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Vol. 333

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

IN RE TAIJHA H.-B.*
(SC 20151)

Palmer, McDonald, Mullins, Kahn and Ecker, Js.

Syllabus

Pursuant to the United States Supreme Court's decision in *Anders* v. *California* (386 U.S. 738), appointed appellate counsel for an indigent defendant who concludes that the grounds for the defendant's appeal are wholly frivolous and wishes to withdraw from representation must, prior to withdrawal, provide the court and the defendant with a brief outlining anything in the record that may support the appeal, and the defendant must be given time to raise any additional, relevant points. Thereafter, the court must conduct an independent review of the entire record and may allow counsel to withdraw if it agrees with counsel's conclusion that the defendant's appeal is entirely without merit.

The respondent mother, who is indigent and whose parental rights with respect to her child, T, had been terminated, appealed from the Appellate Court's dismissal of her appeal from, inter alia, the trial court's granting of her appointed counsel's motion to withdraw from representing her on appeal in light of his conclusion that such an appeal would be frivolous. After the trial court rendered judgment terminating the respondent's parental rights, counsel was appointed to review the respondent's case for potential grounds for appeal. The court reporter was unable to provide counsel with a complete set of transcripts, and, thus, counsel was unable to fully review the case file for potential appealable issues, prior to the deadline for filing an appeal. Nevertheless, counsel proceeded to file a timely appeal from the judgment terminating her parental rights. After receiving the remaining transcripts, counsel completed his review of the case and advised the respondent that he would be unable to represent her on appeal because there were no appealable issues that were not frivolous. Counsel then filed motions in the trial court and the Appellate Court seeking to withdraw. The Appellate Court denied counsel's motion without prejudice pending resolution of the matter in the trial court. After multiple hearings, the trial court granted counsel's motion to withdraw without requiring him to file an *Anders* brief or conducting an independent review of the record to determine whether the respondent's appeal would be frivolous. Subsequently, counsel amended the respondent's appeal to include the issue of whether the trial court should have allowed him to withdraw without utilizing the

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

Anders procedure. The Appellate Court thereafter dismissed the respondent's amended appeal on the ground that the *Anders* procedure is not applicable to the withdrawal of an appellate attorney in child protection proceedings and also on the ground that the appeal was not properly filed due to a failure to comply with the rule of practice (§ 79a-3 [c]) establishing the procedure by which an indigent party who wishes to appeal from the termination of his or her parental rights but whose appointed trial counsel declines to pursue the appeal may obtain review by the Division of Public Defender Services. On the granting of certification, the respondent appealed to this court from the Appellate Court's dismissal of her amended appeal. *Held*:

1. The Appellate Court improperly dismissed the respondent's appeal for failure to comply with Practice Book § 79a-3 (c) insofar as counsel filed the respondent's original appeal before he fully reviewed the merits of that appeal; as § 79a-3 (c) does not purport to authorize the taking of an appeal by an indigent party but, rather, merely dictates the procedure by which an appointed appellate review attorney is to engage and assist in that process, this court did not read § 79a-3 (c) to mandate the dismissal of the respondent's appeal when, under the unusual circumstances of the case, the respondent's counsel, through no fault of his own, was unable to fully review the case prior to the deadline for filing the appeal and prudently opted to file the appeal prior to making a final merits determination in order to preserve the respondent's rights.
2. The respondent could not prevail on her claim that Practice Book § 79a-3 violates the equal protection clause of the fourteenth amendment to the United States constitution on the ground that the rule imposes a higher legal burden on appeals brought by indigent litigants who have been assigned counsel than on litigants who have the financial means to hire private counsel: although the Rules of Professional Conduct (3.1) generally prohibit an attorney from taking an appeal that is frivolous whereas the rules of practice (§§ 35a-21 [b] and 79a-3) governing appeals in child protection matters by indigent parents permit assigned counsel to appeal if counsel determines there is merit to an appeal, the concepts of nonfrivolous appeals and potentially meritorious appeals are deemed to be synonymous for purposes of § 79a-3, as reviewing counsel for an indigent parent and a parent who is not indigent must apply the same standards in determining whether there is no merit to an appeal as in determining whether the appeal would be frivolous; accordingly, § 79a-3 does not impose a higher standard on indigent parents seeking to appeal from a termination of their parental rights, and, therefore, the rules do not treat indigent and nonindigent parents differently.
3. The respondent had a right under the due process clause of the fourteenth amendment to the assistance of counsel in connection with her appeal from the termination of her parental rights: pursuant to the United States Supreme Court's decision in *Lassiter* v. *Dept. of Social Services* (452 U.S. 18), whether the due process clause of the fourteenth amendment requires the appointment of counsel for an indigent parent whenever a

state seeks to terminate his or her parental rights is a fact specific determination that must be made on a case-by-case basis, and this court determined, on the basis of the United States Supreme Court's decision in *M.L.B.* v. *S.L.J. ex rel. S.L.J.* (512 U.S. 102), that this right to appointed counsel, if it is found to apply in termination proceedings, also applies to appeals from termination decisions; moreover, in determining whether the right to counsel is required under *Lassiter*, a court is to consider various factors, including whether the indigent parent faces potential criminal liability as a result of evidence presented in the proceedings, whether expert testimony will be presented, whether the case will involve complex points of substantive or procedural law, whether the parent has shown a willingness to participate in the proceedings, in contesting termination, and in strengthening his or her relationship with the child, and whether the parent might reasonably prevail with the assistance of counsel; furthermore, consideration of those factors led this court to find a right to appointed counsel in the present case, as the respondent had a long history of criminal activity and was facing new charges at the time of the termination proceedings, and evidence presented during those proceedings could have influenced her prosecution or implicated the respondent in various other crimes, the respondent's termination proceedings involved testimony by multiple experts, and the court relied heavily on that testimony in reaching its conclusions that the respondent was incapable of caring for T and was unable or unwilling to benefit from reunification efforts, the respondent previously had been adjudicated incompetent and had serious, unresolved mental health issues that would have made it difficult, if not impossible, for her to devise and execute a viable appellate strategy if she had been required to represent herself, and there was abundant evidence that the respondent had demonstrated a commitment to reestablishing custody and maintaining a parental relationship with T, and to actively asserting her legal rights.

4. The respondent having had a constitutional right to appointed appellate counsel, due process did not permit her counsel to withdraw for lack of a nonfrivolous issue on which to proceed without demonstrating, either in the form of an *Anders* brief or in the context of a hearing, that the record had been thoroughly reviewed for potentially meritorious issues, and without taking sufficient steps to facilitate review of the case by the respondent and the presiding court for the purpose of a determination of whether counsel accurately concluded that any appeal would be meritless: this court based its determination that some *Anders*-type procedure was required in the present case on the fact that the majority of courts that have addressed this issue have imposed such a requirement as a matter of federal or state constitutional law, the fact that most of the same rationales that require the use of the *Anders* procedure in the criminal context apply with equal force to termination proceedings, and the fact that the benefits of obtaining a second opinion in the form of some limited judicial review of counsel's no merit determi-

nation more than offset the potential costs, and, in light of the circumstances of the case, fundamental fairness required that the respondent be afforded some minimal procedural protections before the court accepted counsel's representation that any appeal would be frivolous and potentially required the respondent to proceed on a self-represented basis; moreover, in termination cases in which there is a right to some *Anders*-type procedure, and subject to the discretion of the presiding court, that court must conduct a colloquy sufficient to ascertain that appointed counsel has evaluated all potential grounds for appeal and has brought the most promising grounds to the court's attention, the indigent parent must be afforded an opportunity to review counsel's conclusion and to bring to the court's attention what he or she believes are any appealable issues, and the court must reach its independent conclusion that any appeal would be frivolous; furthermore, a review of the record in the present case led this court to conclude that the trial court had failed to observe adequate procedural safeguards before permitting the respondent's counsel to withdraw, as the record did not indicate that the trial court was sufficiently apprised of the facts and legal issues involved in the case so as to enable it to perform an independent review, that the court did in fact form its independent judgment that the respondent's counsel had accurately determined that any appeal would be meritless, or that counsel adequately communicated to the respondent her procedural options in the event that counsel was allowed to withdraw; accordingly, the Appellate Court improperly dismissed the respondent's amended appeal on the ground that *Anders* was inapplicable to the withdrawal of an appellate attorney in child protection proceedings, and the case was remanded in order to allow the trial court, at a minimum, to conduct a hearing to verify, on the record, that the respondent had been advised as to any potential grounds for appeal and had the opportunity to question counsel, to be satisfied that counsel has fully explored potential grounds for appeal, and to independently determine that any appeal by the respondent would be frivolous.

(*Two justices concurring in part and dissenting in part in one opinion*)

Argued January 22—officially released September 27, 2019**

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights as to their minor child, brought to the Superior Court in the judicial district of New Haven, Juvenile Matters, and tried to the court, *Marcus*, *J.*; judgment terminating the respondents' parental rights, from which the respon-

** September 27, 2019, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

dent mother appealed to the Appellate Court; thereafter, the court, *Burke*, *J.*, granted the motion to withdraw filed by the respondent mother's counsel; subsequently, the respondent mother amended her appeal, and the Appellate Court dismissed the amended appeal; thereafter, the respondent mother, on the granting of certification, appealed to this court. *Reversed*; *further proceedings*.

James P. Sexton, assigned counsel, with whom were *Megan L. Wade*, assigned counsel, and, on the brief, *Emily Graner Sexton*, assigned counsel, for the appellant (respondent mother).

John E. Tucker, assistant attorney general, with whom, on the brief, were *George Jepsen*, former attorney general, *Benjamin Zivyon* and *Jessica Gauvin*, assistant attorneys general, and *Hannah Kalichman*, certified legal intern, for the appellee (petitioner).

Joshua Michtom, assistant public defender, *Jay Sicklick* and *Dan Barrett* filed a brief for the Office of the Chief Public Defender et al. as amici curiae.

Chris Oakley, *Bet Gailor*, *Ellen Morgan*, *Douglas Monaghan*, *Katherine Dornelas* and *Benjamin Wattenmaker* filed a brief for the Child Welfare and Juvenile Law Section of the Connecticut Bar Association as amicus curiae.

Opinion

PALMER, J. Under Practice Book § 79a-3,[1] in a case involving the termination of parental rights in which the attorney appointed to represent an indigent party

[1] Practice Book § 79a-3 (b) provides in relevant part: "If a trial attorney who has provided representation to an indigent party through the Division of Public Defender Services declines to pursue an appeal and the indigent party expressly wishes to appeal, the trial attorney shall within twenty days of the decision or judgment simultaneously file with the court before which the matter was heard a motion for an additional twenty day extension of time to appeal, a sworn application signed by the indigent party for appointment of an appellate review attorney and a waiver of fees, costs and expenses,

in the trial court declines to pursue an appeal, that party may seek the appointment of an appellate review attorney who, after reviewing the case and determining that there is a legitimate basis for an appeal, is required to represent the party on appeal. The principal issue presented by this certified appeal is whether an appellate review attorney appointed to represent an indigent parent in an appeal from the termination of his or her parental rights must follow the procedure set forth in *Anders* v. *California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), before being permitted to withdraw from representation on the ground that he or she is unable to identify any nonfrivolous basis for appeal.[2] We hold that when, as in the present case, the circumstances are such that the indigent parent has a constitutional right to appellate counsel, counsel may not be

including the cost of an expedited transcript, and shall immediately request an expedited transcript from the court reporter in accordance with Section 79a-5, the cost of which shall be paid for by the Division of Public Defender Services. . . ."

Practice Book § 79a-3 (c) (1) provides: "If the appellate review attorney determines that there is merit to an appeal, that attorney shall file the appeal in accordance with Section 63-3."

Practice Book § 79a-3 (c) (2) provides: "If the reviewing attorney determines that there is no merit to an appeal, that attorney shall make this decision known to the judicial authority, to the party and to the Division of Public Defender Services at the earliest possible moment. The reviewing attorney shall inform the party, by letter, of the balance of the time remaining to appeal as a self-represented party or to secure counsel who may file an appearance to represent the party on appeal at the party's own expense. A copy of the letter shall be sent to the clerk for juvenile matters forthwith."

[2] "In *Anders*, the United States Supreme Court outlined a procedure that is constitutionally required when, on direct appeal, appointed counsel concludes that an indigent defendant's case is wholly frivolous and wishes to withdraw from representation. . . . Under *Anders*, before appointed counsel may withdraw, he or she must provide the court and the defendant with a brief outlining anything in the record that may support the appeal, and the defendant must be given time to raise any additional relevant points. . . . Thereafter, the court, having conducted its own independent review of the entire record of the case, may allow counsel to withdraw if it agrees with counsel's conclusion that the appeal is entirely without merit." (Citations omitted.) *State* v. *Francis*, 322 Conn. 247, 250 n.3, 140 A.3d 927 (2016).

permitted to withdraw without, first, demonstrating, whether in the form of an *Anders* brief or in the context of a hearing, that the record has been thoroughly reviewed for potential meritorious issues, and, second, taking steps sufficient to facilitate review of the case, by the indigent parent and the presiding court, for the purpose of a determination as to whether the attorney accurately concluded that any appeal would be meritless.

In 2015, the petitioner, the Commissioner of Children and Families, filed a petition to terminate the parental rights of the natural parents of then six year old Taijha H.-B.: her mother, Sonya B., the respondent, and her father, Harold H.[3] After the trial court granted the petition and rendered judgment thereon, the Office of the Chief Public Defender appointed counsel for the respondent, who is indigent, to review the matter for a possible appeal as required by Practice Book § 79a-3 (c). Counsel filed a timely appeal but subsequently filed motions in both the trial court and the Appellate Court to withdraw his appearance for want of a nonfrivolous issue on which to proceed. The trial court granted counsel's motion to withdraw, accepting counsel's representation that the appeal was without merit. Counsel subsequently amended the respondent's appeal, adding a claim that the trial court should not have permitted him to withdraw without first requiring him to comply with *Anders*. The Appellate Court, acting on its own motion, dismissed the amended appeal on the following two independent grounds: (1) the amended appeal was not properly filed pursuant to § 79a-3 (c), which, in the view of that court, does not permit an appellate review attorney to file an appeal without first having determined that there is merit to the appeal; and (2) the briefing procedure set forth in *Anders* is not applicable

[3] Harold H. has not contested the judgment terminating his parental rights and is not a party to the present appeal. We hereinafter refer to Sonya B. as the respondent and to Harold H. by name.

to the withdrawal of an appellate review attorney in a child protection proceeding. We granted certification to appeal with respect to both issues. *In re Taijha H.-B.*, 329 Conn. 914, 187 A.3d 423 (2018). Because we agree with the respondent that, under the circumstances of this case, her amended appeal was not improperly filed and also that the appellate review attorney should not have been permitted to withdraw without first assisting the trial court in conducting a review of the case, we reverse the judgment of the Appellate Court. We reject, however, the respondent's additional claim that § 79a-3 (c), on its face, violates the equal protection clause of the fourteenth amendment to the United States constitution.

I

The record reveals the following relevant facts, as found by the trial court or that are undisputed, and procedural history. The child at the center of this dispute, Taijha, was born to the respondent and Harold H. in November, 2008. The Department of Children and Families was involved with Taijha from the outset due to the respondent's admitted use of illegal substances during pregnancy.

In 2014, the commissioner filed a neglect petition and requested an order of temporary custody, both of which were granted. The trial court subsequently approved permanency plans of termination of the respondent's and Harold H.'s parental rights, and adoption. In October, 2015, the commissioner filed a petition for termination of parental rights.

In 2017, following a trial that included medical testimony by two expert witnesses, the court, *Marcus*, *J.*, granted the petition, terminating the parental rights of the respondent and Harold H. Among other things, the court found, by clear and convincing evidence, that the respondent had an extensive mental health history with a diagnosis of psychotic disorder; a history of selling

and abusing illicit substances, primarily marijuana and phencyclidine (PCP); a significant criminal history, including multiple arrests and incarcerations during Taijha's life; a history of hostile and violent conduct toward both Taijha and others; and an inability to focus on, prioritize, and meet Taijha's emotional needs. At the time of trial, the respondent was again incarcerated, this time for charges involving an alleged armed robbery.

The court further found that the respondent had failed to follow through in obtaining numerous services recommended or facilitated by the department. These include services relating to domestic violence prevention, substance abuse testing and treatment, parenting skills, and mental health assessment and treatment. As a result of this history and other issues involving Harold H., including incidents of domestic violence between the respondent and Harold H. in Taijha's presence, there had been seven neglect substantiations involving Taijha, and Taijha was removed from her mother's care and placed with relative and nonrelative foster parents at various times. On two occasions, the respondent abducted Taijha during periods when she did not have custody of her.

Ultimately, the court concluded, consistent with the expert medical testimony, that the respondent was unable or unwilling to benefit from the various efforts the department had made to reunify her with Taijha and that she had failed to rehabilitate. These findings largely reflected the respondent's frequent incarceration, her lack of stable housing and employment, and, above all, the serious, deteriorating mental health problems that she refused to address. The court also found that, although Taijha has an emotional bond with the respondent, their relationship and the attendant instability had a negative impact on Taijha, on balance, and that Taijha, who was eight years old at that time, expressed a preference to live with her foster parents,

whom she identified as her family and who, the court further found, provide a "safe, secure and reliable" home.

The following additional procedural history, which transpired after the trial court terminated the parental rights of the respondent and Harold H., is the primary subject of the present appeal. The court granted the petition to terminate the parental rights of the respondent and Harold H. on September 25, 2017. On October 13, 2017, the Office of the Chief Public Defender appointed Attorney James Sexton to review the case for potential grounds for appeal. After Sexton sought and was granted the single extension of time that is permitted under the rules of practice; see Practice Book § 79a-2; the final deadline for the respondent to appeal from the judgment of termination would have been November 6, 2017.

Although Sexton timely requested and received transcripts of the trial court proceedings, his review of the initial set of transcripts revealed that they were incomplete. Because the court reporter was unable to provide a complete set of transcripts for review prior to the deadline for filing an appeal, and Sexton, therefore, was unable to fully review the case file for potential appealable issues, he proceeded to file an appeal on behalf of the respondent on November 6, 2017, in order to preserve her appellate rights.

On November 15, 2017, Sexton received the full set of transcripts, completed his review of the case, and advised the respondent that he would be unable to represent her on appeal for lack of any nonfrivolous issue on which to proceed. Sexton then filed motions to withdraw his appearances with the Appellate Court and the trial court. See Practice Book § 3-10.[4] The Appellate

[4] Practice Book § 3-10 sets forth the procedures and requirements that apply when an attorney wishes to withdraw an appearance.

Court denied the motion without prejudice, pending resolution of the matter in the trial court.

The trial court, *Burke*, *J.*, conducted a hearing on the motion to withdraw, during which Sexton represented that, upon a full review of the record, he was unable to identify any nonfrivolous ground for appeal. Sexton further represented that he had explained this conclusion to the respondent and to her guardian ad litem, and had advised them as to the respondent's options and her rights should she choose to proceed on a self-represented basis or to hire alternative counsel. The trial court, raising sua sponte the question of whether replacement counsel must be appointed if Sexton were permitted to withdraw, scheduled a second hearing and asked the parties to brief that question.

In his brief to the trial court, Sexton argued not only that due process might require the appointment of replacement counsel for the respondent, but also that Sexton himself should not be permitted to withdraw without first having complied with the *Anders* requirements. Following a second hearing, the trial court granted Sexton's motion to withdraw without requiring the filing of an *Anders* brief or conducting its own independent review to determine whether any appeal would be frivolous. Sexton then amended the respondent's appeal to include the issue of whether the court should have allowed him to withdraw without utilizing the *Anders* procedure.

Before the amended appeal had been briefed, the Appellate Court, sua sponte, ordered the parties to appear and give reason why that appeal should not be dismissed because (1) "the appeal was not properly filed pursuant to [Practice Book] § 79a-3 (c)," and (2) "the procedure set forth in *Anders* . . . is not applicable to the withdrawal of an appellate review attorney in child protection proceedings." Following argument on the motion, the Appellate Court dismissed the amended appeal for both of those reasons.

This certified appeal followed. Additional facts will be set forth as necessary.

II

We first consider whether the Appellate Court properly dismissed the respondent's amended appeal for failure to comply with Practice Book § 79a-3 (c). The respondent contends, and we agree, that the rule does not envision or account for the unique scenario involved in the present case. For that reason, her appeal should not have been dismissed on procedural grounds.[5]

In its order dismissing the respondent's amended appeal, the Appellate Court stated that "the appeal was not properly filed pursuant to [Practice Book] § 79a-3

[5] Although the meaning of Practice Book § 79a-3 (c) is central to the respondent's claim that her appeal was improperly dismissed, neither party directly addresses the issue of whether the Appellate Court properly construed that provision. Although the respondent argues that the rule makes no provision for a scenario such as the one involved in the present case, she nevertheless appears to assume, arguendo, that the Appellate Court properly construed Practice Book § 79a-3 (c). She argues that dismissing her appeal pursuant to that provision was improper because (1) it abridged her broader substantive right to counsel, as manifested in General Statutes §§ 45a-716 (b), 45a-717, 46b-135 (b), 46b-136 and 51-296a (b), and (2) it violated her equal protection rights insofar as it treats her differently from similarly situated, nonindigent parents, who are not barred from filing an appeal prior to an assessment of the merits thereof. See Practice Book § 63-4 (a) (1) (appellant must file preliminary statement of appellate issues within ten days of filing appeal); Practice Book § 79a-2 (establishing deadlines for filing appeal).

The commissioner, by contrast, contends that the Appellate Court correctly construed and applied Practice Book § 79a-3 (c). Her argument for that position is conclusory, however, and she makes no attempt either to address the respondent's arguments or to defend the Appellate Court's dismissal of the amended appeal on this ground.

In order to assess whether the Appellate Court properly dismissed the respondent's amended appeal pursuant to Practice Book § 79a-3 (c), we first are required to construe that rule. Because we conclude that the Appellate Court incorrectly construed Practice Book § 79a-3 (c) and that the rule did not require the dismissal of the respondent's amended appeal, we need not consider the respondent's arguments that construing the provision in that manner abridged her statutory and constitutional rights. In part III of this opinion, however, we do address a different equal protection argument that the respondent raised and that is likely to arise again on remand.

(c).”[6] That rule establishes the following procedure by which an indigent party, who wishes to appeal from a termination of parental rights but whose appointed trial counsel declines to pursue the appeal, may obtain review by the Division of Public Defender Services: “If the appellate review attorney determines that there is merit to an appeal, that attorney shall file the appeal in accordance with [Practice Book §] 63-3.” Practice Book § 79a-3 (c) (1). Furthermore, “[i]f the reviewing attorney determines that there is no merit to an appeal, that attorney shall make this decision known to the judicial authority, to the party and to the Division of Public Defender Services at the earliest possible moment. The reviewing attorney shall inform the party, by letter, of the balance of the time remaining to appeal as a self-represented party or to secure counsel who may file an appearance to represent the party on appeal at the party’s own expense.” Practice Book § 79a-3 (c) (2).

On its face, the rule envisions and addresses only two possibilities. If the appellate review attorney completes a review of the case prior to the deadline for filing an appeal and determines that there is merit, then that attorney is directed to file an appearance in the Appellate Court; see Practice Book § 35a-21 (b); and to file the appeal on behalf of the indigent party. If a timely review fails to reveal any merit, then the participation of the appellate review attorney is limited to advising the party thereof. The party then has the option of filing an appeal on a self-represented basis or obtaining private counsel. Both prongs of the rule thus assume that the reviewing attorney is capable of completing a full review of the case prior to the filing deadline.

In the vast majority of cases, a diligent attorney will be able to complete this review within the appeal per-

[6] Because the Appellate Court dismissed the amended appeal by way of summary order, without a written decision, and because the commissioner does not actively defend or present a rationale to support this aspect of the Appellate Court’s order, our discussion of the basis for that court’s order is necessarily somewhat speculative.

iod. In the present case, however, it is undisputed that, through no fault of his own, Sexton was unable to review the case fully prior to the filing deadline. Facing a dilemma in which he was unable to comply with either Practice Book § 79a-3 (c) (1) (by filing an appeal that he had determined to have potential merit) or § 79a-3 (c) (2) (by informing the respondent prior to the filing deadline that, in his estimation, there was no nonfrivolous ground for appeal), and lacking any guidance from the rules of practice, Sexton prudently opted to file the appeal, in order to preserve the respondent's rights, prior to making a final merits determination.

The commissioner contends that the better option would have been for Sexton to file a motion in the Appellate Court to suspend the rules; see Practice Book § 60-3; to allow an additional extension of time to obtain the missing portions of the trial record. We do not disagree that this option is available, and perhaps even preferable, as we have little doubt that such a motion would have been granted under the circumstances.[7]

The issue before us, however, is whether the rules categorically prohibit an appellate review attorney from filing a timely appeal, prior to completing a full merits review, even under the unique circumstances of this case.[8] In addressing this issue, we are mindful of the "long recognized presumption in favor of appellate jurisdiction"; *Seebeck* v. *State*, 246 Conn. 514, 533, 717 A.2d 1161 (1998); and also that the rules of practice are to be construed liberally, rather than narrowly and technically, in order to facilitate judicial business and to advance justice. See Practice Book §§ 1-8 and 60-1;

[7] The amici Office of the Chief Public Defender, American Civil Liberties Union of Connecticut, and Center for Children's Advocacy represent that, in their experience, the Appellate Court never has rejected a motion to file a late appeal under such circumstances.

