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CONNECTICUT REPORTS

Vol. 333

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

DONITA J. KING, EXECUTRIX (ESTATE OF DANIEL H. KING), ET AL. *v.* VOLVO EXCAVATORS AB, ET AL.
(SC 20097)

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

Syllabus

The plaintiff, individually and on behalf of the estate of K, sought to recover damages pursuant to the Connecticut Product Liability Act (§ 52-572m et seq.) in connection with a fatal workplace accident. The plaintiff alleged that K had sustained fatal injuries when the bucket of an excavator became dislodged and fell on him while he was acting within the scope of his employment. The defendants, the designer and manufacturer, the distributor, and a prior owner of the excavator, filed motions for summary judgment, claiming, inter alia, that the plaintiff's claims against them were barred by the act's ten year statute of repose (§ 52-577a [a]). While those motions were pending, the legislature passed an amendment to § 52-577a (P.A. 17-97) removing certain statutory language that previously had prevented employees entitled to workers' compensation from invoking an exception to the ten year statute of repose set forth in § 52-577a (a) for product liability claims. Following that amendment, employees, like other claimants, could avoid the ten year statute of repose by demonstrating that the harm occurred during the useful safe life of the product. In granting the defendants' motions for summary judgment, the trial court concluded that P.A. 17-97 was not retroactive and that the plaintiff's action was barred by the preamendment version of § 52-577a because there was no genuine issue of material fact as to whether the defendants had possession of or control over the excavator or the part that attached the bucket thereto in the ten years prior to the plaintiff's commencement of the present action. The trial court rendered judgment in favor of the defendants, and the plaintiff appealed. *Held* that the trial court improperly granted the defendants' motions for summary judgment, this court having concluded that P.A. 17-97 applied retroactively: although the plaintiff was initially unable to raise the issue of retroactivity in opposing summary judgment because P.A. 17-97 was passed after the parties filed their briefs in connection with their motions, that issue was reviewable because it was explicitly addressed by the trial court and was fully briefed on appeal; moreover, the ten year statute of repose set forth in § 52-577a (a) is procedural in nature, as previous decisions of this court have made clear that the act was intended to merely recast common-law rights, and the legislature's amendment to § 52-577a applicable to employees was therefore retroactive in light of the absence of any express legislative intent to the

contrary; furthermore, because the trial court did not consider whether the defendants had met their burden of establishing the absence of any genuine issue of material fact with respect to whether the harm to K occurred within the useful safe life of the product, this court reversed the judgment in favor of the defendants and remanded the case for further proceedings.

Argued December 11, 2018—officially released October 1, 2019

Procedural History

Action to recover damages for, inter alia, personal injuries resulting from an allegedly defective product, and for other relief, brought to the Superior Court in the judicial district of New London, where the court, *Cole-Chu*, *J.*, granted the defendants' motions for summary judgment and rendered judgment thereon, from which the plaintiffs appealed. *Reversed in part*; *further proceedings*.

Ralph J. Monaco, with whom, on the brief, was *Eric J. Garofano*, for the appellants (plaintiffs).

Francis H. LoCoco, pro hac vice, with whom, on the brief, was *Mark J. Claflin*, for the appellees (defendants).

Opinion

MULLINS, J. The plaintiff, Donita J. King, individually and as executrix of the estate of Daniel H. King (decedent), appeals from the judgment of the trial court in favor of the defendants Volvo Group North America, LLC (VGNA), Volvo Construction Equipment North America, LLC (VCENA), and Tyler Equipment Corporation (Tyler Equipment),[1] on claims arising from a work-

[1] We note that the named defendant, Volvo Excavators AB, did not appear in the proceedings before the trial court and is not participating in this appeal. We also note that an employee of Tyler Equipment, Bruce Tuper, was also named as a defendant in the present action. See footnotes 4 and 6 of this opinion. For the sake of simplicity, we refer to VGNA and VCENA as the Volvo defendants, and to VGNA, VCENA, and Tyler Equipment, collectively, as the defendants.

place accident in which the bucket of an excavator became dislodged and fell on the decedent, causing fatal injuries. On appeal, the plaintiff asserts that the trial court improperly granted the defendants' motions for summary judgment. The plaintiff's primary claim on appeal is that the statute of repose applied to her product liability claims, General Statutes (Rev. to 2015) § 52-577a, is unconstitutional because it creates two classes of claimants—employees who are subject to a ten year statute of repose and nonemployees who are not subject to the ten year statute of repose if the claimant can show that the product was within its useful safe life when the injury occurred. While the defendants' motions for summary judgment were pending before the trial court, the legislature enacted Number 17-97 of the 2017 Public Acts (P.A. 17-97), which combined those two classes of claimants by removing the limitations provision applicable to employees. In its decision on the motions for summary judgment, the trial court concluded that P.A. 17-97 was not retroactive and applied the statute of repose applicable to employees to bar the plaintiff's claims.

We conclude that the trial court improperly rendered judgment in favor of the defendants because the amendment to the statute of repose in P.A. 17-97 retroactively applied to the plaintiff's claims. As a result, we need not address the plaintiff's claim on appeal that General Statutes (Rev. to 2015) § 52-577a is unconstitutional. Instead, we conclude that the trial court must consider whether there is a genuine issue of material fact as to whether the injury occurred during the useful safe life of the product.[2]

[2] On appeal, the plaintiff also asserts that the trial court improperly granted the defendants' motions for summary judgment because (1) the disparate treatment between employees and nonemployees in the Connecticut Product Liability Act (act), General Statutes (Rev. to 2015) § 52-572m et seq., violates the equal protection clauses of the state and federal constitutions, (2) there is a genuine issue of material fact regarding whether the defendants had possession or control over the excavator after the sale to the decedent's

The following facts and procedural history are relevant to this appeal. The decedent was an employee of King Construction, Inc. (King Construction). On May 30, 2014, the decedent was installing a public water main at a construction site in Windsor. The decedent's coworker was operating a Volvo model EC340 excavator (excavator), and the decedent was in a trench helping to fill sand on top of a recently installed pipe. As the operator attempted to dump the sand over the water main pipe, the bucket detached from a "quick fit" attachment on the excavator and fell on the decedent, resulting in fatal injuries.

The excavator was designed and manufactured in 1997 and distributed by VCENA in December, 1997. VCENA originally distributed the excavator to L.B. Smith, Inc. Eventually, Tyler Equipment acquired the excavator. Thereafter, on June 25, 1999, Tyler Equipment sold the excavator to King Construction. On August 17, 1999, while the excavator was still in the possession of Tyler Equipment, Bruce Tuper, a service employee at Tyler Equipment, installed a hydraulic quick fit attachment on the excavator's arm. On September 22, 1999, Tyler Equipment delivered the excavator to King Construction.

On November 19, 1999, King Construction enrolled the excavator in Volvo's component assurance program. The component assurance program is an extended warranty, which covers certain aspects of the machine, including the quick fit attachment. The extended warranty period expired after either twenty-four months or

employer, (3) there is a genuine issue of material fact regarding the defendants' duty to repair and/or warn of a known danger, and (4) the claims against Tyler Equipment for postsale negligence are common-law negligence claims that are not barred by the act's statute of repose. Because we conclude that the trial court improperly failed to retroactively apply P.A. 17-97 to the plaintiff's claims and remand the case for further proceedings, we need not address these claims on appeal.

4000 hours, whichever occurred earlier. Therefore, the extended warranty expired no later than November 19, 2001. Under the terms of the extended warranty, Tyler Equipment performed all warranty repair work. Tyler Equipment performed the last repair work under the extended warranty on May 11, 2001, during which time it serviced the power controls and gearbox. The excavator was not repaired by VGNA or VCENA at any point in time.

On September 4, 2015, the plaintiff filed the present action against the defendants. Specifically, in count one of the operative complaint,[3] the plaintiff alleged that the Volvo defendants are "liable and legally responsible for the injuries and damages to the plaintiff and the death [of] the decedent by virtue of [the Connecticut Product Liability Act (act), General Statutes] § 52-572m et seq. . . ." In count two, the plaintiff alleged that Tyler Equipment is "liable and legally responsible for the injuries and damages to the plaintiff and the death [of] the decedent by virtue of [the act] . . . ." In counts three and four, the plaintiff further alleged that the defendants' actions caused her to suffer a loss of spousal consortium. After discovery, the defendants filed motions for summary judgment, and the plaintiff filed objections.[4]

As grounds for its motion for summary judgment, the Volvo defendants asserted that the plaintiff's claims under the act were barred by the applicable statute of repose. Specifically, the Volvo defendants asserted that General Statutes (Rev. to 2015) § 52-577a[5] provides that

[3] We note that the operative complaint in the present case was filed on March 30, 2017.

[4] The Volvo defendants filed one motion for summary judgment. Tyler Equipment and Tuper filed separate motions for summary judgment.

[5] General Statutes (Rev. to 2015) § 52-577a provides: "(a) No product liability claim, as defined in section 52-572m, shall be brought but within three years from the date when the injury, death or property damage is first sustained or discovered or in the exercise of reasonable care should have been discovered, except that, subject to the provisions of subsections (c),

no product liability action may be brought against any party later than ten years from the date that the party last parted with possession or control of the product. In ruling on that motion, the trial court concluded that there was no genuine issue of material fact as to whether VGNA ever had possession or control of the excavator or quick fit attachment. The trial court further concluded that there was no genuine issue of material fact as to whether VCENA possessed or controlled the excavator or quick fit attachment after the expira-

(d) and (e) of this section, no such action may be brought against any party nor may any party be impleaded pursuant to subsection (b) of this section later than ten years from the date that the party last parted with possession or control of the product. . . .

"(c) The ten-year limitation provided for in subsection (a) of this section shall not apply to any product liability claim brought by a claimant who is not entitled to compensation under chapter 568, provided the claimant can prove that the harm occurred during the useful safe life of the product. In determining whether a product's useful safe life has expired, the trier of fact may consider among other factors: (1) The effect on the product of wear and tear or deterioration from natural causes; (2) the effect of climatic and other local conditions in which the product was used; (3) the policy of the user and similar users as to repairs, renewals and replacements; (4) representations, instructions and warnings made by the product seller about the useful safe life of the product; and (5) any modification or alteration of the product by a user or third party.

"(d) The ten-year limitation provided for in subsection (a) of this section shall be extended pursuant to the terms of any express written warranty that the product can be used for a period longer than ten years, and shall not preclude any action against a product seller who intentionally misrepresents a product or fraudulently conceals information about it, provided the misrepresentation or fraudulent concealment was the proximate cause of harm of the claimant.

"(e) The ten-year limitation provided for in subsection (a) of this section shall not apply to any product liability claim, whenever brought, involving injury, death or property damage caused by contact with or exposure to asbestos, except that (1) no such action for personal injury or death may be brought by the claimant later than eighty years from the date that the claimant last had contact with or exposure to asbestos, and (2) no such action for damage to property may be brought by the claimant later than thirty years from the date of last contact with or exposure to asbestos.

"(f) The definitions contained in section 52-572m shall apply to this section.

"(g) The provisions of this section shall apply to all product liability claims brought on or after October 1, 1979."

tion of the extended warranty in November, 2001. Because the plaintiff's action was commenced in 2015, the trial court determined that the claims against the Volvo defendants were time barred and granted their motion for summary judgment.

Tyler Equipment filed a motion for summary judgment on the ground that the plaintiff's claims were barred by the act's statute of repose.[6] In ruling on that motion, the trial court concluded that there was no genuine issue of material fact as to whether Tyler Equipment had possession or control of the excavator or quick fit attachment after the expiration of the extended warranty in November, 2001. In reaching that conclusion, the trial court found that any repairs performed by Tyler Equipment on the excavator after that date were performed at the request of King Construction and were not part of a recall, warranty program, or servicing contract. The trial court determined that the claims against Tyler Equipment were therefore also

[6] Tuper also filed a motion for summary judgment on the ground that the plaintiff's claims against him were barred because the act applies only to claims against a "product seller" and he was not a product seller under the act. The trial court granted Tuper's motion for summary judgment on the ground that Tuper had established he was not a "product seller" for purposes of the act. In this appeal, the plaintiff does not challenge the trial court's judgment that Tuper was entitled to judgment in his favor on his claim under the act. To the extent that the plaintiff asserts that the trial court improperly granted summary judgment in favor of Tuper because the plaintiff also raised an independent, common-law negligence claim against Tuper, we disagree. In her complaint, the plaintiff alleged that "[t]he defendants are liable and legally responsible for the injuries and damages to the plaintiff and the death to the decedent by virtue of [the act]." On the basis of the foregoing, we conclude that the plaintiff in the present case limited her claims against Tuper to statutory grounds. See *Daily* v. *New Britain Machine Co.*, 200 Conn. 562, 570–71, 512 A.2d 893 (1986) (The court concluded that a complaint alleging that defendant was "liable and legally responsible to the plaintiff . . . by virtue of . . . General Statutes [§§] 52-572m through 52-572r" was limited to statutory violations because "to attempt to read into this complaint [common-law] claims is to stretch the imagination. The court cannot read into a complaint claims other than those specifically set forth." [Emphasis omitted; internal quotation marks omitted.]).

time barred and, accordingly, granted its motion for summary judgment.

While the defendants' motions for summary judgment were pending, the legislature amended the act's statute of repose by passing P.A. 17-97, which became effective October 1, 2017. Prior to that amendment, General Statutes (Rev. to 2015) § 52-577a (c) provided in relevant part: "The ten-year limitation provided for in subsection (a) of this section shall not apply to any product liability claim brought by a claimant who *is not entitled to* [*workers'*] *compensation under chapter 568, provided the claimant* can prove that the harm occurred during the useful safe life of the product. . . ." (Emphasis added.) By enacting P.A. 17-97, the legislature removed the phrase "is not entitled to compensation under chapter 568, provided the claimant" from that statutory provision. In doing so, P.A. 17-97 allowed employees to bring claims under the act beyond the ten year limitation period if they could prove that the injury occurred during the useful safe life of the product.

In ruling on the motions for summary judgment in the present case, the trial court recognized that P.A. 17-97 had been signed into law and became effective on October 1, 2017. The trial court, however, determined that this amendment to the act's statute of repose was not retroactively applicable to the plaintiff's claims. Specifically, the trial court concluded that "the act provides neither that [P.A. 17-97] is retroactive nor any basis on which the court could conclude that [it] was intended to be so." (Footnote omitted.) This appeal followed.[7]

"The standard of review of a trial court's decision granting summary judgment is well established. Prac-

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

tice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Citations omitted; internal quotation marks omitted.) *Lucenti* v. *Laviero*, 327 Conn. 764, 772–73, 176 A.3d 1 (2018).

As a threshold issue, we first address the defendants' assertion that we should not address the plaintiff's claim that P.A. 17-97 applies to the present case because the plaintiff did not raise this claim before the trial court. We disagree.

First, because the defendants' motions for summary judgment were filed before P.A. 17-97 was passed, the plaintiff did not initially have the opportunity to assert that P.A. 17-97 applied retroactively. Nevertheless, the plaintiff did make the trial court aware of P.A. 17-97 before the court ruled on the defendants' motions for summary judgment by pointing to that legislation in support of her constitutional claim.

Second, it is well established that a claim addressed by the trial court, even if not raised by the parties, is appropriate for review on appeal. See, e.g., *DeSena* v. *Waterbury*, 249 Conn. 63, 72 n.10, 731 A.2d 733 (1999) (reviewing claim not distinctly raised by parties but addressed by trial court). In the present case, the trial court expressly decided that P.A. 17-97 does not apply retroactively to the plaintiff's claims.

Third, the defendants had the opportunity to brief this issue and, in fact, did brief this issue on appeal. Accordingly, we conclude that, because this appeal requires us to apply the act's statute of repose, we must decide whether P.A. 17-97 applies retroactively to the plaintiff's claims.

"In considering the question of whether a statute may be applied retroactively, we are governed by certain well settled principles, [pursuant to] which our ultimate focus is the intent of the legislature in enacting the statute. . . . [O]ur point of departure is General Statutes § 55-3, which [provides]: No provision of the general statutes, not previously contained in the statutes of the state, which imposes any new obligation on any person or corporation, shall be construed to have retrospective effect. . . . [W]e have uniformly interpreted § 55-3 as a rule of presumed legislative intent that statutes affecting substantive rights shall apply prospectively only. . . . The rule is rooted in the notion that it would be unfair to impose a substantive amendment that changes the grounds upon which an action may be maintained on parties who have already transacted or who are already committed to litigation. . . . In civil cases, however, unless considerations of good sense and justice dictate otherwise, it is presumed that procedural statutes will be applied retrospectively. . . . While there is no precise definition of either [substantive or procedural law], it is generally agreed that a substantive law creates, defines and regulates rights while a procedural law prescribes the methods of enforcing such rights or obtaining redress. . . . Procedural statutes . . . therefore leave the preexisting scheme intact. . . . [We presume] that procedural or remedial statutes are intended to apply retroactively absent a clear expression of legislative intent to the contrary . . . ." (Citations omitted; internal quotation marks omitted.) *Investment Associates* v. *Summit*

Associates, Inc., 309 Conn. 840, 867–68, 74 A.3d 1192 (2013); see also *D'Eramo* v. *Smith*, 273 Conn. 610, 620–21, 872 A.2d 408 (2005).

"A statute of limitations is generally considered to be procedural, especially where the statute contains only a limitation as to time with respect to a right of action and does not itself create the right of action. . . . Where the limitation is deemed procedural and personal it is subject to being waived unless it is specifically pleaded because the limitation is considered merely to act as a bar to a remedy otherwise available. . . . Where, however, a specific time limitation is contained within a statute that creates a right of action that did not exist at common law, then the remedy exists only during the prescribed period and not thereafter. . . . The courts of Connecticut have repeatedly held that, under such circumstances, the time limitation is a substantive and jurisdictional prerequisite . . . ." (Internal quotation marks omitted.) *Neighborhood Assn., Inc.* v. *Limberger*, 321 Conn. 29, 46–47, 136 A.3d 581 (2016); see also *Ecker* v. *West Hartford*, 205 Conn. 219, 231–32, 530 A.2d 1056 (1987).[8] The same rules govern a statute of repose. See *State* v. *Lombardo Bros. Mason Contractors*, 307 Conn. 412, 443, 54 A.3d 1005 (2012) ("in this state, 'the characterization of a statute of repose as procedural or as substantive is governed by the same test that applies to statutes of limitation[s]' "), quoting *Baxter* v. *Sturm, Ruger & Co.*, 230 Conn. 335, 342, 644 A.2d 1297 (1994).

[8] Indeed, the United States Supreme Court has explained: "*Campbell* v. *Holt*, [115 U.S. 620, 628, 6 S. Ct. 209, 29 L. Ed. 483 (1885)], held that where lapse of time has not invested a party with title to real or personal property, a state legislature, consistently with the [f]ourteenth [a]mendment [to the United States constitution], may repeal or extend a statute of limitations, even after right of action is barred thereby, restore to the plaintiff his remedy, and divest the defendant of the statutory bar." *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 311–12, 65 S. Ct. 1137, 89 L. Ed. 1628 (1945).

Therefore, in order to determine whether the statute of repose contained within the act is substantive or procedural in nature, we must determine whether the act "creates a right of action that did not exist at common law . . . ." *Neighborhood Assn., Inc.* v. *Limberger*, supra, 321 Conn. 46–47; cf. *Reclaimant Corp.* v. *Deutsch*, 332 Conn. 590, 604–605, 211 A.3d 976 (2019) (concluding that whether statute of limitations or statute of repose is substantive or procedural for choice of law purposes depends on whether the right existed at common law, regardless of whether limitation period was incorporated into statutory language). This court previously has explained that "the legislative history of the act [reveals] that the legislature was merely recasting an existing cause of action and was not creating a wholly new right for claimants harmed by a product. The intent of the legislature was to eliminate the complex pleading provided at common law: breach of warranty, strict liability and negligence." *Lynn* v. *Haybuster Mfg., Inc.*, 226 Conn. 282, 292, 627 A.2d 1288 (1993); see also *Izzarelli* v. *R.J. Reynolds Tobacco Co.*, 321 Conn. 172, 187, 136 A.3d 1232 (2016) (recognizing that act does not prescribe substantive elements of cause of action); *Gerrity* v. *R.J. Reynolds Tobacco Co.*, 263 Conn. 120, 127, 818 A.2d 769 (2003) ("[t]hese definitions must be read together, with the understanding that the . . . act was designed in part to codify the common law of product liability"). On the basis of the foregoing, we conclude that the statute of repose contained within General Statutes § 52-577a is procedural in nature.

"[L]egislation that affects only matters of procedure is presumed to [be] applicable to all actions, whether pending or not, in the absence of any expressed intention to the contrary." (Internal quotation marks omitted.) *Roberts* v. *Caton*, 224 Conn. 483, 488, 619 A.2d 844 (1993); see also, e.g., *Serrano* v. *Aetna Ins. Co.*, 233

Conn. 437, 443–45, 664 A.2d 279 (1995) (concluding that when statutory time limitation is amended after action is filed, time limitation in effect prior to entry of final judgment governs).

Therefore, we must examine the text of P.A. 17-97 to determine whether it contains any expressed intention that it not be applied retroactively. Public Act 17-97, § 1, made the following changes to § 52-577a (c), with the deleted language in brackets: "Subsection (c) of section 52-577a of the general statutes is repealed and the following is substituted in lieu thereof (Effective October 1, 2017): (c) The ten-year limitation provided for in subsection (a) of this section shall not apply to any product liability claim brought by a claimant who [is not entitled to compensation under chapter 568, provided the claimant] can prove that the harm occurred during the useful safe life of the product. . . ." There is no express language in P.A. 17-97 to indicate that the legislature did not intend the amendment to apply retroactively. Although P.A. 17-97 was assigned an effective date of October 1, 2017, as this court previously has explained that, "[b]ecause all public acts not specifying an effective date automatically are assigned to take effect on the first day of October following the session of the General Assembly at which they are passed . . . we never have ascribed particular significance to such dates in ascertaining the legislature's intent." (Internal quotation marks omitted.) *Investment Associates* v. *Summit Associates, Inc.*, supra, 309 Conn. 867.

The necessity of an unambiguous expression of an intent not to apply the presumption of retroactive effect to the amended statute of repose is underscored by other language in § 52-577a. Section 52-577a (g) provides that "[t]he provisions of this section shall apply to all product liability claims brought on or after October 1, 1979." When the legislature amended subsection (c)

of that statute to remove the exclusive time impediment imposed only on employees entitled to workers' compensation, we presume it was aware of subsection (g) but chose not to amend it. "Our case law is clear . . . that when the legislature chooses to act, it is presumed to know how to draft legislation consistent with its intent and to know of all other existing statutes and the effect that its action or nonaction will have upon any one of them." (Internal quotation marks omitted.) *McCoy* v. *Commissioner of Public Safety*, 300 Conn. 144, 155, 12 A.3d 948 (2011). Accordingly, we presume that the legislature knew that its amendment to § 52-577a (c), when read in conjunction with § 52-577a (g), would apply to "all product liability claims brought on or after October 1, 1979," insofar as no final judgment has been rendered.

Because the trial court concluded that P.A. 17-97 did not apply retroactively, it did not consider whether the defendants had met their burden of establishing that there was no genuine issue of material fact as to whether the harm occurred during the useful safe life of the product so as to avoid the ten year limitation period. General Statutes § 52-577a (c). Therefore, we conclude that the trial court improperly granted summary judgment in favor of the defendants in the present case.

The judgment is reversed insofar as the motions for summary judgment filed by VGNA, VCENA, and Tyler Equipment were granted, and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other justices concurred.

ORDERS

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STATE OF CONNECTICUT *v.* ANDRE DAWSON

The defendant's petition for certification to appeal from the Appellate Court, 188 Conn. App. 532 (AC 40337), is granted, limited to the following issue:

"Did the Appellate Court correctly conclude that the evidence was sufficient to support the defendant's conviction of criminal possession of a firearm?"

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

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

Nancy L. Walker, assistant state's attorney, in opposition.

Decided September 17, 2019

ERNEST FRANCIS *v.* BOARD OF PARDONS AND PAROLES ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 189 Conn. App. 906 (AC 41394), is granted, limited to the following issue:

"Did the Appellate Court properly uphold the trial court's dismissal of the plaintiff's declaratory judgment action as not ripe?"

Ernest Francis, self-represented, in support of the petition.

James M. Belforti, assistant attorney general, in opposition.

Decided September 17, 2019

STATE OF CONNECTICUT *v.* LIVORIO SANCHEZ

The defendant's petition for certification to appeal from the Appellate Court, 190 Conn. App. 466 (AC 39193), is denied.

Aimee Lynn Mahon, assigned counsel, and *Daniel M. Erwin*, assigned counsel, in support of the petition.

Rocco A. Chiarenza, assistant state's attorney, in opposition.

Decided September 17, 2019

STATE OF CONNECTICUT *v.* MICHAEL A. FERNANDES

The defendant's petition for certification to appeal from the Appellate Court, 190 Conn. App. 466 (AC 39194), is denied.

Aimee Lynn Mahon, assigned counsel, and *Daniel M. Erwin*, assigned counsel, in support of the petition.

Rocco A. Chiarenza, assistant state's attorney, in opposition.

Decided September 17, 2019

STATE OF CONNECTICUT *v.* FRANCISCO RODRIGUEZ

The defendant's petition for certification to appeal from the Appellate Court, 190 Conn. App. 466 (AC 39196), is denied.

Aimee Lynn Mahon, assigned counsel, and *Daniel M. Erwin*, assigned counsel, in support of the petition.

Rocco A. Chiarenza, assistant state's attorney, in opposition.

Decided September 17, 2019

STATE OF CONNECTICUT *v.* FRANK SLAUGHTER

The defendant's petition for certification to appeal from the Appellate Court, 190 Conn. App. 466 (AC 39198), is denied.

Aimee Lynn Mahon, assigned counsel, and *Daniel M. Erwin*, assigned counsel, in support of the petition.

Rocco A. Chiarenza, assistant state's attorney, in opposition.

Decided September 17, 2019

STATE OF CONNECTICUT *v.* MICHAEL ANTHONY THIGPEN

The defendant's petition for certification to appeal from the Appellate Court, 190 Conn. App. 466 (AC 39199), is denied.

Aimee Lynn Mahon, assigned counsel, and *Daniel M. Erwin*, assigned counsel, in support of the petition.

Rocco A. Chiarenza, assistant state's attorney, in opposition.

Decided September 17, 2019

STATE OF CONNECTICUT *v.* RAMON A. G.

The defendant's petition for certification to appeal from the Appellate Court, 190 Conn. App. 483 (AC 39704), is granted, limited to the following issues:

"1. Did the Appellate Court correctly conclude that the defendant's claim of instructional error was not preserved?

"2. If the answer to the first question is 'no,' did the Appellate Court incorrectly conclude that the defendant had implicitly waived his instructional claim pursuant to *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011)?"

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

James M. Ralls, assistant state's attorney, in opposition.

Decided September 17, 2019

DAELTE ST. DENIS-LIMA *v.* THOMAS J. ST. DENIS

The plaintiff's petition for certification to appeal from the Appellate Court, 190 Conn. App. 296 (AC 40675), is denied.

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

Brittany B. Paz, in support of the petition.

Heather M. Brown-Olsen, in opposition.

Decided September 17, 2019

DWAYNE ADAMS *v.* COMMISSIONER OF CORRECTION

The petitioner Dwayne Adams' petition for certification to appeal from the Appellate Court, 190 Conn. App. 904 (AC 40930), is denied.

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

Brett R. Aiello, special deputy assistant state's attorney, in opposition.

Decided September 17, 2019

SANTA ENERGY CORPORATION ET AL. *v.* JANET N. SANTA, EXECUTRIX (ESTATE OF NORMAN K. SANTA), ET AL.

The petition by the defendant Lorraine F. Hillgen-Santa for certification to appeal from the Appellate Court, 190 Conn. App. 901 (AC 41099), is denied.

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

David V. DeRosa, in support of the petition.

Edward P. McCreery III and *Daniel P. Scholfield*, in opposition.

Decided September 17, 2019

STATE OF CONNECTICUT *v.* ISMAIL H. ABDUS-SABUR

The defendant's petition for certification to appeal from the Appellate Court, 190 Conn. App. 589 (AC 41515), is denied.

Raymond L. Durelli, assigned counsel, in support of the petition.

Timothy F. Costello, assistant state's attorney, in opposition.

Decided September 17, 2019

VERNON VASSELL *v.* COMMISSIONER OF CORRECTION

The petitioner Vernon Vassell's petition for certification to appeal from the Appellate Court, 190 Conn. App. 903 (AC 41725), is denied.

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

Robert L. O'Brien, assigned counsel, in support of the petition.

Rocco A. Chiarenza, assistant state's attorney, in opposition.

Decided September 17, 2019

STATE OF CONNECTICUT *v.* ERNEST FRANCIS

The defendant's petition for certification to appeal from the Appellate Court, 191 Conn. App. 101 (AC 41183), is granted, limited to the following issue:

"Did the Appellate Court correctly conclude that the sentencing judge did not substantially rely on materially inaccurate information about the defendant?"

Robert L. O'Brien, assigned counsel, in support of the petition.

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

Decided September 17, 2019

THE GOODWIN ESTATE ASSOCIATION, INC.
v. DARYL L. STARKE ET AL.

The named defendant's petition for certification to appeal from the Appellate Court (AC 42821) is denied.

Keith Yagaloff, in support of the petition.

John J. Bowser, in opposition.

Decided September 17, 2019

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

DOMINICK BOCCANFUSO ET AL. *v.* NADER DAGHOGHI ET AL.
(AC 40559)

Keller, Prescott and Pellegrino, Js.

Syllabus

The plaintiff landlords, D, C, and B Co., sought, by way of summary process, to regain possession of certain premises leased to the defendant tenants, N, S, and S Co. Since 1970, the plaintiffs' property was used as an automobile repair facility, and the plaintiffs had installed underground gasoline and waste oil storage tanks on the property but failed to follow proper protocols for their removal, which resulted in environmental contamination. Subsequently, in July, 2014, seven months after the parties entered into a lease of the property, the Department of Energy and Environmental Protection issued an enforcement order directed to B Co. and commenced a civil action that resulted in a stipulated judgment. During trial in the present case, the defendants asserted the special defense of equitable nonforfeiture and argued in their posttrial brief

that they withheld rent payments because of their counsel's advice to hold the rent in escrow, because they were unaware of the contamination, and because they were concerned that one of their two businesses would not be permitted to open due to the plaintiffs' failure to extend their rent abatement period, despite the delay of the plaintiffs' property manager and leasing agent in obtaining certificates of occupancy for retail or food service uses. The trial court rendered a judgment of possession in favor of the plaintiffs, from which the defendants appealed to this court. *Held*:

1. The defendants could not prevail in their claim that the trial court applied an incorrect legal standard in determining that they failed to prove their special defense of equitable nonforfeiture: that court properly applied the doctrine of equitable nonforfeiture to the facts of this case, as it determined that the defendants, who had admitted that they deliberately stopped paying rent upon advice of their counsel because they were upset about the contamination, failed to prove the first element of the equitable nonforfeiture test, namely, that the nonpayment of rent was not wilful or grossly negligent, and the court, having made that determination, was not required to address the other elements; moreover, the court determined that the defendants failed to prove they made a good faith effort to comply with the lease or had a good faith dispute as to its meaning, and it reasonably could have reached the conclusions it did on the basis of certain testimony presented, which it was free to credit.
2. The defendants' claim that the trial court erred in finding that the plaintiffs were unaware of contamination until after July 1, 2014, was unavailing, as there was evidence in the record to support that finding; D testified that he believed any contamination detected in 2011 was within acceptable limits and that he told the defendants that there was some contamination, but if there was any problem, he would take care of it, and even if the existence of contamination on the property requiring action prior to July 1, 2014, was concealed from the defendants, the court also found that the plaintiffs had complied with their obligation under the lease and had taken care of the problem, and that the remediation had no effect on the progress of the defendants' renovations or their ability to open both of their businesses on the property, and, therefore, even if the court's finding that the plaintiffs were unaware that the tank graves contained gasoline type contaminants above action levels was erroneous, any error was harmless.
3. The defendants' claim that the trial court abused its discretion in finding that they failed to prove their special defenses of unjust enrichment and violation of the implied covenant of good faith and fair dealing was not reviewable, the defendants having failed to brief the claim adequately; the defendants' analysis appeared in a single paragraph of their brief, they did not distinguish between their third or fifth special defenses, both of which alleged a violation of the implied covenant of good faith and fair dealing, there were no legal authorities cited or an

analysis of whether the special defenses were legally viable, and the defendants did not cite any standard of review governing this court's review and inaccurately asserted that the court failed to make any factual findings as to the fourth and fifth special defenses, and that the court failed to refer to the special defenses alleging a violation of the implied covenant of good faith and fair dealing.

4. The trial court did not abuse its discretion in denying the defendants' request for a continuance so that T, an enforcement officer employed by the department, could testify: the defendants failed to make an adequate showing as to why T, who purportedly was under subpoena, was not available to testify as scheduled, or why T's deposition was not taken beforehand and offered into evidence in lieu of live testimony, they made no proffer to the court as to the necessity of T's testimony or why the denial of a continuance would impair their defense, nor did they request a capias to compel T's presence, and the court appropriately considered that counsel for the defendants moved for a continuance on the day of trial; moreover, even if the court abused its discretion, any error was harmless, because even though the defendants argued before this court that denying their request effectively kept out of evidence department documentation concerning the history of contamination on the property, the trial court considered the contamination issue to be "pretextual" and found that the defendants suffered no detriment as a result of the contamination and remediation, and that they did not offer any evidence that they complained about the issue until they filed their answer in this case, and, thus, the defendants did not demonstrate that they were harmed by the court's purported error.

Argued February 11—officially released October 1, 2019

Procedural History

Summary process action brought to the Superior Court in the judicial district of Stamford-Norwalk, Norwalk Housing Session, and tried to the court, *Rodriguez*, *J.*; judgment for the plaintiffs, from which the defendants appealed to this court; thereafter, the court, *Rodriguez*, *J.*, denied the defendants' motion for articulation; subsequently, this court granted in part the defendants' motion for review and the court, *Rodriguez*, *J.*, issued an articulation; thereafter, this court granted in part the defendants' motion for review, and the court, *Rodriguez*, *J.*, issued an articulation. *Affirmed.*

Eugene E. Cederbaum, with whom was *Ryan Driscoll*, for the appellants (defendants).

Matthew B. Woods, for the appellees (plaintiffs).

Opinion

KELLER, J. This summary process action involves a lease of commercial premises located at 936-940 Post Road East in Westport (property). The defendants, Nader Daghoghi (Nader), Sassoon Daghoghi (Sassoon) and 940 Post Road East, LLC, doing business as Savoy Rug Gallery (defendant LLC), appeal from a judgment of possession rendered in favor of the plaintiffs, Dominick Boccanfuso (Dominick), Crescienzo Boccanfuso (Crescienzo), and Boccanfuso Bros., Inc. (plaintiff corporation). The defendants claim that the trial court (1) applied an incorrect legal standard in determining that they failed to prove their special defense of equitable nonforfeiture; (2) erred in finding that the plaintiffs were unaware of environmental contamination at the property until after July 1, 2014; (3) abused its discretion in finding that the defendants had failed to prove their special defenses of unjust enrichment and violation of the implied covenant of good faith and fair dealing; and (4) abused its discretion by not granting the defendants a continuance so that a witness could testify. We affirm the judgment of the trial court.

The following facts, as stipulated to by the parties or as found by the court in its original decision or subsequent articulations, and procedural history are relevant to this appeal.

The property was owned by the plaintiff corporation, and, at all times relevant to this litigation, Dominick was a shareholder, director and officer of the plaintiff corporation. Since at least 1970 and through the date of Dominick's retirement at the end of 2013, the property was used as an automobile repair facility. In or about 1989, the plaintiffs installed a 2000 gallon gasoline underground storage tank under the front parking lot of the property. Sometime thereafter, they also installed a 330 gallon waste oil underground storage tank in the rear of the property. Both underground storage tanks

were removed in 2013 for reuse elsewhere, but the plaintiffs failed to follow proper procedures and protocols for the removals.

Dominick received a letter from Absolute Tank Testing, Inc. (Absolute), dated October 31, 2011, advising him that soil samples taken from the area around the perimeter of the 2000 gallon gasoline underground storage tank contained "detectable concentrations of [Extractable Total Petroleum Hydrocarbons] 540 parts per million," and that Absolute had notified the Department of Energy and Environmental Protection (department). (Internal quotation marks omitted.)

In March, 2013, Dominick's nephew, Giuseppe Boccanfuso (Giuseppe), who was not licensed to remove underground storage tanks, removed the 2000 gallon gasoline underground storage tank. In March or April, 2014, Giuseppe removed the 300 gallon waste oil underground storage tank. The department was not notified of the removal of either of the tanks. Additionally, no test of the soil surrounding the waste oil underground storage tank was conducted.

On November 22, 2013, the parties entered into a lease of the property. The five-year lease, with an option of extending the term for five additional five-year terms, provided that the defendants were to convert the property from an automobile repair facility to spaces in which they would operate their two businesses, the Savoy Rug Gallery and a Subway sandwich shop. The defendants intended to use a portion of the space to sell handmade oriental rugs and the remainder to house their Subway franchise.

Richard H. Girouard, Sr., was the leasing agent for the property and also the property manager for the Boccanfuso family. Girouard negotiated the terms and conditions of the lease and drafted it on behalf of the plaintiffs.[1] The monthly base rent for the property was $16,338.

[1] Nader negotiated the lease on behalf of the defendants.

Prior to the signing of the lease, on October 29, 2013, Girouard, on behalf of Klein New England,[2] sent a letter to the defendants regarding the renovation of the retail space. In this letter, Girouard offered to provide the defendants consulting and design services for the demolition and renovation of the property. Two of Klein New England's undertakings were to obtain the building permits and certificates of occupancy for the retail space. The defendants paid Klein New England the $22,500 fee set forth in Girouard's letter.

On July 1, 2014, over seven months after the lease was signed, the department, after finding evidence of environmental contamination, issued an enforcement order directed to the plaintiff corporation. The department later commenced a civil action against the plaintiff corporation in the Superior Court for the Judicial District of Hartford at Hartford, alleging a violation of the enforcement order. On August 15, 2016, the court, *Hon. Susan A. Peck*, judge trial referee, rendered a judgment upon the stipulation of the parties to that action.

Paragraph 33 of the lease provides in pertinent part: "Lessor will be responsible for any environmental issues which may arise with the [d]emised [p]remises." The plaintiffs addressed the contamination issues at their expense, and the property has been remediated in accordance with the stipulation between the plaintiffs and department.

On June 11, 2014, the defendants obtained a building permit to renovate a portion of the property into the retail rug gallery, and a certificate of occupancy for that renovated space was issued on February 26, 2015.

[2] The letter is on the stationery of "Klein New England." Sassoon testified that Girouard operates under another company called Klein New England and that he and that business were one and the same. Girouard testified that he had purchased a business known as Victor Klein Associates, a business and restaurant brokerage firm, in 1996, and that he sent his proposals to the defendants for his consulting work on Klein New England stationery.

At the direction of the plaintiffs, on June 27, 2014, Girouard informed the defendants by letter that the rent commencement date pursuant to paragraph 10 of the lease would be July 1, 2014, and to commence payment of all water and electric charges.[3] In the letter, Girouard also informed the defendants that the plaintiffs had instructed him to handle all lease and building matters exclusively and that the plaintiffs did not want to be called or visited by the defendants about lease or building matters.

On August 1, 2014, Girouard, on behalf of Klein New England, sent a letter to the defendants regarding the renovation of the Subway space. The defendants paid Klein New England a $9000 consultation fee regarding the renovation of this space.

On September 15, 2014, the defendants obtained a building permit for the renovation of the Subway space and a certificate of occupancy was issued for that renovated space on June 5, 2015.

The defendants did not pay rent for the month of December, 2014, or make any other rent payments thereafter.[4] On January 7, 2015, the plaintiffs served the defendants with a notice to quit for nonpayment of rent when due for commercial property, thereby terminating

[3] Paragraph 10 of the lease provides in pertinent part: "Rent shall commence on the date (the 'Rent Commencement Date') which is the earlier of (a) the date the [l]essee opens for business to the public or (b) the 180th day after a fully executed [l]ease is delivered to the [t]enant." The 180th day following the execution of the lease occurred on May 21, 2014. On May 29, 2014, the individual plaintiffs met with the individual defendants and Girouard and agreed to extend the 180 day rent abatement period for an additional one month and one week. The defendants commenced paying rent in July, 2014.

[4] Apart from three missed rental payments for December, 2014, January, 2015, and February, 2015, the defendants claim, and the plaintiffs do not dispute, that pursuant to a court order, they deposited monthly payments of $16,388 with the clerk of the court for use and occupancy. The defendants, however, initially objected to paying any use and occupancy fees.

the lease. The defendants remained in possession of the property beyond the date specified in the notice to quit. On January 17, 2015, the plaintiffs commenced this summary process action.

In their answer to the complaint, the defendants raised six special defenses. All but the first special defense, which alleged a lack of standing on the part of the plaintiff corporation, are the subjects of this appeal.

In their second special defense, the defendants alleged that the plaintiffs had violated paragraphs 14 and 33 of the lease by failing to remediate environmental contamination they caused and were aware of prior to the execution of the lease.[5] In their third special defense, the defendants alleged that the plaintiffs, by failing to remediate the environmental contamination, had violated the implied covenant of good faith and fair dealing.

The defendants' fourth special defense alleged unjust enrichment as a result of the failure of the plaintiff's property manager, Girouard, to properly oversee the extensive renovations to the property pursuant to "an agreement" he had with the defendants.[6] The defendants asserted that Girouard failed to obtain a certificate of occupancy until fourteen months after the lease was signed, which caused the defendants to pay basic

[5] Paragraph 14 of the lease provides: "Quiet Enjoyment. Lessor covenants with the said [l]essee that it has good right to lease said premises in manner aforesaid and that it will suffer and permit said [lessee] (it keeping all the covenants on its part, as hereinafter contained) to occupy, possess and enjoy said premises during the term aforesaid, without hindrance or molestation from it or any person claiming by, from or under it."

Paragraph 33 of the lease provides: "Lessor's Work. Lessor will be responsible for any environmental issues which may arise with the [d]emised [p]remises. Lessor will also be obligated to remove the hydraulic lifts in a timely manner."

[6] The evidence actually revealed that the defendants entered into two consulting agreements with Girouard, one in October, 2013, and another in August, 2014.

and additional rent to the plaintiffs, unjustly enriching them, for a period when the defendants were unable to physically occupy any portion of the leased premises.

In their fifth special defense, the defendants alleged that, despite the failure of the plaintiffs' property manager and agent, Girouard, to properly oversee the progress of their renovations, the plaintiffs required them to pay basic and additional rent. The plaintiffs' demand of these payments prior to the defendants' ability to physically occupy any portion of the property, they allege, was a violation of the implied covenant of good faith and fair dealing owed to them by the plaintiffs.

The sixth special defense alleged that the plaintiffs' claim for possession of the leased premises was barred by the equitable doctrine against forfeitures. This special defense, however, failed to allege or incorporate any facts. In the defendants' posttrial brief, the defendants argued to the court that their justifiable reasons for withholding of rent were due to (1) being unaware of long existent on-site contamination of the property until the fall of 2014, nine months after the lease was signed, and their concern that the Subway would not be permitted to open due to the contamination, which had not yet been remediated in breach of the plaintiffs' obligations under paragraph 33 of the lease; (2) the plaintiffs' failure to extend the rent abatement period despite Girouard's failure to obtain expediently certificates of occupancy for either the retail or food service uses; and (3) counsel's advice to hold the rent in escrow.

In their reply, the plaintiffs essentially denied the allegations contained in the defendants' special defenses.

A trial was held before the court over three days: February 2, 2016, May 19, 2016, and April 4, 2017. At the court's request, during trial on February 2, 2016, counsel for the parties acknowledged that the court, in deciding the issues, could rely on a joint stipulation

that the parties had prepared and filed with the court on May 19, 2015.

On February 2 and May 19, 2016, the court chose only to hear evidence and rule on the viability of the defendants' fourth special defense, unjust enrichment. This special defense was based on the fact that the plaintiffs required the defendants to make rental payments despite the fact that Girouard, who allegedly had been acting as an agent of and on behalf of the plaintiffs, had failed to obtain necessary permits and approvals in a timely fashion. The court found that the defendants had failed to prove this special defense.[7] The

[7] The court did not provide a written ruling that specifically addressed the merits of the related fifth special defense, which alleged that the plaintiffs breached the implied covenant of good faith and fair dealing by insisting on rental payments before Girouard had completed renovations of either space. Neither party filed a motion for articulation addressing the fifth special defense. The court did, however, in its first articulation, find that the defendants "had failed to sustain [their] burden of proof as to *all* the special defenses." (Emphasis added.)

The fifth special defense is derivative of the fourth special defense, because the fourth special defense alleged that the plaintiffs, despite knowledge of Girouard's failure to obtain the necessary permits and approvals, required the defendants to commence paying rent, thereby breaching the implied covenant of good faith and fair dealing. The court found that there was no agreement between the plaintiffs and the defendants with respect to any expectations as to Girouard's performance of his consulting agreements with the defendants as to the renovations. It concluded that there was only a separate and independent agreement between Girouard and the defendants.

We note that a breach of the implied covenant of good faith and fair dealing can only occur when there is already a contract, i.e., an enforceable obligation, because "[t]he implied covenant is derivative, that is, it does not create or supply new contract terms but grows out of existing ones." (Internal quotation marks omitted.) *Goldwater* v. *Ollie's Garage*, Superior Court, judicial district of New Haven, Docket No. CV-94-0357372 (June 5, 1995); see also *Macomber* v. *Travelers Property & Casualty Corp.*, 261 Conn. 620, 638, 804 A.2d 180 (2013) ("*the existence of a contract between the parties is a necessary antecedent to any claim of breach of the duty of good faith and fair dealing*" [emphasis in original; internal quotation marks omitted]); *Hoskins* v. *Titan Value Equities Group, Inc.*, 252 Conn. 789, 793, 749 A.2d 1144 (2000) (same). We conclude that in finding that the plaintiffs were under no contractual obligation to monitor or control the activities Girouard performed for the defendants, the court impliedly applied those factual findings in rejecting the defendants' fifth special defense.

court stated, "[a]ny agreement entered into between [Girouard] and the defendants . . . was entered into separate from and independent of the agreement between the plaintiffs . . . and the defendants . . . . [T]here was no control by [the plaintiffs] over the actions of [Girouard], nor was there any form of supervision, nor was there any benefit to the [plaintiffs] from the agreement between Girouard and [the defendants]. Simply put, the agreement was separate from and independent of the agreement between [the plaintiffs] and [the defendants]. The defendants . . . are free to seek, from [Girouard], any claim for damages allegedly resulting from the fit-up delays and any delay in not timely producing a certificate of occupancy. This is not the fault or responsibility of [the plaintiffs]. The court finds that [Girouard] was acting for and solely on behalf of the defendant tenants in all of his undertakings to fit-up the property and in obtaining any certificate of occupancy."

On June 13, 2017, after hearing evidence on the plaintiff's complaint and the remainder of the defendants' special defenses, the court rendered a judgment of possession in favor of the plaintiffs. The court found that the defendants had breached the lease agreement by nonpayment of rent, and had failed to sustain their burden of proof as to their "special defense," referring only to the sixth special defense of equitable nonforfeiture. The court cited to *Cumberland Farms, Inc.* v. *Dairy Mart, Inc.*, 255 Conn. 771, 627 A.2d 386 (1993), as illustrative of the "guidance needed to resolve a claim regarding equitable nonforfeiture." The defendants filed the present appeal.

On July 20, 2017, the defendants filed a motion for articulation, which the court denied without comment. On September 29, 2017, the defendants filed a motion for review of this denial of articulation with this court. This court ordered that the trial court articulate "(1)

whether it considered the defendants' good faith intent to comply with the lease and their good faith dispute over the meaning of the lease in reaching its decision on the special defense of equitable nonforfeiture and, if so, how its consideration of these matters impacted its decision on the special defense of equitable nonforfeiture; and (2) whether it decided the defendants' second and third special defenses, and, if so, to articulate any findings it made in connection therewith regarding whether the plaintiffs knew of the existing environmental contamination on the property prior to the signing of the subject lease, whether the plaintiffs were responsible for that contamination and whether they disclosed the existence of the contamination to the defendants prior to the signing of the subject lease."

The trial court complied with this court's order. In an articulation dated November 21, 2017, it stated that it had "considered and rejected the defendants' claimed good faith intent to comply with the lease and also rejected the defendants' alleged good faith dispute over the meanings of the lease." The court found that the defendants were "well advised of the property and were ill advised by their counsel to withhold rent and breach their obligation to pay rent to the plaintiff[s]." With respect to the second and third special defenses, the court stated only that the defendants had "failed to sustain [their] burden of proof as to all the special defenses."

Dissatisfied with the court's articulation, on November 30, 2017, the defendants filed a second motion for review with this court, given the first articulation of the trial court. On March 20, 2018, this court issued a second order for articulation that was substantially similar to the first order. On April 24, 2018, the trial court issued a supplemental articulation, which it corrected on April 26, 2018. The court articulated that the second and third special defenses were not proven by a preponderance of the evidence submitted at trial. The

court found that "[u]ntil July 1, 2014, the plaintiffs and the defendants were unaware that the tank graves contained gasoline type contaminants above action levels. Accordingly, on November 23, 2013, the date when the lease was signed, neither party knew of the existence . . . of the contamination. . . . The plaintiffs have addressed the contamination issues at their expense and the property has been remediated in accordance with a [department] stipulation. . . . Neither the contamination itself nor the remediation thereof affected the renovation timelines of the retail space or the Subway space, nor did the contamination and remediation affect the operation of either business. . . . Not only did the property have a long history of use as an automotive repair shop, but the defendants knew this, not only because of the proximity of their businesses before moving into the property, but also because they were longtime customers of the plaintiffs. The lease obligated the plaintiffs to clean up any contamination on the property and they did so. The [defendants'] alleged concerns about the contamination are pretextual, since neither the contamination nor the remediation had any effect on the critical path of the defendants' renovations to the property. The [defendants'] real issue centers on the delays in renovation, and therefore in openings of business operations, beyond the rental grace period, thereby obligating them to pay rent under the lease and to their existing landlords. The plaintiffs were not responsible for the delays because of the following provisions of the lease, paragraphs 31 and 32. . . .[8] The

[8] Paragraph 31, titled "Maintenance of Leased Premises," states: Lessee agrees to take good care of and maintain the [l]eased [p]remises in good condition throughout the term of the [l]ease.

"Lessee, at his expense shall make all necessary repairs and replacements to the [l]eased [p]remises, including the repair and replacement of pipes, electrical wiring, heating and plumbing systems, fixtures and all other systems and appliances and their appurtenances. The quality and class of all repairs and replacements shall be equal to or greater than the original worth. If [l]essee defaults in making such repairs or replacements, [l]andlord may make them for [l]essee's account, and such expenses will be considered [a]dditional [r]ent."

defendants failed to prove that they were justified in withholding the rent because of the contamination issues affecting the [property]."

The court, in finding that the defendants had failed to prove their second and third special defenses, stated that the plaintiffs had not breached the lease in failing to remediate the contamination, as alleged by the defendants. It found that the plaintiffs promptly addressed the environmental issues affecting the exterior of the property, as required by paragraph 33 of the lease, and did not breach the implied covenant of good faith and fair dealing. The court further concluded that the defendants suffered no detriment as a result of the contamination and remediation. "They failed to offer any evidence that they ever even complained about the contamination and remediation until they filed their answer in this case on March 24, 2015." Additional facts will be set forth as necessary.

I

The defendants' first claim is that the court applied an incorrect legal standard in determining that they failed to prove their special defense of equitable nonforfeiture. We disagree.

The plenary standard of review applies to the preliminary issue of whether the court applied the correct legal standard in evaluating this special defense. "[I]t is well established that [t]he . . . determination of the proper

Paragraph 32, titled "Alterations and Improvements," states: "Lessee shall not make any alterations or improvements to, or install any fixtures on the [l]eased [p]remises without [l]andlord's prior written consent. If such consent is given, all alterations and improvements made, and fixtures installed by [l]essee shall become [l]andlord's property at the end of the [l]ease term. Landlord may, however, require [l]essee to remove such fixtures, at [l]essee's expense, at the end of the [l]ease term.

"All alterations and improvements to the [p]remises are the [l]essee's sole responsibility. All expenses and costs associated with the required zoning change of use are the [l]essee's sole responsibility."

legal standard in any given case is a question of law subject to our plenary review . . . .'' (Internal quotation marks omitted.) *Cathedral Green, Inc.* v. *Hughes*, 174 Conn. App. 608, 619, 166 A.3d 873 (2017).

With respect to the issue of whether the court committed error in applying the correct legal standard to the unique facts of the present case, we observe that a trial court's exercise of its equitable powers is governed by the abuse of discretion standard. ''Any challenge to how the court exercised its equitable authority . . . is entitled to considerable deference.'' Id., 619–20. ''Although we ordinarily are reluctant to interfere with a trial court's equitable discretion . . . we will reverse [if] we find that a trial court acting as a court of equity could not reasonably have concluded as it did . . . or to prevent abuse or injustice. . . . In reviewing claims of error in the trial court's exercise of discretion in matters of equity, we give great weight to the trial court's decision. . . . [E]very reasonable presumption should be given in favor of its correctness. . . . The ultimate issue is whether the court could reasonably conclude as it did.'' (Citation omitted; internal quotation marks omitted.) *Presidential Village, LLC* v. *Phillips*, 325 Conn. 394, 407, 158 A.3d 772 (2017).

