the regular course of the business to make the writing or record at the time of the act, transaction, occurrence or event or within a reasonable time thereafter."

[5] Section 8-9 of the Connecticut Code of Evidence provides: "A statement that is not admissible under any of the foregoing exceptions is admissible if the court determines that (1) there is a reasonable necessity for the admission of the statement, and (2) the statement is supported by equivalent guarantees of trustworthiness and reliability that are essential to other evidence admitted under traditional exceptions to the hearsay rule."

issued an oral decision in which, after expressing doubt as to whether the defendant had established that Morgan Brown was unavailable, it denied the defendant's motion on the ground that the interview was not trustworthy and reliable because the state would be unable to cross-examine Morgan Brown about the inconsistencies therein.

The jury subsequently found the defendant guilty of all charges, and the court, after rendering judgment in accordance with the verdict, sentenced the defendant to a total effective sentence of fifty-five years incarceration and imposed a fine of $5000. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the court improperly denied his motion to suppress several items of evidence seized from Jackson's bedroom located at Nixon's residence because neither Jackson nor Nixon provided voluntary consent to search therein. Specifically, he contends that the court erroneously found that both Jackson and Nixon had provided free and voluntary consent to search the bedroom because the evidence presented at the motion to suppress hearing established that they were coerced by the law enforcement officers into providing consent. The defendant argues that the warrantless search of the bedroom by the law enforcement officers violated his constitutional rights, and, therefore, the items of evidence seized from this search should have been suppressed. We disagree.

In its memorandum of decision denying the defendant's motion to suppress, the court found the following additional facts. "Law enforcement officers . . . were seeking to serve two arrest warrants on the defendant, [who] . . . was a convicted felon and a suspected gang member. The officers also possessed information from

a confidential informant that the defendant was in possession of a weapon, [had previously been involved in shootings], and was residing with his girlfriend . . . [Jackson] . . . [i]n one of two houses in the Valley Street area of New Haven. On April [3], 2014, eight to ten law enforcement officers went to 461 Valley Street in New Haven to determine whether the defendant was at that address and to serve the arrest warrants. They arrived at approximately 6 a.m. Three of the officers approached the front door of the dwelling, while the remaining officers took up positions outside the perimeter of the house. The three officers were armed. Karl Jacobson, a sergeant with the New Haven Police Department, was armed with a handgun, while . . . Podsiad . . . and State Trooper McWilliams were armed with assault rifles. Jacobson knocked on the front door, which was eventually answered by . . . Nixon, who was the lessee of the home. Nixon opened the door and let the three officers inside the house. Jacobson asked Nixon whether the defendant was there to which Nixon replied that she did not think so. Jacobson then asked Nixon if they could look to see if the defendant was present and Nixon responded, 'go ahead.' Jacobson stayed with Nixon as Podsiad and McWilliams searched the premises for the defendant. The two officers proceeded to an upstairs bedroom and knocked on the door, which was locked. The defendant opened the door and was immediately arrested and handcuffed. Also inside the bedroom was . . . Jackson . . . .

"The defendant was eventually brought outside and placed inside a patrol car. Nixon initially declined to consent to a search of the premises. At some point, Jacobson was informed by a patrol officer that the defendant wanted to speak with him. Jacobson went to the patrol car where the defendant was in custody.

The defendant volunteered that the gun they were looking for was in the bedroom and he did not want anyone else to get in trouble for it. Jacobson informed the defendant that Nixon would not consent to a search. Upon hearing this news, the defendant asked to speak with Nixon. The defendant's request was accommodated, whereupon the defendant told Nixon that the gun was in the bedroom and to 'just let them get it.' Nixon then signed a consent form allowing the officers to search the bedroom. Jackson signed a similar consent form. Each form stated that the signer ha[d] been informed of her constitutional right not to have a search made without a search warrant and her right to refuse to consent to a search. The form also stated that permission to search [was] being given 'voluntarily and without duress, threats, or promises of any kind.' After obtaining the written consent to search from Nixon and Jackson, Podsiad searched the bedroom and seized the subject handgun located in a dresser drawer."

The court also specifically credited the testimony of the law enforcement officers and discredited the conflicting testimony of Jackson, Nixon, and the defendant. The court stated that "Nixon and Jackson disputed the above facts in important respects. Jackson testified that she returned to the bedroom prior to her signing the consent form to obtain clothes for the defendant and that it was apparent from the disarray of the room and the open dresser drawer that it had already been searched. [The court] find[s] this testimony not to be credible. It is contradicted by the testimony of Podsiad that no civilian was allowed back into the bedroom after it was initially vacated by Jackson and the defendant, as well as the testimony of Nixon . . . that Jackson did not go back upstairs.

"Nixon testified that she was coerced into consenting to a search of the bedroom because she was told by a police officer that Jackson would be arrested if the

police were required to obtain a search warrant and a handgun was found. Nixon testified that, since [Jackson] was pregnant and she was concerned that she might be arrested, she was forced to consent to the search. Jackson and the defendant offered testimony, which supported Nixon's version of events. [The court] do[es] not find any of this testimony to be credible. Rather, [the court] credit[s] the testimony of Jacobson, the lead law enforcement officer during the search and the person who witnessed the signing of the two consent forms, that neither Nixon nor Jackson [were] coerced or threatened in any way."

We turn next to the well established law and standard of review that governs the defendant's claim. Both the fourth amendment to the United States constitution and article first, § 7, of the constitution of Connecticut protect individuals from unreasonable searches and seizures. "Under both the fourth amendment to the federal constitution and article first, § 7, of the state constitution, a warrantless search of a home is presumptively unreasonable." (Internal quotation marks omitted.) *State* v. *Brunetti*, 279 Conn. 39, 69, 901 A.2d 1 (2006), cert. denied, 549 U.S. 1212, 127 S. Ct. 1328, 167 L. Ed. 2d 85 (2007).

"A warrantless search is not unreasonable under either the fourth amendment to the constitution of the United States or article first, § 7, of the constitution of Connecticut if a person with authority to do so has freely consented to the search. . . . The state bears the burden of proving [by a preponderance of the evidence] that the consent was free and voluntary. . . . The state must affirmatively establish that the consent was voluntary; mere acquiescence to a claim of lawful authority is not enough to meet the state's burden. . . . The question whether consent to a search has in fact been freely and voluntarily given, or was the product of coercion,

express or implied . . . is a question of fact to be determined from the totality of all the circumstances. . . . We may reverse [the trial court's factual findings] on appeal only if they are clearly erroneous. . . . Thus, [w]hether there was valid consent to a search is a factual question that will not be lightly overturned on appeal." (Citation omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Jenkins*, 298 Conn. 209, 249–50, 3 A.3d 806 (2010); see *State* v. *Azukas*, 278 Conn. 267, 277–78, 897 A.2d 554 (2006) (delineating principles of valid third-party consent of residence).

"Our standard of review of a trial court's findings and conclusions in connection with a motion to suppress is well defined. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . We undertake a more probing factual review when a constitutional question hangs in the balance." (Internal quotation marks omitted.) *State* v. *Davis*, 331 Conn 239, 246, 203 A.3d 1233 (2019).

"Notwithstanding our responsibility to examine the record scrupulously, it is well established that we may not substitute our judgment for that of the trial court when it comes to evaluating the credibility of a witness. . . . It is the exclusive province of the trier of fact to weigh conflicting testimony and make determinations of credibility, crediting some, all or none of any given witness' testimony. . . . Questions of whether to believe or to disbelieve a competent witness are beyond our review. As a reviewing court, we may not retry the case or pass on the credibility of witnesses. . . . We must defer to the trier of fact's assessment of the credibility of the witnesses that is made on the basis of its firsthand observation of their conduct, demeanor and attitude." (Internal quotation marks omitted.) *State* v. *Castillo*, 329 Conn. 311, 322, 186 A.3d 672 (2018).

On appeal, it is undisputed that the law enforcement officers did not have a search warrant and that Jackson and Nixon had the authority to give and actually provided consent to search the bedroom; the issue, therefore, is whether their consent was voluntary. The defendant argues that the consent was not voluntary because, under the totality of the circumstances, Jackson and Nixon had been coerced to give their consent.[6] In support of his argument, the defendant relies on the testimony of Jackson, Nixon, and himself that the officers allegedly threatened to arrest Jackson if she refused to consent and that the officers informed them that, if they did not consent, the officers would obtain a search warrant anyway.[7] The defendant also relies on the evidence presented that Nixon initially refused to consent, there was a large number of armed officers present within the home at an early hour in the morning, and

[6] The defendant also argues that the court erroneously made three subsidiary factual findings that (1) Jackson had not returned to the bedroom to obtain clothing for the defendant, (2) Nixon and Jackson were informed that they had the right to refuse to consent to the search, and (3) no officer pointed a weapon at Nixon when they entered the home or at Nixon and Jackson when they sought consent to search the bedroom. These findings warrant little discussion because there was evidence presented at the motion to suppress hearing to support them. First, Podsiad testified that Jackson was not permitted to return upstairs, and Nixon testified that there were officers standing at the bottom of the stairs preventing anyone from going back upstairs. Second, Sergeant Jacobson testified that both Nixon and Jackson each had signed a consent to search form that contained an express disclaimer that they had "been informed of [their] constitutional rights not to have a search made without a search warrant, and [their] right to refuse to consent to such a search . . . ." Third, although there was testimony that the officers pointed their guns at Jackson when they first entered the bedroom, as they were aware that the defendant potentially was armed, there was no evidence presented that an officer pointed a gun at Jackson at any other point in time, or at Nixon at any time.

[7] See *State* v. *Brunetti*, supra, 279 Conn. 70 ("[i]t is true that, if the police had instructed the [individual who provided consent] that they would obtain a search warrant if he had refused to give consent, then such consent would have been involuntary, for constitutional purposes, because the intimation that a warrant will automatically issue is as inherently coercive as the announcement of an invalid warrant" [internal quotation marks omitted]).

Jacobson told Nixon that it was okay if she did not consent because they were applying for a warrant to search the house.

The initial problem with the defendant's claim is that he relies, in part, on the testimony of Jackson, Nixon, and himself, which the court explicitly found to be not credible. In light of the principle that we must defer to the credibility assessments of the trial court, the testimony of Jackson, Nixon, and the defendant as to the allegedly coercive statements made by the police are removed from our determination as to whether the court's voluntariness finding was clearly erroneous. See id.; see also *State* v. *Martinez*, 49 Conn. App. 738, 745–46, 718 A.2d 22 (declining to second-guess trial court's assessment that discredited individual's testimony that she did not consent to search), cert. denied, 247 Conn. 934, 719 A.2d 1175 (1998).