[8] Like our interpretation of statutes, our interpretation of the rules of practice presents an issue of law subject to plenary review. E.g., *State* v. *Jones*, 314 Conn. 410, 418, 102 A.3d 694 (2014).

see also 3A S. Singer, Sutherland Statutes and Statutory Construction (8th Ed. 2018) § 67:10, pp. 404–406 ("Courts usually favor a party's right of appeal and construe statutes and rules to protect that prerogative . . . . The essential policy animating this broad judicial approach is . . . that courts should consider cases on their merits and in terms of a party's substantive rights and not defeat them on mere technicalities.").

The primary argument in favor of the Appellate Court's reading of Practice Book § 79a-3 (c) would seem to be a prohibition by negative implication. It is well established that "[a] statute that prescribes that a thing should be done in a particular way, carries with it an implied prohibition against doing it in any other way . . . ." *New Haven* v. *Whitney*, 36 Conn. 373, 375 (1870). From the fact that the rule requires a reviewing attorney to file an appeal *after* having found potential merit, the Appellate Court apparently drew a negative implication that the attorney may not file the appeal prior to having made such a finding.

The principle of prohibition by negative implication, however, applies most directly in situations in which a statute or rule confers enumerated powers. See *State* v. *White*, 204 Conn. 410, 424, 528 A.2d 811 (1987). "But when the power to do a thing exists and may be exercised according to the usual methods of law or equity, and the statute is only by way of regulation or enlargement of the power, then there can be no implied prohibition of the power, or to the way it is to be enforced." *Johnston* v. *Allis*, 71 Conn. 207, 217, 41 A. 816 (1898); see also 3A S. Singer, supra, § 69:13, pp. 933–34 (with respect to termination of parental rights statutes, purely procedural language that is neither prohibitory nor jurisdictional is usually directory rather than mandatory).

The rules of practice permit an indigent parent, like any other party, to file an appeal without first having conducted a full review of the record and having made

a formal determination of merit. See Practice Book § 63-4 (a) (1). Section 79a-3 (c) does not purport to authorize the taking of an appeal by an indigent party but, rather, merely dictates the procedure by which an appointed appellate review attorney is to engage and assist in the process. Accordingly, we do not read that rule as mandating the dismissal of an indigent party's appeal when, as under the unusual circumstances of this case, full review for merit was not possible prior to the filing deadline.

III

We next turn our attention to the respondent's claim that Practice Book § 79a-3, on its face, violates the equal protection clause of the federal constitution. Specifically, she argues that the rule imposes a different, higher legal burden on appeals brought by indigent litigants who have been assigned counsel than on litigants who have the financial means to hire private counsel. We are not persuaded.[9]

We begin by setting forth the governing law. "[T]he concept of equal protection [under both the state and

[9] Ordinarily, we do not decide constitutional issues when resolving those issues is not necessary to dispose of the case before us. See, e.g., *St. Paul Travelers Cos.* v. *Kuehl*, 299 Conn. 800, 818, 12 A.3d 852 (2011); see also *Thalheim* v. *Greenwich*, 256 Conn. 628, 639, 775 A.2d 947 (2001) (same principles apply when construing rules of practice). We have made an exception to this rule, however, when an issue with constitutional implications that has been presented and briefed by the parties is likely to arise on remand. See, e.g., *State* v. *Santiago*, 305 Conn. 101, 293–94, 49 A.3d 566 (2012), superseded on other grounds, 318 Conn. 1, 122 A.3d 1 (2015).

In the present case, issues at the core of the respondent's second equal protection challenge; see footnote 5 of this opinion; are likely to arise again on remand. The respondent contends that Practice Book § 79a-3 is facially unconstitutional because, in every case in which an appellate review attorney is appointed to assist an indigent parent, that attorney is permitted to file an appeal only upon a determination that the appeal meets a higher standard (potential merit) than the standard that applies to nonindigent parents (nonfrivolousness). On remand, the trial court, in evaluating Sexton's arguments and deciding whether to allow Sexton to withdraw, will need to know whether the respondent is correct that a different legal standard governs an indigent party's appeal from a termination of parental rights. We believe that the present context provides the most appropriate occasion to resolve this issue.

federal constitutions] has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. . . . Conversely, the equal protection clause places no restrictions on the state's authority to treat dissimilar persons in a dissimilar manner. . . . Thus, [t]o implicate the equal protection [clause] . . . it is necessary that the state statute [or rule] . . . in question, either on its face or in practice, treat persons standing in the same relation to it differently. . . . [Accordingly], the analytical predicate [of an equal protection claim] is a determination of who are the persons [purporting to be] similarly situated. . . . [T]his initial inquiry is not whether persons are similarly situated for all purposes, but whether they are similarly situated for purposes of the law challenged. . . .

"This court has held, in accordance with the federal constitutional framework of analysis, that in areas of social and economic policy that neither proceed along suspect lines nor infringe fundamental constitutional rights, the [e]qual [p]rotection [c]lause is satisfied [as] long as there is a plausible policy reason for the classification . . . the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental [decision maker] . . . and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational . . . . If, however, state action invidiously discriminates against a suspect class or affects a fundamental right, the action passes constitutional muster . . . only if it survives strict scrutiny. . . . Under that heightened standard, the state must demonstrate that the challenged statute is necessary to the achievement of a compelling state interest."[10] (Citations omitted;

[10] Under both the state and federal constitutions, a third, intermediate level of scrutiny applies to certain quasi-suspect classifications and important liberty interests. See, e.g., *Kerrigan* v. *Commissioner of Public Health*, 289 Conn. 135, 160–61, 957 A.2d 407 (2008).

internal quotation marks omitted.) *Kerrigan* v. *Commissioner of Public Health*, 289 Conn. 135, 157–59, 957 A.2d 407 (2008).

In the present case, the respondent's equal protection argument proceeds as follows. First, she argues that indigent parents such as herself and nonindigent parents with the means to hire private counsel are similarly situated with regard to appeals from parental rights termination orders.

Second, she argues that Practice Book § 79a-3 treats those similarly situated classes differently. She contends that, whereas § 79a-3 permits assigned counsel to take an appeal on behalf of an indigent client only if the attorney believes that the appeal is meritorious; see Practice Book § 79a-3 (c); a privately retained attorney may, consistent with the Rules of Professional Conduct, take an appeal from a termination order, as long as the appeal is not frivolous. See Rules of Professional Conduct 3.1. The respondent argues that, in essence, § 79a-3 (c) imposes a more restrictive bar than does rule 3.1, because there is a category of appellate claims that lack merit but that nevertheless are not frivolous. For example, there might be a case in which the only colorable basis for appeal is to invite an appellate tribunal to revisit a rule of law that had been upheld in the face of previous challenges. The respondent's argument appears to be that such an appeal would lack merit, because there would be little if any chance that the appellant would prevail, but it would not constitute a frivolous appeal for purposes of rule 3.1, because it would rest on a good faith argument for the reversal of existing law.

Third, the respondent argues that, because natural parents have a fundamental liberty interest in the care, custody, and management of their children; e.g., *Santosky* v. *Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); the alleged disparity created by

Practice Book § 79a-3 will pass constitutional muster only if it can survive strict scrutiny. She suggests that no compelling state interest justifies the alleged disparity created by the rule.

We assume without deciding that the first and third premises of the respondent's argument are true: indigent and nonindigent parents are similarly situated with respect to their right to appeal from termination orders and, because fundamental familial rights are implicated, any disparate treatment would be subject to strict scrutiny. Nevertheless, we conclude that the argument fails because the second premise is false. Section 79a-3 does not impose a different, higher standard for bringing an appeal than does rule 3.1.

Under rule 3.1 of the Rules of Professional Conduct, "[an] action is frivolous . . . if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law." Rules of Professional Conduct 3.1, commentary. The notion of a meritorious appeal, by contrast, is nowhere defined in the Practice Book. Although common usage might support the respondent's argument that a meritorious appeal is one that enjoys a reasonable possibility of success,[11] so that an appeal brought in good faith but with a very slim chance of success could lack merit without being frivolous, the Practice Book generally treats the concepts of a meritless claim as meaning a frivolous claim.

Practice Book § 79a-3 operates in conjunction with Practice Book § 35a-21, which establishes not only the procedures by which appellate counsel may file an appearance in a child protection matter, but also the time to appeal from final judgments or decisions in such matters. Section 35a-21 (b) provides in relevant

[11] See, e.g., Black's Law Dictionary (10th Ed. 2014) p. 1139 (defining "meritorious" as, among other things, "worthy of legal victory").

part: "If an indigent party, child or youth wishes to appeal a final decision, the trial attorney shall file an appeal or seek review by an appellate review attorney in accordance with the rules for appeals in child protection matters in Chapter 79a. The reviewing attorney determining whether there is a *nonfrivolous* ground for appeal shall file a limited 'in addition to' appearance with the trial court for purposes of reviewing the merits of an appeal. If the reviewing attorney determines there is *merit* to an appeal, such attorney shall file a limited 'in addition to' appearance for the appeal with the Appellate Court. . . ." (Emphasis added.) It seems clear, then, that the concepts of a nonfrivolous appeal and a potentially meritorious appeal are deemed to be synonymous for purposes of § 79a-3.

This conclusion finds support in other provisions of the rules of practice; see Practice Book § 8-2 (d) (2) (B) (referring to "frivolous filings that have been without merit"); and also in the decisions of other courts that have considered under what circumstances an indigent parent is entitled to appellate review or representation in a termination matter.[12] Accordingly, we conclude that Practice Book § 79a-3 does not impose a higher standard on indigent parents seeking to appeal from a termination of their parental rights and, therefore, does not, on its face, violate their right to the equal protection of the law.

[12] See, e.g., *Linker-Flores* v. *Arkansas Dept. of Human Services*, 359 Ark. 131, 141, 194 S.W.3d 739 (2004) (when reviewing counsel can find no issue of arguable merit, court may deem appeal frivolous); *A.C.* v. *Cabinet for Health & Family Services*, 362 S.W.3d 361, 371 (Ky. App. 2012) ("[an] appeal [that] lacks any meritorious issues [that] might support the appeal . . . is . . . frivolous"); *State ex rel. D.A.G.*, 935 So. 2d 216, 219 (La. App.) ("should counsel find no valid, [good faith, i.e., nonfrivolous] grounds for appeal after conscientious examination of the record, counsel should so advise [the] court and request permission to withdraw"), review denied, 936 So. 2d 1278 (La. 2006); *In re D.E.S.*, 135 S.W.3d 326, 330 (Tex. App. 2004) (equating "wholly frivolous" and "without merit"). But see *L.C.* v. *State*, 963 P.2d 761, 765 (Utah App. 1998) (distinguishing meritless from frivolous appeals), cert. denied sub nom. *D.C.* v. *State*, 982 P.2d 88 (Utah 1999).

We recognize that, in *Anders*, the United States Supreme Court indicated that a statement by counsel that he found no merit in the defendant's appeal did not amount to a determination that an appeal would be wholly frivolous. See *Anders* v. *California*, supra, 386 U.S. 743–44. That conclusion in no way contradicts our determination that, for purposes of Connecticut's rules of appellate procedure, reviewing counsel is required to apply the same standards in determining whether there is no merit to an appeal as in determining whether the appeal would be frivolous. Indeed, the United States Supreme Court has subsequently indicated that the two concepts may be used synonymously in the *Anders* context. See *McCoy* v. *Court of Appeals of Wisconsin, District 1*, 486 U.S. 429, 438 n.10, 108 S. Ct. 1895, 100 L. Ed. 2d 440 (1988) ("The terms 'wholly frivolous' and 'without merit' are often used interchangeably in the *Anders* . . . context. Whatever term is used to describe the conclusion an attorney must reach as to the appeal before requesting to withdraw and the court must reach before granting the request, what is required is a determination that the appeal lacks any basis in law or fact.").

Finally, we note that, in the present case, reviewing counsel did not merely conclude that the respondent's appeal lacked merit in that it was unlikely to succeed. Rather, he expressly represented to the court that, after reviewing the record, counsel "concluded that [they] did not have a nonfrivolous ground [on which] to proceed." Accordingly, there is no question that the respondent herself was not held to a higher standard than are nonindigent parents.

IV

Lastly, we turn our attention to the respondent's argument that the Appellate Court incorrectly determined that the procedure set forth in *Anders* is inapplicable to the withdrawal of an appellate review attorney in

child protection proceedings and, therefore, that the respondent's amended appeal should not have been dismissed on that basis. She argues that (1) the due process provisions of the state and federal constitutions secure a right to the effective assistance of counsel in appeals from termination decisions, and (2) a trial court may not permit appointed counsel to withdraw for lack of a nonfrivolous basis for appeal without adhering to the procedure set forth in *Anders*. In the alternative, the respondent contends that, at the very least, the state constitution requires some sort of more limited procedural safeguards than those set forth in *Anders*, and allowing reviewing counsel to withdraw on the basis of his mere representation that no potentially meritorious grounds for appeal have been identified is not sufficient to protect the rights of an indigent parent to due process of law. We conclude that, on the facts of the present case, the respondent had a constitutional right to the assistance of counsel on appeal and that the trial court did not observe adequate procedural safeguards before permitting Sexton to withdraw.

A

"*Anders* established a prophylactic framework that is relevant when, and only when, a litigant has a previously established constitutional right to counsel." *Pennsylvania* v. *Finley*, 481 U.S. 551, 555, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987). Accordingly, in assessing whether the trial court was required to follow some version of the *Anders* procedure before permitting reviewing counsel to withdraw, our first task is to determine whether, under either the federal or the state constitution, an indigent parent has a right to appointed counsel in an appeal from a termination of parental rights.[13]

[13] The Appellate Court, answering this question in the negative in the present case, was bound by *In re Isaiah J.*, 140 Conn. App. 626, 59 A.3d 892, cert. denied, 308 Conn. 926, 64 A.3d 333, cert. denied sub nom. *Megan J.* v. *Katz*, 571 U.S. 924, 134 S. Ct. 317, 187 L. Ed. 2d 224 (2013). In that case, a different panel of the Appellate Court, relying on the decision of

In answering this question, our starting point is *Lassiter* v. *Dept. of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981). In *Lassiter*, the United States Supreme Court considered whether the due process clause of the fourteenth amendment requires the appointment of counsel for indigent parents in every parental status termination proceeding. See id., 24. The court read its prior cases as establishing a presumption that an indigent litigant has a right to appointed counsel only when his or her physical liberty is at stake. Id., 25–27. The court then applied the due process balancing test set forth in *Mathews* v. *Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)—weighing the competing private and governmental interests at stake and the risk of an erroneous decision in the absence of appointed counsel—to determine whether an indigent parent's interest in obtaining the assistance of counsel is sufficiently compelling to overcome that presumption. *Lassiter* v. *Dept. of Social Services*, supra, 27–32.

Despite marshalling a number of potentially convincing arguments in favor of recognizing a right to counsel; see id.;[14] the court ultimately declined to hold that due

this court in *State* v. *Anonymous*, 179 Conn. 155, 425 A.2d 939 (1979), concluded that "[a] parent's right to effective assistance of counsel in a termination of parental rights proceeding is not rooted in the federal or state constitutions." *In re Isaiah J.*, supra, 640. In *Anonymous*, however, we concluded only that the *sixth* amendment right to the assistance of counsel "[i]n all criminal prosecutions"; U.S. Const., amend. VI; and the corresponding provision of the state constitution; see Conn. Const., art. I, § 8; do not extend to a parent in a civil termination of parental rights hearing. *State* v. *Anonymous*, supra, 159. We did not address in that case, which was decided prior to *Lassiter* v. *Dept. of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981), the issue presented in the present action, namely, whether the due process clause of the fourteenth amendment to the federal constitution, or the civil due process clause of the constitution of Connecticut; see Conn. Const., art. I, § 10; affords such a right. That question has yet to be resolved by this court.

[14] The court discussed, for example, the parent's "commanding" interest in "the accuracy and justice of the decision to terminate his or her parental status"; *Lassiter* v. *Dept. of Social Services*, supra, 452 U.S. 27; the fact that the state shares those interests, by virtue of its own "urgent interest" in the

process requires the appointment of counsel whenever a state seeks to terminate the parental rights of an indigent parent. Id., 31. Instead, the court held that whether the federal constitution requires the appointment of counsel is a fact specific determination that must be made by balancing the *Mathews* factors on a case-by-case basis. See id., 31–32. The court further cautioned that, in light of the presumption against the right to appointed counsel in the absence of a potential deprivation of physical liberty, such a right would exist only "[i]f, in a given case, the parent's interests [are] at their strongest, the [s]tate's interests [are] at their weakest, and the risks of error [are] at their peak . . . ." Id., 31.

In *Lassiter*, the court concluded that the trial court did not deny the indigent mother due process of law when it declined to appoint counsel. Id., 33. The court reached this conclusion largely because (1) the mother faced no potential criminal liability as a result of allegations raised in the hearing, (2) no expert testimony was presented, (3) the case did not involve especially troublesome points of substantive or procedural law, (4) the mother had declined to participate in prior proceedings and demonstrated little interest in contesting the termination, and (5) the weight of the evidence indicated that the mother, who only recently had begun serving a prison sentence of twenty-five to forty years for second degree murder, had little interest in strengthening her relationship with her son. Id., 20, 32–33. Accordingly, although the court expressly declined to set forth "a precise and detailed set of guidelines to be followed in determining when the provi[sion] of counsel is necessary to meet the applicable due process require-

welfare of the child; id.; the relative insignificance of the state's pecuniary interests in the process; id., 28; the fact that parents involved in termination hearings "are likely to be people with little education, who have had uncommon difficulty in dealing with life, and who are, at the hearing, thrust into a distressing and disorienting situation"; id., 30; and the fact that most state courts have required the appointment of counsel for indigent parents at termination proceedings. Id.

ments" (internal quotation marks omitted); id., 32; we can glean from the court's analysis that the appointment of counsel may be required under the federal constitution when the indigent parent actively contests the termination, faces potential criminal liability as a result of evidence presented in the proceedings, must navigate complex substantive, procedural, or evidentiary issues, or might reasonably have prevailed with the assistance of counsel. Ultimately, the question is whether requiring the parent to proceed on a self-represented basis renders the proceedings fundamentally unfair. See id., 33.

Although *Lassiter* addressed the right to counsel at the hearing stage, subsequent decisions have strongly suggested that the same principles and considerations apply when an indigent parent appeals from a termination decision. Indeed, in *M.L.B.* v. *S.L.J. ex rel. S.L.J.*, 519 U.S. 102, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996), the United States Supreme Court all but stated that, under appropriate circumstances, *Lassiter* also confers a right to counsel in termination appeals: "It would be anomalous to recognize a right to a transcript needed to appeal a misdemeanor conviction . . . but hold, at the same time, that a transcript need not be prepared for [an indigent parent]—though were her defense sufficiently complex, [state paid] counsel, as *Lassiter* instructs, would be designated for her." Id., 123. It seems apparent, therefore, that *Lassiter* applies to appeals from parental rights termination decisions.

Having established that *Lassiter* applies to the present case, we now consider whether, on these facts, and in light of the guidance that the United States Supreme Court provided in that case, the respondent had a right to appellate counsel under the due process clause of the fourteenth amendment. We conclude that she did.

As we discussed, the United States Supreme Court found several factors to be dispositive in *Lassiter*: the absence of any potential criminal liability, the fact that

the mother was not confronted with expert testimony or complicated issues that might have necessitated legal expertise, her general lack of engagement in the process, and compelling evidence favoring termination.[15] In the present case, by contrast, most of those factors point in the other direction.[16]

1

First, the United States Supreme Court has recognized the importance of having access to counsel when the behavior at issue in a termination proceeding also

[15] Other courts have construed the *Lassiter* factors somewhat more broadly. The Tennessee Court of Appeals, for example, looks to the following seven factors: "(1) whether expert medical and/or psychiatric testimony is presented at the hearing; (2) whether the parents have had uncommon difficulty in dealing with life and life situations; (3) whether the parents are thrust into a distressing and disorienting situation at the hearing; (4) the difficulty and complexity of the issues and procedures; (5) the possibility of criminal self-incrimination; (6) the educational background of the parents; and (7) the permanency of potential deprivation of the child in question." *State ex rel. T.H.* v. *Min*, 802 S.W.2d 625, 627 (Tenn. App. 1990). We would arrive at the same destination were we to follow that path.

[16] For purposes of brevity, rather than retracing the entire *Mathews* balancing analysis that the court conducted in *Lassiter*, as adapted to the facts of the present case, we focus our discussion on the handful of factors and considerations that the court in *Lassiter* identified as dispositive and on whether those factors would tip the scale differently in the present case. Accordingly, we do not discuss at length considerations such as, on the one hand, a parent's fundamental interest in "the companionship, care, custody, and management of his or her children"; (internal quotation marks omitted) *Lassiter* v. *Dept. of Social Services*, supra, 452 U.S. 27; or, on the other hand, the state's interest in assessing and furthering the best interests of the child in the most efficient and economical manner possible, both of which interests will be evident in more or less every termination proceeding. See id., 27–28. We emphasize, however, that *Mathews* remains the governing, overarching test.

For this reason, we disagree with Justice Mullins when he alleges in his concurring and dissenting opinion that "the majority [does] not consider the interests of the child . . . ." On the contrary, our analysis, which incorporates *Lassiter*'s full *Mathews* analysis, takes the child's interests into account, albeit implicitly. Specifically, as *Lassiter* and its progeny explain, the child invariably will have an interest in an accurate determination as to whether his or her parent should remain as a parent. *Anders* is designed to ensure the accuracy of that determination. Moreover, in any particular termination case, any possible delay attendant to the limited procedural safeguards that due process requires; see part IV B 2 of this opinion; is likely to be de minimis and will be far outweighed by the shared interest of the parent and the child in an accurate determination.

may implicate potential criminal liability. As the court explained in *Lassiter*, "[s]ome parents will have an additional interest to protect. Petitions to terminate parental rights are not uncommonly based on alleged criminal activity. Parents so accused may need legal counsel to guide them in understanding the problems such petitions may create." *Lassiter* v. *Dept. of Social Services*, supra, 452 U.S. 27 n.3.

In the present case, this factor weighs in favor of recognizing a right to counsel. The respondent has a long history of criminal activity. She was arrested, convicted, and incarcerated on several occasions between 2014 and 2017. Importantly, at the time of the termination hearing, the respondent was facing new charges involving alleged marijuana possession and conspiracy to commit armed robbery. Testimony and other evidence presented at the hearing could have influenced those prosecutions or implicated the respondent in various other crimes. There was evidence, for example, that she had assaulted Taijha with a belt, abducted Taijha during a supervised visit, refused to participate in substance abuse testing and faked those tests that she did take, and repeatedly appeared to be abusing or under the influence of illicit substances, such as PCP. In fact, during the hearing, counsel for the commissioner questioned the respondent at some length about the new criminal charges. Ultimately, the trial court's finding that the respondent "failed to remain sober and drug free" was a key factor in its determination that she had failed to rehabilitate. Other courts applying *Lassiter* have found a right to appointed counsel for an indigent parent when there was far less potential for criminal liability than in the present case. See, e.g., *South Carolina Dept. of Social Services* v. *Vanderhorst*, 287 S.C. 554, 559–60, 340 S.E.2d 149 (1986) (allegations of alleged physical abuse of child); *State ex rel. T.H.* v. *Min*, 802 S.W.2d 625, 627 (Tenn. App. 1990) (parent made one statement to court exposing herself to potential criminal liability).

In *Lassiter*, the court also indicated that an indigent parent's need for representation is greater, and the potential for error, should she proceed on a self-represented basis, is higher, when a case involves complex legal questions, the presentation of expert testimony, or other factors that would render self-representation problematic or impossible. Unlike in *Lassiter*, in the present case, those factors also support the conclusion that the respondent has a right to the appointment of appellate counsel.[17]

The trial featured testimony by two expert witnesses —Ines Schroeder, a forensic psychologist, and James Pier, a clinical neuropsychologist—and a third expert, Bandy Lee, a forensic psychiatrist, testified at a prior competency hearing. The court relied heavily on the opinions of those experts in reaching the conclusions

[17] We recognize that *Lassiter* dealt with the issue of whether *trial* counsel should be appointed and that some of the factors that we have been discussing, such as potential criminal liability, are arguably less relevant at the appellate level. Nevertheless, our sister courts, often as a matter of state constitutional or statutory law, have recognized the importance of the assistance of counsel to effectively present an appeal from a termination of parental rights, given the complexities and intricacies of appellate practice. See, e.g., *Reist* v. *Bay County Circuit Judge*, 396 Mich. 326, 348–49, 241 N.W.2d 55 (1976), overruled in part on other grounds by *Lassiter* v. *Dept. of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981); *State ex rel. Heller* v. *Miller*, 61 Ohio St. 2d 6, 13–14, 399 N.E.2d 66 (1980), overruled in part on other grounds by *Lassiter* v. *Dept. of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981); *In re Welfare of Luscier*, 84 Wn. 2d 135, 138, 524 P.2d 906 (1974), overruled in part on other grounds by *Lassiter* v. *Dept. of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981); see also *K.P.B.* v. *D.C.A.*, 685 So. 2d 750, 752 (Ala. Civ. App. 1996) (recognizing indigent parent's right to appointed counsel in termination appeals under Alabama constitution); *In re H.E.*, 312 Mont. 182, 186, 59 P.3d 29 (2002) (suggesting that indigent parent has constitutional right to appointed counsel in termination appeals but not specifying whether right is based on federal or state constitution). Even with respect to potential criminal liability, there is always the prospect that a party compelled to represent himself or herself on appeal will be required to address issues related to his or her alleged criminal conduct.

that the respondent was incapable of caring for Taijha and that she was unable or unwilling to benefit from reunification efforts.