The defendants' sixth special defense alleged that the equitable doctrine against forfeiture barred their eviction. The burden of establishing an equitable defense in a summary process action falls on the party asserting that defense. See *Lynwood Place, LLC* v. *Sandy Hook Hydro, LLC*, 150 Conn. App. 682, 690, 92 A.3d 996 (2014) (summary process defendant had burden of proving equitable defense of laches).

''In determining whether a defendant is entitled to equitable relief from forfeiture of a tenancy, our Supreme Court has reiterated that courts should look to the test arising from its decision in *Fellows* v. *Martin*, 217 Conn. 57, 66–67, 584 A.2d 458 (1991). . . . In

Fellows, the court clarified that, under Connecticut law, equitable defenses and counterclaims implicating the right to possession are available in a summary process proceeding. . . . The court in *Fellows* also made clear, however, that [a] court of equity will apply the doctrine of clean hands to a tenant seeking such equitable relief; thus, a tenant whose breach was wilful or grossly negligent will not be entitled to relief. . . .

"Accordingly, *Fellows* established that an equitable nonforfeiture defense can succeed only if (1) the tenant's breach was not [wilful] or grossly negligent; (2) upon eviction the tenant will suffer a loss wholly disproportionate to the injury to the landlord; *and* (3) the landlord's injury is reparable. . . . This enumerated test, formulated from the holding in *Fellows*, is stated in the conjunctive, and, therefore, the failure of any prong of that test means that equitable relief is unavailable." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Cathedral Green, Inc.* v. *Hughes*, supra, 174 Conn. App. 620–21; see also *BNY Western Trust* v. *Roman*, 295 Conn. 194, 207 n.11, 990 A.2d 853 (2010) (limiting appellate review to one element of applicable conjunctive test); *Berzins* v. *Berzins*, 105 Conn. App. 648, 654, 938 A.2d 1281 (same), cert. denied, 289 Conn. 932, 958 A.2d 156 (2008).

In addition to applying the three part test enunciated in *Fellows*, our Supreme Court has also stated that "[t]he doctrine against forfeitures applies to a failure to pay rent in full when that failure is accompanied by a good faith intent to comply with the lease or a good faith dispute over the meaning of a lease." *Fellows* v. *Martin*, supra, 217 Conn. 69; see also *Cumberland Farms, Inc.* v. *Dairy Mart, Inc.*, supra, 225 Conn. 778.

As to the first element of the *Fellows* test, whether the defendants' breach of the lease was wilful or grossly negligent, the defendants maintain that they justifiably

withheld their rent because it was very shocking to find out about the environmental violations and contaminations—information that they assert Dominick had withheld from them. They assert that they were fearful that Subway might have revoked its franchise if it had learned about the contamination. They essentially claim that Girouard had a conflict of interest in working for the benefit of both the plaintiffs and the defendants, and that when he failed to complete the renovations in a more expedient fashion, the plaintiffs were responsible for their agent's derelictions and should have agreed to extend the rental abatement period until the defendants' businesses could occupy the property.

In addition, the defendants claim that the court failed to determine whether their failure to pay rent in full when due was accompanied by a good faith intent to comply with the lease or a good faith dispute over the meaning of the lease. The defendants claim they acted in good faith given Nader's testimony that after they were informed of their nonpayment, they acted in good faith to avoid a forfeiture by informing the plaintiffs that the unpaid rent was going into an escrow account. They further indicate in support of their claim that Nader also testified that he offered to pay the money back to the plaintiffs immediately. Nader testified that the defendants "immediately" offered to pay the plaintiffs the three months of rent they had placed in escrow.

The plaintiffs argue that the defendants are not entitled to the equitable nonforfeiture defense because the trial court properly applied the standard and found that the defendants had intentionally breached the lease by refusing to pay rent due in December, 2014, and thereafter, because of the delay in the completion of their renovations, for which paragraphs 31 and 32 of the lease held the defendants responsible. The plaintiffs maintain that the defendants' nonpayment of rent was deliberate and wilful, as they used "self-help in an effort

to impose on the [plaintiffs] a unilateral extension of the rent concession period." Furthermore, the plaintiffs argue that the defendants never exemplified a willingness to comply fully with the lease and cure the full rental default because they deliberately failed to pay over $100,000 in real estate taxes and sewer charges that had accrued since the date of the January, 2014 tax installment and for which they were responsible under paragraph 7 of the lease.[9]

The court's decision rejecting the sixth special defense was set forth piecemeal. Nonetheless, in its first articulation, the court not only cited to *Cumberland Farms, Inc.* v. *Dairy Mart, Inc.*, supra, 225 Conn. 771, a case which fully discusses the defense of equitable nonforfeiture, but it properly applied the doctrine of equitable nonforfeiture to the facts of the present case. The court determined that the defendants had failed to prove the first element of equitable nonforfeiture pertaining to the absence of wilful or grossly negligent nonpayment. In finding that the defendants failed to prove the first element of equitable nonforfeiture, the court was not required to address the other two elements. The court also determined that the defendants failed to prove that they made a good faith effort to comply with the lease or that they had a good faith dispute with the plaintiff as to its meaning.

As to the first element, the defendants admit that they deliberately stopped paying the rent upon advice of their counsel. In particular, they noted that they were upset about the contamination and the plaintiffs' refusal to extend the rent abatement period due to the delay

[9] Paragraph 7 of the lease provides: "Taxes. From and after the [r]ent [c]ommencement [d]ate, and for and during the remaining [t]erm(s) of this [l]ease, [l]essee hereby covenants and agrees to pay as [a]dditional [r]ent the [d]emised [p]remises annual real estate and sewer taxes in lawful money of the United States. Lessor shall furnish [l]essee copies of the municipal tax statements. Penalties for late payments are the sole responsibility of the [l]essee."

in the renovations, which they blamed on Girouard's purported conflict of interest in his capacities as both the plaintiffs' agent and the defendants' renovation consultant.

In the court's initial memorandum of decision, it cited to *Cumberland Farms*, which the defendants claim the court ignored. The court therein found that "[t]he elements necessary to sustain the defense of equitable nonforfeiture do not exist in this case because the defendant[s] caused the breach [of nonpayment of rent] intentionally.[10] That finding alone negates any finding of equitable nonforfeiture."[11] (Footnote added.) After determining that the defendants had failed to prove the first prong of the test set forth in *Fellows*—that their breach of the lease for nonpayment of rent was not wilful or grossly negligent—the court was not required to, and did not, address the second and third prongs.[12]

[10] "Whether a party's conduct is wilful is a question of fact." *Saunders* v. *Firtel*, 293 Conn. 515, 530, 978 A.2d 487 (2009). Wilful commonly means intentional or deliberate, as opposed to accidental. Id., 531. At times, the term has been used to describe conduct deemed highly unreasonable or indicative of bad faith. Id. Although the term is subject to multiple meanings, reviewing some of the court's explicit findings, such as its finding that the claims regarding the contamination were "pretextual," and not raised until after this action was commenced, in addition to finding that it had rejected "the defendants' claimed good faith intent to comply with the lease and . . . alleged good faith dispute over the [meaning] of the lease," we conclude that the court used the term to mean highly unreasonable or in bad faith.

[11] In *Cumberland Farms, Inc.* v. *Dairy Mart, Inc.*, supra, 225 Conn. 777, the trial court determined, and our Supreme Court agreed, that a tenant was entitled to equitable relief from forfeiture in light of the fact that there had been confusion on the part of the tenant about the identity of the landlord and where to send the rental payments, and the tenant had diligently sought to obtain necessary calculations from a confused landlord as to the amount it owed the landlord.

[12] The defendants argue that the court, in rendering its decision, failed to consider the second and third elements of the equitable nonforfeiture test that pertain to whether, upon eviction, the defendant would suffer a loss wholly disproportionate to the injury to the plaintiffs and whether the plaintiffs' injuries were reparable. The court made no findings as to the nature of any losses the defendants would suffer upon eviction or whether the plaintiffs' injuries were reparable. See, e.g., *Fellows* v. *Martin*, supra, 217

Later, in its first articulation in response to this court's order, the court also found that the defendants' claims of a good faith intent to comply with the lease and a good faith dispute over the meaning of the lease had not been proven.

The defendants argue that they were justified in withholding rent because they had not been informed of the existence of contamination on the property. In its corrected supplemental articulation, the court found that in an attempt to justify their intentional breach of the lease by nonpayment, the defendants raised "pretextual" concerns about their lack of knowledge of the contamination of the tank graves, and that they actually were seeking to avoid having to simultaneously pay rent to the plaintiffs and to pay the existing rents for their two businesses' prior locations because the rent concession period in the lease had expired before their renovations were completed. The court noted that the plaintiffs met all of their obligations under the lease with respect to remediating the environmental contamination, and that the contamination had no effect on the progress of the defendants' renovations. It found that the defendants failed to offer any evidence that they had ever complained about the contamination and remediation work until they filed their answer in the present case on March 24, 2015.[13] The court also concluded that the plaintiffs were not responsible for the renovation delays because paragraphs 31 and 32 of the lease imposed responsibility for repairs, replacements, alterations and improvements on the defendants.

The court further found, with respect to the defendants' claim that they were justified in withholding their

Conn. 66–67. Although the parties have briefed the issue of whether the evidence proved the second and third elements of the equitable nonforfeiture test, we see no need to address those additional arguments raised in connection with the present claim.

[13] As of March, 2015, the defendants had obtained certificates of occupancy for both businesses.

rent because the plaintiffs refused to extend the commencement date for the payment of rent beyond July 1, 2014, as a result of Girouard's allegedly inefficient consulting work, that there was no evidence that Girouard delayed the progress of the renovations so as to benefit the plaintiffs. The court stated that "[b]ased upon the credible evidence presented in this matter, with regards to the fourth special defense and the reasonable inferences which may be drawn therefrom, the court finds that the defendant has failed to prove its fourth special defense.[14] Any agreement entered into between [Girouard] and the defendants, Nader and Sassoon . . . was entered into separate from and independent of the agreement between the plaintiffs . . . and the defendants . . . . The court finds that there was no control by [the plaintiffs] over the actions of . . . Girouard, nor was there any form of supervision, nor was there any benefit to the [plaintiffs] from the agreement between Girouard and [the defendants]. Simply put, the agreement was separate from and independent of the agreement between [the plaintiffs] and [the defendants]. The defendants . . . are free to seek, from [Girouard], any claim for damages allegedly resulting from the fit-up delays and any delay in not timely producing a certificate of occupancy. This is not the fault or responsibility of [the plaintiffs]. The court finds that [Girouard] was acting for and solely on behalf of the defendant tenants in all of his undertakings to fit-up the property and in obtaining any certificate of occupancy."[15] (Footnote added.)

[14] These findings also pertain to the fifth special defense. See footnote 8 of this opinion.

[15] We agree with the plaintiffs that the defendants' claim appears to be based on the doctrine of constructive eviction, a doctrine that would not permit them to withhold rent payment yet remain in possession of the property. "[A] constructive eviction arises where a landlord, while not actually depriving the tenant of possession of any part of the premises leased, has done or suffered some act by which the premises are rendered untenantable, and has thereby caused a failure of consideration for the tenant's promise to pay rent. . . . In addition to proving that the premises are untenantable,

We have thoroughly reviewed the exhibits and the testimony of the witnesses as to the claim that the defendants were justified in withholding rent as a result of their lack of knowledge of environmental contamination or the plaintiffs' failure to extend their rent abatement as a result of Girouard's allegedly deficient consulting work. We conclude that the court, exercising its equitable authority, to which we afford considerable deference, could reasonably have reached the conclusions it did.

The court could have credited Dominick, who testified that the department in 2010 wanted him to put a leak detection device on his gasoline underground storage tank. He did not recall receiving any violation notice from the department in May, 2010. He decided to remove the two underground storage tanks rather than install any device and had his nephew do the removal work. He believed soil testing done in 2011 by Absolute, authorized by the plaintiffs, showed some contamination but it was at satisfactory levels and did not exceed acceptable limits. Dominick stated that he told the defendants that there was some contamination but if there was a problem, he would take care of it. The parties provided for that contingency in paragraph 33 of the lease.[16]

Girouard testified that when the plaintiffs received the July 1, 2014 notice from department, they asked Girouard to look into it. Girouard testified that he hired

a party pleading constructive eviction must prove that (1) the problem was caused by the landlord, (2) the tenant vacated the premises because of the problem, and (3) the tenant did not vacate until after giving the landlord reasonable time to correct the problem." (Citation omitted; internal quotation marks omitted.) *Heritage Square, LLC* v. *Eoanou*, 61 Conn. App. 329, 332, 764 A.2d 199 (2001).

[16] We note that there is no provision in the lease in which the plaintiffs warranted to the defendants that no environmental contamination on the property existed.

Enviro Shield to remediate any contamination, in addition to hiring a licensed environmental professional, Sherry Hartman, to supervise the project. He did not tell the defendants about the department notice. Dominick testified that the defendants never complained that the contamination related to the underground tanks interfered with their ability to renovate the property.

During his testimony, Nader indicated that he found out about the July 1, 2014 department order in the early fall of 2014, when he heard media reports and encountered Omar Z. Tyson, an enforcement officer employed by the department, on the property. He admitted that the remediation work, which began in August, 2014, did not interfere with the progress of the defendants' renovations, which had commenced in July, 2014.

Girouard indicated that he had had nothing to do with the removal of the two underground storage tanks or the testing that took place on the property between 2010 and 2013. Girouard testified that he first became aware of the contamination on July 3, 2014, which the court could have credited.

During the discussions between the parties prior to the signing of the lease, Nader testified that Dominick and Crescienzo had recommended Girouard to assist the defendants with their renovations. Nader and Girouard negotiated the lease. In addition, Sassoon knew that Girouard was the leasing agent for the plaintiffs prior to signing the lease, having attended a meeting with Dominick and Crescienzo in September, 2013, to discuss a possible lease where Girouard was present at the plaintiffs' request. Prior to signing the lease, Nader entered into a consulting contract with Girouard to assist with the renovations on October 29, 2013, and paid him $11,250.

Girouard testified that there were a number of reasons for the delays in the issuance of the certificates

of occupancy for the rug gallery and Subway spaces. Initially, the defendants did not intend to immediately renovate space for their Subway franchise because their current lease for the operation of their franchise would not expire for four more years. A preliminary drawing dated December 28, 2013, provided to the defendants by Girouard, showed no renovations for a retail food space. Prior to the signing of the lease, the defendants had not selected a contractor for the renovation work. The Westport Architectural Review Board (board) slowed the progress of the renovations due to its concern about the exterior design. Girouard had to attend three hearings, and the board's requirements for the exterior added to the cost. Girouard thereafter obtained three different contractors' proposals. He denied that he ever estimated the cost of the renovations or the amount of time needed for their completion for the defendants. The defendants were not satisfied with any of the three proposals. Ultimately, the defendants, after having two other contractors bid for the job, one of which, Alpha Additions, would not set a price, hired MK Remodeling, which estimated that it would cost $420,000 just to renovate the retail space for the rug store.

There were additional costs for electrical, plumbing, fireproofing, exterior doors and heating, ventilation, and air conditioning. The defendants obtained a building permit only for the rug gallery retail space on June 11, 2014.

On May 28, 2014, and June 27, 2014, the defendants received two letters from Girouard, which he had written on behalf of the plaintiffs. The letters identified Girouard as "Boccanfuso Family Property Manager, 611 Riverside Avenue, Westport."[17] The first letter reminded

[17] Dominick had testified that Girouard was not the property manager for his garage at the property, although he did negotiate the lease for the plaintiffs. Dominick stated that Girouard was the property manager for other properties the plaintiffs owned, including 611 Riverside Avenue in Westport.

the defendants that pursuant to paragraph 10, rent for the property was due on June 1, 2014, and that payment of utilities for the property should be assumed by then.

The June 27, 2014 letter addressed to the defendants rejected revising the lease as suggested in a letter from the defendants' attorney to Girouard. Girouard advised the defendants that Dominick and Crescienzo had granted them an additional one month rent concession, but that the July, 2014 rent was due by July 10. He reminded them again that the utilities must be assumed by them and put in their business' name. The letter concluded with a paragraph that stated that the individual plaintiffs did not want to be called or visited at their residences or places of business by the defendants, and that Girouard would exclusively handle all future lease and building matters on their behalf. On July 1, 2014, Dominick and Crescienzo sent a letter to the defendants indicating that Girouard had made them aware of the defendants' desire to meet concerning the lease. The brothers indicated that they no longer wanted to be involved in any discussions concerning the lease and that no further concessions of any kind would be granted. They stated that they were fully expecting rental payments starting July 1, 2014, and that all matters concerning the lease were to be handled exclusively by Girouard. Although the defendants also were to pay the property taxes and sewer charges for the property as part of the rent, they never did so.

In July, 2014, after Girouard had sent the letters to the defendants on behalf of the plaintiffs demanding that they commence paying rent and utilities, Nader discussed with Girouard that the defendants had decided to begin renovating the space for the Subway. The addition of the Subway space required more extensive sewer work and the addition of sidewalks.

Despite their purported resentment toward Girouard and the plaintiffs for the delays which they claim were

attributable to Girouard, and the failure of the plaintiffs to grant them a further extension of the rent abatement period, on August 1, 2014, the defendants again agreed to hire Girouard as their consultant to assist in the renovation of the retail space for the Subway. For this work, they agreed to pay Girouard $9000. At this point, the defendants were fully aware that Girouard served as both a property manager and leasing agent for the plaintiffs.

Sassoon testified that by the end of 2014, Girouard was no longer communicating with the defendants, and that the defendants stopped paying rent as an "act of desperation" because they were then paying three rents, but had not yet occupied the property. Sassoon admitted that they did not pay rent beginning in December, 2014, which led to the plaintiffs' commencement of this action.

Sassoon testified inconsistently. He first testified that the defendants informed Girouard that they wanted to bring both businesses, the rug gallery and the Subway, under the same roof as soon as the lease was signed, but later admitted that the consulting agreement they entered into with Girouard on October 28, 2013, did not include renovation of the Subway space.

Dominick testified that he was uninvolved with the consulting arrangements Girouard had with the defendants or with their contractors. This was confirmed by Girouard. Dominick indicated that Girouard was never the property manager for the property the defendants leased.

Affording the court every reasonable presumption in favor of upholding its decision, we conclude that the court, on the basis of the facts and the reasonable inferences drawn from them, did not abuse its discretion in applying the doctrine of equitable nonforfeiture. The court indicated it understood the parameters of the doctrine and properly determined that the defendants failed to prove the first *Fellows* element, that their with-

holding of the rent was not wilful or grossly negligent, and that the defendants failed to prove that they made a good faith effort to comply with the lease or that a good faith dispute as to the meaning of any of its terms existed.[18] Accordingly, the defendants have failed to demonstrate that the court improperly chose or applied the law on equitable nonforfeiture.

II

The defendants' next claim is that the court erred in finding that the plaintiffs were unaware of environmental contamination on the property until after July 1, 2014.[19] We disagree.

When reviewing findings of fact, we defer to the trial court's determination unless it is clearly erroneous. "A finding of fact is clearly erroneous when there is no evidence to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling." (Internal quotation marks omitted.) *State* v. *Dunbar*, 188 Conn. App. 635, 641, 205 A.3d 747, cert. denied, 331 Conn. 926, 207 A.3d 27 (2019).

[18] The defendants, in their brief, do not enlighten us as to any dispute between the parties as to the meaning of any particular provision of the lease, nor do they question the court's ultimate interpretation of any of its relevant provisions. They also fail to adequately brief their argument that their withholding of rent upon the advice of counsel satisfies the requisite proof for the defense of equitable nonforfeiture set forth in *Fellows*. We consider both of these unarticulated arguments in their first claim to be abandoned.

[19] The defendants misrepresent the court's actual finding on the issue of existing contamination on the property before July 1, 2014. The court's actual finding was that the parties were "unaware that the tank graves contained gasoline type contaminants *above action levels*." (Emphasis added.)

The defendants argue that Dominick had withheld information about environmental contamination on the property prior to the date that they signed the lease, justifying their withholding of their rental payments, as well as supporting their second and third special defenses that the plaintiffs had breached paragraphs 14 and 33 of the lease and violated the implied covenant of good faith and fair dealing.

The court found that "[u]ntil after July 1, 2014, the plaintiffs and the defendants were unaware that the tank graves contained gasoline-type contaminants above action levels. Accordingly, on November [22], 2013, the date when the lease was signed, neither party knew of the existence . . . of the contamination." As a result, the court found no merit to the defendants' second and third special defenses.

Our review of the testimony and other evidence related to the environmental contamination issues, which we discuss in part I of this opinion, reveals that there was evidence in the record to support the court's finding that the plaintiffs were unaware of contamination levels requiring action on the property until after July 1, 2014. Dominick testified that he believed any contamination detected in 2011 was within acceptable limits and that he told the defendants that there was *some* contamination, but if there was any problem, he would take care of it.

Moreover, even if the existence of contamination on the property requiring action prior to July 1, 2014, was concealed from the defendants, the court also found that the plaintiffs had complied with their obligation under paragraph 33 of the lease and had taken care of the problem. Furthermore, the court found that the remediation had no effect on the progress of the defendants' renovations or their ability to open both of their businesses on the property. The court stated that the

plaintiffs had addressed the contamination issues at their expense and the property had been remediated in accordance with the stipulation between the department and the plaintiffs.

Accordingly, even if the court's finding that the plaintiffs were unaware that the tank graves contained gasoline type contaminants above action levels was erroneous, such an error would be harmless, as the plaintiffs complied with their obligation under the lease to remedy the conditions. Neither the contamination nor the remediation process had any effect on the defendants' use of the property or the progress of their renovations. Therefore, the court properly concluded that the contamination did not justify the defendants' nonpayment of rent.

III

The defendants' third claim is that the court abused its discretion in finding that they had failed to prove their special defenses of unjust enrichment and violation of the implied covenant of good faith and fair dealing. We decline to reach the merits of this claim because it is inadequately briefed.

It is well established that "[w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . 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.) *State* v. *Fowler*, 178 Conn. App. 332, 345, 175 A.3d 76 (2017), cert. denied, 327 Conn. 999, 176 A.3d 556 (2018).

The defendants' analysis of this claim appears in a single paragraph of their brief. Moreover, in referring to their special defense alleging a violation of the implied covenant of good faith and fair dealing, the defendants do not distinguish between their third or fifth special defenses, both of which allege a violation of the implied

covenant of good faith and fair dealing. There are no legal authorities cited, let alone any analysis of whether the special defenses at issue were legally viable. We note, as well, that the defendants do not cite to any standard of review that governs our review of this claim.[20]

Moreover, in their scant analysis of this claim, the defendants inaccurately assert that the court failed to make any factual findings as to the fourth and fifth special defenses.[21] The defendants also inaccurately assert that the court failed to refer to the special defenses alleging a violation of the implied covenant of good faith and fair dealing.[22] On the basis of the foregoing, we decline to review the merits of this claim.

IV

The defendants' final claim is that the court abused its discretion by not granting the defendants a continuance so that Tyson, an enforcement officer employed by the department, could testify on their behalf. We disagree.

The following additional facts are relevant to this claim. At the beginning of the hearing on April 4, 2017, which was a Tuesday, counsel for the defendants indicated to the court that he had subpoenaed one witness,

[20] The defendants' statement of the claim suggests that the abuse of discretion standard of review applies, yet the issue of whether a contract has been breached ordinarily is a question of fact, subject to the clearly erroneous standard of review, as we previously cited in part I of this opinion. See *Strouth* v. *Pools by Murphy & Sons, Inc.*, 79 Conn. App. 55, 59, 829 A.2d 102 (2003).

[21] The defendants ignore the court's oral ruling, at the conclusion of the second day of trial on May 19, 2016, in which it ruled on the viability of the fourth special defense pertaining to the delays in the property renovations allegedly caused by Girouard. We are particularly perplexed by this omission because the defendants included a copy of the signed transcript containing the court's factual findings relevant to the fourth special defense in the appendix to their appellate brief.

[22] In its original order, its first articulation, and its corrected supplemental articulation, the court specifically found that the defendants had failed to prove their third special defense.

a "state employee," whom he anticipated would testify on Thursday. The court responded that the case had been scheduled for "today" for quite some time; counsel for the defendants knew the Stamford-Norwalk Housing Session sits on alternate days, Tuesdays and Thursdays; and the court had a lot of other cases going forward. The court noted that counsel had not requested permission from the court for a later date, there had been "many, many meetings" and hearings concerning the case, and it was one of the oldest summary process cases in the Norwalk Housing Session. The court stated, "it's going forward without any further delay." The court, however, then stated, "we'll see what happens with . . . the evidence," and then it would make a ruling on the defendants' request.

Counsel for the defendants then stated that he thought the case had been scheduled for Tuesday *and* Thursday. The court stated, "[t]his case has not been designated to be a two day trial. Be very clear about that." Counsel for the defendants replied, "[a]t the first break, Your Honor, I will call the witness and see if he can be here this afternoon."

The plaintiffs then put on their case for summary process. During the defendants' presentation of the testimony of Nader, counsel for the defendants advised the court that he had attempted to call the witness from the department: "I've called him on cell phone and I've called him at his office desk. I have not heard back from him and I will call him now again." The court stated, "I want to make the record pretty clear. At no time were you told by the clerk's office that you would have Thursday to continue with this trial. It's completely inconsistent with how we do business because again as I said earlier, we work on Tuesdays and Thursdays in Norwalk and time is very scarce in terms of having a contested hearing."

Nader finished testifying just before the lunch break. Counsel for the defendants indicated to the court that he would be calling Sassoon to testify after lunch. The court stated, "And that will conclude, assuming you don't locate the individual that you . . . ." Counsel for the defendants indicated he would do his best, and the court responded, "Well I'm not going to hear it if he's not here. Just be very clear. This is it. This is your day. I'm not going to continue this case. It's been dragging and dragging and dragging very, very long, as I said earlier."

After the lunch recess, the defendants continued with their presentation of their case, and Sassoon gave brief testimony. After Sassoon finished testifying, the court stated, "I'm not going to entertain any continuance request for any witness who's out there on the road or whatever, [defense counsel]. And I don't know if I'm really going to need testimony from someone from the [department] based on what I've heard in this case." Counsel for the defendants did not respond to this statement.

The court then discussed a date for the filing of simultaneous posttrial briefs in lieu of closing arguments. At the conclusion of the hearing, the court inquired of both the plaintiffs' and the defendants' counsel if there was anything else. Counsel for the defendants replied, "[t]hank you, Judge. Nothing else."

We briefly set forth the standard of review. "The determination of whether to grant a request for a continuance is within the discretion of the trial court, and will not be disturbed on appeal absent an abuse of discretion. . . .

"A reviewing court is bound by the principle that [e]very reasonable presumption in favor of the proper exercise of the trial court's discretion will be made. . . . To prove an abuse of discretion, an appellant must show that the trial court's denial of a request for a continuance was arbitrary. . . . There are no mechanical

tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. . . . In the event that the trial court acted unreasonably in denying a continuance, the reviewing court must also engage in harmless error analysis. . . .

"Among the factors that may enter into the court's exercise of discretion in considering a request for a continuance are the timeliness of the request for continuance; the likely length of the delay; the age and complexity of the case; the granting of other continuances in the past; the impact of delay on the litigants, witnesses, opposing counsel and the court; the perceived legitimacy of the reasons proffered in support of the request; the [defendants'] personal responsibility for the timing of the request; [and] the likelihood that the denial would substantially impair the [defendants'] ability to defend [themselves]. . . . We are especially hesitant to find an abuse of discretion where the court has denied a motion for continuance made on the day of the trial . . . .

"Lastly, we emphasize that an appellate court should limit its assessment of the reasonableness of the trial court's exercise of its discretion to a consideration of those factors, on the record, that were presented to the trial court, or of which that court was aware, at the time of its ruling on the motion for a continuance." (Internal quotation marks omitted.) *State* v. *Godbolt*, 161 Conn. App. 367, 374–75, 127 A.3d 1139 (2015), cert. denied, 320 Conn. 931, 134 A.3d 621 (2016).

For several reasons, we conclude that the defendants have not demonstrated that the court abused its discretion by denying their request for a continuance in an over three year old summary process case for the purpose of presenting Tyson's testimony. April 4, 2017,

was the third day of a trial in an action that had been commenced in January, 2015. On April 4, 2017, the defendants failed to make an adequate showing as to why Tyson, purportedly under subpoena for that day, was not available to testify as scheduled, or why his deposition could not have been taken beforehand and offered into evidence in lieu of live testimony.[23] The defendants made no proffer to the court as to the necessity for Tyson's testimony or why the denial of a continuance would substantially impair their defense. Certainly, they are unable to advance any such theory of relevance for the first time before this court.[24] They also made no request for a capias to compel Tyson's presence. Finally, it was appropriate for the court to consider the timing of the request and the fact that the defendants' counsel moved for a continuance on the day of trial. See, e.g., *State* v. *Godbolt*, supra, 161 Conn. 375–76 (late hour of request weighed in favor of court's denial of request for continuance).

Moreover, we conclude that, even if the court did abuse its discretion in refusing to grant a continuance for the presentation of Tyson's testimony, any error was harmless. The defendants argue before this court that failing to grant the request for a continuance had the effect of excluding Tyson's testimony, which "effectively kept out of evidence extremely relevant [department] documentation concerning the history of contamination on the [plaintiffs'] property." In discussing the

[23] In the appendix of their brief to this court, the defendants have provided a copy of the subpoena served on Tyson. It reflects that he was served by a state marshal on March 29, 2017, to appear on Tuesday, April 4, 2017, not Thursday, April 6, 2017. It would appear that, prior to April 4, 2017, the defendants, with the exercise of due diligence, could have ascertained whether Tyson would appear and could have apprised the court of a problem with Tyson's compliance.

[24] The defendants argue in their brief that the court's denial of a continuance "effectively kept out of evidence extremely relevant [department] documentation concerning the history of contamination . . . and Tyson's . . . repeated contact with Dominick . . . ." The defendants, however, made no

prejudice they allegedly suffered as a consequence of the court's ruling, however, the defendants do not address the significance of the fact that the court considered the environmental contamination issue to be "pretextual." As the court found, "[t]he defendants suffered no detriment as a result of the contamination and remediation. They failed to offer any evidence that they ever even complained about the contamination and remediation until they filed their answer in this case on March 24, 2015." The defendants have not demonstrated that the court's rationale in this respect was flawed and, thus, are unable to demonstrate that they were harmed by the court's purported error. We therefore reject the defendants' claim that the court abused its discretion by not granting their request for a continuance in order to call Tyson as a witness.

The judgment is affirmed.

In this opinion the other judges concurred.

DEVONTE DALEY *v.* ZACHARY KASHMANIAN ET AL.
(AC 41393)

Keller, Bright and Harper, Js.

Syllabus

The plaintiff sought to recover damages from the defendant police detective, K, and the defendant city of Hartford for personal injuries he sustained when he was ejected from his motorcycle after it was struck by K's unmarked vehicle, which was not equipped with flashing or revolving lights or a siren, while K was surveilling the plaintiff and traveling above the speed limit in the wrong lane of traffic. The plaintiff sought to recover damages on the basis of K's alleged reckless and negligent conduct, claiming that K's conduct violated a ministerial duty imposed on him by certain motor vehicle statutes. After the case was tried to a jury, the trial court granted K's motion for a directed verdict on the

proffer whatsoever to the trial court as to what evidence Tyson might have contributed in support of their defense.

plaintiff's recklessness claim. The jury thereafter returned a verdict in favor of the plaintiff on his negligence claim. Subsequently, the trial court set aside the verdict on the negligence count, concluding that the plaintiff's allegations related to discretionary acts for which the defendants were immune from liability pursuant to the statute (§ 52-557n) concerning governmental immunity. From the judgment rendered thereon, the plaintiff appealed to this court. *Held*:

1. The trial court improperly directed a verdict in favor of K as to the plaintiff's recklessness claim, as the evidence, viewed in a light most favorably to the plaintiff, was sufficient for the jury reasonably to conclude that K acted recklessly: on the basis of the evidence presented, the jury reasonably could have concluded that K consciously disregarded state laws relating to speed limits, reckless driving, following too closely and traveling in the correct lane of traffic in a situation in which a high degree of danger was present, and that he was aware of the risks and dangers his conduct imposed on others, yet showed little regard for the consequences of his actions; accordingly, the plaintiff was entitled to have his recklessness claim submitted to the jury.
2. The trial court properly set aside the verdict in favor of the plaintiff on his negligence claim; the circumstances surrounding K's conduct demonstrated that he was engaged in discretionary activity, as he was engaged in the discretionary police activity of surveilling the plaintiff and, thus, did not have a ministerial duty to follow every motor vehicle statute, even if those statutes in other circumstances would impose ministerial duties, and in the absence of a directive that clearly compelled K's conduct, he was entitled to governmental immunity for his discretionary acts.

Argued May 13—officially released October 1, 2019

Procedural History

Action to recover damages for the alleged negligence and recklessness of the named defendant et al., and for other relief, brought in the Superior Court in the judicial district of Hartford and tried to the jury before *Scholl*, *J.*; thereafter, the court granted the named defendant's motion for a directed verdict on the plaintiff's recklessness claim; verdict for the plaintiff on his negligence claim; subsequently, the court set aside the verdict and rendered judgment for the defendants, from which the plaintiff appealed to this court. *Reversed in part; new trial.*

Martin McQuillan, for the appellant (plaintiff).

William J. Melley, for the appellee (named defendant).

Nathalie Feola-Guerrieri, for the appellee (defendant city of Hartford).

James J. Healy and *Karen K. Clark* filed a brief for the Connecticut Trial Lawyers Association as amicus curiae.

Opinion

BRIGHT, J. This appeal stems from a personal injury action brought by the plaintiff, Devonte Daley, against the defendants, Zachary Kashmanian and the city of Hartford (city), seeking damages for the injuries he sustained when Kashmanian, a detective with the Hartford Police Department who had been surveilling the plaintiff in an unmarked police car, allegedly, negligently and recklessly caused the plaintiff to be ejected from his motorcycle. The plaintiff appeals, following a jury trial, from the judgment of the trial court directing a verdict in favor of Kashmanian on the plaintiff's recklessness claim, and from the judgment of the trial court setting aside the jury's verdict on the plaintiff's negligence claim. On appeal, the plaintiff claims that the court improperly (1) directed a verdict because there was sufficient evidence for the jury to find that Kashmanian engaged in reckless conduct, and (2) set aside the verdict with respect to the negligence claim on the ground that the defendants were entitled to governmental immunity because Kashmanian was engaged in ministerial, not discretionary, conduct. We agree with the plaintiff's first claim only, and, accordingly, we reverse the judgment of the trial court directing a verdict on the recklessness claim and affirm the judgment of the trial court setting aside the verdict on the negligence claim.

The relevant facts, viewed in a light most favorable to the plaintiff, and procedural history, are as follows. On June 1, 2013, at approximately 12 a.m., the plaintiff was riding his yellow Suzuki motorcycle on Asylum

Avenue in Hartford with a group of eight to ten other people who were riding "dirt bikes" and "quads." The plaintiff's motorcycle was neither "street legal" nor "roadworthy" because it did not have headlights and was equipped with off-road tires: a black tire on the front and a yellow tire on the back. Also at that time, Kashmanian was operating an unmarked gray Acura TL, which the police characterize as a "soft car." A soft car is a vehicle that is not equipped with flashing or revolving lights, sirens, or police markings so that it is indiscernible from ordinary civilian cars.

At or around that same time, a confidential informant provided an anonymous tip to the police that a man riding a yellow motorcycle with a yellow tire had a gun. Kashmanian was instructed by other officers to perform surveillance[1] on the group of motorcycles and quads, including the yellow motorcycle, which was operated by the plaintiff. When Kashmanian arrived at Asylum Avenue, he observed the yellow motorcycle and the group of motorcycles and quads, and proceeded to follow them westbound on Asylum Avenue. All of the motorcycles and quads then turned right and proceeded northbound on Sumner Street, which is a two lane road with a speed limit of twenty-five miles per hour. At the intersection of Asylum and Sumner, Kashmanian's vehicle "sideswip[ed]" another motor vehicle driven by Brontain Stringer, which had been proceeding in the same direction. Kashmanian paused for a brief second, but he was directed by the police on the radio to "just keep going" and that they would "take care of the accident; just keep going."

Kashmanian then proceeded north in the northbound lane of Sumner Street, to continue to surveil the plaintiff. Kashmanian was traveling between forty and fifty

[1] Kashmanian testified that his understanding of surveillance is "you're following someone at a distance, trying to keep an eye on them, where they're going; what their actions are. It could be in a car; it can be walking. It could be anywhere. It could be through a camera."

miles per hour, well over the twenty-five miles per hour speed limit. Kashmanian then crossed the center line to travel north in the southbound lane in an effort to avoid two quads in the group that fishtailed and sideswiped his vehicle. Although he could have returned to the northbound lane of traffic after passing the two quads, Kashmanian continued to travel north in the southbound lane, closing the distance between his car and the plaintiff's motorcycle until he struck the back tire of the plaintiff's motorcycle with the front left panel of his vehicle, which caused the plaintiff to crash his motorcycle into a parked car in the southbound lane of Sumner Street. The plaintiff was ejected from his motorcycle and landed approximately ninety-five feet down Sumner Street, causing him significant injuries. As evinced by the lack of skid marks on Sumner Street, Kashmanian neither suddenly slowed his vehicle nor applied his brakes before striking the plaintiff's motorcycle.

On February 26, 2015, the plaintiff filed this personal injury action against the defendants. The plaintiff's operative fifth amended complaint contains two relevant counts.[2] In count one, the plaintiff asserted a common-law negligence claim against Kashmanian in his

[2] The complaint contains two additional counts that are not relevant to our resolution of this appeal. In count three, the plaintiff alleged a statutory recklessness claim pursuant to General Statutes § 14-295 against Kashmanian in his individual capacity. The plaintiff withdrew this count at the conclusion of the presentation of evidence at trial. In count four, the plaintiff alleged an indemnification claim against the city pursuant to General Statutes § 7-465 (providing indemnification by municipalities of municipal officers, agents or employees who incur liability for negligent official conduct). Count four was not submitted to the jury because resolution of that claim was dependent on the court's analysis of the defendants' governmental immunity special defense. Specifically, in the absence of a common-law negligence claim against Kashmanian, there would be no basis for a statutory indemnification claim against the city pursuant to § 7-465. See *Wu* v. *Fairfield*, 204 Conn. 435, 438, 528 A.2d 364 (1987) ("in a suit under § 7-465, any municipal liability which may attach is predicated on prior findings of individual negligence on the part of the employee and the municipality's employment relationship with that individual").

official capacity and the city, alleging that Kashmanian negligently caused the plaintiff's injuries. In count two, the plaintiff asserted a common-law recklessness claim against Kashmanian, alleging that he recklessly, wilfully, and wantonly caused the plaintiff's injuries.

In response, the defendants filed answers denying the essential allegations of the plaintiff's complaint and alleging two relevant special defenses. The defendants alleged that the plaintiff's injuries were caused by his own comparative negligence, and that the plaintiff's claims are barred by common-law and statutory governmental immunity, pursuant to General Statutes § 52-557n,[3] because Kashmanian was engaged in discretionary acts.[4] Prior to the submission of the case to the jury, the parties stipulated that the issue of whether the defendants were entitled to governmental immunity would be decided by the court if the jury returned a verdict in favor of the plaintiff on his negligence claim.

The case was tried to a jury over the course of five days. At the close of evidence, Kashmanian made an oral motion for a directed verdict as to count two, the common-law recklessness count. In particular, Kashmanian argued that count two should not be submitted

[3] General Statutes § 52-557n (a) provides in relevant part: "(1) Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties . . . . (2) Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by: (A) Acts or omissions of any employee, officer or agent which constitute criminal conduct, fraud, actual malice or wilful misconduct; or (B) negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law."

[4] The defendants pleaded governmental immunity as a special defense generally to all of the plaintiff's claims, yet Kashmanian does not argue that governmental immunity would apply to his alleged wilful, wanton, or reckless conduct.

to the jury because there was no evidence that Kashmanian engaged in reckless conduct. After hearing the plaintiff's counterargument, the court orally granted Kashmanian's motion for a directed verdict as to count two. Accordingly, the jury was charged and the case was submitted to the jury only as to count one, the negligence count, and the defendants' comparative negligence special defense. On that same day, the jury returned a verdict for the plaintiff in the total amount of $416,214, reduced on the basis of the jury's finding that the plaintiff comparatively was 25 percent negligent, for a net award of $312,160.50.

The court then scheduled oral argument for January 23, 2018, and ordered the parties to file memoranda of law on the reserved issue of governmental immunity. On December 19 and 22, 2017, the city and Kashmanian, respectively, each filed a memorandum of law in which they argued, inter alia, that the jury's verdict in favor of the plaintiff on his negligence claim should be set aside because it was barred by the doctrine of governmental immunity.[5] On January 12, 2018, the plaintiff filed a memorandum of law in opposition on the ground that the defendants are not entitled to governmental immunity.

On February 8, 2018, the court set aside the jury's verdict in favor of the plaintiff on count one, the negligence claim. In particular, the court concluded that governmental immunity was applicable to Kashmanian's conduct because his driving surveillance involved

[5] In its December 19, 2017 memorandum of law, the city also moved for a directed verdict as to count four of the plaintiff's complaint, the § 7-465 indemnification claim against it. See footnote 2 of this opinion. In his December 22, 2017 memorandum of law, Kashmanian specifically moved for a "directed verdict" as to count one, the negligence claim, however, the court properly treated this memorandum of law as seeking to set aside the jury's verdict in favor of the plaintiff on count one. Further, the city, by way of motion filed on December 29, 2017, joined and incorporated Kashmanian's December 22, 2017 memorandum of law.

discretionary police activity, which is protected under § 52-557n (a) (2) (B). Because of its determination on governmental immunity, the court also reasoned that no cognizable claim existed against the city for indemnification under § 7-465. See footnotes 2 and 5 of this opinion. The court then rendered judgment in favor of the defendants on counts one and four of the plaintiff's complaint. This appeal followed. Additional facts will be set forth as necessary.

I

The plaintiff first claims that the court improperly directed a verdict in favor of Kashmanian on his claim of recklessness. We agree.

"We begin our analysis with the standard of review of a trial court's decision to grant a motion for a directed verdict. Whether the evidence presented by the plaintiff was sufficient to withstand a motion for a directed verdict is a question of law, over which our review is plenary. . . . Directed verdicts are not favored. . . . A trial court should direct a verdict only when a jury could not reasonably and legally have reached any other conclusion. . . . In reviewing the trial court's decision to direct a verdict in favor of a defendant we must consider the evidence in the light most favorable to the plaintiff. . . . Although it is the jury's right to draw logical deductions and make reasonable inferences from the facts proven . . . it may not resort to mere conjecture and speculation. . . . A directed verdict is justified if . . . the evidence is so weak that it would be proper for the court to set aside a verdict rendered for the other party. . . . [Our Supreme Court] has emphasized two additional points with respect to motions to set aside a verdict that are equally applicable to motions for a directed verdict: First, the plaintiff in a civil matter is not required to prove his case beyond a reasonable doubt; a mere preponderance of the evidence is sufficient. Second, the well established standards compelling great deference to the historical func-

tion of the jury find their roots in the constitutional right to a trial by jury." (Citations omitted; internal quotation marks omitted.) *Curran* v. *Kroll*, 303 Conn. 845, 855–56, 37 A.3d 700 (2012).

Next, we turn to our standard for recklessness, which is well established. "Recklessness requires a conscious choice of a course of action either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man, and the actor must recognize that his conduct involves a risk substantially greater . . . than that which is necessary to make his conduct negligent. . . . More recently, we have described recklessness as a state of consciousness with reference to the consequences of one's acts. . . . It is more than negligence, more than gross negligence. . . . The state of mind amounting to recklessness may be inferred from conduct. But, in order to infer it, there must be something more than a failure to exercise a reasonable degree of watchfulness to avoid danger to others or to take reasonable precautions to avoid injury to them. . . . Wanton misconduct is reckless misconduct . . . . It is such conduct as indicates a reckless disregard of the just rights or safety of others or of the consequences of the action. . . .

"While we have attempted to draw definitional distinctions between the terms wilful, wanton or reckless, in practice the three terms have been treated as meaning the same thing. The result is that willful, wanton, or reckless conduct tends to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent." (Citations omitted; internal quotation marks omitted) *Matthiessen* v. *Vanech*, 266 Conn. 822, 832–33, 836 A.2d 394 (2003); see *Williams* v. *Housing Authority*, 327 Conn. 338, 380, 174 A.3d 137 (2017) (same).

The plaintiff claims on appeal that the court erred in granting Kashmanian's motion for a directed verdict because there was sufficient evidence for the jury to find that Kashmanian's conduct that caused the plaintiff's injuries was wilful, wanton, or reckless. Specifically, the plaintiff cites Kashmanian's numerous traffic violations, the fact that Kashmanian did not stop or change course even though he was aware of the plaintiff's motorcycle slightly in front of him, and his accident with Stringer as evidence of highly unreasonable conduct rising to the level of recklessness. Conversely, Kashmanian contends that, because he was conducting surveillance in the scope of his police duties and in response to direct orders from his supervisor, his conduct lacked the requisite conscious disregard for the safety of others. Kashmanian argues that his conduct was the opposite of reckless because it was done to preserve the safety of others. We do not agree with Kashmanian's argument. We agree with the plaintiff that, viewing the evidence in a light most favorable to him, there was sufficient evidence for the jury reasonably to conclude that Kashmanian's conduct was reckless.

At trial, Kashmanian testified that the purpose of surveillance is to monitor covertly the conduct of the subject *at a distance*. Nevertheless, the evidence, viewed in a light most favorable to the plaintiff, demonstrated that Kashmanian drove down Sumner Street, in the dark, in a soft car, and at approximately double the speed limit in order to stay close to the plaintiff. He did so immediately after colliding with Stringer's vehicle on Asylum Avenue, and driving away to continue his surveillance. Kashmanian maintained his same rate of speed while *knowingly* driving northbound in the southbound lane, even though he could have returned to the correct lane. In fact, the jury reasonably could have concluded that Kashmanian, following his collision with

Stringer, must have increased his speed in order to catch up to the plaintiff. Kashmanian ultimately got so close to the plaintiff, while in the wrong lane of traffic, that he struck the plaintiff's motorcycle at such a speed and with enough force to drive it into a parked vehicle, which propelled the plaintiff ninety-five feet. As a result of Kashmanian's driving on Asylum Avenue and Sumner Street, there were at least three vehicles that sustained significant damage and one person, the plaintiff, who sustained significant physical injuries.

On the basis of this evidence, the jury reasonably could have concluded that Kashmanian consciously disregarded Connecticut's laws relating to speed limits, reckless driving, following too closely, and travelling in the correct lane of traffic, in a situation in which a high degree of danger was apparent. See General Statutes §§ 14-218a, 14-222, 14-230 and 14-240a. The jury reasonably could have concluded that Kashmanian was aware of the dangers and risks he was imposing on others, including the plaintiff, and yet showed little regard for the consequences of his actions. Although Kashmanian's supervisor instructed him to surveil the plaintiff and to continue that surveillance after his accident with Stringer, those instructions did not give Kashmanian license to engage in wilful, wanton, or reckless conduct. See, e.g., *O'Connor* v. *City of New York*, 280 A.D.2d 309, 719 N.Y.S.2d 656 (2001) (findings that officer drove unmarked vehicle without turret light or siren, at high rate of speed against flow of traffic on one-way street, and entered intersection without warning or slowing down were sufficient to support reckless claim); *Adams* v. *Peoples*, 18 Ohio St.3d 140, 480 N.E.2d 428 (1985) (allegations that officer drove his vehicle at excessive speed, "had gone left of the center line to enter the intersection on a red traffic light," under wet road conditions, were sufficient to support willful and wanton claim). Similarly, Kashmanian's argument that

he was attempting to stop the entire group of riders who posed a threat to the residents of the city does not justify engaging in reckless conduct.[6] *Jackson* v. *Lipsey*, 834 So. 2d 687, 690 (Miss. 2003) (findings that officer, in attempt to apprehend suspects, suddenly turned into traffic without headlights, blue lights, or siren were sufficient to support reckless claim). Ultimately, because the evidence, viewed in a light most favorable to the plaintiff, was sufficient for the jury reasonably to conclude that Kashmanian acted recklessly, the plaintiff was entitled to have his claim submitted to the jury. Therefore, we conclude that the court erred in granting Kashmanian's motion for a directed verdict as to count two.

II

The plaintiff next claims that the court improperly set aside the verdict on his negligence claim on the ground that the defendants are entitled to governmental immunity. We disagree.

We begin with the standard of review and legal principles relevant to our resolution of this claim. Although generally a court's decision to set aside a jury verdict is subject to an abuse of discretion review; *Rawls* v. *Progressive Northern Ins. Co.*, 310 Conn. 768, 776, 83 A.3d 576 (2014); we afford plenary review to the present claim because, as the parties properly recognize, the ultimate determination as to whether the defendants are entitled to governmental immunity is a question of law. *Ventura* v. *East Haven*, 330 Conn. 613, 634–37, 199 A.3d 1 (2019).

The law pertaining to municipal immunity is well settled. "[Section] 52-557n abandons the common-law principle of municipal sovereign immunity and establishes the circumstances in which a municipality may

[6] The jury reasonably could have found Kashmanian's testimony that his goal was to assist in stopping the entire group of motorcycles and quads not credible given evidence that he passed other members of the group to close in on the plaintiff.

be liable for damages. . . . One such circumstance is a negligent act or omission of a municipal officer acting within the scope of his or her employment or official duties. . . . [Section] 52-557n (a) (2) (B), however, explicitly shields a municipality from liability for damages to person or property caused by the negligent acts or omissions [that] require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law." (Footnote omitted; internal quotation marks omitted.) *Brooks* v. *Powers*, 328 Conn. 256, 264–65, 178 A.3d 366 (2018).

"Municipal officials are immune from liability for negligence arising out of their discretionary acts in part because of the danger that a more expansive exposure to liability would cramp the exercise of official discretion beyond the limits desirable in our society. . . . [D]iscretionary act immunity reflects a value judgment that—despite injury to a member of the public—the broader interest in having government officials and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury. . . . In contrast, municipal officers are not immune from liability for negligence arising out of their ministerial acts, defined as acts to be performed in a prescribed manner without the exercise of judgment or discretion." (Citations omitted; internal quotation marks omitted.) *Ventura* v. *East Haven*, supra, 330 Conn. 630.

"For purposes of determining whether a duty is discretionary or ministerial, [our Supreme Court] has recognized that [t]here is a difference between laws that impose general duties on officials and those that mandate a particular response to specific conditions. . . . A ministerial act is one which a person performs in a given state of facts, in a prescribed manner, in obedi-

ence to the mandate of legal authority, without regard to or the exercise of his own judgment [or discretion] upon the propriety of the act being done. . . . In contrast, when an official has a general duty to perform a certain act, but there is no city charter provision, ordinance, regulation, rule, policy, or any other directive [requiring the government official to act in a] prescribed manner, the duty is deemed discretionary." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Northrup* v. *Witkowski*, 332 Conn. 158, 169–70, 210 A.3d 29 (2019).

"[I]t is firmly established that the operation of a police department is a governmental function, and that acts or omissions in connection therewith ordinarily do not give rise to liability on the part of the municipality. . . . Indeed, [our Supreme Court] has long recognized that it is not in the public's interest to [allow] a jury of laymen with the benefit of 20/20 hindsight to second-guess the exercise of a policeman's discretionary professional duty. Such discretion is no discretion at all. . . . Thus, as a general rule, [p]olice officers are protected by discretionary act immunity when they perform the typical functions of a police officer. . . .

"In accordance with these principles, our courts consistently have held that to demonstrate the existence of a ministerial duty on the part of a municipality and its agents, a plaintiff ordinarily must point to some statute, city charter provision, ordinance, regulation, rule, policy, or other directive that, by its clear language, compels a municipal employee to act in a prescribed manner, without the exercise of judgment or discretion." (Citations omitted; internal quotation marks omitted.) *Ventura* v. *East Haven*, supra, 330 Conn. 630–31.

Neither our Supreme Court nor this court has determined whether a municipal police officer conducting surveillance while driving a motor vehicle is engaged in discretionary or ministerial conduct. The plaintiff, relying on a number of Superior Court and out-of-state

cases,[7] argues that Kashmanian's surveillance, while operating a motor vehicle, was ministerial. Conversely, the defendants argue that Kashmanian's surveillance, while driving, was discretionary because it entailed the use of judgment. We conclude that, on the basis of the facts of the present case, the defendants are entitled to governmental immunity as to the plaintiff's negligence claim because Kashmanian was engaged in discretionary conduct.

In the present case, the plaintiff, concededly, has not pointed us to any directive that prescribes the manner in which police officers are required to conduct surveillance. The plaintiff relies, instead, on Kashmanian's testimony as to his subjective understanding that surveil-

[7] The decisions of the Superior Court are split as to whether a police officer is entitled to governmental immunity for the operation of a motor vehicle. See *Williams* v. *New London*, Superior Court, judicial district of New London, Docket No. CV-12-6012328-S (April 7, 2014) (58 Conn. L. Rptr. 86) (collecting cases on both sides).