On the basis of the remaining evidence presented, we conclude that the court's voluntariness finding was not clearly erroneous. Although there were eight to ten armed officers at the premises early in the morning, this was due to the fact that they were seeking to arrest the defendant, who was a convicted felon, potentially a gang member, had been involved in shootings, and was suspected to have a weapon. See *State* v. *Gray-Brown*, 188 Conn. App. 446, 458–59, 204 A.3d 1161 (rejecting argument that "consent was coerced because the search occurred in the early morning and twelve police officers were present at the house" where police believed that suspect was armed and responsible for homicide), cert. denied, 331 Conn. 922, 205 A.3d 568 (2019). There was no evidence that the officers forcibly entered the home; rather, three of the officers were granted access to the premises by Nixon, and she willingly answered their question as to whether she knew if the defendant was present. See *State* v. *Reynolds*, 264 Conn. 1, 45, 836 A.2d 224 (2003) (determining that

finding of voluntary consent to search not clearly erroneous where officers requested permission to enter premises and did not use loud or threatening language or point their guns at anyone), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004). Although two officers pointed their weapons at the defendant and Jackson when entering the bedroom, there was no evidence that the police used their weapons for any other purpose, including when they asked for consent. See *State* v. *Jenkins*, supra, 298 Conn. 254 (presence of armed officers, although factor to be considered, "does not render the atmosphere coercive"). Further, Jackson and Nixon each completed and signed a consent to search form that contained disclaimers, including that the consent was given "voluntarily and without duress, threats, or promises of any kind."

Moreover, the fact that Nixon initially declined to consent to a search does not render the court's voluntariness finding clearly erroneous; rather, it shows that she possessed the ability and the will to make that decision despite what the defendant claims were coercive conditions. See *State* v. *Brunetti*, supra, 279 Conn. 56 ("because refusal to sign a consent to search form is one of several factors to be considered in determining the validity of consent, such refusal does not vitiate consent otherwise found to be valid in light of all of the circumstances"). Indeed, it is a strong indication of voluntariness that Jackson and Nixon decided to provide the officers consent only after the defendant told Nixon that the gun was in the bedroom and that she should "just let them get it."

Finally, Jacobson testified that after Nixon initially refused consent to search, he sent officers back to the police station to start "drafting up a [search] warrant." He did not testify, however, that he told Nixon or Jackson that he would get a warrant if they did not consent. Furthermore, he testified that after the defendant told

him there was a gun in the bedroom, Jacobson told the defendant that Nixon and Jackson were not consenting to a search so the police were going to apply for a search warrant. Jacobson never testified that any such statement was made to Nixon or Jackson, or that they were aware of Jacobson's conversation with the defendant when they consented to the search.

We conclude that the evidence presented supported the court's finding that Jackson and Nixon voluntarily consented to the officers' request for permission to search the bedroom, and, therefore, the court properly denied the defendant's motion to suppress the evidence seized by the police from the bedroom.[8]

II

The defendant next claims that the court improperly excluded evidence concerning the inability of the Browns to identify extrajudicially the defendant in a photographic array as the shooter. The defendant argues that the court improperly determined that § 8-5 (2) of the Connecticut Code of Evidence was the hearsay exception applicable to the evidence of nonidentification in the form of the testimony of Wuchek and the photographic array documents. We conclude that the court did not improperly exclude the evidence of nonidentification.

The following additional facts are relevant to our resolution of the defendant's claim. Wuchek testified as part of the state's case-in-chief. On cross-examination,

[8] The state alternatively argues on appeal that the evidence seized from the bedroom would have been admissible, even if it was seized therefrom in violation of the defendant's constitutional rights, pursuant to the inevitable discovery doctrine. See *State* v. *Shields*, 308 Conn. 678, 689 n.13, 69 A.3d 293 (2013), cert. denied, 571 U.S. 1176, 134 S. Ct. 1040, 188 L. Ed. 2d 123 (2014). We need not reach this alternative argument in light of our conclusion that the court's voluntariness finding was not clearly erroneous.

Wuchek testified that the Browns, as potential eyewitnesses, were interviewed by the police on the night of the murder. He testified that, two months after the murder, the Browns were recalled to the police station where they each separately completed a review of a photographic array. Wuchek averred that he did not administer either array. Consequently, he was not in a position to testify regarding how the Browns responded to the photographic array, and, thus, he could not confirm whether they affirmatively said that they did not see the shooter, were uncertain if the shooter was in the array, or were silent after reviewing the array. Nevertheless, he outlined that it was the then existing practice of the police to present to the witness eight photographs of people similar in appearance, including a picture of the suspect, one at a time. The witness then would state whether any of the pictures represented the individual that they saw commit the crime. After Wuchek answered that the Browns each had completed a review of a photographic array, which included a picture of the defendant, defense counsel then asked whether the Browns were able to identify the defendant from the photographic array. The state objected, and the court excused the jury.

At the outset, the court recognized that the question called for hearsay, and it stated that the relevant hearsay exception was § 8-5 (2) of the Connecticut Code of Evidence, which excepts pretrial identification evidence from the hearsay rule when the witness is available to testify at trial. The court stated that, on the basis of a conversation with counsel in chambers, it understood that the Browns both were unavailable to testify. The state then represented that it had confirmed that, to the best of its knowledge, Morgan Brown was on active duty in the United States Air Force in Texas, and Jeremy Brown also was in the state of Texas, but

not assigned to the Air Force. Defense counsel confirmed that he had not been able to verify the Browns' addresses or to contact them. Accordingly, the court determined that, because the Browns would not be available at trial for cross-examination, Wuchek's testimony as to whether they previously had been able to identify the defendant in a photographic array was not excepted from the hearsay rule pursuant to § 8-5 (2) of the Connecticut Code of Evidence.

Next, defense counsel made an offer of proof as to a pair of two page documents that constituted the one page New Haven Police Department "witness instructions—identification procedures" and a one page compilation of the photographic array. The two sheets of instructions were completed and individually signed by the Browns and New Haven Police Sergeant David Zannelli. The two photographic arrays contained eight pictures of individuals with comparable appearances, including the defendant, as well as their corresponding names. Neither photographic array contained any markings. In response to several questions posed by defense counsel, Wuchek testified that he recognized the documents, but that the photographs depicted in the arrays would have been presented separately to the Browns and that the Browns would not have been shown the names of the individuals. He testified that the police maintain the photographic array records as part of their investigation and case file. He also testified that if a witness were to identify an individual in the array, they would mark that individual's picture, and, if the witness were unable to identify an individual in the array, no marks would be made. Defense counsel then asked that the documents be admitted as business records for the purpose of establishing that the Browns could not identify the defendant. The state objected on the ground of relevancy.

The court reasoned that these documents, which did not indicate whether the Browns were able to identify any of the individuals, were relevant only if the Browns' identification or lack of identification also was admissible as evidence. Defense counsel argued that the documents were relevant because the jury could draw a reasonable inference therefrom that there was no positive identification. The court then determined that, if the documents were used for the purpose of inferring the lack of a positive identification, then that evidence was not admissible pursuant to § 8-5 (2) of the Connecticut Code of Evidence because the Browns were unavailable to be cross-examined at trial.

We turn next to the well established law and standard of review that governs the defendant's claim. "To the extent [that] a trial court's admission of evidence is based on an interpretation of the Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review." (Internal quotation marks omitted.) *State* v. *Taupier*, 330 Conn. 149, 181, 193 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 1188, 203 L. Ed. 2d 202 (2019).

"It is well settled that . . . [a]n out-of-court statement offered to prove the truth of the matter asserted is hearsay and is generally inadmissible unless an exception to the general rule applies." (Internal quotation marks omitted.) *State* v. *Carrion*, 313 Conn. 823, 837, 100 A.3d 361 (2014). Evidence offered for the purpose of establishing whether the declarant extrajudicially identified a defendant is hearsay. See *State* v. *Outlaw*, 216 Conn. 492, 496–98, 582 A.2d 751 (1990). This identification evidence may be excepted from the hearsay rule if the requirements of § 8-5 (2) of the Connecticut Code of Evidence are met. That section provides in relevant

part: "The following are not excluded by the hearsay rule, provided the declarant is available for cross-examination at trial . . . (2) The identification of a person made by a declarant prior to trial where the identification is reliable." Conn. Code Evid. § 8-5 (2).

Furthermore, a hearsay document may be excepted from the hearsay rule pursuant to § 8-4 (a) of the Connecticut Code of Evidence, which provides: "Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of the act, transaction, occurrence or event, if the trial judge finds that it was made in the regular course of any business, and that it was the regular course of the business to make the writing or record at the time of the act, transaction, occurrence or event or within a reasonable time thereafter." See also General Statutes § 52-180 (governing admissibility of business entries); *Margolin* v. *Kleban & Samor, P.C.*, 275 Conn. 765, 779–80, 882 A.2d 653 (2005) (outlining three requisite conditions for admissibility of business record).

In the present case, the defendant twice sought to introduce the fact that the Browns, although they were in close proximity to 31 Kossuth Street at the time the victim was shot, were unable to identify the defendant, from a photographic array, as the shooter. He sought to introduce this fact through the testimony of Wuchek as well as through the photographic array documents. The defendant argues that the court improperly identified § 8-5 (2) of the Connecticut Code of Evidence as applicable to his offers of proof.

With respect to the testimony of Wuchek, the defendant argues that the pretrial identification hearsay exception does not apply because his answer would have revealed that the Browns failed to identify the

defendant, not that they positively identified him. He argues that the language of § 8-5 (2) of the Connecticut Code of Evidence was intended to govern only positive identifications, as opposed to a failure to make an identification. Because the defendant has identified no other hearsay exception that would have made Wuchek's testimony admissible, the defendant's argument necessarily relies on an assumption that testimony from Wuchek that the Browns did not identify the defendant when shown the photographic array would not have been hearsay at all. We disagree.

Hearsay includes not only verbal and written statements, but also "nonverbal conduct of a person, if it is intended by the person as an assertion." Conn. Code Evid. § 8-1 (1) (B); see *State* v. *Burney*, 288 Conn. 548, 561, 954 A.2d 793 (2008). For example, an out-of-court nod or shake of the head in response to a question is as much an assertion subject to the hearsay rules as if the person had answered the question verbally or in writing. See *State* v. *King*, 249 Conn. 645, 670–71, 735 A.2d 267 (1999). Similarly, testimony that a person was silent in response to a question or did not mention a particular fact may constitute hearsay when offered to prove the existence or nonexistence of the fact. Id., 672; see also *State* v. *Rosado*, 134 Conn. App. 505, 519, 39 A.3d 1156, cert. denied, 305 Conn. 905, 44 A.3d 181 (2012).

For example, in *King*, our Supreme Court addressed the issue of whether testimony as to the nonverbal conduct of a declarant was assertive and, thus, constituted hearsay. *State* v. *King*, supra, 249 Conn. 670–72. At the defendant's murder trial, defense counsel sought to introduce the testimony of a police officer who had shown a photographic array, which included a picture of the defendant, to the victim's younger sister, who was present at the home where the murder occurred. Id., 652–53, 670, 673. Defense counsel expected the

police officer to testify that the victim's sister "did nothing" when presented with the picture of the defendant. Id., 670 n.31. The state objected on the ground that this testimony was inadmissible hearsay because defense counsel sought to treat the silence of the victim's sister as an assertion that she could not identify the defendant. Id., 671. The trial court sustained the state's objection. Id. On appeal, our Supreme Court held that the trial court properly excluded the officer's testimony because the silence of the victim's sister was offered by defense counsel to establish only that she failed to identify the defendant from the photographic array. Id., 672. As such, the declarant's silence was "a nonverbal assertion or statement" that constituted "inadmissible hearsay." Id.