More important, although we are not prepared to say that the trial involved especially complex questions of law, in the present case, that is largely irrelevant insofar as the respondent has been adjudicated incompetent and has serious, unresolved mental health issues that would make it difficult, if not impossible, for her to devise and execute a viable appellate strategy. The trial court credited expert testimony that the respondent suffers from a number of severe psychiatric impairments. She has been diagnosed with psychotic disorder. Her behavior is erratic and unfocused, her thought processes tangential and delusional, her speech rambling and incoherent, and her insight and judgment extraordinarily limited.[18]

In short, the task of representing oneself on appeal, which is formidable for the most competent of laypersons, would be virtually inconceivable for a litigant facing the respondent's challenges. Our sister courts, under similar circumstances, have had no difficulty concluding that to require such a litigant to proceed on a self-represented basis would be fundamentally unfair. See, e.g., *South Carolina Dept. of Social Services* v. *Vanderhorst*, supra, 287 S.C. 560 (recognizing right to appointed counsel under *Lassiter* when mother's behavior evidenced mental instability); *In re Welfare of Hall*, 99 Wn. 2d 842, 846–47, 664 P.2d 1245 (1983) (unlike in criminal context, in which defendant must be competent to stand trial, respondent in child deprivation proceeding "may be entirely incompetent and entirely unable to raise potentially meritorious issues" pro se); see also *State ex rel. T.H.* v. *Min*, supra, 802

[18] Counsel also represented to the trial court that the respondent, who is incarcerated, has limited access to legal materials, a law library, or a telephone.

S.W.2d 627 (although case did not present overly complex issues or procedures, parents were so lacking in education and intelligence that appointment of counsel was necessary).

3

The next factor that the United States Supreme Court found to be dispositive in *Lassiter* was that the mother in that case had declined to participate in prior proceedings and demonstrated little interest in contesting the termination. *Lassiter* v. *Dept. of Social Services*, supra, 452 U.S. 33. In the present case, there is no doubt that the respondent's unresolved mental health and substance abuse problems and repeated incarcerations hindered her ability to take the steps necessary to demonstrate an ability to rehabilitate.

Unlike in *Lassiter*, however, there is abundant evidence in the present case that the respondent has attempted to prioritize her relationship with Taijha. After Taijha was removed from the respondent's care, the respondent filed a petition in 2011 to be reinstated as Taijha's guardian. In 2014, she attended thirty-three of forty scheduled visits to the R Kids therapeutic family time program. The following year, she referred herself for substance abuse treatment. The respondent also engaged private counsel to represent her at the trial, despite her documented financial need. She attended all of the hearings before the trial court and submitted additional documentary evidence after the close of the trial.

In addition, several of the commissioner's own witnesses testified about the respondent's affection for and commitment to her daughter. Schroeder testified that she was very loving, attentive, and affectionate with Taijha in their various sessions together. Alyssa Clarino, a department social worker, indicated that it was very apparent that the respondent loved Taijha and wished to care for Taijha to the best of her ability.

Anna Garcia, the director of the R Kids Family Center, concurred, testifying that Taijha is clearly the respondent's "biggest motivation in life." Indeed, at the time of trial, the respondent recently had requested that the frequency of her visitation with Taijha be increased. There is little doubt, then, that, despite her well documented inability to be a stable, reliable, and nurturing resource for Taijha, the respondent demonstrated far more of a commitment to reestablishing custody, maintaining a parental relationship, and actively asserting her legal rights than did the mother in *Lassiter*. See *Lassiter* v. *Dept. of Social Services*, supra, 452 U.S. 33.

4

The last factor that the court found persuasive in *Lassiter* was that the weight of the evidence that the mother lacked interest in rekindling her relationship with her son was so great that the presence of counsel could not have made a determinative difference. Id., 32–33. In the present case, as we discussed, it is undisputed that the respondent was interested in maintaining a relationship with Taijha and that mother and daughter shared a close emotional bond. The primary concern was that the respondent's largely unacknowledged and untreated mental health conditions made it impossible for her to provide a stable, nurturing environment.

Our review of the *Lassiter* factors, then, leads us to conclude that the respondent has a right to appointed appellate counsel under the due process clause of the fourteenth amendment. Because we are persuaded that the federal constitution quite clearly secures the respondent's right to counsel,[19] we need not consider her argument that article first, § 10, of the Connecticut constitution independently confer such a right.[20]

[19] We emphasize that *Lassiter* and its progeny recognize a constitutional right to counsel in the civil context only in termination of parental rights actions and, indeed, only in a very limited subset of such cases. Our decision today should not be read to expand the scope of that right.

[20] It bears noting, however, that the respondent offers several facially plausible arguments as to why the state constitution confers broader rights

In so holding, we do not intend to gainsay the trial court's well documented factual findings on the merits. Nor do we express an opinion as to whether Sexton correctly concluded that there is no nonfrivolous ground for the respondent's appeal. We hold only that, for all of the reasons discussed in this opinion, we are unable to conclude, on the basis of the present record, that the assistance of counsel could be of no benefit to the respondent in an appeal from the termination of her parental rights.

B

Having concluded that the respondent was entitled to the appointment of counsel in her appeal from the termination of her parental rights, we now turn our attention to her contention that an *Anders* procedure, or something akin thereto, is required to vindicate that right when, as in the present case, appointed counsel finds no potential merit in the appeal and seeks to withdraw. We begin by briefly reviewing *Anders* and its progeny.

"In *Anders*, the United States Supreme Court outlined a procedure that is constitutionally required when, on direct appeal, appointed counsel concludes that an indi-

in this respect. She notes, among other things, that (1) it already is well established that the due process clauses of our state constitution have, in certain contexts, a broader meaning and confer greater protections than do their federal counterparts; see, e.g., *State* v. *Morales*, 232 Conn. 707, 717, 657 A.2d 585 (1995); *Fasulo* v. *Arafeh*, 173 Conn. 473, 475, 378 A.2d 553 (1977); (2) the open courts provision contained in article first, § 10, which has been identified as grounding a right to state supported counsel for indigent paternity defendants; see *Lavertue* v. *Niman*, 196 Conn. 403, 412, 493 A.2d 213 (1985); see also W. Horton, The Connecticut State Constitution (2d Ed. 2012) p. 79; has no direct counterpart in the federal constitution; and (3) several of our sister courts have concluded that their state constitutions independently confer a right to counsel for indigent parents in termination proceedings. See, e.g., *K.P.B.* v. *D.C.A.*, 685 So. 2d 750, 752 (Ala. Civ. App. 1996) (Alabama Court of Civil Appeals recognized right under due process clause of Alabama constitution); *In re K.L.J.*, 813 P.2d 276, 278, 283–84 (Alaska 1991) (holding that Alaska constitution confers right and noting "the growing number of jurisdictions [that] have held that the right to counsel in termination proceedings exists under a state constitution"); *In re Welfare of Hall*, supra, 99 Wn. 2d 846 (implying that right derives from state constitution).

gent [criminal] defendant's case is wholly frivolous and wishes to withdraw from representation. . . . Under *Anders*, before appointed counsel may withdraw, he or she must provide the court and the defendant with a brief outlining anything in the record that may support the appeal, and the defendant must be given time to raise any additional relevant points. . . . Thereafter, the court, having conducted its own independent review of the entire record of the case, may allow counsel to withdraw if it agrees with counsel's conclusion that the appeal is entirely without merit." (Citations omitted.) *State* v. *Francis*, 322 Conn. 247, 250 n.3, 140 A.3d 927 (2016).

From one vantage point, *Anders* attempted to resolve the conflicting professional duties facing appointed counsel, who is bound to advocate zealously for the interests of the indigent client but who is simultaneously prohibited from presenting frivolous arguments on appeal. From the standpoint of the client, *Anders* serves a range of purposes when appointed counsel can find no potentially meritorious grounds for appeal and seeks to withdraw. See *Penson* v. *Ohio*, 488 U.S. 75, 81–82, 109 S. Ct. 346, 102 L. Ed. 2d 300 (1988). The *Anders* procedure (1) ensures that counsel has, in fact, diligently reviewed the record for potential errors, (2) provides a possible appellate road map for the client should he or she choose to proceed on a self-represented basis, and (3) may lead counsel, through the process of researching and drafting, to conclude that the client's appeal is not without merit after all. In addition, submission of the brief facilitates and potentially expedites the independent judicial review that *Anders* requires. See *L.C.* v. *State*, 963 P.2d 761, 766 (Utah App. 1998), cert. denied sub nom. *D.C.* v. *State*, 982 P.2d 88 (Utah 1999).

In the more than one-half century since *Anders* was decided, the United States Supreme Court, our sister state courts, and the courts of Connecticut have sought

to answer a number of questions regarding the scope and applicability of the *Anders* procedure. These include, first, whether something short of the full procedure delineated in the final part of the *Anders* decision; see *Anders* v. *California*, supra, 386 U.S. 744; satisfies the requirements of the federal constitution and, second, whether *Anders* applies outside of the context of direct criminal appeals, such as in habeas proceedings, in connection with motions to set aside an illegal sentence, or in various civil contexts.

The United States Supreme Court answered the first question in *Smith* v. *Robbins*, 528 U.S. 259, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000). In that case, the court held that the final part of *Anders*, in which the court set forth one acceptable procedure for handling frivolous appeals, is not obligatory, and that states are free to adopt different procedures for the withdrawal of appointed counsel, as long as those procedures adequately safeguard an indigent defendant's right to appellate counsel and protect against the possibility that appointed counsel has incorrectly determined that an appeal would be frivolous. Id., 265, 272–76. For example, in *Robbins*, the court approved of a procedure that the Supreme Court of California had adopted in *People* v. *Wende*, 25 Cal. 3d 436, 441–42, 600 P.2d 1071, 158 Cal. Rptr. 839 (1979).[21] *Smith* v. *Robbins*, supra, 276;

[21] Under *Wende*, appointed counsel, "upon concluding that an appeal would be frivolous, files a brief with the appellate court that summarizes the procedural and factual history of the case, with citations [to] the record. He also attests that he has reviewed the record, explained his evaluation of the case to his client, provided the client with a copy of the brief, and informed the client of his right to file a pro se supplemental brief. He further requests that the court independently examine the record for arguable issues. Unlike under the *Anders* procedure, counsel following *Wende* neither explicitly states that his review has led him to conclude that an appeal would be frivolous . . . although that is considered implicit . . . nor requests leave to withdraw. Instead, he is silent on the merits of the case and expresses his availability to brief any issues on which the court might desire briefing. . . .

"The appellate court, upon receiving a *Wende* brief, must conduct a review of the entire record, regardless of whether the defendant has filed a pro se brief." (Citations omitted; internal quotation marks omitted.) *Smith* v. *Robbins*, supra, 528 U.S. 265.

see also *People ex rel. South Dakota Dept. of Social Services*, 678 N.W.2d 594, 597 (S.D. 2004) (under *Robbins*, state adopted briefing procedure pursuant to which counsel concedes lack of arguably meritorious issues for appeal but discusses only those issues requested by client, as alternative to *Anders*); J. Dugan & A. Moeller, "Make Way for the ABA: *Smith* v. *Robbins* Clears a Path for *Anders* Alternatives," 3 J. App. Prac. & Process 65, 91 (2001) ("states now have exceptionally wide latitude in regulating the performance of appellate counsel in frivolous cases").

The United States Supreme Court also has clarified that the federal constitution does not require that appointed counsel file an *Anders* brief before withdrawing from representation in postconviction criminal proceedings other than an appeal as of right. See, e.g., *Austin* v. *United States*, 513 U.S. 5, 8, 115 S. Ct. 380, 130 L. Ed. 2d 219 (1994) (discretionary appellate review of conviction); *Pennsylvania* v. *Finley*, supra, 481 U.S. 556–57 (habeas appeals). Although that court has not directly addressed the issue, this court has held that *Anders* also does not apply with respect to a postconviction motion to correct an illegal sentence; see *State* v. *Francis*, supra, 322 Conn. 265–66; and several of our sister courts have concluded that the *Anders* procedure is not required in the context of appeals from civil commitment. See J. Frueh, "The *Anders* Brief in Appeals from Civil Commitment," 118 Yale L.J. 272, 277 (2008). In some instances, however, *Anders* has been held to apply in other civil contexts. See, e.g., *In re D.A.S.*, 973 S.W.2d 296, 299 (Tex. 1998) (juvenile delinquency appeals).

1

With this background in mind, we turn now to the issue of whether, in termination cases such as this one, in which the indigent parent enjoys a constitutional right to counsel under *Lassiter*, some procedure similar

to that set forth in *Anders* is constitutionally required before appointed counsel, having found no nonfrivolous ground for appeal, will be permitted to withdraw from representation. Although our analysis is grounded in the due process clause of the fourteenth amendment, similar rationales would independently lead to the same conclusion under the due process provisions of the constitution of Connecticut. See footnote 20 of this opinion.

Three primary considerations lead us to conclude that due process does not permit the withdrawal of appointed counsel on the sole basis of counsel's conclusory statement that he or she was unable to identify any nonfrivolous grounds for appeal. First, of those courts that have analyzed the issue as a matter of federal or state constitutional law,[22] a majority have concluded that some *Anders*-type procedure is required. See, e.g., *In re Keller*, 138 Ill. App. 3d 746, 747–48, 486 N.E.2d 291 (1985) (*Anders* applies, and right may be constitutional or statutory); *State ex rel. D.A.G.*, 935 So. 2d 216, 218–19 (La. App.) (*Anders* applies under federal constitution, as well as rules of court), review denied, 936 So. 2d 1278 (La. 2006); *In re V.E.*, 417 Pa. Super. 68, 81, 83, 611 A.2d 1267 (1992) (*Anders* applies under federal constitution); *In re H.E.*, 312 Mont. 182, 186, 59 P.3d 29 (2002) (*Anders* applies, but constitutional basis was unspecified); *L.C.* v. *State*, supra, 963 P.2d 763–66 (*Anders* applies under both Utah and federal constitutions).[23] But see *Denise H.* v. *Arizona Dept. of Economic*

[22] A number of other courts have grounded a right to an *Anders*-type procedure in a state statutory right to counsel. See, e.g., *A.C.* v. *Cabinet for Health & Family Services*, 362 S.W.3d 361, 370 (Ky. App. 2012); *People ex rel. South Dakota Dept. of Social Services*, supra, 678 N.W.2d 598; *In re K.S.M.*, 61 S.W.3d 632, 633 (Tex. App. 2001).

[23] We note that some of the cited cases address the precise issue presented in this case, namely, whether an *Anders* procedure is required to satisfy an indigent litigant's due process rights, whereas others address whether appointed counsel is ethically obligated to continue to prosecute a frivolous appeal or is permitted to withdraw upon satisfying the *Anders* requirements. In other words, some cases ask whether *Anders* is *necessary* before counsel may withdraw, whereas others ask whether it is *sufficient*.

Security, 193 Ariz. 257, 259–60, 972 P.2d 241 (App. 1998) (indigent parent has due process and statutory right to appointed counsel, but counsel has no right to file *Anders* brief); *In re Sade C.*, 13 Cal. 4th 952, 985, 920 P.2d 716, 55 Cal. Rptr. 2d 771 (1996) (*Anders* brief is not constitutionally required), cert. denied sub nom. *Gregory C.* v. *Los Angeles County Dept. of Children's Services*, 519 U.S. 1081, 117 S. Ct. 747, 136 L. Ed. 2d 685 (1997); *N.S.H.* v. *Florida Dept. of Children & Family Services*, 843 So. 2d 898, 903 (Fla.) (same), cert. denied, 540 U.S. 950, 124 S. Ct. 388, 157 L. Ed. 2d 282 (2003).

The second reason why we conclude that a mere conclusory representation by appointed counsel that he or she was unable to identify any nonfrivolous ground for appeal is insufficient to protect an indigent parent's due process right to counsel is that most of the same rationales that require the use of the *Anders* procedure in the criminal context apply with equal force to termination actions. A number of our sister courts have found this reasoning to be compelling. See, e.g., *J.K.* v. *Lee County Dept. of Human Resources*, 668 So. 2d 813, 816 (Ala. Civ. App. 1995); *Linker-Flores* v. *Arkansas Dept. of Human Services*, 359 Ark. 131, 139, 194 S.W.3d 739 (2004); *People ex rel. South Dakota Dept. of Social Services*, supra, 678 N.W.2d 598; *In re D.E.S.*, 135 S.W.3d 326, 329 (Tex. App. 2004).

Although it is rare for a diligent attorney to overlook potentially meritorious grounds for appeal, such oversights are not unheard of. See, e.g., *Penson* v. *Ohio*, supra, 488 U.S. 79 (in criminal case, reviewing court found " 'several arguable claims,' " one of which was deemed to be reversible error); *Tammy M.* v. *Dept. of Child Safety*, 242 Ariz. 457, 460–62 and n.4, 397 P.3d 1057 (App. 2017) (in termination of parental rights proceeding, indigent mother, proceeding pro se after withdrawal of appellate counsel, identified and ultimately prevailed on due process claim that counsel failed to identify). In a criminal matter, it is, first and foremost,

the defendant whose interest it is to ensure that an erroneous conviction is not sustained on appeal; yet, in a termination matter, it is not only the parent whose rights are at stake but also the child, who has a fundamental interest in the accuracy of the outcome and the preservation of family integrity. See, e.g., *In re Melody L.*, 290 Conn. 131, 157, 962 A.2d 81 (2009), overruled in part on other grounds by *State* v. *Elson*, 311 Conn. 726, 91 A.3d 862 (2014); see also *Santosky* v. *Kramer*, supra, 455 U.S. 766–67 ("[The state] shares the parent's interest in an accurate and just decision . . . . [T]he [s]tate registers no gain [toward] its declared goals when it separates children from the custody of fit parents." [Citations omitted; internal quotation marks omitted.]). Accordingly, the primary purpose for requiring *Anders* briefing and independent judicial review, namely, error correction, applies with as much force in the context of a termination proceeding.

The other primary functions of the *Anders* procedure —assisting the reviewing court in efficiently reviewing the record and the indigent parent in preparing for possible self-representation—are also especially critical in the termination context. Relative to a criminal trial, a termination proceeding can potentially lead to the deprivation of a liberty interest under a less stringent standard of proof, with fewer procedural and evidentiary safeguards, without the option of a jury trial, and on the basis of somewhat amorphous or imprecise concepts such as the best interest of the child. See *In re V.E.*, supra, 417 Pa. Super. 83; see also General Statutes § 45a-717 (g) (court must find, on basis of clear and convincing evidence, that termination is in best interest of child); Practice Book § 32a-2 (a) (termination hearings are civil in nature and informal). For these reasons, "zealous advocacy of the parent's cause is of particular importance in an involuntary termination proceeding." *In re V.E.*, supra, 83.

Third, particularly with respect to that subset of termination appeals for which the federal constitution requires the appointment of appellate counsel, we conclude that a balancing of the relevant interests weighs in favor of affording the indigent litigant at least some of the procedural protections set forth in *Anders*. As we discussed, cases in which a parent has a right to appointed counsel under the fourteenth amendment will typically be those in which he or she may face some potential criminal liability, those involving thorny legal or evidentiary issues, or those in which the parent has actively asserted his or her parental rights but is ill equipped to vindicate them as a self-represented party on appeal. When criminal liability may attach, the same considerations that require the use of the *Anders* procedure in the sixth amendment context are likely to apply with respect to a civil termination proceeding as well. When the case involves expert testimony or complex legal issues, then, especially in light of our conclusion in part IV B 2 of this opinion that a trial court may opt to apply safeguards that are more expeditious and less resource intensive than those discussed in *Anders*, the benefits of obtaining a second opinion in the form of some limited judicial review of counsel's no merit determination more than offset the potential costs.[24] Finally, in tragic situations such as in the present case, in which an indigent parent continually tries to assert her parental rights and to maintain a nourishing relationship with her child but lacks the mental or emo-

[24] Some courts and commentators have argued that, especially in the context of a termination proceeding, in which it is important that children are provided with some semblance of stability and closure in as timely a manner as justice permits; see *In re Davonta V.*, 285 Conn. 483, 489–92, 494–95, 940 A.2d 733 (2008); the use of a formal *Anders* procedure represents an unnecessary delay. See, e.g., *N.S.H.* v. *Florida Dept. of Children & Family Services*, supra, 843 So. 2d 902; see also C. Yee, Comment, "The *Anders* Brief and the Idaho Rule: It Is Time for Idaho to Reevaluate Criminal Appeals After Rejecting the *Anders* Procedure," 39 Idaho L. Rev. 143, 152–53 (2002). But see *A.C.* v. *Cabinet for Health & Family Services*, 362 S.W.3d 361, 369 (Ky. App. 2012) (*Anders* briefing entails "insignificant" delay of at most thirty days and typically will expedite reviewing court's work).

tional competence to do so successfully, fundamental fairness requires that she be afforded some minimal procedural protections before a court accepts counsel's representation that any appeal would be frivolous and, therefore, that she must prosecute her appeal on a self-represented basis.

2

For the foregoing reasons, we conclude that appellate review counsel may not be permitted to withdraw from representing an indigent parent who is constitutionally entitled to appointed counsel in a termination hearing solely on the basis of counsel's representation that he or she was unable to identify any nonfrivolous ground for appeal. As we discussed, however, the United States Supreme Court has indicated that the precise procedures discussed in *Anders* are not constitutionally mandated. Rather, states are free to adopt alternative procedures, as long as those procedures adequately safeguard an indigent litigant's right to counsel and protect against the possibility that appointed counsel has incorrectly determined that any appeal would be frivolous. *Smith* v. *Robbins*, supra, 528 U.S. 265, 272–76.

In the present case, the amici Office of the Chief Public Defender, American Civil Liberties Union of Connecticut, and Center for Children's Advocacy propose, and the respondent herself concedes, that something short of the full *Anders* procedure may be adequate to vindicate her right to counsel. In the context of a termination proceeding, we can conceive of circumstances in which a trial court reasonably might conclude that preparation of a formal *Anders* brief would represent a misuse of resources that would serve only to unnecessarily delay the resolution of the child's legal status. See footnote 24 of this opinion.

For instance, a court might determine, in its discretion, that holding a hearing would give the court sufficient opportunity to make an initial determination that

counsel had diligently reviewed the case for potential appellate issues and would provide an adequate forum for counsel to present the most promising—or least meritless—potential appellate issues for the court's and the parent's consideration. At that point, after the court and the parent have had an opportunity to question counsel about various possible avenues for appeal, the court could determine whether written briefing would be of value.

At a minimum, *Robbins* requires the following: (1) the court must conduct a colloquy sufficient to ascertain that counsel has evaluated all potential grounds for appeal and has brought the most promising ones to the attention of the court; a mere representation that, upon review, no grounds for appeal have been identified is insufficient; (2) the indigent parent must be afforded an opportunity to review counsel's conclusions and to bring to the court's attention what he or she believes are any appealable issues; and (3) the court must reach its own independent conclusion that any appeal would be frivolous. See J. Dugan & A. Moeller, supra, 3 J. App. Prac. & Process 91–92; see also *Smith* v. *Robbins*, supra, 528 U.S. 279–81. We believe that, subject to the discretion of the trial court, such a procedure would vindicate the due process rights of the indigent litigant without imposing undue financial burdens or delays.

3

In the present case, a review of the record does not satisfy us that even these minimal procedural protections were afforded to the respondent. Sexton's motion to withdraw was heard and decided by a different court than that which presided over the termination proceedings. Over the course of the two hearings conducted on the motion to withdraw, Sexton's evaluation of the merits of the case was limited to the following statement: "Upon our full review of the record, we have reached the conclusion and—and when I say the full

record, we did ultimately receive the full transcripts that were missing prior to the time that we needed to file the appeal, and we have subsequently concluded that we did not have a nonfrivolous ground [on which] to . . . proceed."

In addition, although Sexton's brief to the trial court in connection with the motion to withdraw did include a short procedural history, that history was tailored and limited to the purpose of the brief, which was to advise the court as to whether the appointment of replacement counsel or the use of the *Anders* procedure was constitutionally required. At no point does the record indicate that the court was sufficiently apprised of the facts and legal issues involved in the case so as to enable it to perform its own independent review; nor does the record indicate that the court did in fact form its own independent judgment that Sexton had accurately determined that any appeal would be meritless.

Moreover, although Sexton indicated that he had communicated with the respondent by mail, over the telephone, and in person, and she represented that he had answered all of her questions to her satisfaction, there is no indication in the record whether those communications extended beyond satisfying the requirements of Practice Book § 3-10 and explaining what procedural options the respondent had should the court permit Sexton to withdraw. Specifically, there is no indication that the respondent was advised or educated as to potential legal issues that she might consider pursuing on appeal.[25] Accordingly, on remand, it will be necessary for the court, at the least, (1) to conduct a

[25] We emphasize that we do not in any way fault Sexton for these lacunae in the record. Sexton sought the opportunity to satisfy all of the *Anders* requirements, and it may well be that he either educated the respondent as to the relative merits of different potential appellate issues or reasonably concluded that, in light of the fact that she had been adjudicated incompetent, such education could serve no useful purpose. Our point is merely that, in light of the manner in which the motion to withdraw was disposed of, we are unable to confirm that the minimal requirements of due process were satisfied.

hearing to verify, on the record, that the respondent has been advised as to any potential grounds for appeal and has had the opportunity to question counsel thereon, and (2) to be satisfied that Sexton has fully explored potential grounds for appeal and shares his view that any appeal would be frivolous.

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

In this opinion McDONALD and ECKER, Js., concurred.

MULLINS, J., with whom KAHN, J., joins, concurring in part and dissenting in part. I agree with and join parts I, II and III of the majority opinion. My disagreement with the majority centers on the question of whether, in the present case, the prophylactic procedures set forth in *Anders* v. *California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493, are required under the due process clause of the fourteenth amendment to the United States constitution. As the majority points out, for the *Anders* procedure to apply, first, there must be a constitutional right to counsel. We already have concluded that a parent has no right to counsel under the sixth amendment to the federal constitution or under article first, § 8, of the Connecticut constitution. See *State* v. *Anonymous*, 179 Conn. 155, 159, 425 A.2d 939 (1979). Nevertheless, the majority concludes that, pursuant to *Lassiter* v. *Dept. of Social Services*, 452 U.S. 18, 27, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981), the present case falls into the small subset of termination proceedings where there is such a constitutional right pursuant to the due process clause of the fourteenth amendment. I respectfully disagree with part IV of the majority opinion.