The plaintiff cites to several Superior Court cases for the proposition that a police officer's operation of a motor vehicle is ministerial conduct. See, e.g., *Letowt* v. *Norwalk*, 41 Conn. Supp. 402, 405–406, 579 A.2d 601 (1989) (relying on Rhode Island Supreme Court decision to hold that police officer driving patrol car to scene of accident is ministerial because "[o]rdinary citizens drive their cars every day, not just police officers . . . ."); *Borchetta* v. *Brown*, 41 Conn. Supp. 420, 424, 580 A.2d 1007 (1990) (relying on *Letowt* to determine that "operation of a police vehicle [on patrol duty] was a ministerial function"); *MacMillen* v. *Branford*, Superior Court, judicial district of New Haven, Docket No. 374004 (March 30, 1998) (21 Conn. L. Rptr. 561) (relying on *Letowt* to determine that operation of police vehicle on the way to crime scene is ministerial activity); *Hurdle* v. *Waterbury*, Superior Court, judicial district of Waterbury, Docket No. 0123428 (December 12, 1995) (relying on *Letowt* to determine that operation of police vehicle is ministerial activity); see also *Jones* v. *Lathram*, 150 S.W.3d 50, 53 (Ky. 2004) (act of safely driving police cruiser, even in emergency, was ministerial because it does not require any deliberation or exercise of judgment).

The cases that the defendants cite stand for the contrary proposition that driving is a discretionary activity because it requires some degree of judgment. See, e.g., *Kajic* v. *Marquez*, Superior Court, judicial district of Hartford, Docket No. CV-16-6065320-S (August 16, 2017) (determining that police officer's operation of patrol car was discretionary because duty to use reasonable care "is a quintessentially discretionary duty because it involves the exercise of judgment in evaluating the circumstances requiring action or inaction"); *Paternoster* v. *Paszkowski*, Superior Court, judicial district of Fairfield, Docket No. CV-14-6042098-S (September 1, 2015) (determining that police officer's pursuit in patrol car, in violation of motor vehicle statutes, was discretionary).

lance meant "you're following someone at a distance, trying to keep an eye on them, where they're going; what their actions are. It could be in a car; it can be walking. It could be anywhere. It could be through a camera." We reject the plaintiff's position because Kashmanian's understanding of desired conduct does not clearly establish a ministerial duty. See, e.g., *Strycharz* v. *Cady*, 323 Conn. 548, 566–67, 148 A.3d 1011 (2016) (testimony that did not identify specific directive but merely established manner in which individual official performed his official duties was insufficient to establish existence of ministerial duty); *Northrup* v. *Witkowski*, 175 Conn. App. 223, 236 n.5, 167 A.3d 443 (2017) (explaining that "vague" testimony that "does not come close to an admission that the town had a nondiscretionary duty" is insufficient to establish ministerial duty in absence of written directive), aff'd, 332 Conn. 158, 210 A.3d 29 (2019).

Further, even in instances in which an officer has been provided with a written directive, courts across the country have held that officer surveillance is a discretionary function. See, e.g., *Estate of Salazar* v. *United States*, United States District Court, Docket No. LA-CV-11-10279 JAK (SPx) (C.D. Cal. May 20, 2014) (examining United States Marshall Policy Directives, which "suggest, but do not require, particular conduct," to determine that surveillance is discretionary); *Davis* v. *United States*, United States District Court, Docket No. 7:10CV00005 (GEC) (W.D. Va. July 12, 2010) (examining United States Code and prison regulations to determine that surveillance of inmates is discretionary); *Flax* v. *United States*, 847 F. Supp. 1183, 1188–89 (D.N.J. 1994) (examining police guidelines to determine that surveillance is discretionary). These decisions are consistent with the general rule in Connecticut that "[p]olice officers are protected by discretionary act immunity when they perform the typical functions of a police officer." (Internal quotation marks omitted.)

Ventura v. *East Haven*, supra, 330 Conn. 630. Kashmanian's surveillance, performed in the course of his employment as a police officer, necessarily required him to exercise his judgment, under the circumstances; for example, as to how fast to travel, the distance to maintain between his car and the plaintiff, and whether to change lanes.

The plaintiff also argues that, because there is no statutory exception applicable, Kashmanian had a ministerial duty to comply with the motor vehicle statutes. In particular, the plaintiff argues, and the defendants do not dispute, that Kashmanian was not exempt from certain motor vehicle statutes pursuant to General Statutes § 14-283 (providing that police officers responding to "emergency call[s]" while "making use of an audible warning signal device" are exempt from certain motor vehicle statutes in some circumstances) because he was operating a soft car with no lights or sirens. According to the plaintiff, because the legislature has identified specific circumstances in § 14-283 in which police may disregard certain motor vehicle statutes, that necessarily means that absent those circumstances, police have a ministerial duty to obey all traffic laws. We disagree.

Section 14-283 addresses only two situations: responses to emergency calls and pursuit of fleeing law violators. It does not purport to set a standard of conduct for other police endeavors, including surveillance.[8] Furthermore, the plaintiff's argument would make effective police surveillance impossible in many

[8] We note that § 14-283 (d) provides: "The provisions of this section shall not relieve the operator of an emergency vehicle from the duty to drive with due regard for the safety of all persons and property." The question of whether this language creates a ministerial duty to which governmental immunity would not apply is currently before our Supreme Court in *Borelli* v. *Renaldi*, SC 20232. That case involves the defendant officer's pursuit of a fleeing vehicle under § 14-283. We asked counsel at oral argument in the present case if we should stay this case pending the outcome of *Borelli*. Both counsel agreed that, because this case did not involve activity governed by § 14-283, resolution of the present case would not be impacted by our Supreme Court's decision in *Borelli*.

instances. For example, if an officer is instructed to maintain surveillance of another vehicle and the operator of that vehicle decides to exceed the posted speed limit, the officer would be unable to maintain surveillance without driving contrary to the mandate of General Statutes § 14-219 (prohibiting speeding). Similarly, maintaining surveillance of a particular suspected criminal may require an officer engaged in such surveillance while driving his vehicle to drive though a stop sign or red traffic light, make a right turn on red without stopping, or even drive the wrong way down a one-way street. Deciding whether the need to maintain surveillance of the person or vehicle being surveilled outweighs the risk to public safety caused by the violation of a motor vehicle statute requires the sound judgment of the police officer, and, is, therefore, inherently discretionary.

Having said this, we decline to hold that, *under all circumstances*, a municipal police officer operating a motor vehicle is engaged in discretionary conduct, thereby immunizing the officer and municipality from damages arising from all violations of motor vehicle statutes. Although it may be true that some motor vehicle statutes implicitly require drivers to exercise some degree of judgment when operating a motor vehicle, some statutes do not. Furthermore, although some circumstances may permit an officer, in the exercise of discretion, to violate a motor vehicle statute, that is not always the case. Affording governmental immunity in *every* instance where an officer violates a motor vehicle statute is far too expansive a rule. For example, a police officer who fails to stop at a stop sign because he is distracted by a personal phone call and, as a result, causes an accident can hardly be said to be engaging in discretionary conduct. In such a circumstance, the officer likely has a ministerial duty to obey the law and stop at the stop sign. Ultimately, the determination of

whether a police officer who violates a motor vehicle statute is engaged in ministerial or discretionary conduct must be made in view of the language of the statute at issue and the circumstances presented. See *Ventura* v. *East Haven*, supra, 330 Conn. 636–37 n.11 (issue of governmental immunity, in some cases, is contingent on factual circumstances).[9]

In the present case, the circumstances surrounding Kashmanian's conduct demonstrate that he was engaged in discretionary activity. Kashmanian was not merely operating his motor vehicle on the roads under ordinary conditions; instead, he was engaged in the discretionary police activity of surveilling the plaintiff. In exercising such discretion in the present case, Kashmanian did not have a ministerial duty to follow each and every motor vehicle statute, even if those statutes in other circumstances would impose ministerial duties. Under these circumstances, Kashmanian's discretion as to the manner in which to conduct his surveillance extends to whether to violate the motor vehicle statutes. A review on appeal of Kashmanian's actions in the performance of his police duties would violate the proscription of second-guessing the decisions made pursuant to his professional duty. See *Ventura* v. *East Haven*, supra, 330 Conn. 630–31. Therefore, in the absence of a directive that clearly compelled Kashmanian's conduct and considering the circumstances of his conduct, we conclude that the defendants are entitled to governmental immunity and, thus, the court properly set aside the jury's verdict in favor of the plaintiff on his negligence claim.

[9] Further, the policy determination as to whether a municipal police officer should be liable for operating a motor vehicle under all circumstances is best left to our legislature. See *Thomas* v. *Dept. of Developmental Services*, 297 Conn. 391, 412, 999 A.2d 682 (2010) ("[w]e are not in the business of writing statutes; that is the province of the legislature" [internal quotation marks omitted]); see also General Statutes § 52-556 ("[a]ny person injured in person or property through the negligence of any *state official or employee* when operating a motor vehicle owned and insured by the state against personal injuries or property damage shall have a right of action against the state to recover damages for such injury" [emphasis added]).

The judgment setting aside the jury's verdict on the negligence count is affirmed; the judgment directing a verdict in favor of Kashmanian on the common-law recklessness count is reversed and the case is remanded for a new trial as to that count.

VIRGINIA CHA BARBER *v.* ATIIM KIAMBU BARBER
(AC 39755)

Lavine, Prescott and Elgo, Js.

Syllabus

The defendant filed a motion to modify an award of child support that had been issued in connection with a foreign judgment of dissolution. He sought a downward modification of his child support obligations, claiming that there had been a substantial change in his and the plaintiff's financial circumstances. In support of his motion, the defendant cited statutes from Connecticut (§ 46b-86) and New York (N.Y. Dom. Rel. Law § 236 [B] [9] [b] [2] [i]), both of which permit modification of a child support order upon demonstration by the moving party of a substantial change in the financial circumstances of either party. Following the dissolution, the plaintiff moved from New York to Connecticut with the parties' four children, and the defendant moved to New Jersey. In response to the motion to modify, the plaintiff filed a motion for an order requesting the trial court to find that the New York child support guidelines applied to the defendant's motion. Prior to the dissolution of their marriage, the parties had entered a detailed separation agreement, which was incorporated into the dissolution judgment, provided that it was to be construed pursuant to New York law and required that the defendant pay the plaintiff basic child support and add-on child support. The agreement also contained a default provision, which provided, inter alia, that if a party failed to perform his or her obligations under the agreement, the aggrieved party could bring an action to enforce his or her rights, and if that action was successful, the defaulting party was liable for the aggrieved party's reasonable attorney's fees and litigation costs. The trial court granted the plaintiff's motion for order, concluding that the substantive law of New York applied to the defendant's motion to modify. Thereafter, the plaintiff filed a motion for contempt regarding the children's add-on expenses, a motion for attorney's fees and costs, and a motion for contempt regarding the defendant's alleged failure to pay his basic child support obligation. Following a hearing, the trial court, applying New York law, denied the defendant's motion to modify and the plaintiff's motions for contempt and for attorney's fees and

costs. In denying the motion for contempt regarding child support, the court found that the precise amount of basic child support that the defendant owed the plaintiff was not entirely clear and unambiguous, and, therefore, it issued an order directing the parties to follow the procedure set forth in their agreement for resolving child support disputes, whereby they are to have their accountants discuss and try to reconcile any discrepancies before the parties resort to judicial intervention. Specifically, it ordered that the parties direct their accountants to utilize the New York child support guidelines formula, as well as the precise illustrations contained in relevant paragraphs of the agreement, including the use of adjusted gross income as shown on the parties' income tax returns, when making their child support calculations. On the plaintiff's appeal and the defendant's cross appeal to this court, *held*:

1. The plaintiff could not prevail on her claim that the trial court improperly rewrote the parties' agreement by issuing its order with respect to the manner in which the parties were to proceed to resolve their dispute regarding basic child support, including how to calculate the amount of basic child support the defendant owed her: the trial court, by issuing its order, did not rewrite the agreement but, instead, sought to facilitate its enforcement by providing the parties with a timeline for exchanging information as required by the agreement, and the order was necessary to narrow the issues in dispute at any future hearing, as the court ordered the parties, who appeared unable or unwilling to abide by the clear requirements of their agreement, to do what they should have done before the plaintiff filed her motion for contempt, and the court's inclusion of the term adjusted gross income in its order did not rewrite the agreement because that term was incorporated, by way of example as to how the defendant's basic child support obligation was to be calculated, in the agreement that became part of the New York judgment of dissolution; furthermore, the plaintiff did not demonstrate that she was harmed by the court's order, as the objective of the order was to have the parties and their accountants reach an agreement regarding the defendant's basic child support obligation, and, if they could agree, there would be no need for the parties to seek judicial intervention.
2. The record was inadequate to review the plaintiff's claim that the trial court erred by failing to award her attorney's fees and costs to defend against the defendant's attempt to invalidate the agreement with respect to the law applicable to his motion to modify his child support obligations, as that court did not provide a factual or legal analysis of its denial of the plaintiff's motion for attorney's fees and costs, and this court would not speculate as to the reasons for the trial court's determination or what conduct of the parties it considered.
3. The trial court did not err by failing to award the plaintiff attorney's fees pursuant to the default provision of the parties' agreement: contrary to the plaintiff's claim, her motion for contempt regarding the children's add-on expenses was not successful, as she failed to obtain all of the add-on expenses she was seeking, and the court found that there was a good faith dispute between the parties regarding the amount the

defendant owed the plaintiff, who failed to prove all of the allegations in her motion; moreover, the plaintiff's allegation that the defendant was in wilful and intentional violation of the agreement was a legal conclusion, neither party was in full compliance with the agreement, there was no evidence that the defendant was unwilling to pay what he owed and, in fact, he proposed a settlement and had a good faith reason not to pay some of the claimed expenses upon request, and the fact that the defendant offered to pay what he owed, not what was demanded of him during the litigation, should not result in his having to pay the plaintiff attorney's fees to have a court resolve disputes that the parties should have been able to resolve given that the add-on expenses and conditions were clearly spelled out in the agreement.

4. The defendant's claim on cross appeal that because he had registered the New York dissolution judgment in Connecticut pursuant to the applicable statute (§ 46b-71), the trial court improperly concluded that New York law, rather than Connecticut law, applied to the motion to modify was dismissed as moot; because the standard for modification of a child support order under both New York and Connecticut law is a substantial change in circumstances, the result would have been the same whether the court had applied New York or Connecticut law, and, therefore, there was no practical relief that could be afforded to the parties.

Argued January 17—officially released October 1, 2019

Procedural History

Motion by the defendant for modification of child support issued in connection with a foreign judgment of dissolution, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Tindill*, *J.*, granted the plaintiff's motion for order; thereafter, the court, *Colin*, *J.*, denied the defendant's motion to modify child support and the plaintiff's motions for contempt and for attorney's fees and costs, and issued certain orders, and the plaintiff appealed and the defendant cross appealed to this court. *Affirmed; cross appeal dismissed.*

Sarah E. Murray, with whom was *Christopher DeMattie*, for the appellant-cross appellee (plaintiff).

Yakov Pyetranker, for the appellee-cross appellant, (defendant).

Opinion

LAVINE, J. This postdissolution appeal arises out of motions filed by the plaintiff, Virginia Cha Barber, and the defendant, Atiim Kiambu Barber, regarding the child support provisions of their separation agreement (agreement), which was incorporated into their New York divorce decree. On appeal, the plaintiff claims that the trial court, *Colin*, *J.*, erred by (1) "rewriting" the agreement with respect to the manner in which the defendant's child support obligation is to be calculated and (2) failing to award her attorney's fees and costs to oppose the defendant's unsuccessful attempt to invalidate a provision of the agreement and to enforce the agreement's default provision regarding add-on child support. On cross appeal, the defendant claims that the trial court, *Tindill*, *J.*, erred by concluding that the substantive law of New York applied to his motion to modify child support. We affirm the judgments of the trial court with respect to the plaintiff's appeal and dismiss the defendant's cross appeal.

The following facts and procedural history are relevant to our resolution of the parties' appeals. On April 3, 2012, prior to the dissolution of their marriage, the parties entered into a highly detailed, sixty-page agreement,[1] which provides that it is to be construed pursuant to New York law.[2] On June 23, 2012, the Supreme Court of New York, county of New York, dissolved the parties' marriage and incorporated the agreement into the dissolution judgment.

At the time of dissolution, the parties and their four minor children all lived in New York City.[3] Pursuant to

[1] Within the agreement, the parties refer to the document as "Stipulation of Settlement."

[2] Article XXXVI of the agreement states: "The Stipulation shall be construed pursuant to the laws of the State of New York."

[3] The parties' children were born in 2002, 2004, and 2010 (twins), respectively.

the agreement, the parties have joint legal custody of their children, although the children primarily reside with the plaintiff. In 2013, the defendant moved to New Jersey. The agreement contemplated that the plaintiff may relocate outside of New York City; in August, 2014, she and the children moved to Connecticut.

The agreement requires the defendant to pay the plaintiff basic child support and add-on child support.[4] The parties agreed that the defendant should have an opportunity to rehabilitate his career,[5] and, therefore, he was not required to pay the plaintiff child support from the date of dissolution through February 28, 2015.[6] On February 5, 2015, pursuant to General Statutes § 46b-71, the defendant registered the New York judgment of dissolution in the Superior Court.

On February 23, 2015, the defendant filed a "Motion for Modification, Postjudgment" (motion to modify), in which he represented that there had been a substantial change in the parties' financial circumstances and asked the trial court to modify downward his child support obligations. The motion to modify cited General Statutes § 46b-86 (modification permitted upon demonstration of substantial change in circumstances) and New York Domestic Relations Law § 236 (B) (9) (b) (2) (i) (McKinney 2010) (same). In response to the defendant's motion to modify, the plaintiff filed a "Motion for Order Regarding the Applicable Child Support Guidelines, Postjudgment" (motion for order). On September 21, 2015, the parties appeared at short calendar before

[4] The child support add-ons include expenses related but not limited to health insurance, education, summer camp, child care, and extracurricular activities.

[5] The defendant is a retired professional athlete.

[6] Article IX, paragraph 1, of the agreement provides in relevant part: "Both parties acknowledge and represent that the [plaintiff] is receiving more than 50 [percent] of the parties' marital assets under this Agreement because, in part, it represents a pre-payment of the [defendant's] basic child support obligation through February 28, 2015."

Judge Tindill, who requested supplemental briefing. On January 12, 2016, the court granted the plaintiff's motion for order, concluding that the substantive law of New York applied to the defendant's motion to modify. The court denied the defendant's motions for articulation and for reargument. The defendant appealed from Judge Tindill's decision, but this court dismissed the appeal for lack of a final judgment.

On February 1, 2016, the plaintiff filed three motions: "Motion for Contempt re: Children's Add-on Expenses, Postjudgment"; "Motion for Order re: Attorney's Fees and Expenses, Postjudment"; and "Motion for Contempt re: Child Support, Postjudgment." The plaintiff's motions and the defendant's motion to modify were heard by Judge Colin on September 7 and 8, 2016. Although the defendant continued to disagree with Judge Tindill's decision that New York law applied to the motion to modify, during the hearing on the motion to modify he accepted Judge Colin's position that the court was bound by Judge Tindill's decision, which was the law of the case.[7] The plaintiff and the defendant agreed that the standard for modification of child support is the same under Connecticut and New York law, namely, that the moving party must prove a substantial change in circumstances. On September 19, 2016, Judge Colin denied the defendant's motion to modify and the plaintiff's motions for contempt and for attorney's fees and costs. On October 28, 2016, the plaintiff appealed from the judgments denying her motions for attorney's fees and for contempt regarding the children's add-on expenses. Although she did not appeal from the judgment denying her motion for contempt regarding

[7] The defendant noted that Judge Colin did not agree that New York law applied to the motion to modify. During the hearing on the motion to modify, Judge Colin stated, "[B]ut couldn't the other side argue Judge Tindill said it's New York law? I don't agree with her, but that's what she said." He also stated: "Even if I agreed with you now [that Connecticut law applies], we're stuck. That's that law of the case, right?"

child support, the plaintiff claims that in issuing a prospective order related to that motion, the court "rewrote" the agreement. On November 7, 2016, the defendant filed a cross appeal regarding the choice of law order issued by Judge Tindill. Additional facts will be provided as necessary.

In addressing the parties' appeals, we are guided by our general standard of review. "An appellate court's review of a trial court decision is circumscribed by the appropriate standard of review. . . . The scope of our appellate review depends upon the proper characterization of the rulings made by the trial court. To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous. When, however, the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *St. Germain* v. *St. Germain*, 135 Conn. App. 329, 333, 41 A.3d 1126 (2012).

I

THE PLAINTIFF'S APPEAL

On appeal, the plaintiff claims that Judge Colin erred by (1) rewriting the parties' agreement with respect to the manner in which the defendant's basic child support obligation is to be calculated and (2) failing to award her attorney's fees and costs to defend the defendant's alleged effort to invalidate a provision of the agreement and to enforce the default provision of the agreement. We disagree with the plaintiff's claims and, therefore, affirm the judgments of the trial court.

A

The plaintiff first claims that in adjudicating her motion for contempt regarding child support, the court issued an order with respect to the manner in which

the parties were to proceed to resolve their dispute regarding basic child support, namely, how they were to calculate the amount of basic child support the defendant owes the plaintiff. The plaintiff claims that the court rewrote the agreement by ordering the parties to direct their accountants to use the "adjusted gross income as shown on the parties' income tax returns to calculate the amount of child support each party claims to be owed . . . ." (Internal quotation marks omitted.) The order constitutes a rewriting of the agreement, the plaintiff argues, because the agreement requires the parties to use the New York child support guidelines formula, not the adjusted gross income shown on the parties' tax returns. We disagree that in issuing its order, the court rewrote the agreement.

The following facts pertain to the plaintiff's claim that the court improperly rewrote the agreement by issuing its order related to the calculation of basic child support. In the contempt motion, the plaintiff quoted Article IX, paragraph 2,[8] of the agreement concerning the defendant's obligation to pay basic child support. She also quoted Article IX, paragraph 4, of the agreement, which concerns how the parties are to calculate the amount of basic child support the defendant owes the plaintiff for the coming year.[9] The plaintiff claimed

[8] Article IX, paragraph 2, of the agreement states in relevant part: "Commencing on March 1, 2015 and continuing on the first day of each month thereafter, during the lifetime of the [defendant], during the lifetime of the [plaintiff], and until the emancipation of a Child . . . the [defendant] shall pay to the [plaintiff] basic child support in accordance with the formula set forth in the presently existing [New York Domestic Relations Law] § 240 . . . except that the [defendant's] basic child support obligation shall not be less than $3,513.33 per month . . . nor exceed $10,333.33 per month (based on an income, as defined in the [Child Support Standards Act, N.Y. Dom. Rel. Law § 240 (McKinney 2010)], of $400,000 per year) . . . . " (Internal quotation marks omitted.)

[9] Article IX, paragraph 4, of the agreement provides in relevant part: "The parties shall use their best efforts to calculate the amount of basic child support that the [defendant] will pay for the upcoming twelve month period, which commences on March 1st. If the parties cannot agree on the amount of basic child support that the [defendant] will pay for the upcoming twelve

that under the terms of, and formula in, the agreement, the defendant's child support obligation from March 1, 2015 to February 29, 2016, was $8148.24 per month, or $97,778.88 for the year. The plaintiff alleged that the defendant had paid only $42,159.96 for the year and, therefore, owed her $55,618.91. She alleged that the defendant had violated the agreement wilfully and intentionally, and, therefore, she was compelled to incur legal fees and costs to enforce the defendant's basic child support obligation. She also alleged that pursuant to Article XXXI of the agreement, she was entitled to attorney's fees and expenses if she prevailed on the motion. She asked the court to hold the defendant in contempt and to order him to pay her $55,618.92 immediately, and to pay her reasonable attorney's fees and costs associated with the motion for contempt.

Judge Colin denied the plaintiff's motion for contempt and issued an order to facilitate the resolution of the dispute between the parties. In its order, the court stated that the motion involves a claim by the plaintiff that the defendant is in contempt of his basic periodic percentage based child support obligation. The court found that the original basic child support order contains a somewhat complicated income based formula and contemplates that there may be future disagreement between the parties as to the exact amount of child support the defendant is to pay the plaintiff. The agreement specifically provides that "[i]f the parties cannot agree on the amount of basic child support that the [defendant] will pay for the upcoming twelve month period, the [defendant] will pay at least that support that he deems appropriate and the [plaintiff] will accept same without waiving any of her rights and may seek judicial intervention . . . ." The court further found

month period, the [defendant] will pay at least that support that he deems appropriate and the [plaintiff] will accept same without waiving any of her rights and may seek judicial intervention . . . ."

that the agreement "expressly contemplates that in the event of a dispute, the parties' respective accountants shall discuss [the issues] and, if they are still unable to agree, either party may seek [judicial intervention]." (Internal quotation marks omitted.)

The court found that "the precise amount of the payment order is not entirely clear and unambiguous . . . ." Of particular significance to the present issue is the court's finding that there was *no evidence* that before they sought judicial intervention, the parties had fulfilled the agreement's condition precedent that their accountants discuss the issues in dispute. The court, therefore, issued the order of which the plaintiff complains.

The court ordered that, within thirty days, the plaintiff was to deliver to the defendant a computation prepared by her accountant of the amount that she claims is owed to her by way of periodic, basic child support. Within sixty days, the defendant is to deliver to the plaintiff a computation prepared by his accountant of the amount that he believes he owes the plaintiff. The court directed the parties "to instruct their accountants, as per the previous ruling of Judge Tindill, to utilize the New York child support guidelines formula in general, and the precise illustrations contained in paragraph 7 on pages 16 and 17 of their [agreement] in particular (including the use of adjusted gross income as shown on the parties' income tax returns as per paragraphs 7 (a) and (b) on pages 16 and 17 of the [agreement]), in order to prepare the necessary calculations."

The court noted that the plaintiff's computation of her income for use in the child support calculation was not consistent with the adjusted gross income shown on her income tax returns and that the plaintiff did not adequately explain the discrepancy. The court stated

that perhaps the discrepancy "can be addressed by the accountants during their discussions . . . [and] [t]he amount of the claimed arrearage shall also be discussed between the accountants as contemplated by the language of the order quoted above." The defendant was to pay any agreed on arrearage no later than March 1, 2017. If a dispute exists after the parties conclude the steps the court referenced in its order, either party may file a motion for order that will be heard by the court. In light of the language of the current New York child support order and the evidence presented at the hearing on September 7 and 8, 2016, the court concluded that its order was necessary to insure full compliance with the New York court orders and to narrow the issues in the dispute at any future hearing.

The plaintiff's claim requires us to determine whether, in adjudicating the plaintiff's motion for contempt, the court rewrote the agreement when it determined the path the parties were to follow to resolve their dispute as to the amount of child support the defendant owed the plaintiff. Pursuant to our de novo review, we conclude that the court did not rewrite the agreement.

"The law of judgments . . . is well settled. The construction of a judgment is a question of law with the determinative factor being the intent of the court as gathered from all parts of the judgment. . . . As a general rule, the court should construe [a] judgment as it would construe any document or written contract in evidence before it. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . If faced with . . . an ambiguity, we construe the court's decision to support, rather than to undermine, its judgment. . . . The judgment should admit of a consistent construction as a whole. . . . To determine the meaning of a judgment, we must ascertain the intent of the court from the language used and, if necessary, the surrounding circumstances. . . . We

review such questions of law de novo. . . . Additionally, our appellate courts do not presume error on the part of the trial court. . . . Rather, we presume that the trial court, in rendering its judgment . . . undertook the proper analysis of the law and the facts." (Citations omitted; internal quotation marks omitted.) *Rogan* v. *Rungee*, 165 Conn. App. 209, 223, 140 A.3d 979 (2016).

Our review of Judge Colin's September 19, 2016 decision discloses that the court was well aware of the parties' dissolution judgment, including the child support provisions in the agreement. It also was aware that Judge Tindill had ordered that New York law was to be applied to the calculation of the defendant's basic child support obligation. The court found that the parties agreed to a complicated income based formula and that they contemplated that there may be future disagreement about the amount of basic child support. The court further found that the agreement addresses how the parties were to reconcile any disagreement regarding the amount of basic child support the defendant owed the plaintiff for the coming twelve months. In fact, the court quoted paragraph 3 of the relevant article of the agreement, i.e., the parties' "respective accountants shall discuss same and if they are still unable to agree either party may seek [judicial intervention]." (Internal quotation marks omitted.) The court found that the precise amount of the payment order was not entirely clear and unambiguous. Most significantly, the court found no evidence that before they sought judicial intervention, the parties fulfilled the condition precedent to have their respective accountants discuss discrepancies and come to an agreed on sum, if possible.[10] The court's finding that the parties failed to abide by their agreement to resolve child support

[10] The court quoted Article XXVI of the agreement, to wit: "The [defendant] and the [plaintiff] at any and all times . . . promptly shall make, execute and deliver any and all such other further instruments as may be necessary or desirable for the purpose of giving full force and effect to the provisions of this [agreement], without charge therefore."

disputes themselves before resorting to judicial intervention is the genesis of the court's order.

Rather than rewriting the agreement, the court's order seeks to facilitate its enforcement by providing the parties with a timeline for exchanging information as required by the agreement. The parties are to instruct their accountants, "as per the previous ruling of Judge Tindill, to utilize the New York child support guidelines formula in general, and the precise illustrations contained in paragraph 7 on pages 16 and 17 of their [agreement] in particular (including the use of adjusted gross income . . .), in order to prepare the necessary calculations." The parties' accountants are to discuss the claimed arrearage as contemplated by the court's order. The court stated that to insure full compliance with the current court order, its order was necessary given the evidence presented to the court on September 6 and 7, 2016, and the current New York child support order. Moreover, the order was necessary to narrow the issues in dispute at any future hearing. In other words, the court ordered the parties, who appeared unable or unwilling to abide by the clear requirements of their agreement, to do what they should have done before the plaintiff filed her motion for contempt. We also conclude that the court's including the term "adjusted gross income" in its order did not rewrite the agreement because the term is incorporated, by way of example as to how the defendant's basic child support obligation

In his brief on appeal, the defendant notes internal inconsistencies in the agreement, particularly with respect to the calculation of basic child support. At trial, the plaintiff conceded the inconsistencies regarding the calculation of basic child support, including adjusted gross income.

The plaintiff testified, in part, on cross-examination:

"[The Defendant's Counsel]: The agreement says two different things, doesn't it?

"[The Plaintiff]: I believe so.

"[The Defendant's Counsel]: And you signed it?

"[The Plaintiff]: Yes."

was to be calculated, in the agreement that became part of the New York judgment of dissolution.[11]

Moreover, the plaintiff has not demonstrated that she was harmed by the court's order. As the court stated, the parties were to provide their respective accountants with the relevant financial information, and they were to meet and resolve any differences using the New York child support guidelines. The objective of the court's order is to have the accountants and the parties reach an agreement regarding the defendant's basic child support obligation. If they can agree, there is no need for the parties to seek judicial intervention.

For the foregoing reasons, we conclude that the court did not rewrite the agreement. The plaintiff's claim, therefore, fails.

B

The plaintiff also claims that the court erred by failing to award her attorney's fees and costs (1) to oppose the defendant's unsuccessful effort to invalidate a provision of the agreement and (2) to enforce the agreement's default provision regarding add-on child support. The essence of the plaintiff's claims is that when the court adjudicated her motions for contempt and for attorney's fees and costs, it applied the wrong legal standard and failed to enforce the parties' agreement because the defendant breached the agreement. We disagree that the court erred in declining to award the plaintiff attorney's fees and costs.

Generally, we apply the abuse of discretion standard when reviewing a trial court's decision to deny an award of attorney's fees. "Under the abuse of discretion standard of review, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling,

[11] Article IX, paragraph 7, of the agreement sets forth the formula used to calculate the presumptive incomes of the parties. It uses their adjusted gross income figures as set forth in their 2010 income tax returns.

and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Citation omitted; internal quotation marks omitted.) *Munro* v. *Munoz*, 146 Conn. App. 853, 858, 81 A.3d 252 (2013).

"The general rule of law known as the American rule is that attorney's fees and ordinary expense and burdens of litigation are not allowed to the successful party absent a contractual or statutory exception. . . . This rule is generally followed throughout the country. . . . Connecticut adheres to the American rule. . . . There are few exceptions. For example, a specific contractual term may provide for the recovery of attorney's fees and costs . . . or a statute may confer such rights." (Internal quotation marks omitted.) *Giordano* v. *Giordano*, 153 Conn. App. 343, 352–53, 101 A.3d 327 (2014).

"Because a stipulation is considered a contract, [o]ur interpretation of a separation agreement that is incorporated into a dissolution decree is guided by the general principles governing the construction of contracts. . . . Thus, if there is definitive contract language, the determination of what the parties intended by their . . . commitments is a question of law [over which our review is plenary]." (Citation omitted; internal quotation marks omitted.) *Ahmadi* v. *Ahmadi*, 294 Conn. 384, 390, 985 A.2d 319 (2009).

1

The plaintiff first claims that the court erred by failing to enforce the agreement when it denied her attorney's fees and costs to defend against the defendant's attempt to invalidate the agreement with respect to the law applicable to the defendant's motion to modify child support. The plaintiff's claim fails because the record is inadequate for our review.

The following facts are relevant to the plaintiff's claim. On February 23, 2015, the defendant filed a motion to modify in which he recited the relevant portions of the parties' agreement regarding basic child support, namely, Article IX, paragraph 2. He claimed that his income had decreased and his expenses had increased and that the plaintiff's income had increased and her expenses had decreased. The motion contained no reference to the substantive law to be applied to the motion to modify nor did it request a change in the agreement regarding the controlling law.

On February 1, 2016, the plaintiff filed a "Motion for Order re: Attorney's Fees and Expenses, Postjudgment." She predicated the motion on Article XXXI, paragraph 4, of the agreement and highlighted the following language of the paragraph: "If either party by any action . . . seeks to . . . declare any of [the agreement's] terms and conditions as invalid . . . said party . . . shall reimburse the other party and be liable for any and all such party's reasonable attorney['s] fees and expenses . . . ."[12] In the motion for attorney's fees and costs, the plaintiff states that on February 23, 2015, the defendant filed the motion to modify that "attempts to declare some of the [dissolution] judgment's terms and conditions invalid and apply Connecticut law since his child support obligation would be significantly lower if the Connecticut child support guidelines were

[12] Article XXXI of the agreement is titled "Default Obligations." Paragraph 4 therein provides: "If either party by any action, proceeding, defense, counterclaim or otherwise, seeks to vacate or set aside this [agreement], or declare any of its terms and conditions as invalid, void or against public policy, by any reason including, but not limited to, fraud, duress, incompetency, overreaching or unconsciounaiblity, said party shall not be entitled to attorney['s] fees if the relief sought is denied and shall reimburse the other party and be liable for any and all such party's reasonable attorney['s] fees and expenses, provided and to the extent that such action, proceeding, counterclaim or defense results in a decision, judgment, decree or order dismissing or rejecting said claims."

applied."[13] She alleged that the defendant had refused to abide by the terms of the New York judgment, and, therefore, she was forced to file a motion for order to enforce the judgment, specifically, that the trial court should apply the New York child support guidelines. The plaintiff further represented that the defendant had opposed the motion for order and that Judge Tindill heard lengthy arguments from counsel and ordered supplemental briefing on the issue. On January 12, 2016, Judge Tindill ruled on the motion for order, concluding that New York law applies to the basic child support order. The plaintiff alleged that the defendant's actions, proceedings, and/or defenses resulted in a decision rejecting his claims, and, therefore, pursuant to Article XXXI, paragraph 4, of the agreement, the defendant "shall reimburse the plaintiff and be liable for any and all of her reasonable attorney's fees and expenses." The plaintiff alleged that she had incurred approximately $36,000 in attorney's fees and expenses with respect to the motion to modify.

Judge Colin denied the motion for attorney's fees and expenses stating that the "plaintiff has failed to prove that the defendant's filing and prosecution of an unsuccessful motion for modification of child support is tantamount to an action that seeks to vacate or set aside the parties' dissolution agreement, or constitutes an effort to declare any of its terms invalid, such that she is entitled to legal fees pursuant to Article XXXI, paragraph 4, of the [agreement]. As a result, the motion is denied."

On October 7, 2016, the plaintiff filed a motion for reconsideration of her motions for contempt and for

[13] We note that the defendant's motion to modify did not state that the defendant sought to have some of the dissolution judgment's terms and conditions declared invalid and makes no claim that his child support obligation would be less under Connecticut law.

attorney's fees with respect to (1) enforcing the add-on child support provision of the agreement and (2) the motion to modify and her motion for order. She claimed that she was successful in enforcing the add-on child support provision of the agreement because the court ordered the defendant to pay her $36,954.73 of the disputed amount. With respect to the default provision of the agreement, the plaintiff argued that, in the motion to modify, the defendant "sought to declare the [New York] judgment's terms and conditions invalid by arguing that the Connecticut child support guidelines, not the New York child support guidelines, should apply to any modification of his child support obligation."[14] In order to defend the choice of law provision in the agreement, the plaintiff represented that she filed a motion for order pursuant to the default provision of the agreement. She sought to enforce the terms of the New York judgment, specifically, that the court should apply the New York child support guidelines. She also recounted the procedural history of the motion to modify before Judge Tindill. The court denied the plaintiff's motion for reconsideration without explanation. The plaintiff took no further action prior to filing the present appeal.

On appeal, the plaintiff claims that the court erred in failing to award her attorney's fees and costs because the defendant was unsuccessful in his effort to invalidate the parties' agreement by arguing that Connecticut's child support guidelines should apply to his motion to modify. In response, the defendant argues, in part, that the court properly denied the plaintiff's motion for attorney's fees and costs by concluding that the motion to modify was not tantamount to an action to vacate

[14] Our review of the motion to modify discloses that the defendant requested a downward modification of his basic child support obligation. He did not ask the court to apply Connecticut law. The choice of law issue was raised by the plaintiff in her motion for order.

or set aside the agreement. He notes that the word "modify" does not mean to vacate, set aside, invalidate, or void, and that the word modify is not included in paragraph 4 of Article XXXI of the agreement. We agree with the defendant.

"An agreement between divorced parties . . . that is incorporated into a dissolution decree should be regarded as a contract. . . . In interpreting contract items, we have repeatedly stated that the intent of the parties is to be ascertained by a fair and reasonable construction of the written words and that the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity and words do not become ambiguous simply because lawyers or laymen contend for different meanings. . . . [Where] . . . there is clear and definitive contract language, the scope and meaning of that language is not a question of fact but a question of law. . . . In such a situation our scope of review is plenary, and is not limited by the clearly erroneous standard." (Citations omitted; internal quotation marks omitted.) *Breiter* v. *Breiter*, 80 Conn. App. 332, 336–37, 835 A.2d 111 (2003).

The United States Supreme Court has stated that "[v]irtually every dictionary we are aware of says that to modify means to change moderately or in minor fashion." (Internal quotation marks omitted.) *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U.S. 218, 225, 114 S. Ct. 2223, 129 L. Ed. 2d 182 (1994). "A modification is defined as [a] change; an alteration or amendment which introduces new elements into the details, or cancels some of them, but leaves the general purpose and effect of the subject

matter intact." (Internal quotation marks omitted.) *Jaser* v. *Jaser*, 37 Conn. App. 194, 202, 655 A.2d 790 (1995). Conversely, to vacate means to "annul; to set aside; to cancel or rescind. To render an act void; as, to vacate an entry of record, or a judgment." Black's Law Dictionary (5th Ed. 1979).

Our review of the motion to modify discloses that the defendant represented that there had been a substantial change in the parties' circumstances; he asked that his child support obligation be modified downward. He wanted to pay less, not to have his entire child support obligation eliminated or voided. We, therefore, agree with the trial court that filing and prosecuting an unsuccessful motion to modify is not tantamount to, or the same as, an action that seeks to vacate or set aside the parties' agreement. Moreover, the New York dissolution judgment specifically provides that the parties may file a motion for modification if there is a substantial change of circumstances.[15]

The plaintiff's issue on appeal is that Judge Colin erred by failing to award her attorney's fees for successfully "defend[ing] against the defendant's attempts to invalidate the parties' [agreement] with respect to what law applied to his child support modification . . . ." In denying the plaintiff's motion for attorney's fees and costs, the court stated that "[t]he plaintiff failed to prove that the defendant's filing and prosecution of an unsuccessful motion for modification of child support is tantamount to an action that seeks to vacate or set aside the

[15] The first paragraph of the New York judgment of divorce states: "EACH PARTY HAS A RIGHT TO SEEK A MODIFICATION OF THE CHILD SUPPORT ORDER UPON A SHOWING OF: (I) A SUBSTANTIAL CHANGE IN CIRCUMSTANCES; 0R (II) THAT THREE YEARS HAVE PASSED SINCE THE ORDER WAS ENTERED, LAST MODIFIED OR ADJUSTED; OR (III) THERE HAS BEEN A CHANGE IN EITHER PARTY'S GROSS INCOME BY FIFTEEN PERCENT OR MORE SINCE THE ORDER WAS ENTERED, LAST MODIFIED, OR ADJUSTED; HOWEVER, IF THE PARTIES HAVE SPECIFICALLY OPTED OUT OF SUBPARAGRAPH (II) OR (III) OF THIS PARAGRAPH IN A VALIDLY EXECUTED AGREEMENT OR STIPULATION, AS HERE, THEN THAT BASIS TO SEEK MODIFICATION DOES NOT APPLY."

parties' dissolution agreement or constitutes an effort to declare any of its terms invalid . . . . ." The court did not provide a factual or legal analysis of its denial of the plaintiff's motion for attorney's fees and costs. We will not speculate as to the reasons for the court's determination or what conduct of the parties it considered. See *Hane* v. *Hane*, 158 Conn. App. 167, 174 n.9, 118 A.3d 685 (2015). We, however, note that the court found that the defendant's motion to modify was unsuccessful, not that the plaintiff successfully defended the choice of law provision of the agreement. The record, therefore, is inadequate for our review.

2

The plaintiff also claims that the court erred by failing to award her attorney's fees pursuant to the default provision of the agreement. We disagree.

On February 1, 2016, the plaintiff filed a "Motion for Contempt re: Children's Add-On Expenses, Postjudgment" (motion for contempt). In the motion for contempt, the plaintiff represented that the judgment of dissolution required the defendant to pay 75 percent of the children's health care expenses,[16] $2500 per calendar year for each child's agreed on summer activities, $2500 for each of the twins to attend nursery school, 50 percent of the children's tutoring expenses, and 50 percent of the children's extracurricular activities, not to exceed $10,000 for the children per school year. The motion for contempt also set forth the provisions of paragraphs 1, 2, and 3 of Article XXXI of the agreement,[17]

[16] Health care included medical, dental, optical, orthodontic, co-pays, pharmaceutical, psychiatric, psychotherapy, occupational therapy, physical therapy, speech therapy, and audiology expenses not covered by insurance.

[17] Article XXXI, titled "Default Obligations," provides in relevant part: "1. All payments are due in accordance with the terms of this [a]greement. The parties covenant and agree that if in the event it is alleged by either party that the other has failed to perform, or there has been a lack of performance, or there has been a breach by the other . . . then the party presumptively aggrieved shall notify the other party . . . of the default . . . and the other party shall have ten . . . days, after receipt of such written notice, to cure

which, in summary, provide that if a party fails to perform, the aggrieved party shall notify the defaulting party who has ten days in which to cure the default. If the defaulting party does not cure, the aggrieved party may bring an action to enforce his or her rights. If the aggrieved party's action is successful, the defaulting party shall become liable to the aggrieved party for reasonable attorney's fees and expenses. If an action is commenced and the defaulting party complies with the agreement before judgment is rendered, the action shall be deemed to have resulted in a judgment in favor of the aggrieved party.

The plaintiff further represented that she sent the defendant numerous letters with supporting documents on various dates between August 22, 2012 and December 3, 2015, notifying him of past due add-on child support expenses. She claimed that as of December 31, 2015, the defendant's share of the children's total add-on expenses was $73,418.55 and that he had paid only $35,455.62. The plaintiff alleged that the defendant *wilfully and intentionally* violated the agreement and that she was compelled to incur legal fees and costs of $37,455.62 to enforce the defendant's child support obligations. She asked that the defendant be held in contempt and ordered to pay her attorney's fees and costs immediately.

such default . . . . In the event the party fails to cure . . . the aggrieved party . . . may commence such proceedings to enforce his or her rights with respect to any of the terms of this [a]greement . . . .

"2. The parties covenant . . . that if such legal proceedings are commenced, the defaulting party shall become liable to the aggrieved party for reasonable attorney's fees and reasonable expenses of litigation in bringing on such proceedings if the aggrieved party is successful in any court proceeding and an order or judgment is rendered in his or her favor by reason of the actions of the defaulting party.

"3. It is understood and agreed that in the event a party shall institute any such legal proceedings, and after the commencement thereof and before Judgment is or can be entered, the defaulting party shall comply with such term or condition of this [a]greement, then the proceeding instituted shall be deemed to have resulted in a Judgment, Decree or Order in favor of the

The court heard argument on the plaintiff's motion for contempt on September 7 and 8, 2016, and issued its order on September 19, 2016. Although the plaintiff had claimed that the defendant was in contempt of his obligations under the New York dissolution judgment for failing to pay certain child related expenses, the court found that the plaintiff had "failed to prove by clear and convincing evidence that the defendant had wilfully and intentionally violated a clear and unambiguous court order."[18] The court also found that there was a good faith dispute as to a number of the expense items. The plaintiff, by her own admission, mistakenly asked for reimbursement for expenses to which she was not entitled, such as babysitter expenses when she was not gainfully employed. In addition, the court found that the defendant "may have made some payments directly to certain vendors that may or may not be included as part of the plaintiff's claim." For those reasons, the court stated that "no contempt finding shall enter and no costs or counsel fees shall be awarded."

With respect to the amount of money the defendant owed the plaintiff for outstanding add-on expenses, the court found that the defendant was more credible than the plaintiff. Therefore, in accordance with the proposed order submitted by the defendant, the court ordered him to pay the plaintiff $36,954.73.[19] The court

aggrieved party. The provisions of this paragraph shall be in addition, and without prejudice, to any other rights or remedies to which the aggrieved party may be entitled."

[18] The plaintiff has conceded that at trial she was seeking a finding of contempt against the defendant for what she deemed to be his wilful violations of the agreement. On appeal, however, she argues that the court's failure to find the defendant in contempt did not absolve him of his contractual obligation to pay her attorney's fees and costs. We decline to reach the plaintiff's breach of contract claim, which was not raised before the trial court. "To review a claim advanced for the first time on appeal and not raised before the trial court amounts to a trial by ambuscade of the trial judge." *Musolino* v. *Musolino*, 121 Conn. App. 469, 477, 997 A.2d 599 (2010).

[19] The sum of $36,954.73 represents the plaintiff's arrearage claim of $58,186.03 less a credit of $21,231.30 due the defendant.

rejected the defendant's claim that he was entitled to a 50 percent discount for some of the expenses because he had not consented to them, as there was no factual or legal basis for such a claim. The court denied the plaintiff's motion for reconsideration.

On appeal, the plaintiff acknowledges that, in the motion for contempt, she asked the court to find the defendant in contempt for wilfully and intentionally violating the agreement, and she does not claim that the court erred when it failed to find the defendant in contempt. Her argument is that the court erred in that it likely assumed that it had to find the defendant in contempt pursuant to General Statutes § 46b-87 in order to award her attorney's fees and costs. She argues that she was entitled to attorney's fees and costs pursuant to the agreement, which did not require a finding of contempt. She argues that the evidence demonstrated that the defendant was in breach of the add-on child support provision of the agreement. She underscores this point by noting that the court ordered the defendant to pay her $36,954.73, a sum the defendant proposed because he knew he was indebted to her. The plaintiff argues that because she prevailed, she was successful and, therefore, entitled to attorney's fees and costs.[20]

The defendant argues that the plaintiff is not entitled to attorney's fees and costs because she was "not successful, only partly successful," and did not receive the full amount of add-on child support that she was seeking. He also argues that, pursuant to the allegations of the motion for contempt, the plaintiff set out to prove

[20] Article XXXI, paragraph 2, of the agreement provides in relevant part that if a party commences legal proceedings to enforce the terms of the agreement, "the defaulting party shall become liable to the aggrieved party for reasonable attorney's fees and reasonable expenses of litigation in bringing on such proceedings if the aggrieved party is successful in any court proceeding and an order or judgment is rendered in his or her favor by reason of the actions of the defaulting party."

that he was in wilful and intentional violation of the agreement. He notes that the plaintiff conceded such at the hearing before Judge Colin.

"To impose contempt penalties, whether criminal or civil, the trial court must make a contempt finding, and this requires the court to find that the offending party wilfully violated the court's order; failure to comply with an order, alone, will not support a finding of contempt. . . . Rather, to constitute contempt, a party's conduct must be wilful . . . . A good faith dispute or legitimate misunderstanding about the mandates of an order may well preclude a finding of wilfulness. . . . Whether a party's violation was wilful depends on the circumstances of the particular case and, ultimately, is a factual question committed to the sound discretion of the trial court. . . . Without a finding of wilfulness, a trial court cannot find contempt and, it follows, cannot impose contempt penalties." (Citations omitted; internal quotation marks omitted.) *O'Brien* v. *O'Brien*, 326 Conn. 81, 98–99, 161 A.3d 1236 (2017).

"[T]he fact that an order has not been complied with fully does not dictate that a finding of contempt must enter. . . . A finding of contempt is a question of fact, and our standard of review is to determine whether the court abused its discretion in [finding] that the actions or in actions of the [alleged contemnor] were in contempt of a court order. . . . To constitute contempt, a party's conduct must be wilful. . . . Noncompliance alone will not support a judgment of contempt. . . . [T]he credibility of witnesses, the findings of fact and the drawing of inferences are all within the province of the trier of fact. . . . We review the findings to determine whether they could legally and reasonably be found, thereby establishing that the trial court could reasonably have concluded as it did." (Citation omitted; internal quotation marks omitted.) *Aliano* v. *Aliano*, 148 Conn. App. 267, 277, 85 A.3d 33 (2014).

Although the plaintiff claims on appeal that she is entitled to attorney's fees and costs pursuant to the agreement, that is not what she alleged in her motion for contempt. She alleged that the defendant was in wilful and intentional violation of the agreement. Her prayer for relief asked that the defendant be held in contempt and ordered to pay her $37,455.62.

The court found that there was a good faith dispute as to a number of expense items because the defendant may have paid vendors directly that may or may not be included in the plaintiff's claim and the plaintiff conceded that she had requested reimbursement for babysitting expenses to which she was not entitled because she was not gainfully employed. Moreover, the court found the defendant to be more credible than the plaintiff with respect to the amount outstanding for the add-on child care expenses.

On the basis of the court's factual findings, we agree with the defendant's contention that the plaintiff's motion for contempt was not successful because she failed to obtain all of the add-on expenses she was seeking. The court found a good faith dispute between the parties regarding the amount the defendant owed the plaintiff. The allegations in the motion for contempt were just that, allegations, and the plaintiff failed to prove them all. Also, her allegation that the defendant was in breach of the agreement was a legal conclusion. The plaintiff herself breached the agreement by requesting funds to which she was not entitled, i.e., babysitter expenses. Furthermore, the defendant claimed that he had paid vendors directly for some expenses. Under the circumstances, it appears that neither party was in full compliance with the agreement. In addition, there was no evidence that the defendant was unwilling to pay what he owed; in fact, he proposed a settlement. See footnote 17 of this opinion. The court's findings disclose that the defendant had a good faith

reason not to pay some of the claimed expenses upon request. The fact that he offered to pay what he owed, not what was demanded of him during the litigation, should not result in his having to pay the plaintiff attorney's fees to have a court resolve disputes that the parties should have been able to resolve given that the add-on child care expenses and conditions are clearly spelled out in the agreement. There were no complicated questions of law to be decided by the court. For these reasons, we conclude that the court did not err in failing to award the plaintiff attorney's fees and costs.

II

THE DEFENDANT'S CROSS APPEAL

On cross appeal, the defendant claims that because he had registered the New York dissolution judgment in Connecticut pursuant to § 46b-71,[21] Judge Tindill improperly concluded that New York law, rather than Connecticut law, applied to the motion to modify. We conclude that the standard for modification of a child support order is a substantial change in circumstances under both New York and Connecticut law. A substantial change in circumstances is the standard Judge Colin applied in denying the motion to modify. Thus, irrespective of which state's law applies, there is no practical relief that we can grant the defendant. The cross appeal, therefore, is moot and must be dismissed.

We briefly review the procedural history underlying the cross appeal. On February 23, 2015, the defendant filed a motion to modify, in which he represented that since the time of dissolution, he had moved to New Jersey and that the plaintiff and the parties' children had relocated to Connecticut. The defendant set forth the basic child support, as well as the add-on child

[21] General Statutes § 46b-71 (a) provides in relevant part: "Any party to an action in which a foreign matrimonial judgment has been rendered, shall file, with a certified copy of the foreign matrimonial judgment, in the court in this state in which enforcement of such judgment is sought, a certification that such judgment is final . . . ."

support he had been ordered to pay the plaintiff. The defendant claimed that there had been a substantial change in circumstances due to a reduction in his income and an increase in his expenses coupled with the plaintiff's increase in income and reduction in expenses. In support of his motion, he cited § 46b-86 (substantial change in circumstances) and New York Domestic Relations Law § 236 (B) (9) (b) (2) (i) (McKinney 2010) (same). He asked the court to modify downward or otherwise reduce his child support and add-on support obligations.