The same is true in the present case. The defendant sought to have Wuchek testify that the Browns did not identify the defendant's picture when they reviewed the photographic array. As in *King*, the defendant sought to introduce the Browns' nonidentification of the defendant in an assertive manner, as evidence that the Browns could not identify the defendant as the shooter. Because Wuchek was not present when the Browns reviewed the photographic array, it is unclear exactly how they responded, if at all, to the defendant's photograph. Nevertheless, it does not matter. Whether the Browns affirmatively excluded the defendant's picture, shook their heads when asked if they saw the shooter, or were silent, makes no difference when their nonidentification is offered in an assertive manner. Clearly, testimony as to the Browns' verbal responses or nonverbal conduct, if offered through Wuchek, would constitute hearsay because the defendant would be offering the Browns' conduct for the truth of the matter asserted. We see no reason why the same rule, as outlined in *King*, should not apply to Wuchek's testimony that the

Browns did not identify the defendant from the photographic array. Consequently, the court was correct in concluding that Wuchek's testimony regarding the Browns' nonidentification of the defendant was hearsay and was only admissible if it fell within a hearsay exception. The court also correctly concluded that § 8-5 (2) of the Connecticut Code of Evidence was not applicable to Wuchek's testimony because the Browns were not available to be cross-examined.[9] Because the defendant has not identified any other hearsay exception that would have applied to the proffered testimony, there is no basis to conclude that the court in any way erred in excluding Wuchek's testimony regarding the nonidentifications by the Browns.

With respect to the photographic array documents, the defendant argues that the court improperly determined that the pretrial identification exception, as opposed to the business records exception, was the applicable hearsay exception. The defendant offered these photographic array documents for the relevant purpose of establishing an inference that the Browns were unable to identify the defendant, from the photographic array, as the shooter.[10] When offered for that

[9] We note that the rationale for the identification exception in § 8-5 (2) of the Connecticut Code of Evidence applies with equal force to positive identifications and nonidentifications. Section 8-5 (2) of the Connecticut Code of Evidence has two requirements: that the declarant is available for cross-examination and that the identification is reliable. If the Browns had been available for trial, the opportunity to test what they said or did during their reviews of the photographic array would have been the same regardless of whether they made an identification. Similarly, the reliability of the assertion resulting from the identification procedure is the same regardless of whether it resulted in a positive identification or a nonidentification. Consequently, had the Browns been available to testify at the defendant's trial, we see no reason why § 8-5 (2) of the Connecticut Code of Evidence would not apply to their failure to identify the defendant prior to trial.

[10] The state argues on appeal that the documents were irrelevant as offered for this purpose because the circumstances under which the Browns observed the shooter had not been admitted into evidence. We disagree with the state that the court abused its discretion in determining that the business records were relevant if offered for this purpose. See *State* v.

purpose, the inference that the Browns were unable to identify the defendant constituted implied hearsay in the form of a nonverbal assertion.

This relevant inference constituted implied hearsay because, although the offered documents themselves do not establish whether the Browns were able to identify the defendant, this fact can be inferred from Wuchek's foundational testimony in conjunction with the lack of markings on the documents. See *State* v. *Jones*, 44 Conn. App. 476, 486, 691 A.2d 14 (implied hearsay occurs when "although a witness did not repeat the statements of [the declarant], his or her testimony presented to the jury, by implication, [revealed] the substance of the [the declarant's] statements"), cert. denied, 241 Conn. 901, 693 A.2d 304 (1997); *In re Jose M.*, 30 Conn. App. 381, 386, 620 A.2d 804 ("The conversation was not repeated verbatim by [the coconspirator] but, nevertheless, his testimony expressly conveyed the substance of the conversation. As such, [the coconspirator's] testimony, by implication, presented out-of-court statements that if offered as assertions or to prove the facts asserted would run afoul of the hearsay rule."), cert. denied, 225 Conn. 921, 625 A.2d 821 (1993); see also *Dutton* v. *Evans*, 400 U.S. 74, 88, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970) (recognizing that witness' statement included implicit identification of accused). Accordingly, we must determine whether this inference of nonverbal conduct was admissible under the business records exception as claimed by the defendant.

Fernando V., 331 Conn. 201, 212, 202 A.3d 350 (2019) (trial court's relevancy determination is subject to abuse of discretion review); see also §§ 4-1 and 4-2 of the Connecticut Code of Evidence; E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 4.1, pp. 144–46. This inference is relevant as exculpatory evidence as to whether the defendant was the individual who had shot the victim. If the Browns, who were in the proximity of 31 Kossuth Street when the victim was shot, were unable to identify the defendant, from a photographic array, as the shooter, this fact would tend to make it more probable that the defendant was not the shooter.

The business records exception, however, applies, at most, to the contents of the documents themselves and not to the implied hearsay drawn therefrom. "[O]nce [the criteria of business records exception] have been met by the party seeking to introduce the record . . . it does not necessarily follow that the record itself is generally admissible, nor does it mean that everything in it is required to be admitted into evidence. . . . For example, the information contained in the record must be relevant to the issues being tried. . . . In addition, the information contained in the [record] must be based on the entrant's own observation or on information of others whose business duty it is to transmit it to the entrant. . . . If the information does not have such a basis, it adds another level of hearsay to the [record] which *necessitates a separate exception to the hearsay rule in order to justify its admission*." (Emphasis added; internal quotation marks omitted.) *State* v. *George J.*, 280 Conn. 551, 593–94, 910 A.2d 931 (2006), cert. denied, 549 U.S. 1326, 127 S. Ct. 1919, 167 L. Ed. 2d 573 (2007); see *Pagano* v. *Ippoliti*, 245 Conn. 640, 651, 716 A.2d 848 (1998) (meeting notes admissible as business record but their description of statements made by meeting participant constituted inadmissible hearsay).

In the present case, the photographic array documents were offered not for the information contained therein, but for the inference of the Browns' nonverbal assertive acts that is drawn from the documents. Thus, the business records exception does not apply to the inference that the Browns could not identify the defendant from the photographic array because that fact is not contained in the documents themselves, but is based on hearsay implied from a combination of the documents and the Browns' assertive actions or inactions. Accordingly, in light of our conclusion that the business records exception does not apply to the

implied hearsay, the defendant was required to identify an applicable hearsay exception that would allow for its admission. Because the defendant has failed to identify any applicable exception, we conclude that the court properly excluded the evidence concerning the inability of the Browns to identify extrajudicially the defendant in a photographic array.

The defendant also argues that, notwithstanding its evidentiary admissibility, the evidence of nonidentification was "constitutionally admissible pursuant to the defendant's rights to due process and to present a defense." We disagree. Our conclusion that the court properly applied the rules of evidence to exclude this evidence disposes of the defendant's constitutional claim. See *State* v. *Bennett*, 324 Conn. 744, 764, 155 A.3d 188 (2017) ("[i]f . . . we conclude that the trial court properly excluded the proffered evidence, then the defendant's constitutional claims necessarily fail" [internal quotation marks omitted]).

III

The defendant finally claims that the court improperly excluded from evidence a video recording of an interview between Morgan Brown and the police. The defendant argues, contrary to the court's ruling, that the video recording of the interview was admissible pursuant to the residual exception to the hearsay rule; see Conn. Code Evid. § 8-9; because there was a reasonable necessity for its admission and it was trustworthy and reliable. We disagree.

The following additional facts are relevant to our resolution of the defendant's claim. During the state's case-in-chief, the defendant filed a motion to admit the entire video recording of an interview between Morgan Brown and the police (interview), and a memorandum of law in support thereof. The interview took place at the New Haven Police Department on the night of the

murder of the victim. In the course of the interview, which later was transcribed, Morgan Brown provided the following description of events in response to a series of questions posed by New Haven police detectives. She and Jeremy Brown were sitting in a parked vehicle in front of 31 Kossuth Street when they observed a vehicle driven by a young female with a light complexion park on Ann Street. She first answered that the female driver was white, but then immediately corrected her answer to say that she was black. She described the female as wearing her hair down, not up. She further stated that she did not know what kind of car the female was driving because she "was not really paying attention to it," and there were "so many" cars because it was a busy street. Nonetheless, she gave a description of the car as a newer, plain, charcoal grey, four door car with dark tinted windows.

She stated that, approximately two to five minutes later, "a boy comes out, well, I didn't see him come out [of] the car, but you put two and two together. He walk[ed] down the street smoking a cigarette" and approached the entrance to 31 Kossuth Street. On the way to the entrance, the boy walked in front of the Browns' car and looked at them. She stated that "he looked young, but [she] did [not] really see his face," but she described the boy as black, about five feet, nine inches tall, skinny, wearing a dark hooded sweatshirt, with the hood up, jeans, and black shoes. Several questions later, she described the boy as having light skin.

After the victim opened the door, the boy entered the residence and, while the door stayed open, she "just heard the shot. He ran out [of] the house, ran across the street, hopped in the car, and they pulled off." The boy had passed them again on the way back to his car, and she did not see him with a gun. Morgan Brown then entered 31 Kossuth Street and saw the victim lying

on the ground bleeding from his head just inside the entrance.

The defendant sought to admit the entire video recording of the interview pursuant to the residual exception to the hearsay rule. See Conn. Code Evid. § 8-9. At oral argument on the motion, held outside the presence of the jury, the defendant maintained that the interview was reasonably necessary to his case because Morgan Brown was unavailable for trial, and that the interview was reliable on the basis of the circumstances. The state opposed the admission of the interview. The state disputed that admission of the video recording of the interview was necessary because defense counsel had not undertaken all efforts to procure Morgan Brown for trial. See General Statutes § 54-82i (c) (delineating procedures to summon out-of-state material witness). The state also argued that it would not have an opportunity to cross-examine Morgan Brown regarding the inconsistent statements made in the interview and that the interview is not categorically reliable because it was given to the police and recorded on video.

The court then orally denied the defendant's motion to admit the video recording of the interview. The court initially expressed its concern whether the defendant had undertaken sufficient efforts to procure Morgan Brown's attendance by way of an interstate subpoena, but it rested its decision on the sole ground that the interview failed to meet the trustworthy and reliable requirement. In particular, the court recognized that the interview occurred immediately after the shooting, was given to the police, and was video recorded, but it determined that those circumstances, alone, did not make the interview trustworthy and reliable. The court reasoned that the inability of the state to cross-examine

Morgan Brown as to the "clear ambiguities in her statement," and her ability to perceive the shooter, were fatal to the admission of the video recording of the interview.

We turn next to the law and standard of review that governs the defendant's claim. "[I]n order to establish reversible error on an evidentiary impropriety, the defendant must prove both an abuse of discretion and a harm that resulted from such abuse." (Internal quotation marks omitted.) *State* v. *Jenkins*, 271 Conn. 165, 189, 856 A.2d 383 (2004); see *State* v. *Bennett*, supra, 324 Conn. 761–62 (affording abuse of discretion review to claim that court improperly determined that hearsay statement was not admissible under residual exception).