Rather, I agree with the reasoning of the Supreme Court of California, which balanced the factors

expressed in *Lassiter* and concluded that the due process clause of the fourteenth amendment does not require an *Anders* procedure in this context. See *In re Sade C.*, 13 Cal. 4th 952, 990, 920 P.2d 716, 55 Cal. Rptr. 2d 771 (1996), cert. denied sub nom. *Gregory C.* v. *Dept. of Children's Services*, 519 U.S. 1081, 117 S. Ct. 747, 136 L. Ed. 2d 685 (1997). In *Lassiter*, the United States Supreme Court began its analysis with "the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." *Lassiter* v. *Dept. of Social Services*, supra, 452 U.S. 26–27. The court further explained that "[t]he dispositive question . . . is whether the three . . . factors [set forth in *Mathews* v. *Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)], when weighed against the presumption that there is no right to appointed counsel in the absence of at least a potential deprivation of physical liberty, suffice to rebut that presumption and thus . . . lead to the conclusion that the [d]ue [p]rocess [c]lause requires the appointment of counsel when a [s]tate seeks to terminate an indigent's parental status." *Lassiter* v. *Dept. of Social Services*, supra, 31.

The three *Eldridge* factors that must be weighed against the presumption are "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions." Id., 27. The United States Supreme Court explained in *Lassiter* that "[w]e must balance these elements against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom." Id. The majority acknowledges the presumption and the balancing that is required to overcome it but, in my view, overcomes the presumption too readily.

In assessing the strength of the first *Eldridge* prong—the private interests at stake—the majority did not con-

sider the interests of the child, Taijha H.-B. As the Supreme Court of California explained in *In re Sade C.*, supra, 13 Cal. 4th 987, in a proceeding for termination of parental rights, the first prong of the *Eldridge* factors must necessarily include consideration of the rights of the child. See id. ("[t]he private interests at stake are those of the indigent parent and his child"). That court aptly reasoned that, "[w]hat the parent wants or needs is not necessarily what the child wants or needs. . . . If [their wants and needs are] consistent, any added protection arguably given to the parent might benefit the child as well. If inconsistent, however, such protection might effectively cause the child harm by helping the parent. The presumption, evidently, [when parental rights have been terminated] is that the wants and needs of parent and child are *inconsistent*. As stated, the appealed-from decision [the termination of parental rights], which is predicated on detriment the parent caused or allowed his child to suffer, is presumptively accurate and just." (Citation omitted; emphasis in original.) Id., 989.

In the present case, there is no indication that the child supports the appeal of the respondent, her mother, Sonya B., and, therefore, we are left with the presumption that the wants and needs of the parent and the child are inconsistent.[1] Therefore, weighing the *Eld-*

[1] I agree with the majority that an accurate determination as to whether a child's parent should remain the parent is an interest shared by both the child and the parent. But, those interests may diverge once a trial court determines that termination of parental rights is in the child's best interest. Here, the trial court has made a final determination that the respondent should not remain the parent. "After the [s]tate has established parental unfitness . . . the court may assume . . . that the interests of the child and the natural parents . . . diverge." *Santosky* v. *Kramer*, 455 U.S. 745, 760, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1981). Thus, a valid determination has been made that "presumptively establishes that the child's welfare lies with someone *other than* [her] parent." (Emphasis in original.) *In re Sade C.*, supra, 13 Cal. 4th 990.

Consequently, given that a presumptively valid determination that the respondent's rights should be terminated has been made, the *Anders*-like procedures the majority now requires unnecessarily prolong the resolution of this matter. "There is little that can be as detrimental to a child's sound

ridge factors against the presumption against counsel, unless there is a deprivation of physical liberty, I would conclude that there is no constitutional due process right to state appointed counsel in this case. Consequently, if there is no constitutional right to counsel, the *Anders* procedure does not apply.

I acknowledge that, despite not having a constitutional due process right to counsel, parents still enjoy a statutory right to counsel in termination proceedings. See General Statutes § 45a-717 (b). That statutory right, however, does not mandate the use of the *Anders* procedure. See *State* v. *Francis*, 322 Conn. 247, 259, 262, 140 A.3d 927 (2016) (declining to require *Anders* procedure to safeguard purely statutory right to counsel for motion to correct illegal sentence in criminal cases and reasoning that, "because there is no underlying constitutional right to appointed counsel in postconviction proceedings, criminal defendants have no constitutional right to insist on the *Anders* [procedure] which [was] designed solely to protect that underlying constitutional right" [internal quotation marks omitted]). Thus, I conclude that our state statutes and rules of practice provide the proper procedure to follow when an appellate attorney wishes to withdraw from an appeal of a decision terminating parental rights.

Under our law, for cases involving the termination of parental rights, if counsel reviews a case and concludes that there are no nonfrivolous issues to pursue on appeal, counsel is required to make this known to

development as uncertainty over whether he is to remain in his current 'home,' under the care of his parents or foster parents, especially when such uncertainty is prolonged." *Lehman* v. *Lycoming County Children's Services Agency*, 458 U.S. 502, 513–14, 102 S. Ct. 3231, 73 L. Ed. 2d 928 (1982). The extended uncertainty that the *Anders*-like procedures usher in after a presumptively valid determination has been made that termination of parental rights is appropriate, is not in the child's best interest. This view is fortified by the fact that, in this particular case, the child, who has a right to do so, has not joined in the respondent's appeal, nor has she raised any of her own issues with respect to the accuracy of the trial court's determination that the respondent's parental rights should be terminated.

the judicial authority, as well as to the party and the Division of Public Defender Services. See Practice Book § 79a-3 (c) (2). Nothing more is required. The fact that nothing more is required does not mean that a trial judge's hands are tied. If a trial court has concerns related to the reasons for counsel's withdrawal, it can always inquire further. To be sure, this court previously has stated that, "if the court is not completely satisfied with the reasons for counsel's conclusion, it may direct counsel to provide additional substantiation for his opinion or deny counsel's request to withdraw." *State* v. *Francis*, supra, 322 Conn. 268 n.12. The fact that the trial court is not mandated to merely accept counsel's representation, without question, supports my view that the statutory scheme is sufficient to protect an indigent parent's right to counsel.

Accordingly, I respectfully concur and dissent.

R.T. VANDERBILT COMPANY, INC. *v.* HARTFORD ACCIDENT AND INDEMNITY COMPANY ET AL.

(SC 20000)
(SC 20001)
(SC 20003)

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

Syllabus

The plaintiff, which previously mined and sold industrial talc that allegedly contained asbestos, sought, inter alia, a declaratory judgment to determine, inter alia, its rights and obligations under certain insurance policies issued by the defendant insurance companies as to the costs of defending and indemnifying the plaintiff in numerous civil actions brought against it for personal injuries sustained allegedly as a result of exposure to asbestos. The defendants consisted of approximately thirty insurance companies, including H Co. and C Co., primary insurers that issued certain insurance policies to the plaintiff between 1948 and 2008, when it mined and sold talc, and L Co., M Co., and P Co., secondary insurers that issued umbrella or excess coverage to the plaintiff during that same period. Prior to trial, the court issued certain scheduling orders separating the trial into four phases, the first two of which were tried

to the court and focused on issues pertaining to how defense and indemnification costs were to be allocated between the plaintiff and the defendants, specifically with respect to long latency claims alleging that the claimants' exposure to asbestos caused a series of injuries that developed gradually over the course of years, thereby implicating multiple insurance policy periods. The court also considered, inter alia, whether certain pollution and occupational disease exclusions in some of the secondary insurance policies precluded coverage. After the first two phases of the trial were complete, the trial court issued memoranda of decision applying the time on the risk rule of contract law, which provides for pro rata allocation of defense and indemnity costs for asbestos related disease claims, in order to determine how to allocate those costs among the parties. In doing so, the trial court adopted the continuous trigger theory of insurance coverage, pursuant to which every insurer that had issued a policy in effect from the date that a claimant was first exposed to asbestos until the date the claimant manifested an asbestos related disease is potentially liable for defense and indemnity costs. To that end, the trial court precluded the admission of expert testimony regarding the adoption of the trigger theory of liability and medical science about the timing of bodily injury from asbestos related disease. The court also adopted the unavailability of insurance exception to the time on the risk rule, pursuant to which defense and indemnity costs are allocated to the insured for periods of time during which insurance is not available. With respect to the pollution exclusions at issue, the trial court concluded that they were ambiguous as to whether they encompassed claims arising from exposure to asbestos, as opposed to claims strictly involving traditional environmental pollution, and, therefore, that those exclusions did not preclude coverage. As to the occupational disease exclusions contained in two policies issued by L Co. and P Co., the trial court concluded that those exclusions were unambiguous and that they barred coverage only for claims brought by the plaintiff's own employees, not for claims brought by nonemployees who developed occupational diseases while using the plaintiff's talc in the course of working for other employers. Thereafter, the plaintiff and certain defendants were granted permission to file interlocutory appeals with the Appellate Court pursuant to the rules of practice (§ 61-4 [a]). The Appellate Court concluded that the trial court properly adopted, as a matter of law, a continuous trigger theory of coverage for asbestos related disease claims and, accordingly, upheld the preclusion of expert testimony proffered by M Co. on the timing of bodily injury from asbestos related disease. The Appellate Court also upheld the trial court's adoption of an unavailability of insurance exception to the time on the risk rule and agreed with the trial court that the pollution exclusions were ambiguous and did not bar coverage for the underlying claims outside of the context of traditional environmental pollution. With respect to

the occupational disease exclusions, however, the Appellate Court disagreed with the trial court's determination that those exclusions were ambiguous and concluded that those exclusions unambiguously barred coverage for occupational disease claims brought not only by the plaintiff's own employees, but also by nonemployees who developed an occupational disease while using the plaintiff's talc in the course of working for other employers. The Appellate Court reversed in part the judgment of the trial court, and the plaintiff and certain defendants, on the granting of certification, filed separate appeals with this court. *Held*:

1. The Appellate Court properly upheld the decision of the trial court to adopt a continuous trigger theory of coverage for asbestos related disease claims and an unavailability of insurance exception to the time on the risk rule of contract law, and to preclude M Co.'s proffered expert testimony regarding medical science and the timing of bodily injury from asbestos related disease, and also properly upheld the trial court's conclusion that the pollution exclusions do not bar coverage for asbestos related disease claims: following a careful examination of the appellate record and consideration of the briefs and arguments presented as to those issues, this court concluded that the Appellate Court sufficiently addressed those issues and, accordingly, adopted the relevant parts of that court's opinion as the proper statement of the issues and the applicable law concerning those issues.

2. The Appellate Court correctly concluded that the language of the occupational disease exclusions in the secondary insurance policies issued by L Co. and P Co. applied not only to claims brought against the plaintiff by its own employees, but clearly and unambiguously excluded from coverage claims brought by nonemployees of the plaintiff who developed asbestos related diseases while using the plaintiff's talc in the course of working for other employers: contrary to the plaintiff's claim that the term "occupational disease," which was not specifically defined by the policies issued by L Co. and P Co., is a term of art devoid of meaning outside of the employer-employee relationship and workers' compensation law, that term has a meaning, as gleaned from dictionaries in print at the time the policies were issued, outside of the context of workers' compensation law that contemplates an illness caused by factors or conditions arising out of one's employment; moreover, the occupational disease exclusions did not expressly limit their application to the plaintiff's employees, whereas other exclusions in those policies expressly contained such limiting language, and the Appellate Court's reading of the exclusion did not render the liability coverage provided by the policies meaningless, because, although the exclusions may significantly limit coverage, the parties had stipulated that there were additional classes of nonemployees whose claims were not barred by the occupational disease exclusions.

Argued March 28—officially released October 8, 2019

Procedural History

Action for, inter alia, a declaratory judgment to determine the rights of the parties in connection with certain insurance policies as to the defense and indemnification of the plaintiff in numerous civil actions brought against it for personal injuries allegedly sustained as a result of asbestos exposure, and for other relief, brought to the Superior Court in the judicial district of Hartford and transferred to the judicial district of Waterbury, Complex Litigation Docket, where Columbia Casualty Company et al. were joined as defendants; thereafter, the court, *Shaban*, *J.*, denied the motions for summary judgment filed by the defendant Mt. McKinley Insurance Company et al.; subsequently, the plaintiff withdrew the complaint as against the defendant TIG Insurance Company; thereafter, the court bifurcated the trial and ordered that the parties' declaratory judgment claims be tried to the court in four phases; subsequently, the court granted the motions for summary judgment filed by the defendant Government Employees Insurance Company and to dismiss filed by the defendant National Union Fire Insurance Company of Pittsburgh, PA, and denied the motions for summary judgment filed by the defendant National Casualty Company et al.; thereafter, the first phase was tried to the court; subsequently, Vanderbilt Minerals, LLC, was substituted as the plaintiff; thereafter, the second phase was tried to the court; subsequently, the court issued memoranda of decision; thereafter, the defendant Everest Reinsurance Company appealed and the substitute plaintiff cross appealed to the Appellate Court; subsequently, the court, *Shaban*, *J.*, granted the motions filed by the substitute plaintiff and the defendant Mt. McKinley Insurance Company for permission to appeal to the Appellate Court; thereafter, the Appellate Court granted the motions for permission to appeal filed by the substitute plaintiff and the defendant Mt. McKinley Insurance Company; subsequently, the substitute plaintiff and the

defendant Mt. McKinley Insurance Company filed separate appeals with the Appellate Court; thereafter, the substitute plaintiff and the defendant Everest Reinsurance Company filed amended appeals; subsequently, the defendant St. Paul Fire and Marine Insurance Company et al. filed separate appeals and cross appeals with the Appellate Court, which consolidated the appeals and cross appeals; thereafter, the Appellate Court, *Lavine*, *Beach*, and *Bear*, *Js.*, reversed in part the judgment of the trial court and remanded the case for further proceedings, and the substitute plaintiff and the defendant Mt. McKinley Insurance Company et al., on the granting of certification, filed separate appeals with this court. *Affirmed.*

Michael J. Smith, pro hac vice, with whom were *Jeffrey R. Babbin* and, on the brief, *Michael Menapace*, *Bryan W. Petrilla*, pro hac vice, *Laura P. Zaino*, *Lawrence A. Serlin*, pro hac vice, *Michael G. Albano*, *Peter R. Reynolds*, *Amy R. Paulus*, pro hac vice, *Michael L. Duffy*, pro hac vice, *William A. Meehan*, *Alexander J. Mueller*, pro hac vice, *Stephen T. Roberts*, *Robert M. Flannery*, pro hac vice, *Louis B. Blumenfeld*, *Lawrence A. Levy*, pro hac vice, *Matthew G. Conway*, *Kevin M. Haas*, pro hac vice, *Marianne May*, pro hac vice, *Michael F. Lettiero*, *Lawrence D. Mason*, pro hac vice, *John A. Lee*, pro hac vice, *James P. Sexton*, *Daniel Hargraves*, pro hac vice, *David A. Slossberg*, *John E. Rodewald*, pro hac vice, and *Heather L. McCoy*, for the appellants in SC 20001 (defendant TIG Insurance Company et al.).

John W. Cerreta, with whom were *Kathleen D. Monnes* and, on the brief, *Erick M. Sandler*, for the appellants in SC 20000 (defendant Travelers Casualty and Surety Company et al.).

Jacob M. Mihm and *Marilyn B. Fagelson*, with whom were *Proloy K. Das*, *Rachel Snow Kindseth* and, on the brief, *Stephen Hoke*, for the appellant in SC 20003 and

the appellees in SC 20000 and SC 20001 (substitute plaintiff).

Lawrence D. Mason, pro hac vice, with whom, on the brief, were *John A. Lee*, pro hac vice, *Michael F. Lettiero*, *Laura P. Zaino*, *Lawrence A. Serlin*, pro hac vice, *William A. Meehan*, *Alexander J. Mueller*, pro hac vice, *Stephen T. Roberts*, *Robert M. Flannery*, *Heather L. McCoy*, *Jeffrey R. Babbin*, *Michael Menapace*, *Michael J. Smith*, pro hac vice, *Bryan W. Petrilla*, pro hac vice, *Matthew G. Conway*, *Kevin M. Haas*, pro hac vice, *Marianne May*, pro hac vice, *Louis B. Blumenfeld* and *Lawrence A. Levy*, pro hac vice, for the appellees in SC 20003 (defendant National Casualty Company et al.).

Alexander J. Mueller, pro hac vice, with whom was *William A. Meehan*, for the appellees (defendant Certain London Market Insurers et al.).

Stephanie V. Corrao and *Laura A. Foggan*, pro hac vice, filed a brief for the Complex Insurance Claims Litigation Association as amicus curiae in SC 20000 and SC 20001.

Michael T. McCormack filed briefs for the National Association of Manufacturers as amicus curiae in SC 20000, SC 20001 and SC 20003.

Opinion

ROBINSON, C. J. These certified appeals, which present us with several significant questions of insurance law, arise from coverage disputes between the plaintiff, R.T. Vanderbilt Company, Inc. (Vanderbilt),[1] and the defendants, who are numerous insurance companies

[1] "The action was filed by R.T. Vanderbilt Company, Inc. During the trial court proceedings, the court granted that company's motion to substitute its successor, Vanderbilt Minerals, LLC, as the . . . plaintiff. For convenience, we refer to both entities as 'Vanderbilt' throughout this opinion." *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, 171 Conn. App. 61, 75 n.1, 156 A.3d 539 (2017).

(insurer defendants)[2] that issued primary and secondary comprehensive general liability insurance policies to Vanderbilt between 1948 and 2008, stemming from thousands of underlying lawsuits alleging injuries from exposure to industrial talc containing asbestos that Vanderbilt mined and sold. Vanderbilt and the insurer defendants appeal, upon our granting of their petitions for certification,[3] from the judgment of the Appellate

[2] The insurer defendants that are the appellants in Docket No. SC 20000 are Travelers Casualty and Surety Company, formerly known as Aetna Casualty and Surety Company, and St. Paul Fire and Marine Insurance Company.

The insurer defendants that are the appellants in Docket No. SC 20001 are Mt. McKinley Insurance Company and Everest Reinsurance Company, with Clearwater Insurance Company and later TIG Insurance Company subsequently substituted for Mt. McKinley, along with Pacific Employers Insurance Company, Century Indemnity Company, Ace Property and Casualty Insurance Company, Old Republic Insurance Company, Certain Underwriters at Lloyd's, London, Certain London Market Insurance Companies, American International Underwriters Insurance Company, Granite State Insurance Company, Fireman's Fund Insurance Company, American Insurance Company, Westport Insurance Corporation, National Casualty Company, Employers Mutual Casualty Company, Munich Reinsurance America, Inc., and Zurich International (Bermuda) Limited.

The insurer defendants that are the appellees in Docket No. SC 20003 are National Casualty Company, Pacific Employers Insurance Company, Certain Underwriters at Lloyd's, London, and Certain London Market Insurance Companies, Zurich Reinsurance Company Limited, Everest Reinsurance Company, Westport Insurance Corporation, and Fireman's Fund Insurance Company. We refer to the insurer defendants individually when appropriate.

For the history of the direct and third-party claims against the various insurer defendants, see *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, 171 Conn. App. 61, 76–78, 156 A.3d 539 (2017).

[3] We granted the petition of Travelers Casualty and Surety Company and St. Paul Fire and Marine Insurance Company for certification to appeal, limited to the following issues: "1. Did the Appellate Court properly affirm the trial court's adoption of a 'continuous trigger' theory of coverage for asbestos related disease claims as a matter of law and the trial court's related preclusion of expert testimony on current medical science regarding the actual timing of bodily injury from such disease?

"2. Did the Appellate Court properly affirm the trial court's adoption of an 'unavailability of insurance' exception to the 'time on the risk' rule of contract law, which provides for pro rata allocation of defense costs and indemnity for asbestos related disease claims?" *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, 327 Conn. 923, 171 A.3d 63 (2017).

We also granted the petition of Mt. McKinley Insurance Company and Everest Reinsurance Company, limited to the following issues: "1. Did the Appellate Court properly affirm the trial court's adoption of a 'continuous

Court affirming in part and reversing in part numerous interlocutory decisions made by the trial court in connection with the first and second phases of a complex trial between the parties. *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, 171 Conn. App. 61, 75–76, 156 A.3d 539 (2017). On appeal, the insurer defendants claim that the Appellate Court improperly (1) upheld the trial court's adoption of a "continuous trigger" theory of coverage for asbestos related disease claims as a matter of law and the trial court's related preclusion of expert testimony on current medical science regarding the actual timing of bodily injury from such disease, (2) upheld the trial court's adoption of an "unavailability of insurance" exception to the "time on the risk" rule of contract law, which provides for pro rata allocation of defense costs and indemnity for asbestos related disease claims, and (3) interpreted pollution exclusion clauses in certain insurance policies as applicable only to claims arising from "traditional" environmental pollution, rather than to those arising from asbestos exposure in indoor working environments. In its appeal, Vanderbilt claims that the Appel-

trigger' theory of coverage for asbestos related disease claims as a matter of law and the trial court's related preclusion of expert testimony on current medical science regarding the actual timing of bodily injury from such disease?

"2. Did the Appellate Court properly affirm the trial court's adoption of an 'unavailability of insurance' exception to the 'time on the risk' rule of contract law, which provides for pro rata allocation of defense costs and indemnity for asbestos related disease claims?

"3. Did the Appellate Court properly interpret pollution exclusion clauses in certain insurance policies as applicable only to claims arising from 'traditional' environmental pollution and not to those arising from asbestos exposure in indoor working environments?" *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, 327 Conn. 923, 923–24, 171 A.3d 62 (2017).

Finally, we also granted Vanderbilt's cross petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly interpret occupational disease exclusion clauses in certain insurance policies as precluding coverage for claims of occupational disease, regardless of whether the claimant was employed by the policyholder or by a third-party user of the claimant's allegedly harmful product?" *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, 327 Conn. 925, 171 A.3d 61 (2017).

late Court improperly construed occupational disease exclusions present in certain policies as not limited to claims brought by Vanderbilt's own employees. Because we conclude that the Appellate Court's comprehensive opinion properly resolved these significant issues, we affirm the judgment of the Appellate Court.

The opinion of the Appellate Court aptly sets forth the relevant background facts and procedural history.[4] "Vanderbilt is a Connecticut corporation engaged in the mining and sale of various chemical and mineral products. In 1948, it began to produce industrial talc through its subsidiary, Gouverneur Talc Company. Vanderbilt continued to mine and sell talc until 2008, when it ceased production and sold off the last of its inventory.

"Over the past several decades, thousands of underlying actions have been filed against Vanderbilt in various jurisdictions throughout the United States, many of which remain pending. Those actions alleged that talc and silica mined and sold by Vanderbilt contained asbestos or otherwise caused diseases that are correlated to asbestos exposure, such as mesothelioma, other asbestos related cancer, and asbestosis (collectively, asbestos related disease). In response, Vanderbilt has taken the position that its industrial talc does not contain asbestos. From the time that it started mining talc, Vanderbilt purchased or attempted to purchase primary and secondary comprehensive general liability insurance to cover the defense and indemnity costs of asbestos related claims.

"Vanderbilt brought the present action against several insurance companies that issued it primary insur-

[4] For the sake of brevity, we recite only the most salient background facts and procedural history, as distilled from the record and the Appellate Court's opinion. Readers desiring a more comprehensive review of this case's complex facts and procedural history should consult the excellent recitation in the Appellate Court's opinion. See *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, supra, 171 Conn. App. 76–87.

ance policies between 1948 and 2008 . . . .'' Id., 76–77; see footnote 2 of this opinion (listing defendants). In particular, Vanderbilt alleged that its primary insurers—Hartford Accident and Indemnity Company, and Continental Casualty Company, Columbia Casualty Company and Continental Insurance Company (collectively, Continental) ''had breached their contractual obligations to pay their proper shares of defense and indemnity costs in the underlying actions. Vanderbilt also sought a declaratory judgment as to the parties' respective rights and responsibilities under the policies at issue.

''Continental subsequently filed a [third-party] complaint against various insurance companies that had provided secondary coverage—umbrella or excess[5]—to Vanderbilt during the time that it was in the talc business.'' (Footnote altered.) *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, supra, 171 Conn. App. 77. ''Vanderbilt thereafter brought direct claims against these [third-party] secondary insurers.'' Id., 78.

''Prior to the start of trial, the trial court issued a series of scheduling orders, pursuant to which it separated the trial into four phases. In the first two phases, which were tried to the court and have been completed, the court addressed Vanderbilt's declaratory judgment claims and related counterclaims and cross claims. The primary issue before the court in those phases was how insurance obligations are to be allocated with respect to long latency[6] asbestos related claims alleging

[5] As the Appellate Court noted, the '' 'phrase ''follow form'' refers to the practice, common in excess policies, of having the [second layer] coverage follow substantively the primary layer provided by the main insurer . . . .' '' *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, supra, 171 Conn. App. 257 n.91.

As the Appellate Court also noted, ''the term 'umbrella coverage' is often used not only with reference to policies that offer both excess coverage and primary drop-down insurance, but also specifically to the drop-down portion of such policies.'' Id., 276 n.101.