On July 23, 2015, in response to the motion to modify, the plaintiff filed a motion for order asking the court to find that child support guidelines are substantive in nature and, therefore, that the New York child support guidelines apply to the defendant's motion to modify. In support of her motion for order, the plaintiff cited § 46b-71 (b).[22] The defendant filed a memorandum of law in opposition to the plaintiff's motion for order in which he argued that Connecticut law applied pursuant to § 46b-71 and the Uniform Interstate Family Support Act (uniform act), General Statutes § 46b-212 et seq. The parties appeared before Judge Tindill at short calendar on September 21, 2015. The court, thereafter, ordered the parties to submit supplemental briefs.[23] The

[22] General Statutes § 46b-71 (b) provides in relevant part: "Such foreign matrimonial judgment shall become a judgment of the court of this state where it is filed and shall be enforced and otherwise treated in the same manner as a judgment of a court in this state; provided such foreign matrimonial judgment does not contravene the public policy of the state of Connecticut. A foreign matrimonial judgment so filed shall have the same effect and may be enforced or satisfied in the same manner as any like judgment of a court of this state and is subject to the same procedures for modifying, altering, [or] amending . . . as a judgment of a court of this state; provided, in modifying, altering, [or] amending . . . any such foreign matrimonial judgment in this state the substantive law of the foreign jurisdiction shall be controlling."

[23] The court ordered the parties to brief the following question: "Assuming, for the sake of argument, that these modification proceedings were pending in New York, would a New York court decline to exercise jurisdiction under

parties submitted their briefs on October 5, 2015; the defendant argued that Connecticut substantive law applied, and the plaintiff argued that New York substantive law applied.

The court issued its ruling on the motion for order on January 12, 2016, concluding that the Supreme Court of New York was no longer a court of competent jurisdiction and that there is no conflict among § 46b-71, the uniform act, and the Full Faith and Credit for Child Support Orders Act, 28 U.S.C. § 1738B. The court found that the parties had contemplated that the plaintiff and the children would move from New York City. The court concluded that child support guidelines are substantive in nature and that it must apply the substantive law of New York, which requires that Connecticut law apply with respect to the modification of the June 23, 2012 child support order. The court further concluded that "Connecticut law requires that the New York Child Support Standards Act . . . as amended [by] the Domestic Relations Law and Family Court Act of the State of New York, and the parties' agreement appl[ied] to any modification of the June 23, 2012 child support order." On January 27, 2016, the defendant filed a motion for articulation and a motion to reargue. The court denied both of the defendant's motions. The defendant appealed to this court, but the appeal was dismissed for lack of a final judgment.

A hearing on the motion to modify was held before Judge Colin. During the hearing, the parties agreed that the substantial change of circumstances standard applied to the motion to modify.[24] On September 19, 2016, the court denied the motion to modify. Although

the [uniform act], and defer to a Connecticut court the determination of the modification issue pursuant to Connecticut's child support guidelines."

[24] Counsel for the defendant stated in response to the court's inquiry as to the standard for modification in New York: "It is virtually identical in terms of how modification works to Connecticut."

the defendant had alleged that his income had decreased and his expenses had increased and that the plaintiff's income had increased and her expenses had decreased, the court found, on the basis of the evidence presented, that the defendant had failed to prove by a preponderance of the evidence that his income had decreased, that his expenses had increased or that the plaintiff's income had increased. In fact, the court found that the defendant's income was greater at the time of the hearing than it was at the time of dissolution.[25] The court found, however, that the defendant had proved that the plaintiff's expenses were reduced substantially due to her remarriage. Nonetheless, the court concluded that those changes did not warrant a modification of the defendant's child support obligations. The parties had moved from New York, each to a different state, and the defendant spends far less parenting time with the children than the amount of time to which he is entitled under the existing court orders. Moreover, concluded the court, the defendant's basic child support obligation is percentage based and effectively modifies itself pursuant to changes in the parties' incomes. Finally, the court stated that the percentage, including "caps," the defendant is obligated to pay the plaintiff for other child related expenses is still appropriate notwithstanding the fact that the plaintiff's remarriage has resulted in a decrease in her overall expenses.

After the plaintiff appealed from the judgments rendered by Judge Colin on her motions for contempt and for attorney's fees and costs, the defendant filed the present cross appeal in which he claims that Judge Tindill improperly concluded that the substantive law of New York applied to his motion to modify, rather than the Connecticut child support guidelines. In response to the cross appeal, the plaintiff argues that the cross

[25] The defendant conceded that his income had increased since the time of dissolution.

appeal should be dismissed on three grounds: (1) the cross appeal is jurisdictionally defective because it was not taken from a final judgment;[26] (2) it is moot because Judge Colin denied the motion to modify; and (3) it is moot because the legal standard for modification of a child support order is the same in both Connecticut and New York. We agree with the plaintiff that the cross appeal is moot because the standard for granting a motion to modify is the same in New York and Connecticut, such that the parties' interests are not adverse, and consequently there is no practical relief that we can afford the parties. The parties agree that the standard in both New York and Connecticut is a substantial change in circumstances. Judge Colin found that there was no substantial change of circumstances and, therefore, denied the motion to modify. Neither party has taken an appeal from the denial of the motion to modify on that basis.

"Mootness implicates [the] court's subject matter jurisdiction and is thus a threshold matter for us to resolve. . . . It is a well-settled general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of

[26] On his cross appeal form, the defendant stated that the judgment from which he was appealing was "Judge Tindill's 1/12/16 order finding New York law applies to Connecticut child support modification proceeding, which order was effectuated by Judge Colin's 9/19/16 orders and thus made an appealable judgment."

Practice Book § 61-8, titled "Cross Appeals," provides in relevant part: "Any appellee or appellees aggrieved by the judgment or decision from which the appellant has appealed may jointly or severally file a cross appeal . . . ." Practice Book § 63-4, titled "Additional Papers To Be filed by Appellant and Appellee when filing Appeal," provides in relevant part that "[i]f any appellee wishes to: (A) present for review alternative grounds upon which the judgment may be affirmed; (B) present for review adverse rulings or decision of the court which should be considered on appeal in the event the appellant is awarded a new trial; or (C) claim that a new trial rather than a directed judgment should be ordered if the appellant is successful on appeal, that appellee shall file a preliminary statement of issues within twenty days from the filing of the appellant's preliminary statement of the issues. . . ."

appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . Because mootness implicates subject matter jurisdiction, it presents a question of law over which our review is plenary. . . . Mootness presents a circumstance wherein the issue before the court has been resolved or had lost its significance becaue of a change in the condition or affairs between the parties. . . . A case is moot when due to intervening circumstances a controversy between the parties no longer exists. (Citations omitted; internal quotation marks omitted.) *Sargent* v. *Sargent*, 156 Conn. App. 109, 113–14, 113 A.3d 72 (2015).

The substance of the issue the defendant has raised on cross appeal is that Judge Colin applied New York law when he adjudicated the motion to modify because he was bound by Judge Tindill's decision on the plaintiff's motion for order that New York law applied. The defendant's cross appeal falls short because the standard for modification in both New York and Connecticut is the same—a substantial change in circumstances. In denying the motion to modify, Judge Colin found that the agreement provides that the defendant's child support is self-modifying and, more importantly in the present context, that the defendant failed to prove that his income has decreased since the time of dissolution. Moreover, the defendant's add-on child support was still appropriate.

Our plenary review of the law regarding a motion to modify child support confirms that the standard in New York and Connecticut, as noted, is the same, i.e., a substantial change of circumstances. "When a party seeks to modify the child support provision of a prior order or judgment, including an order or judgment incorporating without merging an agreement or stipulation of the parties, he or she must demonstrate a substantial change in circumstances . . . . It is the burden

of the moving party to establish the change in circumstance[s] warranting the modification . . . . In determining whether there has been a substantial change in circumstances, the change is measured by comparing the payor's financial situation at the time of the application for a downward modification with that at the time of the order or judgment . . . . A parent's child support obligation is not necessarily determined by his or her current financial condition, but rather by his or her ability to provide support . . . as well as his or her assets and earning power." (Citations omitted; internal quotation marks omitted.) *Malbin* v. *Martz*, 88 App. Div. 3d 715, 716, 930 N.Y.S.2d 67 (2011), citing N.Y. Dom. Rel. Law § 236 (B) (9) (b) (2) (i) (McKinney 2010); see also *Kolodny* v. *Perlman*, 143 App. Div. 3d 818, 820, 38 N.Y.S.3d 613 (2016), citing N.Y. Fam. Ct. Act § 451 (McKinney 2014).

"When presented with a motion for modification, a court must first determine whether there has been a substantial change in the financial circumstances of one or both of the parties." (Internal quotation marks omitted.) *Coury* v. *Coury*, 161 Conn. App. 271, 282, 128 A.3d 517 (2015). "To obtain a modification, the moving party must demonstrate that circumstances have changed since the last court order such that it would be unjust or inequitable to hold either party to it. Because the establishment of changed circumstances is a condition precedent to a party's relief, it is pertinent for the trial court to inquire as to what, if any, new circumstance warrants a modification of the existing order. In making such an inquiry, the trial court's discretion is essential. . . . A conclusion that there has been a substantial change in financial circumstances justifying a modification . . . based only on income is erroneous; rather, the present overall circumstances of the parties must be compared with the circumstances existing at the time of the original award to determine if there has been substantial change." (Internal quotation marks omitted.) Id., 283.

As stated, our plenary review of the law regarding a motion to modify child support reveals that the standard for adjudication of such a motion is the same in both New York and Connecticut. In the present case, the defendant does not claim that the court erred in concluding that he had failed to prove that there had been a substantial change in circumstances to warrant granting the motion to modify. He argues that Judge Tindill improperly decided that New York law applied to the motion to modify, and it thereby became the law of the case. Judge Tindill's decision, however, was not controlling of the issue to be decided by Judge Colin. Whether Judge Colin had applied New York or Connecticut law, the result would have been the same, and, therefore, there is no practical relief that we can afford the parties.[27] "If no practical relief can be afforded to the parties, the appeal must be dismissed." (Internal quotation marks omitted.) *Chase Manhattan Mortgage Corp.* v. *Burton*, 81 Conn. App. 662, 664, 841 A.2d 248, cert. denied, 268 Conn. 919, 847 A.2d 313 (2004). We, therefore, dismiss the cross appeal.

The judgments on the plaintiff's appeal are affirmed; the cross appeal is dismissed.

In this opinion the other judges concurred.

[27] In response to the plaintiff's claim that the cross appeal is moot, the defendant argues that it is not moot because this court can offer prospective relief. Although his argument is difficult to discern and not adequately briefed, the defendant seems to be arguing that he could obtain practical relief if this court were to determine that Judge Tindill improperly decided that New York law applied to the motion to modify. In that circumstance, the defendant arguably would benefit by the application of Connecticut law with respect to other issues that may arise in the case. Whether in the future the parties will litigate issues affected by the choice of law question is speculative. "[A] court will not speculate about future events . . . ." *Hammick* v. *Hammick*, 71 Conn. App. 680, 683, 803 A.2d 373, cert. denied, 262 Conn. 908, 810 A.2d 273 (2002). Moreover, appellate courts do not issue advisory opinions about events that may or may not occur. "Because this court has no jurisdiction to give advisory opinions, no appeal can be decided on its merits in the absence of an actual controversy for which judicial relief can be granted." (Internal quotation marks omitted.) *Sherman* v. *Sherman*, 41 Conn. App. 803, 806, 678 A.2d 9 (1996).

BARBARA AYRES *v.* GEORGE AYRES
(AC 41548)

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

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court resolving a postjudgment motion for contempt filed by the plaintiff. The parties' separation agreement included payment of alimony to the plaintiff calculated from the defendant's gross income of base pay and performance based bonuses, and a provision stating that income shall not include stock that may be awarded to either party. In 2011, the defendant was hired by a company that was acquired by V Co., and he accepted a position with V Co. that included a retention plan, which included short-term incentives, long-term incentives, including both restricted stock units that would be payable in the form of stock and performance stock units that would be payable in the form of cash, and a severance package. In August, 2015, the defendant's employment with V Co. was terminated, and he received a severance payment, after which he found higher paying employment and adjusted his alimony payment accordingly. In July, 2014, the plaintiff filed a motion for contempt, alleging, inter alia, that the defendant failed to amend support based on the total reported for his income. There were three court rulings as to this motion, the last of which declined to find the defendant in contempt but ordered, inter alia, the defendant to include all past long-term incentive payments and the severance payment from V Co. in the calculation of gross income and to recalculate past alimony owed to the plaintiff. From that decision, the defendant appealed to this court, claiming, inter alia, that the trial court improperly interpreted a provision in the parties' separation agreement governing alimony to require that restricted stock units and performance stock units received from the defendant's employer be included within the alimony calculation. *Held:*

1. The trial court erred in ordering the defendant to include all past and future restricted stock unit payments in the calculation of gross income under the alimony provision, as the separation agreement unambiguously excluded stock from the alimony calculation: the separation agreement required an annual exchange of income tax returns for purposes of establishing the actual gross income for the previous calendar year, which the parties understood included any additional bonus income received and, thus, the annual alimony calculation was performed using the income the parties received during the previous calendar year, and during the calendar years at issue, the evidence showed that the distributions received by the defendant pursuant to the restricted stock unit

program consisted of shares of V Co.'s common stock, which is unambiguously excluded from the alimony calculation; moreover, the plaintiff's claim that the alimony exclusion for stock excludes only nonperformance based awards of stock was unavailing, as the parties could have included language to that effect if they had intended for the alimony exclusion for stock to be so limited, and to define the stock exclusion to be limited to nonperformance based stock awards would render the stock exclusion wholly unnecessary.

2. The defendant could not prevail on his claim that the trial court erred in finding that performance stock units are not stock, as the defendant's vested performance stock units were designed to be distributed in cash, all distributions of the defendant's performance stock units were made in cash, and, thus, the defendant did not receive stock pursuant to the performance stock unit component of the long-term incentives program; moreover, the record did not support the defendant's claim that performance stock units were neither base pay nor performance based bonuses and, therefore, did not fall within gross income for purposes of the calculation of alimony under the separation agreement, and although the defendant presented testimony that the long-term incentives programs are golden handcuffs designed to keep an individual with the company, not to give them a bonus for performance, the court was not required to credit that testimony or to find that a golden handcuff is not normally a form of bonus.

3. The trial court improperly interpreted gross income, which included only base pay and performance based bonuses, to include the defendant's severance payment; although the amount of the defendant's severance payment was determined by his base pay and eligibility for the short-term incentives plan, the severance payment was distinct from both base pay and performance based bonuses and, therefore, did not fall within the definition of gross income pursuant to the separation agreement.

Argued May 15—officially released October 1, 2019

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Litchfield, where the court, *Hon. Charles D. Gill*, judge trial referee, rendered judgment dissolving the marriage and granting certain other relief; subsequently, the court, *Bentivegna*, *J.*, denied the plaintiff's motion for contempt and issued certain orders requiring the defendant to recalculate past alimony owed to the plaintiff, and the defendant appealed to this court. *Reversed in part*; *judgment directed.*

Jeffrey D. Ginzberg, for the appellant (defendant).

Stephanie M. Weaver, for the appellee (plaintiff).

Opinion

ALVORD, J. In this marital dissolution action, the defendant, George Ayres, appeals from the trial court's postdissolution order resolving the motion for contempt filed by the plaintiff, Barbara Ayres. On appeal, the defendant claims that the court erred in interpreting the provision of the parties' separation agreement governing alimony to conclude that (1) the payment of long-term incentives, including restricted stock units and performance stock units, received from his employer were included within the alimony calculation and (2) a severance payment was included within the alimony calculation. We agree with the defendant's claims as to the restricted stock units and severance pay and, accordingly, reverse in part the judgment of the trial court.

The record reveals the following facts and procedural history. The parties were divorced on November 9, 2010. The dissolution judgment incorporated by reference a separation agreement executed by the parties on that date (separation agreement). Section 3.2 of the separation agreement governs alimony and provides in relevant part: "At the earlier of such time as the marital residence is sold, or beginning December 1, 2010, the [defendant] shall pay periodic alimony to the [plaintiff] for the duration set forth in paragraph 3.1, and which shall be calculated to be an amount which equals thirty percent of the [defendant's] gross income minus twenty percent of the [plaintiff's] gross income. Should the [defendant] be self-employed his income for the purposes of this calculation shall be based upon a minimum gross self-employment income of $80,000 to reflect his earning capacity and the [plaintiff's] income shall be not less than $25,000 to reflect her earning capacity; so that alimony under this calculation will be $19,000 annually.

"Each party's gross income for the purpose of this calculation shall be the party's gross income from their base pay and any performance based bonuses received. Income shall not include moving expenses, any car allowance, sign on stock options or stock which may be awarded to either party." Section 3.4 of the separation agreement provides, in relevant part: "The parties shall exchange income tax returns each year by May 1 for the purpose of establishing the actual gross income for the previous calendar year, which the parties understand will include any additional bonus income which was received by either party in the previous calendar year. Thereafter they shall determine if an adjustment in the support payment between the parties is necessary so as to meet the formula established. Any additional payments by the [defendant] or reimbursements by the [plaintiff] shall be made by the parties by June 1 of that year unless otherwise agreed."

At the time of the dissolution, the defendant was self-employed as a consultant. He worked for a number of companies, including Hughes Telematics, Inc., which hired him as an employee in August, 2011. Verizon Communications (Verizon) subsequently acquired Hughes Telematics, Inc., and the defendant was hired as a Verizon employee. When Verizon offered him the position, it also offered him a nonnegotiable retention plan, which included short-term incentives (STI), long-term incentives (LTI), including both restricted stock units (RSUs) that would be payable in the form of stock and performance stock units (PSUs) that would be payable in the form of cash, and a severance package. The defendant's employment with Verizon was terminated effective August 14, 2015, and he received a severance payment in the amount of $159,250, which represented twenty-six weeks of base pay ($227,500 annually), plus twenty-six weeks of STI ($91,000 annually). He was unemployed for seven weeks before obtaining employment with IBM on October 5, 2015. The defendant paid alimony at the Verizon rate through September, 2015,

while he was unemployed and after receiving his severance payment. Beginning in October, 2015, the defendant paid alimony at the IBM rate, which was higher than the Verizon rate.

On July 30, 2014, the plaintiff filed a motion for contempt, alleging, in relevant part, that despite the separation agreement provision that requires the parties to amend spousal support for each year by exchanging income tax returns with proof of income, "the defendant has refused to amend support based upon the total reported for his income." The motion for contempt and the interpretation of the alimony provision have been the subject of three court rulings, only the third of which is challenged in the present appeal.

The first decision was issued by the court, *Moore*, *J.*, on May 15, 2015 (*Ayres I*). At issue were two STI payments, a 2013 payment in the amount of $72,800 in 2013 and a 2014 payment in the amount of $100,100, both of which were paid in cash. In its ruling, the court found that the STI payments constituted "performance based bonuses" within the meaning of the alimony provision and, thus, ordered that the STI payments be included in the calculation of spousal support paid by the defendant. In reaching this decision, the court found the term "performance based bonuses" within the alimony provision clear and unambiguous. Rejecting the defendant's argument that "performance based bonuses," within the context of the separation agreement, referred only to bonuses paid by the employer on the basis of the defendant's individual performance, the court found that the term included amounts paid on the basis of the company's performance. Noting testimony that STI payments were cash payments, the court stated that "no issues are raised as to whether an STI payment might be excluded from the definition of 'performance based bonus' as stock."

On December 23, 2016, the court, *Dooley*, *J.*, issued a second ruling (*Ayres II*) regarding the alimony provision, which addressed the portion of the provision (alimony exclusion) that states that "[i]ncome shall not include moving expenses, any car allowance, sign on stock options or stock which may be awarded to either party." The court found the alimony provision clear and unambiguous and addressed only the issue of whether the separation "agreement excludes all stock or only sign on stock from the definition of gross income." It specifically did not decide whether RSUs or PSUs were, in fact, stock, nor did it decide the issue of whether "the [LTI] proceeds should be treated identically to the [STI] proceeds because they are 'bonuses based upon the longer employment of the defendant.' " In its ruling, the court agreed with the defendant that " 'sign on' applies only to stock options and that 'stock which may be awarded to either party,' regardless of when it is awarded, is excluded from the definition of gross income." The court directed the parties to contact the caseflow coordinator to schedule a hearing on the issue of whether the LTIs are stock.

That hearing was held on September 26 and 27, 2017. The court, *Bentivegna*, *J.*, also heard the issue of whether the defendant's severance payment received following the 2015 termination of his employment with Verizon should be included in the alimony calculation.[1]

[1] At the beginning of the second day of the contempt hearing on September 27, 2017, the defendant's counsel informed the court that he had filed a motion requesting that the plaintiff be precluded from raising the issue of whether the defendant's severance payment should be included in the alimony calculation. Because the plaintiff had filed her motion for contempt in 2014 and the defendant's employment was not terminated until 2015, he contended that he was not on notice of her claim regarding his severance pay. He asked that the court schedule a hearing on the severance pay issue after the plaintiff filed a motion regarding severance. In the event the court allowed the plaintiff to extend her contempt filing to include the severance issue, he requested that he be permitted to recall his expert, Attorney Bruce Barth, to provide testimony on that issue. The court denied the defendant's preclusion motion and permitted the defendant to recall Barth. On appeal, the defendant does not claim error in the court's denial of his motion.

In addition to the testimony of the plaintiff and the defendant, the defendant presented the testimony of an expert in executive compensation, Attorney Bruce Barth.

After receiving posttrial briefs from both parties, the court issued its memorandum of decision on February 28, 2018. The court indicated that it would treat *Ayres I* and *Ayres II* as the law of the case.[2] Like the two prior decisions, the court also concluded that the language of the alimony provision is clear and unambiguous. The court determined that the RSUs and PSUs were "performance based bonuses" and, therefore, were included in the alimony calculation set forth in the alimony provision. It further concluded that the RSUs and PSUs were not stock under the alimony exclusion. Lastly, the court concluded that the defendant's severance payment also must be included in the alimony calculation.

Finding that the defendant's conduct was not wilful, the court declined to hold the defendant in contempt. It issued remedial orders requiring the defendant to "include all past LTI payments and the 2015 severance payment in the calculation of 'gross income' under [the alimony provision] and to recalculate past alimony owed to the plaintiff pursuant to the alimony formula set forth in the [separation] agreement." The court also ordered "the defendant to include all future LTI payments from Verizon in the definition of gross income under [the alimony provision] so as to ascertain the amount of alimony owed by the defendant to the plaintiff for the duration of his alimony obligation under the [separation] agreement." This appeal followed.[3]

[2] The parties do not raise any challenges in this appeal regarding the trial court's treatment of *Ayres I* and *Ayres II* as the law of the case.

[3] On May 31, 2018, the defendant filed a motion for an articulation, which the court denied on June 18, 2018. The defendant then filed a motion for review with this court. This court, thereafter, granted review but denied the requested relief.

The defendant's claims on appeal involve questions of law and fact. Our standards of review are well settled. "In a marriage dissolution action, an agreement of the parties executed at the time of the dissolution and incorporated into the judgment is a contract of the parties. . . . The construction of a contract to ascertain the intent of the parties presents a question of law when the contract or agreement is unambiguous within the four corners of the instrument. . . . The scope of review in such cases is plenary . . . [rather than] the clearly erroneous standard used to review questions of fact found by a trial court." (Internal quotation marks omitted.) *Steller* v. *Steller*, 181 Conn. App. 581, 588–89, 187 A.3d 1184 (2018). Both parties maintain that the alimony provision is clear and unambiguous. Each of the trial courts that has considered the provision has agreed, and so do we. Because the language of the alimony provision in the present case is clear and unambiguous, our review is plenary. See *Dejana* v. *Dejana*, 176 Conn. App. 104, 117–18, 168 A.3d 595 (whether court properly concluded that separation agreement unambiguously provided that defendant could use existing and future LTIP income toward payment of college expenses presented question of law subject to plenary review), cert. denied, 327 Conn. 977, 174 A.3d 195 (2017).

The determination of the nature of the payments at issue is factual; therefore, the clearly erroneous standard of review is appropriate. See *Nadel* v. *Luttinger*, 168 Conn. App. 689, 700 147 A.3d 1075 (2016) (applying clearly erroneous standard of review to court's finding that cash award was a "nonvested asset of any kind" under clear and unambiguous provision of separation agreement). "[T]he trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . We cannot retry the facts or pass on the credibility of the witnesses. . . . A finding of fact is clearly erroneous when there is no evidence in the

record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Isenburg* v. *Isenburg*, 178 Conn. App. 805, 813, 177 A.3d 583 (2017), cert. denied, 328 Conn. 916, 180 A.3d 963 (2018).

I

We address the defendant's first two claims together because they are interrelated. The defendant claims that the court erred in interpreting the alimony provision to require that RSUs and PSUs be included within the alimony calculation. Specifically, he argues that RSUs and PSUs are neither base pay nor performance based bonuses. In the alternative, he argues that even if the RSUs and PSUs are performance based bonuses, they are nevertheless excluded from the alimony calculation on the basis that they are stock. As to the RSUs, we conclude, contrary to the trial court, that the payments received by the defendant through the RSU component of the LTI program constitute stock within the meaning of the alimony exclusion.[4] As to the PSUs, we conclude that the court properly determined that they are performance based bonuses and not stock.

In its memorandum of decision, the court, recognizing that the separation agreement did not define the term stock, consulted Black's Law Dictionary, which defines stock as: "[A] proportional part of a corporation's capital represented by the number of equal units (or shares) owned, and granting the holder the right to participate in the company's general management and

[4] Because we conclude that the payments received by the defendant through the RSU component of the LTI program constitute stock within the meaning of the alimony exclusion and are, therefore, excluded from the alimony calculation, we need not address the defendant's argument that the RSUs are not performance based bonuses.

to share in its net profits or earnings."[5] (Internal quotation marks omitted.) In their appellate briefs, both parties also have offered this definition.

The court then stated: "The evidence shows that the RSUs and PSUs are not common stock of the company. PSU and RSU represent a hypothetical share of Verizon's common stock. Stock units are called stock equivalents in the industry. Stock is an actual ownership interest in the company; while a stock unit is a phantom ownership interest in a company. The LTIs are not 'stock' that are excluded from the alimony calculation. See *Ayers II*." (Footnote omitted.)

The evidence before the court, on the issue of whether LTIs are stock, primarily consisted of documents issued by Verizon and Barth's expert testimony. See *Nadel* v. *Luttinger*, supra, 168 Conn. App. 699 (considering, inter alia, language of performance award agreement to determine nature of award for purposes of categorization under provisions of unambiguous separation agreement). Barth reviewed documentation provided by Verizon regarding the LTI program, including the July 27, 2012 letter setting forth the defendant's employment agreement with Verizon, which explained generally the defendant's base compensation, STI plan, LTI plan,[6] and Verizon severance program, among other

[5] The court also consulted the online version of Merriam-Webster's Collegiate Dictionary, which defines stock as "[t]he proprietorship element in a corporation usually divided into shares and represented by transferable certificates." (Internal quotation marks omitted.) The court further provided definitions indicative of the common usage of the term: "A stock is a type of security that signifies ownership in a corporation and represents a claim on part of the corporation's assets and earnings," and "[s]tock means the Common Stock of the Company." (Internal quotation marks omitted.)

[6] The letter provided in relevant part: "Commencing with the 2012 plan year, you will be eligible to participate in the Verizon Long Term Incentive (LTI) Plan. Long-term incentive awards typically are granted during the first quarter of the year and consist of performance stock units (PSUs) and restricted stock units (RSUs). Each PSU and RSU represents a hypothetical share of Verizon's common stock. The target value of your full-year long-term incentive award opportunity will be 75 [percent] of your base salary

benefits. According to Barth, under the terms of the employment agreement, both RSUs and PSUs are stock units, which are hypothetical shares of Verizon's common stock. In industry terms, stock units would be called "stock equivalents." Barth testified that "stock is an actual ownership interest in a company," whereas "[a] stock unit is a phantom ownership interest in a company." Barth testified that the value of the LTIs was tied to the value of Verizon stock on a particular day. Specifically, the LTIs in the present case were based on the fair market value on the date of the grant of the stock of the company. Acknowledging that RSUs are payable in stock while PSUs are payable in the form of cash, Barth opined that payment in cash does not change the nature of PSUs as a stock equivalent.

A document titled "2009 Verizon Communications Inc. Long-Term Incentive Plan (As Amended and Restated)" (2009 plan) was entered into evidence. Following its approval by shareholders, the 2009 plan authorizes the grant of RSUs and PSUs as "Awards," which term is defined to include "Nonqualified Stock

or $170,625. For the 2012 plan year, you will receive the full value of your LTI grant (it will not be prorated). In addition, for the 2012 plan year only, your 2012 LTI award will be delivered in the form of RSUs. The grant date value of each RSU will be based on the closing price of Verizon's common stock on July 26, 2012, which was the date the merger was completed, or $44.46. These RSUs will vest, subject to the terms and conditions of the award agreement, at the end of 2014 and will be payable in shares of Verizon common stock (less applicable tax withholdings) at the same time long-term incentives are paid to other employees. Your RSUs will accrue dividend equivalents in the form of additional RSUs, which will vest and be paid at the same time and to the extent that the RSUs vest and are paid.

"You will receive a detailed communications package regarding your 2012 long-term incentive award opportunity following your acceptance of the terms of this offer. The RSUs will be subject to the terms and conditions of the Restricted Stock Unit Award Agreement in the form applicable to Verizon employees. As a condition to your entitlement to the 2012 LTI award, you will be required to accept the terms and conditions of the applicable award agreement, which contains certain non-solicitation and non-competition provisions."

Options, Incentive Stock Options, Restricted Stock, Restricted Stock Units, Performance Shares, Performance Units, or other Awards." The 2009 plan defines "Share" as "a share of common stock of the Company," and "Share Pool" as "the number of Shares available under [§] 4.1 hereof, as adjusted pursuant to [§§] 4.2 and 4.3 hereof." Section 4.1 governs the "Number of Shares Available for Grants" and states that "there shall be reserved for issuance under Awards 115,000,000 Shares." Barth testified that the 115,000,000 shares referenced in § 4.1 make up Verizon's common stock. Section 4.2 of the 2009 plan governs "Share Pool Adjustments" and identifies the Awards that "shall reduce, on a Share-for-Share basis, the number of Shares available for issuance under the Share Pool." Included in that list is "An Award of Restricted Stock;" "An Award of a Restricted Stock Unit payable in Shares;" "An Award of a Performance Share;" "An Award of a Performance Unit payable in Shares;" and "Other Awards payable in Shares." Absent from the list is an award of a performance unit payable in cash.

Article 7 of the 2009 plan governs "Restricted Stock and Restricted Stock Units." RSU is defined in the 2009 plan as "an Award granted pursuant to [§] 7.5 hereof." Section 7.5 provides, in relevant part: "In lieu of or in addition to any Awards of Restricted Stock, the Committee may grant Restricted Stock Units to any Participant, subject to the terms and conditions of this Article 7 being applied to such Awards as if those Awards were for Restricted Stock and subject to such other terms and conditions as the Committee may determine. Each Restricted Stock Unit shall have an initial value that is at least equal to the Fair Market Value of a Share on the date of grant. Restricted Stock Units may be paid at such time as the Committee may determine in its direction, and payments may be made in a lump sum or in installments, in cash, Shares, or a combination thereof, as determined by the Committee in its discretion . . . ."

Article 8 of the 2009 plan governs "Performance Units and Performance Shares." "Performance Unit" is defined in the 2009 plan as "an Award granted pursuant to Article 8 hereof, which shall have an initial value established by the Committee on the date of grant." Section 8.2 further provides that "[e]ach Performance Unit shall have an initial value that will not be less than the Fair Market Value of a Share on the date of grant." Section 8.4, titled "Form and Timing of Payment of Performance Units/Shares," states in relevant part: "Subject to the terms of the Plan, the Committee, in its discretion, may direct that earned Performance Units/Shares be paid in the form of cash or Shares (or in a combination thereof) that have an aggregate Fair Market Value equal to the value of the earned Performance Units/Shares on the last trading day immediately before the close of the applicable Performance Period."

The Verizon RSU agreements authorized by the 2009 plan also were admitted into evidence. The RSU agreement for the 2012-2014 award cycle provides that "[t]he Participant is granted the number of RSUs as specified in the Participant's account under the 2012 RSU grant, administered by Fidelity Investments or any successor thereto ('Fidelity'). A RSU is a hypothetical share of Verizon's common stock. The value of a RSU on any given date shall be equal to the closing price of Verizon's common stock on the New York Stock Exchange . . . . as of such date." The RSU Agreement for the 2012-2014 cycle further provides that "[a]ll payments under this Agreement shall be made in shares of Verizon common stock, except for any fractional shares, which shall be paid in cash. . . . The number of shares that shall be paid . . . shall equal the number of vested RSUs. . . . Once a payment has been made with respect to a RSU, the RSU shall be canceled; however, all other terms of the Agreement, including but not limited to the Participant's Obligations, shall remain in effect." Under a provision titled "Shareholder Rights," the RSU agreement

states that "[t]he Participant shall have no rights as a shareholder with respect to the RSUs until the date on which the Participant becomes the holder of record with respect to any shares of Verizon common stock to which this grant relates. Except as provided in the Plan or in this Agreement, no adjustment shall be made for dividends or other rights for which the record date occurs while the RSUs are outstanding." The agreements for the 2013-2015 award cycle, 2014-2016 award cycle, and 2015-2017 award cycle all contain identical or nearly identical provisions.

The Verizon PSU agreements authorized by the 2009 plan also were admitted into evidence. The PSU agreement for the 2013-2015 award cycle provides that "[t]he Participant is granted the number of PSUs as specified in the Participant's account under the 2013 PSU grant, administered by Fidelity Investments or any successor thereto ("Fidelity"). A PSU is a hypothetical share of Verizon's common stock. The value of a PSU on any given date shall be equal to the closing price of Verizon's common stock on the New York Stock Exchange . . . . as of such date." The PSU agreement also contains vesting requirements based on the company's performance. The PSU Agreement for the 2013-2015 cycle further provides that "[a]ll payments under this Agreement shall be made in cash. . . . The amount of cash that shall be paid . . . shall equal the number of vested PSUs . . . *times* the closing price of Verizon's common stock on the [New York Stock Exchange] as of the last trading day in the Award Cycle. . . . Once a payment has been made with respect to a PSU, the PSU shall be canceled; however, all other terms of the Agreement, including but not limited to the Participant's Obligations and the Non-Competition Obligations, shall remain in effect." (Emphasis in original.) Under a provision titled "Shareholder Rights," the agreement states that "[t]he Participant shall have no rights as a shareholder with respect to the PSUs." The agreements for

the 2014-2016 award cycle and 2015-2017 award cycle contain identical or nearly identical provisions.

A

We first address the defendant's challenge to the trial court's conclusion that RSUs are not stock. The defendant argues, inter alia, that "[t]he fact that the defendant was paid in stock further amplifies the logical conclusion that RSUs must be excluded from alimony. . . . Whether the stock award is termed RSUs or something else, there is no getting away from the fact that the defendant was awarded stock because RSUs were distributed in shares of stock, duly placed in his brokerage account." The plaintiff argues that the "units" awarded under the LTI program, as hypothetical shares of Verizon's common stock, do not constitute stock within the meaning of the alimony exclusion. We agree with the defendant that because he was awarded, and ultimately received, shares of Verizon's common stock, the RSU payments constitute stock within the meaning of the alimony exclusion.

As noted previously, the parties agree on the definition of stock used by the trial court, which defines the term as: "[A] proportional part of a corporation's capital represented by the number of equal units (or shares) owned, and granting the holder the right to participate in the company's general management and to share in its net profits or earnings." (Internal quotation marks omitted.)

The court failed to find determinative the fact that the RSU plan was an employee stock award vehicle. We agree with the trial court that the RSUs granted to the defendant *prior to vesting* are not shares of stock. Because the evidence showed that the distributions received by the defendant pursuant to the RSU program consisted of shares of Verizon's common stock, however, the defendant received stock, which is unambiguously excluded from the alimony calculation. Thus, the

court erred in ordering the defendant to include his RSU payments in the calculation of gross income for purposes of calculating the alimony owed to the plaintiff.

It is undisputed that the defendant received actual shares of Verizon's common stock following vesting of the RSUs. For example, pursuant to the RSU agreement for the 2012-2014 award cycle, on February 13, 2015, 2776.54 shares of Verizon's common stock were deposited into the defendant's Fidelity brokerage account. Similarly, pursuant to the RSU agreement for the 2013-2015 award cycle, on February 12, 2016, 1036.34 shares of Verizon's common stock were deposited into the defendant's Fidelity brokerage account.[7] Thus, through the RSU component of the LTI program, the defendant received shares of Verizon's common stock.

Moreover, the documents issued by Verizon further support the conclusion that the defendant received stock within the definition of that term proffered by the parties. First, the RSU agreements show that, upon payment of Verizon's common stock, the RSU is cancelled and the defendant acquires shareholder rights. Pursuant to the RSU agreements, the defendant had no rights as a shareholder "until the date on which [he became] the holder of record with respect to any shares of Verizon's common stock to which [the] grant [of RSUs] relates." Although the defendant must still comply with his obligations pursuant to the RSU agreements, the agreements provide that the RSUs are canceled upon payment. Second, the 2009 plan indicates that an award of a RSU payable in shares reduces, "on a Share-for-Share basis, the number of Shares available for issuance under the Share Pool."

[7] Similarly, pursuant to the RSU agreement for the 2014-2016 award cycle, 1100.240 shares of Verizon's common stock were deposited into the defendant's Fidelity brokerage account.

With respect to the 2015-2017 cycle, the RSUs were scheduled to vest in December, 2017. Thus, on the date of the hearing, no distributions had been made as to the 2015-2017 cycle.

The plaintiff argues that even if the LTIs are stock, the alimony exclusion applies only to items that are not incentive based. Therefore, she argues that the alimony exclusion for stock applies only to stock "received during the course of employment for purposes other than a performance based bonus." Because the LTIs in the present case are performance based, the plaintiff contends that they are required to be included within the gross income calculation. In support of this argument, she offers a framework under which there are three distinct categories of stock awards: (1) sign on stock; (2) stock "received during the course of employment for purposes other than a performance based bonus"; and (3) "stock awarded for purposes of a performance based bonus." She relies on dicta from *Ayres II*, which provides: "An employer might issue stock to its employees for a myriad of reasons, to include for length of service, as an incentive for future performance, as part of a profit sharing plan or others. Indeed, stock awards can be used as an additional and separate category of compensation, distinct from either 'base pay' or 'performance based bonuses.' "

The plaintiff's argument is that the alimony exclusion for *stock* excludes only *nonperformance based awards of stock*. We decline to read into the alimony exclusion a limitation that its language does not support. Had the parties intended the alimony exclusion for stock to be limited only to nonperformance based awards of stock, they could have included language to that effect. To define the stock exclusion to be limited to nonperformance based stock awards would render the stock exclusion wholly unnecessary. According to the terms of the separation agreement, alimony is calculated using the parties' "gross income," which the separation agreement defines as "base pay" and "performance based bonuses." If stock is awarded neither as base pay nor on the basis of performance, it is not included within gross income and, therefore, is not included within the

alimony calculation. We decline to interpret the alimony provision in a manner that would render the alimony exclusion for stock superfluous. "When interpreting a contract, we must look at the contract as a whole, consider all relevant portions together and, if possible, give operative effect to every provision in order to reach a reasonable overall result." (Internal quotation marks omitted.) *Dejana* v. *Dejana*, supra, 176 Conn. App. 120.

The separation agreement requires an annual exchange of income tax returns for purposes of establishing the actual gross income for the previous calendar year, which "the parties understand will include any additional bonus income which was received by either party in the previous calendar year." Thus, the annual alimony calculation is performed using the income the parties received during the previous calendar year. During the calendar years at issue, the defendant received shares of Verizon's common stock. Because the separation agreement unambiguously excludes stock from the alimony calculation, the court erred in ordering the defendant to include all past and future RSU payments in the calculation of gross income under the alimony provision.

B

We next address the defendant's challenge to the trial court's finding that PSUs are not stock. He argues that PSUs, "[a]s stock units . . . do not fall within the formula for the alimony computation," and that the "conver[sion] into cash by Verizon" does not change the nature of the PSUs as stock awards. The plaintiff argues, inter alia, that " 'units' are not paid out in shares; they are paid in cash and deposited in cash." We agree with the plaintiff that because the defendant's vested PSUs were designed to be distributed in cash and were, in fact, distributed in cash, the payments from the PSUs do not constitute stock within the meaning of the alimony exclusion.

As discussed previously, although the defendant's vested RSUs were designed to be, and were, in fact, distributed to the defendant in shares of Verizon's common stock, all distributions of the defendant's PSUs were made in cash. For example, pursuant to the PSU agreement for the 2013-2015 award cycle, on February 12, 2016, $42,815.16 was deposited into the defendant's Fidelity brokerage account. The "Transaction Details" indicated that no shares were deposited to the defendant's account. Similarly, pursuant to the PSU agreement for the 2014-2016 award cycle, $69,197.52 was deposited into the defendant's Fidelity brokerage account.[8] Again, no shares were deposited to the defendant's account. Thus, the defendant did not receive stock pursuant to the PSU component of the LTI program.

Moreover, the documents issued by Verizon further support the conclusion that the defendant did not receive stock pursuant to the PSU component of the LTI program. Although the 2009 plan authorized the issuance of PSUs to be "paid in the form of cash or Shares (or a combination thereof)," each of the PSU agreements issued by Verizon and accepted by the defendant specified that "[a]ll payments under [the agreements] shall be made in cash." Additionally, the PSU agreements indicate that the defendant has "no rights as a shareholder with respect to the PSUs." Given that the parties advance a definition of stock as, in part, "granting the holder the right to participate in the company's general management," the lack of shareholder rights weighs against a determination that the PSUs should be categorized as stock. Lastly, under the 2009 plan, an award of a performance unit *payable in shares* reduces, "on a Share-for-Share basis, the number

[8] With respect to the 2015-2017 cycle, the PSUs were scheduled to vest in December, 2017. Thus, on the date of the hearing, no distributions had been made as to the 2015-2017 cycle.

of Shares available for issuance under the Share Pool,'' whereas an award of a PSU *payable in cash* does not.[9]

The defendant argues that "the conversion of assets into cash does not change the essential character of the asset for purposes of contract interpretation." In support of this argument, he cites *Denley* v. *Denley*, 38 Conn. App. 349, 353, 661 A.2d 628 (1995), which recognized that "[t]he mere exchange of an asset awarded as property in a dissolution decree, for cash, the liquid form of the asset, does not transform the property into income.'' In *Denley*, this court held that the trial court improperly had considered as income money the defendant received from the exercise of stock options he was awarded as property in the dissolution decree. Id., 354. In the present case, the defendant was not awarded stock that he received and subsequently converted to cash. Rather, he received cash pursuant to an LTI program that awarded him hypothetical shares of stock in the form of PSUs, which, from the date of their grant, were payable only in cash. See

[9] The defendant relies on *Nadel* v. *Luttinger*, supra, 168 Conn. App. 700, in support of his argument that PSUs are stock. In that case, the issue before this court was not whether the "cash performance award" received by the defendant constituted stock. Indeed, the court expressly noted that the trial court's finding that the cash performance award was "not a stock transaction" was not contested. Id., 698, n.6. Rather, the issue before this court in *Nadel* was the propriety of the trial court's finding that the cash performance award was a "non-vested award of any kind," and this court concluded that the trial court's finding was not clearly erroneous. Id., 700.

The other cases relied on by the defendant do not inform our consideration of the issues in this appeal. See *McKeon* v. *Lennon*, 321 Conn. 323, 345, 138 A.3d 242 (2016) ("exercised *stock options* and *restricted stock* that has vested ordinarily should be considered components of a party's gross income *for purposes of calculating child support* because they constitute 'deferred or incentive-based compensation' " [emphasis added]); *Baldwin* v. *Baldwin*, 19 Conn. App. 420, 422–23, 562 A.2d 581 (1989) (gain realized by plaintiff from exercise of *stock options* was not income under ambiguous separation agreement term, where plaintiff testified that stock options were not to be included as income and parties had listed stock options on financial affidavits as assets and not income).

Whitt v. *Sherman International Corp.*, 147 F.3d 1325, 1327 (11th Cir. 1998) (A phantom stock is "[a] right . . . to receive an award with a value equal to the appreciation of a share of stock from the date the Phantom Stock is cashed out. . . . Phantom Stock programs are designed to provide executives with cash payments equivalent to amounts they could receive under an actual stock option or similar program. . . . Phantom programs are based on phantom or hypothetical shares or units." [Internal quotation marks omitted.]); see also *Bunnell* v. *Netsch*, United States District Court, Docket No. 3:12CV03740 (L) (N.D. Tex. June 11, 2013) ("[p]hantom stock, is not actually 'stock' ").

Having concluded that the PSUs are not stock, we turn to the defendant's argument that the PSUs are neither base pay nor performance based bonuses and, therefore, do not fall within gross income for purposes of the calculation of alimony under the separation agreement. Specifically, citing Barth's testimony, he argues that PSUs are "a form of retention benefits, and a golden handcuff." The plaintiff responds that the golden handcuff characteristics of the PSUs do not exclude them from performance based bonuses. She argues that the LTI program, "whether or not its incentives act as a retention incentive, is tied to the company's longer term performance to which the defendant, and all those awarded compensation under the [LTI program], has contributed through their three year service history." We agree with the plaintiff.

In concluding that the PSUs fell under the definition of "performance based bonuses," the trial court found that "the LTI payments are based on performance, both explicitly (company's performance) and implicitly (individual employee's performance that benefits the company as a whole)." This determination is supported by ample evidence in the record, including brochures issued to the defendant explaining Verizon's LTIs, one of which provided that "[LTIs] are an integral part of

your Total Rewards and provide you with the opportunity to share in our success over time. The value of your LTI award, combined with base pay and short-term incentives, offers a competitive total compensation package that enables our Company to attract and retain highly valued, top-performing, and experienced executives, like you." The 2009 plan, which authorized the issuance of the RSUs and PSUs, also provided: "The objectives of the Plan are to optimize the profitability and growth of the Company through long-term incentives that are consistent with the Company's goals and that link the interests of Participants to those of the Company's shareholders; to provide Participants with incentives for excellence in individual performance; to provide flexibility to the Company in its ability to motivate, attract, and retain the services of Participants who make significant contributions to the Company's success; and to allow Participants to share in the success of the Company." Thus, the trial court properly concluded that the PSUs are performance based, and the court did not err in determining that PSUs fall within the category of "performance based bonuses."[10]

Although Barth opined that the LTIs are golden handcuffs, which are "designed to keep an individual employed, not to give them a bonus for performance," the trial court was not required to credit this testimony,

[10] The defendant argues that "[t]he trial court wrongly concluded that the defendant made the same argument for exclusion of LTI as he did for STI (based on personal performance)." In its memorandum of decision, the trial court noted "the defendant's argument that performance based bonuses is limited to the defendant's individual performance." The defendant correctly observes that he did not make this argument in his posttrial brief. We reject, however, the defendant's reading of the court's decision to suggest that it considered *Ayres I* as controlling the outcome of its decision regarding LTI. Although it stated that it "adopt[ed] the reasoning" of *Ayres I*, the court did not conflate STI with LTI and it expressly considered the evidence presented before it as to the characteristics of the LTI program in reaching a determination that its payments fell under the definition of performance based bonuses.

nor was it required to credit Barth's testimony that a golden handcuff is not normally a form of bonus. The defendant's counsel conceded during oral argument before this court that the trial court's decision not to credit expert testimony is not reversible error. "[I]t is the quintessential function of the fact finder to reject or accept certain evidence, and to believe or disbelieve any expert testimony. . . . The trier may accept or reject, in whole or in part, the testimony of an expert offered by one party or the other." (Internal quotation marks omitted.) *Wyszomierski* v. *Siracusa*, 290 Conn. 225, 243, 963 A.2d 943 (2009).

II

Lastly, the defendant claims that the court erred in interpreting gross income, which included only "base pay" and "performance based bonuses," to include his severance payment. Specifically, he argues that his right to receive severance pay "was dependent upon his agreement to release Verizon from any and all liability arising from the termination, among other things." The plaintiff responds that the conditions imposed on the defendant's severance pay "do not place it outside of the definition of gross income." The plaintiff, noting that STI previously had been ordered to be included in the defendant's gross income for purposes of the alimony calculation, emphasizes that the severance payment "includes the corresponding STI payments associated with his weeks in that year associated with the company." We agree with the defendant.

In its memorandum of decision, the court noted that the separation agreement did not define severance pay and, thus, turned to the following dictionary definitions of the term: "[A]n allowance usually based on length of service that is payable to an employee on termination of employment" and "[m]oney (apart from back wages or salary) that an employer pays to a dismissed employee. The payment may be made in exchange for

a release of any claims that the employee might have against the employer." (Internal quotation marks omitted.) The court concluded: "The evidence demonstrates that the severance payment should be included in the alimony formula. The severance payment the defendant received was determined by his base pay, service time, grade band and eligibility for STI plan regardless of performance. Base pay and STI payments are included in the alimony formula. In addition, the defendant paid alimony after he received his severance pay and while he was unemployed. He wrote severance in the note section of the September 2015 check. The court has concluded that the severance payment must be part of the alimony calculation inclusion for base pay and performance based bonuses."[11] (Footnote added.)

The court's findings as to the method of calculation of the severance pay are not clearly erroneous. Neither are its findings that the defendant paid alimony after he received his severance pay and while he was unemployed, and that he wrote severance in the note section of the aforementioned check. Those findings, however, do not support the conclusion that the severance pay was includable within the alimony calculation as base pay and/or performance based bonuses.[12] To the contrary, the evidence presented as to the characteristics of the defendant's severance pay, including evidence

[11] The plaintiff acknowledges in her appellate brief that the amount of alimony the defendant owed on his severance payment would be reduced by the amount of alimony he paid for the seven weeks he was between employment.

[12] With respect to the notation "9/15 support-severance" that the defendant made on his check to the plaintiff, the defendant testified: "[M]y rationale [for writing the word severance on the check] was that, at the moment that I wrote that check, I had already secured an agreed employment with IBM, and so I knew I would have an October paycheck, and I didn't want any issues regarding alimony interruptions, and so I simply continued to pay at the Verizon rate one more month." The word "severance," according to the defendant, "referred to the basis for paying [the plaintiff alimony] in an [un]interrupted fashion. She knew that I had lost employment."

noted by the court that the defendant was required to sign a severance agreement that included a release, demonstrate that it is distinct from both base pay and performance based bonuses.[13]

Barth testified that severance generally is provided to employees as a termination payment for the employee's service with a company. Specifically, he opined that companies provide for severance at the beginning of employment as a way of retaining employees, in "that they know that they have something if they're involuntarily terminated . . . ." Barth testified that although

[13] Recognizing a lack of appellate authority on this issue, the plaintiff relies on the Connecticut child support guidelines inclusion of severance pay in its definition of gross income in support of her argument that the defendant was required to pay alimony on his severance payment. As our Supreme Court has explained, the child support guidelines "allocate a certain percentage of parental income to child support," resulting in "an allocation of resources between parents and children that the legislature has decided is the appropriate allocation." (Internal quotation marks omitted.) *McKeon* v. *Lennon*, supra, 321 Conn. 343. In seeking to preserve this allocation, "the determination of a parent's child support obligation must account for *all* of the income that would have been available to support the children had the family remained together." (Internal quotation marks omitted.) Id. Thus, our Supreme Court previously has "interpreted broadly the definition of gross income contained in the guidelines to include items that, in effect, increase the amount of a parent's income that is available for child support purposes." (Footnote omitted; internal quotation marks omitted.) Id. The present case involves the categorization of certain payments, for purposes of determining whether the defendant owes an obligation to pay alimony thereon, under provisions of the parties' separation agreement and, thus, is distinct from the categorization of income pursuant to the child support guidelines.

The plaintiff further relies on *Prieto* v. *Prieto*, Superior Court, judicial district of Fairfield, Docket No. FA-08-4023879 (July 26, 2010) (where separation agreement defined income as including "all severance package payments or any and all other termination packages regardless of how they are labeled," issue before court was whether severance package should be categorized as "gross annual base income" or "bonus" income), and *Rivera* v. *Rivera*, Superior Court, judicial district of Hartford, Docket No. HHD-FA-156057803-S (Jan. 8, 2016) (considering severance payments to be in nature of income, and considering such payments in making other orders including order for lump sum alimony), which are both distinguishable and, moreover, as Superior Court cases, are not binding precedent on this court.

the "amount of severance usually, not always, is determined based on someone's base pay . . . the severance itself is not base pay, it's termination pay." According to Barth, severance pay is distinct from base pay in that "it is not payment for services rendered."

The documentary evidence supports the conclusion that the defendant's severance payment does not fall within the specific categories of "base pay" or "performance based bonuses." The July 27, 2012 letter setting forth the defendant's employment agreement with Verizon provided with respect to the Verizon Severance Program: "In addition, commencing in 2012 you will be eligible for the Verizon Severance Program. This program generally provides that in the event you incur a Qualifying Separation (generally defined as an involuntarily termination by the Company for reasons other than death, disability or for cause), you will be entitled to receive a separation payment based on your weekly compensation (base salary and target STI award opportunity divided by 52) times 2 times years of service, with a 26 week minimum and 35 week maximum, subject to your execution and non-revocation of a release of claims acceptable to Verizon." The "separation payment," to which the defendant would be entitled only in the event that he both incurred a "qualifying separation" and executed "a release of claims acceptable to Verizon" is qualitatively different from the defendant's "base pay."