"The legal principles guiding the exercise of the trial court's discretion regarding the admission of hearsay evidence under the residual exception are well established. An [out-of-court] statement is hearsay when it is offered to establish the truth of the matters contained therein. . . . As a general rule, hearsay evidence is not admissible unless it falls under one of several well established exceptions. . . . The purpose behind the hearsay rule is to effectuate the policy of requiring that testimony be given in open court, under oath, and subject to cross-examination." (Internal quotation marks omitted.) *State* v. *Bennett*, supra, 324 Conn. 762. Section 8-9 of the Connecticut Code of Evidence, which is "[t]he residual, or catchall, exception to the hearsay rule allows a trial court to admit hearsay evidence not admissible under any of the established exceptions if: (1) there is a reasonable necessity for the admission of the statement, and (2) the statement is supported by the equivalent guarantees of reliability and trustworthiness essential to other evidence admitted under the traditional hearsay exceptions. . . . [T]he residual hearsay exceptions [should be] applied in the rarest of cases

. . . .” (Citations omitted; internal quotation marks omitted.) Id.

In *Bennett*, our Supreme Court considered whether the trial court abused its discretion in denying the admission, pursuant to § 8-9 of the Connecticut Code of Evidence, of a recorded statement made by a purported eyewitness to the police on the same day that the victim had been murdered. Id., 760. There, the trial court “rested its decision solely on the ground that [the witness’] statement lacked sufficient reliability and trustworthiness.” Id., 763. Our Supreme Court concluded that the trial court had not abused its discretion in denying the admission of the witness’ statement because the witness “had never been subjected to cross-examination regarding the circumstances surrounding her observations of the incident. A declarant’s availability for cross-examination has been deemed particularly significant in determining whether hearsay evidence is supported by guarantees of trustworthiness and reliability. . . . [The witness] conceded in her statement that the lighting was too limited to make out any distinguishing features of the people at the scene. [The witness] was never subject to cross-examination to further explore her ability to properly observe the events that she reported or her ability to accurately hear the sounds and statements that she had reported (i.e., how far she was from the incident, whether she has any visual or hearing impairments, whether there were obstructions or distractions at the time). . . .

“Additionally, the evidence at trial not only failed to materially corroborate [the witness’] statement, it contradicted her statement in part. . . . None of the witnesses reported hearing any gunshots, and [the victim’s] injuries were inflicted by a knife. [The witness’] report that a man in a yellow shirt was kneeling beside the victim stating, Oh, I killed him. I killed him, was consistent with the other witnesses only insofar as they

reported that [the victim's friend] wore a yellow shirt as he knelt by [the victim]; no one reported that anyone had made statements remotely consistent with that statement or any others recounted by [the witness]. Given that [the witness'] report of this inculpatory statement constituted hearsay within hearsay, the lack of corroboration bore significantly on its indicia of reliability." (Citations omitted; internal quotation marks omitted.) Id., 763–64.

In the present case, as in *Bennett*, the eyewitness, Morgan Brown, never was subjected to cross-examination; thus, the trustworthiness and reliability of the interview is undermined by the parties' inability to question her as to her ability to perceive the events that night. We agree with the trial court that cross-examination was particularly important given the substance of Morgan Brown's interview. She told the police that the driver was a black female with a light complexion, however, it is unclear the extent to which the allegedly dark tinted windows on the female's vehicle hindered Morgan Brown's observation. She also provided a description of the car that was driven by the female, but could not recall anything distinctive about it because there were "so many" cars because it was a busy street, and she "really wasn't paying attention to it." She also told the police that the shooter had twice walked directly in front of the vehicle in which she was sitting and looked at her, but she later discounted her observation by stating that she "did [not] really see his face" and that he was wearing the hood on his sweatshirt.

The state also did not have the opportunity to cross-examine Morgan Brown as to the critical uncertainties contained within the interview. For example, she told the police that she saw the shooter walking down the street and, although she did not see what car he came from, that he must have exited the female's car. She

further stated that when the shooter rapidly exited the residence, he hopped in "the car and they pulled off." It is unclear from both of these statements which car, if any, the shooter came from and to which car he returned.

Furthermore, also as in *Bennett*, the evidence presented at trial failed to corroborate in many material respects, and actually contradicted, Morgan Brown's version of events. For instance, Morgan Brown stated that the car in which the shooter purportedly arrived was driven by a female, however, Helwig, a male, testified at trial that he was the driver of the car that the defendant arrived and left in. She also told the police that the shooter departed 31 Kossuth Street without a gun, conversely, there was evidence presented at trial to establish that the defendant sprinted back to the vehicle with a gun in his hand and, after entering the vehicle, he pointed the gun at Helwig and told him to go. Therefore, we conclude that the court did not abuse its discretion in concluding that the video recording of Morgan Brown's interview was not sufficiently reliable or trustworthy to support its admission under the residual exception.

The defendant also argues that, "the defendant's constitutional rights to present a defense and to confrontation and due process requires the admission of this evidence without strict adherence to the evidentiary rules." As noted in part II of this opinion, such a claim is without merit. See *State* v. *Bennett*, supra, 324 Conn. 764 ("[i]f . . . we conclude that the trial court properly excluded the proffered evidence, then the defendant's constitutional claims necessarily fail" [internal quotation marks omitted]).

The judgment is affirmed.

In this opinion the other judges concurred.

CONNECTICUT CENTER FOR ADVANCED TECHNOLOGY, INC. *v.* BOLTON WORKS, LLC
(AC 41225)

Keller, Elgo and Bishop, Js.

Syllabus

The plaintiff landlord sought, by way of summary process, to regain possession of certain premises that it had leased to the defendant tenant. The plaintiff commenced the action by service of process, with the summons and complaint having a return date of October 26, 2017, and returned process to the court on October 24, 2017. The defendant subsequently filed a motion to dismiss for lack of jurisdiction, claiming that the plaintiff had failed to comply with the statute (§ 47a-23a) that requires that process in a summary process action be returned to court at least three days before the return date. In response, on November 15, 2017, the plaintiff served on the defendant and returned to the court an amended writ of summons and complaint with a new return date of November 24, 2017. The defendant moved to dismiss the amended complaint on the grounds that the plaintiff's original failure to return process at least three days before the return date had deprived the court of jurisdiction and that that defect in service could not be cured by amending the return date. The trial court denied the motion to dismiss, concluding that the plaintiff properly had amended the complaint and the return date to comply with § 47a-23a pursuant to the statute (§ 52-72) that allows for the proper amendment of civil process that, for any reason, is defective. The court thereafter rendered judgment of possession in favor of the plaintiff, from which the defendant appealed to this court. *Held* that the trial court properly denied the defendant's motion to dismiss the amended complaint; contrary to the defendant's claim, our Supreme Court has clarified that § 52-72 permits the amendment of civil process to correct an improper return date regardless of whether the correct return date has passed, as that statute contains no language limiting its applicability to amendments sought before the passage of the correct return date, and that summary process actions constitute civil actions that fall within the scope of § 52-72, and, accordingly, the plaintiff properly amended the return date so as to comply with the mandatory process requirements of § 47a-23a.

Argued March 5—officially released August 13, 2019

Procedural History

Summary process action brought to the Superior Court in the judicial district of Hartford, Housing Session, where the court, *Shah*, *J.*, denied the defendant's

motion to dismiss; thereafter, the matter was tried to the court; judgment for the plaintiff, from which the defendant appealed to this court. *Affirmed.*

Joshua C. Shulman, for the appellant (defendant).

Natalie J. Real, with whom was *Pat Labbadia III*, for the appellee (plaintiff).

Opinion

BISHOP, J. The issue in this appeal is whether, pursuant to General Statutes § 52-72,[1] the return date of a summary process complaint can be amended to correct the plaintiff's failure to return the complaint at least three days before the return date as required by General Statutes § 47a-23a.[2] The defendant, Bolton Works, LLC, appeals from the judgment of possession rendered by the trial court in favor of the plaintiff, Connecticut Center for Advanced Technology, Inc. The defendant claims that the trial court improperly concluded that § 52-72 permits the amendment of the return date in the context of summary process actions and that the court therefore erred in denying its motion to dismiss the plaintiff's amended complaint for failure to comply with § 47a-23a. We disagree and, accordingly, affirm the judgment of the trial court.

The following procedural history is relevant to our resolution of the defendant's appeal. The plaintiff brought a summary process action against the defendant alleging termination of the lease by lapse of time.

[1] General Statutes § 52-72 provides in relevant part: "(a) Upon payment of taxable costs, any court shall allow a proper amendment to civil process which is for any reason defective.

"(b) Such amended process shall be served in the same manner as other civil process and shall have the same effect, from the date of the service, as if originally proper in form. . . ."

[2] General Statutes § 47a-23a (a) provides in relevant part: "[The] complaint [in a summary process action] . . . shall be returned to court at least three days before the return day."

The writ of summons and complaint were dated October 17, 2017, with a return date of October 26, 2017. Following service on the defendant, the plaintiff returned the process on October 24, 2017—two days before the return date. The defendant subsequently filed a motion to dismiss on the ground that the process was not returned at least three days prior to the return date as required by § 47a-23a.

To satisfy the three day requirement of § 47a-23a, the plaintiff, on November 15, 2017, filed and served an amended writ of summons and complaint with a return date of November 24, 2017. In response, the defendant filed a motion to dismiss the plaintiff's amended complaint on December 4, 2017, arguing that the failure to return the complaint in a summary process action in compliance with § 47a-23a cannot be cured by amendment and, therefore, the plaintiff's action was still subject to dismissal. The court denied this motion on December 12, 2017, concluding that the plaintiff had properly amended its complaint and the return date pursuant to § 52-72 so as to comply with § 47a-23a. The court subsequently rendered judgment of possession in favor of the plaintiff on December 28, 2017. This appeal followed.

On appeal, the defendant claims that the trial court improperly concluded that § 52-72 permits the amendment of the return date in the context of summary process actions and that the court therefore erred in denying its motion to dismiss the plaintiff's amended complaint.

The standard of review for a court's ruling on a motion to dismiss pursuant to Practice Book § 10-31 (a) (1) is well settled. "A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination]

of the motion to dismiss will be de novo. . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone. . . . In undertaking this review, we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *Dorry* v. *Garden*, 313 Conn. 516, 521, 98 A.3d 55 (2014).

The defendant first contends that we are bound by this court's decision in *Arpaia* v. *Corrone*, 18 Conn. App. 539, 559 A.2d 719 (1989), which stated, in the context of a summary process action, that "[w]here return of service is not timely . . . the defect cannot be cured by amendment." (Internal quotation marks omitted.) Id., 540. We disagree.