[6] ''Throughout this opinion, we use the terms 'long latency,' 'long-tail,' and 'progressive injury' interchangeably. Those terms refer to the fact that toxic tort claims typically allege that exposure to toxins such as asbestos causes

injuries that occur over the course of years or even decades and, therefore, potentially implicate multiple insurance policy periods. Specifically, in Phase I, the court addressed the question of how defense costs for the underlying actions were to be allocated as between Vanderbilt and its insurers. That required a determination of (1) the periods during which the defendants' insurance policies were in effect and (2) whether Vanderbilt should be treated as self-insured for any period so as to create an equitable obligation to contribute to the costs of its defense. In Phase II, the court considered the same questions with respect to indemnity costs. In that phase, the court also issued rulings with respect to the meaning of various policy provisions, the exhaustion of Vanderbilt's primary policies, and related issues. In Phase III of the trial, which also will be tried to the court, the court plans to adjudicate the defendants' claims for recovery of overpayment of insurance costs. In Phase IV, Vanderbilt's breach of contract claims against its insurers are to be tried to a jury." (Footnote altered.) Id., 78–79.

"In addressing the allocation questions in Phases I and II, the trial court proceeded on the assumption that Connecticut follows a pro rata, [time on the risk] approach to allocating insurance obligations in long-tail cases. See footnote [6] of this opinion. Under that allocation scheme, the court assumed that a victim of asbestos related disease suffers continuous injuries commencing at the time of initial exposure to asbestos and extending until disease manifests and, therefore, that defense and indemnity costs must be allocated across all of the insurance policies on the risk (i.e., potentially liable) during that period (allocation block). The court further assumed that (1) the policyholder is responsible for a pro rata share of costs for any period

a series of continuing, indivisible injuries that develop gradually over time but may not manifest for many years." *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, supra, 171 Conn. App. 78 n.5.

during which it is uninsured or underinsured (proration to the insured), including so-called 'orphan share' periods covered by policies that were lost, destroyed, or issued by insurers that subsequently became insolvent; but (2) Connecticut has embraced an unavailability of insurance exception pursuant to which there is no proration to the insured for periods during which insurance is not available. Applying these principles to the present case, the court held evidentiary hearings during Phases I and II to determine, among other things, whether defense and indemnity insurance coverage, respectively, was available for asbestos related claims between 1948 and 2008 and, if so, whether Vanderbilt availed itself of such coverage." Id., 79–80.

On the basis of findings of fact rendered after Phase I,[7] the trial court "determined that the allocation of defense and indemnity costs would be applied prospectively in the following manner, on the basis of a total potential exposure period of [732] months running from 1948 through 2008:[8] (1) as to defense costs, Vanderbilt would be liable for 265 of the [732] months; (2) as to indemnity costs, Vanderbilt would be liable for [96] of the [732] months; and (3) Vanderbilt's responsibility as to both defense and indemnity costs would be adjusted upward for any additional periods when there was a gap in coverage or an insolvent insurer. The court applied these same findings, principles, and allocation rules to underlying actions that alleged harms arising from nonasbestos particulates such as silica. Specifically, the court credited testimony that all of the underlying actions, whether on their face or through subsequent discovery or investigation, involved claims of exposure to asbestos.

[7] For those specific findings, see *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, supra, 171 Conn. App. 80–82.

[8] See *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, supra, 171 Conn. App. 187 n.54 (noting immaterial miscalculation with respect to length of allocation block).

"In its Phase II decision, the court also considered the applicability of two types of exclusions contained in certain of Vanderbilt's excess and umbrella policies. The court first addressed the claim by several secondary insurers that the pollution exclusion clauses contained in their policies barred coverage for the underlying actions. The court concluded that the relevant policy language was ambiguous as applied to the asbestos related claims and, therefore, that the exclusions did not preclude coverage. The court also addressed the issue of whether occupational disease exclusions contained in certain secondary policies applied only to claims brought by the policyholder's own employees. The court found that the exclusions were unambiguous and that they did, in fact, bar coverage only for claims brought by Vanderbilt's own employees." (Footnote altered.) Id., 82–83.

"Following the completion of the Phase II trial, Vanderbilt and several defendants filed appeals and cross appeals [with the Appellate Court], challenging approximately twenty of the court's conclusions and findings."[9] Id., 83. The Appellate Court subsequently issued an opinion of extraordinary complexity and comprehensiveness addressing a plethora of issues.[10] With respect to

[9] "Everest [Reinsurance Company] filed an immediate appeal from the trial court's Phase I and Phase II rulings on the ground that the rulings constituted a final judgment as to it. Vanderbilt and other defendants were subsequently granted permission to file interlocutory appeals pursuant to Practice Book § 61-4 (a), which provides in relevant part that an interlocutory ruling is considered to be an appealable final judgment when 'the trial court makes a written determination that the issues resolved by the judgment are of such significance to the determination of the outcome of the case that the delay incident to the appeal would be justified, and the chief justice or chief judge of the court having appellate jurisdiction concurs.' " *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, supra, 171 Conn. App. 83–84 n.9.

[10] For a summary of all of the issues considered by the Appellate Court, see *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, supra, 171 Conn. App. 84–87.

the issues now before us in this certified appeal, the Appellate Court first concluded that the trial court properly adopted a "continuous trigger" theory of coverage for asbestos related disease claims as a matter of law and, accordingly, properly precluded the admission of expert testimony on current medical science regarding the actual timing of bodily injury from such disease. Id., 118–19. The Appellate Court further upheld the trial court's adoption of an "unavailability of insurance" exception to the "time on the risk" rule of contract law, which provides for the pro rata allocation of defense costs and indemnity for asbestos related disease claims. Id., 143. The Appellate Court then interpreted the pollution exclusion clauses as applicable only to claims arising from "traditional environmental pollution," rather than those arising from asbestos exposure in indoor working environments. Id., 252. Finally, the Appellate Court concluded that the trial court had improperly construed the occupational disease exclusions as "bar[ring] coverage only for occupational disease claims brought by a policyholder's own employees and that the exclusions do not apply to complainants who developed occupational disease while using the policyholder's products in the course of working for another employer." Id., 256.

The Appellate Court rendered judgment reversing the decisions of the trial court "with respect to [its] determinations that (1) Vanderbilt is responsible for defense costs for the period of March 3, 1993 through April 24, 2007, (2) a default date of first exposure of January 1, 1962, applies to pending and future claims, and (3) the occupational disease exclusions in certain secondary policies apply only to claims brought by Vanderbilt's own employees; the proper allocation methodology and the prospective application of that methodology are clarified as set forth herein . . . ." Id., 309. The Appellate Court then remanded the case to the trial court

"for further proceedings consistent with [its] opinion." Id. These certified appeals followed. See footnote 3 of this opinion.

I

We begin with the claims of the numerous insurer defendants in the certified appeals docketed as Docket Nos. SC 20000 and SC 20001. See footnote 2 of this opinion. Specifically, they contend that the Appellate Court improperly upheld the decision of the trial court (1) adopting a "continuous trigger" theory of coverage for asbestos related disease claims as a matter of law, (2) precluding expert testimony on current medical science regarding the actual timing of bodily injury from asbestos related diseases, and (3) adopting an "unavailability of insurance" exception to the "time on the risk" rule of contract law. The insurer defendants also claim that the Appellate Court improperly interpreted pollution exclusion clauses in certain insurance policies as applicable only to claims arising from "traditional environmental pollution," rather than to those arising from asbestos exposure in indoor working environments.

After carefully examining the record on appeal and considering the briefs and arguments of the parties, we have concluded that the judgment of the Appellate Court should be affirmed with respect to these issues. The Appellate Court's thorough and well reasoned opinion more than sufficiently addresses these certified questions, and there is no need for us to repeat the discussion contained therein. We therefore adopt parts III A, III B, and IV A of the Appellate Court's opinion as the proper statement of the issues and the applicable law concerning those issues. See, e.g., *Deutsche Bank AG* v. *Sebastian Holdings, Inc.*, 331 Conn. 379, 384, 204 A.3d 664 (2019); *State* v. *Henderson*, 330 Conn. 793, 799, 201 A.3d 389 (2019).

II

We next turn to Vanderbilt's claim, in Docket No. SC 20003, that the Appellate Court incorrectly determined that occupational disease exclusion clauses in two excess policies apply to claims brought by nonemployees of Vanderbilt who allegedly developed an occupational disease while using Vanderbilt talc at any workplace. The Appellate Court's opinion sets forth the following additional facts and procedural history relevant to this claim. "At trial, several of Vanderbilt's secondary insurers [secondary insurers][11] either sought declaratory judgments determining or raised special defenses or claims alleging that occupational disease exclusions in their policies precluded coverage for some of the underlying actions. Two versions of the occupational disease exclusion, contained in policies issued by Certain Underwriters at Lloyd's, London (Lloyd's), and Pacific Employers Insurance Company (Pacific), are at issue.[12]

"The first policy at issue, Lloyd's policy number 77/18503/1/PNB21250D, was in effect from May 17, 1977 through March 3, 1979. The policy contains an endorsement clause stating in relevant part that 'this policy shall not apply . . . to personal injury (fatal or nonfatal) by occupational disease.' Several other defendants issued secondary policies following form to the Lloyd's policy.[13]

"The second policy at issue, Pacific policy number XMO017535 (NCA15), was in effect from March 3, 1985 through March 3, 1986. It contains the following

[11] For a listing of these secondary insurers, see footnote 2 of this opinion.

[12] "The trial court found that the minor variations in policy language between the two versions are not relevant to the question of whether the occupational disease exclusions apply to nonemployees of the policyholder. On appeal, the parties do not challenge this finding or argue that the two provisions are materially different." *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, supra, 171 Conn. App. 256 n.90.

[13] See footnote 5 of this opinion.

endorsement clause: 'This policy does not apply to any liability arising out of: Occupational Disease.' National Casualty [Company (National Casualty)], [a secondary insurer that] has taken the lead in challenging the trial court's rulings regarding the occupational disease exclusions, issued an excess policy, number XU000233, which follows form to the Pacific policy. Lloyd's also issued an excess policy that follows form to the Pacific policy. None of the relevant policies defines the term 'occupational disease.'

"In addition to these occupational disease exclusions, the Lloyd's and Pacific policies contain employers' liability exclusions. The Lloyd's policy provides that 'this policy shall not apply . . . to the liability of employees.' The Pacific policy provides that '[t]his policy does not apply to personal injury to any employee of the insured arising out of and in the course of his employment by the insured or to any obligation of the insured to indemnify another because of damages arising out of such injury.' In addition, National Casualty's excess policy, while following form to the Pacific policy, also includes its own 'employers liability exclusion,' which is somewhat broader than the one in the Pacific policy. It provides in relevant part: '[T]his policy shall not apply to any liability for bodily injury, sickness, disease, disability or shock, including death at any time resulting therefrom . . . sustained by any employee of the insured and arising out of and in the course of his employment by the insured.' Last, both the Lloyd's and Pacific policies contain exclusions for obligations for which the insured may be held liable under workers' compensation, unemployment compensation, or disability benefits laws.

"To facilitate the trial court's resolution of the issue, the parties stipulated during the second phase of the trial that none of the claimants in the underlying actions [is] or ever [was a] Vanderbilt [employee]. The parties

further stipulated that the underlying complaints fall into three categories: those that allege (1) exposure to Vanderbilt products solely through the workplace of another employer, (2) exposure both in and outside the workplace, and (3) exposure solely outside the workplace. Accordingly, if the occupational disease exclusions do apply to nonemployees of Vanderbilt, they likely will bar coverage for some but not all of the underlying complaints during the relevant policy years.[14]

"In its Phase II decision, the trial court concluded that the occupational disease exclusions apply only to claims brought by Vanderbilt's own employees. Because the policies themselves do not define the term 'occupational disease,' the court looked to the Workers' Compensation Act (act), General Statutes § 31-275 et seq., for a definition of the term. Section 31-275 (15) provides that ' "[o]ccupational disease" includes any disease peculiar to the occupation in which the employee was engaged and due to causes in excess of the ordinary hazards of employment as such, and includes any disease due to or attributable to exposure to or contact with any radioactive material by an employee in the course of his employment.' The trial court concluded that the term, as defined in the statute, was unambiguous, and that it applied solely to employees of the insured. The court rejected the defendants' argument that such a construction would render the

[14] "For this reason, [the Appellate Court] reject[ed] Vanderbilt's argument that the [insurer] defendants' interpretation of the occupational disease exclusions would render much of the coverage afforded by the policies 'illusory.' At the very least, the exclusions would not bar coverage for claims brought by complainants in category 3.

"[The Appellate Court] note[d] in this respect that the parties . . . neither briefed nor asked [it] to resolve the question of whether, if the occupational disease exclusions do apply to nonemployees, they bar coverage for underlying actions in category 2, which allege both workplace and nonworkplace exposure. That question will fall to the trial court on remand to address in the first instance." *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, supra, 171 Conn. App. 258 n.92.

occupational disease exclusion superfluous, insofar as the employers' liability exclusions in the policies already preclude coverage for any claims of workplace injury or disease by employees of the policyholder. The court reasoned that the act draws a distinction between occupational diseases; General Statutes § 31-275 (15); and ' "[p]ersonal injur[ies]" '; General Statutes § 31-275 (16); and that the policies at issue incorporate that distinction—whereas the occupational disease exclusion applies to employees of an insured who allege occupational diseases, the employers' liability exclusion applies to employees who allege that they have suffered sudden personal injuries while on the job.

"Because the court agreed with Vanderbilt that the occupational disease exclusions do not apply to any of the underlying claims, the court did not address Vanderbilt's alternative arguments that (1) in the event that the policy language is determined to be ambiguous, the exclusions should be construed in favor of the insured pursuant to the doctrine of contra proferentem, and (2) certain of the defendants have waived their right to invoke the exclusions." (Footnote added; footnote altered; footnotes in original.) *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, supra, 171 Conn. App. 256–59.

On appeal, the Appellate Court disagreed with the trial court's construction of the occupational disease exclusions, concluding instead that they "unambiguously bar coverage for occupational disease claims brought not only by employees of Vanderbilt but also by individuals who contracted an occupational disease in the course of their work for other employers." (Footnote omitted.) Id., 269–70. In concluding that the language of the exclusions was plain and unambiguous, the Appellate Court rejected Vanderbilt's "primary argument," namely, "that the term occupational disease is so interwoven with the concept of workers' compensation and other claims by an employee against his employer

as to be meaningless outside of that particular context." (Internal quotation marks omitted.) Id., 262–63. The Appellate Court also observed that, when the policies were drafted "between the late 1970s and mid-1980s, 'occupational disease' had a common and ordinary meaning within the legal and insurance fields."[15] Id., 263–64. The Appellate Court also relied on the rules of contract construction and noted that the employer liability exclusions were expressly limited to employees of the insured, whereas the "occupational disease exclusions are framed broadly and do not contain any similar language of limitation . . . ." Id., 269. Accordingly, the Appellate Court reversed the judgment of the trial court with respect to the occupational disease exclusions and remanded the case to the trial court with direction "to consider Vanderbilt's alternative argument that certain defendants are precluded from invoking the exclusions because they failed to timely plead the exclusions as a special defense." Id., 270.

On appeal, Vanderbilt claims that the Appellate Court improperly failed to limit the application of the occupational disease exclusions to claims brought against Vanderbilt by its own employees. Vanderbilt relies on case law and legal dictionaries; see, e.g., *Ins. Co. of North America* v. *Forty-Eight Insulations, Inc.*, 451 F. Supp. 1230 (E.D. Mich. 1978), aff'd, 633 F.2d 1212 (6th Cir. 1980); *Nolan* v. *Johns-Manville Asbestos & Magnesia Materials Co.*, 74 Ill. App. 3d 778, 392 N.E.2d 1352 (1979), aff'd, 85 Ill. 2d 161, 421 N.E.2d 864 (1981); *Commercial Union Ins. Co.* v. *Porter Hayden Co.*, 116 Md.

[15] On this point, the Appellate Court relied on, inter alia, a Harvard Law Review note, "Compensating Victims of Occupational Disease," 93 Harv. L. Rev. 916, 926 (1980), in support of the proposition that, at the time, there was a "proliferation" of litigation concerning occupational diseases, in which individuals barred by workers' compensation laws from "suing their employers were instead 'su[ing] the manufacturer or seller of a product used in the workplace if that product caused the illness.' " *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, supra, 171 Conn. App. 264. But see footnote 25 of this opinion.

App. 605, 698 A.2d 1167, cert. denied, 348 Md. 205, 703 A.2d 147 (1997); Black's Law Dictionary (5th Ed. 1979); and argues that the term " 'occupational disease' is a term of art that refers only to disputes between [the] employer and [the] employee or to statutory compensation plans for employees." Vanderbilt also contends that the Appellate Court's interpretation of the term "occupational disease" is inconsistent with the long-standing rules by which we construe insurance policies and their exclusions, in particular that an insurer bears a heightened burden in proving the applicability of an exclusion and that ambiguous exclusions are construed in favor of the insured. Supported by the amicus curiae National Association of Manufacturers, Vanderbilt contends that the Appellate Court's construction of the exclusion to the contrary "dramatically reduce[s] general liability coverage for manufacturers, particularly in the context of claims of disease resulting from alleged exposure to asbestos and other industrial products."

In response, National Casualty, leading the secondary insurers, argues that the occupational disease exclusions are plain and unambiguous. Citing, among other cases, *Ricigliano* v. *Ideal Forging Corp.*, 280 Conn. 723, 912 A.2d 462 (2006), National Casualty contends that the phrase "occupational disease" has a plain meaning beyond the narrow workers' compensation context insofar as "an 'occupational disease' is a disease arising from engaging in one's occupation—if an employee develops a condition arising out of his or her employment, that employee has an 'occupational disease,' *no matter where that employee works*." (Emphasis added.) Responding to Vanderbilt's historical and contextual analysis of the term, National Casualty relies on *TKK USA, Inc.* v. *Safety National Casualty Corp.*, 727 F.3d 782 (7th Cir. 2013), *Rodriguez* v. *E.D. Construction, Inc.*, 126 Conn. App. 717, 12 A.3d 603, cert. denied, 301 Conn. 904, 17 A.3d 1046 (2011), *Wyness* v. *Armstrong World Industries, Inc.*, 171 Ill. App. 3d 676, 525 N.E.2d

907 (1988), *Tooey* v. *AK Steel Corp.*, 623 Pa. 60, 81 A.3d 851 (2013), and *United National Ins. Co.* v. *J.H. France Refractories Co.*, 36 Pa. D. & C.4th 400, 409–10 (C.P. 1996), to contend that the meaning of the phrase "occupational disease" has not changed over time "from the pre-workers' compensation era to the present"; instead, only the remedies available for such illness claims have changed, with the addition of workers' compensation coverage in the first instance. National Casualty also argues that Vanderbilt's proffered construction of the occupational disease exclusions violates rules of contract interpretation by adding nonexistent language and rendering the exclusions "redundant, as the policies at issue contain [e]mployers' [l]iability and [w]orkers' [c]ompensation exclusions that act specifically to bar Vanderbilt employees' workplace related claims." National Casualty emphasizes that the occupational disease exclusions were "stand-alone provisions outside of the base policy forms and, consequently, readily identifiable," meaning that either Vanderbilt or its sophisticated brokers, acting as its agent, "knew exactly the scope and limitations of the coverage Vanderbilt was procuring," rendering that coverage still meaningful with respect to asbestos exposure that was even partially outside the workplace. In resolving this question of first impression nationally, we agree with National Casualty and conclude that the Appellate Court properly interpreted the occupational disease exclusions to exclude occupational disease claims brought against Vanderbilt by both its employees and nonemployees.

We begin with well established principles governing the interpretation of insurance policies. "[C]onstruction of a contract of insurance presents a question of law for the [trial] court which this court reviews de novo. . . . The determinative question is the intent of the parties, that is, what coverage the [insured] expected to receive and what the [insurer] was to provide, as disclosed by the provisions of the policy. . . . In evalu-

ating the expectations of the parties, we are mindful of the principle that provisions in insurance contracts must be construed as laymen would understand [them] and not according to the interpretation of sophisticated underwriters and that the policyholder's expectations should be protected as long as they are objectively reasonable from the layman's point of view. . . . [W]hen the words of an insurance contract are, without violence, susceptible of two [equally responsible] interpretations, that which will sustain the claim and cover the loss must, in preference, be adopted. . . . [T]his rule of construction favorable to the insured extends to exclusion clauses. . . . When construing exclusion clauses, the language should be construed in favor of the insured unless it has a high degree of certainty that the policy language clearly and unambiguously excludes the claim. . . . While the insured bears the burden of proving coverage, the insurer bears the burden of proving that an exclusion to coverage applies." (Citations omitted; internal quotation marks omitted.) *Nationwide Mutual Ins. Co.* v. *Pasiak*, 327 Conn. 225, 238–39, 173 A.3d 888 (2017); see, e.g., *Travelers Casualty & Surety Co. of America* v. *Netherlands Ins. Co.*, 312 Conn. 714, 740, 95 A.3d 1031 (2014) ("[U]nambiguous terms are to be given their plain and ordinary meaning. . . . As with contracts generally, a provision in an insurance policy is ambiguous when it is reasonably susceptible to more than one reading." [Internal quotation marks omitted.]). But see *Travelers Casualty & Surety Co. of America* v. *Netherlands Ins. Co.*, supra, 740–41 (noting that contra proferentem rule does not apply in disputes between insurers). "[A]lthough policy exclusions are strictly construed in favor of the insured . . . the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous." (Internal quotation marks omitted.) *Liberty Mutual Ins. Co.* v. *Lone Star Industries, Inc.*, 290 Conn. 767, 796, 967 A.2d 1 (2009).

We begin with the language of the occupational disease exclusions at issue. The first policy at issue, Lloyd's policy number 77/18503/1/PNB21250D, was in effect from May 17, 1977 through March 3, 1979. The occupational disease exclusion for this policy is contained in an endorsement stating that "this policy shall not apply . . . to personal injury (fatal or nonfatal) by occupational disease." The second policy at issue, Pacific policy number XMO017535 (NCA15), was in effect from March 3, 1985 through March 3, 1986. It contains the following endorsement with an occupational disease exclusion: "This policy does not apply to any liability arising out of: Occupational Disease." Because neither of the policies at issue defines the term "occupational disease," our analysis begins with its ordinary meaning, as ascertained from dictionaries contemporary to the 1970s and 1980s, when the policies were issued. See, e.g., *Lexington Ins. Co.* v. *Lexington Healthcare Group, Inc.*, 311 Conn. 29, 42 n.8, 84 A.3d 1167 (2014); *R.T. Vanderbilt Co.* v. *Continental Casualty Co.*, 273 Conn. 448, 463, 870 A.2d 1048 (2005); *Buell Industries, Inc.* v. *Greater New York Mutual Ins. Co.*, 259 Conn. 527, 539, 791 A.2d 489 (2002). The Random House Dictionary of the English Language Unabridged (1966) p. 996, defines "occupational disease" as synonymous with "industrial disease," namely, "a disease caused by the conditions or hazards of a particular occupation." Similarly, Webster's Third New International Dictionary (1961) pp. 1560–61, defines "[o]ccupational disease" as "an illness caused by factors arising from one's occupation <dermatitis is often an *occupational disease*> . . . ."[16] (Emphasis in original.)

[16] We note that the dictionary definition of "occupational disease" has remained consistent in all material aspects for many decades, both preceding and succeeding the drafting of the policy provisions at issue in this appeal. Compare American Heritage College Dictionary (4th Ed. 2007) p. 961 (defining "occupational disease" as "[a] disease resulting from the conditions of a person's work, trade, or occupation"), with Webster's New International Dictionary (2d Ed. 1934) p. 1684 (defining "occupational disease" as "[a] disease brought on by or arising from the occupation of the patient, as miner's phthisis, etc.").

Contemporaneous legal dictionaries contain similar general definitions of the term "occupational disease,"[17] along with specifically indicating the existence of a relationship between occupational diseases, as previously defined, and workers' compensation statutory schemes. Notably, the fifth edition of Black's Law Dictionary, published in 1979 and relied on heavily by Vanderbilt, defines "[o]ccupational disease" as "[a] disease (as black lung disease incurred by miners) resulting from exposure during employment to conditions or substances detrimental to health. *Compensation for such is provided by state* [*workers'*] *compensation acts and such federal acts as the Black Lung Benefits Act.* Impairment of health not caused by accident but by exposure to conditions arising out of or in the course of one's employment." (Emphasis added.) Black's Law Dictionary (5th Ed. 1979) p. 973.

The Black's Law Dictionary entry then goes on to explain that a "disease is compensable under [workers'] compensation statute as being an 'occupational' disease where: (1) the disease is contracted in the course of employment; (2) the disease is peculiar to the claimant's employment by its causes and the characteristics of its manifestation or the conditions of employment result in a hazard which distinguishes the employment in character from employment generally; and (3) the employment creates a risk of contracting the disease in a greater degree and in a different manner than the public generally."[18] Id.; accord Black's Law Dictionary (10th

[17] Legal dictionary definitions are also relevant to our textual analysis of the policy provisions at issue. See, e.g., *Lexington Ins. Co.* v. *Lexington Healthcare Group, Inc.*, supra, 311 Conn. 42–43 (considering conventional and legal dictionary definitions of term "related" in insurance policy); *Springdale Donuts, Inc.* v. *Aetna Casualty & Surety Co. of Illinois*, 247 Conn. 801, 810–11, 724 A.2d 1117 (1999) (considering conventional and Black's Law Dictionary definition of term "publication" to determine whether underlying claims constituted slander covered by commercial general liability policy).