In the detailed severance agreement, which the defendant executed on July 27, 2015, he acknowledged and agreed: "I will receive payment(s) and benefits by voluntarily signing this Release that I otherwise would not receive. I understand that I am being separated from the payroll and that I have been offered severance pay . . . and other benefits . . . in exchange for signing this Release." The release provided, in relevant part: "I am giving up my right to claim benefits and/or damages that relate to or arise from my employment with the

Company and/or separation from employment with the Company." The defendant testified that he did not have to sign a release in order to receive his regular salary. The severance agreement also contained a callback provision that required him to return ninety percent of the payment were he to violate certain provisions of the severance agreement.[14] Barth testified that base pay would never be called back.

The plaintiff argues that because the severance payment partially is based on STI and STI was determined in *Ayres I* to be a performance based bonus, the severance pay should be included within gross income. The documentary evidence and testimony, however, showed that the component of severance corresponding with the defendant's STI was paid as a percentage of the *target* of his STI, regardless of performance.[15] Exhibit A to the severance agreement indicated prorated 2015 STI based on "67 [percent] of calendar year *Target* prorated through Last Day of Active Employment." (Emphasis added.) Barth testified: "[I]f your severance date is before the end of the applicable short-term incentive plan year and you otherwise make the short-term incentive plan's eligibility requirements for

[14] Paragraph 11 of the severance agreement provided in relevant part: "*I understand there will be consequences if I breach this Release*. If I break my promises in paragraphs 7-10 of this Release, I will not be entitled to receive any outstanding portion of the Severance Payment or other benefits and compensation described in Attachment A of this Release, and Verizon shall be entitled to recover from me any Severance Payment or other benefits and compensation already paid at the time of breach, less 10 [percent], without affecting the validity of this Release which will remain in full force and effect." (Emphasis in original).

[15] Exhibit A further provided with respect to any PSUs and RSUs granted but outstanding and unpaid on the date the defendant separated from service, he would be "eligible for payment of these outstanding and unpaid PSUs and RSUs subject to the terms and conditions of the applicable award agreements that [he] received and executed with the grants and the terms of the [2009 plan] and, with respect to the PSUs, subject to the attainment of the applicable performance targets (all terms and conditions of such award agreement will remain in effect and are not superseded by this Release)."

that year, i.e., you're eligible to be in the plan, then the amount is prorated based on your service during the year regardless of performance. If the company had hit a 150 percent of target, he wouldn't get any more money. If the company had hit 50 percent of target, he wouldn't get any less money. He's getting an amount based on target, and that's the amount that's used to calculate his severance."

We conclude that, although the amount of the defendant's severance payment was determined by his base pay and eligibility for STI plan, the severance payment was distinct from both base pay and performance based bonuses and, therefore, does not fall within the definition of gross income pursuant to the separation agreement.

The judgment is reversed only as to the orders to include the defendant's RSU distributions and severance payment in the definition of "gross income" under § 3.2 of the parties' separation agreement and the case is remanded with direction to vacate those orders. The judgment is affirmed in all other respects.

In this opinion the other judges concurred.

JUAN COLON-COLLAZO *v.* LESLIE COX
(AC 40858)

Lavine, Prescott and Eveleigh, Js.

Syllabus

The plaintiff sought to recover damages for defamation from the defendant, who filed a counterclaim for breach of the parties' separation agreement, alleging, inter alia, that the plaintiff was in arrears on his obligation to pay unallocated alimony and child support. Thereafter, the plaintiff withdrew his complaint, the parties stipulated to the amount due on the counterclaim, and the trial court rendered judgment on the counterclaim in accordance with the parties' stipulation. The defendant subsequently applied for, and was granted, a property execution on the contents of a storage unit rented in the name of the plaintiff's father, and filed a claim for a determination of interests in the disputed property.

Following an evidentiary hearing, the trial court found that the plaintiff owned the contents of the storage unit but that a variety of items in the storage unit were exempt from property execution pursuant to statute (§ 52-352b). On the defendant's appeal to this court, *held*:

1. The trial court erred in determining, sua sponte, that certain property was statutorily exempt from execution; pursuant to the plain language of the applicable statute (§ 52-361b [d]), a judgment debtor may claim an exemption by returning a signed exemption claim form indicating the property claimed to be exempt, and because § 51-361b (d) makes clear that if a judgment debtor chooses to claim an exemption, the judgment debtor must return the exemption claim form, which the plaintiff here failed to do, the statutory procedures provided for in § 52-361b (d), which provide for notice, a stay of the property execution and a hearing to determine the rights to the disputed property, were not triggered.
2. Even if the plaintiff could assert a claim of exemption over the levied property without filing the necessary form, the plaintiff failed to seek a determination that the property was exempt, and, thus, the trial court should not have exempted any of the items from execution because it was never asked to do so; the sole claim of the plaintiff at the hearing was that the items in the storage unit did not belong to him, he failed to assert in any way that even if the property belong to him it should be deemed exempt as necessary to him, and, thus, the court improperly determined that certain items were necessary to the plaintiff despite the lack of any such claim being made and without supporting evidence.

Argued May 15—officially released October 1, 2019

Procedural History

Action to recover damages for defamation and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the defendant filed a counterclaim; thereafter, the plaintiff withdrew the complaint; subsequently, the matter was transferred to the judicial district of Stamford, where the court, *Heller, J.*, rendered judgment on the counterclaim for the defendant in accordance with a stipulation of the parties; thereafter, the court, *Hon. Edward J. Karazin, Jr.*, judge trial referee, ordered that certain property of the plaintiff was exempt from a property execution, and the defendant appealed to this court. *Reversed in part; further proceedings.*

Thomas B. Noonan, for the appellant (defendant).

Juan Colon-Collazo, pro se, the appellee (plaintiff) filed a brief.

Opinion

PRESCOTT, J. In this appeal from postjudgment proceedings to obtain satisfaction of a civil dissolution judgment, the defendant judgment creditor, Leslie Cox, appeals from the judgment of the trial court ordering that certain property of the plaintiff judgment debtor, Juan Colon-Collazo, is exempt from a property execution.[1] On appeal, the judgment creditor claims that the court improperly concluded that certain property she sought to levy was exempt because (1) the judgment debtor never filed a claim for an exemption as required by our statutes and case law and (2) its conclusion was not supported by any evidence. We reverse, in part, the judgment of the trial court.

The following facts, as found by the trial court, and procedural history are relevant. In February, 2012, the judgment debtor initiated an action against his former wife, the judgment creditor, alleging defamation. The judgment debtor withdrew the complaint, and the action proceeded on the judgment creditor's amended counterclaim, which alleged various breaches of the parties' separation agreement, including that the judgment debtor was in arrears on his obligations to pay unallocated alimony and child support. The judgment debtor was unrepresented during these underlying proceedings and on appeal. The parties stipulated to the amount due on the counterclaim, and, on November 23, 2015, the court, *Heller*, *J.*, rendered judgment on the counterclaim in the amount of $448,946.61, plus postjudgment interest.

On August 15, 2016, the judgment creditor applied for a property execution pursuant to General Statutes § 52-356a, which was issued by the clerk of the court. A levying officer seized the property in a storage unit

[1] For sake of clarity, we refer to Cox as the judgment creditor and Colon-Collazo as the judgment debtor rather than as defendant and plaintiff.

at Uncle Bob's Self Service Storage in Stamford (storage unit).[2]

On May 12, 2017, the judgment creditor filed a "Claim for Determination of Interests in Disputed Property" form that sought a determination of the parties' interests in the personal property in the storage unit, stating that the storage unit was leased in the name of the judgment debtor's father, Juan Colon-Pagan, but that the judgment debtor stored property in the storage unit that either belonged to him or was a former marital asset. See General Statutes § 52-356c.

The clerk of the court signed the section of the "Claim for Determination of Interests in Disputed Property" form entitled "Order For Hearing and Notice" and set a hearing date for June 5, 2017. Following an evidentiary hearing, the court, *Hon. Edward R. Karazin, Jr.*, judge trial referee, issued a memorandum of decision on July 28, 2017, that determined the interest in the disputed property contained in the storage unit. The court found that the storage unit was in the name of the judgment debtor's father, but that the judgment debtor owned the contents of the storage unit. The court noted that none of the witnesses provided a complete list of the items in the storage unit, and that it searched the records and photographs of the inside of the storage unit to determine its contents. The court determined that a variety of items in the storage unit statutorily were exempt, pursuant to General Statutes § 52-352b, from property execution and that various other items

[2] "Goods are levied as part of the process of execution of a judgment. . . . The execution of a writ of execution consists of two acts, the levy, or taking property into possession of the sheriff for sale, and the execution sale itself. . . . A levy on personal property is generally defined as a seizure of the property. Thus, in most jurisdictions, it is essential to the completion of a levy of execution upon personal property that there be a seizure, either actual or constructive, of the property." (Citations omitted; internal quotation marks omitted.) *Nemeth* v. *Gun Rack, Ltd.*, 38 Conn. App. 44, 52–53, 659 A.2d 722 (1995).

were to be sold.[3] The court ordered that all other boxes and items not identified were to be sold except that the judgment debtor would have the ability to review those boxes to retain financial papers containing personal, identifying information. The court ordered that the net proceeds of the sale exceeding $1000 be turned over to the judgment creditor, and that the judgment debtor was to retain up to the first $1000. The judgment creditor filed a motion to reargue, which the court denied. This appeal followed.

I

The judgment creditor claims that because the judgment debtor did not claim that some or all of the goods were exempt from levy execution by filing an exemption claim form, the court's determination that certain property statutorily was exempt from execution was improper. We agree.

To place the judgment debtor's claim on appeal in the proper context, we turn to the relevant statutory

[3] The court stated: "LIST OF ITEMS TO BE AWARDED OR SOLD:

"1. Charles Dickens desk—Exempt

"2. Base for the break front—Exempt

"3. Refrigerator—Sell

"4. Wine Refrigerator—Sell

"5. Desktop—Exempt

"6. Skis—Sell

"7. Daughter's bed—Sell

"8. Bikes—Sell all except one of the ex-husband's choice for health reasons

"9. Brown Jordan's Furniture—Sell

"10. Base for the partner's desk—Exempt

"11. Tennis balls and machines—Sell except for one tennis racket for health reasons and 3 balls

"12. Ducks bed of daughter—Sell

"13. Partner's desk—Exempt

"14. Skis—Sell

"15. Baseball mitt—Sell

"16. The lamp shown in Exhibit F5—Exempt

"17. Personal pictures as shown in Exhibit F10—Exempt except that the defendant is to make, at his expense, suitable copies for Leslie Cox . . . ."

scheme.[4] General Statutes § 52-356a (a) (1) provides in relevant part: "On application of a judgment creditor or a judgment creditor's attorney, stating that a judgment remains unsatisfied and the amount due thereon, and subject to the expiration of any stay of enforcement and expiration of any right of appeal, the clerk of the court in which the money judgment was rendered shall issue an execution pursuant to this section against the nonexempt personal property of the judgment debtor . . . ." Pursuant to General Statutes § 52-350f, "[a] money judgment may be enforced against any property of the judgment debtor unless the property is exempt from application to the satisfaction of the judgment under section . . . 52-352b . . . ." Section 52-352b provides a list of personal property that is exempt from a property execution.

The procedure by which a judgment debtor may claim an exemption is set forth in General Statutes § 52-361b (d), which provides in relevant part: "[A] judgment debtor may claim an exemption as to property . . . sought to be levied on . . . in a supplemental proceeding to the original action *by return of a signed exemption claim form*, indicating the property . . . claimed

[4] By way of background, we note that in 1983, the legislature passed Public Acts 1983, No. 83-581, which overhauled postjudgment procedures regarding the enforcement of judgments, attempting to balance the interests of judgment creditors and judgment debtors. Philip Dunn, chairman of the subcommittee responsible for drafting the act concerning postjudgment remedies, which included § 52-361b, stated: "This task [of drafting an act concerning postjudgment remedies] was assigned to the [c]ommission in 1981 . . . and at that time, the intent was to clean up a hodgepodge of legislation that regulated and controlled the enforcement of judgments. . . .

"I think the notice requirements of exemptions of the consumers is [a] large step forward and we feel that the disclosure provisions will be a help to the people who collect just debts. And I think there's no way [we] can avoid not wanting to have [the] just debt collected and by the same token, there is no intent by the [c]ommission or the legislature to try and take advantage of a citizen or consumer creditor or debtor." Conn. Joint Standing Committee Hearings, Judiciary, Pt. 3, 1983 Sess., p. 1075–76.

to be exempt . . . . *Any claim* with respect to a personal property execution under section 52-356a *shall be returned* within twenty days after levy on such property. On receipt of the claim, the clerk of the court shall promptly set the matter for a short calendar hearing and give notice of the exemption . . . claimed and the hearing date to all parties . . . .'' (Emphasis altered.)

Accordingly, this claim presents an issue of statutory construction over which our review is plenary. ''The principles that govern statutory construction are well established. 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. . . . Issues of statutory construction involve questions of law over which we exercise plenary review.'' (Citation omitted; internal quotation marks omitted.) *State* v. *Rodriguez-Roman*, 297 Conn. 66, 74–75, 3 A.3d 783 (2010).

The plain language of § 52-361b (d) provides that a *judgment debtor* may claim an exemption by returning a signed exemption claim form indicating the property claimed to be exempt. The use of the words ''may'' in the statute denotes that claiming an exemption is permissive conduct on the part of the judgment debtor. See *Lostritto* v. *Community Action Agency of New Haven, Inc.*, 269 Conn. 10, 20, 848 A.2d 418 (2004) (generally ''may'' imports permissive conduct and conferral

of discretion). That same subsection provides that a judgment debtor "shall" return a signed claim form, which suggests that the legislature intended to mandate a procedure that a judgment debtor must follow in order to make a claim for an exemption.[5] See id. (when legislature uses "shall" and "may" in same statute, those words "must then be assumed to have been used with discrimination and a full awareness of the difference in their ordinary meanings" [internal quotation marks omitted]); see also *Bailey* v. *State*, 65 Conn. App. 592, 604, 783 A.2d 491 (2001) (absent indication to contrary, use of mandatory term "shall" indicates mandatory legislative directive).

"The test to be applied in determining whether a statute is mandatory or directory is whether the prescribed mode of action is the essence of the thing to be accomplished, or in other words, whether it relates to a matter of substance or a matter of convenience. . . . If it is a matter of substance, the statutory provision is mandatory. If, however, the legislative provision is designed to secure order, system and dispatch in the proceedings, it is generally held to be directory, especially where the requirement is stated in affirmative terms unaccompanied by negative words." (Internal quotation marks omitted.) *Katz* v. *Commissioner of Revenue Services*, 234 Conn. 614, 617, 662 A.2d 762 (1995).

In our view, the returning of the claim form is an essential part of the process mandated by the statutory

[5] We need not decide whether the twenty day time limit is mandatory or whether the court can permit a late return of the exemption claim form because, in the present case, the judgment debtor did not claim an exemption at any time. At issue in the present case is whether it is the burden of the *judgment debtor* to claim an exemption or whether a trial court properly can exempt certain property even if the judgment debtor failed to claim an exemption or failed to offer any evidence that certain property statutorily should be exempt.

subsection. The return of the exemption claim form gives the judgment creditor notice of the dispute as to ownership of the seized property and provides the judgment debtor with an opportunity for a hearing to resolve the dispute. General Statutes § 52-361b (d). Pending the hearing on such claim, the execution is stayed and the marshal cannot dispose of the assets. General Statutes § 52-361b (e). Thus, the language of § 52-361b (d) makes clear that if a judgment debtor chooses to claim an exemption, the judgment debtor must return the exemption claim form.

Case law and other authority provide additional support for our determination that it is the judgment debtor's burden to claim an exemption. See *Great Country Bank* v. *Ogalin*, 168 Conn. App. 783, 800–803, 148 A.3d 218 (2016) (third party's claim that certain expenses not subject of property execution rejected, inter alia, because judgment debtor did not avail himself of statutory process to claim exemption under § 52-361b). "Property is not automatically exempted; it may be exempted provided the debtor follows proper procedure. Connecticut provides a simple procedure for judgment debtors to claim exemptions. . . . Accordingly, debtors are required to follow the statutory requirements to claim exemptions." (Citations omitted; emphasis omitted.) *Shrestha* v. *State Credit Adjustment Bureau, Inc.*, 117 F. Supp. 2d 142, 145 (D. Conn. 2000); see id., 145–46 (interpreting similar statute, General Statutes § 52-367b).

Although the judgment debtor was served with the property execution, which included a notice of judgment debtor rights, and was served with a copy of the exemption form, he did not claim an exemption by filing the exemption claim form. The exemption claim form, JD-CV-5b, includes a section entitled "Section 5–Claim

of Exemption Established by Law."[6] Because the judgment debtor did not return the exemption form identifying property to be exempt, the statutory procedures in § 52-361d, which provide for notice, a stay of the property execution, and a hearing to determine the parties right to the disputed property, were not triggered.

In the present case, the judgment creditor requested a hearing to determine the rights to the property that was stored in a unit leased by the judgment debtor's father. At the hearing, the judgment debtor maintained that the seized property belonged to his father.[7] Therefore, even if other procedures in addition to those set forth by statute might be sufficient to claim an exemption, the judgment debtor failed to claim properly an exemption at any time during the pendency of the proceedings before the trial court.[8] Accordingly, the court

[6] Section 4 of the exemption claim form provides in relevant part: "As a result of a judgment entered against you the attached execution has been issued against your personal property. Some of your personal property may be exempt from execution—Certain classes of personal property may be protected from execution by state statutes or other laws or regulations of this state or of the United States. A checklist and description of the most common classes of personal property of a natural person exempt from execution are listed on page 2 of this form.

"How to claim an exemption established by law—If you want to claim that the property levied on by the levying officer is exempt by law from execution you must fill out and sign the Claim of Exemption on page 2 of this form and return this exemption claim form to the clerk of the Superior Court at the address above. The form must be received by the clerk of the Superior Court within 20 days after levy on the property. Upon receipt of this form, the court clerk will send you and the judgment creditor the date of the court hearing on your claim." (Emphasis omitted.)

[7] The judgment debtor's father did not seek to intervene in the proceedings to assert any claim of ownership in the property that was levied by the marshal.

[8] "[Although] . . . [i]t is the established policy of the Connecticut courts to be solicitous of [self-represented] litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the [self-represented] party . . . we are also aware that [a]lthough we allow [self-represented] litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law." (Internal quotation marks omitted.) *Tonghini* v. *Tonghini*, 152 Conn. App. 231, 240, 98 A.3d 93 (2014).

improperly determined, sua sponte, that certain property was exempt from the property execution pursuant to § 52-352b.

II

Even if we were to conclude that a judgment debtor can assert a claim of exemption over levied property without filing the necessary form, we would still conclude, on the present record, that the judgment debtor failed to seek a determination that the property was exempt. Thus, we agree with the judgment creditor's alternative claim that the judgment debtor presented no claim or evidence at the hearing that any of the seized property was exempt.

"As a general rule, the party asserting an exemption from execution, attachment, or seizure to satisfy a judgment bears the burden of establishing entitlement to the exemption. Once a judgment creditor proves a judgment debtor owns property, it is the judgment debtor's burden to prove that the property is exempt from attachment." (Footnote omitted.) 31 Am. Jur. 2d 1002, Exemptions § 311 (2012).

A determination that property is "necessary" and therefore exempt from a property execution is a question of fact. See *Patten* v. *Smith*, 4 Conn. 450, 454 (1823) (whether articles claimed to be exempted are necessary is factual inquiry). "[A] finding of fact will not be overturned unless it is clearly erroneous in light of the evidence in the entire record. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . ." (Citations omitted; internal quotation marks omitted.) *Baretta* v. *T & T Structural, Inc.*, 42 Conn. App. 522, 525, 681 A.2d 359 (1996).

Section 52-352b provides in relevant part: "The following property of any natural person shall be exempt: (a) Necessary apparel, bedding, foodstuffs, household furniture and appliances . . . (f) Health aids necessary to enable the exemptioner to work or to sustain

health . . . .'' The term "necessary" is defined within the postjudgment procedure statutes in relevant part as "reasonably required to meet the needs of the exemptioner . . . ."[9] General Statutes § 52-352a (b). The court found that certain sports equipment was exempt for health reasons, and that some of the bedding, household furniture and appliances in the storage unit was also exempt. See footnote 3 of this opinion. In its decision on the judgment creditor's motion to reargue, the court explained that it took into consideration the statutory definition of the word "necessary."

An examination of the claim before us[10] reveals that the court found items to be "necessary" to the judgment debtor despite the lack of any such claim being made and without supporting evidence. The sole claim of the judgment debtor at the hearing was that the items in the storage unit did not belong to him. He failed to assert in any way that even if the property belonged to him that it should be deemed exempt as necessary to him. He testified that in March, 2012, the items were placed in a storage unit leased by his father and that the items were transferred to his father at that time. The judgment debtor argued that, sometime thereafter, he had returned to Puerto Rico years before the hearing. The judgment debtor presented no evidence or argument at the hearing that any property in the storage

[9] Also included in the definition of "necessary" are items reasonably required to meet the needs of the exemptioner's "dependents including any special needs by reason of health or physical infirmity." The court did not find that any of the items associated with the judgment debtor's daughter were exempt and no mention was made at the hearing or in the decision of the judgment debtor having any special needs.

[10] The court found that some bedding, household furniture and appliances were exempt and some were not exempt. It is clear that the court applied the word "necessary" to modify each item in § 52-352b (a). Because no claim was raised, and because the requirements in *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 161–64, 84 A.3d 840 (2014), for raising nonjurisdictional claims sua sponte have not been met, we make no determination as to whether the court's application was proper.

unit should be deemed exempt and presented no evidence that the seized property was "necessary" to him. Having resolved the question of whether the property was owned by the judgment debtor and not his father, the trial court should not have exempted any of the items from execution because it was never asked to do so.[11]

The judgment is reversed as to the portion of the court's order exempting certain property from the execution and the case is remanded for further proceedings as to that property; the judgment is affirmed in all other respects.

In this opinion, the other judges concurred.

CONG DOAN *v.* COMMISSIONER OF CORRECTION (AC 41026)

Elgo, Bright and Beach, Js.

Syllabus

The petitioner, who previously had been convicted on a guilty plea of home invasion and kidnapping in the first degree, sought a writ of habeas corpus, claiming that his trial counsel provided ineffective assistance by failing to investigate his mental health and to retain a forensic psychologist to aid in mitigating his sentence. The petitioner had gone to the home of a family for whom he had previously worked, took cash from the homeowner, tied the hands of the homeowner and her minor son with rope and forced the homeowner to write several checks and to sign a contract to make it look as if she owed him money, after which he bound their mouths with duct tape and confined them in the home. The homeowner was able to convince the petitioner that she should accompany him to the bank, where she withdrew cash and wrote another check to the petitioner, who then asked the homeowner to drive him

[11] Even if the judgment debtor had claimed that some or all of the property was exempt because it is reasonably required to meet his needs, we note that the items have been in storage since 2012. This fact seems fundamentally inconsistent with any claim that they are necessary to meet the needs of the judgment debtor, who had asserted at the hearing that he had been in Puerto Rico for much of that time and had been to the storage facility only once since 2012.

to Vernon, where she dropped him off before returning home and calling the police. The habeas court rendered judgment denying the habeas petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The habeas court abused its discretion in denying the petition for certification to appeal; the petitioner's claims that his trial counsel rendered ineffective assistance in not investigating his mental health and retaining a forensic psychologist were, as the habeas court recognized, a close issue, and, thus, the petitioner's appeal was not frivolous, and the question he raised was adequate to deserve encouragement to proceed further.

2. The petitioner could not prevail on his claim that his trial counsel rendered deficient performance by failing to investigate his mental health and to retain a forensic psychologist to aid in mitigating his sentence: the petitioner could not overcome the strong presumption that his counsel's performance fell within the wide range of reasonable professional assistance, as the habeas court credited counsel's assessment of the petitioner as an intelligent adult who coherently and cogently discussed his case with trial counsel, displayed wide understanding of the legal process and showed no discernable signs of mental problems; moreover, counsel had inquired of the petitioner as to whether he ever had issues with mental illness or received mental health care, which the petitioner denied and counsel confirmed with the petitioner's family, counsel addressed certain disagreements he had with the petitioner's presentence investigation report and presented a detailed and articulate sentencing memorandum, as well as a letter from the petitioner's sister, in an attempt to explicate why the petitioner would conceive of and execute a plot to extort money from the victims, and counsel's mitigation strategy was crafted and executed on the basis of the petitioner's history of repeated setbacks in his life that culminated in the home invasion incident, as the petitioner and his family members denied that he had mental health issues and, instead, gave counsel information to prepare a mitigation defense.

Argued April 16—officially released October 1, 2019

Procedural History

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

James B. Streeto, senior assistant public defender, for the appellant (petitioner).

Nancy L. Chupak, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Angela R. Macchiarullo*, senior assistant state's attorney, for the appellee (respondent).

Opinion

ELGO, J. The petitioner, Cong Doan, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. On appeal, the petitioner claims that the court (1) abused its discretion in denying his petition for certification to appeal and (2) improperly concluded that he was not denied the effective assistance of trial counsel. We agree that the court abused its discretion in denying the petition for certification to appeal. Nonetheless, we conclude that the court properly determined that the petitioner was not denied the effective assistance of trial counsel. We, therefore, affirm the judgment of the habeas court.

The record reveals the following relevant facts and procedural history. On November 10, 2011, the petitioner went to the home of a family for whom he had previously completed flooring work. The petitioner approached the front door numerous times, pretending that his car broke down and that he needed to use a telephone. Finally, on approximately the fourth time he approached the house, when the female homeowner opened the door, the petitioner stormed past her and shut the door behind him. He then grabbed the female homeowner and placed her in a chokehold. He told her that he was sorry and that she should follow his instructions. She tried to pull away and the struggle caused them to fall to the floor. The petitioner asked her where she kept her money. After retrieving envelopes

of cash, the petitioner brought the female homeowner upstairs to the master bedroom, where he tied her hands with rope.

Subsequently, the homeowner's thirteen year old son came home. As the son entered the house, the petitioner held the female homeowner's mouth shut with his hand and told her not to make any noise. The son went upstairs and found his mother with her hands bound. The petitioner then apologized to the son and tied him up so that his hands were tied behind his back. Next, the petitioner forced the female homeowner to sign a contract to make it look like she owed him money. He also forced her to write out several nonsequential checks in different amounts.

After putting duct tape over their mouths, the petitioner forced the female homeowner and the son into a closet. He told them that he was going to cash the checks at a bank and return to intercept the male homeowner in order to tie him up as well. Thereafter, the petitioner put the female homeowner and the son in the basement. He tied their feet and told them not to do anything foolish. At some point, the petitioner removed the duct tape from their mouths. The female homeowner was then able to convince the petitioner that she should accompany him to the bank. The petitioner, the female homeowner, and the son went to the bank where the female homeowner attempted to withdraw $20,000. Because she was permitted to withdraw only $10,000 in cash, the female homeowner also made out a check for $10,000 to the petitioner. The petitioner took the cash and the check and asked the female homeowner to drive him to Vernon, where she dropped him off.

The female homeowner and the son then returned home. They told the male homeowner what had happened and called the police. Thereafter, the petitioner was apprehended. He confessed to the police, told the

male homeowner that he was sorry, and offered to be the homeowners' slave.

On June 3, 2013, the petitioner entered a guilty plea to home invasion in violation of General Statutes § 53a-100aa (a) (1) and two counts of kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (B). Pursuant to the transcript of the plea hearing, the petitioner agreed to a sentence of not less than ten years and up to twenty-five years to serve.

On June 17, 2013, counsel met with the petitioner at MacDougall-Walker Correctional Institution in Suffield, where the petitioner was being held. At the meeting, the petitioner raised the possibility of withdrawing his guilty plea. In response, counsel drafted a chart in order to show the petitioner the likely outcomes associated with filing that motion.[1] The petitioner also asked counsel to withdraw his representation.

Subsequently, counsel sent the petitioner a three page letter dated July 2, 2013, in which counsel advised the petitioner that he had filed a motion to withdraw his representation, but cautioned the petitioner that the court may not grant the motion and permit him to withdraw from the case. Counsel also addressed the petitioner's attempt to file an appearance in order to begin representing himself so that he could withdraw his guilty plea. Counsel explained that it was unlikely that the sentencing judge would allow the petitioner to represent himself or allow him to withdraw his guilty plea.

[1] Counsel's chart indicated that, if the petitioner proceeded to sentencing, he was facing a minimum sentence of ten years of imprisonment to serve and that the victims would likely demand "at least" twenty to twenty-five years. Counsel's chart also indicated that, should the petitioner insist on filing a motion to withdraw his guilty plea, and if the court denied that motion, the petitioner could face a longer sentence with an additional twelve to twenty-four months, "more or less." If the court were to grant that motion, counsel's chart explained, the petitioner would either face a new plea deal that would likely be worse, or he would face a "98 [percent] certain" risk of conviction at trial with a prison term of fifteen to twenty years to serve.

Counsel also explained the repercussions of the petitioner's decision to try to withdraw his guilty plea. Counsel's letter stated in part that "[the judge] will . . . consider your attempt to [withdraw your guilty plea] as an expression or indication that you are not fully or truly accepting full responsibility for what you did. This will probably cause her to consider imposing a harsher or increased sentence upon you whenever you are sentenced. While you may find this as unfair, in my experience over the past [twenty-six and one-half] years, judges and prosecutors tend to look poorly on defendants whom they see as trying to avoid responsibility or shift blame onto others or who they think are trying to manipulate or game the system. Although I do not believe that any of such negative factors apply to you, you should understand that others may tend to believe that they do by your effort to take back your guilty plea."

In his letter, counsel also explained what sentence he believed the petitioner was facing with his guilty plea and what he could receive if he went to trial. Counsel stated that the sentencing judge had indicated that she intended to sentence the petitioner to ten to twelve years of imprisonment "based on the facts of [his] case and subject to her learning more about [the petitioner] and hearing more from [the] victims." Counsel also stated that, if the petitioner were allowed to withdraw his guilty plea and proceed to trial, "[a] reasonable estimate of a prison term for a person convicted of home invasion after trial would start at a low of [twenty] years to serve and could easily and quickly get to a range of more than [twenty-five] years to serve in prison with another [ten] or [twenty] years suspended over the person's head for a full [five] year probation term."

On July 18, 2013, the petitioner appeared before the court, at which time his counsel explained that the petitioner had attempted to file an appearance in order

to begin representing himself. The court ruled that the petitioner would not be permitted at this late stage in the proceedings to represent himself, but that he could direct counsel to file a motion to withdraw his guilty plea if he so wanted. After the petitioner expressed his desire to file a motion to withdraw his guilty plea, the court allowed the petitioner to make his argument orally. In his oral motion to withdraw his guilty plea, the petitioner asserted that he disagreed with the home invasion charge, that he felt as if he was "strong-armed" into pleading guilty, and that he and counsel never talked about building a case. In response, the court read portions of the transcript of the June 3, 2013 proceeding during which the petitioner was canvassed before pleading guilty. The court denied the petitioner's oral motion on the ground that he did not present any ground that would allow the plea to be withdrawn. The court, however, stated that the petitioner could put his motion to withdraw in writing if he wanted to do so and have it filed through counsel.

A sentencing hearing was held on August 15, 2013. The court began the hearing by addressing the petitioner's written motion to withdraw his guilty plea, which the petitioner had filed with the court. Counsel represented that he had not seen the petitioner's motion. Counsel stated that he did not believe that the petitioner was in "any way incompetent" but that he believed the petitioner was naive and "inexperienced in the law . . . ." He argued that he believed the petitioner was motivated "not by any avoidance of responsibility or shifting of blame, or foolish expressions of excuse, but he's fixated on the notion of his family, and of the belief that somehow maybe things could be different so that although he knows he deserves to be punished substantially for what he did, he was hopeful that he could be

punished less severely." After hearing from the petitioner, the court denied the petitioner's motion, concluding that he had not met his burden of establishing a valid reason for withdrawing his guilty plea.

At the sentencing hearing, the petitioner's counsel then presented the court with certain mitigation evidence, including a defense sentencing memorandum, a letter from the petitioner's sister, and two letters from the petitioner's children. Counsel also addressed the presentence investigation report (report) prepared by the Office of Adult Probation and made various corrections or clarifications to its contents. Additionally, in his sentencing argument, counsel acknowledged the petitioner's remorse for what had transpired, and emphasized the petitioner's circumstances and desperation at the time he committed the crime. Counsel described the petitioner's course of action as an "artifice" and "absolute insanity," and he stated that the petitioner was "completely out of his mind, in duress of the circumstances that he found [himself] in . . . ." The petitioner also addressed the court and the victims. He expressed remorse for what he had done, but he also stated that the "person that did that, he's no longer around. That person's gone. I'm here."

The female homeowner, the male homeowner, and the son were present at the sentencing hearing. Both the female homeowner and the son read statements to the court in which they described their experience and the lasting impact that it has had on their lives. In her remarks, the female homeowner asked that the court "make the justice to put this evil person with no heart and soul in the prison where he deserves to be locked up without freedom for a maximum sentencing, if not for a life in prison."

Before imposing the petitioner's sentence, the court first noted that the petitioner had entered a plea to three class A felonies, that one of the victims was a

minor child, and that the petitioner was the sole perpetrator. The court then discussed the "extremely high degree of violence" that occurred. Although the court recognized that the petitioner had a limited criminal record, it characterized the petitioner's background and this incident as depicting "a pattern of theft."[2] Additionally, the court stated that it could not "emphasize enough that it recognizes the impact on the victims here, both physically and psychologically." The court stated that it believed the petitioner "is a true example of a sociopath," given his ability to "torture someone, say he's sorry, torture them some more, ask . . . if he can come into their lives as a slave, and then come here and say that that person no longer exists." In light of those considerations, the court sentenced the petitioner to a total effective term of twenty years incarceration followed by five years of special parole. The petitioner thereafter did not file a direct appeal.

Years later, on July 24, 2017, the petitioner filed an amended petition for a writ of habeas corpus predicated on the alleged ineffective assistance of trial counsel.[3] Specifically, the petitioner alleged that counsel was ineffective because he failed to investigate his mental health and to retain the services of a forensic psychologist to aid in mitigating his sentence.[4] A trial on the petitioner's amended petition was held on October 2, 2017, at which the court heard testimony from the petitioner, the petitioner's trial counsel, and the petitioner's two experts—Dr. Erik Frazer, a licensed clinical psychologist who specializes in forensic psychology, and Attorney Frank J. Riccio, Jr.

[2] The petitioner previously had been convicted of a felony that involved the passing of bad checks in Louisiana.

[3] Although the petitioner first was represented by a different attorney, his ineffective assistance of counsel claim solely concerns the acts of his second attorney, John F. O'Brien, who represented him at all relevant times.

[4] Although the amended petition for a writ of habeas corpus included additional claims of ineffective assistance of counsel, those claims are not at issue in this appeal.

In its October 5, 2017 memorandum of decision, the habeas court found that the petitioner's counsel "performed within the necessarily broad expectations of competent representation." In coming to this conclusion, the court specifically noted that counsel observed no signs of mental illness in his client, and that counsel was told by the petitioner and his family that no issues with mental illness existed. Accordingly, the court denied the amended petition for a writ of habeas corpus, and, on October 16, 2017, the court denied the petitioner's petition for certification to appeal. This appeal followed.

"Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, [the petitioner] must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 181 Conn. App. 572, 577–78, 187 A.3d 543, cert. denied, 329 Conn. 909, 186 A.3d 13 (2018). We address each of those two prongs in turn.

I

The petitioner first claims that the court abused its discretion in denying his petition for certification to appeal. We agree.

"To prove that the denial of his petition for certification to appeal constituted an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable

among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . . In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by [our Supreme Court] for determining the propriety of the habeas court's denial of the petition for certification." (Internal quotation marks omitted.) Id., 578.

On our review of the claim raised by the petitioner, we agree with the petitioner that the habeas court abused its discretion in denying his petition for certification to appeal. The petitioner claims that trial counsel rendered ineffective assistance in not investigating his mental health and retaining a forensic psychologist to aid in mitigating his sentence. As the habeas court recognized in its memorandum of decision, the issue of his counsel's performance is "a close issue . . . ." We agree with that assessment. As such, the petitioner's appeal is not frivolous and the question is adequate to deserve encouragement to proceed further. Accordingly, we conclude that the court abused its discretion in denying the petition for certification to appeal and proceed to a full review of the merits of the petitioner's appeal.

II

The petitioner claims that he was denied his constitutional right to effective assistance of counsel on the basis of trial counsel's failure to use a forensic psychologist to investigate and evaluate the petitioner's mental

health and to use the results of that evaluation as evidence of mitigation at sentencing. We disagree.

In considering the merits of the petitioner's ineffective assistance of counsel claim, we first set forth the legal standard and relevant principles of law that govern our review. "The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . Historical facts constitute a recital of external events and the credibility of their narrators. . . . Accordingly, [t]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review. . . .

"Furthermore, it is well established that [a] criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. *Strickland* v. *Washington* [466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. . . . It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law." (Citations omitted; internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 677–78, 51 A.3d 948 (2012).

"With respect to the performance prong of *Strickland*, we are mindful that judicial scrutiny of counsel's

performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that [the] conduct [of trial counsel] falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." (Emphasis omitted; internal quotation marks omitted.) *Grover* v. *Commissioner of Correction*, 183 Conn. App. 804, 819–20, 194 A.3d 316, cert. denied, 330 Conn. 933, 194 A.3d 1196 (2018). Applying this standard to the petitioner's claims, we conclude that the petitioner has failed to meet his burden of demonstrating deficient performance and, therefore, we do not reach the issue of prejudice.[5]

In rejecting the petitioner's claim that the failure to secure a forensic psychologist demonstrated deficient performance, the court relied on and credited counsel's

[5] "When a petitioner has failed to meet the performance prong of *Strickland*, we need not reach the issue of prejudice . . . . It is well settled that [a] reviewing court can find against a petitioner on either ground, whichever is easier." (Citation omitted; internal quotation marks omitted.) *Grover* v. *Commissioner of Correction*, supra, 183 Conn. App. 818 n.7.

assessment of his client as "an intelligent adult who coherently and cogently discussed his case with [his trial counsel] Attorney [John F.] O'Brien. The petitioner displayed wide understanding of the legal process as explained by his attorney and showed no discernable signs of mental problems." In addition, the court found that counsel specifically inquired of the petitioner as to whether he had ever had prior issues with mental illness or received mental health care. The petitioner truthfully denied any issues with his mental health, which counsel then confirmed in his inquiries of the petitioner's family. The court thus concluded that, "[u]nder these circumstances, reasonable advocates could refrain from engaging the services of a forensic psychologist." We agree.

As the petitioner concedes, there is no per se rule that requires a trial attorney to call an expert in a criminal case. See *Michael T.* v. *Commissioner of Correction*, 307 Conn. 84, 100–101, 52 A.3d 655 (2012) (recognizing that our Supreme Court "has never adopted a bright line rule that an expert witness for the defense is necessary in every . . . case"); *Antonio A.* v. *Commissioner of Correction*, 148 Conn. App. 825, 833, 87 A.3d 600 ("there is no per se rule that requires a trial attorney to seek out an expert witness" [internal quotation marks omitted]), cert. denied, 312 Conn. 901, 91 A.3d 907 (2014). Relying on *Copas* v. *Warden*, 30 Conn. App. 677, 621 A.2d 1378 (1993), the petitioner nonetheless argues that it was objectively unreasonable for counsel to fail to have his client evaluated by a forensic psychologist. He notes that, in *Copas*, no expert testimony was offered or utilized in the underlying trial and that one of the allegations before the habeas court was the claim that counsel was deficient for failing to secure an independent evaluation of the petitioner. The petitioner's reliance on *Copas*, however, is misplaced. This court did not hold in *Copas* that trial counsel was ineffective

on the basis of his failure to secure an expert. See id., 685. Instead, this court held that the petitioner in *Copas* established deficient performance because trial counsel failed to "point out inconsistencies between the presentence investigation and the diagnostic clinic evaluation coupled with his inadequate presentation at sentencing . . . ." Id. At sentencing, trial counsel in *Copas* only minimally discussed mitigating factors regarding the petitioner's mental state and family history, and failed to have family members present to speak on behalf of the petitioner. Id., 680. By contrast, the habeas court in the present case specifically found that counsel addressed certain disagreements he had with the report and presented a very detailed and articulate sentencing memorandum in which he "attempted to explicate why the petitioner, a forty year old person who had exhibited no violent behavior previously, would conceive of and execute such a terrifying plot to extort money from the victims."[6] Furthermore, unlike in *Copas*, counsel in the

[6] In the sentencing memorandum prepared by the petitioner's trial counsel, counsel went through a detailed history of the major events in the petitioner's life leading up to the crime. The memorandum began with the petitioner's birth in Vietnam and his parents' arrival in the United States as refugees after fleeing a communist regime and further recounted: his service in the army with three commendations and an honorable discharge, his marriage and the birth of his three daughters, his operation of a cleaning and repair business in Louisiana, which he subsequently gave up to his wife following his divorce in exchange for primary custody of their three children, his relationship with a girlfriend whose four children he combined with his own, his move to Connecticut sometime after Hurricane Rita destroyed his home in 2005, and his acquisition of a flooring business, which ultimately failed.

The sentencing memorandum further recounted that, after the petitioner returned to Louisiana with his girlfriend and their combined family, he joined his father's shrimping business until they lost their homes in Hurricanes Gustav and Ike in 2008. According to the sentencing memorandum, the petitioner then returned to Connecticut until additional stresses led to his children being sent to live with his sister and to the breakup with his girlfriend in the months before the crime. The sentencing memorandum also went through the crime itself and the petitioner's state of mind at that time. Counsel explained that, when the petitioner committed the crime, his "personal and financial troubles consumed and overwhelmed him." More-

present case submitted a letter from the petitioner's sister who "thoughtfully and poignantly tried to do the same."

The petitioner also contends that counsel's investigation of his mental health issues was deficient because counsel had a duty to go beyond inquiring of the petitioner and his family to determine whether the petitioner had mental health issues. In arguing that the failure to consult with a forensic psychologist amounts to deficient performance with respect to counsel's duty to investigate, the petitioner relies on *Rompilla* v. *Beard*, 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005), and *Siemon* v. *Stoughton*, 184 Conn. 547, 440 A.2d 210 (1981).

"Constitutionally adequate assistance of counsel includes competent pretrial investigation." *Siemon* v. *Stoughton*, supra, 184 Conn. 554. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. . . . That is, counsel's decision to forgo or truncate an investigation must be directly assessed for reasonableness in all the circumstances . . . . In assessing the reasonableness of an attorney's investigation . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. . . . In addition, in contrast to our evaluation of the constitutional adequacy of counsel's strategic decisions, which are entitled to deference, when

over, the petitioner "was absolutely desperate and incapable of any rational thoughts to resolve his situation. He was essentially out of his mind with anxiety, depression and utter confusion about what to do to save his family and his business." Counsel further explained that the petitioner "never meant to harm" the victims, and that he was "truly very sorry for what he did and for all of the fear and physical and emotional harm that he caused this family."

the issue is whether the investigation *supporting* counsel's [strategic] decision to proceed in a certain manner was itself reasonable . . . we must conduct an objective review of [the reasonableness of counsel's] performance . . . ." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Skakel* v. *Commissioner of Correction*, 329 Conn. 1, 32, 188 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 788, 202 L. Ed. 2d 569 (2019).

Thus, the assessment of what is reasonable must take into account all of the information available to counsel that has informed his or her judgment, including the determination of whether to forgo further investigation. In *Rompilla*, supra, 545 U.S. 381–83, the United States Supreme Court, in part, found deficient performance in counsel's reliance on an uncooperative defendant and family members who did not know him well in preparing a mitigation defense. The petitioner here has not claimed that either he or his family members refused or were unable to provide relevant information to counsel. To the contrary, as already noted, counsel produced a seven page, single spaced sentencing memorandum, which, as relied on by the court, was a detailed and articulate recitation of the petitioner's tragic personal history. Moreover, the determination in *Rompilla* that the petitioner was deprived of his right to effective assistance of counsel was also informed by counsel's failure to review the defendant's prior conviction records after the state specifically put counsel on notice that it intended to use the defendant's prior convictions for rape and assault to establish an aggravating factor in a death penalty case. Id., 383.

In his reply brief, the petitioner responds to this additional basis for deficient performance in *Rompilla* by arguing that counsel's failure to consult with a forensic psychologist in this case is analogous to the failure to review conviction records, and that, in the absence of a strategic reason for doing so, *Rompilla* requires a

finding that counsel rendered ineffective assistance. We are not persuaded. The failure to investigate known and inherently damaging information, which the state has made clear it would use against the petitioner in *Rompilla*, is simply not comparable to the claimed omission here.

The petitioner's reliance on *Siemon* similarly is misplaced. In *Siemon*, supra, 184 Conn. 557, our Supreme Court concluded that trial counsel was deficient for failing to follow up on information in the state's file that suggested the possibility of another culpable party. In both *Rompilla* and *Siemon*, the omissions of counsel had no strategic merit but were clear manifestations of inattention and a lack of oversight. See *Skakel* v. *Commissioner of Correction*, supra, 329 Conn. 35 (noting that it is only "when counsel's failure to proceed with an investigation is due not to professional or strategic judgment but, instead, results from oversight, inattention or lack of thoroughness and preparation, [that] no deference or presumption of reasonableness is warranted").

The same is true with respect to the petitioner's reliance on *Siano* v. *Warden*, 31 Conn. App. 94, 623 A.2d 1035, cert. denied, 226 Conn. 910, 628 A.2d 984 (1993), which he characterizes as "[t]he most compelling precedent . . . ." In *Siano*, counsel failed to secure evidence specifically identified by the petitioner, including medical records and the testimony of the petitioner's orthopedic surgeon, which, if proffered, would have directly refuted testimony of the state's principal witness by establishing that the petitioner did not have the physical capacity to commit the residential burglary underlying the petitioner's conviction. Id., 99–100. This court concluded that trial counsel's performance was deficient because his "failure to call the surgeon was not a strategic or tactical decision. His alleged strategy left the [petitioner] without a key witness and a viable defense." Id., 105.

The petitioner argues that counsel "knew or should have known about potential mental health issues, which, like the medical issues in *Siano*, would have directly supported his chosen defense, mitigation." In contrast to *Siano*, however, the petitioner in the present case provided counsel with information that he had no medical or mental health issues and no history of mental health treatment. Moreover, aside from the undisputed depression and anxiety, which one might reasonably expect upon a first time arrest and incarceration for serious felonies, the petitioner did not present as if he had mental health issues. Rather, the petitioner and his family members denied such issues and, instead, gave counsel information from which counsel prepared a mitigation defense. Far from ignoring information presented to him, as did counsel in *Rompilla*, *Siemon* and *Siano*, counsel in the present case crafted and executed his mitigation strategy on the basis of the petitioner's history of ongoing and repeated setbacks that culminated in the desperate home invasion incident. See footnote 6 of this opinion.

"Inasmuch as [c]onstitutionally adequate assistance of counsel includes competent pretrial investigation . . . [e]ffective assistance of counsel imposes an obligation [on] the attorney to investigate all surrounding circumstances of the case and to explore all avenues that may potentially lead to facts relevant to the defense of the case." (Citation omitted; internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 680. Nonetheless, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the [petitioner's] own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the [petitioner] and on information supplied by the [petitioner]. In particular, what investigation decisions are reasonable depends critically on such information. . . .

[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." (Internal quotation marks omitted.) Id., 681, quoting *Strickland* v. *Washington*, supra, 466 U.S. 690–91.

As noted by the habeas court in its memorandum of decision, the petitioner's counsel "testified at the habeas trial that he has employed forensic psychologists as a resource in criminal cases but saw no need to consult with such an expert in the petitioner's matter. The petitioner was an intelligent adult who coherently and cogently discussed his case with Attorney O'Brien. The petitioner displayed wide understanding of the legal process as explained by his attorney and showed no discernable signs of mental problems. Attorney O'Brien inquired of the petitioner regarding whether such issues had arisen in the past and whether he had ever received mental health care. The petitioner truthfully responded that he had never sought or received such care previously. The petitioner's attorney inquired about this topic with the petitioner's family, and the petitioner's sister confirmed that the petitioner had never engaged such care before." Crediting this evidence, the court properly concluded that it was not unreasonable for counsel—relying on the petitioner's representations, the representations of the petitioner's family, and his own judgment—to present his mitigation strategy without securing a forensic psychologist.

Notably, the petitioner does not take issue with counsel's theory of mitigation, which he discussed in his brief as follows: "The petitioner was not a bad person, an evil person, a sociopath or a chronic lawbreaker. He was a man who served his country in the military, worked hard, supported his family, and lived a quiet, law-abiding life until a toxic combination of economic and social factors, mental illness, and bad luck had pushed him over the edge." Instead, the petitioner

argues that having chosen that theory, it was objectively unreasonable for counsel not to retain an expert to assist in the presentation of the petitioner's mitigation case at sentencing.[7] The petitioner essentially claims that a forensic psychologist's recitation of the same mitigating factors—that this was an isolated act made by a desperate man who was suffering from depression and anxiety—simply would have been more persuasive than counsel's argument of the same.[8] The petitioner also relies on Riccio's testimony that an opinion of a forensic psychologist would have been "very helpful," even though Riccio also acknowledged that the procurement of an expert comes with risk to a defendant.[9] Leaving aside the fact that deficient performance is not measured by whether counsel has failed to elect the superior strategy, it is by no means obvious that a forensic psychologist's opinion, drawn from review of records, would have been a more powerful counterweight to the victims' accounts of their terror than counsel's impassioned account of the petitioner's unremittingly tragic personal history leading up to the crime.

"[W]hether [counsel's] actions fell below an objective standard of reasonableness turns on whether his decision . . . can be considered sound trial strategy, or

[7] In particular, the petitioner notes that counsel argued at sentencing that the petitioner was "out of his mind" and that his actions were "absolute insanity." It appears, however, that counsel was using those terms colloquially and not suggesting a diagnosis of mental disease, which he had no reason to believe existed.

[8] Notably, Frazer, having never met the petitioner, did not testify as to whether he had made a diagnosis. Instead, Frazer testified on the basis of his recollection of diagnoses found in the Department of Correction records and the report, coupled with information he had received on the petitioner's background.

[9] The court explained in its memorandum of decision: "As Attorney Riccio conceded, having a forensic evaluation conducted carries with it the risk that the outcome of that evaluation is detrimental to a client. For example, the forensic psychologist's study may reveal that the client succumbs to dangerous propensities or labors under some other personality disorder that resists correction. That conclusion may cause the sentencing authority to impose a longer prison term out of fear that the client is less amenable to rehabilitation and less likely to conform conduct to lawful behavior."

whether it constitutes a serious deviation from the actions of an attorney of ordinary training and skill in criminal law." *Bryant* v. *Commissioner of Correction*, 290 Conn. 502, 513, 964 A.2d 1186, cert. denied sub nom. *Murphy* v. *Bryant*, 558 U.S. 938, 130 S. Ct. 259, 175 L. Ed. 242 (2009). Moreover "[i]n any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances."[10] *Strickland* v. *Washington*, supra, 466 U.S. 688. As we previously have stated, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." (Internal quotation marks omitted.) *Grover* v. *Commissioner of Correction*, supra, 183 Conn. App. 819–20.

In the present case, counsel's sentencing memorandum was, as found by the court, "very detailed and articulately attempted to explicate why the petitioner,

[10] As the United States Supreme Court has recognized: "Surmounting *Strickland's* high bar is never an easy task. . . . [T]he standard for judging counsel's representation is a most deferential one. Unlike a later reviewing [appellate] court, the attorney [whose performance is allegedly deficient] observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is all too tempting to second-guess counsel's assistance after conviction or adverse sentence." (Citations omitted; internal quotation marks omitted.) *Harrington* v. *Richter*, 562 U.S. 86, 105, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). Accordingly, the United States Supreme Court observed that, "while in some instances even an isolated error can support an ineffective-assistance claim if it is sufficiently egregious and prejudicial . . . it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." (Citation omitted; internal quotation marks omitted.) Id., 111.

Counsel's letter indicates that he attempted to warn the petitioner of the consequences of the petitioner's attempt to withdraw his guilty plea, informed him that his decision to decline to cooperate with the probation officer was fraught with risk and strongly urged the petitioner not only to cooperate with his second and final opportunity to speak to the probation officer in the preparation of the report, but to ensure that he specifically addressed the tragic details of his life. Additionally, counsel addressed before the court the petitioner's attempt to withdraw his guilty plea and tried to minimize the repercussions of that attempt by arguing that the petitioner had only good intentions.

a forty year old person who had exhibited no violent behavior previously, would conceive of and execute such a terrifying plot to extort money from the victims." We are not persuaded, under the circumstances presented to counsel at the time, and eliminating the distorting effects of hindsight, that the petitioner overcame the strong presumption that counsel's assistance fell within the wide range of reasonable professional assistance.

We conclude that the habeas court abused its discretion in denying the petition for certification to appeal. In reviewing the merits of the petitioner's underlying ineffective assistance of counsel claims, however, the petitioner failed to establish that his trial counsel rendered ineffective assistance.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* CARLTON BRYAN (AC 40848)

Keller, Prescott and Moll, Js.