In *Arpaia*, the defendants filed a motion to dismiss the plaintiffs' summary process action for failure to make timely return of process before the listed return date as required by § 47a-23a. Id., 539–40. The trial court denied the defendants' motion and subsequently rendered judgment of possession in favor of the plaintiffs. Id., 539. On appeal to this court, the defendants argued that the trial court had erred in denying their motion to dismiss the plaintiffs' action because the plaintiffs made return of process only two days prior to the return date, not three and, therefore, the action was subject to dismissal upon timely motion. Id., 539–40. Agreeing with the defendants, this court reversed the judgment

of possession, concluding that, because the defendants had filed a timely motion to dismiss the plaintiffs' action, thereby choosing not to waive the defect in the process, the trial court was required to grant the motion. Id. In so concluding, this court noted that, when return of service is untimely made and the return date has already passed, the defect may not be amended. Id., 541. The court reasoned that, "once the date for return has passed there is nothing before the court which can be amended." (Internal quotation marks omitted.) Id.

Although the portion of *Arpaia* pertaining to the amendment of process directly supports the defendant's claim in the present case, we disagree that it is binding on this court. To the extent that this portion of *Arpaia* was part of the court's holding and not mere dictum,[3] it was thereafter impliedly overruled by our Supreme Court in *Concept Associates, Ltd.* v. *Board of Tax Review*, 229 Conn. 618, 642 A.2d 1186 (1994).

In *Concept Associates, Ltd.*, the plaintiff appealed a tax assessment of its property by the Board of Tax Review of the town of Guilford to the Superior Court, but the return date listed on the complaint fell on a Thursday, and not a Tuesday as required by General Statutes § 52-48. Id., 620. The defendants therefore filed a motion to dismiss the appeal, arguing that the defective return date deprived the trial court of jurisdiction. Id., 621. In response, the plaintiff filed a motion to amend the improper return date pursuant to § 52-72, which the court denied on the ground that the return date had already passed. Id. Consequently, the court granted the defendants' motion to dismiss the plaintiff's appeal. Id.

On appeal to this court, the plaintiff argued that § 52-72 is the proper vehicle by which a party may amend

[3] There is no indication in the text of the *Arpaia* decision that the plaintiffs had, in fact, sought to amend the return date in that matter.

a defect of process. *Concept Associates, Ltd.* v. *Board of Tax Review*, 31 Conn. App. 793, 795, 627 A.2d 471 (1993), rev'd, 229 Conn. 618, 642 A.2d 1186 (1994). This court agreed with the defendants, however, that the plaintiff could not amend its civil process because the return date had already passed at the time the motion to amend had been filed in the trial court and, therefore, the court did not have jurisdiction to consider the matter. Id., 797. In so holding, this court relied on the decision in *Arpaia*, stating: "In *Arpaia* . . . this court held that when the return of service is not timely, it is a defect that cannot be cured by amendment. *The rationale for this proposition is that once the date for return has passed there is nothing before the court that can be amended. . . . The same rationale applies here.* The plaintiff's summons in this case failed to state a correct return date. Therefore, there was no proceeding before the trial court. The plaintiff's motion to amend the return day was filed after the date for return had passed. Thus, the plaintiff's motion attempted to amend an action that was not properly before the trial court and must fail. The trial court's dismissal of the action for lack of subject matter jurisdiction was proper." (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 796–97. This court therefore affirmed the judgment of dismissal rendered by the trial court. Id., 797.

The plaintiff in that case then appealed to our Supreme Court, claiming that § 52-72 permits the amendment of process to correct an improper return date regardless of whether the correct return date has passed. *Concept Associates, Ltd.* v. *Board of Tax Review*, supra, 229 Conn. 621. In response, the defendants argued that the plaintiff's amendment was "not a proper amendment" within the meaning of § 52-72 because the plaintiff did not seek to amend the return date until after the correct return date had passed and

that, therefore, there was nothing before the court that could be amended. (Internal quotation marks omitted.) Id., 622–23. Our Supreme Court disagreed with the defendants' strict construction, pointing out that § 52-72 has no provision limiting its applicability to amendments sought prior to the passage of the relevant return date. Id., 623. The court therefore rejected the narrow interpretation of the statute advanced by the defendants, explaining that, "[a]s a remedial statute, § 52-72 must be liberally construed in favor of those whom the legislature intended to benefit." (Internal quotation marks omitted.) Id. Accordingly, the court reversed this court's judgment. Id., 626.

Although our Supreme Court's decision in *Concept Associates, Ltd.* v. *Board of Tax Review*, supra, 229 Conn. 618, did not explicitly overrule the portion of *Arpaia* prohibiting amendment of process to correct an improper return date after the return date has passed, that was the practical effect of its decision. It is clear from the procedural history of *Concept Associates, Ltd.*, that both the Appellate Court and the defendants had relied on *Arpaia* to support the trial court's dismissal of the plaintiff's action. By reversing the judgment of the Appellate Court and explicitly rejecting the defendants' argument that "there [was] no longer a case before the court once the return date ha[d] passed" and, therefore, "there [was] nothing to amend," the Supreme Court implicitly overruled *Arpaia*. Id., 623. Accordingly, we reject the defendant's argument that *Arpaia* is dispositive of the present appeal.

The defendant further argues, however, that § 52-72, which permits the amendment of *civil* process, is inapplicable in the present case because summary process actions are not ordinary civil actions. According to the defendant, a summary process action is a unique cause of action that is distinct from the types of cases that the legislature intended to classify as "civil

actions." This issue requires little discussion, as the question of whether a summary process action is a civil action was recently answered by our Supreme Court in *Presidential Village, LLC* v. *Phillips*, 325 Conn. 394, 158 A.3d 772 (2017).

The question before the court in *Presidential Village, LLC*, was whether summary process actions constitute "other civil actions" within the meaning of General Statutes § 52-174 (b), which provides a medical treatment report exception to the rule against the admission of hearsay. Id., 414–16. In holding that summary process actions are "civil actions," the court explained: "Black's Law Dictionary defines 'civil action' in relevant part as, '[a]n action wherein an issue is presented for trial formed by averment of complaint and denials of answer or replication to new matter . . . .' Black's Law Dictionary (Rev. 4th Ed. 1968). *The statutory process by which eviction occurs in Connecticut is consistent with this definition.* Specifically, if a tenant neglects or refuses to quit possession after having received a pretermination notice and a subsequent notice to quit; see General Statutes § 47a-23; 'any commissioner of the Superior Court may issue a writ, summons and complaint *which shall be in the form and nature of an ordinary writ, summons and complaint in a civil process* . . . .' " (Emphasis altered.) *Presidential Village, LLC* v. *Phillips*, supra, 325 Conn. 416; see also General Statutes § 47a-23a. The court further explained: "At this point, the tenant may file an answer to the complaint and may allege any special defenses, a process facilitated by a standard form provided by the Judicial Branch. See Summary Process (Eviction) Answer to Complaint, Judicial Branch Form JD-HM-5; see also Practice Book § 17-30 (rule of civil practice governing default judgment for failure to appear or plead in summary process matter). After the pleadings are closed, a trial is scheduled. See General Statutes

§ 47a-26d." *Presidential Village, LLC* v. *Phillips*, supra, 416.

In sum, summary process actions are civil actions, and, therefore, in the absence of explicit statutory language to the contrary, they fall within the scope of § 52-72. Accordingly, we conclude that the trial court properly denied the defendant's motion to dismiss the plaintiff's summary process action.

The judgment is affirmed.

In this opinion the other judges concurred.

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Habeas corpus; claim that habeas court improperly dismissed count one of second petition for writ of habeas corpus as improper successive claim that was barred by doctrine of res judicata; whether petitioner sought to relitigate claims against his trial counsel on same legal grounds of ineffective assistance of counsel and sought same legal relief in second petition; claim that habeas court improperly denied count two of second habeas petition alleging ineffective assistance of prior habeas counsel on ground that petitioner failed to establish that he was prejudiced by trial counsel's allegedly deficient performance; whether habeas court properly determined that there was no reasonable probability that, but for trial counsel's alleged failure to investigate and present to trial court certain mitigating information, trial court would have imposed original recommended sentence of twenty-five years of incarceration.

Harris *v.* Commissioner of Correction 238

Habeas corpus; ineffective assistance of counsel; claim that habeas court abused its discretion in denying petition for certification to appeal and improperly concluded that petitioner's prior habeas and trial counsel were not ineffective for failing to obtain psychiatric records of one of state's witnesses; whether petitioner demonstrated that claim of ineffective assistance of habeas and trial counsel was adequate to deserve encouragement to proceed further.

In re Adrian K. 397

Child neglect; motion to dismiss; order of temporary custody; subject matter jurisdiction; claim that trial court improperly denied respondent father's motion to dismiss order of temporary custody for lack of subject matter jurisdiction; claim that rule of practice (§ 33a-6 [c]) limited court's jurisdiction; claim that trial court denied father's motion to dismiss in violation of substantive and procedural due process rights; claim that trial court deprived father of right to family integrity and timely notice by failing to interpret as mandatory timing requirements for filing motion to modify disposition pursuant to § 33a-6 (c).

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.

IP Media Products, LLC *v.* Success, Inc. 413

Foreclosure; claim that plaintiff was holder in due course entitled to enforce mortgage and note irrespective of whether documents were executed with requisite corporate authority; failure of plaintiff to challenge trial court's finding that mortgage and note were unenforceable as conveyed and executed without requisite corporate

authority; whether plaintiff properly preserved claim that it was entitled to foreclose mortgage as holder in due course; whether plaintiff introduced any evidence at trial seeking to establish elements required by statute (§ 42a-3-302) that defines holder in due course.

Jackson *v.* Drury 587

Probate; trusts; motion to dismiss; whether trial court properly granted motion to dismiss appeal for lack of subject matter jurisdiction on ground that appeal was untimely pursuant to statute (§ 45a-186 [a]); whether plaintiff lacked standing to appeal where she failed to allege colorable claim of direct personal injury; whether plaintiff was aggrieved by Probate Court's decree; failure of plaintiffs to file appeal within thirty days of when Probate Court's order was mailed; claim that doctrine of equitable estoppel tolled late filing of appeal.

Lewis *v.* Newtown 213

Summary judgment; whether trial court properly granted motion for summary judgment on ground of governmental immunity pursuant to statute (§ 52-557n [a] [2] [B]); claim that trial court improperly concluded that complaint did not contain allegations of negligence directed at acts and omissions of defendants' faculty and staff during shooting at school; claim that trial court improperly concluded that plaintiffs failed to establish existence of genuine issue of material fact as to whether defendants' implementation of school security guidelines was discretionary; claim that trial court improperly determined that identifiable person-imminent harm exception to governmental immunity did not apply to defendants' claim of immunity; whether trial court improperly concluded that no genuine issue of material fact existed as to whether adoption of school security guidelines was discretionary act within defendants' general duty to manage and supervise employees and schoolchildren, and, therefore, protected by governmental immunity.

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.