[18] We note that the immediately preceding edition of Black's Law Dictionary defined "occupational disease" more generally—akin to the ordinary language dictionaries—as a "[d]isease gradually contracted in usual and

Ed. 2014) p. 1248; see also *Ricigliano* v. *Ideal Forging Corp.*, supra, 280 Conn. 731–32 (discussing statutory definitions of "occupational disease" under § 31-275 [15] as consistent with dictionary definitions). Although the relationship between occupational disease and workers' compensation is now a matter of black letter law, none of the definitions on which Vanderbilt relies—including the definition in Black's Law Dictionary—suggests in any way that the phrase "occupational disease" is a construct devoid of meaning outside the law of workers' compensation,[19] notwithstanding its obvious significance within that area of the law. Instead, we

ordinary course of employment, because thereof, and incidental thereto." Black's Law Dictionary (4th Ed. 1968) p. 1230; see also Ballentine's Law Dictionary (3d Ed. 1969) p. 879 ("Occupational disease" is "[a] disease which develops gradually and imperceptibly as a result of *engaging in a particular employment and is generally known and understood to be a usual and natural incident or hazard of such employment*. . . . A disease caused by or especially incident to a particular employment. . . . Something other than an accidental injury. But none the less a personal injury, the injury being regarded as sustained when the employee becomes unable to work." [Citations omitted; emphasis added.]).

[19] In a footnote in its brief, Vanderbilt crafts a hypothetical to contend that "[a]pplying 'occupational disease' outside of the context of claims brought against Vanderbilt by its employees leads to absurd results," namely, a high school student alleging exposure to talc while working part-time at a family business or a babysitter alleging exposure to talc in the home where he or she is babysitting. Vanderbilt states that the "insurers would argue that the students were 'working' when they were allegedly exposed to talc and, therefore, [that] the 'occupational disease' exclusions bar coverage." We disagree that this hypothetical is illustrative of an absurd result, even under the Black's Law Dictionary definition propounded by Vanderbilt. Although the hypothetical babysitter's disease might well have been contracted during his or her employment, that fact does not, without more, render it occupational in nature. See Black's Law Dictionary (5th Ed. 1979) p. 973; see, e.g., 2 M. Rothstein et al., Employment Law (6th Ed. 2019) § 7:24 ("[a]n ailment does not become an occupational disease simply because it is contracted on the employer's premises" [internal quotation marks omitted]). Put differently, in determining whether the disease in the hypothetical argued by Vanderbilt is occupational in nature, the babysitter performing ordinary child care tasks might well be situated differently from the other student in the hypothetical who works at a family business, if that family business is an industry that had peculiar incidence of diseases occasioned by exposure to talc.

read those definitions only to highlight the availability of workers' compensation as a common, legal remedy for claims arising from the underlying condition. Thus, we disagree with Vanderbilt's argument in its reply brief that " '[o]ccupational [d]isease' [is] a term of art that is tied to the employee-employer relationship," thus meaning that "no specific reference to employees needed to be added to the exclusion."

Given the lack of any verbiage in commonly used dictionary definitions expressly limiting the definition of occupational disease to the workers' compensation context,[20] it is significant that the text of the occupational disease exclusions does not contain language expressly limiting their application to the employees of the insured. In contrast, other exclusions in the relevant policies, namely, for employer's liability and workers' compensation, expressly contain such language.[21] This omission is significant because it indicates that, when

[20] Indeed, this court previously has rejected attempts to import other areas of the law to vary otherwise clear and unambiguous insurance policy language. In concluding that "emotional distress" was not "bodily injury" for purposes of an insurance policy, this court rejected the argument that "emotional distress is within the insurance policy definition of bodily injury because modern medical science teaches that emotional distress is accompanied by some physical manifestations," as well as that "such an interpretation is consistent with our precedents in the areas of tort and workers' compensation law." *Moore* v. *Continental Casualty Co.*, 252 Conn. 405, 414, 746 A.2d 1252 (2000). Stating that we did "not question the modern medical understanding of the interrelatedness of the mind and body," this court nevertheless "disagree[d] that such an understanding determines the meaning of the policy language in question in the present case. We also disagree[d] with the contention that our precedents in the areas of tort and workers' compensation law appropriately inform the meaning of that policy language." Id., 414–15.

[21] The Pacific policy provides that it "does not apply . . . to any obligation for which the [i]nsured or any carrier as his insurer may be held liable under any workmen's compensation, unemployment compensation or disability benefits law, or under any similar law . . . ." A separate rider to the Pacific policy states that "[t]his policy does not apply to personal injury to any employee of the insured arising out of and in the course of his employment by the insured or to any obligation of the insured to indemnify another because of damages arising out of such injury."

the drafters of the policy desired to limit the application of an exclusion to a certain group of individuals, they did so. It renders all the more unambiguous the lack of any such express limitation in the occupational disease exclusions. See *Lexington Ins. Co.* v. *Lexington Healthcare Group, Inc.*, supra, 311 Conn. 54 ("[t]ypically, when different terms are employed within the same writing, different meanings are intended"); *Buell Industries, Inc.* v. *Greater New York Mutual Ins. Co.*, supra, 259 Conn. 539–40 (use of word "sudden" in "sudden and accidental" exception to pollution exclusion was intended to preclude coverage for gradually occurring pollution, "so that only a temporally abrupt release of pollutants would be covered as an exception to the general pollution exclusion").

Indeed, to read the exclusions as urged by Vanderbilt would require us to add otherwise nonexistent language specifically limiting their application to Vanderbilt's employees, which is contrary to how we interpret contracts, including insurance policies. See *Moore* v. *Continental Casualty Co.*, 252 Conn. 405, 414, 746 A.2d 1252 (2000) ("We cannot rewrite the insurance policy by adding semicolons any more than we can by adding words. If the policy had referred to 'green vehicles,' and defined that term as 'green cars, trucks or motorcycles,' it is unlikely that there would be a reasonable dispute about whether blue trucks and red motorcycles were intended to be included in the definition."); see also *Travelers Ins. Co.* v. *Namerow*, 257 Conn. 812, 827, 778 A.2d 168 (2001) ("The language of the policy clearly does not contain the word 'motive' or any other analogous term. Under the language of the policy, the plaintiff

The Lloyd's policy provides that it "shall not apply . . . to any obligation for which the [a]ssured and any company as its insurer may be held liable under any [w]orkmen's [c]ompensation, unemployment compensation or disability benefits law provided, however, that this exclusion does not apply to liability of others assumed by the [n]amed [a]ssured under contract or agreement . . . ."

did not need to prove motive as an element of its claim that the defendants' loss fell within the [intentional act] policy exclusion." [Footnote omitted.]), superseded in part on other grounds, 261 Conn. 784, 807 A.2d 467 (2002); *Community Action for Greater Middlesex County, Inc.* v. *American Alliance Ins. Co.*, 254 Conn. 387, 403, 757 A.2d 1074 (2000) ("[t]here is nothing in the language of the exclusion to indicate that the alleged abuse or molestation must be sexually motivated or calculated to arouse the person or persons involved in the offending conduct; the boys' nonconsensual grabbing and fondling of [the victim] fall within the plain meaning of the words 'abuse' and 'molestation' irrespective of the boys' subjective state of mind"); *Moore* v. *Continental Casualty Co.*, supra, 415 (rejecting reading of "definition of ' "[b]odily [i]njury" ' so as to mean not merely bodily harm, bodily sickness, and bodily disease, but also nonbodily sickness and nonbodily disease" because "[t]he definition of ' "[b]odily [i]njury" ' in the policy does not provide: bodily harm; sickness; or disease").

We also disagree with Vanderbilt's reliance on provisions in the Lloyd's policy form, including the limits of liability and special conditions, referring to "occupational disease sustained by any employee of the assured," as "mak[ing] clear that 'occupational disease' is a type of claim that only applies to Vanderbilt's employees and is distinct from a 'product liability' claim, with separate policy limits."[22] In the absence of a specific definition of the term "occupational disease" to that effect in the policy's definitions section, it is significant that the occupational disease exclusions at issue in this appeal are provided via endorsement, which, like a "rider . . . is a writing added or attached to a policy or certificate of insurance which expands or restricts its benefits or excludes certain conditions

[22] As Vanderbilt notes, similar references to "occupational disease" are not found in the 1985 Pacific policy form.

from coverage. . . . When properly incorporated into the policy, the policy and the rider or endorsement together constitute the contract of insurance, and are to be read together to determine the contract actually intended by the parties." (Internal quotation marks omitted.) *Liberty Mutual Ins. Co.* v. *Lone Star Industries, Inc.*, supra, 290 Conn. 806; see also, e.g., *Lexington Ins. Co.* v. *Lexington Healthcare Group, Inc.*, supra, 311 Conn. 55–56. If, however, "the endorsement itself is clear and unambiguous, the content of the form policies themselves is irrelevant . . . because [e]ndorsement has also been defined generally to mean [a] written or printed form attached to the policy which alters provisions of the contract, and the word alter is synonymous with change." (Internal quotation marks omitted.) *Liberty Mutual Ins. Co.* v. *Lone Star Industries, Inc.*, supra, 806; see id., 806–807 (concluding that summary judgment was proper, even when insurer failed to supply policy provisions beyond clear and unambiguous endorsements, because "[e]ven a policy provision that contradicts directly the terms of the endorsement is irrelevant to the disposition of the summary judgment motion"). Thus, even reading the Lloyd's provisions in harmony, the fact that the occupational disease exclusion lacks the language confining its application to Vanderbilt's employees, as found elsewhere in the Lloyd's policy, confirms further that such language was not intended to exist in the exclusion.

Although the occupational disease exclusion uses the term "occupational disease" broadly and without qualification, "[t]he breadth of this exclusion does not render it any less clear and unambiguous . . . ." Id., 800; see id., 799–800 (concluding that silicon exclusion defining " 'silicon' " as " 'the mineral in any form,' " excluded silicosis and silica related hazards that "cannot exist in the absence of [the element] silicon"); *Peerless Ins. Co.* v. *Gonzalez*, 241 Conn. 476, 483, 697 A.2d 680 (1997)

("Because there is no requirement that a policy exclusion be cast in specific, rather than general, terms, the fact that the policy's lead exclusion contains no express reference to lead paint does not support [the insured's] contention that lead paint falls outside the purview of the exclusion. The relevant inquiry is not whether the policy issued by [the insurer] expressly excludes lead paint from its coverage but, rather, whether the language of the exclusionary provision nevertheless clearly and unambiguously applies to lead paint.").

We also acknowledge Vanderbilt's argument that the occupational disease exclusion should not be read in a way that renders the liability coverage provided by the policy meaningless. Although this argument is at first pass tempting, as noted by the Appellate Court; see *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, supra, 171 Conn. App. 258 n.92; Vanderbilt's argument is undercut by the stipulation between the parties that, for purposes of litigating the application of the occupational disease exclusion, (1) "[n]one of the plaintiffs in any of the underlying actions allege[s] that [he or she is] or ever [was a] Vanderbilt [employee]," and (2) "[t]he underlying actions can be classified into three categories, based on the alleged exposure of the underlying plaintiff to Vanderbilt products," specifically "Category A—alleged exposure is claimed solely through workplace exposure," "Category B—alleged exposure is claimed through a combination of workplace exposure and exposure outside of the workplace," and "Category C—alleged exposure is claimed solely through exposure outside of the workplace." The stipulation provides citations to multiple exemplar cases under each category. The existence of categories B and C indicates that the Appellate Court's reading of the plain language of the occupational disease exclusion does not completely vitiate the coverage provided by the policy. Indeed, even a significant exclusion limiting available coverage does not mean that the

insured did not get the coverage for which it bargained, or that the "insurance policies . . . are rendered meaningless by virtue of the denial of coverage . . . ." *Schilberg Integrated Metals Corp.* v. *Continental Casualty Co.*, 263 Conn. 245, 270–71, 819 A.2d 773 (2003); see id. (no evidence that absolute pollution exclusion rendered policies "meaningless" given that they "provide coverage for a wide variety of accidents and mishaps . . . that may occur during [the plaintiff's routine business activities]" [internal quotation marks omitted]).

Finally, the case law cited by the parties, none of which interprets an occupational disease exclusion, simply bears out that an occupational disease may be compensable on the first-party basis by an affected employee's workers' compensation employer, *or* on a third-party basis by another tortfeasor—like Vanderbilt.[23] In particular, we disagree with Vanderbilt's reliance on the decision of the Maryland Court of Special Appeals in *Commercial Union Ins. Co.* v. *Porter Hayden Co.*, supra, 116 Md. App. 605, for the proposition that "the phrase 'occupational disease' cannot be interpreted outside of the employer-employee context without creating ambiguity." In that case, the court rejected an insurer's argument that a general liability policy that covered only " 'accidents' " did not cover claims of asbestos related diseases resulting from work-

[23] Indeed, Connecticut's workers' compensation statutory scheme contemplates third parties being held liable in tort for injuries that are compensable under the act, including occupational diseases; see General Statutes § 31-275 (15); by providing an employer the right to intervene in an action brought by its employee against a third-party tortfeasor, in order to recover the benefits paid. See General Statutes § 31-293 (a); *Nichols* v. *Lighthouse Restaurant, Inc.*, 246 Conn. 156, 164–65, 716 A.2d 71 (1998). Put differently, the exclusivity of the workers' compensation remedy under statutes such as General Statutes § 31-284 is between the employee and the employer. See, e.g., *Hernandez* v. *Cavaliere Custom Homes, Inc.*, 511 F. Supp. 2d 221, 226 (D. Conn. 2007); *Mello* v. *Big Y Foods, Inc.*, 265 Conn. 21, 25–26, 826 A.2d 1117 (2003); *Ferryman* v. *Groton*, 212 Conn. 138, 146, 561 A.2d 432 (1989).

place exposure. Id., 697; see id., 701 (concluding that inhalation of asbestos fibers "is indisputably a personal bodily injury whether or not it is also an occupational disease," thus triggering coverage because, even "if 'occurrence' and 'accident' are not precise synonyms, they are nonetheless largely overlapping terms and they include 'continuous or repeated exposure to conditions which result in bodily injury' "). The Maryland court distinguished the insurer's reliance on cases that have "treated 'occupational diseases,' on the one hand, and 'personal bodily injuries caused by accident,' on the other hand, as mutually exclusive categories," as "taken from the very special and statutory world of [w]orkers' [c]ompensation law. It is a body of law that is not concerned with fault or liability coverage based on fault; it is concerned with whether certain forms of disability were [job related]. Although [job related] injury and [job related] disease are slowly evolving toward a single compensable phenomenon, their respective histories have been widely divergent. That divergence has produced a number of linguistic anomalies that are peculiar to [w]orkers' [c]ompensation law." Id., 697–98. We disagree with Vanderbilt's reliance on *Commercial Union Ins. Co.* because that case does not interpret an occupational disease exclusion or explain why commonly used definitions of the term "occupational disease" are inherently ambiguous. Indeed, the Maryland court emphasized that, "[e]ven if 'occupational disease' and 'personal bodily injury as a result of an accident' are mutually exclusive terms in [w]orkers' [c]ompensation law, that mutual exclusivity *by no means* carries over into general tort law."[24] (Emphasis added.) Id., 701.

[24] We also disagree with Vanderbilt's reliance on *Nolan* v. *Johns-Manville Asbestos & Magnesia Materials Co.*, supra, 74 Ill. App. 3d 778, for the proposition that "the phrase 'occupational disease' related only to workmen's compensation . . . ." In that product liability case, the court followed its workers' compensation case law and adopted the discovery rule to govern the running of the statute of limitations. Id., 788. Vanderbilt relies on the following observation in *Nolan*: "We are thoroughly cognizant of the distinctions between the present case and an occupational disease case seeking

Given the clear and unambiguous meaning of the term "occupational disease,"[25] we conclude that the Appellate Court properly construed the occupational

statutory compensation such as *Madison* [v. *Wedron Silica Co.*, 352 Ill. 60, 184 N.E. 901 (1933)]; however, the analysis drawn by the [Illinois Supreme Court] is useful in a case such as this, [in which] the disease of asbestosis according to expert testimony, can develop over a period of ten to twenty-five years, even though the action pursued here is for [product] liability rather than workmen's compensation." *Nolan* v. *Johns-Manville Asbestos & Magnesia Materials Co.*, supra, 788. Again, nothing in the cited portions of *Nolan* supports the proposition that occupational disease is a concept that is linguistically meaningless beyond the workers' compensation context; instead, they support the opposite proposition, namely, that the term has applicability in a variety of legal settings. Nor does *Nolan* describe specifically *any* applicable "distinctions" between workers' compensation and the common law.

We similarly disagree with Vanderbilt's reliance on *Ins. Co. of North America* v. *Forty-Eight Insulations, Inc.*, supra, 451 F. Supp. 1230. In that insurance coverage case, the court declined to apply a manifestation trigger for the underlying product liability claim, deeming the common-law contracts principles distinguishable from the statutory "last employer" rule that governs coverage for workers' compensation claims. Id., 1240–41. Again, this case does nothing to elucidate the meaning of the occupational disease exclusion, with the court's failure to refer to the underlying claims as "occupational diseases" both unexplained, and in our view, purely incidental. Similarly, the court does not state in any way that occupational disease is a phrase with a distinct meaning in the context of workers' compensation, as opposed to the common law.

The cases cited by National Casualty similarly do not interpret an occupational disease exclusion, and stand only for the proposition that a claim arising from an occupational disease may exist independently of a workers' compensation claim. See *TKK USA, Inc.* v. *Safety National Casualty Corp.*, supra, 727 F.3d 788–90 (common-law claim against employer for negligence is covered under employer's liability coverage, even if underlying claim is statutorily barred by state occupational disease compensation statute, because of gaps in statute, and "covered loss" would include defense of even groundless claim); *Rodriguez* v. *E.D. Construction, Inc.*, supra, 126 Conn. App. 728 (independent contractor was excluded from participation in workers' compensation system); *Wyness* v. *Armstrong World Industries, Inc.*, supra, 171 Ill. App. 3d 677 (surviving spouse of insulator who died from asbestos related lung cancer brought wrongful death action against manufacturers of insulation); *Tooey* v. *AK Steel Corp.*, supra, 623 Pa. 82 (exclusivity provision of workers' compensation act did not bar common-law action by employee against employer when occupational disease claim manifested beyond act's limitation period); *United National Ins. Co.* v. *J.H. France Refractories Co.*, supra, 36 Pa. D. & C.4th 409–10 (manufacturer fraudulently procured commercial general liability insurance despite knowledge of pending third-party product liability claims against it arising from asbestosis injuries).

[25] Vanderbilt's criticism of the Appellate Court's reliance on two law review articles and an American Bar Association report to elucidate the apparent

disease exclusions to "bar coverage for occupational disease claims brought not only by employees of Vanderbilt but also by individuals who contracted an occupational disease in the course of their work for other employers." *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, supra, 171 Conn. App. 269–70. The Appellate Court, therefore, properly reversed the decision of the trial court, which had adopted a reading of the occupational disease exclusions to the contrary.[26]

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

purpose of the occupational disease exclusions, as well as the apparent "mutual understanding" of the parties with respect to the policies at issue, is, however, well taken. See *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, supra, 171 Conn. App. 264 and n.95, citing W. Viscusi, "Structuring an Effective Occupational Disease Policy: Victim Compensation and Risk Regulation," 2 Yale J. on Reg. 53, 65 (1984); Note, "Compensating Victims of Occupational Disease," 93 Harv. L. Rev. 916, 926 (1980); American Bar Association, ABA Blueprint for Improving the Civil Justice System: Report of the ABA Working Group on Civil Justice System Proposals (1992) p. 53. As Vanderbilt notes, the law review articles both were published after the Lloyd's policy was issued, and the American Bar Association report was published after both policies were issued, and, thus, neither could have had affected the parties' intent. Moreover, given the plain and unambiguous language of the occupational disease exclusions, it simply was unnecessary to consider "legal scholarship from that era" in support of the conclusion that "the insurance industry was concerned over the emerging proliferation of private litigation by workers who, having developed long latency diseases after exposure to asbestos and other alleged industrial toxins, sought to circumvent the workers' compensation system and sue manufacturers of those products." *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, supra, 265–66. Indeed, this extratextual focus on the intent of the insurers runs counter to our well established approach of interpreting insurance policies, which focuses on how the language would be viewed by the layman, or policyholder. See, e.g., *Nationwide Mutual Ins. Co.* v. *Pasiak*, supra, 327 Conn. 238–39.

[26] As Vanderbilt acknowledges, whether the insurers waived their right to invoke the occupational disease exclusions via a reservation of rights or failing to plead it as a special defense in this action is a question reserved for the next phase of this complex litigation. Accordingly, we agree with the Appellate Court's direction to the trial court to "consider Vanderbilt's alternative argument that certain defendants are precluded from invoking the exclusions because they failed to timely plead the exclusions as a special defense." *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity. Co.*, supra, 171 Conn. App. 270.

ORDERS

CONNECTICUT REPORTS

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COMMISSIONER OF TRANSPORTATION *v.*
TERESA B. LAGOSZ ET AL.

The named defendant's petition for certification to appeal from the Appellate Court, 189 Conn. App. 828 (AC 40885), is denied.

Teresa B. Lagosz, self-represented, in support of the petition.

Raul A. Rodriguez, assistant attorney general, in opposition.

Decided September 24, 2019

STATE OF CONNECTICUT *v.* FELIX A. IRIZARRY

The defendant's petition for certification to appeal from the Appellate Court, 190 Conn. App. 40 (AC 39394), is denied.

Peter G. Billings, assigned counsel, in support of the petition.

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

Decided September 24, 2019

AMBER DECHELLIS *v.* ANTHONY DECHELLIS

The defendant's petition for certification to appeal from the Appellate Court, 190 Conn. App. 853 (AC 40108), is denied.

Charles D. Ray and *Brittany A. Killian*, in support of the petition.

Peter J. Zarella, in opposition.

Decided September 24, 2019

HECTOR L. CASABLANCA *v.*
ANOLAN CASABLANCA

The plaintiff's petition for certification to appeal from the Appellate Court, 190 Conn. App. 606 (AC 40332), is denied.

Steven R. Dembo, *Caitlin E. Kozloski* and *P. Jo Anne Burgh*, in support of the petition.

Brandon B. Fontaine, in opposition.

Decided September 24, 2019

STATE OF CONNECTICUT *v.* JODI M. DOJNIA

The defendant's petition for certification to appeal from the Appellate Court, 190 Conn. App. 353 (AC 40650), is granted, limited to the following issues:

"1. Did the Appellate Court correctly conclude that General Statutes §§ 1-1f (b) and 53a-60b (a) (1) were not unconstitutionally vague as applied to the defendant?

"2. Did the Appellate Court correctly conclude that the evidence the state presented at trial was sufficient to prove beyond a reasonable doubt that the victim was 'physically disabled' under the governing statutes?"

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

Megan L. Wade, assigned counsel, and *James P. Sexton*, assigned counsel, in support of the petition.

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

Decided September 24, 2019

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

ALPHA BETA CAPITAL PARTNERS, L.P. *v.* PURSUIT INVESTMENT MANAGEMENT, LLC, ET AL.
(AC 39388)

Lavine, Bright and Bishop, Js.