Syllabus

Convicted of the crimes of murder and conspiracy to commit murder in connection with the shooting death of the victim, who was pregnant with his child, the defendant appealed. The defendant had plotted with a friend, H, to kill the victim after she refused the defendant's requests to have an abortion. The victim and the defendant had driven to a location where the defendant purportedly intended to collect money from someone. H, who had driven the defendant's car to the area and parked nearby, thereafter approached the victim's parked car, in which she and the defendant were sitting, and fatally shot the victim. The defendant later told a police detective, E, that an unknown individual had attempted to rob them and shot the victim as she tried to drive away. H thereafter told a friend, M, that he had killed the victim at the defendant's behest, after which H and M robbed a store using the gun that H had used to shoot the victim, which they then hid in a park. The defendant subsequently told E that H and M had robbed the store, after which M turned himself in to the police and helped them retrieve the

gun. At trial, after H invoked his privilege against self-incrimination and declined to testify, M testified about the gun and what H had told him concerning the victim's murder. On appeal, the defendant claimed, inter alia, that the trial court improperly admitted into evidence H's statements to M as dual inculpatory statements pursuant to the applicable provision (§ 8-6 [4]) of the Connecticut Code of Evidence. *Held*:

1. The trial court did not abuse its discretion by admitting H's statements to M about the victim's murder as dual inculpatory statements under § 8-6 (4), as H's statements were sufficiently trustworthy and against his penal interest:

   a. The defendant's claim that H's statements to M were inadmissible as dual inculpatory statements because they sought to shift the blame for the victim's murder to the defendant was unavailing, as the statements were squarely against H's penal interest; H had unequivocally admitted to killing the victim as part of a scheme he and the defendant concocted, the statements implicated H and the defendant equally, and even if H's statements suggested that he was trying to minimize his involvement in the scheme or to explain his reasons for killing the victim, they exposed him to potential liability for the same crimes with which the defendant was charged, for which H was convicted in a separate trial.

   b. The trial court correctly concluded that H's statements to M were sufficiently trustworthy, as H, who sometimes stayed at M's home, made the statements less than two weeks after the victim's murder, and H and M, who robbed the store together, trusted one another, shared a friendship and had known each other for about ten years at the time H made the statements; moreover, the truthfulness of H's statements was corroborated by evidence that included an attempt by H and M to repair the gun before the victim's murder, and testimony from W that, less than two hours before the murder, the defendant, who was accompanied by H, told W that he wanted to kill the victim and asked W to act as a lookout and to provide a false statement to the police.

2. The defendant could not prevail on his unpreserved claim that the state failed to disclose to him certain police internal affairs records, in violation of *Brady* v. *Maryland* (373 U.S. 83), that concerned allegations of prior misconduct by E, as those records were not material to the outcome of the defendant's trial; moreover, even if the records could have been used to impeach E's credibility, there was overwhelming evidence to support the defendant's conviction, the impeachment of E with the records would not have raised doubts about the reliability of the testimony of W and M, as M's testimony directly implicated the defendant in the victim's murder, and the impeachment of E with the records in order to call into question W's credibility would have been cumulative, as the defendant argued to the jury, concerning the circumstances surrounding a written statement that W had given to the police, that the evidence suggested that W had been coerced by the police, and there was no indication that W's testimony was tainted as a result of his interactions with the police.

Argued April 16—officially released October 1, 2019

Procedural History

Substitute information charging the defendant with the crimes of murder and conspiracy to commit murder, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Bentivegna*, *J.*; verdict and judgment of guilty, from which the defendant appealed; thereafter, the court, *Bentivegna*, *J.*, denied in part the defendant's motions for augmentation and rectification of the record. *Affirmed.*

Erica A. Barber, assigned counsel, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Robert J. Scheinblum* and *Donna Mambrino*, senior assistant state's attorneys, for the appellee (state).

Opinion

MOLL, J. The defendant, Carlton Bryan, appeals from the judgment of conviction,[1] rendered after a jury trial, of murder in violation of General Statutes §§ 53a-54a (a)[2] and 53a-8,[3] and conspiracy to commit murder in violation of General Statutes §§ 53a-48 (a)[4] and 53a-54a

[1] The defendant appealed to our Supreme Court pursuant to General Statutes § 51-199 (b) (3). On September 15, 2017, the appeal was transferred to this court pursuant to Practice Book § 65-1.

[2] General Statutes § 53a-54a (a) provides in relevant part: "A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person . . . ."

[3] General Statutes § 53a-8, which defines accessorial liability, provides in relevant part: "(a) A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender. . . ."

[4] General Statutes § 53a-48 (a) provides: "A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy."

(a). On appeal, the defendant claims that (1) the trial court erroneously concluded that an unavailable declarant's hearsay statements were admissible as dual inculpatory statements pursuant to § 8-6 (4) of the Connecticut Code of Evidence, and (2) the state, in violation of *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), failed to disclose to him certain internal affairs records relating to Reginald Early, a police sergeant whom the state called as a witness at trial. We affirm the judgment of the trial court.

On the basis of the evidence adduced at trial, the jury reasonably could have found the following facts. In April, 2013, the victim, Shamari Jenkins, was four months pregnant with the defendant's child. At that time, the defendant had a minor child with another woman, Iesha Wimbush, with whom the defendant had an "off and on" relationship. On several occasions after learning of the victim's pregnancy, the defendant encouraged the victim to have an abortion. After initially informing the defendant that she would have an abortion, the victim told the defendant that she ultimately had decided not to proceed with an abortion. The victim's decision angered and upset the defendant because the victim's pregnancy was a source of contention between the defendant and Wimbush.

Having failed to convince the victim to have an abortion, the defendant plotted with Matthew Allen Hall-Davis, a close friend of his, to kill the victim and terminate the pregnancy. Sometime in March, 2013, the defendant asked Reginald Lewis, a former coworker of his, to clean and repair a firearm, a .44 magnum Ruger Super Black Hawk revolver (.44 Ruger). Lewis was unable to fix the .44 Ruger and returned it, along with certain gun components that the defendant had ordered for the repair, to the defendant. Hall-Davis, who was present when Lewis returned the .44 Ruger to the defendant, told Lewis that he would fix the .44 Ruger. At

some time prior to the morning of April 29, 2013, the defendant and Hall-Davis repaired the .44 Ruger.

On April 28, 2013, the defendant, the victim, and Hall-Davis attended a cookout at the home of the victim's father in East Hartford. The defendant and Hall-Davis left the cookout together at about dusk. At approximately 11 p.m. that night, the defendant and Hall-Davis met with Everett Walker, a cousin of Hall-Davis', near Walker's apartment building located on Magnolia Street in Hartford. The defendant told Walker that he was having "problems" with the victim stemming from the victim's refusal to have an abortion and that he wanted to kill the victim in the vicinity of Walker's apartment building. The defendant asked Walker to provide assistance by acting as a lookout and by telling the police officers who would be dispatched to the crime scene that he had observed an unknown individual running away from the scene. Walker did not respond to the defendant's request and returned to his apartment alone.

Sometime between 12 and 12:30 a.m. on April 29, 2013, the victim left her father's cookout and met with the defendant, whom she then drove in her car to Magnolia Street, where the defendant purportedly intended to meet with and collect money from a cousin of his. The victim parked her car along the curb of the street, and the defendant exited the car. At about that time, Hall-Davis had driven and parked the defendant's car on an adjacent street. After the defendant had returned to and reentered the victim's car, the victim began driving away from the curb. At that moment, Hall-Davis approached the car and, using the .44 Ruger, fired a single gunshot through the rear windshield of the car, striking the victim. The car then accelerated and crashed into the front stairs of a nearby home. The defendant proceeded to call 911 to report that the victim had been shot, without identifying the shooter.

At approximately 1 a.m. on April 29, 2013, Officer Jay Szepanski of the Hartford Police Department was dispatched to the area of Magnolia Street and Mather Street in Hartford to investigate a reported shooting. When he arrived at the scene, Szepanski found the defendant in the street yelling and waving him down. Szepanski found the victim slumped between the front seats of her car and unresponsive. The defendant told Szepanski that the victim had given him a ride to meet with his cousin and that, after he had returned to the car, an unidentified individual fired a gunshot through the rear windshield of the car that struck the victim.[5] Shortly thereafter, medical personnel arrived and transported the victim to Saint Francis Hospital and Medical Center (hospital) in Hartford, where she was pronounced dead as a result of a gunshot wound to the chest.

Later in the morning on April 29, 2013, Szepanski transported the defendant to the Hartford Police Department and thereafter to the hospital. Early, who was at the time a detective in the Hartford Police Department's major crimes division but later was promoted to sergeant, briefly spoke with the defendant at the police station and later at the hospital. With respect to the victim's murder, the defendant told Early that an unknown individual had attempted to rob the defendant and the victim while they were sitting in the victim's car, the victim tried to drive away to escape the attempted robbery, and, as the victim was driving away, the individual fired into the car a gunshot that struck the victim. The defendant did not provide a written statement at that time.

Later that same day, after Early had spoken with the defendant at the hospital, the defendant met with Hall-Davis and drove him to the Hartford Police Department.

[5] The defendant recited a similar version of events to two other police officers who had been dispatched to respond to the reported shooting.

There, Hall-Davis had a conversation with Early about the victim's murder; however, he declined to provide a written statement at that time.[6] Following Hall-Davis' conversation with Early, the defendant picked up Hall-Davis from the police station.

On May 1, 2013, the defendant met with Early at the Hartford Police Department and submitted a signed, sworn statement regarding the victim's murder. In that statement, the defendant averred that an individual nicknamed "Low," whose real name was Kevan Simmons, attempted to rob the defendant and the victim while they were sitting in the victim's car, and that Simmons shot the victim as she tried to drive away. The defendant further averred that he did not immediately identify Simmons as the shooter to the police because the defendant wanted to get revenge on Simmons himself, but, after giving it more thought, the defendant decided to inform the police that Simmons had shot the victim. Following an ensuing investigation, Early ruled out Simmons as a suspect in the victim's murder.

On the day of the victim's funeral, which was held sometime before May 11, 2013, Hall-Davis met with Kingsley Minto, a mutual friend of his and the defendant's, at Minto's home in Vernon. Hall-Davis confessed to Minto that he had killed the victim at the defendant's behest in order to terminate the victim's pregnancy. Hall-Davis told Minto that he initially was reluctant to comply with the defendant's request to kill the victim; however, after the defendant repeatedly had pleaded with him, Hall-Davis agreed to commit the crime because he felt obligated to assist the defendant on account that, during the course of their friendship, the defendant had provided him with financial support, written letters to him while he had been incarcerated,

[6] The substance of Hall-Davis' conversation with Early was not admitted into evidence.

and permitted him to stay at the defendant's home. Hall-Davis then asked Minto for money so that he could flee the area. Minto replied that he had no money to give to Hall-Davis.

On May 11, 2013, Minto and Hall-Davis robbed a jewelry store in Manchester (Manchester robbery). Hall-Davis brandished the .44 Ruger in the course of the Manchester robbery, which was recorded on surveillance video. As Hall-Davis and Minto were driving away from the jewelry store, Hall-Davis tossed out of the car window a shell casing, which Hall-Davis told Minto was from the bullet that he had fired at the victim. Later that day, Hall-Davis and Minto drove to a park in Vernon, where Hall-Davis hid the .44 Ruger under some leaves and brush.

At some point after the Manchester robbery, the defendant and Hall-Davis met with one another in Hartford. The defendant asked Hall-Davis where the .44 Ruger was, and Hall-Davis replied that he had gotten rid of it. The defendant, using his cell phone, then showed Hall-Davis video footage of the Manchester robbery that he had found on the Internet, which depicted Hall-Davis holding the .44 Ruger during the Manchester robbery. Evidently having had the belief that Hall-Davis had disposed of the .44 Ruger immediately after the victim's murder, the defendant became upset that Hall-Davis had lied to him about the disposal of the .44 Ruger, after which Hall-Davis left.

In the middle of May, 2013, the defendant traveled to Florida to stay with his father. While he was in Florida, the defendant called Early on numerous occasions to convey that Hall-Davis and Minto had committed the Manchester robbery. Early shared that information with the Manchester Police Department, and, largely on the basis of that information, the Manchester Police Department secured arrest warrants for Hall-Davis and Minto

in connection with the Manchester robbery. Hall-Davis was arrested on May 23, 2013, and Minto turned himself in to the police on May 25, 2013. While in police custody, Minto admitted to his involvement in the Manchester robbery and assisted the police in locating and retrieving the .44 Ruger that Hall-Davis had hidden in the park in Vernon.

After turning himself in to the police, Minto also submitted a signed, sworn statement regarding the victim's murder. On the basis of information that he obtained during the course of his investigation from, inter alia, Minto, Hall-Davis, and Lewis, Early secured arrest warrants for Hall-Davis and the defendant in relation to the victim's murder. On June 6, 2013, Early arrested the defendant, who had returned from Florida, at Wimbush's home in Windsor.[7] After waiving his *Miranda* rights,[8] the defendant agreed to be interviewed by Early, along with another detective, and submitted a signed, sworn statement. In that statement, the defendant averred that, while he was sitting with the victim in her car on Magnolia Street on April 29, 2013, Hall-Davis entered the car and sat in the backseat behind the victim. Early questioned the defendant as to how Hall-Davis could have entered the car, which had two doors only, without the defendant first exiting the car, and Early noted that the bullet that struck the victim had been shot through the rear windshield of the car and would have hit Hall-Davis had he been seated in the backseat of the car. The defendant terminated the interview at that juncture.

By way of a long form information dated May 1, 2015, the defendant was charged with murder in violation of §§ 53a-54a (a) and 53a-8, and conspiracy to commit

[7] At some point, Early also arrested Hall-Davis, who had already been arrested in connection with the Manchester robbery at the time.

[8] See *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

murder in violation of §§ 53a-48 (a) and 53a-54a (a). On May 28, 2015, following a jury trial, the jury found the defendant guilty on both counts, and the trial court, *Bentivegna*, *J.*, accepted the jury's verdict. On July 30, 2015, the court sentenced the defendant to sixty years of incarceration on the charge of murder and twenty years of incarceration on the charge of conspiracy to commit murder, with the sentences to run consecutively, for a total effective sentence of eighty years of incarceration.[9] This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the court erroneously concluded that certain hearsay statements made by Hall-Davis to Minto concerning the victim's murder were admissible as dual inculpatory statements pursuant to § 8-6 (4) of the Connecticut Code of Evidence. Specifically, the defendant asserts that (1) portions of Hall-Davis' statements were not against Hall-Davis' penal interest but, instead, shifted the blame for the victim's murder to the defendant, and (2) Hall-Davis' statements were not sufficiently trustworthy. We conclude that the court did not abuse its discretion by admitting the statements.

The following additional facts and procedural history are relevant to our disposition of the defendant's claim. During its case-in-chief on the second day of evidence, the state called Hall-Davis as a witness. As the clerk attempted to swear him in, Hall-Davis invoked his fifth

[9] With respect to the victim's murder, Hall-Davis was charged with murder in violation of § 53a-54a (a), conspiracy to commit murder in violation of §§ 53a-48 (a) and 53a-54a (a), and criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1). Following a separate jury trial, Hall-Davis was found guilty on all three counts and sentenced to a total effective sentence of seventy years of incarceration. On appeal, this court affirmed Hall-Davis' judgment of conviction. See *State* v. *Hall-Davis*, 177 Conn. App. 211, 242, 172 A.3d 222, cert. denied, 327 Conn. 987, 175 A.3d 43 (2017).

amendment privilege against self-incrimination and declined to testify. The court excused Hall-Davis after determining that he had properly invoked his fifth amendment privilege against self-incrimination.

On the third day of evidence, the state called Minto as a witness. Before Minto was sworn in, the court noted that there was an evidentiary issue to resolve relating to Minto's testimony and asked the state to make an offer of proof. Outside of the jury's presence, the state proffered that, pursuant to the statement against penal interest exception to the hearsay rule codified in § 8-6 (4) of the Connecticut Code of Evidence, Minto would testify, inter alia, as follows: Hall-Davis told Minto on the day of the victim's funeral that Hall-Davis killed the victim after the defendant had "kept pressuring" Hall-Davis to do so and that Hall-Davis felt that "he needed" to comply with the defendant's request because of their close friendship; Hall-Davis confessed to Minto that he had shot the victim because he trusted Minto not to share that information with anyone; Hall-Davis and Minto had known each other for approximately ten years at the time of the victim's murder; Minto was familiar with Hall-Davis' life and upbringing; Hall-Davis' mother and Minto's wife were friends; Hall-Davis at times had lived with Minto; and Hall-Davis and Minto committed the Manchester robbery together. The defendant objected to the proffered testimony, arguing that Hall-Davis' statements to Minto were self-serving, Minto and Hall-Davis did not have a close relationship, and Hall-Davis' statements were not recorded.

Following argument, the court overruled the defendant's objection and determined that Hall-Davis' hearsay statements to Minto were admissible as dual inculpatory statements pursuant to § 8-6 (4) of the Connecticut Code of Evidence. In reaching its decision, the court determined: (1) Hall-Davis was unavailable

to testify because he had invoked his fifth amendment privilege against self-incrimination; (2) Hall-Davis' statements were against his penal interest; and (3) the statements were sufficiently trustworthy.

Following the court's ruling, the state elicited testimony from Minto. Minto testified that, on the day of the victim's funeral, Hall-Davis met with Minto at Minto's home in Vernon. Minto then testified in relevant part as follows:

"Q. And what did [Hall-Davis] tell you?

"A. He asked me: Who [do] you think kill[ed] [the victim]?

"Q. And what was your response?

"A. I said I think [the defendant] did it.

"Q. And what did [Hall-Davis] tell you?

"A. He said, no, I did it.

"Q. And what was your reaction when [Hall-Davis] told [you] that he did it?

"A. I was shocked and I was upset and I was crying.

"Q. And did you say something specifically to him when he told you that?

"A. Yes. I said he was stupid, like, why would you even kill [the victim] if you didn't get her pregnant?

"Q. And what was [Hall-Davis'] response to you when you asked him that question?

"A. He said he did it for [the defendant].

"Q. And when he said he did it for [the defendant], did he tell you that he did this—that he wanted to do it?

"A. Yes.

"Q. And did [Hall-Davis] tell you that anything that [the defendant] did or said to him to get him to kill [the victim]?

"A. At first he didn't want to do it. And then—

"Q. When you say 'he,' do you mean [Hall-Davis]?

"A. Yes, [Hall-Davis]. He didn't want to do it.

"Q. At first he didn't want to do it.

"A. Yes.

"Q. But?

"A. [The defendant] kept pleading into him to do it for [the defendant].

"Q. So, [the defendant] kept pleading [with Hall-Davis] to do it for [the defendant]?

"A. Yes.

"Q. And when [the defendant] kept pleading with [Hall-Davis] to do it, did he give you—did [Hall-Davis] give you an explanation why he would do such a thing for [the defendant]?

"A. Yes.

"Q. What did he tell you?

"A. [The defendant] looked out for him while he was in jail, gave him money, wrote him letters, gave him a place to stay while he was incarcerated.

"Q. Did he tell you he felt obliged to help out [the defendant]?

"A. Yes. . . .

"Q. And how does that make sense to you based on what you know about [Hall-Davis]?

"A. They [were] friends. He was just looking out for a friend.

"Q. Did [Hall-Davis] tell you anything about why this defendant wanted [the victim] dead?

"A. Yes.

"Q. What did he tell you?

"A. That it was causing problems with [the defendant] and [Wimbush].

"Q. Did he tell you anything about the pregnancy?

"A. Yeah. That [the defendant] wanted to get rid of the baby, get rid of [the victim] before she hit seven months.

* * *

"Q. Now, after [the victim's] funeral, did this defendant—excuse me, did [Hall-Davis] tell you why he was telling you about [the victim's] murder?

"A. Yes. . . .

"Q. What did he tell you?

"A. He trusted me not to turn on him."

We begin by setting forth the relevant standard of review and legal principles governing our disposition of the defendant's claim. "To the extent a trial court's admission of evidence is based on an interpretation of the [Connecticut] 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. They require determinations about which reasonable minds may not differ; there is no judgment call by the trial court . . . . We review the trial court's decision to admit evidence, if premised on a correct view of the law, however, for an abuse of discretion." (Internal quotation marks omitted.) *State* v. *Vega*, 181 Conn. App. 456, 463–64, 187 A.3d 424, cert. denied, 330 Conn. 928, 194 A.3d 777 (2018).

"An [out-of-court] statement is hearsay when it is offered to establish the truth of the matters contained therein." (Internal quotation marks omitted.) *State* v. *Rivera*, 181 Conn. App. 215, 223, 186 A.3d 70, cert. denied, 329 Conn. 907, 184 A.3d 1216 (2018). "As a general matter, hearsay statements may not be admitted into evidence unless they fall within a recognized exception to the hearsay rule. . . . Section 8-6 of the Connecticut Code of Evidence provides in relevant part that [t]he following are not excluded by the hearsay rule if the declarant is unavailable as a witness . . . (4) Statement against penal interest. A trustworthy statement against penal interest that, at the time of its making, so far tended to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. In determining the trustworthiness of a statement against penal interest, the court shall consider (A) the time the statement was made and the person to whom the statement was made, (B) the existence of corroborating evidence in the case, and (C) the extent to which the statement was against the declarant's penal interest. . . . In short, the admissibility of a hearsay statement pursuant to § 8-6 (4) of the Connecticut Code of Evidence is subject to a binary inquiry: (1) whether [the] statement . . . was against [the declarant's] penal interest and, if so, (2) whether the statement was sufficiently trustworthy." (Citation omitted; internal quotation marks omitted.) *State* v. *Bonds*, 172 Conn. App. 108, 117, 158 A.3d 826, cert. denied, 326 Conn. 907, 163 A.3d 1206 (2017).

In the present case, the court admitted Hall-Davis' hearsay statements to Minto as dual inculpatory statements. "A dual inculpatory statement is a statement that inculpates both the declarant and a third party, in this case the defendant. . . . We evaluate dual inculpatory statements using the same criteria we use for statements against penal interest." (Internal quotation marks omitted.) *State* v. *Azevedo*, 178 Conn. App. 671, 686,

176 A.3d 1196 (2017), cert. denied, 328 Conn. 908, 178 A.3d 390 (2018).

A

We first address the defendant's assertion that portions of Hall-Davis' statements to Minto were not against his penal interest. Specifically, the defendant contends that blame-shifting statements made by a declarant in a broader self-inculpatory narrative are not admissible as dual inculpatory statements, such that "at least those portions of [Hall-Davis'] alleged statements shifting blame from [Hall-Davis] to the defendant should have been excluded from evidence, including [Hall-Davis'] statements identifying the defendant as the architect of the crime and supplying his so-called motive for the murder." The state responds that Hall-Davis' statements in their entirety were self-inculpatory and against Hall-Davis' penal interest.[10] We agree with the state.

"Section 8-6 (4) preserves the common-law definition of 'against penal interest' in providing that the statement be one that 'so far tend[s] to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true.' " Connecticut Code of Evidence § 8-6 (4), commentary. "Whether a statement is against a declarant's penal interests is an objective inquiry of law, rather than a subjective analysis of the declarant's personal legal knowledge. Under § 8-6 (4) [of the Connecticut Code of Evidence], we must evaluate the statements according to a reasonable person standard, not according to an inquiry into the

[10] As a preliminary matter, the state argues that we should not review the defendant's claim that portions of Hall-Davis' statements were blame-shifting and, thus, not against his penal interest because the defendant failed to raise that claim before the trial court. Upon our review of the record, we conclude that the defendant sufficiently raised this claim at trial, and, therefore, it is properly preserved.

declarant's personal knowledge or state of mind." (Internal quotation marks omitted.) *State* v. *Azevedo*, supra, 178 Conn. App. 686.

In his statements to Minto, Hall-Davis confessed that he had killed the victim after the defendant repeatedly had pleaded with him to commit the crime in order to terminate the victim's pregnancy. Hall-Davis also told Minto that he killed the victim out of a sense of obligation to the defendant, who had supported him in a variety of ways throughout their friendship.[11] Contrary to the defendant's contention, none of Hall-Davis' statements to Minto can be construed as blame-shifting. Hall-Davis unequivocally admitted to killing the victim as part of a scheme concocted between himself and the defendant. Even if Hall-Davis' statements suggest that he was trying to minimize his involvement in the scheme or to explain his reasons for killing the victim, the statements exposed him to potential liability for the same crimes with which the defendant was charged, and, thus, the statements implicated Hall-Davis and the defendant equally. See *State* v. *Camacho*, 282 Conn. 328, 360, 924 A.2d 99 (declarant's statements were not blame-shifting because they "exposed [the declarant] to potential liability for the same crimes with which the defendant is now charged, thereby implicating both himself and the defendant equally" [footnote omitted]), cert. denied, 552 U.S. 956, 128 S. Ct. 388, 169 L. Ed. 2d

[11] We observe that, relative to Hall-Davis' statements proffered by the state during its offer of proof, the statements made by Hall-Davis that were admitted into evidence by way of Minto's testimony more strongly demonstrated that the statements were against Hall-Davis' penal interest. The state proffered that Minto would testify that the defendant had "kept pressuring" Hall-Davis to kill the victim and that Hall-Davis felt that "he needed" to kill the victim, given his close friendship with the defendant. By comparison, Minto testified that the defendant had "kept pleading" with Hall-Davis to kill the victim and that Hall-Davis felt "obliged" to kill the victim, given the assistance that the defendant had provided Hall-Davis while he had been incarcerated.

273 (2007); *State* v. *Rivera*, 268 Conn. 351, 368, 844 A.2d 191 (2004) (declarant's statement was squarely against penal interest because, even if statement was attempt to minimize his involvement in homicide, it nonetheless "fully and equally implicated both [the declarant] and the defendant"); *State* v. *Azevedo*, supra, 178 Conn. App. 688 (declarant's statements were not blame-shifting because they "exposed him to liability for the same crimes for which the defendant was charged"). In fact, Hall-Davis was tried and convicted of murder and conspiracy to commit murder, the same charges on which the defendant was tried and convicted, along with criminal possession of a firearm, in a separate trial.[12] See footnote 9 of this opinion. Accordingly, Hall-Davis' statements to Minto were squarely against his penal interest and within the ambit of § 8-6 (4) of the Connecticut Code of Evidence as dual inculpatory statements.[13]

B

Having determined that Hall-Davis' statements to Minto in their entirety were against Hall-Davis' penal

[12] To the extent that Hall-Davis' personal knowledge is relevant, Hall-Davis understood the legal implications of his statements regarding the victim's murder, as he indicated that he trusted Minto not to share his confession with anyone else. See *State* v. *Camacho*, supra, 282 Conn. 360–61 (concluding that statements were against declarant's penal interest where statements were not blame-shifting and declarant understood legal ramifications of statements); *State* v. *Rivera*, supra, 268 Conn. 368–69 (same); *State* v. *Azevedo*, supra, 178 Conn. App. 688 (same).

[13] Because we conclude that Hall-Davis' statements in their entirety were against Hall-Davis' penal interest, we are not faced with a situation in which a declarant's hearsay statements were only partially self-inculpatory. See, e.g., *State* v. *Rivera*, supra, 268 Conn. 371 n.18 ("We previously have stated that, under our evidentiary law, 'where the disserving parts of a statement are intertwined with self-serving parts, it is more prudential to admit the entire statement and let the trier of fact assess its evidentiary quality in the complete context.' *State* v. *Bryant*, 202 Conn. 676, 696–97, 523 A.2d 451 [1987]; but see *Williamson* v. *United States*, 512 U.S. 594, 600–601, 114 S. Ct. 2431, 129 L. Ed. 2d 476 [1994] [rule 804 (b) (3) of Federal Rules of Evidence 'does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory'].").

interest, we next turn to the defendant's contention that the statements were not sufficiently trustworthy. The state responds that the court properly determined that the statements bore adequate indicia of reliability. We agree with the state.

"In determining the trustworthiness of a statement against penal interest, the court shall consider (A) the time the statement was made and the person to whom the statement was made, (B) the existence of corroborating evidence in the case, and (C) the extent to which the statement was against the declarant's penal interest. . . . Conn. Code Evid. § 8-6 (4). Additionally, when evaluating a statement against penal interest, the trial court must carefully weigh all of the relevant factors in determining whether the statement bears sufficient indicia of reliability to warrant its admission. . . . As we previously have stated, when viewing this issue through an evidentiary lens, we examine whether the trial court properly exercised its discretion." (Citations omitted; internal quotation marks omitted.) *State* v. *Pierre*, 277 Conn. 42, 68, 890 A.2d 474, cert. denied, 547 U.S. 1197, 126 S. Ct. 2873, 165 L. Ed. 2d 904 (2006). "[N]o single factor for determining trustworthiness . . . is necessarily conclusive. . . . Rather, the trial court is tasked with weighing all of the relevant factors set forth in § 8-6 (4) . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Bonds*, supra, 172 Conn. App. 125.

In the present case, after determining that Hall-Davis was unavailable to testify[14] and that his statements to Minto were against his penal interest, the court, on the

[14] There is no dispute on appeal that Hall-Davis was unavailable to testify as a witness in the defendant's criminal trial as a result of Hall-Davis' invocation of his fifth amendment privilege against self-incrimination. *State* v. *Pierre*, supra, 277 Conn. 68 n.10 ("[d]ue to [declarant's] decision to exercise his fifth amendment right against self-incrimination, it is undisputed that he was unavailable at trial").

basis of the state's offer of proof, determined that the statements were adequately trustworthy, stating: "And in determining the trustworthiness and factoring those requirements, in this case Hall-Davis' statements were made to Minto, who—and they were close personal friends. They had a personal relationship. They'd known each other for a long time. The statements were made shortly after the crime was committed. And then the statements were corroborated. Corroborating details connecting the statements to the crime have been testified to already, and it's corroborated by numerous circumstances and coincidence."

Mindful of the factors set forth in § 8-6 (4) of the Connecticut Code of Evidence, we conclude that the court did not err in determining that Hall-Davis' statements to Minto were sufficiently trustworthy. First, the timing of Hall-Davis' statements to Minto strengthens their reliability. "In general, declarations made soon after the crime suggest more reliability than those made after a lapse of time where a declarant has a more ample opportunity for reflection and contrivance." (Internal quotation marks omitted.) *State* v. *Camacho*, supra, 282 Conn. 361. Here, Hall-Davis made the statements to Minto on the day of the victim's funeral, which was held less than two weeks following the victim's murder. See *State* v. *Smith*, 289 Conn. 598, 631, 960 A.2d 993 (2008) (statements made less than three months following murder deemed trustworthy); *State* v. *Camacho*, supra, 361 (statements made approximately one week following murders deemed trustworthy); *State* v. *Pierre*, supra, 277 Conn. 71 (statements made within "couple of weeks" following homicide deemed trustworthy); *State* v. *Rivera*, supra, 268 Conn. 370 (statements made within five months following homicide deemed trustworthy).

Relatedly, the relationship between Minto and Hall-Davis strengthens the trustworthiness of Hall-Davis'

statements. Minto had known Hall-Davis for approximately ten years at the time of the victim's murder and knew details about Hall-Davis' upbringing. In addition, Minto's wife was friends with Hall-Davis' mother, and Hall-Davis sometimes stayed at Minto's home. Minto and Hall-Davis also committed the Manchester robbery together. Although Minto and Hall-Davis are not related, they trusted one another and shared a friendship. See *State* v. *Pierre*, supra, 277 Conn. 70 ("[A]lthough [the witness] was not a relative of [the declarant] . . . a factor that [our Supreme Court has] previously noted when evaluating whether a statement is trustworthy, the trial court specifically found that [the witness] was far from a stranger either. . . . [T]he fact remains that they shared a friendship and a relationship of trust."); see also *State* v. *Camacho*, supra, 282 Conn. 362 (citing *Pierre* for same proposition).[15]

Second, there was evidence in the record corroborating the truthfulness of Hall-Davis' statements. For example, Lewis testified that, before the victim's murder, the defendant and Hall-Davis approached him about fixing the .44 Ruger, and that Hall-Davis told Lewis that he would repair it. The victim's father testified that, on the day before the victim's murder, the defendant and Hall-Davis attended a cookout at his home and left together at about dusk. In addition, Walker testified that, less than two hours before the victim's murder, the defendant, with Hall-Davis accompanying him, told Walker that he wanted to kill the

[15] We also note that Hall-Davis made the statements in Minto's home, and that Hall-Davis was neither under arrest nor facing arrest at that time. As our Supreme Court has observed, statements made in a "noncoercive atmosphere to a person with whom [the declarant] had a close relationship . . . are significantly more trustworthy than statements obtained by government agents for the purpose of creating evidence that would be useful at a future trial. . . . In short, neither facing arrest nor being under arrest when making his statements to [the witness], [the declarant] lacked the obvious incentive to shift blame or curry favor with the police." (Internal quotation marks omitted.) *State* v. *Camacho*, supra, 282 Conn. 362.

victim and asked Walker to act as a lookout and to provide a false statement to the police officers who would be dispatched to the crime scene.

Finally, § 8-6 (4) of the Connecticut Code of Evidence also requires the trial court to consider the extent to which a declarant's statement was against his or her penal interest. As the court determined, and as we concluded in part I A of this opinion, Hall-Davis' statements in their entirety were squarely against his penal interest.

In sum, we conclude that Hall-Davis' hearsay statements to Minto in their entirety were against his penal interest and sufficiently trustworthy. Accordingly, the court did not abuse its discretion by admitting the statements as dual inculpatory statements under § 8-6 (4) of the Connecticut Code of Evidence.[16]

II

We next address the defendant's claims that the state violated *Brady* by failing to disclose to him certain internal affairs records detailing investigations conducted by the Hartford Police Department into allegations of misconduct committed by Early. For the reasons we set forth subsequently in this opinion, these claims fail.

The following additional facts and procedural history are relevant to our resolution of these claims. On February 25, 2015, the defendant filed a pretrial motion

[16] We note that, in overruling the defendant's objection to the admission of Hall-Davis' hearsay statements to Minto, the court determined that the statements were nontestimonial in nature. On appeal, the defendant does not contest that determination and does not claim a violation of his rights under the confrontation clause of the sixth amendment to the United States constitution. See *State* v. *Hutton*, 188 Conn. App. 481, 501 n.10, 205 A.3d 637 (2019) ("[h]earsay statements that are nontestimonial in nature do not implicate the confrontation clause; rather, their admissibility is governed solely by the rules of evidence").

for "*Giglio* material,"[17] requesting that the state disclose materials relevant to the impeachment of the state's witnesses and informants, including files relating to the witnesses and informants, confidential or otherwise, and evidence of perjury or false statements committed or made by the witnesses and informants. On March 6, 2015, the court, *Alexander*, *J.*, granted the motion. On May 18, 2015, prior to the start of the evidentiary portion of trial, defense counsel confirmed with the court, *Bentivegna*, *J.*, that the state had complied with the defendant's request for *Giglio* material.

During its case-in-chief, the state called Early as a witness on two separate occasions. Early testified in relevant part as follows: he was the lead detective investigating the victim's murder; on April 29, 2013, shortly after the victim's murder, the defendant spoke with him and told him that an unknown individual had shot the victim; on April 29, 2013, after speaking with the defendant, he spoke with Hall-Davis about the victim's murder; on May 1, 2013, he received from the defendant a signed, sworn statement regarding the victim's murder, which was admitted into evidence as a full exhibit, in which the defendant averred that Simmons had shot the victim after a failed robbery attempt; after the defendant had traveled to Florida in the middle of May, 2013, the defendant called him numerous times to convey that Hall-Davis and Minto had committed the Manchester robbery; following their arrests in connection with the Manchester robbery, he received information from Minto and Hall-Davis regarding the victim's murder;[18] on the basis of the information that he received from Hall-Davis, he spoke with Lewis, who provided him with invoices for the repair parts that were ordered to

[17] See *Giglio* v. *United States*, 405 U.S. 150, 154–55, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972).

[18] The substance of the information provided to Early by Minto and Hall-Davis was not admitted into evidence.

fix the .44 Ruger, which were admitted into evidence as full exhibits, and who submitted a signed, sworn statement; on the basis of his investigation, he secured arrest warrants for Hall-Davis and the defendant with respect to the victim's murder; on June 6, 2013, he located and arrested the defendant inside Wimbush's home in Windsor; and following the defendant's arrest, he received from the defendant a signed, sworn statement regarding the victim's murder, which was admitted into evidence as a full exhibit, in which the defendant averred that Hall-Davis had been in the car with him and the victim shortly before the victim's murder.

On August 19, 2016, while this appeal was pending before our Supreme Court; see footnote 1 of this opinion; the defendant filed a motion for augmentation and rectification of the record (2016 motion for augmentation and rectification).[19] Defense counsel alleged therein that, in the course of her law office's representation of another individual in an unrelated federal case, the United States Attorney's Office for the District of Connecticut had provided counsel's office with an internal affairs report, dated 2008, detailing an investigation conducted by the Hartford Police Department into an incident involving Early in 2007. Defense counsel asserted that Early was one of the state's key witnesses against the defendant and that the state's nondisclosure of the report, which purportedly contained evidence impeaching Early's credibility, violated *Brady*. Defense counsel requested, as relief, that the trial court conduct an evidentiary hearing pursuant to *State* v. *Floyd*, 253 Conn. 700, 756 A.2d 799 (2000) (*Floyd* hearing),[20] to

[19] The defendant filed the 2016 motion for augmentation and rectification with our Supreme Court, and the motion was forwarded to the trial court for adjudication. See Practice Book § 66-5.

[20] "*Floyd* hearings to explore claims of potential *Brady* violations are ordered pursuant to the appellate courts' supervisory authority under Practice Book § 60-2 . . . . [Appellate courts] will order a *Floyd* hearing to develop a potential *Brady* violation only in the unusual situation in which a defendant was precluded from perfecting the record due to new information

make the report a part of the record and to "establish the circumstances of the [state's] nondisclosure prior to and during trial." On August 29, 2016, the state filed a partial opposition to the motion. The state did not object to having the report become a part of the record, but the state opposed the request for a *Floyd* hearing, arguing that (1) the state would stipulate that the report was not disclosed at the time of trial, (2) the report was not favorable to the defendant because it did not contain information pertaining to Early's veracity, and (3) even if the report was favorable to the defendant, it was not material under *Brady*.

On February 23, 2017, the court held a hearing on the 2016 motion for augmentation and rectification. During the hearing, the court admitted into evidence internal affairs records, dated 2008, relating to the incident involving Early in 2007 (2008 internal affairs records).[21] On March 15, 2017, the court issued a memorandum of decision granting in part and denying in part

obtained after judgment. . . . A *Floyd* hearing is not a license to engage in a posttrial fishing expedition, as the [trial] court will not hold a hearing in the absence of sufficient prima facie evidence, direct or circumstantial, of a *Brady* violation unascertainable at trial." (Citation omitted; internal quotation marks omitted.) *State* v. *Ortiz*, 280 Conn. 686, 713 n.17, 911 A.2d 1055 (2006).

[21] At the time that the defendant filed the 2016 motion for augmentation and rectification, defense counsel possessed an internal affairs report that constituted only a portion of the 2008 internal affairs records. During an initial hearing held before the trial court on October 13, 2016, the state offered and the court admitted into evidence, under seal, the entirety of the 2008 internal affairs records. The parties disputed whether, prior to oral argument on the 2016 motion for augmentation and rectification, defense counsel was entitled to access all of the 2008 internal affairs records. By way of a memorandum of decision issued on November 18, 2016, the court denied the request of defense counsel to access the entirety of the 2008 internal affairs records. Prior to the February 23, 2017 hearing, defense counsel acquired a copy of the 2008 internal affairs records in their entirety from a media outlet that had obtained them in response to a Freedom of Information Act request. See General Statutes § 1-200 et seq. The 2008 internal affairs records in toto were admitted into evidence, not under seal, at the February 23, 2017 hearing.

the 2016 motion for augmentation and rectification. The court granted the motion in terms of making the 2008 internal affairs records a part of the record for purposes of appellate review, but the court denied the defendant's request for a *Floyd* hearing, concluding that, although the state had conceded that it had not disclosed the 2008 internal affairs records to the defendant prior to trial, the defendant had failed to produce sufficient prima facie evidence of a *Brady* violation unascertainable at trial. On March 31, 2017, pursuant to Practice Book § 66-7, the defendant filed a motion for review of the ruling on the 2016 motion for augmentation and rectification.[22]

On May 3, 2017, our Supreme Court denied the motion for review "without prejudice to the parties addressing in the appellate briefs whether the trial court properly found that the defendant did not meet his burden of proving a violation of [*Brady*]."

On June 22, 2018, after this appeal had been transferred to this court; see footnote 1 of this opinion; and after the parties had filed their principal appellate briefs, the defendant filed a motion for further augmentation and rectification of the record (2018 motion for augmentation and rectification).[23] Defense counsel alleged therein that counsel recently had discovered that the state failed to disclose additional internal affairs records, dated 2005, detailing an investigation conducted by the Hartford Police Department with respect to an incident involving Early in 2005 (2005 internal affairs records). Defense counsel asserted that the

[22] "The trial court's decision with respect to whether to hold a *Floyd* hearing is reviewable by motion for review pursuant to Practice Book § 66-7 . . . ." *State* v. *Ortiz*, 280 Conn. 686, 713 n.17, 911 A.2d 1055 (2006).

[23] The defendant filed a motion for permission to file the 2018 motion for augmentation and rectification late, which this court granted. The 2018 motion for augmentation and rectification was then forwarded to the trial court for adjudication. See Practice Book § 66-5.

state's nondisclosure of the 2005 internal affairs records, which purportedly contained evidence impeaching Early's credibility, violated *Brady* and, as relief, requested that the trial court conduct a *Floyd* hearing to make the 2005 internal affairs records a part of the record and to establish the "circumstances of the [state's] nondisclosure prior to and during trial." On June 25, 2018, the state filed a partial opposition to the motion. The state did not object to the court making the 2005 internal affairs records a part of the record, but the state opposed the request for a *Floyd* hearing, arguing that (1) the state would stipulate that the 2005 internal affairs records were not disclosed at the time of trial, (2) the 2005 internal affairs records were not favorable to the defendant because they did not contain information pertaining to Early's veracity, and (3) even if the 2005 internal affairs records were favorable to the defendant, they were not material under *Brady*.

On August 31, 2018, the trial court held a hearing on the 2018 motion for augmentation and rectification. During the hearing, the court admitted into evidence the 2005 internal affairs records and made a finding, in accordance with a stipulation agreed to by the parties, that the 2005 internal affairs records had not been disclosed to the defendant at the time of trial. There was no additional argument on the motion. On October 22, 2018, the court issued a memorandum of decision, stating that the 2018 motion for augmentation and rectification was "granted in terms of making the [2005 internal affairs records] a part of the record for the purpose of appellate review." The court did not expressly adjudicate the defendant's request for a *Floyd* hearing. Subsequently, this court granted the parties permission to file supplemental briefs addressing the defendant's claim that the state violated *Brady* by failing to disclose the 2005 internal affairs records.

As a preliminary matter, we examine the contours of the *Brady* claims that the defendant has raised on appeal. In the 2016 motion for augmentation and rectification, the defendant requested that the trial court make the 2008 internal affairs records a part of the record and conduct a *Floyd* hearing. In its decision on the motion, the court entered the 2008 internal affairs records into the record but declined the defendant's request to hold a *Floyd* hearing, concluding that the defendant failed to make out a prima facie showing of a *Brady* violation. The defendant then filed a motion for review, which our Supreme Court denied "without prejudice to the parties addressing in the appellate briefs whether the trial court properly found that the defendant did not meet his burden of proving a violation of [*Brady*]."

On appeal, the defendant presents two alternative claims regarding the 2008 internal affairs records. First, he claims that the state violated *Brady* by failing to disclose the 2008 internal affairs records, and, thus, he is entitled to a new trial. Apparently acknowledging that the trial court never adjudicated the specific issue of whether the state's nondisclosure of the 2008 internal affairs records constituted a *Brady* violation, as the court's ruling on the 2016 motion for augmentation and rectification was limited to entering the 2008 internal affairs records into the record and determining that the defendant had failed to produce prima facie evidence of a *Brady* violation to warrant a *Floyd* hearing, the defendant requests that we review this unpreserved claim pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), now that the 2008 internal affairs records are a part of the record. In the alternative, the defendant argues, if we were to determine that the record is inadequate to review this unpreserved *Brady* claim, we should conclude that

the trial court erred in denying his request for a *Floyd* hearing and, thus, remand the matter to the trial court to hold a *Floyd* hearing with regard to the 2008 internal affairs records.

With respect to the 2005 internal affairs records, in the 2018 motion for augmentation and rectification, the defendant requested that the trial court make the 2005 internal affairs records a part of the record and conduct a *Floyd* hearing. The court granted the motion in that it made the 2005 internal affairs records a part of the record; however, the court did not expressly rule on the defendant's request for a *Floyd* hearing. The defendant requested permission to file supplemental briefs on the issue of whether the state's nondisclosure of the 2005 internal affairs records constituted a *Brady* violation, which this court granted.

On appeal, the defendant asserts that the state violated *Brady* by failing to disclose the 2005 internal affairs records, and, therefore, he is entitled to a new trial. Seemingly recognizing that the trial court did not adjudicate the specific issue of whether the state committed a *Brady* violation by failing to disclose the 2005 internal affairs records, as the court's ruling on the 2018 motion for augmentation and rectification was limited to making the 2005 internal affairs records a part of the record, the defendant requests that we review this claim pursuant to *Golding*, as the 2005 internal affairs records are now a part of the record. He does not present an alternate claim asserting that a *Floyd* hearing with regard to the 2005 internal affairs records is necessary.

With respect to the 2008 internal affairs records, we conclude that no additional proceedings under *Floyd* are necessary. Accordingly, pursuant to *Golding*, we proceed to examine the defendant's unpreserved claims that the state committed *Brady* violations by failing to disclose the 2008 internal affairs records and the 2005

internal affairs records. See *State* v. *McCoy*, 331 Conn. 561, 598, 206 A.3d 725 (2019) (observing that unpreserved *Brady* claims have been subject to *Golding* review); see also *State* v. *Bethea*, 187 Conn. App. 263, 281–82, 202 A.3d 429 (conducting *Golding* review of unpreserved *Brady* claim), cert. denied, 332 Conn. 904, 208 A.3d 1239 (2019).

Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40. "The first two steps in the *Golding* analysis address the reviewability of the claim, while the last two steps involve the merits of the claim." (Internal quotation marks omitted.) *State* v. *Jerrell R.*, 187 Conn. App. 537, 543, 202 A.3d 1044, cert. denied, 331 Conn. 918, 204 A.3d 1160 (2019).

With respect to the first prong of *Golding*, the record is adequate for our review of the defendant's *Brady* claims because the 2008 internal affairs records and the 2005 internal affairs records, which the state concedes were not disclosed to the defendant, are part of the record for our review. The second prong of *Golding* is also satisfied, as the defendant's *Brady* claims are "of constitutional magnitude, alleging the violation of a fundamental right to due process. See *Gaskin* v. *Commissioner of Correction*, 183 Conn. App. 496, 530, 193 A.3d

625 (2018) ('[t]he *Brady* rule is based on the requirement of due process' . . .)." *State* v. *Bethea*, supra, 187 Conn. App. 281. Although the defendant's *Brady* claims are reviewable, we conclude that the 2008 internal affairs records and the 2005 internal affairs records were not material under *Brady*, and, thus, the *Brady* claims fail under the third prong of *Golding*.

"As set forth by the United States Supreme Court in *Brady* v. *Maryland*, supra, 373 U.S. 87, [t]o establish a *Brady* violation, the [defendant] must show that (1) the government suppressed evidence, (2) the suppressed evidence was favorable to the [defendant], and (3) it was material [either to guilt or to punishment]. . . . Whether the [defendant] was deprived of his due process rights due to a *Brady* violation is a question of law, to which we grant plenary review." (Citation omitted; internal quotation marks omitted.) *Turner* v. *Commissioner of Correction*, 181 Conn. App. 743, 752–53, 187 A.3d 1163 (2018).

The 2008 internal affairs records detail an investigation conducted by the Hartford Police Department in 2007 into allegations that Early had (1) arbitrarily or abusively used his police powers in a personal dispute or affair in June, 2007, when he requested that a towing company waive or reduce the fee for the release of his personal vehicle, which had been towed as a result of an expired parking permit, and (2) made false statements in interviews conducted during the course of the investigation regarding who had driven him to the towing company to retrieve his personal vehicle. An internal affairs sergeant sustained both allegations against Early. Early was issued a written reprimand for arbitrarily or abusively using his police powers, but he was not disciplined for making the false statements, as it did not appear that Early made the statements to mislead the investigation.

The 2005 internal affairs records describe an investigation conducted by the Hartford Police Department in 2005 into an incident involving Early, in which Early, while employed in a private services capacity at a Walmart in July, 2005, grabbed a citizen by the neck and shouted profanities at him after having told the citizen to dispose of a cigarette that the citizen had thrown or spat on the ground nearby. Early did not document or notify his supervisor of the incident. In relation to the incident, Early was charged with (1) intentionally, unnecessarily, and excessively using force in effectuating an arrest or in the performance and execution of official duties, and (2) intentionally using rude, offensive, or profane language and/or behavior toward a citizen while on duty. An internal affairs sergeant sustained both allegations against Early. The 2005 internal affairs records do not reveal whether Early was disciplined in relation to the sustained allegations.

In the present case, the state concedes that it did not disclose the 2008 internal affairs records or the 2005 internal affairs records to the defendant, and, thus, our inquiry becomes whether the records were favorable and material under *Brady*. Assuming, without deciding, that the 2008 internal affairs records and the 2005 internal affairs records were favorable to the defendant as impeachment evidence against Early, we conclude that the records were not material to the outcome of the defendant's trial, and, thus, the state's nondisclosure of the records did not run afoul of *Brady*. See *State* v. *Esposito*, 235 Conn. 802, 815, 670 A.2d 301 (1996) (for purposes of *Brady* analysis, declining to determine whether suppressed evidence was favorable in light of conclusion that suppressed evidence was not material).

"Not every failure by the state to disclose favorable evidence rises to the level of a *Brady* violation. Indeed, a prosecutor's failure to disclose favorable evidence will constitute a violation of *Brady* only if the evidence

is found to be material. The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial . . . . *United States* v. *Bagley*, [473 U.S. 667, 675, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)]. In a classic *Brady* case, involving the state's inadvertent failure to disclose favorable evidence, the evidence will be deemed material only if there would be a reasonable probability of a different result if the evidence had been disclosed. *Bagley*'s touchstone of materiality is a reasonable probability of a different result, and the adjective [reasonable] is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial." (Internal quotation marks omitted.) *Gaskin* v. *Commissioner of Correction*, supra, 183 Conn. App. 529–30. "In evaluating the reasonable probability standard, we should be aware of what adverse effect the nondisclosure may have had on the defendant's preparation or presentation of his case and that we should act with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have [otherwise] taken . . . . On the other hand, we must also recognize that the mere *possibility* that an item of undisclosed evidence *might* have helped the defense or *might* have affected the outcome of the trial, however, does not establish materiality in the constitutional sense." (Emphasis in original;

internal quotation marks omitted.) *Small* v. *State*, 143 Conn. App. 655, 664, 70 A.3d 180 (2013), cert. denied, 311 Conn. 908, 83 A.3d 1163 (2014).

Although we do not countenance the state's failure to disclose the 2008 internal affairs records and the 2005 internal affairs records, we conclude that there is no reasonable probability that the outcome of the defendant's trial would have been different had the state disclosed either set of the records to the defendant. Even if the defendant could have used the records to impeach Early's credibility, there was overwhelming evidence adduced at trial supporting the defendant's conviction, namely, Lewis' testimony that, prior to the victim's murder, the defendant asked him to fix the .44 Ruger, which, according to Minto's testimony, the defendant and Hall-Davis fixed before the victim's murder; the testimony of the victim's father indicating that the defendant and Hall-Davis had left his cookout together at about dusk on the day before the victim's murder; Walker's testimony that, approximately two hours before the victim's murder, the defendant, accompanied by Hall-Davis, met with Walker at the eventual crime scene, told Walker that he was having "problems" with the victim as a result of her pregnancy and wanted to kill the victim, and requested that Walker act as a lookout for him and provide a false statement to the police officers responding to the crime scene; and Minto's testimony that Hall-Davis told him that Hall-Davis had killed the victim after the defendant had repeatedly pleaded with Hall-Davis to commit the crime in order to terminate the victim's pregnancy, that Hall-Davis used the .44 Ruger to kill the victim, and that, shortly after the Manchester robbery, Hall-Davis disposed of the shell casing from the bullet that was fired at the victim. See *Elsey* v. *Commissioner of Correction*, 126 Conn. App. 144, 160, 10 A.3d 578 ("[T]his was not a case in which the prosecution's case hinge[d] entirely

on the testimony of [the witness in question] . . . . Rather . . . there was ample evidence to support the [defendant's] conviction. . . . Therefore, we cannot say that the fact that the state did not disclose the evidence . . . undermines our confidence in the jury's verdict . . . ." [Citations omitted; internal quotation marks omitted.]), cert. denied, 300 Conn. 922, 14 A.3d 1007 (2011).

The defendant asserts that Early's testimony "served as the bridge between the vacillating and self-serving statements of criminals/cooperating witnesses, Minto and Walker, and a more credible basis upon which to find guilt," such that impeaching Early's testimony with the 2008 internal affairs records and the 2005 internal affairs records would have raised doubts about the reliability of the testimonies elicited from Minto and Walker. We are not persuaded. With respect to Minto, Early testified that Minto gave him information that aided him in securing arrest warrants for the defendant and Hall-Davis in relation to the victim's murder; however, we are not convinced that impeaching Early's credibility with the records would have impacted the jury's consideration of Minto's testimony, which directly implicated the defendant in the victim's murder.