Meriden *v.* Freedom of Information Commission 648

Administrative appeal; alleged violation of Freedom of Information Act (§ 1-200 et seq.); whether gathering of less than quorum of city council was "proceeding" within meaning of § 1-200 (2), and constituted "meeting" within meaning of statute; whether plaintiff violated applicable statute (§ 1-225 [a]) by failing to properly notice leadership group gathering; claim that trial court erred in concluding that gathering of less than quorum of city council members to set agenda and decide to submit resolution for action by full city council constituted meeting under § 1-200 (2) and that such gathering constituted step in process

of agency-member activity such that it was proceeding within meaning of § 1-200 (2); whether gathering of leadership group of less than quorum of city council members did not constitute meeting within meaning of § 1-200 (2) and did not trigger open meeting requirements of § 1-225 (a); whether gathering of leadership group served adjudicatory function within plain meaning of "hearing" or "proceeding"; whether, under holding of Windham *v.* Freedom of Information Commission *(48 Conn. App. 529), gathering akin to "convening or assembly" as opposed to "hearing or other proceeding" of less than quorum of members of public agency constituted "meeting" within meaning of § 1-200 (2); whether trial court's interpretation of "hearing or other proceeding" in § 1-200 (2) as alluding to gathering between agency members that constituted step in process of agency-member activity was supported by language of statute or this court's interpretation of statute.*

Monroe *v.* Ostrosky 474

Injunction; appeal from judgment of trial court denying motion to open and vacate court's prior judgment that had been rendered in favor of plaintiff town and several of its agencies and employees; action seeking injunctive relief compelling defendant to comply with two cease and desist orders, which alleged violations of zoning and inland wetlands regulations; claim that defendant did not have notice of, and opportunity to be heard at, evidentiary hearing.

Mosby *v.* Board of Education 280

Contracts; whether trial court properly granted motion to dismiss for improper service of process; whether plaintiff properly served defendant board of education pursuant to statute (§ 52-57 [b]); reviewability of claim that trial court improperly granted motion for summary judgment for lack of standing; failure to brief claim adequately.

Moutinho *v.* 500 North Avenue, LLC 608

Foreclosure; motion to dismiss; claim that trial court improperly denied motion to dismiss; reviewability of claim challenging trial court's denial of motion to dismiss; claim that court improperly failed to rule on oral motion for judgment of dismissal for failure to make out prima facie case under applicable rule of practice (§ 15-8) at close of plaintiff's case-in-chief; harmless error; claim that trial court improperly denied defendant right to make closing arguments or to file posttrial briefs in lieu of closing arguments under applicable rule of practice (§ 15-5 [a]).

Moutinho *v.* 1794 Barnum Avenue, Inc. (See Moutinho *v.* 500 North Avenue, LLC) 608

Moutinho *v.* Red Buff Rita, Inc. (See Moutinho *v.* 500 North Avenue, LLC). 608

Newtown *v.* Ostrosky 450

Injunction; action seeking injunctive relief compelling defendant to comply with two cease and desist orders, which alleged violations of zoning and inland wetlands regulations; claim that trial court lacked subject matter jurisdiction to determine municipal boundaries and that motion to dismiss, therefore, should have been granted because court's judgment necessarily determined boundary line; claim that trial court erred in denying motion to open because defendant had not received notice of, and did not have opportunity to be heard at, evidentiary hearing on merits of action; claim that, because court has continuing jurisdiction to enforce and to modify its injunctive orders, judgment was not subject to four month rule and could validly be revisited at any time.

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.

Sack Properties, LLC *v.* Martel Real Estate, LLC 383

Quiet title; claim that trial court improperly rejected quiet title and trespass claims on ground that plaintiff failed to prove that it exclusively owned pipe through which drainage easement ran; claim that trial court's findings that there was no evidence of exclusive ownership and that plaintiff failed to prove exclusive ownership was clearly erroneous; claim that trial court's finding that plaintiff failed to prove that defendant had overburdened drainage easement by using pipe to drain excess stormwater was clearly erroneous.

Scott *v.* CCMC Faculty Practice Plan, Inc. 251

Medical malpractice; claim that trial court improperly permitted defendants to introduce evidence that, after surgery, plaintiff's pain substantially resolved due to syrinx that had developed within his spinal cord to establish reduction in damages; claim that syrinx evidence had to be categorized as "benefits evidence"

under Restatement (Second) of Torts (§ 920) that was outside pleadings and contrary to public policy; whether trial court erred when it failed to give plaintiff's requested jury instructions regarding syrinx evidence; claim that trial court's rulings were harmful because syrinx evidence permeated case; claim that trial court's rulings were harmful because jury could have considered syrinx evidence in its determination of liability.

Seward *v.* Administrator, Unemployment Compensation Act 578

Unemployment compensation benefits; whether Employment Security Board of Review properly affirmed decision of appeals referee finding that plaintiff was not entitled to certain unemployment benefits; claim that trial court exceeded scope of its authority by making factual findings not in record and relying on its own factual findings in determining that board had abused its discretion by denying plaintiff's motion to open.

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.* Alicea 421

Assault in first degree; whether verdict of guilty of intentional assault in violation of statute (§ 53a-59 [a] [1]) and reckless assault in violation of § 53a-59 (a) (3) was legally inconsistent; claim that defendant's right to due process was violated because he was unaware that he could be convicted of both intentional assault and reckless assault; whether trial court abused its discretion by excluding from evidence defendant's statement to police; claim that defendant's statement to police was admissible under spontaneous utterance exception to rule against hearsay; whether evidence was sufficient to disprove beyond reasonable doubt defendant's claim of self-defense.

State *v.* Burton 808

Murder; criminal possession of firearm; carrying pistol without permit; motion to suppress; hearsay; claim that trial court improperly denied motion to suppress certain evidence seized by police from bedroom of defendant's girlfriend; whether trial court's finding that defendant's girlfriend and girlfriend's mother voluntarily consented to search of bedroom was clearly erroneous; credibility of witnesses; claim that trial court improperly excluded certain testimony and documents concerning inability of two eyewitnesses to identify defendant in photographic array as shooter; whether trial court improperly determined that § 8-5 (2) of Connecticut Code of Evidence was hearsay exception applicable to nonidentification evidence; whether business records exception to hearsay rule set forth in § 8-4 (a) of Connecticut Code of Evidence did not apply to inference that eyewitnesses could not identify defendant from photographic array; whether trial court abused its discretion in concluding that video recording of interview between an eyewitness and police was not sufficiently reliable or trustworthy to support its admission under residual exception to hearsay rule set forth in § 8-9 of Connecticut Code of Evidence.

State *v.* Carrasquillo 665

Murder; criminal possession of firearm; unpreserved claim that defendant was deprived of rights to due process and to jury trial because trial court applied improper pressure on jury to reach verdict; claim that jury would have believed it would not be excused at end of day if it did not reach verdict after receiving Chip Smith instruction; claim that trial court did not respond to note from juror that alerted court to existence of family emergency that would require juror's absence beginning on certain date; claim that trial court sanctioned pressure that juror was under from other members of jury; claim that two hours of jury deliberation after trial court gave jury Chip Smith instruction suggested that court coerced jury to reach unanimous verdict; claim that trial court abused its discretion in denying motion for mistrial; claim that defendant was denied fair trial because trial court failed to conduct inquiry of juror at time of trial as to note from juror; waiver of claim that trial court failed to canvass juror at time

it received note; unpreserved claim that defendant was denied right to due process because trial court's response to note from jury about accessorial liability as to murder charges created reasonable possibility that jury was misled about state's burden of proof; waiver of objection to jury instructions concerning accessorial liability; claim that jury instruction on accessorial liability as to murder charge constituted plain error; claim that jury instruction on accessorial liability as to murder charge created possibility of confusion in minds of jurors as to what evidence state relied on in support of murder counts or with respect to mental state required for commission of murder as accessory.

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.

State *v.* Juan V. 553

Risk of injury to child; claim that trial court committed plain error by permitting jury during its deliberations and in jury room to view, without limitation, video recording of victim's forensic interview, which had been admitted into evidence as full exhibit; whether trial court correctly submitted video exhibit to jury as required by applicable rule of practice (§ 42-23) and in manner consistent with our Supreme Court's stated preference for juries to receive all exhibits, when feasible, in jury room; reviewability of claim that trial court improperly instructed jury on inferences; waiver of right to challenge trial court's jury instruction; whether trial court's instruction constituted impermissible two-inference instruction that improperly diluted state's burden of proof; whether inferences instruction constituted obvious and undebatable error so as to establish manifest injustice or fundamental unfairness pursuant to plain error doctrine; claim that trial court erred in failing to disclose victim's school records following in camera review; whether victim's undisclosed school records contained information that was exculpatory or probative of victim's credibility.

State *v.* Kerlyn T. 476

Aggravated sexual assault in first degree; home invasion; risk of injury to child; assault in second degree with firearm; unlawful restraint in first degree; threatening in first degree; assault in third degree; whether trial court erred when it determined that defendant knowingly, intelligently, and voluntarily waived his right to jury trial; whether trial court abused its discretion when it determined that defendant had not demonstrated substantial reason that warranted either discharge of defense counsel or more searching inquiry into that request; claim that colloquy between court and defendant regarding waiver of right to jury trial was constitutionally inadequate because it failed to elicit information regarding defendant's background, experience, conduct, and mental and emotional state.

State *v.* Mercer. 288

Sexual assault in first degree; unlawful restraint in first degree; claim that defendant was deprived of constitutional rights to due process and effective assistance of counsel during plea bargaining stage of proceedings because state initially charged defendant with crime predicated on misunderstanding of victim's age; whether record was adequate to conduct meaningful review of defendant's claim.

State *v.* Porfil. 494

Possession of narcotics with intent to sell by person who is not drug-dependent; sale of narcotics within 1500 feet of school; possession of drug paraphernalia; possession of narcotics; interfering with officer; claim that there was insufficient evidence to support defendant's conviction; whether state failed to produce sufficient evidence to prove beyond reasonable doubt that defendant had constructive possession of narcotics recovered by police in common area of certain house; whether defendant's reliance on State *v.* Nova *(161 Conn. App. 708) for contention that state failed to establish, in addition to his spatial and temporal proximity to subject narcotics, existence of other incriminating statements or circumstances linking him to them was misplaced; whether state relied solely on two hand-to-hand exchanges observed by police officer and defendant's proximity to narcotics to prove constructive possession of narcotics; whether, on basis of evidence presented, jury reasonably could have inferred that defendant had been selling subject narcotics from porch of house during time in question; whether jury reasonably could have concluded that defendant was aware of nature and presence of narcotics and had dominion and control over them; claim that trial court committed evidentiary error and deprived defendant of his constitutional right to present defense by improperly excluding certain photographs of front and back of house; whether exclusion of photograph of front of house rose to level of constitutional violation or substantially affected jury's verdict; whether trial court properly excluded photograph of rear of house on ground that defendant failed to authenticate it; claim that trial court improperly prevented defendant from showing scar on his back to jury, thereby depriving him of his constitutional right to present misidentification defense; whether trial court abused its discretion by excluding demonstration of scar as needlessly cumulative.*

State *v.* Scott. 315

Robbery in first degree; whether trial court denied defendant right to due process under federal and state constitutions when court denied motion to suppress out-

of-court and subsequent in-court identifications of defendant by victim; whether trial court properly determined that out-of-court identification of defendant at arraignment proceeding was sufficiently reliable under federal constitution on basis of factors in Neil *v.* Biggers *(409 U.S. 188); whether trial court's findings as to* Biggers *factors were supported by evidence; claim that victim's failure to identify defendant in police photographic arrays undermined reliability of subsequent identification at arraignment; whether trial court correctly denied motion to suppress victim's in-court identification of defendant; whether trial court improperly failed to suppress victim's identifications of defendant under article first, § 8, of state constitution on basis of Supreme Court's modification in* State *v.* Harris *(330 Conn. 91) of reliability standard in* Biggers *with respect to admissibility of eyewitness identification testimony; whether trial court's application of* Biggers *factors was harmless; claim that unconscious transference—mistaken identity of face seen in one context as face seen in another context—was fatal to trial court's application of* Biggers*; whether evidence was sufficient to support defendant's conviction as against deceased victim; claim that jury could not have reasonably inferred that second victim knew that deceased victim had cash and cell phone in car prior to search of vehicle by defendant and accomplice, and that defendant, his accomplice or both had taken deceased victim's cash and cell phone; claim that defendant could have been convicted of robbery in first degree only as accessory; whether evidence was sufficient to prove that defendant acted as principal during robbery; whether trial court abused its discretion in denying motion to disqualify trial judge, who had presided at prior trial of defendant's accomplice, ruled on accomplice's motion to suppress and indicated admiration for victim who testified against accomplice and against defendant.*

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.