Syllabus

The plaintiff company sought to recover damages from the defendants for, inter alia, breach of contract for their failure to remit to the plaintiff its proportionate share of certain proceeds secured by a settlement agreement. The defendants S and C are individuals who, together, formed, operated, and controlled the defendant companies, O Co., F Co., C Co., M Co., P Co., I Co. and N Co. In approximately 2007, the plaintiff invested in both O Co. and C Co. and, as a result, acquired limited partnership interests in those companies. In 2007, F Co. and M Co. had purchased certain securities known as collateralized debt obligations from U Co. and, in 2008, after the value of the collateralized debt obligations precipitously dropped, P Co. and I Co. commenced a civil action alleging fraud against U Co. In April, 2009, the plaintiff executed a limited partnership agreement for C Co., which contained certain provisions for withdrawals by and distributions to limited partners. In September, 2009, the plaintiff redeemed its investment in O Co., which extinguished its interest in that company except for certain holdbacks to indemnify potential future expenses of O Co. In 2010, the plaintiff commenced a civil action in the Supreme Court of the state of New York against I Co., S, and C, and filed a separate arbitration proceeding against O Co. and C Co. In April, 2011, the plaintiff, I Co., S, C, O Co., C Co., and A Co., the former general partner of C Co., executed a confidential settlement agreement to resolve the 2010 New York action and the arbitration proceeding. As consideration for the plaintiff's withdrawal and release, § 3 of the settlement agreement required I Co. to pay the plaintiff a settlement payment, as well as a redemption payment, which represented the plaintiff's pro rata share, approximately 32.083612 percent, of the net asset value in C Co. as of February 28, 2011, minus a holdback of $250,000 for the purpose of funding costs associated with the ongoing 2008 action against U Co., and minus an additional holdback of $200,000 to pay legal fees and expenses. In addition, § 4 of the settlement agreement secured the plaintiff's interest in two of C Co.'s contingent assets by providing that nothing in the settlement agreement shall affect the plaintiff's pro rata share in C Co.'s proportionate interest in the U Co. litigation proceeds or in C Co.'s interest in a claim against L Co. Shortly after the settlement agreement was signed, the L Co. claim was sold for $9,334,141.55, but no portion of the L Co. claim proceeds were remitted to the plaintiff until October, 2011, when the plaintiff received $1,022,022.36. In 2013, the plaintiff commenced a civil action

in the Supreme Court of the state of New York against I Co., C Co., O Co., and A Co., alleging that those defendants had breached the settlement agreement by, inter alia, failing to pay the plaintiff its pro rata portion of the L Co. claim proceeds. Soon after the commencement of the 2013 New York action, certain of the defendants transferred to the plaintiff approximately $700,000 in additional proceeds from the L Co. claim, for a total distribution of $1,722,022.36. In 2015, P Co. settled the U Co. litigation for a total of $36 million, but the defendants have not provided the plaintiff with any portion of the settlement proceeds. The plaintiff then brought the present action against the defendants seeking damages for their failure to remit to the plaintiff its proportionate share of the U Co. litigation proceeds as secured by § 4 of the settlement agreement. The plaintiff filed an application for a prejudgment remedy, and the plaintiff's operative amended substitute complaint alleged, inter alia, breach of contract, breach of the implied covenant of good faith and fair dealing, conversion, statutory theft (§ 52-564), and violation of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.). Subsequently, the defendants filed a motion to strike the plaintiff's complaint, which the court granted only as to the claims of statutory theft and a CUTPA violation. The court also granted the plaintiff's application for a prejudgment remedy, and the plaintiff thereafter secured the full attachment amount. In October, 2016, the court rendered judgment partially in favor of the plaintiff as to certain defendants on its complaint and in favor of the plaintiff on a counterclaim filed by the defendants. In particular, the court concluded that the defendants that were parties to the settlement agreement, namely, C Co., O Co., I Co., S, and C, as well as N Co., the general partner of C Co. at the time the U Co. litigation proceeds were realized, were liable for breach of contract and breach of the implied covenant of good faith and fair dealing for their intentional failure to remit to the plaintiff its proportionate share of the U Co. litigation proceeds as secured by the settlement agreement. The defendants appealed and the plaintiff cross appealed to this court. During the pendency of this appeal, the plaintiff, pursuant to statute (§ 52-278k), filed a motion with the trial court seeking modification of the previously secured prejudgment remedy attachment amount to secure from C Co., O Co., I Co., S, C, and N Co., an additional $947,731 that it anticipated would accrue during the pendency of this appeal. The plaintiff also filed a motion with the court seeking supplemental asset disclosure from those defendants to assist with the securing of the additional attachment pursued by the motion to modify. Subsequently, the trial court granted those two motions, and the defendants filed an amended appeal with this court. *Held*:

1. The defendants could not prevail on their claim that the trial court improperly interpreted the agreements between the parties when it concluded that the plaintiff prevailed on its breach of contract claim, which alleged that the defendants had failed to pay the plaintiff its proportionate share of the proceeds from the U Co. litigation, as the court properly held

that the plaintiff proved a breach of contract because the defendants settled the U Co. litigation for $36 million, and the plaintiff has not received its portion of those proceeds in contravention of the settlement agreement and the limited partnership agreement: the defendants' claim that they could not be held liable for breach of the settlement agreement because, pursuant to § 4 of that agreement, the distribution of the proceeds from the contingent assets was governed by all of provisions of the limited partnership agreement, which afforded the general partner discretion to withhold or reduce payment of the contingent interests, was unavailing, as the trial court correctly determined that the execution of the settlement agreement constituted a withdrawal of the plaintiff as a limited partner from C Co. and properly concluded, in light of that withdrawal, that the payment of the contingent assets was to be governed by the specific withdrawal provision of the limited partnership agreement, and the court's interpretation of both the settlement agreement and the limited partnership agreement together was further bolstered by the relevant portion of the withdrawal provision of the limited partnership agreement, which provides that a withdrawal was subject to certain restrictions and reserves for contingent or undetermined liabilities of C Co., as the parties specifically identified those restrictions and reserves in the settlement agreement's holdback provisions, and it was logical for the court to conclude that, following C Co.'s receipt of proceeds from the realization of a contingent asset, the plaintiff, pursuant to § 4 of the settlement agreement and § 5.01 of the limited partnership agreement, was entitled to its pro rata share of those proceeds in cash as soon as practicable following the effective date of the withdrawal; accordingly, the trial court properly considered the language of § 4 of the settlement agreement in conjunction with the other provisions of the settlement agreement, the limited partnership agreement, the relation of the parties, and the circumstances under which it was executed.

2. The defendants' claim that the trial court improperly rejected their breach of contract counterclaim, which alleged that they were relieved of their obligation to remit the U Co. litigation proceeds because the plaintiff had breached the settlement agreement, was unavailing:

a. The defendants could not prevail on their claim that the trial court erroneously found that the plaintiff had not materially breached the settlement agreement by violating § 7 when it requested that R Co., the plaintiff's law firm, contact the United States Securities and Exchange Commission regarding an ongoing investigation, by commencing the 2013 New York action seeking an injunction to prevent C Co. from utilizing the U Co. litigation holdback, and by colluding with S Co.; that court's finding that the plaintiff's actions did not constitute a material breach of the settlement agreement, the essential purpose of which was to resolve the then existing disputes among the parties, was not clearly erroneous and was supported by the evidence that § 7 was not central to the settlement agreement, that the plaintiff sought information from the United States Securities and Exchange Commission regarding an

ongoing investigation in which the plaintiff's interests were potentially involved, that the plaintiff filed an action in New York alleging that the defendants had breached the settlement agreement, and that the plaintiff had communicated with S Co. after it already had been advised of the settlement agreement, as those actions were taken by the plaintiff to enforce its rights that were at the core of the settlement agreement.

b. The defendants could not prevail on their claim that the trial court erroneously found that their prior partial delayed payment of the L Co. claim to the plaintiff relieved the plaintiff from its obligations under the confidentiality provision, as the court's finding that any claimed breach by the plaintiff was excused by the defendant's prior breach of the settlement agreement was not clearly erroneous; the evidence demonstrated that the settlement agreement, read in conjunction with the limited partnership agreement, obligated the payment of the contingent assets, including the pro rata share of the proceeds of the L Co. claim, approximately $2,994,729.76, to the plaintiff in cash as soon as practicable following the effective date of the withdrawal on June 1, 2011, and that no portion of the L Co. claim proceeds were remitted to the plaintiff until October, 2011, when the plaintiff received $1,022,022.36, and, even if the defendants' calculation as to the plaintiff's proportionate share of the L Co. claim was correct, the evidence that, prior to any of the contested communications, the plaintiff received less than one half of what the defendants had calculated was the plaintiff's entitlement, more than four months after the funds had been received by C Co. without sufficient justification, supported the court's finding that the defendants had materially breached the settlement agreement.

3. The trial court properly concluded that the plaintiff prevailed on its breach of the implied covenant of good faith and fair dealing claim; that court found that the signatory defendants, I Co., O Co., C Co., S, and C, deprived the plaintiff of its right to receive the benefits under the settlement agreement, under which they had a clear obligation to remit the U Co. litigation proceeds to the plaintiff, and the trial court's conclusion that at least some of the defendants breached the implied covenant of good faith and fair dealing was supported by its findings that the defendants failed to remit the U Co. litigation proceeds to the plaintiff, wilfully attempted to thwart the plaintiff's ability to receive those proceeds, raised unsupported claims and counterclaims that alleged misconduct by the plaintiff, maintained control over the proceeds so as to retain them for as long as possible for their own benefit, continued to prolong the litigation and cause excessive expenses, and failed, until ordered by the court, to provide information to the plaintiff that could have resolved some of the issues in advance of this litigation.

4. The plaintiff's claim on cross appeal that the trial court improperly concluded that the plaintiff could not prevail on its conversion claim was unavailing, as the court properly concluded that the plaintiff could not prevail on its conversion claim because it merely was a recasting of its breach of contract claim; the plaintiff's conversion claim sought the

same damages as its breach of contract claim, namely, its proportionate share of the U Co. litigation proceeds, the plaintiff's conversion claim alleged the same breach of duty, namely, the defendants' obligation pursuant to the settlement agreement and the limited partnership agreement to remit the U Co. litigation proceeds to the plaintiff, and the plaintiff's conversion claim was based on the exact same allegations as its breach of contract claim because the plaintiff's complaint entirely incorporated the breach of contract allegations into its count alleging conversion.

5. The plaintiff could not prevail on its claim that the trial court improperly granted the defendants' motion to strike its Connecticut statutory causes of action for statutory theft and a violation of CUTPA on the ground that those claims were barred by § 12 of the settlement agreement, which provides in relevant part that any disputes or litigation arising out of that agreement "shall be governed by New York law"; the relevant language in § 12 of the settlement agreement is broad and does not apply only to breach of contract causes of action, and the plaintiff's statutory causes of action arose out of the settlement agreement because the basis for both claims stemmed from the settlement agreement, as the statutory theft claim alleged that the defendants withheld and utilized for themselves the U Co. litigation proceeds, and the CUTPA claim alleged that the defendants breached the settlement agreement and failed to provide the plaintiff its share of the U Co. litigation proceeds.

6. The plaintiff could not prevail on its claim that all of the defendants should be held liable for the plaintiff's claims of breach of contract and breach of the implied covenant of good faith and fair dealing pursuant to a piercing the corporate veil or alter ego theory, and that the trial court improperly declined to consider those theories despite the fact that they had been pleaded and briefed; when construing the trial court's judgment as a whole, it was apparent that although the court recognized that the plaintiff had not separately pleaded its piercing the corporate veil and alter ego theories, and although the court did not engage in a discussion of each and every element of the plaintiff's theories, it considered and rejected those theories.

7. The trial court improperly interpreted the settlement agreement to conclude that all of the defendants who were signatories to the settlement agreement, I Co., O Co., C Co., S, and C, as well as N Co. as successor general partner of C Co., were liable for nonpayment of the U Co. litigation proceeds, as only I Co., C Co., and N Co. were liable: although that court correctly concluded that there was no express limitation in § 4 of the settlement agreement as to which defendants had the obligation to remit the U Co. litigation proceeds, the court erred in literally interpreting certain language in the settlement agreement to hold all of the signatory defendants liable for each and every obligation in the settlement agreement, and it improperly failed to consider the limited partnership agreement or the circumstances under which the settlement agreement was executed, as O Co. could not be held liable pursuant to § 4 of the

settlement agreement because it was unable to remit the U Co. litigation proceeds to the plaintiff, and S and C could not be held individually liable in the absence of an express agreement by them to undertake an individual obligation in either the settlement agreement or the limited partnership agreement to remit the U Co. litigation proceeds as soon as practicable; moreover, the defendants could not prevail on their claim that the proper interpretation of the limited partnership agreement and the settlement agreement required that only N Co. be held liable for nonpayment of the U Co. litigation proceeds, as the defendants that are liable for nonpayment are those that both undertook an obligation and had the ability to pay the U Co. litigation proceeds, namely, C Co., as owner of the interest in the U Co. litigation proceeds at issue, N Co., as general partner of C Co., and I Co., which had remitted both the settlement payment and redemption payment on behalf of the defendants, including C Co., pursuant to the settlement agreement.

8. The defendants could not prevail on their claim that the trial court erroneously awarded damages because it failed to reduce C Co.'s share of the U Co. litigation proceeds by 10 percent to account for M Co.'s other investor, H Co., which is another entity controlled by S and C: the trial court's finding that C Co. was the sole investor in M Co. and, thus, that C Co. was entitled to all of M Co.'s share of the proceeds from the settlement of the U Co. litigation, was supported by the court's findings regarding the lack of credibility of the defendants' position regarding $1.1 million that S and C had deposited into an account of M Co., the defendants' failure to comply fully with discovery, and the lack of credibility of the testimony of S, and that the investment was withdrawn prior to the execution of the settlement agreement, as well as evidence that S and C, through H Co., made their investment in M Co. after the collateralized debt obligations had been purchased, after the collateralized debt obligations had lost value, and after the U Co. litigation had been commenced; moreover, the defendants could not prevail on their claim that the trial court erroneously awarded damages because it failed to account for a performance fee reduction from the U Co. litigation proceeds, which was based on their claim that the limited partnership agreement provides that the general partner of C Co., N Co. at the time, was entitled to a 20 percent performance fee for net economic profit, as the limited partnership agreement definitively provides that losses incurred by a limited partner prior to the execution of the limited partnership agreement are to be taken into account when determining cumulative fiscal period net economic profit and, thus, the trial court correctly concluded that the U Co. litigation proceeds did not constitute a net profit because those proceeds only partially recouped prior substantial losses incurred in connection with the collateralized debt obligations.

9. The plaintiff could not prevail on its claim that the trial court erroneously awarded damages because it improperly permitted the defendants to retain the remainder of the U Co. litigation holdback, which was based on the plaintiff's claim that the court, having found that the $250,000

holdback designated by the settlement agreement to cover expenses incurred in connection with the U Co. litigation had not been exhausted, erroneously failed to award damages for the remainder of the unused U Co. litigation holdback: that court definitively concluded that there was insufficient evidence to conclude that the U Co. litigation holdback had been exhausted, and did not conclude, as claimed by the plaintiff, that the evidence demonstrated that the holdback had not been exhausted, and the plaintiff's claim that the trial court erroneously found the division of the U Co. litigation proceeds to be 52.8 percent to M Co. and 47.2 percent to F Co., and that the court should have drawn an adverse inference against the defendants for their failure to comply fully with discovery was unavailing, as the trial court specifically rejected the plaintiff's credibility challenge to the position taken by the defendants, this court could not second-guess that credibility assessment, and the testimony and evidence cited by the court were sufficient to support its conclusion; accordingly, the court's finding as to the division of the net proceeds of the U Co. litigation was not clearly erroneous, and the court properly determined the amount of damages.

10. The defendants could not prevail on their claim that the trial court improperly granted the plaintiff's motion to increase the amount of the prejudgment remedy, which was based on their claim that the filing of an appeal, without more, did not constitute a sufficient basis for the court to modify, pursuant to § 52-278k, the existing prejudgment remedy; it was not clear error for the trial court to have increased the amount of the prejudgment remedy, as the court made its probable cause determination on the basis of the amount of the judgment rendered against the defendants, the court's award of postjudgment interest, the fact that the defendants took an amended appeal, and the average pendency of similar civil cases before this court.

This court declined to review the defendants' unpreserved claim that the trial court improperly granted the plaintiff's motion for postjudgment discovery in connection with the court's upward modification of the prejudgment remedy amount, the defendants having failed to preserve properly their claim that the trial court lacked authority to grant the plaintiff's supplemental motion for disclosure of assets.

Argued November 27, 2018—officially released October 8, 2019

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and transferred to the Complex Litigation Docket, where the defendants filed a counterclaim; thereafter, the court, *Genuario*, *J.*, granted the plaintiff's application for a prejudgment remedy; subsequently, the court

granted in part the defendants' motion to strike; thereafter, the court denied the defendants' motion to reargue and for reconsideration, and the named defendant et al. appealed to this court; subsequently, the matter was tried to the court, *Genuario*, *J.*; thereafter, the court, *Genuario*, *J.*, denied the motion to modify the prejudgment remedy filed by the defendant Pursuit Partners, LLC, et al.; judgment in part for the plaintiff on the complaint and for the plaintiff on the counterclaim, from which the named defendant et al. appealed and the plaintiff cross appealed to this court; subsequently, the court, *Genuario*, *J.*, granted the plaintiff's motion to modify the prejudgment remedy attachment and the plaintiff's motion for disclosure of assets, and the named defendant et al. filed an amended appeal with this court; thereafter, the court, *Genuario*, *J.*, denied the motion to open the judgment and to modify the interest rate filed by the named defendant et al., and the named defendant et al. filed a second amended appeal with this court. *Reversed in part*; *judgment directed.*

Michael S. Taylor, with whom were *Brendon P. Levesque* and, on the brief, *James P. Sexton* and *Megan L. Wade*, for the appellants-cross appellees (named defendant et al.).

Edward P. Dolido, pro hac vice, with whom were *James C. Graham* and, on the brief, *Anthony C. Famiglietti*, *Bijan Amini*, and *Kelly McCullough*, for the appellee-cross appellant (plaintiff).

Opinion

BRIGHT, J. This appeal arises out of a dispute between the plaintiff, Alpha Beta Capital Partners, L.P., and the defendants Pursuit Opportunity Fund I, L.P. (POF), Pursuit Opportunity Fund I Master Ltd. (POF Master), Pursuit Capital Management Fund I, L.P. (PCM), Pursuit Capital Master (Cayman) Ltd. (PCM Mas-

ter), Pursuit Partners, LLC (Pursuit Partners),[1] Pursuit Investment Management, LLC (PIM), Northeast Capital Management, LLC (Northeast), Anthony Schepis, and Frank Canelas, Jr. The central issue of this appeal is the defendants' claim that the court improperly interpreted the agreements between the parties to hold that certain defendants were liable for their failure to distribute to the plaintiff its share of a substantial contingent asset in which it had an interest.

The defendants appeal, and the plaintiff cross appeals, from the judgment of the trial court, rendered after a bench trial, partially in favor of the plaintiff as to certain defendants on its complaint and in favor of the plaintiff on the defendants' counterclaim.[2] The defendants also appeal from the orders of the trial court granting the plaintiff's postjudgment motion to increase the amount of a previously secured prejudgment remedy, and granting the plaintiff's motion for discovery to secure the additional prejudgment remedy attachment.

Addressing the parties' various contentions, we conclude that (1) the court properly interpreted the agreements between the parties in concluding that the plaintiff prevailed on its breach of contract claim, (2) the court properly rejected the defendants' breach of contract counterclaim, (3) the court properly concluded that the plaintiff prevailed on its breach of the implied covenant of good faith and fair dealing claim, (4) the court properly concluded that the plaintiff could not prevail on its conversion claim, (5) the court properly struck the plaintiff's Connecticut statutory causes of

[1] Pursuit Partners did not appeal from the judgment of the trial court and is not involved in this appeal. Our references to the defendants do not include Pursuit Partners.

[2] As set forth subsequently in this opinion, the court rendered judgment in favor of the plaintiff against PCM, POF, PIM, Schepis, Canelas, and Northeast on two of the seven counts of the complaint, in favor of all of the defendants on the remaining counts of the complaint, and in favor of the plaintiff on the defendants' counterclaim.

action, (6) the court improperly concluded that all of the defendants who had signed the settlement agreement were liable for breach of contract and for breach of the implied covenant of good faith and fair dealing, (7) the court properly determined the amount of damages awarded to the plaintiff, (8) the court properly granted the plaintiff's motion to increase the amount of the prejudgment remedy, and (9) the defendants' claim that the court improperly granted the plaintiff's motion for postjudgment discovery was not properly preserved, and, thus, we decline to review it. Accordingly, we affirm in part and reverse in part the judgment of the trial court.

The following facts, as found by the trial court, and procedural history are relevant to our resolution of this appeal. The plaintiff is a limited partnership organized under the laws of the state of Delaware. POF and PCM are both hedge funds[3] that were formed as Delaware limited partnerships. POF Master and PCM Master are both hedge funds that were formed as Cayman Islands limited liability companies. The vast majority of investments in POF Master were made by POF, and, likewise, the vast majority of investments in PCM Master were made by PCM. Pursuit Partners[4] and PIM are Delaware limited liability companies, each with a principal place of business in Greenwich, Connecticut. PIM provided advisory and investment management services to POF, PCM, POF Master, and PCM Master. Northeast is a limited liability company that became the general partner of PCM on February 17, 2014, which was after the prior general partner, Pursuit Capital Management, LLC (Pursuit Management), had filed for bankruptcy. Schepis and Canelas are individuals who reside in

[3] A "hedge fund" is "[a] specialized investment group—[usually] organized as a limited partnership or offshore investment company—that offers the possibility of high returns through risky techniques such as selling short or buying derivatives." Black's Law Dictionary (9th Ed. 2009).

[4] The court did not make any factual findings as to the role of Pursuit Partners in the hedge fund structure.

Greenwich, Connecticut, and who, together, formed, operated, and controlled all of the other defendants. At one point in time, the defendants cumulatively managed assets in excess of $600 million. During all relevant times, the plaintiff was represented by the law firm Reed Smith, and the defendants were represented by the law firm DLA Piper.

In approximately 2007, the plaintiff invested in both POF and PCM.[5] In return, the plaintiff acquired limited partnership interests in POF and PCM, and became a signatory to both the POF and PCM limited partnership agreements. Also invested in POF and PCM at that time was the Schneider Group, which was comprised of various persons and entities, including Leslie Schneider, Lillian Schneider, Claridge Associates, LLC, and Jamus Scott, LLC. In 2007 and 2008, all of the defendants were experiencing significant financial difficulties as a result of the volatility of the global securities market. More specifically, in 2007, POF Master and PCM Master had purchased certain securities known as collateralized debt obligations (CDOs)[6] from UBS AG, or its affiliate, for substantial sums of money. Shortly thereafter, the value of the CDOs precipitously dropped and, in 2008, Pursuit Partners and PIM commenced a civil action in the Connecticut Superior Court against UBS AG and Moody's Corporation (UBS litigation), alleging "a fraud

[5] The plaintiff did not invest directly in POF Master or PCM Master.

[6] According to Wikipedia, a popular encyclopedia website, which is accessible to the public free of charge and updated collaboratively by the site's visitors, a CDO is "a type of structured asset-backed security . . . . Originally developed as instruments for the corporate debt markets, after 2002 CDOs became vehicles for refinancing mortgage-backed securities . . . . Like other private label securities backed by assets, a CDO can be thought of as a promise to pay investors in a prescribed sequence, based on the cash flow the CDO collects from the pool of bonds or other assets it owns." (Footnotes omitted.) Wikipedia, the free encyclopedia, "Collateralized debt obligation," (last modified September 16, 2019), available at https://en.wikipedia.org/wiki/Collateralized debt obligation (last visited September 26, 2019).

. . . committed by [UBS AG and UBS Securities, LLC], upon [POF Master and PCM Master] in connection with [those entities'] purchase of CDOs from [UBS AG and UBS Securities, LLC]." *Pursuit Partners, LLC* v. *UBS AG*, Superior Court, judicial district of Stamford-Norwalk, Complex Litigation Docket, Docket No. CV-08-4013452-S (September 8, 2009) (48 Conn. L. Rptr. 557, 558). POF Master and PCM Master were not parties to that action even though they were the actual purchasers of the CDOs from UBS AG and UBS Securities, LLC.

In 2009, the investors in POF and PCM were provided an opportunity to redeem their investments and to withdraw their partnership interests from POF and PCM. A majority of the investors chose to redeem. In September, 2009, the plaintiff redeemed its investment in POF, which extinguished its interest in POF except for certain holdbacks[7] to indemnify potential future expenses of POF. Nevertheless, the plaintiff, as well as the Schneider Group, chose to remain invested in PCM and, as a result, between them, they cumulatively held approximately two thirds of the equitable interest in PCM.

On or about April 1, 2009, the plaintiff executed the "Amended and Restated Limited Partnership Agreement" (LPA) for PCM, which was drafted by one or more of the defendants under the supervision of Schepis and Canelas. The LPA did not require or contemplate any new investment; rather, the plaintiff retained its interest in PCM consistent with the terms of the LPA on the basis of its previous investment in PCM. The LPA contained certain provisions for withdrawals by and distributions to limited partners.

In 2010, the plaintiff commenced a civil action in the Supreme Court of the state of New York (2010 New York

[7] A "holdback" is "[a]n amount withheld from the full payment of a contract pending the other party's completion of some obligation . . . ." Black's Law Dictionary, supra.

action) against PIM, Schepis, and Canelas. Therein, the plaintiff alleged that PIM, Schepis, and Canelas were liable for substantial damages caused by their "tortious conduct involving the management of its investments in the hedge funds." Contemporaneously, the plaintiff filed a separate arbitration proceeding against POF and PCM, claiming similar losses for similar tortious conduct. In that proceeding, the plaintiff alleged, among other things, that one or more of the defendants had paid themselves compensation on the basis of a highly inflated value of the CDOs, notwithstanding their knowledge that the CDOs had little or no value.[8]

On or about April 8, 2011, the plaintiff, PIM, Schepis, Canelas, Pursuit Management, POF, and PCM executed the "Confidential Settlement Agreement and Mutual Release" (CSA) to resolve the 2010 New York action and the arbitration proceeding. The CSA was comprised of fifteen sections and provided at the outset that "the [p]arties hereby agree as follows . . . ." In §§ 1, 2, 5, and 6, the CSA provided that the plaintiff was to execute a dismissal with prejudice as to both the 2010 New York action and the parallel arbitration proceeding, and that the plaintiff agreed to a mutual release with PIM, Schepis, Canelas, Pursuit Management, POF, and PCM of all claims that were, or could have been, raised therein.

As consideration for the plaintiff's withdrawal and release, § 3 of the CSA required PIM to pay the plaintiff a settlement payment of $2.2 million and a redemption payment of $1,418,033. Pursuant to § 3 (b) (i) and (iii)

[8] Approximately during the same time, the United States Securities and Exchange Commission (SEC) began an investigation of the defendants. After receiving a letter from DLA Piper indicating that the SEC proceeding could cost as much as $10 million, the defendants notified the investors, including the plaintiff, of the SEC investigation, but not the estimate of costs. On receipt of this letter, and pursuant to the plaintiff's request, Reed Smith contacted the SEC in 2010, 2011, and 2012, to learn more about the investigation. Ultimately, the SEC investigation was resolved without penalty or sanction.

of the CSA, the amount of the redemption payment represented the plaintiff's pro rata share, approximately 32.083612 percent, of the net asset value (NAV) in PCM as of February 28, 2011,[9] minus a holdback of "$250,000 for the purpose of funding necessary costs . . . associated with the ongoing [UBS litigation]" and minus "an additional holdback in the amount [of] $200,000 to pay legal fees and expenses with respect to which PCM has an obligation to indemnify." Section 3 (b) (ii) of the CSA provided detailed mandates regarding these holdbacks, including that PIM shall not use any prior holdbacks in connection with the UBS litigation, that the plaintiff shall "be entitled to periodic updates on the status of the holdbacks," and that the plaintiff "will be provided with the opportunity to pay additional expenses necessary for the UBS [l]itigation" if the UBS litigation holdback was insufficient.