With regard to Walker, on direct examination by the state, Walker testified that on May 20, 2013, he gave a statement to the police in relation to the victim's murder. On cross-examination, Walker testified that he went to the police station to give his statement, which was documented by Early, after his landlord had told him that "the police [were] going to kick down my door if [he] didn't come down [to the police station]." Specifically, according to Walker, the landlord identified Early as the officer who had come searching for Walker. Walker also testified that he had offered testimony as a witness in a prior, unrelated criminal case in which Early was the lead investigator. The defendant

contends that the findings in the 2008 internal affairs records and the 2005 internal affairs records "would have raised serious questions about the reliability of Walker's account. If the testimony against the defendant was the product of police coercion or 'abuse of authority,' it was more suspect than the jury was led to believe." We find that argument unavailing. Walker's testimony concerning the circumstances surrounding the May 20, 2013 statement that he gave to Early supplied the defendant with evidence upon which to argue to the jury that Walker's testimony was unreliable. In fact, during closing arguments, defense counsel called Walker's credibility into question by arguing, inter alia, that the evidence suggested that Walker had been coerced by the police. Impeaching Early with the 2008 internal affairs records and the 2005 internal affairs records to call into question Walker's credibility on that particular point would have been cumulative. Furthermore, we are unconvinced that Walker's testimony was incredible on the basis that he felt compelled to speak with the police, where there is no indication that his testimony was tainted as a result of his interactions with the police.[24]

In sum, we conclude that the 2008 internal affairs records and the 2005 internal affairs records were not material to the outcome of the defendant's trial, and, thus, the state's nondisclosure of the records did not constitute *Brady* violations. Accordingly, the defendant's *Brady* claims fail to satisfy the third prong of *Golding*.[25]

The judgment is affirmed.

In this opinion the other judges concurred.

[24] We note that defense counsel did not ask Early any questions regarding his interactions with Walker during the investigation of the victim's murder.

[25] As a final matter, we note that the defendant requests that, in order to help prevent future instances of the state suppressing *Brady* material, we exercise our supervisory authority over the administration of justice to "direct trial courts to conduct a formal inquiry on the record with the

PETER J. FRANCINI, TRUSTEE, ET AL. *v.* NICHOLAS A. RIGGIONE
(AC 41528)

DiPentima C. J., and Keller and Olear, Js.

Syllabus

The plaintiffs, trustees of a certain trust, sought to recover damages from the defendant for, inter alia, breach of contract. The plaintiff F had purchased an undeveloped lot from the defendant in the town of Milford with views of Long Island Sound, Charles Island, and Milford Harbor. At closing, the parties entered into an agreement pursuant to which the defendant was to maintain certain height restrictions on his property, regrade certain topsoil and trim certain tree limbs. After attempts to resolve disputes related to the topsoil and tree limbs had failed, the plaintiffs commenced this action. Following a trial, the court rendered judgment in favor of the plaintiffs with respect to their breach of contract claims and awarded them $4100 in damages, but it denied their request for injunctive and equitable relief with respect to their claim of private nuisance, and determined that the plaintiffs' two principal claims for injunctive relief regarding the tree limbs and the pile of topsoil had become moot because the defendant trimmed the relevant limbs and leveled the topsoil so that it no longer obstructed F's view. Subsequently,

prosecutor during pretrial hearings to ascertain whether the state has exercised due diligence in locating favorable evidence, and whether all such information has been disclosed to the defense. This will serve the purpose of creating a record, impressing upon prosecutors the importance of satisfying their disclosure obligations, and reducing the number of *Brady* violations that result from the inadvertent or intentional suppression of favorable evidence." (Footnote omitted.) We decline this invitation.

"Our supervisory powers are an *extraordinary* remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole." (Emphasis in original; internal quotation marks omitted.) *Marquez* v. *Commissioner of Correction*, 330 Conn. 575, 608, 198 A.3d 562 (2019). Under *Brady*, the state has an affirmative obligation to disclose favorable evidence to the defense, including any such evidence held by the state's investigative agencies. See *Demers* v. *State*, 209 Conn. 143, 153, 547 A.2d 28 (1988). Although the state in the present case failed to disclose the records at issue, the defendant does not suggest that the state is failing systematically to comply with *Brady*. Accordingly, we are not convinced that exercising our supervisory authority to establish the procedure sought by the defendant is warranted.

the court held an evidentiary hearing concerning a motion for attorney's fees filed by the plaintiffs in accordance with a provision of the parties' contract, which provided that the prevailing party in litigation enforcing the agreement would be entitled to recover reasonable attorney's fees and court costs. The trial court awarded the plaintiffs $93,405 in attorney's fees and costs and determined that the plaintiffs were the prevailing party under the contract. On the defendant's appeal to this court, *held:*

1. The trial court did not abuse its discretion by not discounting the award of attorney's fees on account of the small sum awarded to the plaintiffs for the breach of contract claim; although the defendant claimed that a proper analysis of the factors listed in rule 1.5 (a) of the Rules of Professional Conduct would compel a significant downward departure from the plaintiffs' initial lodestar calculation, which is the initial estimate of a reasonable attorney's fee calculated by multiplying the number of hours expended on litigation times a reasonable hourly rate, because the damages awarded were insignificant in relation to the court's award of attorney's fees, the plaintiffs had a legitimate claim for attorney's fees pursuant to the contract, and the fact that the defendant rendered the plaintiffs' claims for injunctive relief under the breach of contract claims moot by performing as required under the contract well into the trial did not obviate the plaintiffs' legitimate claim for attorney's fees pursuant to the contract.
2. The trial court abused its discretion in awarding attorney's fees with respect to the plaintiff's private nuisance claim on which the plaintiffs did not prevail; although a party may recover attorney's fees for unsuccessful claims that are inextricably intertwined and involve a common basis in fact or legal theory with the successful claims, the private nuisance and breach of contract claims in the present case were factually and legally distinct, and were not inextricably intertwined or based on a common legal theory.

Argued April 15—officially released October 1, 2019

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Ansonia-Milford, where the defendant filed a counterclaim; thereafter, the matter was tried to the court, *Hon. John W. Moran*, judge trial referee; judgment in part for the plaintiffs on the complaint and in part for the defendant on the counterclaim; subsequently, the court granted the motion for attorney's fees filed by the plaintiffs, and the defendant appealed to this court. *Reversed in part*; *further proceedings.*

Sean M. Dunne, for the appellant (defendant).

Charles J. Willinger, Jr., with whom, on the brief, were *Ann Marie Willinger* and *James A. Lenes*, for the appellees (plaintiffs).

Opinion

KELLER, J. This appeal arises from a breach of contract and private nuisance action brought by the plaintiffs, Peter J. Francini, Trustee, and Donald W. Anderson, Trustee, on behalf of the Peter J. Francini 1992 Revocable Family Trust,[1] against the defendant, Nicholas A. Riggione. After a five day trial to the court, the court rendered judgment in favor of the plaintiffs on their breach of contract claims, but denied their request for injunctive and equitable relief on their private nuisance claim. The defendant appeals from the court's subsequent award, after determining that the plaintiffs were the prevailing party, of approximately $90,000 in attorney's fees.[2] On appeal, the defendant essentially claims that the court abused its discretion in calculating the award of attorney's fees (1) because in awarding fees to the plaintiffs on their claims related to a breach of contract between the parties, a proper analysis of the factors listed in rule 1.5 (a) of the Rules of Professional Conduct[3] would compel a significant downward departure from the plaintiffs' initial lodestar calculation; and

[1] For ease of discussion we refer to Francini and Anderson collectively as the plaintiffs and individually by name where necessary.

[2] The defendant does not dispute the court's determination that attorney's fees should be awarded to the plaintiffs. The defendant also does not dispute the costs awarded to the plaintiffs.

[3] Rule 1.5 (a) of the Rules of Professional Conduct provides in relevant part: "The factors to be considered in determining the reasonableness of a fee include the following: (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) The likelihood, if made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) The fee customarily charged in the locality for similar legal services; (4) The amount involved and the results obtained; (5) The time limitations imposed by the client or by the circumstances; (6) The nature and length of the professional relationship with the client; (7) The

(2) when it awarded fees for a private nuisance claim on which the plaintiffs did not prevail.[4] We agree with the defendant that the court abused its discretion in awarding attorney's fees for a claim on which the plaintiffs did not prevail. Accordingly, we reverse the judgment of the trial court in part and remand the case for further proceedings consistent with this opinion.

The record reveals the following relevant facts, found by the trial court or otherwise undisputed, and procedural history. The defendant was the owner of a three lot subdivision on Gulf Street, which abuts Milford Harbor and Long Island Sound, in the city of Milford. In 2012, the defendant agreed to sell one of the undeveloped lots (lot 3) for approximately $800,000 to Francini so that he could build a home with views of Long Island Sound, Charles Island, and the Milford Harbor. The initial closing date was set for July 18, 2012. The parties failed to close by the July closing date, and, thereafter, their attorneys drew up a second, more comprehensive

experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) Whether the fee is fixed or contingent."

[4] In his principal appellate brief, the defendant asserts five separate claims of error. For ease of discussion, we address certain claims together and in a different order than they appear in the defendant's appellate brief.

The balance of the defendant's claims posit that the court abused its discretion by awarding attorney's fees that were (1) duplicative, and (2) unnecessarily incurred because most issues litigated were not materially in dispute. With respect to duplicative fees, the defendant argues that two trial attorneys were not necessary given that this was a garden variety breach of contract case. The defendant, however, concedes in his appellate brief that the trial court was correct when it stated that, "the [plaintiffs were] free to prosecute [their] case in whatever manner that [they saw] fit." We agree both with the court's observation and its subsequent determination that it was reasonable to award fees for both attorneys because the case was sufficiently complex due to the amount of contested facts and abundance of exhibits.

With respect to fees unnecessarily incurred in litigation, the defendant's primary claim is that the main issues of the case, as a practical matter, were not in dispute. After a careful review of the record, we conclude that the defendant's claim is simply belied by the record and that a number of material issues remained unresolved prior to the commencement of trial.

agreement with a new closing date of September 14, 2012 (lawyers' contract). The parties subsequently failed to close in September, 2012.[5]

In March, 2014, approximately eighteen months after the second closing date, the defendant conveyed title to Francini. At the March, 2014 closing, the parties entered into a final agreement (postclosing agreement),[6] and memorialized the defendant's remaining obligations relevant to lot 3. Among other things, the contract provided that the defendant was to maintain certain height restrictions on his property (lot 2), level and regrade whatever topsoil remained on lot 2 after the construction of Francini's home, and trim certain limbs of a large tree located on lot 2 that obscured Fancini's view of Long Island Sound and Charles Island.

On September 22, 2015, after subsequent attempts to resolve disputes related to the topsoil and tree limbs had failed, the plaintiffs commenced the present action. In the operative complaint, the plaintiffs sought money damages and equitable and injunctive relief for claims sounding in breach of contract and private nuisance. The plaintiffs alleged that, among other things, the defendant had breached the parties' contract by refusing to trim certain limbs from the tree and refusing to level the topsoil pile on lot 2, which, at its peak, reached a height of approximately thirteen feet and significantly obscured Francini's view of Long Island Sound. In their prayer for relief, the plaintiffs' primary request was that the court provide them with a mandatory injunction requiring the defendant to "prune the lower limbs" of the tree and "remove or grade" the topsoil in order to

[5] Thereafter, Francini brought an action against the defendant for specific performance pursuant to the lawyers' contract, which was settled.

[6] The trial court found that the lawyers' contract was amended by the postclosing agreement and that the two documents formed an integrated contract. We therefore refer to both documents as the contract.

restore lot 2 to its "natural topography."[7] The defendant filed a counterclaim seeking damages for Francini's "[removal of] excess subsurface gravel and top soil material from [lot 3]," and his subsequent failure to stockpile said materials on lot 2.

After a five day trial, the court found in favor of the plaintiffs with respect to their breach of contract claims and awarded them $4100 in damages.[8] The court, however, denied the plaintiffs' request for injunctive and equitable relief with respect to their claim of private nuisance because the relief requested in their posttrial brief under this claim was not sufficiently pleaded in the operative complaint, and, thus, the defendant was not given adequate notice as to the specific relief being sought.[9] The court further concluded that the plaintiffs' two principal claims for injunctive relief regarding the tree limbs and the pile of topsoil had become moot after the fourth day of trial because the defendant trimmed the relevant limbs and leveled the topsoil so that they were no longer obscuring Francini's view.

Thereafter, the court held an evidentiary hearing over the course of two days on the plaintiffs' timely motion for attorney's fees.[10] In its memorandum of decision on

[7] The plaintiffs' prayer for relief also sought money damages for breach of contract. Specifically, they sought damages for the defendant's failure to install curb cuts, a driveway apron, and frontage landscaping on the plaintiffs' lot pursuant to the contract. The court subsequently awarded the plaintiffs damages for the defendant's failure to install the driveway apron, curb cuts and to plant two trees per the contract.

[8] The court also determined that the defendant prevailed on his counterclaim and awarded him $192 in damages, thereby reducing the plaintiffs' award from $4100 to $3908.

[9] See *Solomon* v. *Hall-Brooke Foundation, Inc.*, 30 Conn. App. 129, 133–34, 619 A.2d 863 (1993) ("When prosecuting a civil matter, the general rule is that a prayer for relief must articulate with specificity the form of relief that is sought. . . . A party who fails to comply with this rule runs the risk of being denied recovery." [Internal quotation marks omitted.]).

[10] During the hearing the parties provided testimony, affidavits, time sheets, an engagement letter, and e-mails in support of their respective claims. The defendant does not dispute that the fee, which was based on an hourly fee agreement, was customary for similar legal services in the area.

attorney's fees, the court determined that, even though the plaintiffs did not prevail on their nuisance claim, and that their principal claims for injunctive relief under their breach of contract claims were moot, the plaintiffs were the prevailing party, and that an award of fees was warranted pursuant to paragraph twenty-nine of the lawyers' contract, which provided in relevant part: "[I]n the event of any litigation brought to enforce any material provision of this Agreement, the prevailing party shall be entitled to recover its reasonable [attorney's] fees and court costs from the other party." The court further concluded that no downward departure from the initial lodestar calculation was warranted and, thereafter, awarded the plaintiffs $93,405 in attorney's fees and costs. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant claims that the court abused its discretion in its award for attorney's fees. In his view, had the court properly analyzed all of the factors in rule 1.5 (a) of the Rules of Professional Conduct,[11] a significant downward adjustment from the plaintiffs' initial lodestar calculation[12] would be warranted. Specifically, the defendant argues that the court must have ignored the fourth factor, which provides that a court should consider "[t]he amount involved and the results obtained," because if the court had considered it, it would have reduced the award accordingly.[13] We find the defendant's argument unpersuasive.

[11] See footnote 3 of this opinion.

[12] "[A lodestar calculation is] [t]he initial estimate of a reasonable attorney's fee [which] is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." (Internal quotation marks omitted.) *Ernst* v. *Deere & Co.*, 92 Conn. App. 572, 576, 886 A.2d 845 (2005).

[13] We note that the defendant did not file a motion to reargue the court's award of attorney's fees nor did he seek an articulation from the trial court with respect to its treatment of the factors in rule 1.5 (a) of the Rules of Professional Conduct. Despite the defendant's claim at oral argument before

The following additional facts are relevant to the defendant's claim. After the court concluded that the plaintiffs were the prevailing party, the defendant argued in his opposition to the plaintiffs' motion for attorney's fees, as he does on appeal, that the case did not involve novel or difficult questions of law and that the breach of contract damages awarded were insignificant in relation to the court's award for attorney's fees, and, therefore, a downward departure from the initial lodestar calculation was warranted. The defendant further argued that the entire litigation was unnecessary because the material facts were not in dispute and the plaintiffs' claims for injunctive relief were moot.

In response, the plaintiffs countered that, "[only] after the filing of this lawsuit and after the initial close of evidence in this case, and after the expenditure of [a] significant amount of money on attorney's fees by the [plaintiffs, did] the defendant remove the offensive tree limbs and . . . topsoil pile. . . . The fact of the matter is that the need for injunctive relief and specific performance concerning these issues was rendered moot, only after substantial litigation of the issues, when the defendant ultimately complied with his contractual responsibilities." The plaintiffs further argued that, "while the amount of monetary damages involved in the [plaintiffs'] complaint was minimal, the overriding focus of the case from day one was to return to [Francini] his million dollar view of Long Island Sound, a goal that was accomplished solely through the institution of the lawsuit."

this court that filing a motion for articulation was not warranted, it is the appellant's responsibility to ensure that the record is adequate for review. See Practice Book § 61-10; *Commission on Human Rights & Opportunities* v. *Brookstone Court, LLC*, 107 Conn. App. 340, 352, 945 A.2d 548, cert. denied, 288 Conn. 907, 953 A.2d 651, cert. denied, 288 Conn. 907, 953 A.2d 651 (2008); see also *Perez* v. *D & L Tractor Trailer School*, 117 Conn. App. 680, 707, 981 A.2d 497 (2009) ("we read an ambiguous trial record to support, rather than to undermine, the judgment" [internal quotation marks omitted]), cert. denied, 294 Conn. 923, 985 A.2d 1062 (2010).

After the two day evidentiary hearing on the plaintiffs' motion, the court issued its memorandum of decision, concluding that after "carefully review[ing] the factors outlined in [both] § 1.5 (a) of the Rules of Professional Conduct and . . . *Johnson* v. *Georgia Highway Express*, *Inc.*, [488 F.2d 714, 717–19 (5th Cir. 1974)]," the award of attorney's fees to the plaintiffs was warranted. In addressing the defendant's claim that the case did not present a novel or difficult question of law, the court noted that "the law on each . . . [count] individually may not be sophisticated, but taken together as intertwined with the facts [of this case], the law borders on . . . complicated." With respect to the defendant's argument that litigating the issue of injunctive relief was unnecessary because the issues were ultimately moot, the court also identified that "[the defendant's] suggestion [that the fees were unnecessary because the issues became moot] lacks merit. The initial thrust and purpose of this lawsuit was to have the topsoil on lot 2 leveled. The trial commenced prior to, and was well underway, when [the defendant ultimately] leveled the topsoil and pruned the tree adjacent to Milford Harbor."[14]

We next turn to the applicable legal principles that govern the disposition of the defendant's claim. "An award of attorney's fees is not a matter of right. Whether any award is to be made and the amount thereof lie within the discretion of the trial court, which is in the best position to evaluate the particular circumstances of a case. . . . A court has few duties of a more delicate nature than that of fixing counsel fees. The issue grows even more delicate on appeal; we may not alter an

[14] In its memorandum of decision, the court further stated that it considered the nature of the litigation, the procedural history of the case, the hourly rates charged by the plaintiffs' counsel, the number of hours billed, the nature of the billing, as well as the results obtained. The defendant does not claim error with respect to the court's consideration of these other factors.

award of attorney's fees unless the trial court has clearly abused its discretion, for the trial court is in the best position to evaluate the circumstances of each case. . . . Because the trial court is in the best position to evaluate the circumstances of each case, we will not substitute our opinion concerning counsel fees or alter an award of attorney's fees unless the trial court has clearly abused its discretion. . . .

"With respect to the relevant legal principles, we have often explained that Connecticut adheres to the American rule regarding attorney's fees. . . . Under the American rule, in the absence of statutory or contractual authority to the contrary, a successful party is not entitled to recover attorney's fees or other ordinary expenses and burdens of litigation . . . . There are few exceptions. For example, a specific contractual term may provide for the recovery of attorney's fees and costs . . . ." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *WiFiLand, LLP* v. *Hudson*, 153 Conn. App. 87, 101–102, 100 A.3d 450 (2014).

Here, paragraph twenty-nine of the lawyers' contract provides a specific contractual term for the recovery of attorney's fees. It provides in relevant part: "[I]n the event of any litigation brought to enforce any material provision of this Agreement, the prevailing party shall be entitled to recover its reasonable [attorney's] fees and court costs from the other party."

"If a contractual provision allows for reasonable attorney's fees, [t]here are several general factors which may properly be considered in determining the amount to be allowed as reasonable compensation to an attorney. These factors are summarized in [rule 1.5 (a) of the Rules of Professional Conduct]." (Internal quotation marks omitted). Id., 102–103. "[T]he commentary to rule 1.5 provides that the factors specified in the rule . . .

are not exclusive" and not all may be relevant given a particular instance. Id. 103. "[As] [w]e have explained [previously,] courts . . . may rely on their general knowledge of what has occurred at the proceedings before them to supply evidence in support of an award of attorney's fees." (Internal quotation marks omitted.) Id. For additional guidance in adjusting attorney's fees, Connecticut courts have adopted the twelve factors set forth in *Johnson* v. *Georgia Highway Express, Inc.*, supra, 488 F.2d 717–19.[15] See *Steiger* v. *J. S. Builders, Inc.*, 39 Conn. App. 32, 37-39, 663 A.2d 432 (1995) (adopting *Johnson* factors).

The gravamen of the defendant's argument in his opposition to the plaintiffs' motion for attorney's fees, which is nearly identical to his claim now on appeal, was that the court's award for attorney's fees far outpaced the small sum awarded to the plaintiffs for breach of contract damages, and when considered in light of the fact that the plaintiffs' claim for injunctive relief due to breach of contract was rendered moot, the court's award of attorney's fees reflected an abuse of discretion. The defendant's argument focuses on one factor, namely, "the amount involved and the results obtained." He claims that a proper analysis of this factor, under the present circumstances, would compel a significant downward departure from the initial lodestar calculation, because the award for breach of contract damages was de minimis compared to the

[15] "The *Johnson* factors are (1) the time and labor required, (2) the novelty and difficulty of the questions, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee for similar work in the community, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation and ability of the attorneys, (10) the undesirability of the case, (11) the nature and length of the professional relationship with the client and (12) awards in similar cases." *Ernst* v. *Deere & Co.*, 92 Conn. App. 572, 576, 886 A.2d 845 (2005).

court's award for attorney's fees. He further argues that the present case is distinguishable from a typical case where attorney's fees might far outpace actual damages, such as in a case where a plaintiff acts as a private attorney general vindicating some public right. We are not persuaded.

In the context of the present case, it would appear that the defendant wants us to interpret this factor, in particular, the words "results obtained," as functionally equivalent to "court awarded contract damages." To adopt this view would thus imply that the plaintiffs' costs associated with seeking injunctive relief for breach of contract, due to the unquantifiable character of that relief, would be unrecoverable, despite paragraph twenty-nine of the lawyers' contract. We decline to adopt such a narrow view. Critically, as the defendant concedes, the principal claim in the underlying action was not for contract damages, but rather it was to compel his specific performance with respect to removing certain view-obscuring objects on lot 2. Thus, the result obtained was precisely the result sought. See *Conservation Commission* v. *Red 11, LLC*, 135 Conn. App. 765, 786-88, 43 A.3d 244 (2012) (no abuse of discretion when court awarded approximately $390,000 in attorney's fees to party exclusively seeking injunctive relief).

Furthermore, regardless of whether the defendant's ultimate performance was court ordered or done by his own volition, the fact remains that the defendant, despite his contractual obligations, removed the view-obscuring impediments only after significant litigation.[16] The fact that the defendant rendered the plaintiffs' claims for injunctive relief under the breach of contract claims moot by performing as required under

[16] See footnote 5 of this opinion.

the contract well into trial does not obviate the plaintiffs' legitimate claim for attorney's fees pursuant to the contract. On the basis of our review of the record, we do not conclude that the court abused its discretion by not discounting the award of attorney's fees on account of the small sum awarded to the plaintiffs for the breach of contract claims. Accordingly, the defendant's first claim fails.

II

The defendant further claims that the court abused its discretion by awarding fees for work performed on the plaintiffs' private nuisance claim, on which they did not prevail.[17] Specifically, the defendant contends that because the plaintiffs did not prevail on their private nuisance claim, the court's failure to modify the award accordingly was an abuse of discretion.[18] In response,

[17] "[P]rivate nuisance . . . is a nontrespassory invasion of another's interest in the private use and enjoyment of land. . . . The law of private nuisance springs from the general principle that [i]t is the duty of every person to make a reasonable use of his own property so as to occasion no unnecessary damage or annoyance to his neighbor. . . . The essence of a private nuisance is an interference with the use and enjoyment of land. . . . [I]n order to recover damages in a common-law private nuisance cause of action, a plaintiff must show that the defendant's conduct was the proximate cause of an unreasonable interference with the plaintiff's use and enjoyment of his or her property. The interference may be either intentional . . . or the result of the defendant's negligence." (Citation omitted; internal quotation marks omitted.) *Rickel* v. *Komaromi*, 144 Conn. App. 775, 782–83, 73 A.3d 851 (2013).

[18] The defendant also claims that the court abused its discretion by awarding fees not associated with the underlying litigation. Specifically, the defendant claims that this was a breach of contract case and, therefore, any work related to issues involving the Planning and Zoning Commission of the City of Milford or the Milford Health Department should not have been included in the court's award. In the alternative, the defendant contends that, to the extent that those fees related to the plaintiffs' private nuisance claim, they should have not been awarded to them because they did not prevail on that claim. We disagree with the defendant's view that this work was unrelated to the underlying litigation, but we agree with the defendant that, to the extent that these fees were associated with the plaintiffs' unsuccessful and factually distinct private nuisance claim, they were improper.

the plaintiffs contend that, because both sets of claims "arose from a single set of underlying facts, [i.e.] the failure of the defendant to perform in accordance with the [contract]," the failure of their nuisance claim is not fatal to the court's award of the full lodestar calculation. We agree with the defendant that because the plaintiffs did not prevail on their private nuisance claim, the court should have excluded fees related to the preparation and presentation of that claim from the award.

The following additional facts are relevant to the defendant's claim. In the amended complaint, the plaintiffs alleged that the defendant's property had "been cited by the city of Milford Health Department for health code violations and is in an extreme state of disrepair; the house located on the property has boarded up windows, debris, deteriorating and compromised porches, peeling clapboards, and is host to a number of pigeons, rodents and other opportunistic animals." This disrepair has thus "interfered with [Francini's] use and an enjoyment of the [property]." In the prayer for relief, the plaintiffs requested, without specific reference to the private nuisance claim, that the court grant "such other relief within equity and law appertain."

At trial, the court heard testimony from both parties relating to the dilapidated structure located on lot 2. Both parties testified that during their earlier negotiations, the structure on lot 2 was a point of discussion. According to Francini's testimony, the defendant assured him that the structure, although in disrepair, was undergoing a historical restoration. The plaintiffs also presented evidence that the property was subsequently the object of a number of complaints from local residents, who had complained that the structure had become a refuge for pigeons, rodents and other wild animals. In response, the defendant produced evidence demonstrating that after he sold lot 3, his incremental progress on the lot 2 structure, despite his best efforts,

was the result of the administrative and financial burdens that accompanied restoring the structure to its historic specifications. The court also heard testimony that, although the structure was an issue for Francini when considering whether to purchase lot 3, the contract never reflected any obligations on the part of the defendant as to the condition or continued renovation of the structure on lot 2.

Nevertheless, in the plaintiffs' posttrial brief they argued: "In light of the defendant's promises to [Francini], it would be unreasonable to allow the defendant to continue his renovations on the . . . premises at a glacial pace. The dilapidated condition of the . . . premises has been a constant cause of damage and annoyance to the plaintiffs. At a minimum, the defendant should be ordered to complete the installation of a new roof, windows, and exterior siding on the . . . premises in accordance with applicable building codes, within ninety days of the court's ruling."

In its memorandum of decision, the court concluded that "[n]owhere in the complaint does Francini allege facts regarding a new roof, windows, and siding on the defendant's house that would infer that he is seeking equitable relief regarding completion of a new roof, windows and exterior siding on the premises . . . . Further, Francini does not claim injunctive relief regarding repairing the residence . . . in his prayer for relief. Francini's prayer for relief contains the timeworn phrase '[s]uch other relief within which equity and law appertain.' . . . The defendant could not possibly be put on notice that Francini is seeking relief regarding the completion of the exterior of the residence on lot 2. Based on the foregoing, the court declines to order injunctive relief regarding the completion of the residence on [the defendant's property]." (Footnote omitted.)

Thereafter, in the defendant's opposition to the plaintiffs' motion for attorney's fees, he argued that because the plaintiffs were unsuccessful on this claim, the court should reduce the award accordingly. The court, however, concluded that "[t]hese issues were intertwined with the other issues presented in the trial . . . and the court cannot separate and cull out the precise time and effort spent on these specific issues." On appeal, the defendant makes essentially the same argument that he made in opposition to the plaintiffs' motion for attorney's fees.

This court has reasoned that a party may recover attorney's fees for unsuccessful claims, but those claims must be inextricably intertwined and involve a common basis in fact or legal theory with the successful claims. See *Conservation Commission* v. *Red 11, LLC*, supra, 135 Conn. App. 787 n.16; see also *Perez* v. *D & L Tractor Trailer School*, 117 Conn. App. 680, 704 n.19, 981 A.2d 497 (2009), (citing approvingly to *Chopra* v. *General Electric Co.*, 527 F. Supp. 2d 230, 251–52 [D. Conn. 2007], which held that "[i]n order to recover on the entire fee incurred on both successful and unsuccessful causes of action, the claims must be 'inextricably intertwined' and involve a common basis in fact or legal theory"), cert. denied, 294 Conn. 923, 985 A.2d 1062 (2010). In the present case, we do not agree with the court's conclusion that the facts relating to both the breach of contract and private nuisance claims were inextricably intertwined or based on a common legal theory.[19] The plaintiffs' private nuisance claim was factually and legally distinct from their breach of contract claims. Because the plaintiffs were not successful on

[19] For example, the defendant claims that the affidavit submitted in support of the plaintiffs' request for attorney's fees referenced $3362 billed for work performing investigations and/or research at the Planning and Zoning Commission of the City of Milford and the Milford Health Department, which was primarily related to the plaintiffs' private nuisance claim.

their private nuisance claim, we conclude that the court abused its discretion by not reducing the plaintiffs' award for attorney's fees accordingly.

The judgment is reversed in part and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

DELORES PEEK *v.* MANCHESTER MEMORIAL HOSPITAL ET AL.
(AC 41298)

Alvord, Moll and Bear, Js.

Syllabus

The plaintiff sought to recover damages from the defendants for negligence for injuries she sustained while admitted to the defendant hospital. On February 10, 2015, while she was placed on fall prevention protocol, which required that she have assistance to leave her hospital bed, the plaintiff fell while using a restroom and sustained certain injuries. Thereafter, on April 6, 2015, the plaintiff was informed that a nurse or nurse's aide should have been responsible for her safety while at the defendant hospital. In November, 2016, the plaintiff received an automatic ninety day extension of the statute of limitations and delivered the action to the state marshal for service of process on May 22, 2017. The trial court granted a motion for summary judgment filed by the defendants and found that because the plaintiff suffered actionable harm on February 10, 2015, she should have brought the action, with the ninety day extension, on or before May 10, 2017, and that the action was barred by the applicable statute of limitations (§ 52-584). On appeal, the plaintiff claimed that the trial court improperly determined that her action was barred by § 52-584. *Held*:

1. The plaintiff could not prevail on her claim that the statute of limitations was tolled by the continuous course of treatment doctrine; the continuous course of treatment doctrine applies only to the repose portion of § 52-584 and not to the discovery portion, which addresses the plaintiff's knowledge of the injury and not the defendant's act or omission, and because the plaintiff commenced her action within three years of the act or omission complained of, her action was not barred by the repose portion, and the continuing course of treatment doctrine was not applicable under the circumstances of this case.

2. The trial court improperly granted the defendants' motion for summary judgment on the ground that the plaintiff's action was time barred, as the evidence before the court, viewed in the light most favorable to the plaintiff as the nonmoving party, demonstrated a genuine issue of material fact as to when the plaintiff discovered her injury as contemplated by § 52-584; the plaintiff adequately countered the defendants' motion for summary judgement with admissible evidence demonstrating that it was not until April 6, 2015, that she was informed that a nurse or nurse's aide should have been responsible for her safety and, thus, there existed a genuine issue of material fact as to when the plaintiff discovered the alleged breach of a duty by the defendants and a causal relationship between the defendants' alleged breach of duty and the resulting harm to her, and the plaintiff did not sustain an injury for purposes of § 52-584 until she had knowledge or in the exercise of reasonable care should have had knowledge of sufficient facts to bring a cause of action against the defendants.

Argued March 5—officially released October 1, 2019

Procedural History

Action to recover damages for, inter alia, the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Cobb, J.*, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed. *Reversed*; *further proceedings*.

Neil Johnson, for the appellant (plaintiff).

Gretchen G. Randall, with whom, on the brief, was *Emily McDonough Souza*, for the appellees (defendants).

Opinion

ALVORD, J. The plaintiff, Delores Peek, appeals from the summary judgment rendered in favor of the defendants, Manchester Memorial Hospital and Prospect Medical Holdings, Inc. On appeal, the plaintiff claims that the court improperly determined that her action

was barred by the statute of limitations in General Statutes § 52-584.[1] Because we conclude that the evidence before the trial court demonstrated a genuine issue of material fact as to when the plaintiff discovered her injury as contemplated by § 52-584, we reverse the judgment of the trial court.

The record, viewed in the light most favorable to the plaintiff as the nonmoving party, reveals the following relevant facts and procedural history. On January 30, 2015, the plaintiff was admitted to Manchester Memorial Hospital with a medical diagnosis of C-Diff diarrhea. On or about that date, she was assessed at the hospital and found to be at risk for falling. She was placed on "fall prevention protocol" and required assistance to leave her hospital bed. On February 10, 2015, the plaintiff fell while using the restroom and sustained injuries to her shoulder and neck, for which she received medication and treatment. She "was unaware," on the date of her fall, "what was the cause of [her] fall." The plaintiff left the hospital on February 12, 2015, and received follow up care through December 10, 2015, on which date she underwent neck surgery.[2] On or about April 6, 2015, staff at the office of the plaintiff's doctor informed the plaintiff that "a nurse or nurse's aide should have been responsible for [her] safety while inpatient at [the defendants' hospital]."

On November 22, 2016, the plaintiff received an automatic ninety day extension of the statute of limitations

[1] The defendants argue that the plaintiff inadequately briefed and thus abandoned and waived her claim. Although the plaintiff's briefing is extremely minimal, the briefing is adequate for review of her claim.

[2] We note that although the plaintiff's affidavit submitted in opposition to the defendants' motion for summary judgment states that she received continuing treatment until her "neck surgery on December 10, 2015, at the defendants' Rockville General Hospital," Rockville General Hospital is not named as a defendant in the present action. The defendants, however, conceded at oral argument before this court that they have an affiliation with Rockville General Hospital.

pursuant to General Statutes § 52-190a (b).[3] The plaintiff delivered the action to the state marshal for service of process on May 22, 2017. In her one count complaint, the plaintiff alleges that her fall resulted from the defendants' negligence in "fail[ing] to exercise the degree of care, skill, and diligence ordinarily exercised by hospitals engaged in the treat[ment] of patients . . . on . . . fall prevention protocol . . . ." On July 26, 2017, the defendants filed an answer and a special defense alleging that the plaintiff's claim was barred by the statute of limitations in § 52-584. On July 31, 2017, the plaintiff filed her reply to the special defense, stating therein: "The plaintiff . . . denies any and all allegations of the defendants' special defense in its entirety, the plaintiff was inpatient for the stay subject of the plaintiff's complaint until February 28, 2015."[4]

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

On December 29, 2017, the plaintiff objected to the motion for summary judgment, arguing that her action was timely because the statute of limitations was tolled

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

[4] In her reply, the plaintiff did not specifically plead the continuous course of treatment doctrine. The defendants do not argue that the plaintiff's failure to plead the continuous course of treatment doctrine prevents review and, therefore, we do not address any pleading deficiency.

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

On January 2, 2018, the court granted the defendants' motion for summary judgment, stating that "the plaintiff did not place the action in the hands of the marshal until May 22, 2017. Because the plaintiff suffered actionable harm—the fall and injuries—on February 10, 2015, she should have brought the action on or before February 10, 2017. Having received a ninety day extension . . . the suit should have been initiated on or before May 10, 2017. Having failed to initiate this action within the applicable statute of limitations, the action is time barred." This appeal followed.

On appeal, the plaintiff claims that the court improperly determined that her action was barred by the statute of limitations in § 52-584. She argues that the statute of limitations was tolled by the continuous course of treatment doctrine[5] and, thus, the statute did not begin

[5] "[T]he statute of limitations, in the proper circumstances, may be tolled under the continuous treatment . . . doctrine, thereby allowing a plaintiff to commence his or her lawsuit at a later date. . . . As a general rule, [t]he [s]tatute of [l]imitations begins to run when the breach of duty occurs. When

running until December 10, 2015, on which date she underwent neck surgery. In the alternative, she argues that actionable harm did not occur until April 6, 2015, on which date she claims that she learned that the defendants' negligence had caused her injury. We disagree that the statute of limitations was tolled by the continuing course of treatment doctrine. As to the plaintiff's alternative argument, however, we conclude that she demonstrated the existence of a genuine issue of material fact as to when she discovered her injury.

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the injury is complete at the time of the act, the statutory period commences to run at that time. When, however, the injurious consequences arise from a course of treatment, the statute does not begin to run until the treatment is terminated. . . . So long as the relation of physician and patient continues as to the particular injury or malady which [the physician] is employed to cure, and the physician continues to attend and examine the patient in relation thereto, and there is something more to be done by the physician in order to effect a cure, it cannot be said that the treatment has ceased. That does not mean that there must be a formal discharge of the physician or any formal termination of his [or her] employment. If there is nothing more to be done by the physician as to the particular injury or malady which he [or she] was employed to treat or if he [or she] ceases to attend the patient therefor, the treatment ordinarily ceases without any formality. . . .

"The continuous treatment doctrine has been justified on a number of public policy grounds. First . . . [i]t may be impossible to pinpoint the exact date of a particular negligent act or omission that caused injury during a course of treatment. . . . In such cases, it is appropriate to allow the course of treatment to terminate before allowing the repose section of the statute of limitations to run, rather than having the parties speculate and quarrel over the date on which the act or omission occurred that caused the injury during a course of treatment. . . . Second . . . public policy favors maintain[ing] the physician/patient relationship in the belief that the most efficacious medical care will be obtained when the attending physician remains on a case from onset to cure." (Citations omitted; internal quotation marks omitted.) *Grey* v. *Stamford Health System, Inc.*, 282 Conn. 745, 751–52, 924 A.2d 831 (2007).

"As [our Supreme Court has] indicated, to establish the elements of the continuing course of treatment doctrine, a plaintiff is required to prove: (1) that he or she had an identified medical condition that required ongoing treatment or monitoring; (2) that the defendant provided ongoing treatment or monitoring of that medical condition after the allegedly negligent conduct, or that the plaintiff reasonably could have anticipated that the defendant would do so; and (3) that the plaintiff brought the action within the appropriate statutory period after the date that treatment terminated." (Internal quotation marks omitted.) *Cefaratti* v. *Aranow*, 321 Conn. 637, 646–47, 138 A.3d 837 (2016).

We begin by setting forth the applicable standard of review. "Practice Book § [17-49] requires that judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A material fact is a fact that will make a difference in the result of the case. . . . The facts at issue are those alleged in the pleadings. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue as to all material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. . . . The party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. See Practice Book §§ [17-44 and 17-45]. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The test is whether a party would be entitled to a directed verdict on the same facts. . . . Our review of the trial court's decision to grant a motion for summary judgment is plenary. . . . Summary judgment may be granted where the claim is barred by the statute of limitations." (Internal quotation marks omitted.) *Wojtkiewicz* v. *Middlesex Hospital*, 141 Conn. App. 282, 285–86, 60 A.3d 1028, cert. denied, 308 Conn. 949, 67 A.3d 291 (2013).

We next review the law governing the statute of limitations. Section 52-584 provides in relevant part: "No action to recover damages for injury to the person . . . shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of . . . ." This court has explained

that "this statute imposes two specific time requirements on plaintiffs. The first requirement, referred to as the discovery portion . . . requires a plaintiff to bring an action within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered . . . . The second provides that in no event shall a plaintiff bring an action more than three years from the date of the act or omission complained of. . . . The three year period specifies the time beyond which an action under § 52-584 is absolutely barred, and the three year period is, therefore, a statute of repose." (Emphasis omitted; internal quotation marks omitted.) *Wojtkiewicz* v. *Middlesex Hospital*, supra, 141 Conn. App. 286–87.

Turning to the plaintiff's arguments, we first reject her contention that the statute of limitations was tolled by the continuous course of treatment doctrine. This court has held that that doctrine does not apply to the discovery portion of § 52-584. Id.; *Rosato* v. *Mascardo*, 82 Conn. App. 396, 405, 844 A.2d 893 (2004). The continuous course of treatment doctrine applies "only to the repose portion of the statute and not to the discovery portion. The discovery portion addresses the plaintiff's knowledge of the injury and not the defendant's act or omission.[6] Once the plaintiff has discovered her injury,

[6] Our Supreme Court has explained: "Unlike the two year limitation section of § 52-584, the repose portion of § 52-584 which provides that no action may be brought more than three years from the date of the act or omission complained of bars the bringing of suit more than three years after the alleged negligent conduct of a defendant regardless of when a plaintiff discovers the proximate cause of his harm or any other essential element of a negligence cause of action." (Internal quotation marks omitted.) *Barrett* v. *Montesano*, 269 Conn. 787, 793, 849 A.2d 839 (2004); see also *Lagassey* v. *State*, 268 Conn. 723, 752, 846 A.2d 831 (2004) (limiting its holding to principle that trial court improperly concluded as matter of law that plaintiff failed to exercise reasonable care in discovering injury, and noting that in absence of "exceptional circumstances," including where repose provision is tolled by continuous course of conduct doctrine, three year repose provision of § 52-584 will prevent plaintiff from unduly delaying cause of action for more than three years from negligent act complained of).

the statute begins to run. Moreover, after the discovery of actionable harm, the policy behind [the] doctrine, that is, the preservation of a continuing physician-patient relationship to remedy the created harm, is no longer served." (Footnote added.) *Rosato* v. *Mascardo*, supra, 405. In the present case, the plaintiff commenced her action within three years of the "act or omission complained of"; General Statutes § 52-584; and, therefore, her action was not barred by the repose portion of § 52-584. Accordingly, the continuing course of treatment doctrine is not applicable under the circumstances of this case. The only remaining issue for our consideration in this appeal is whether the plaintiff's action is time barred under the discovery portion of the statute.

The plaintiff argues that she submitted evidence in opposition to the defendants' motion for summary judgment that shows that she did not discover her "injury" for purposes of § 52-584 until April 6, 2015. She argues that actionable harm occurred on April 6 when she learned that the defendants' negligence had caused her injury. We conclude that the plaintiff provided an evidentiary foundation to demonstrate the existence of a genuine issue of material fact.

"The limitation period for actions in negligence begins to run on the date when the injury is first discovered or in the exercise of reasonable care should have been discovered. . . . In this regard, the term 'injury' is synonymous with 'legal injury' or 'actionable harm.' 'Actionable harm' occurs when the plaintiff discovers, or in the exercise of reasonable care, should have discovered the essential elements of a cause of action. . . . A breach of duty by the defendant and a causal connection between the defendant's breach of duty and the resulting harm to the plaintiff are essential elements of a cause of action in negligence; they are therefore necessary ingredients for ' "actionable harm." ' . . . Furthermore, 'actionable harm' may occur when the plaintiff has knowledge of facts that would put a reasonable person on notice of the nature and extent of an

injury, and that the injury was caused by the negligent conduct of another. . . . In this regard, the harm complained of need not have reached its fullest manifestation in order for the limitation period to begin to run; a party need only have suffered some form of ' "actionable harm." ' " (Citations omitted.) *Lagassey* v. *State*, 268 Conn. 723, 748–49, 846 A.2d 831 (2004); see also *Kelly* v. *University of Connecticut Health Center*, 290 Conn. 245, 253–54, 963 A.2d 1 (2009). In determining when a plaintiff has suffered actionable harm, "[t]he focus is on the plaintiff's knowledge of facts, rather than on discovery of applicable legal theories." (Internal quotation marks omitted.) *Taylor* v. *Winsted Memorial Hospital*, 262 Conn. 797, 805, 817 A.2d 619 (2003).

With respect to the essential element of causation, "[a]ctionable harm does not occur until the plaintiff discovers or should have discovered that the harm complained of *was caused by the negligence of the defendant*." (Emphasis in original.) *Lagassey* v. *State*, supra, 268 Conn. 747; see also *Catz* v. *Rubenstein*, 201 Conn. 39, 44, 49, 513 A.2d 98 (1986) (plaintiffs' decedent did not have an "injury" as contemplated by § 52-584 until she discovered, or in exercise of reasonable care should have discovered, causal relationship between defendant's alleged negligent diagnosis and metastasis of cancer [internal quotation marks omitted]).[7]

With those principles in mind, we review the record in the present case. The limited materials submitted in

[7] We also note that "the determination of when a plaintiff in the exercise of reasonable care should have discovered 'actionable harm' is ordinarily a question reserved for the trier of fact." *Tarnowsky* v. *Socci*, 271 Conn. 284, 288, 856 A.2d 408 (2004); *Lagassey* v. *State*, supra, 268 Conn. 749; see also *Taylor* v. *Winsted Memorial Hospital*, supra, 262 Conn. 810 ("because the determination of reasonable care is a question of fact, it was up to the jury to determine whether the plaintiff exercised reasonable care in the discovery of his injury"); *Jackson* v. *Tohan*, 113 Conn. App. 782, 790, 967 A.2d 634 (reversing summary judgment where question of whether plaintiff exercised reasonable care in discovery of her injury was question of fact not properly decided on summary judgment), cert. denied, 292 Conn. 908, 973 A.2d 104 (2009).

support of the defendants' motion for summary judgment established that the plaintiff fell on February 10, 2015, and that, on that date, she knew that she fell and sustained physical injuries.

In support of her opposition to the defendants' motion for summary judgment, the plaintiff submitted an affidavit in which she averred that she "was unaware," on the date of her fall, "what was the cause of [her] fall." She further averred that staff at her doctor's office informed her on April 6, 2015, that "a nurse or nurse's aide should have been responsible for [her] safety while inpatient at [the defendants' hospital]." Thus, we conclude that the plaintiff adequately countered the defendants' motion with admissible evidence demonstrating a genuine issue of material fact as to when she discovered her "injury" as contemplated by § 52-584. According to the plaintiff's evidence, it was not until April 6, 2015, that she was informed that a nurse or nurse's aide should have been responsible for her safety. Thus, there existed a genuine issue of material fact as to when the plaintiff discovered the alleged breach of a duty by the defendants and a causal relationship between the defendants' alleged breach of duty and the resulting harm to the plaintiff.

The defendants argue: "That [the] plaintiff may not have been conscious of the fact that she was on fall risk protocol, such that [the] defendants' 'responsibility for fall prevention was heightened to the point of requiring physical assistance for any such patient leaving the bed,' until April 6, 2015, speaks solely to an applicable *legal* theory because it implicates an enhanced legal duty of care on the part of [the] defendants." (Emphasis in original.) We disagree. "[T]he limitation period in § 52-584 does not begin to run until a plaintiff has knowledge or in the exercise of reasonable care should have had knowledge of sufficient facts to bring a cause of action against a defendant, which, in turn, requires that a plaintiff is or should have been aware that he or she

has an injury that was caused by the negligence of the defendant." (Emphasis omitted.) *Lagassey* v. *State*, supra, 268 Conn. 743–44; see also *Catz* v. *Rubenstein*, supra, 201 Conn. 44 ("A breach of duty by the defendant and a causal connection between the defendant's breach of duty and the resulting harm to the plaintiff are essential elements of a cause of action in negligence. . . . They are therefore necessary ingredients for 'actionable harm.' " [Citations omitted.]). Thus, the plaintiff did not sustain an "injury" for purposes of § 52-584 until she had knowledge or in the exercise of reasonable care should have had knowledge of sufficient facts to bring a cause of action against the defendants, including knowledge of facts that the defendants breached a duty owed to her and the causal nexus between that breach and the resulting harm. Because the evidence before the court, viewed in the light most favorable to the plaintiff, demonstrated a genuine issue of material fact as to when the plaintiff discovered her injury as contemplated by § 52-584, the court erred in granting the defendants' motion for summary judgment on the basis that the plaintiff's action was time barred.

The judgment is reversed and the case is remanded for further proceedings.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* YOON CHUL SHIN
(AC 40385)

Keller, Bright and Beach, Js.

Syllabus

Convicted of the crimes of interfering with an officer and disorderly conduct, the defendant appealed to this court, claiming, inter alia, that the evidence was insufficient to support his conviction. Police officers, who had been providing security at an event for Jewish athletes, were alerted that the defendant was driving across the country to various synagogues, and had posted a video on the Internet in which he stated that he was in the process of desecrating Jewish temples and was on a mission to

rid the planet of Jewish people. When the police observed the defendant's parked car across the street from a Jewish temple, they approached and asked him for his driver's license and vehicle registration, which the defendant refused to provide. The police observed metal devices with wire attached to them inside the car, which the defendant told them he used to desecrate the temples. After the defendant refused the officers' requests to step out of his car, the police extricated him from the car and attempted to place him in a police vehicle. The defendant resisted the officers' efforts to place him in the police vehicle and screamed anti-Semitic comments loud enough to be heard by a crowd of bystanders nearby. Police officers who had watched the defendant's Internet video testified at trial about its contents. The trial court also declined, for lack of relevance, the defendant's request to issue a subpoena to a rabbi from out of state whom the defendant claimed would testify that he had a cordial visit with the defendant and that the defendant was doing no harm while traveling around the country. *Held*:

1. The defendant's claim that his arrest and seizure by the police were illegal was unavailing; even if the defendant's arrest were illegal, it could not serve as the basis for overturning his conviction, as the defendant did not argue that evidence was obtained or used against him at trial as a result of his purported illegal arrest, and his claim that certain evidence that the police seized from his car was invalid could not be reviewed, as it was raised for the first time in his reply brief, the defendant never moved to suppress the evidence, and the trial court did not make any factual findings or legal conclusions regarding whether any evidence was illegally seized.
2. The defendant could not prevail on his claim that the evidence was insufficient to support his conviction because the police officers' testimony was fabricated; the jury was free to credit or discredit the testimony of the officers, it heard testimony from the defendant that the police officers' testimony was false, and it was free to weigh the conflicting testimony and to assess the credibility of the various witnesses, and there was a reasonable view of the evidence that supported the jury's guilty verdict.
3. This court declined to review the defendant's unpreserved claim that the trial court improperly admitted testimony from police officers about statements the defendant had made in an Internet video that he had posted; the trial court made clear to the parties that it was not going to make any ruling in advance of the officers' testimony and that it would, instead, consider any objections as they were raised during the presentation of the evidence, the defendant did not object to any of the state's questions or move to strike any testimony, he did not argue that the officers' testimony should be excluded or stricken but, rather, claimed that other videos should have been admitted to mitigate the prejudicial effects of the officers' testimony, and, therefore, the defendant failed to secure from the court a finalized, specific ruling as to any of the testimony elicited at trial.

4. The trial court did not abuse its discretion when it denied the defendant's request to excuse a prospective juror for cause during voir dire; the prospective juror repeatedly stated that she was able to serve as an impartial juror, and nowhere in the record was there an indication that she could not judge the defendant impartially, nor was there any indication in the record that her demeanor, which the court was able to observe, suggested that she could not be a fair and impartial juror.
5. The defendant could not prevail on his unpreserved claim that the trial court violated his state constitutional right to compulsory process when it denied his request to issue a subpoena to a rabbi from out of state; it was apparent that the testimony the defendant sought to illicit from the rabbi was irrelevant and inadmissible, as testimony regarding one peaceful interaction that the rabbi had with the defendant or that the defendant was not doing any harm on his spiritual journey was not relevant to the charges for which the defendant was on trial.
6. The defendant's claim that the trial court improperly found him incompetent to stand trial before it later determined that he was competent to stand trial was not reviewable, the defendant having failed to brief the claim adequately; the defendant's brief contained no analysis as to how the court made the initial determination that he was incompetent to stand trial, and the defendant did not analyze the evidence of competency or attempt to undermine the court's finding by reference to relevant law.
7. The defendant's claim that the trial court violated his constitutional right to travel when it imposed as a term of his conditional discharge a special condition that he stay out of Connecticut was dismissed as moot, as that condition had expired prior to the resolution of the defendant's appeal; moreover, the defendant's assertion that his claim was not moot because it fell within the collateral consequences exception to the mootness doctrine was unavailing, as he only generally asserted that his sentencing would have lasting consequences and did not demonstrate how an expired restriction on his ability to enter the state would create a reasonable possibility that prejudicial collateral consequences will occur, and the defendant's claim that the condition banning him from the state has led to adverse employment consequences because he has been denied employment after failing background checks was mere conjecture, as he failed to allege or to demonstrate that the condition led to his adverse employment consequences.

Argued April 10—officially released October 1, 2019

Procedural History

Substitute information charging the defendant with three counts of the crime of interfering with an officer and with the crime of disorderly conduct, brought to the Superior Court in the judicial district of Stamford-Norwalk, geographical area number one, and tried to the jury before *Blawie*, *J.*; verdict and judgment of

guilty, from which the defendant appealed to this court. *Appeal dismissed in part*; *affirmed.*

Yoon Chul Shin, self-represented, the appellant (defendant).

Sarah Hanna, assistant state's attorney, with whom, on the brief, were *Richard J. Colangelo, Jr.*, state's attorney, and *Daniel E. Cummings*, deputy assistant state's attorney, for the appellee (state).