White *v.* Latimer Point Condominium Assn., Inc. 767

Permanent injunction; claim that trial court rendered judgment that was neither legally correct nor factually supported by record; whether record could be read to support court's conclusion that plaintiff failed to meet burden; whether trial court properly found that plaintiff did not prove case; claim that trial court disregarded case law; failure of plaintiff to seek articulation of bases of trial court's decision.

Wilton Campus 1691, LLC *v.* Wilton. 712

Tax appeals; whether, pursuant to statute (§ 12-63c [d]), plaintiff property owners were required to provide assessor with annual income and expense reports regarding properties by certain date; whether assessor improperly imposed late filing penalties under § 12-63c (d) on plaintiffs retroactively, after assessor signed grand list, pursuant to statute (§ 12-60) that governs corrections to grand list due to clerical omission or mistake; whether trial court improperly concluded that although assessor had violated statute (§ 12-55 [b]) that requires assessor to make any assessment required by law prior to signing grand list, only redress for assessor's failure to comply with provisions of § 12-55 (b) was to postpone right of plaintiffs to appeal action to assessor until succeeding grand list, and that penalty prescribed for in § 12-63c (d) makes no provision for removal of penalty imposed by legislature, regardless of action taken by assessor; whether, pursuant to § 12-55 (b), imposition of late filing penalty constitutes assessment required by law and, as such, it must be made by assessor prior to taking oath; whether assessor lacked statutory authority to impose late filing penalties after he took oath; whether late adjustments were invalid and prevented any recovery of taxes based thereon; claim that language in § 12-55 (a) demonstrated legislative intent to exclude, by implication, late penalties under § 12-63c (d) as required assessment; whether trial court improperly concluded that delayed imposition of late filing penalties did not correct clerical omission or mistake, rendering § 12-60 inapplicable; claim that plaintiffs were not harmed by assessor's imposition

of late filing penalties because plaintiffs were able to seek review of assessor's imposition of penalties by appealing to board.
Wilton River Park North, LLC *v.* Wilton (See Wilton Campus 1691, LLC *v.* Wilton) 712
Wilton River Park 1688, LLC *v.* Wilton (See Wilton Campus 1691, LLC *v.* Wilton) 712

NOTICES

NOTICE OF REPRIMAND

MMX-CV-19-6025172-S. OFFICE OF CHIEF DISCIPLINARY COUNSEL v. DISORBO, MATTHEW L. SUPERIOR COURT, JUDICIAL DISTRICT OF MIDDLESEX AT MIDDLETOWN 7/17/2019.

Pursuant to Practice Book § 2-54, notice is hereby given that on 07/17/2019 in docket number MMX-CV-19-6025172-S, Matthew L. Disorbo, juris number 428702, of Middletown, Connecticut was reprimanded from the practice of law.

The court,
Suarez, J.

Notice of Certification as Authorized House Counsel

Upon recommendation of the Bar Examining Committee, in accordance with § 215A of the Connecticut Practice Book, notice is hereby given that the following individuals have been certified by the Superior Court as Authorized House Counsel for the organization named:

Certified as of July 19, 2019:

Corinne P. Kevorkian	Whitsons Culinary Group
Brendan Ryan	Gartner, Inc.
Adam W. Tracy	Odyssey Logistics & Technology Corporation

Certified as of July 22, 2019:

Adam T. Domzalski	SS&C Technologies, Inc.
Courtney V. Keany	Propark, Inc.

Hon. Patrick L. Carroll III
Chief Court Administrator

Notice of Suspension of Attorney

Pursuant to § 2-54 of the Connecticut Practice Book, notice is hereby given that on July 16, 2019, in Docket Number HHD-CV-19-6111881 Neil Joseph Judd, juris # 431836 of Boxford, MA, was suspended from the practice of law for a period of 6 months, effective immediately, as reciprocal discipline for his State of Massachusetts, Supreme Judicial Court for Suffolk County order of discipline.

1. The Respondent shall comply with Practice Book § 2-47B (Restrictions on the Activities of Deactivated Attorneys).
2. The Respondent shall request a hearing before this court to consider his reinstatement upon the expiration of his six month suspension; however, the

Respondent shall not be eligible to apply for reinstatement unless and until such time as he is eligible for reinstatement in the Commonwealth of Massachusetts.

3. Additionally, prior to reinstatement in Connecticut, the Respondent must satisfy any bar requirements and must otherwise be in good standing.

David Sheridan
Presiding Judge

Notice of Suspension of Attorney and Appointment of Trustee

Pursuant to Practice Book Section 2-54, notice is hereby given that on July 11, 2019, in Docket Number HHD-CV-19-6111642 Jeffrey D. Cedarfield (juris# 417470) of West Hartford, CT was found to have engaged in misconduct.

As to the First Count:

1. Jeffrey Cedarfield is suspended from the practice of law for a period of 90 days, effective immediately.
2. Attorney Patrick J. Rosenberger, Juris No. 309309, of Hartford, Connecticut, is appointed Trustee to take such steps as are necessary to protect the interests of Respondent's clients, to inventory Respondents' files, and to take control of Respondent's clients' funds accounts. The respondent shall cooperate with the Trustee in this regard.
3. The Respondent shall comply with Practice Book § 2-47B (Restrictions on the Activities of Deactivated Attorneys).
4. Prior to being reinstated, the Respondent shall pay all fees dues to the Client Security Fund and restitution to the complainant. Unless Disciplinary Counsel requests a hearing prior to October 9, 2019, the Respondent shall be automatically reinstated.

As to the Second Count:

1. Jeffrey Cedarfield is suspended from the practice of law for a period of 30 days, effective immediately to run concurrent with the suspension imposed in the First Count herein.
2. Attorney Patrick J. Rosenberger, Juris No. 309309, of Hartford, Connecticut, is appointed Trustee to take such steps as are necessary to protect the interests of Respondent's clients, to inventory Respondents' files, and to take control of Respondent's clients' funds accounts. The respondent shall cooperate with the Trustee in this regard.
3. The Respondent shall not deposit to, or disburse any funds from, his clients' funds accounts.
4. The Respondent shall comply with Practice Book § 2-47B (Restrictions on the Activities of Deactivated Attorneys).
5. Prior to being reinstated, the Respondent shall pay all fees dues to the Client Security Fund.

Kevin Dubay
Judge

Notice of Procedures by Which an Individual May be Removed from the List of Those Deemed Eligible for Appointment as a Guardian Ad Litem or Attorney for the Minor Child in Family Matters

Effective September 3, 2019

Standing Committee on Guardians Ad Litem and Attorneys for the Minor Child in Family Matters

Pursuant to Practice Book Section 25-61A(b)(3), the Standing Committee on Guardians Ad Litem and Attorneys for the Minor Child in Family Matters establishes the following procedures by which an individual may be removed from the list of those deemed eligible for appointment as a guardian ad litem or attorney for the minor child in family matters.

Section 1 – Definitions

''Committee'' means the Standing Committee on Guardians Ad Litem and Attorneys for the Minor Child in Family Matters established pursuant to Practice Book Section 25-61A;

''Complainant'' means a Judge, a Party, an attorney-at-law who has filed an appearance for a Party in a Relevant Proceeding, a person who has been appointed as a guardian ad litem or attorney for a minor child in the same Relevant Proceeding as the Respondent, or a licensed mental health professional directly involved in a Relevant Proceeding;

''Complaint'' means a written document, submitted under penalty of false statement on a form approved by the Committee, alleging Grounds for Removal of a Respondent from the Eligible List;

''Eligible List'' means the current list of individuals deemed eligible for appointment as a guardian ad litem or attorney for a minor child, which is approved pursuant to Practice Book Section 25-61A(b)(4);

''Full Committee'' means a quorum of at least five of the nine members of the Committee;

''Grounds for Removal'' means a finding that the Respondent presents an imminent risk of significant harm to the health, safety, or welfare of the public;

''Judge'' means a judge or senior judge of the superior court, judge trial referee, family support magistrate, or family support referee;

''Party'' means a plaintiff, defendant, applicant, respondent, petitioner, or intervening party in a Relevant Proceeding, or the State of Connecticut with respect to a Relevant Proceeding in which it is represented by the Attorney General;

''Period of Limitations'' means within one year of the act or conduct complained of subject to, at the Committee's discretion, a period of tolling of up to one year if an act of concealment or fraud is involved;

''Probable Cause Panel'' means a panel of two or three members of the Committee, as the case may be, appointed by the Chair of the Committee in accordance with these rules to determine whether probable cause exists that there are Grounds for Removal of a Respondent named in a Complaint;

''Record'' means the Complaint, the written response of the Respondent to the Complaint, if any, any investigatory file and copies of any documents, transcripts, or other written materials which were available to a Probable Cause Panel or to the Full Committee;

''Relevant Proceeding'' means a family relations matter, as defined by CGS Sec. 46b-12(d), in which the Respondent has been appointed as a GAL/AMC pursuant to CGS Sec. 46b-54;

''Respondent'' means an individual on the Eligible List as of the date of filing of a Complaint against him or her.

Section 2 – Filing a Complaint

A. Any Complainant, as defined above, may file a Complaint with the Committee within the Period of Limitations. The required Complaint form can be obtained from any superior court clerk's office, Court Services Center, or online from the Committee's homepage on the Judicial Branch's website, https://www.jud.ct.gov/Committees/GAL_AMC/default.htm. There is no fee to file a Complaint.

B. Complaints may be submitted by electronic mail to *GalApprovedList@jud.ct.gov*. All Complaints submitted by electronic mail must be in .pdf format. A Complainant may also submit a Complaint by certified mail, return receipt requested. If a Complaint is submitted by certified mail, the Complainant must include an original and 3 copies. Complaints submitted by certified mail can be mailed to *GAL Approved List, P.O. Box 273, Glastonbury, CT 06033*.

C. A Complaint may not contain any unredacted personal identifying information as defined by Connecticut Practice Book Section 4-7.

D. Failure to submit a Complaint that complies with these rules will result in the Complaint being returned to the Complainant, who may then file a revised Complaint which complies with these rules. Complaints that are not filed on the proper form approved by the Committee, or that are not signed under penalty of false statement, will be returned to the Complainant by staff to the Committee. Complaints returned to the Complainant for any other reason will be done at the direction of a Probable Cause Panel. If a revised Complaint, based on the original allegations, is filed within fifteen (15) days after the date of mailing or emailing the original Complaint back to the Complainant, then for purposes of the Period of Limitations it shall relate back to the date of filing of the original Complaint; otherwise it shall be treated as a newly filed Complaint.

E. Upon the successful filing of a Complaint, Committee staff will send a copy of the Complaint to the Respondent by electronic mail within two (2) business days.

F. The Respondent, at his or her option, may submit a written response to the Complaint by electronic mail to *GalApprovedList@jud.ct.gov*, or by certified mail, return receipt requested, to *GAL Approved List, P.O. Box 273, Glastonbury, CT 06033*. All responses submitted by electronic mail must be in .pdf format. If a response is submitted by certified mail, the Respondent must include an original and 4 copies. If any response is filed, Committee staff will send a copy of the response to the Complainant within two (2) business days. No further pleadings or replies will be allowed.

G. All responses must be filed within twenty-one (21) days of the filing of the Complaint. A Probable Cause Panel may allow additional time for the filing of a response.

H. A response may not contain any unredacted personal identifying information as defined by Connecticut Practice Book Section 4-7.

I. Neither the Complaint, nor any response to the Complaint, may contain or be accompanied by any supporting materials. Any supporting materials that are submitted with the Complaint, or any response to the Complaint, will be returned to the filer. However, any supporting materials and/or witnesses may be listed in the Complaint, or the response to the Complaint, along with an offer of proof briefly explaining their relevance. The Probable Cause Panel may request that the Complainant or the Respondent provide it with 5 copies of any listed supporting materials for its review and investigation. One copy of any supporting materials submitted to the Probable Cause Panel will be provided to the opposing party by Committee staff.

J. Notwithstanding any request by the Respondent to seek voluntary removal from the Eligible List, or any request by the Complainant to voluntarily withdraw their Complaint, the Probable Cause Panel or the Full Committee, as the case may be, may in its discretion continue to proceed under these Procedures as it deems appropriate.

Section 3 – Determination of Probable Cause

A. Upon the proper filing of a Complaint in accordance with these Procedures, the Chair of the Committee will appoint a two (2) member Probable Cause Panel to review and investigate the Complaint. If the Complaint meets the threshold requirements of filing as specified in Section 2, the Probable Cause Panel will determine if probable cause exists that the Respondent engaged in conduct that constitutes Grounds for Removal. At the conclusion of the review and investigation, the Probable Cause Panel will provide a written recommendation of its findings as to probable cause to the Full Committee.

B. The review and investigation conducted by the Probable Cause Panel shall be based solely on the Record. No probable cause hearings will be conducted. Discovery on the part of the Complainant or the Respondent shall not be permitted.

C. The Record is confidential, except to the Complainant, the Respondent, and their counsel, if any, unless and until probable cause is found by the Full Committee in accordance with paragraphs H and I of this Section.

D. The deliberations of the Probable Cause Panel are confidential.

E. At the conclusion of its review and investigation, the recommendation of the two (2) member Probable Cause Panel will be forwarded to the Full Committee. The recommendation made by the two (2) member Probable Cause Panel to the Full Committee must be unanimous.

F. In the event that a two (2) member Probable Cause Panel cannot agree upon a unanimous recommendation to the Full Committee, the Chair will appoint a third member to the panel. The third panel member shall be entitled to review all materials already collected by the Probable Cause Panel prior to the third member's appointment. Any additional review and investigation conducted subsequent to the appointment of the third panel member shall be done by the panel as a whole.

G. At the conclusion of its review and investigation, the recommendation of the majority of the Probable Cause Panel will be forwarded to the Full Committee. A dissenting member of the Probable Cause Panel may also submit a recommendation to the Full Committee. The recommendation of the Probable Cause Panel, and any dissenting recommendation, will not be provided to the Complainant, the Respondent, or their counsel.

H. Once the Probable Cause Panel has made a recommendation, the recommendation will be considered by the Full Committee at its next regularly scheduled meeting, provided that the Full Committee may in its discretion table a decision on the recommendation to a subsequent meeting. Consideration of the Probable Cause Panel's recommendation will take place in executive session that shall not be open to the public.

I. The Full Committee may vote to accept or reject the recommendation of the Probable Cause Panel based on a majority vote. If no probable cause is found by majority vote of the Full Committee, a written decision dismissing the Complaint will be filed. The decision is not subject to any further review. If the Full Committee makes a finding that there is probable cause, it will hear the merits of the Complaint according to the procedures in the following section. A copy of the Full Committee's written decision will be provided to the Complainant, the Respondent, and their counsel, if any.

J. If the Full Committee makes a finding that there is probable cause, the Respondent may be subject to immediate temporary removal from the Eligible List pending the outcome of a hearing on the merits of the Complaint. The decision on whether the Respondent is to be removed from the Eligible List on a temporary basis shall be made based on a majority vote of the Full Committee following a finding of probable cause.

K. If the Full Committee decides to temporarily remove the Respondent from the Eligible List, notice of the Committee's action may be forwarded to either the Statewide Grievance Committee or the Department of Public Health, whichever is the Respondent's appropriate licensing authority. Notice of the Committee's action will also be forwarded to the chief administrative judge for the family division, and the presiding judge of family and chief clerk in each judicial district where the Respondent had been eligible to serve as a guardian ad litem or attorney for the minor child.

Section 4 – Hearing on the Merits

When the Full Committee makes a finding that probable cause exists that there are grounds for removal of a Respondent named in a Complaint, the Full Committee will conduct a hearing on the merits according to the following process:

A. Hearings on the merits shall be open to the public.

B. Notice of the date, time, and location of the hearing on the merits will be provided to the Complainant, Respondent, and their counsel, if any.

C. Discovery on the part of the Complainant or the Respondent shall not be permitted.

D. Hearings may only be recorded, if at all, by an official court reporter, official court recording monitor, or other person designated and arranged for by the Committee.

E. The Chair of the Committee, or the Chair's designee, who shall be a member of the Full Committee, will preside over the hearing.

F. The Complainant and the Respondent may be represented by an attorney, if they so choose. Attorneys who represent either the Complainant or the Respondent shall file a letter with the Committee as notice of their intent to appear on behalf of that party. The Committee is not under any obligation to provide an attorney to either party.

G. The burden of proof is on the Complainant to show that Grounds for Removal exist by a fair preponderance of the evidence.

H. The Complainant and the Respondent will each have an opportunity to present his or her case, should they so choose, including the testimony of any relevant witnesses, the introduction of any relevant evidence, and argument as to why Grounds for Removal do or do not exist by a fair preponderance of the evidence.

I. Evidentiary submissions after a finding of probable cause may only be made as exhibits offered at the hearing of the Full Committee. Any proposed evidence received by the Committee after a finding of probable cause will be returned to the party who submitted it and not be made part of the Record unless it is properly submitted at such hearing. At least seven days before the hearing, the Complainant and Respondent shall: (1) exchange copies of all exhibits each intends to offer at the hearing, and (2) file with the Full Committee and provide to the other party a list of witnesses (other than themselves) which each reasonably expects to call during the hearing. The requirements of this subsection may be waived in the discretion of the Full Committee for good cause.

J. Any evidence may be received, but the Full Committee shall exclude irrelevant, immaterial or unduly repetitious evidence. At its discretion, the Full Committee may exclude evidence not provided to the other party in advance in accord with subsection I of this Section, or witnesses not named in the lists provided in advance pursuant to said subsection. Exhibits of the Complainant shall be marked and listed numerically and of the Respondent alphabetically. Either party shall be entitled to request that an offered exhibit which is not admitted into evidence be marked for identification only.

K. Evidence may be received in the form of copies or excerpts if the original is not readily available. Upon reasonable and timely requests, the parties may be given an opportunity to compare the copy with the original.

L. Each party may conduct reasonable direct and cross-examinations of witnesses. All testimony shall be given under oath.

M. The members of the Full Committee may ask questions of the Complainant, Respondent, and any witnesses.

N. Each party shall be allowed a maximum of 10 minutes for argument immediately after both sides have presented their evidence. The Full Committee may, in its discretion, allow additional time to each party for argument.

O. After the hearing on the merits is concluded, the Full Committee will issue a final written decision with its findings and conclusions. The Full Committee's decision will be based upon a majority vote. A copy of the written decision will be provided to the Complainant, the Respondent, and their counsel, if any.

P. There shall be no post-hearing evidence. Neither the Complainant, the Respondent, nor their counsel may request reconsideration or judicial review once the Full Committee has issued its final written decision.

Q. If the final written decision of the Full Committee finds that Grounds for Removal of the Respondent from the Eligible List have not been proven by a fair preponderance of the evidence, any Respondent who was subject to immediate temporary removal from the Eligible List after a finding of probable cause shall be immediately reinstated to the Eligible List. Notice of reinstatement shall be forwarded to either the Statewide Grievance Committee or the Department of Public Health, whichever is the Respondent's appropriate licensing authority, to the chief administrative judge for the family division, and the presiding judge of family and chief clerk in each judicial district where the Respondent had been eligible to serve as a guardian ad litem or attorney for the minor child immediately prior to the temporary removal.

Section 5 – Remedies

If the final written decision of the Full Committee finds by a fair preponderance of the evidence that Grounds for Removal from the Eligible List exist, the Full Committee may order remedies as follows. Any remedy is to be considered part of the Full Committee's final written decision and, therefore, is not subject to reconsideration or judicial review except as set forth herein:

A. The Full Committee may order that the Respondent be removed from the Eligible List on a temporary basis for a stated time period, after which the respondent will be reinstated automatically, subject to the Respondent's right to make a request for reinstatement prior to the end of the suspension period but no sooner than a date, if any, specified by the Full Committee. Any request for reinstatement prior to the end of the suspension period would require the approval of a majority of the Full Committee.

B. The Full Committee may order that the Respondent be removed from the Eligible List indefinitely, subject to the Respondent's right to make a request for reinstatement no sooner than a date, if any, specified by the Full Committee. Any request for reinstatement would require the approval of a majority of the Full Committee.

C. If the Full Committee decides to order any remedy in this section, notice of the Committee's action may be forwarded to either the Statewide Grievance Committee or the Department of Public Health, whichever is the Respondent's appropriate licensing authority. Notice of the Committee's action will also be forwarded to the chief administrative judge for the family division, and the presiding judge of family and chief clerk in each judicial district where the Respondent had been eligible to serve as a guardian ad litem or attorney for the minor child.

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