Opinion

KELLER, J. The self-represented defendant, Yoon Chul Shin, appeals from the judgment of conviction, rendered by the trial court following a jury trial, of three counts of interfering with an officer in violation of General Statutes § 53a-167a and one count of disorderly conduct in violation of General Statutes § 53a-182. On appeal, the defendant raises a plethora of claims. Primarily, he claims that (1) he was illegally seized by the police because he was arrested without probable cause or an arrest warrant; (2) the evidence was insufficient to find him guilty of any of the crimes with which he was charged because testimony elicited from police officers at trial was fabricated; (3) the court improperly admitted testimony from police officers about statements the defendant made in a video he posted on the Internet; (4) the court abused its discretion in denying his request to excuse a prospective juror for cause during voir dire; (5) the court violated his constitutional right to compulsory process by declining to issue a subpoena; (6) the court improperly found him incompetent to stand trial but restorable before later determining that he was competent;[1] and (7) the court improperly imposed on him as part of his conditional discharge a

[1] See, e.g., *State* v. *Seekins*, 299 Conn. 141, 147–48, 8 A.3d 491 (2010) (defendant found incompetent to stand trial but restorable to competency).

special condition that he stay out of the state of Connecticut.[2] We dismiss the last claim as moot and, with respect to the remaining claims, affirm the judgment of the trial court.

On the basis of the evidence adduced at trial, the jury reasonably could have found the following facts. In August, 2016, the Maccabi Games, an athletic event for Jewish athletes, were held over a span of four days at West Hill High School (school) in Stamford. On August 10, 2016, the Stamford Police Department (department) received from the Stamford Jewish Community Center's internal security staff a memorandum alerting it that a suspicious individual from California, later identified as the defendant, was driving a blue Toyota Celica covered in white painted writing across the country to various synagogues and that he may be seen around the school during the Maccabi Games. Upon receipt of the memorandum, the department forwarded it to the Federal Bureau of Investigation's (FBI) joint terrorism task force, which, in turn, sent an email to the department stating that it had opened an investigation of the defendant in Cincinnati, Ohio, and that it found a video posted on the Internet by the defendant in which he stated that he was in the process of desecrating Jewish temples and that he was "on a mission to rid the Jew . . . of the planet." This information was disseminated to the Stamford police officers assigned to provide security at the Maccabi Games on August 11, 2016.

[2] The defendant also alleges that the state has conspired to alter trial court transcripts and that documents vital to his appeal are missing. During the pendency of this appeal, the file in this case was inadvertently stripped of most of its contents. The state has included in its appendix any documents it deemed relevant to the defendant's claims on appeal. Additionally, at the defendant's request, the trial court transcripts were revised. On the basis of our review of the record, we determine that it is adequate for our review of the defendant's claims.

On the morning of August 11, 2016, Officer Michael Montero alerted other officers via radio that he had seen the defendant's vehicle passing the school and continuing north on Roxbury Road. After receiving the radio call, Lieutenant Christopher Baker and Sergeant Steven Perrotta drove north on Roxbury Road, where they eventually observed the defendant's parked vehicle blocking a residential driveway directly across from Temple Beth El, a Jewish temple. Lieutenant Baker and Sergeant Perrotta turned on their vehicle's overhead lights and pulled behind the defendant's vehicle. When Lieutenant Baker approached the defendant's vehicle, he noticed that the rear window was covered in tin foil, making it impossible to see who or what was in the vehicle. When Lieutenant Baker asked the defendant for his driver's license and vehicle registration, the defendant did not comply with his request. The defendant also was agitated and repeatedly stated that he was only praying and that the police had no right to stop him. Lieutenant Baker observed on the dashboard of the defendant's car two pyramid shaped metal devices, one of which had 12 gauge wire sticking out of it. When Lieutenant Baker asked about the objects, the defendant stated that they were what he used to desecrate the temples.

Lieutenant Baker subsequently asked the defendant several times to turn off his vehicle's motor, but he refused. Sergeant Perrotta then reached into the vehicle and shut it off. Lieutenant Baker on several occasions ordered the defendant out of his vehicle, but he repeatedly refused. Due to the defendant's noncompliance, Lieutenant Baker opened the defendant's door and extricated him from the vehicle. Sergeant Felix Martinez, who had arrived to assist Lieutenant Baker and Sergeant Perrotta, attempted to escort the defendant to the back of his police vehicle. As he was being placed in the back of the police vehicle, the defendant was

screaming anti-Semitic comments loud enough to be overheard by a group of civilians who had gathered near the scene. Sergeant Martinez and Sergeant Perrotta attempted to place the defendant in the police car, but the defendant braced himself against the vehicle to prevent himself from being placed into the car. Eventually, Sergeant Martinez and Sergeant Perrotta were able to physically push the defendant into the police car.

On the basis of the information provided by the FBI, the video made by the defendant, the defendant's behavior while interacting with the police officers, and the pyramids on the dashboard of the defendant's car, Lieutenant Baker requested the presence of a bomb sniffing dog to ensure that the defendant's car did not contain any explosives. Upon arrival, the bomb sniffing dog indicated that explosives were either present or had been present.[3] Accordingly, a safety perimeter around the defendant's vehicle was established while it was being searched. As a precaution, children who had been playing outside at a nearby school were evacuated from the area. While the defendant's vehicle was being searched for explosives, the defendant was twice taken out of Sergeant Martinez' police car so that Sergeant Erin Trew could question him about the pyramid devices on his dashboard. During his second conversation with Sergeant Trew, the defendant again began to scream obscenities and anti-Semitic comments audible to a crowd of bystanders. The defendant then was put in handcuffs and placed under arrest. When Sergeant Martinez again tried to place the defendant back in his police vehicle, the defendant began yelling and screaming while he resisted attempts to be placed in the vehicle. Due to the defendant's resistance, Sergeant Trew needed to go to the other side of the vehicle and pull the defendant into the car. The defendant was thereafter transported to the police station.

[3] No explosive devices were found in the defendant's vehicle.

The defendant originally was charged with breach of the peace in the second degree in violation of General Statutes § 53a-181 and inciting injury to persons or property in violation of General Statutes § 53a-179a. [See file] In a substitute information filed before trial, the defendant was charged with three counts of interfering with an officer in violation of § 53a-167a[4] and one count of disorderly conduct in violation of § 53a-182.[5]

After a jury trial, in which the defendant elected to represent himself,[6] the defendant was found guilty on all counts. The court rendered a judgment of conviction in accordance with the jury's verdict and imposed a total effective sentence of three years of incarceration, execution suspended after seven months, with two years of conditional discharge.[7] This appeal followed. Additional facts will be set forth as necessary.

[4] In a prior substitute information, the defendant was charged with four counts of interfering with an officer.

[5] On appeal, the defendant also claims that the trial court abused its discretion in permitting the state to file a substitute information before trial. We disagree.

It is well settled that "[b]efore the commencement of trial, a prosecutor has broad authority to amend an information . . . ." (Internal quotation marks omitted.) *State* v. *Greene*, 186 Conn. App. 534, 545, 200 A.3d 213 (2018). Moreover, Practice Book § 36-17 provides in relevant part: "If the trial has not commenced, the prosecuting authority may . . . file a substitute information. *Upon motion of the defendant*, the judicial authority, in its discretion, may strike the . . . substitute information, if the trial or the cause would be unduly delayed or the substantive rights of the defendant would be prejudiced." (Emphasis added.)

The defendant did not move to strike the substitute information, which would have required the court to utilize its discretion to determine whether the substitute information would have caused undue delay or prejudiced the substantive rights of the defendant. Because the court was not asked to make such a ruling, it cannot be said that the court abused its discretion. Accordingly, the defendant's claim fails.

[6] The defendant was provided with standby counsel.

[7] The conditions of the defendant's discharge were that he was to stay away from all Jewish establishments, facilities, schools and synagogues and to leave the state of Connecticut within seventy-two hours of being discharged by the Department of Correction and not to return with the exception of probation or court appearances.

I

The defendant first claims that he was illegally seized by the police because he was arrested without probable cause or an arrest warrant. The state argues that, even if the defendant's arrest was illegal, it cannot serve as the basis to overturn the defendant's conviction. We agree with the state.

Our Supreme Court has stated that "[t]he relationship between an illegal arrest and a subsequent prosecution under federal constitutional law is well settled. In an unbroken line of cases dating back to 1886, the federal rule has been that an illegal arrest will not bar a subsequent prosecution or void a resulting conviction." (Internal quotation marks omitted.) *State* v. *Bagnaschi*, 180 Conn. App. 835, 857, 184 A.3d 1234, cert. denied, 329 Conn. 912, 186 A.3d 1170 (2018). "[E]ven when an arrest is made without probable cause, a subsequent conviction is not void if no evidence was obtained as the result of the illegal arrest." *State* v. *Silano*, 96 Conn. App. 341, 344, 900 A.2d 540, cert. denied, 280 Conn. 911, 908 A.2d 542 (2006).

In the present case, the defendant does not argue in his principal appellate brief that evidence was obtained or used against him at trial as a result of his purported illegal arrest. Rather, his argument merely centers on the assertion that he was illegally seized. As a result, even if his arrest was illegal, it cannot serve as the basis for overturning his conviction. Therefore, the defendant's claim fails.

Moreover, the defendant in his reply brief claims for the first time that photographs of his vehicle and the pyramids on his dashboard, police officer testimony adduced at trial, and police reports are "invalid" due to his illegal seizure. It is, however, a "well established principle that arguments cannot be raised for the first

time in a reply brief." (Internal quotation marks omitted.) *State* v. *Myers*, 178 Conn. App. 102, 106, 174 A.3d 197 (2017). Furthermore, the defendant never moved to suppress this evidence. Accordingly, the record is inadequate for appellate review because the court did not make any factual findings or legal conclusions regarding whether any evidence was illegally seized.[8] See, e.g, *State* v. *Collins*, 124 Conn. App. 249, 256–57, 5 A.3d 492 (record inadequate for review where defendant failed to file motion to suppress and no evidentiary hearing held), cert. denied, 299 Conn. 906, 10 A.3d 523 (2010); *State* v. *Necaise*, 97 Conn. App. 214, 220, 904 A.2d 245 (declining to review claim regarding out-of-court identification due to inadequate record where defendant failed to file motion to suppress and to object at trial, and no evidentiary hearing held), cert. denied, 280 Conn. 942, 912 A.2d 478 (2006).

II

The defendant next argues that the evidence was insufficient to find him guilty of the offenses with which he was charged because the police officers' testimony adduced at trial was fabricated.[9] We disagree.

We begin by briefly setting forth the standard of review for claims of evidentiary insufficiency in a criminal appeal. "In reviewing the sufficiency of the evidence to support a criminal conviction we apply a two-part test. First, we construe the evidence in the light most

[8] Before trial, the defendant filed a "motion to return suppressed evidence." In a colloquy with the court discussing the motion, the defendant briefly mentioned that he believed his vehicle was illegally seized and that he wanted it to be moved from a private lot. This colloquy, however, centered only on the defendant's desire to have the vehicle removed from the lot, not whether it was illegally seized and used as evidence at trial. Moreover, at his sentencing, the state reiterated that the defendant's vehicle was not seized as evidence, but that it was towed to a private impound lot because it could not remain parked on the side of a public road.

[9] Although the defendant's analysis of this claim does not refer to evidentiary insufficiency, we interpret his argument to raise such a claim.

favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"We note that the [finder of fact] must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the [finder of fact] to conclude that a basic fact or an inferred fact is true, the [finder of fact] is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

"In evaluating evidence, the [finder] of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [finder of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . .

"On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Dojnia*, 190 Conn. App. 353, 371–72, 210 A.3d 586 (2019).

In the present case, the defendant essentially asks us to assess the credibility of the witnesses who testified at trial. It is well settled, however, that "[a reviewing court] cannot retry the facts or pass upon the credibility

of the witnesses." (Internal quotation marks omitted.) *Frauenglass & Associates, LLC* v. *Enagbare*, 149 Conn. App. 103, 114, 88 A.3d 1246, cert. denied, 314 Conn. 927, 101 A.3d 273 (2014). "[W]e must defer to the finder of fact's evaluation of the credibility of the witnesses that is based on its invaluable firsthand observation of their conduct, demeanor and attitude. . . . [The fact finder] is free to juxtapose conflicting versions of events and determine which is more credible. . . . It is the [fact finder's] exclusive province to weigh the conflicting evidence and to determine the credibility of witnesses. . . . The [fact finder] can . . . decide what—all, none, or some—of a witness' testimony to accept or reject." (Citation omitted; internal quotation marks omitted.) *State* v. *Colon*, 117 Conn. App. 150, 154, 978 A.2d 99 (2009). "Because it is the sole province of the trier of fact to assess the credibility of witnesses, it is not our role to second-guess such credibility determinations." (Internal quotation marks omitted.) *State* v. *Carlos C.*, 165 Conn. App. 195, 200, 138 A.3d 1090, cert. denied, 322 Conn. 906, 140 A.3d 977 (2016).

In the present matter, the jury as the finder of fact was free to credit or discredit the testimony of the police officers. Moreover, the jury heard testimony from the defendant that the police officers' testimony was false. Accordingly, the jury was free to weigh the conflicting testimony and assess the credibility of the various witnesses. Thus, after construing the evidence in the light most favorable to sustaining the verdict, we conclude that there is a reasonable view of the evidence that supports the jury's verdict of guilty. Therefore, we reject the defendant's claim.

III

The defendant next claims that the court improperly admitted testimony from police officers about statements made in an Internet video posted by the defendant, of which the officers were made aware by the

FBI, before their interaction with him on August 11, 2016. In that video, the defendant made derogatory remarks about Jewish people and discussed desecrating Jewish temples. Specifically, the defendant argues that the testimony was irrelevant and unduly prejudicial. Because the defendant failed to preserve his evidentiary claim, we decline to review it.

The following additional facts are relevant to the defendant's claim. On February 23, 2017, the state indicated to the court that it intended to offer into evidence as many as two videos that the defendant made and posted on the Internet in which he made derogatory remarks about Jewish people and discussed desecrating Jewish temples. The defendant argued that the videos were irrelevant, to which the court responded that it was not inclined to make an advance ruling on the admissibility of the videos. On February 27, 2017, the state indicated to the court, for the sake of judicial economy and to reduce the prejudicial effects of the video,[10] that it instead intended to offer the testimony of the police officers who, before encountering the defendant, viewed the video or had been made aware of the comments made in the video via the circulated memorandum, and how those comments affected their subsequent actions.[11] In light of the state's position, the court stated that it would consider objections to the testimony at trial on a question by question basis.

On the first day of trial, the defendant asked the court about the state's use of the video at trial. The court reiterated that the state did not intend to offer the video and that it instead would elicit testimony from its witnesses about the contents of the video. In response,

[10] Although the state originally had suggested that it might offer two videos, the state later mentioned only one video.

[11] The court in its limiting instruction to the jury also noted that the statements were offered to prove the defendant's possible motive as well as his state of mind and intent.

the defendant argued that the testimony was irrelevant, immaterial, prejudicial and inflammatory. Further, he stated that he did not have a "problem with [the state] presenting the video," but that he wanted to introduce other videos that he posted on the Internet to clarify what he meant by desecrating Jewish temples. The court again reminded the defendant that the state was not offering the videos and that it was not going to make any evidentiary rulings in advance. Moreover, the court explained to the defendant that he would be permitted to testify about what he meant in the videos if he wanted to do so.

During the state's case-in-chief, Lieutenant Baker, Sergeant Perrotta, Sergeant Martinez, and Sergeant Trew all testified about their knowledge of the content of the defendant's video, which had been made prior to their encounters with him on August 11, 2016. The defendant failed to object to any of the state's questions and did not move to strike any testimony.[12] Following this testimony, the defendant, in a colloquy with the court, again argued that the testimony was irrelevant and prejudicial and that, as a result, he should be able to offer other Internet videos that would purportedly clarify his comments from the video about which the police officers testified. The defendant, however, did not move to strike any of the elicited testimony.

"[T]he standard for the preservation of a claim alleging an improper evidentiary ruling at trial is well settled. This court is not bound to consider claims of law not made at the trial. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial court of the precise nature of the objection

[12] The defendant's sole objection was that Lieutenant Baker's testimony was inaccurate.

and its real purpose, in order to form an adequate basis for a reviewable ruling. . . . Once counsel states the authority and ground of [the] objection, any appeal will be limited to the ground asserted. . . .

"These requirements are not simply formalities. They serve to alert the trial court to potential error while there is still time for the court to act. . . . Assigning error to a court's evidentiary rulings on the basis of objections never raised at trial unfairly subjects the court and the opposing party to trial by ambush." (Internal quotation marks omitted.) *State* v. *Jorge P.*, 308 Conn. 740, 753, 66 A.3d 869 (2013).

This court has recognized that "where the court's evidentiary ruling is preliminary and not final, it is incumbent on the defendant to seek a definitive ruling [when the evidence is offered at trial] in order to fully comply with the requirements of our court rules of practice for preserving his claim of error . . . ." (Internal quotation marks omitted.) *State* v. *Patel*, 186 Conn. App., 814, 844, 201 A.3d 459, cert. denied, 331 Conn. 906, 203 A.3d 569 (2019), quoting *State* v. *Johnson*, 214 Conn. 161, 170, 571 A.2d 79 (1990); see also *State* v. *Ramos*, 36 Conn. App. 831, 837, 661 A.2d 606, 610 (declining to review evidentiary claim where defendant's objection premature and never renewed), cert. denied, 235 Conn. 902, 665 A.2d 905 (1995).

As previously discussed, the court made clear to the parties that it was not going to make any ruling in advance of the officers' testimony and that it would instead consider any objections as they were raised during the presentation of evidence. Throughout the testimony, the defendant did not object to any of the state's questions or move to strike any testimony. At trial, the defendant argued that the testimony was irrelevant, but only in support of his argument that he then should be able to introduce evidence to demonstrate

that he had previous peaceful interactions at Jewish temples. In other words, the defendant was not arguing that the testimony should be excluded or stricken from the record, but rather he was arguing that other videos should have been admitted to mitigate the prejudicial effects of the officers' testimony. As a result, the defendant failed to secure from the court a finalized, specific ruling as to any of the testimony elicited at trial. Accordingly, we decline to review the defendant's evidentiary claim.[13]

IV

The defendant next appears to claim that the court abused its discretion in denying his request to excuse a juror for cause. We disagree.

The following additional facts are relevant to the defendant's claim. On the second day of jury selection, the parties interviewed D[14] as a potential juror. During voir dire, D stated that she was on the board of her child's Montessori school and that she made several films promoting the school. The defendant then asked D if she could be an impartial juror even if she heard derogatory remarks about Montessori schools, to which D replied that she could. When the state asked a similar question, she reiterated that she believed that she could

[13] We also note that the defendant has failed to brief the issue of whether the court's alleged evidentiary error was harmful; accordingly, the defendant's claim is inadequately briefed. See *MacDermid, Inc.* v. *Leonetti*, 328 Conn. 726, 757, 183 A.3d 611 (2018) ("[w]e do not reach the merits of [a] claim [where] the defendant has not briefed how he was harmed by the allegedly improper evidentiary ruling" [internal quotation marks omitted]); see also *State* v. *LaVallee*, 101 Conn. App. 573, 579, 922 A.2d 316 ("[a]bsent any analysis as to how the [evidentiary] ruling harmed [the defendant], we are unable to conclude that the exclusion of this evidence was an abuse of discretion"), cert. denied, 284 Conn. 903, 931 A.2d 267 (2007).

[14] In accordance with our usual practice, we identify jurors by initials in order to protect their privacy interests. See *State* v. *Biggs*, 176 Conn. App. 687, 695 n.5, 171 A.3d 457, cert. denied, 327 Conn. 975, 174 A.3d 193 (2017).

be fair and impartial.[15] The defendant, having used all of his preemptory challenges, then moved to excuse D for cause, arguing that he had posted several videos online in which he discussed "the corruption in some of these Montessori schools," and that, given her ties to a Montessori school, she could not be an impartial juror. The court denied the defendant's challenge and made D a full juror, stating that the defendant was not on trial for having made verbal attacks on Montessori schools.

We begin with the standard of review and relevant principles of law. "The constitutional standard of fairness requires that a defendant have a panel of impartial, indifferent jurors. . . . [T]he enactment of article first, § 19, of the Connecticut constitution, as amended, reflects the abiding belief of our citizenry that an impartial and fairly chosen jury is the cornerstone of our criminal justice system. . . . We have held that if a potential juror has such a fixed and settled opinion in a case that he cannot judge impartially the guilt of the defendant, he should not be selected to sit on the panel. . . .

"The trial court is vested with wide discretion in determining the competency of jurors to serve, and that judgment will not be disturbed absent a showing of an

[15] The following colloquy occurred between the state and D:

"Q. . . . If you were to hear evidence of a witness or the defendant making derogatory remarks about the Montessori school, would that make you more inclined to convict the defendant of the offenses he's charged with, even if the state hasn't proven it by the evidence?

"A. I would want to hear proof toward—toward that fact.

"Q. Okay.

"A. Yeah, I'd, you know, my feelings aside, you know, I would still need to have the evidence to prove it.

"Q. So, is it fair to say that even if you personally were offended by what the defendant said, if the state had not proven its case, you still—you would not convict him of the offenses?

"A. Yes, I—I agree with your statement, yes."

abuse of discretion. . . . On appeal, the defendant bears the burden of showing that the rulings of the trial court resulted in a jury that could not judge his guilt impartially. . . . Accordingly, we review the defendant's claim for an abuse of discretion." (Citation omitted; internal quotation marks omitted.) *State* v. *Erick L.*, 168 Conn. App. 386, 417, 147 A.3d 1053, cert. denied, 324 Conn. 901, 151 A.3d 1287 (2016).

As previously discussed, D repeatedly stated during voir dire that she was able to serve as an impartial juror. Nowhere in the record is there an indication that D would demonstrate such a fixed and settled opinion in the case that she could not judge the defendant impartially. Moreover, the court was able to observe D's demeanor in deciding whether to excuse her for cause, and there is no indication in the record that her demeanor suggested that she could not be a fair and impartial juror. See *State* v. *Tucker*, 226 Conn. 618, 636, 629 A.2d 1067 (1993) ("[d]emeanor plays an important part in the determination of a juror's impartiality"). Given the court's broad discretion in deciding whether to excuse a juror for cause, we do not conclude in this instance that it abused its discretion. See id. (assessing potential juror's impartiality is "particularly within the province of the trial judge and the trial judge has broad discretion in deciding whether to excuse a juror for cause" [internal quotation marks omitted]).[16]

[16] The defendant also appears to insinuate in his principal appellate brief that the court improperly allowed the state to ask him on cross-examination about comments he made regarding Montessori schools. The defendant makes this assertion without any further discussion or analysis. Thus, to the extent that the defendant has attempted to raise an additional evidentiary claim, it is inadequately briefed. "Claims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion. . . . Claims are also inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record . . . ." (Internal quotation marks omitted.) *Estate of Rock* v. *University of Connecticut*, 323 Conn. 26, 33, 144 A.3d 420 (2016).

V

Additionally, the defendant claims that the trial court violated his right to compulsory process under article first, § 8, of the Connecticut constitution because it declined to issue a subpoena to a rabbi from New Jersey.[17] We disagree.

The following additional facts are relevant to the defendant's claim. The defendant filed an application for the issuance of a subpoena to compel a rabbi in New Jersey to testify. On January 23, 2017, the court, *White*, *J.*, stated that it would consider the application at the time of trial. The defendant did not inquire about the subpoena again until after the first day of trial on March 1, 2017. At that time, the court, *Blawie*, *J.*, indicated that he was unaware of such an application. When the court asked the defendant about the anticipated content of the rabbi's testimony, the defendant proffered that the rabbi would testify that the defendant had a cordial visit with him at his New Jersey temple and that the defendant was doing no harm while he was traveling around the country. After the state objected, the trial court ruled that it would not issue the subpoena on the ground that the rabbi's testimony was irrelevant to the case.

As a preliminary matter, we note that although the defendant has failed to preserve his constitutional claim at trial, we nevertheless review it pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved

[17] The defendant also claims that the court improperly denied his request to submit a police report into evidence. The defendant makes only a conclusory statement that the court's evidentiary ruling was improper without providing any legal analysis. Accordingly, his claim is inadequately briefed. See *Estate of Rock* v. *University of Connecticut*, 323 Conn. 26, 33, 144 A.3d 420 (2016).

at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 239–40. The defendant satisfies the first two prongs of *Golding* because the record is adequate for review, and because he alleges a violation of his right to compulsory process, his claim is of a constitutional magnitude. We conclude, however, that the defendant's claim fails under the third prong of *Golding* because he has failed to demonstrate that the alleged constitutional violation exists and that it deprived him of a fair trial.

"The sixth amendment [to] the United States constitution provides in relevant part that [i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . . The right to compulsory process has been made applicable to state prosecutions through the due process clause of the fourteenth amendment. . . . The same right is protected under article first, § 8, of our state constitution. . . .

"It is well established that [t]he federal constitution require[s] that criminal defendants be afforded a meaningful opportunity to present a complete defense. . . . The sixth amendment . . . [guarantees] the right to offer the testimony of witnesses, and to compel their attendance, if necessary, [and] is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies. . . .

"Although exclusionary rules of evidence cannot be applied mechanistically to deprive a defendant of his [compulsory process] rights, the constitution does not require that a defendant be permitted to present every piece of evidence he wishes. . . . The defendant's sixth amendment right . . . does not require the trial court to forgo completely restraints on the admissibility of evidence. . . . Generally, an accused must comply with established rules of procedure and evidence in exercising his right to present a defense. . . . A defendant, therefore, may introduce only relevant evidence, and, if the proffered evidence is not relevant, its exclusion is proper and the defendant's right is not violated. . . . To establish a violation of the right to compulsory process when a defendant is deprived of a certain witness at trial, [h]e must at least make some plausible showing of how [the] testimony would have been both material and favorable to his defense." (Citations omitted; internal quotation marks omitted.) *State* v. *Nowacki*, 155 Conn. App. 758, 770–72, 111 A.3d 911 (2015).

"Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . One fact is relevant to another if in the common course of events the existence of one, alone or with other facts, renders the existence of the other either more certain or more probable. . . . Evidence is irrelevant or too remote if there is such a want of open and visible connection between the evidentiary and principal facts that, all things considered, the former is not worthy or safe to be admitted in the proof of the latter. . . . The trial court has wide discretion to determine the relevancy of evidence and [e]very reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion." (Internal quotation marks omitted.) *State* v. *Martinez*, 171 Conn. App. 702, 726, 158 A.3d 373, cert. denied, 325 Conn. 925, 160 A.3d 1067 (2017).

In the present case, it is apparent, on the basis of the defendant's proffer, that the testimony he sought to illicit from the rabbi was irrelevant and, accordingly, inadmissible. Specifically, testimony regarding one peaceful interaction that the rabbi had with the defendant or that the defendant was not doing any harm on his "spiritual journey" was not relevant to the charges of interfering with an officer and disorderly conduct for which he was on trial.[18] Accordingly, we conclude that the defendant's constitutional right to compulsory process was not violated.

VI

The defendant also claims that the court improperly found him incompetent to stand trial but restorable to competency before later determining that he then was competent. Because the defendant has failed to analyze how the court erred by initially finding him incompetent, we decline to review his claim.

The following additional facts and procedural history are relevant to the resolution of this claim. On August 12, 2016, the defendant was arraigned. At this time, the defendant was represented by a public defender, who orally moved for the court to order a competency evaluation of the defendant. The court subsequently granted the motion. On September 9, 2016, the court again ordered a competency evaluation because its

[18] The defendant concedes in his principal appellate brief that the rabbi's testimony was not directly related to the charges he faced. Rather, he argues that the testimony is relevant to the "principal issue of the case," which he views as whether the defendant was illegally seized as a threat to the Jewish community. The defendant misconstrues what was at issue in his underlying case and, as a result, the relevance of the testimony he sought to elicit at trial. The defendant was charged solely with three counts of interfering with an officer and one count of disorderly conduct on the basis of his conduct that took place on August 11, 2016, not in connection with his comments regarding the Jewish community.

prior order had not been processed.[19] On October 5, 2016, the court's hearing on the defendant's competency was continued to a later date.[20] On October 25, 2016, the court held a competency hearing during which, following testimony from an expert who evaluated the defendant, it found that the defendant was incompetent to stand trial, but that it was likely that he could be restored to competency. Accordingly, the court committed the defendant to the Whiting Forensic Division of Connecticut Valley Hospital in Middletown for a period of sixty days. On December 27, 2016, the court, after it heard additional evidence, found that the defendant was competent to stand trial.

Although the defendant assumes in his argument that the court erred in its initial determination that he was incompetent to stand trial, his appellate brief contains no analysis as to how the court erroneously made that determination. The defendant neither analyzes the evidence of competency before the court nor, by reference to relevant law, attempts to undermine the court's finding. "It is well settled that [w]e are not required to review claims that are inadequately briefed . . . . We consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed." (Internal quotation marks omitted.) *Nowacki* v. *Nowacki*, 129 Conn. App. 157,

[19] The defendant mentions in his appellate brief that he was improperly denied the right to be present at this proceeding. His defense counsel, however, waived his appearance.

[20] Likewise, the defendant also claims on appeal that he was improperly denied the right to be present at this proceeding. The matter was continued and, accordingly, we are not persuaded that the defendant is able to demonstrate how he was harmed.

163–64, 20 A.3d 702 (2011). Accordingly, we conclude that the defendant has briefed the issue inadequately and we decline to afford it review.

VII

The defendant's final claim is that the court improperly imposed on him as part of his conditional discharge a special condition that he stay out of the state of Connecticut, except to attend judicial proceedings, in violation of his constitutional right to travel. The state argues that the defendant's claims are moot because the defendant's term of conditional discharge was set to expire in March, 2019, before a resolution of this appeal. We agree with the state.

We briefly set forth the facts relevant to the defendant's claim. The defendant was sentenced on March 20, 2017. At sentencing, the state requested that the court impose a sentence that included three years of probation. The court subsequently asked the defendant if he wanted to remain in Connecticut upon his release from custody, to which he replied that he did not. Accordingly, in lieu of imposing three years of probation, the court instead imposed a sentence that included a two year conditional discharge. One condition of the defendant's discharge was that he was to leave the state of Connecticut within seventy-two hours of being discharged by the Department of Correction and not return except for purposes related to his conditional discharge or to attend court appearances. When the court informed the defendant that it intended to impose such a condition on him, the defendant responded that "you could not pay me to . . . stay and live in this state. . . . I am going back to California." Further, when the court asked the defendant if he understood the condition, he replied that he understood "[c]ompletely" and that he had no desire to stay in Connecticut.

We begin our analysis with a brief discussion of the mootness doctrine. "Mootness implicates [the] court's

subject matter jurisdiction and is thus a threshold matter for us to resolve . . . . It is a well-settled general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . Because mootness implicates subject matter jurisdiction, it presents a question of law over which our review is plenary." (Internal quotation marks omitted.) *Kirwan* v. *Kirwan*, 185 Conn. App. 713, 748, 197 A.3d 1000 (2018).

Because the defendant was sentenced on March 20, 2017, his conditional discharge expired in March, 2019. This appeal was not heard until April 10, 2019, and, therefore, the condition that the defendant now challenges on appeal has expired. Therefore, there is no practical relief that this court can provide to him. See *Fredo* v. *Fredo*, 185 Conn. App. 252, 264, 196 A.3d 1235 (2018) ("[a]n actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal" [internal quotation marks omitted]). Accordingly, we conclude that this court lacks subject matter jurisdiction over the defendant's claim because it is moot.[21]

[21] The state argues in its appellate brief that the defendant's claim also does not satisfy the capable of repetition yet evading review exception to the mootness doctrine. Although the defendant does not argue that his claim is subject to this exception, we note that we agree with the state's argument.

"To qualify under [the capable of repetition yet evading review] exception, an otherwise moot question must satisfy the following three requirements: First, the challenged action, or the effect of the challenged action, by its very nature, must be of a limited duration so that there is a strong likelihood that the substantial majority of cases raising a question about its validity will become moot before appellate litigation can be concluded. Second, there must be a reasonable likelihood that the question presented in the pending case will arise again in the future, and that it will affect either the same complaining party or a reasonably identifiable group for whom that party can be said to act as surrogate. Third, the question must have some public importance. Unless all three requirements are met, the appeal must be dismissed as moot." (Internal quotation marks omitted.) *Gainey* v. *Commissioner of Correction*, 181 Conn. App. 377, 383–84, 186 A.3d 784 (2018).

The defendant argues that his claim is not moot because it falls within the collateral consequences exception to the mootness doctrine. We disagree.

"[T]he court may retain jurisdiction when a litigant shows that there is a reasonable possibility that prejudicial collateral consequences will occur. . . . [T]o invoke successfully the collateral consequences doctrine, the litigant must show that there is a reasonable possibility that prejudicial collateral consequences will occur. Accordingly, the litigant must establish these consequences by more than mere conjecture, but need not demonstrate that these consequences are more probable than not. This standard provides the necessary limitations on justiciability underlying the mootness doctrine itself. Where there is no direct practical relief available from the reversal of the judgment . . . the collateral consequences doctrine acts as a surrogate, calling for a determination whether a decision in the case can afford the litigant some practical relief in the future." (Internal quotation marks omitted.) *State* v. *Fletcher*, 183 Conn. App. 1, 6–7, 191 A.3d 1068, cert. denied, 330 Conn. 918, 193 A.3d 1212 (2018).

The defendant argues that being "identified as a threat severe enough to warrant banishment from an entire state for two years" will have lasting consequences throughout his life. The defendant also asserts that he has been denied employment because he has failed background checks. He has failed, however, to allege, let alone demonstrate, that the condition of his conditional discharge banning him from Connecticut for two years led to his adverse employment consequences. Thus, the defendant's claim amounts to mere

Under the unique circumstances of the defendant's case, we are not persuaded that there is a reasonable likelihood that the question presented in the pending case will arise again in the future, or that it will affect either the same complaining party or a reasonably identifiable group for whom that party can be said to act as surrogate. The defendant expressly agreed to the condition imposed on him and stated his desire not to return to the state. Thus, it is unlikely that the question presented will arise in the future.

conjecture. The defendant only generally asserts that his sentencing will have lasting consequences without specifically demonstrating how a now expired restriction on his ability to enter the state of Connecticut would create a reasonable possibility that prejudicial collateral consequences will occur. Cf. *State* v. *McElveen*, 261 Conn. 198, 215–16, 802 A.2d 74 (2002) (collateral consequences exception applicable to challenge of defendant's parole revocation); *Anthony A.* v. *Commissioner of Correction*, 159 Conn. App. 226, 233–34, 122 A.3d 730 (2015) (collateral consequences exception applicable to claim related to petitioner's classification as sex offender), aff'd, 326 Conn. 668, 166 A.3d 614 (2017). Accordingly, we reject the defendant's argument that his claim falls within the collateral consequences exception to the mootness doctrine.

The appeal is dismissed with respect to claim seven; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

R & P REALTY COMPANY ET AL. *v.* PEERLESS INDEMNITY INSURANCE COMPANY (AC 40864)

Lavine, Moll and Bishop, Js.

Syllabus

The plaintiffs, R Co. and U Co., sought to recover damages from the defendant insurance company for breach of contract. R Co. had leased certain property to U Co., which operated a business in a building on the property that was damaged by an overload of snow and ice on its roof. At that time, the defendant provided a policy of casualty insurance to the plaintiffs, who filed an insurance claim for the damage to the building. The defendant accepted that the roof had been damaged by an event covered by the policy and agreed that replacing the roof and its supporting structures was necessary. After the parties had engaged in an adjustment process, the defendant remitted a payment to the plaintiffs in the amount of $167,006.03, upon which the parties had settled, and a portion of which was allocated to the cost of demolishing the existing roof. As

part of the rebuilding process, a company retained by the plaintiffs found that asbestos containing material was present in at least two small areas of the roofing membrane and that lead based paint was detected on a ceiling located in the building. The cost of demolishing and removing all of the old roofing material in a safe and safety compliant manner was $90,139.26. The defendant refused to pay the additional demolition costs, and this action followed. The trial court rendered judgment for the defendant on the breach of contract count, from which the plaintiffs appealed to this court. They claimed that the trial court erroneously concluded that the defendant did not breach the policy by declining to cover the increased demolition costs resulting from the presence of asbestos and lead in the building. Specifically, the plaintiffs contended that the trial court improperly found that the increased demolition costs constituted replacement costs, rather than being a component of the actual cash value of the plaintiffs' loss, and that the plaintiffs failed to provide reasonable notice to the defendant of their claim seeking recovery for the increased demolition costs. *Held* that the plaintiffs having failed to provide this court with an adequate record, this court declined to address the merits of their claim on appeal: although the trial occurred over two days, the plaintiffs provided this court with only a partial transcript consisting of the testimony of a single witness on the second day of trial, and in the absence of transcripts of the entire trial, this court could not evaluate the plaintiff's arguments in support of their appellate claim without resorting to speculation; accordingly, the judgment of the trial court was affirmed.

Argued March 14—officially released October 1, 2019

Procedural History

Action to recover damages for breach of contract brought to the Superior Court in the judicial district of New Haven, where the matter was tried to the court, *Pittman, J.*; judgment for the defendant, from which the plaintiffs appealed to this court. *Affirmed.*

Richard F. Connors, for the appellants (plaintiffs).

Heather J. Adams, for the appellee (defendant).

Opinion

PER CURIAM. The plaintiffs, R & P Realty Company and Unger's Floor Covering, Inc., appeal from the judgment of the trial court, following a court trial, rendered in favor of the defendant, Peerless Indemnity Insurance Company, on count one of their operative complaint

sounding in breach of contract. On appeal, the plaintiffs claim that the trial court erred in concluding that the defendant did not breach the parties' casualty insurance policy by declining to pay for the increased costs of demolition resulting from the presence of asbestos and lead within the insured property, which the plaintiffs discovered after the defendant had remitted an initial insurance payout to which the parties agreed. We conclude that the record is inadequate for our review, and, accordingly, we decline to review the plaintiffs' claim and, thus, affirm the judgment of the trial court.

The following facts, as found by the trial court in its memorandum of decision or as undisputed in the record, and procedural history are necessary for our discussion. At all relevant times, R & P Realty Company owned real property located at 915 Grand Avenue in New Haven, which it leased to Unger's Floor Covering, Inc., a floor covering business in an older brick building situated on the property. In February, 2011, the building was damaged by an overload of snow and ice on its roof. At that time, the defendant provided a policy of casualty insurance (policy) to the plaintiffs. Pursuant to the policy, the plaintiffs filed an insurance claim for the damage to the building caused by the snow and ice overload. The defendant accepted that the roof had been damaged by an event covered by the policy and agreed with the plaintiffs that replacing the roof and its supporting structures was necessary. On October 17, 2012, after the parties had engaged in an adjustment process, the defendant remitted a payment to the plaintiffs in the amount of $167,006.03, upon which the parties had settled. The payment included the cost for removing and rebuilding the roof with new supporting structures, reconfiguring certain heating and ventilation equipment and electric routes, and repairing or renovating certain interior areas and finishes. Of the $167,006.03 paid by the defendant to the plaintiffs,

$26,738.83 was allocated to the cost of demolishing the existing roof.[1]

In 2013, the plaintiffs began planning to reconstruct the damaged roof. As part of the rebuilding process, they retained a company to test for the presence of asbestos and lead in the components to be demolished during the reconstruction of the roof. The company found that asbestos containing material was present in at least two small areas of the roofing membrane, and that lead based paint was detected on an old metal ceiling located underneath a hanging ceiling in the building. During the adjustment process, the parties had contemplated the demolition of those components, but they never discussed the possible presence of asbestos or lead therein. The demolition of materials containing asbestos and lead is subject to Occupational Safety and Health Administration regulations and state laws, which require workers involved in such demolition to have special training, clothing, and apparatus, and that there be a special means of handling and removing the debris created by such demolition. According to a revised estimate obtained by the plaintiffs, the cost of demolishing and removing all of the old roofing material in a safe and safety compliant manner was $90,139.26. The defendant refused to pay the additional demolition costs.

[1] The court noted that the parties had used "the 'actual cash value' rubric in agreeing to the loss payout, rather than the restoration or replacement cost." Generally, the "actual cash value" of a loss is the cost of repairing or replacing the loss, less depreciation, whereas the "replacement cost" of a loss is the actual cost of repairing or replacing the loss without a deduction for depreciation. See *Northrop* v. *Allstate Ins. Co.*, 247 Conn. 242, 245 n.3, 720 A.2d 879 (1998) (discussing actual cash value and replacement cost in case involving fire insurance coverage); see also *Kellogg* v. *Middlesex Mutual Assurance Co.*, 326 Conn. 638, 641 n.2, 165 A.3d 1228 (2017) ("Many insurance policies expressly provide that an insured may recover the [actual cash value] of destroyed property, and subsequently make an additional claim on a replacement cost basis. . . . [S]uch policies invariably include as a condition precedent to a supplemental replacement cost recovery a requirement that the insured first complete restoration of its property." [Internal quotation marks omitted.]).

On February 14, 2013, the plaintiffs commenced the present action against the defendant. In count one of the operative two count complaint filed on September 3, 2013, the plaintiffs alleged that the defendant had breached the policy by failing to fully compensate them for the loss they sustained resulting from the damage to the building caused by the snow and ice overload.[2] More specifically, they contended that, in contravention of the policy, the defendant refused to cover the increased demolition costs resulting from the presence of asbestos and lead in the building.[3] On April 22, 2014, the defendant filed an answer and special defenses. On June 26, 2015, the plaintiffs filed a reply, denying the allegations set forth in the defendant's special defenses.

On August 31, 2017, following a two day court trial, the court issued a memorandum of decision rendering judgment on count one in favor of the defendant. After determining that the presence of asbestos and lead in the building was a latent condition not contemplated by the parties during the adjustment process, the court stated in relevant part: "[T]he defendant insurer might still be obligated under the policy if it had been given reasonable notice of the supplemental claim [for the increased demolition costs]. But it appears that the issue of asbestos and lead was never presented to the defendant until nearly the start of this litigation, certainly more than two years after the date of the loss. . . . [I]f recovery is sought for the repair or replacement cost, rather than the actual cash value, the policy requires the [plaintiffs] to first perform the repairs

[2] In count two of the operative complaint, the plaintiffs alleged that the defendant had breached the terms of the policy by failing to fully compensate them for a separate loss they suffered in August, 2011, resulting from damage to the building caused by a hurricane. The plaintiffs later abandoned that claim.

[3] In addition, the plaintiffs asserted that the policy obligated the defendant to pay costs associated with the repair and reconstruction of the exterior walls of the building. The court rejected the plaintiffs' claim seeking recovery for the damage to the exterior walls. The plaintiffs have not appealed from that portion of the court's judgment.

before the defendant is obligated to pay for these increased costs." This appeal followed.

On appeal, the plaintiffs claim that the court erroneously concluded that the defendant did not breach the policy by declining to cover the increased demolition costs resulting from the presence of asbestos and lead in the building. Specifically, the plaintiffs contend that the court improperly found that (1) the increased demolition costs constituted replacement costs, rather than being a component of the actual cash value of the plaintiffs' loss,[4] and (2) the plaintiffs failed to provide reasonable notice to the defendant of their claim seeking recovery for the increased demolition costs. We decline to address the merits of this claim because the plaintiffs have failed to provide this court with an adequate record.

Practice Book § 61-10 (a) provides: "It is the responsibility of the appellant to provide an adequate record for review. The appellant shall determine whether the entire record is complete, correct and otherwise perfected for presentation on appeal." "The general purpose of [the relevant] rules of practice . . . [requiring the appellant to provide a sufficient record] is to ensure that there is a trial court record that is adequate for an informed appellate review of the various claims presented by the parties." (Internal quotation marks omitted.) *Buehler* v. *Buehler*, 175 Conn. App. 375, 382, 167 A.3d 1108 (2017). This court also has explained that "[a]n appellate tribunal cannot render a decision without first fully understanding the disposition being appealed. . . . Our role is not to guess at possibilities, but to review claims based on a complete factual record . . . . Without the necessary factual and legal conclusions . . . any decision made by us respecting [the claims raised on appeal] would be entirely speculative."

[4] See footnote 1 of this opinion.

(Internal quotation marks omitted.) *Cianbro Corp.* v. *National Eastern Corp.*, 102 Conn. App. 61, 72, 924 A.2d 160 (2007); see also *Calo-Turner* v. *Turner*, 83 Conn. App. 53, 56, 847 A.2d 1085 (2004).

In the present case, the trial occurred over two days. In claiming that the record is devoid of any evidence to support the trial court's findings, however, the plaintiffs have provided this court only with a partial transcript consisting of the testimony of a single witness on the second day of trial. In the absence of transcripts of the entire trial, we cannot evaluate the plaintiffs' arguments in support of their appellate claim without resorting to speculation. See, e.g., *Vasquez* v. *Rocco*, 267 Conn. 59, 71–73, 836 A.2d 1158 (2003) (concluding that plaintiff failed to provide adequate record regarding whether trial court's ruling precluding plaintiff from adducing certain evidence on cross-examination was harmful). As previously noted, we decline to do so. See *Buehler* v. *Buehler*, supra, 175 Conn. App. 382 (this court would not surmise, speculate, or guess at factual predicate for trial court's rulings and declined to review appellate claim where defendant failed to provide complete record of trial court proceedings); *Calo-Turner* v. *Turner*, supra, 83 Conn. App. 56–57 (same); see generally *Rice* v. *Housing Authority*, 129 Conn. App. 614, 616, 20 A.3d 1270 (2011) (this court unable to determine whether evidence supported plaintiff's arguments regarding granting of motion to set aside verdict where no transcripts had been filed). Accordingly, we decline to review the plaintiffs' claim.

The judgment is affirmed.

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Criminal possession of firearm; criminal possession of ammunition; possession of controlled substance with intent to sell; whether trial court erroneously denied motion to suppress evidence police seized from defendant's home and car; claim that trial court improperly found that warrantless search of defendant's home by police after he was arrested and in police custody constituted justifiable, protective sweep of defendant's home; reviewability of unpreserved claims that defendant was constructively seized by police and that they lacked probable cause to search his car; whether information in affidavit of police officer in support of warrant application provided basis for determination that probable cause existed to search defendant's vehicle; unpreserved claim that trial court committed plain error when it granted state's motion for joinder, where defendant, personally and through counsel, expressly stated that he had no objection to joinder; unpreserved claim of judicial bias; whether reversal of judgment was warranted under plain error doctrine where defendant claimed that trial court, in pretrial memorandum of decision on motion to suppress, had found him guilty of kidnapping and assault charges as to certain individuals it referred to as victims and then considered those charges in sentencing him.
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Assault in second degree; whether trial court deprived defendant of right to present defense of investigative inadequacy when it omitted from its jury instructions certain language in defendant's written request to charge that pertained to alleged inadequacy of police investigation as it might relate to weaknesses in state's case.
State *v.* Shin 348
Interfering with officer; disorderly conduct; reviewability of claim that defendant's arrest and seizure by police was illegal, where claim was raised for first time in reply brief, defendant never moved to suppress evidence, and trial court did not make any factual findings or legal conclusions regarding whether any evidence was illegally seized; claim that evidence was insufficient to support conviction because police officers' testimony was fabricated; reviewability of claim that trial court improperly admitted testimony from police officers about statements defendant made in Internet video he had posted; whether defendant failed to secure finalized, specific ruling as to testimony of officers; whether trial court abused its discretion when it denied defendant's request to excuse prospective juror for cause during voir dire; unpreserved claim that trial court violated

defendant's state constitutional right to compulsory process when it denied request to issue subpoena to rabbi from out of state; reviewability of claim that trial court improperly found defendant incompetent to stand trial before it later determined that he was competent to stand trial; whether claim that trial court violated defendant's constitutional right to travel when it imposed as term of conditional discharge special condition that he stay out of Connecticut for two years was moot; whether claim that trial court violated defendant's constitutional right to travel was not moot because it fell within collateral consequences exception to mootness doctrine.

Water Pollution Control Authority *v.* McKinley 901

NOTICES OF CONNECTICUT STATE AGENCIES

Connecticut Higher Education Supplemental Loan Authority

Notice of Intent to Amend CHESLA Refi CT Loan Program Manual

In accordance with the provisions of Connecticut General Statutes § 1-121, notice is hereby given that the Connecticut Higher Education Supplemental Loan Authority (''CHESLA''), pursuant to Connecticut General Statutes § 10a-224(f)(6), intends to amend the CHESLA Refi CT Loan Program Manual (''Program Manual'') as follows:

(1) amend Section B. by adding the following definition: '' ''Cumulative Principal Balance'' means the cumulative outstanding balance on a Borrower's Program Loans'';

(2) amend the second sentence of Section C.1. to read as follows: ''The maximum Program Loan principal amount is $125,000.'';

(3) amend Section C.1. by adding the following sentence at the end of the section: ''At no point may any Borrower borrow proceeds that would result in the Borrower's Program Loans having a Cumulative Principal Balance in excess of $125,000.'';

(4) amend the first sentence of Section D.2. to read as follows: ''An Applicant seeking a Loan must be a U.S. citizen or a Permanent Resident and submit a completed Application.'';

(5) amend Section E.5.a. to read as follows: ''To be eligible, no Applicant may have any record of an education loan default.'';

(6) amend Section E.5.b.ii. to read as follows: ''That no collection or charged off accounts exist in the past twelve (12) months'';

(7) amend Section E.5.b.iii. to read as follows: ''That there is no record of a bankruptcy, foreclosure, repossession, wage garnishments, unpaid tax lines, or unpaid judgments or suits, or other unpaid negative public record items in the past five (5) years.'';

(8) amend the last sentence of Section F.1. to read as follows: ''The Executive Director and CHESLA authorized officers are authorized to approve the making of any such Loan, subject to the limitations set forth in any resolution of the Authority.'';

(9) amend Section H.5. to read as follows: ''Loan Discharge – Borrower Death. Loans may be discharged due to a Borrower's death in accordance with the Servicing Agreement or such other manner prescribed by the Authority.'';

(10) amend subsection number for subsection titled ''Bankruptcy'' in Section H. to number ''6''; and

(11) amend subsection number for subsection titled ''Due Diligence'' in Section H. to number ''7''.

Such amendments shall become effective 30 days after this notice has been published in the Connecticut Law Journal, unless the CHESLA Executive Director,

in her sole discretion, shall determine based on comments received from members of the public during such 30-day period that it would be desirable or appropriate to defer such effectiveness so that the CHESLA Board of Directors (''Board'') may reconsider the proposed amendments to the Program Manual in light of such comments, such determination to be conclusively evidenced by the Executive Director's notice thereof to the Board.

All written comments, questions, and concerns regarding the proposed amendments may be submitted within 30 days of the publication of this notice in the Connecticut Law Journal to Jeanette W. Weldon, Executive Director, Connecticut Higher Education Supplemental Loan Authority, 10 Columbus Boulevard, 7th Floor, Hartford, CT 06106 or via email at jweldon@chesla.org.

A copy of the proposed amendments are available upon request by contacting Jeanette W. Weldon, Executive Director, Connecticut Higher Education Supplemental Loan Authority, 10 Columbus Boulevard, 7th Floor, Hartford, CT 06106 or via email at jweldon@chesla.org.

Connecticut Higher Education Supplemental Loan Authority

Notice of Intent to Amend CHESLA Loan Program Manual

In accordance with the provisions of Connecticut General Statutes § 1-121, notice is hereby given that the Connecticut Higher Education Supplemental Loan Authority (''CHESLA''), pursuant to Connecticut General Statutes § 10a-224(f)(6), intends to amend the CHESLA Loan Program Manual (''Program Manual'') as follows:

(1) amend Section B. by adding the following definition: '' ''Cumulative Principal Balance'' means the cumulative outstanding balance of a student Borrower's Loans'';

(2) amend Section C.1.(c) to read as follows: ''Maximum Borrowing. In no case may any student Borrower borrow proceeds that would result in the student Borrower's Loans having a Cumulative Principal Balance in excess of $125,000.'';

(3) amend Section E.4.a. to read as follows: ''To be eligible, no Applicant or any Co-Applicant may have any record of an education loan default.'';

(4) amend Section E.4.b.(v) to read as follows: ''That there is no record of a foreclosure, repossession, open judgment or suit, or other negative public record items in the past seven (7) years.'';

(5) amend Section E.4.b.(vi) to read as follows: ''That there is no record of a bankruptcy.''; and

(6) amend the last sentence of Section F.1. to read as follows: ''The Executive Director and CHESLA authorized officers are authorized to approve the making of any such Loan.''

Such amendments shall become effective 30 days after this notice has been published in the Connecticut Law Journal, unless the CHESLA Executive Director, in her sole discretion, shall determine based on comments received from members of the public during such 30-day period that it would be desirable or appropriate to defer such effectiveness so that the CHESLA Board of Directors (''Board'') may reconsider the proposed amendments to the Program Manual in light of such comments, such determination to be conclusively evidenced by the Executive Director's notice thereof to the Board.

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DEPARTMENT OF HOUSING

Notice Under the Affordable Housing Appeals Procedure Receipt of a Completed Application for a Moratorium in the City of Suffield

In accordance with C.G.S. 8-30-g, the Connecticut Department of Housing is in receipt of a completed application (September 10, 2019) for a Moratorium of Applicability for the Town of Suffield. A copy of this completed application is available for viewing at the Connecticut Department of Housing during normal business hours. For additional information please call or write to Laura Watson, Economic and Community Development Agent, DOH, 505 Hudson Street, Hartford, CT 06106, (860) 270-8169.

NOTICES

Notice of Certification as Authorized House Counsel

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

Certified as of September 20, 2019:

Stephanie A. Desai	Charter Communications
Tracy J. Grant	Leverage Shares LLC
Charles E. Luftig	Bridgewater Associates
Isida Tushe	FuelCell Energy, Inc.

Hon. Patrick L. Carroll III
Chief Court Administrator