In addition, § 4 of the CSA secured the plaintiff's interest in two of PCM's contingent assets. Section 4 of the CSA provided in relevant part that "PCM owns certain contingent assets that were valued at zero . . . for purposes of calculating PCM's NAV. These contingent assets include (a) PCM's proportionate interest in the UBS [l]itigation; and (b) PCM's interest in a claim against Lehman Brothers International (Europe) . . . in the amount of approximately $14,000,000 [(LBIE claim)]. Nothing herein . . . shall affect in any way [the plaintiff's] pro rata share . . . of the contingent assets as of February 28, 2011. It is further understood that [the plaintiff's] continued interest in the contingent assets shall be governed by the [LPA] . . . ."

[9] Specifically, § 3 (b) (iii) of the CSA defined the total NAV in PCM as of February 28, 2011, to be $5,822,390, and the plaintiff's pro rata share of the NAV in PCM as of February 28, 2011, to be $1,868,033. Consequently, the court found that the CSA defined the plaintiff's percentage of the pro rata share of the NAV in PCM as of February 28, 2011, to be approximately 32.083612 percent ($1,868,033 divided by $5,822,390).

Section 7 of the CSA was a confidentiality provision in which the parties agreed, among other things, "to maintain in the strictest confidence and not disclose . . . the contents and terms of [the CSA] . . . [and] not to use or provide any information relating to any claim arising out of an investment in the [f]unds to any other person in connection with the initiation of any lawsuit, claim, arbitration or action related to or concerning any investment in PCM, POF or any other investment vehicle managed by PIM." Section 12 of the CSA was a choice of law provision that provided: "This [a]greement shall be construed and interpreted in accordance with the laws of the [s]tate of New York. Any disputes or litigation arising out of this [a]greement shall be governed by New York law."

On or about April 28, 2011, PIM sent a letter to the remaining investors in PCM, notifying them that the plaintiff's claims against PCM had been settled, that PIM was effecting a " 'mandatory withdrawal' " of the plaintiff's limited partnership interest, and that the plaintiff would maintain its proportionate interest in the two contingent assets. On or about April 30, 2011, Schepis, in his capacity as the managing member of the general partner of PCM, acting on behalf of the limited partners, executed "Amendment No. 1" to the LPA. That amendment set forth certain terms governing the withdrawn investors' continued interest in the contingent assets, the right of the general partner to be paid an incentive fee, and the right of the general partner to withhold reserves, costs, and expenses from any distribution of the proceeds of the contingent assets.

Shortly after the CSA was signed, the LBIE claim was sold for $9,334,141.55, and, on June 1, 2011, those funds were received in PCM Master's account. Nevertheless, no portion of the LBIE claim proceeds were remitted to the plaintiff until October, 2011, when the plaintiff received $1,022,022.36. Thereafter, a series of communications occurred between Reed Smith and DLA Piper

regarding the distribution of the LBIE claim proceeds to the plaintiff.

On November 9, 2011, DLA Piper sent an explanation to Reed Smith, stating that the plaintiff's contingent interest in the LBIE claim was worth $2,691,641, which amount represented 32.08 percent of PCM's 90 percent interest in the LBIE claim owned by PCM Master, and that a performance fee also would be subtracted from that amount. On November 16, 2011, Reed Smith sent a letter in response, asserting that the defendants had provided no documentation to support their valuation of the plaintiff's proportionate interest in the LBIE claim, that Reed Smith had been in contact with the Schneider Group and their related entities, and that the Schneider Group was supporting the plaintiff's demands. On November 26, 2011, DLA Piper sent another explanation to Reed Smith, stating that the plaintiff's interest in the LBIE claim was reduced to $2,132,559 to account for the performance fee due to the defendants, and that the plaintiff's "reserve balance in May, 2011, was adjusted upward in that amount." Neither of DLA Piper's communications provided an explanation as to the basis for the performance fee or the balance reserve, nor the reason for which the defendants had remitted less than 48 percent of the total amount that they finally had calculated the plaintiff's interest in the LBIE claim to be worth. The defendants did not remit any further amount of the LBIE claim at that time.

On November 6, 2012, the court dismissed the UBS litigation for lack of subject matter jurisdiction on the ground that Pursuit Partners and PIM lacked standing to proceed against UBS AG and Moody's Corporation. On December 4, 2012, lead counsel for Pursuit Partners in the UBS litigation sent a letter to the investors, including the plaintiff, explaining that the case had been dismissed, that he disagreed with the decision, that he had filed a motion to reargue, that the investors should not

take any action that would interfere with the process, and that he was confident that they ultimately would prevail.

In March, 2013, after having received no further communication regarding the LBIE claim and concerned about the status of its holdbacks, the plaintiff commenced a civil action in the Supreme Court of the state of New York against PIM, PCM, POF, and Pursuit Management (2013 New York action).[10] In that action, the plaintiff alleged that those defendants had breached the CSA by failing to pay the plaintiff its pro rata portion of the LBIE claim proceeds, and by failing to provide the plaintiff with periodic updates on the status of its holdbacks and contingent assets. Accordingly, the 2013 New York action did not seek the UBS litigation proceeds, as the UBS litigation had not yet been resolved; rather, the plaintiff sought an accounting and an injunction to prevent those defendants from accessing or utilizing the plaintiff's holdbacks.

Soon after the commencement of the 2013 New York action, the defendants, or some of them, transferred to the plaintiff approximately $700,000 in additional proceeds from the LBIE claim, for a total distribution of $1,722,022.36, which was approximately 81 percent of the total amount that the defendants finally had calculated the plaintiff's interest in the LBIE claim to be worth. The transmittal of the $700,000 was not accompanied by any explanation or accounting as to how the amount was calculated, the balance of the LBIE claim proceeds, or the status of the holdbacks. Even though it mandatorily had withdrawn the plaintiff as a member of PCM in April, 2011, when the CSA was executed, on April 22, 2013, Pursuit Management sent the plaintiff a letter executing its purported right, pursuant to the LPA,

[10] As of the date of oral argument before this court, the 2013 New York action was still pending before the New York Supreme Court. See *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, New York Supreme Court, County of New York, Index No. 152104/2013.

to " 'mandatorily withdraw' " the plaintiff from PCM,[11] which allegedly terminated any interest the plaintiff had in the contingent assets. The purported basis for this second mandatory withdrawal was the initiation of the 2013 New York action.

On July 3, 2014, the court in the UBS litigation, after reconsideration, vacated the judgment dismissing the UBS litigation and held that Pursuit Partners and PIM had standing on the basis of the unique and unitary relationship between the various entities that make up and control the hedge fund structure. In August and September, 2015, Pursuit Partners settled the UBS litigation for a total of $36 million; however, the defendants have not provided the plaintiff with any portion of the settlement proceeds.

The plaintiff then brought the present action against the defendants seeking damages for their failure to remit to the plaintiff its proportionate share of the UBS litigation proceeds as secured under § 4 of the CSA.[12] On September 11, 2015, the plaintiff filed an application for a prejudgment remedy and a proposed summons and complaint against the defendants. The plaintiff's operative amended substitute complaint, dated May 6, 2016, is comprised of seven counts: (1) breach of contract, (2) breach of the covenant of good faith and fair dealing, (3) unjust enrichment, (4) conversion, (5) statutory theft under General Statutes § 52-564, (6) violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and (7) civil conspiracy.

On February 17, 2016, the defendants, in response, filed an application for a prejudgment remedy and a counterclaim against the plaintiff alleging, among

[11] The court inconsistently found that this letter was sent on April 22, 2013, and April 22, 2014. This discrepancy is immaterial to our decision.

[12] The plaintiff does not seek the remaining portion of the LBIE claim, as that claim is the subject of the 2013 New York action.

other things, that the plaintiff is liable to the defendants for breach of contract and is not entitled to any portion of the UBS litigation proceeds. In particular, the defendants alleged that the November, 2011 letter from Reed Smith to DLA Piper referencing the plaintiff's communication with the Schneider Group, as well as the commencement of the 2013 New York action, had breached certain provisions of both the CSA and the LPA. The defendants' operative amended counterclaim, dated June 7, 2016, contained two counts that respectively alleged breach of the CSA and fraud.

On May 17, 2016, the defendants filed a motion to strike all seven counts of the plaintiff's complaint. The defendants argued in their memorandum of law in support, in relevant part, that counts five and six of the complaint, which alleged Connecticut statutory causes of action sounding in statutory theft and CUTPA, are barred by the choice of law provision in § 12 of the CSA, which provided that "[a]ny disputes or litigation arising out of this [a]greement shall be governed by New York law." On June 8, 2016, the plaintiff filed a memorandum of law in opposition to the defendants' motion to strike in which it argued, among other things, that the choice of law provision was not broad enough to preclude the Connecticut statutory causes of action.

On June 16, 2016, after an eight day hearing,[13] the court issued a thorough memorandum of decision in which it concurrently granted the plaintiff's application for a prejudgment remedy and denied the defendants' application for a prejudgment remedy. The court found that there was "probable cause that the plaintiff will obtain a judgment in the amount of $4,929,582 plus interest in the amount of $492,000, for a total prejudgment remedy in the amount of $5,421,582." The defendants then filed a motion for reconsideration,

[13] The parties stipulated that the evidence introduced at the prejudgment remedy proceeding would constitute evidence in the subsequent full trial on the merits.

and certain defendants also filed a motion to modify the prejudgment remedy, which were both summarily denied by the court. The plaintiff thereafter secured the full attachment amount.

On June 20, 2016, the court issued an oral ruling granting the defendants' motion to strike as to counts five and six, and denying the motion as to the remainder of the counts. The court held that although the choice of law provision in § 12 of the CSA "is not quite as broad" as compared to other similar cases, "it is still quite broad. It is difficult to see how the specific claims alleged in counts five and six being litigated in this case do not arise out of the [CSA]. Those counts have as the center of the alleged wrongful conduct of the defendants various wrongful [conduct] and schemes that would further their efforts to withhold from the [plaintiff] the amount the [plaintiff] claim[s] [is] due under the CSA. As such, while those counts do not rest on the validity, construction, and enforcement of the agreement, they do arise out of the obligations of the defendants that emanate from that agreement."

On October 14, 2016, after seven additional days of evidence, the court issued an extensive memorandum of decision in which it rendered judgment partially in favor of the plaintiff as to certain defendants on its complaint and in favor of the plaintiff on the defendants' counterclaim.[14] In particular, the court concluded that the defendants that were parties to the CSA—PCM, POF, PIM, Schepis, and Canelas—as well as the general partner of PCM at the time the UBS litigation proceeds were realized, Northeast, were liable for breach of contract and breach of the covenant of good faith and fair dealing for their intentional failure to remit to the plaintiff its proportionate share of the UBS litigation proceeds as secured by the CSA. The court also

[14] On appeal, the defendants only challenge the court's judgment in favor of the plaintiff on the breach of contract count in the counterclaim, and do not challenge the court's judgment in favor of the plaintiff on its fraud count in the counterclaim.

concluded that the remaining claims in the plaintiff's complaint, the defendants' special defenses, and the defendants' counterclaim had not been proven. Consequently, the court rendered judgment in favor of the plaintiff against PCM, POF, PIM, Schepis, Canelas, and Northeast in the total amount of "$4,929,582 plus prejudgment interest at the rate of 10 percent per year from October 16, 2015, the date that the plaintiff's interest in the UBS [litigation] proceeds should have been remitted to the plaintiff, until October 16, 2016, in the amount of $492,958, for a total of $5,422,540." The court also rendered judgment in favor of Pursuit Partners, PCM Master, and POF Master on counts one and two of the complaint, in favor of all the defendants on counts three through seven of the complaint, and in favor of the plaintiff on the counterclaim. This appeal and cross appeal followed.

On November 8, 2016, during the pendency of this appeal, the plaintiff, pursuant to General Statutes § 52-278k, filed a motion with the trial court seeking modification of the previously secured prejudgment remedy attachment amount to secure from PCM, POF, PIM, Schepis, Canelas, and Northeast an additional $947,731 that it anticipated would accrue during the pendency of this appeal. On the same date, the plaintiff, pursuant to Practice Book § 13-13, filed a motion with the trial court seeking supplemental asset disclosure from those defendants to assist with the securing of the additional attachment pursued by the motion to modify. On December 16, 2016, the defendants filed an opposition to the plaintiff's motion to increase the prejudgment remedy in which they argued, among other things, that § 52-278k does not permit the upward modification of a prejudgment remedy in the present circumstances.

On January 4, 2017, after a hearing, the court granted the plaintiff's motion to increase the prejudgment remedy amount by $947,731 to a total of $6,369,313, holding that § 52-278k permits the modification of a prejudgment remedy " 'at any time,' " and that the "evidence

at trial and the circumstances of the pending appeal'' constituted probable cause warranting an increased modification. On the same date, the court granted the plaintiff's motion for disclosure of assets to assist with the securing of the additional amount. The defendants thereafter filed an amended appeal to challenge these rulings. Additional facts will be set forth as necessary.

On appeal, the defendants present a myriad of claims, which principally challenge the court's interpretation of the CSA and the LPA. In particular, the defendants argue that the court improperly determined that certain defendants breached the CSA and the covenant of good faith and fair dealing, improperly rejected their breach of contract counterclaim, improperly held all of the defendants that had signed the CSA liable for the breach found by the court of a single provision thereof, and improperly determined the amount of damages. The defendants also claim that the court improperly granted the plaintiff's motion to increase the amount of the prejudgment remedy and the plaintiff's motion for discovery to assist it with securing the additional prejudgment remedy attachment. In its cross appeal, the plaintiff claims that the court improperly determined that the defendants that had not signed the CSA were not liable, improperly granted the defendants' motion to strike its Connecticut statutory causes of action, improperly determined that the plaintiff could not prevail on its conversion claim, and improperly determined the amount of damages. We now turn to each of the parties' claims.

I

The defendants first claim that the court improperly interpreted the agreements between the parties when it concluded that the plaintiff prevailed on its breach of contract claim, which alleged that the defendants had failed to pay the plaintiff its proportionate share of the proceeds from the UBS litigation. The defendants first argue that none of them could be held liable for

breach of the CSA because the distribution of the proceeds from the contingent assets was governed by the LPA, which they contend afforded the general partner discretion to withhold or reduce payment of the contingent interests. They argue that the court misinterpreted the agreements to obligate them to remit the proceeds of the contingent assets to the plaintiff as soon as practicable. We disagree.

We begin by setting forth the standard of review and legal principles relevant to this claim. "The standard of review for the interpretation of a contract is well established. Although ordinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact [subject to the clearly erroneous standard of review] . . . [when] 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]." (Internal quotation marks omitted.) *Joseph General Contracting, Inc.* v. *Couto*, 317 Conn. 565, 575, 119 A.3d 570 (2015). In light of the fact that the defendants' claim is directed at the court's interpretation of the agreements, as opposed to the court's factual findings, "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.) *Sun Val, LLC* v. *Commissioner of Transportation*, 330 Conn. 316, 325–26, 193 A.3d 1192 (2018).

In interpreting contracts pursuant to New York law,[15] "the intention of the parties should control. To discern the parties' intentions, the court should construe the agreements so as to give full meaning and effect to the material provisions . . . ." (Citations omitted.) *Excess*

[15] The parties on appeal are in agreement that New York substantive law governs this claim because of the choice of law provision in § 12 of the CSA, which provides in relevant part: "This [a]greement shall be construed and interpreted in accordance with the laws of the [s]tate of New York."

Ins. Co. Ltd. v. *Factory Mutual Ins. Co.*, 3 N.Y.3d 577, 582, 822 N.E.2d 768, 789 N.Y.S.2d 461 (2004). "Where . . . a literal construction defeats and contravenes the purpose of the agreement, it should not be so construed . . . ." (Citation omitted; internal quotation marks omitted.) *Currier, McCabe & Associates, Inc.* v. *Maher*, 75 App. Div. 3d 889, 892, 906 N.Y.S.2d 129 (2010). "In making these determinations, [t]he court should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed. Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby. Form should not prevail over substance and a sensible meaning of words should be sought . . . ." (Citations omitted; internal quotation marks omitted.) Id., 890–91.[16]

We begin our analysis with the plain language of the provision at issue. Section 4 of the CSA provided in relevant part: "PCM owns certain contingent assets that were valued at zero . . . for purposes of calculating PCM's NAV. These contingent assets include (a) PCM's proportionate interest in the UBS [l]itigation; and (b) PCM's interest in [the LBIE claim]. Nothing herein . . . shall affect in any way [the plaintiff's] pro rata share . . . of the contingent assets as of February 28, 2011. It is further understood that [the plaintiff's] continued interest in the contingent assets shall be governed by the [LPA] . . . ."

The definitive language of this section demonstrates that the parties intended to preserve the plaintiff's then existing right to receive its share of proceeds that might

[16] Ordinarily, under New York law, the first determination to be made is whether the contract, under the circumstances, is ambiguous or unambiguous. See *In re Estate of Wilson*, 138 App. Div. 3d 1441, 1442, 31 N.Y.S.3d 331 (2016); see also *Ellington* v. *EMI Music, Inc.*, 24 N.Y.3d 239, 244, 21 N.E.3d 1000, 997 N.Y.S.2d 339 (2014). Nevertheless, because neither the trial court nor the parties frame the issue in that manner, we likewise decline to take that approach.

be realized from certain contingent assets. Prior to the execution of the CSA, these contingent assets were the property of PCM, and, thus, at the time the CSA was executed, the parties carved out these contingent assets from the redemption payment and agreed that the plaintiff would be entitled to its share of these assets if they were realized.

There is no dispute among the parties regarding the foregoing interpretation; rather, the parties' views diverge as to the intended meaning of the final relevant sentence of § 4 of the CSA, which directs that the LPA governs the continued interest in the contingent assets. The defendants argue that the parties intended that *all* of the provisions of the LPA continued to govern the contingent interests. They maintain that the contingent interests were subject to the distribution and withdrawal provisions of the LPA, which they argue granted the general partner of PCM broad discretion to reduce, reinvest, or retain a portion of the contingent assets once realized. The plaintiff argues that, because the execution of the CSA constituted a withdrawal of the plaintiff from PCM, the court properly determined that the parties intended that the payment of the contingent assets was to be governed by a specific portion of the LPA withdrawal provision. We agree with the plaintiff.

In the present case, the court properly considered the language of § 4 of the CSA in conjunction with the other provisions of the CSA, the LPA, the relation of the parties, and the circumstances under which it was executed. The court first determined that the execution of the CSA had the effect of withdrawing the plaintiff as a limited partner from PCM. The court then determined that, because the plaintiff had been withdrawn from PCM, the parties intended that the payment of the contingent assets secured by the CSA was to be governed by § 5.01 (c) of the LPA, which mandated that "[a] withdrawal shall be effective on the applicable [w]ithdrawal [d]ate. In the case of any [l]imited [p]artner who

withdraws all or any portion of its [l]imited [p]artnership [i]nterest, such withdrawing [l]imited [p]artner shall be paid the amount of its withdrawal in cash as soon as practicable following the effective date of the withdrawal, subject to certain restrictions and reserves for contingent or undetermined liabilities of [PCM]." We conclude that the court's interpretation is legally and logically correct and supported by the facts in the record.

The purpose of the CSA, as a whole, was to resolve the then existing disputes between the parties, and the execution of the CSA had the effect of vitiating any remaining investment the plaintiff had in PCM. The CSA provided that, in exchange for the releases of claims, PIM was to pay the plaintiff a settlement payment, as well as a redemption payment, which represented the plaintiff's pro rata share of the NAV remaining in PCM at that time. Thus, the only financial connections between the plaintiff and PCM that existed after the execution of the CSA were the certain holdbacks and the contingent interests. The limited nature of the ongoing relationship was confirmed by PIM's letter to the other investors in PCM, sent twenty days after the CSA was executed, informing the investors that the plaintiff's claims had been settled and that the plaintiff had been mandatorily withdrawn as a limited partner in PCM. Consequently, although the CSA did not expressly state that the plaintiff had been withdrawn from PCM, these facts support the court's determination that the execution of the CSA constituted a withdrawal of the plaintiff from PCM. Thus, in light of this withdrawal, it was logical for the court to conclude that the contingent assets were to be governed by the specific withdrawal provision of § 5.01 (c) of the LPA.[17]

[17] This conclusion also disposes of the defendants' alternative argument that the plaintiff is not entitled to any of the proceeds from the UBS litigation because Pursuit Management exercised its right under the LPA on April 22, 2013 to "mandatorily withdraw" the plaintiff as a limited partner of PCM and, at that time, the UBS litigation had no value because it had been

The court's interpretation of both the CSA and the LPA together[18] is further bolstered by the relevant portion of § 5.01 (c) of the LPA that provides that a withdrawal was "subject to certain restrictions and reserves for contingent or undetermined liabilities of [PCM]." The parties specifically identified these restrictions and reserves in the CSA holdback provisions, pursuant to which $250,000 was subtracted from the plaintiff's redemption payment "for the purpose of funding necessary costs . . . associated with the ongoing [UBS litigation] . . . ." As a result, it is apparent that the parties anticipated that further expenditure was required to pursue the contingent assets, and, thus, they specifically assented to the potential reduction of that amount in the CSA. This reduction is in conformance with the foregoing language of the LPA.

The fatal problem with the defendants' proffered interpretation is that it fails to consider the pertinent language of the CSA in conjunction with the LPA and the circumstances in which the CSA was executed. The court properly determined that the defendants' position is untenable because, in view of the fact that the plaintiff no longer was a limited partner in PCM, it would contravene the purpose of the CSA to permit the defendants to retain or reinvest the contingent assets once they were realized. We agree that it would be illogical to conclude that, after the withdrawal of the entire NAV

dismissed. Because the plaintiff was withdrawn as a limited partner when the CSA was executed, it could not be withdrawn a second time. Furthermore, the defendants' argument that the UBS litigation had no value when it was dismissed in 2012 is disingenuous in light of their counsel's December 4, 2012 letter to the limited partners, including the plaintiff, telling them that despite the dismissal, counsel expected ultimately to prevail in the litigation.

[18] We disagree with the defendants' interpretation of the court's decision as concluding only that they had breached the CSA; rather, the court concluded that certain defendants had breached both the CSA and the LPA when they failed to remit the contingent assets as soon as practicable. See *In re James O.*, 322 Conn. 636, 649, 142 A.3d 1147 (2016) (interpretation of court's decision presents question of law).

of the plaintiff's investment, the realization of the contingent assets would constitute a reinvestment of the plaintiff back into PCM, and the defendants could then utilize those funds however they wished. This myopic interpretation contravenes the purposes of the CSA. Instead, it was logical for the court to conclude that, following PCM's receipt of proceeds from the realization of a contingent asset, the plaintiff, pursuant to § 4 of the CSA and § 5.01 (c) of the LPA, was entitled to its pro rata share of those proceeds "in cash as soon as practicable following the effective date of the withdrawal . . . ." Accordingly, we conclude that the court's interpretation was logically and legally correct and was supported by the facts in the record.

Consequently, we conclude that the court properly held that the plaintiff proved a breach of contract because it is uncontroverted that the defendants settled the UBS litigation for $36 million, and the plaintiff has not received its portion of those proceeds in contravention of the CSA and the LPA.

II

The defendants next claim that the court improperly rejected their breach of contract counterclaim, which alleged that they were relieved of their obligation to remit the UBS litigation proceeds because the plaintiff had breached the CSA. The defendants argue that the court erroneously found that (1) the plaintiff had not materially breached the CSA, and (2) the defendants' prior partial delayed payment of the LBIE claim to the plaintiff relieved the plaintiff from its obligations under the confidentiality provision. We disagree.

We begin by setting forth the standard of review and legal principles relevant to this claim. "The determination of whether a contract has been materially breached is a question of fact that is subject to the clearly erroneous standard of review. . . . 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." (Citations omitted; internal quotation marks omitted.) *Efthimiou* v. *Smith*, 268 Conn. 487, 493–94, 846 A.2d 216 (2004).

Under New York law, "[t]he elements of a cause of action for breach of contract are (1) formation of a contract between plaintiff and defendant; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage . . . ." (Citation omitted; internal quotation marks omitted.) *Clearmont Property, LLC* v. *Eisner*, 58 App. Div. 3d 1052, 1055, 872 N.Y.S.2d 725 (2009). A party's prior material breach relieves the nonbreaching party from performing its remaining obligations under the contract. *U.W. Marx, Inc.* v. *Koko Contracting, Inc.*, 124 App. Div. 3d 1121, 1122, 2 N.Y.S.3d 276, appeal denied, 25 N.Y.3d 904, 30 N.E.3d 167, 7 N.Y.S.3d 276 (2015); *N450JE, LLC* v. *Priority 1 Aviation, Inc.*, 102 App. Div. 3d 631, 632, 959 N.Y.S.2d 156 (2013).

"[A] 'material breach' is a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract. In other words, for a breach of contract to be material, it must 'go to the root' or 'essence' of the agreement between the parties, or be one which touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract, or affect the purpose of the contract in an important or vital way. A breach is 'material' if a party fails to perform a substantial part of the contract or one or more of its essential terms or conditions, the breach substantially defeats the contract's purpose, or the breach is such that upon a reasonable interpretation of the contract, the parties considered the breach as vital to the existence of the contract.

Other courts have defined a breach of contract as 'material' if the promisee receives something substantially less or different from that for which the promisee bargained. In many cases, a material breach of contract is proved by the established amount of the monetary damages flowing from the breach; however, proof of a specific amount of monetary damages is not required when the evidence establishes that the breach was so central to the parties' agreement that it defeated the essential purpose of the contract. Conversely, where a breach causes no damages or prejudice to the other party, it may be deemed not to be 'material.' " (Footnotes omitted.) 23 R. Lord, Williston on Contracts (4th Ed. 2018) § 63:3, pp. 482–84; see *Robert Cohn Associates*, *Inc.* v. *Kosich*, 63 App. Div. 3d 1388, 1389, 881 N.Y.S.2d 235 (2009) ("a party's obligation to perform under a contract is only excused where the other party's breach of the contract is so substantial that it defeats the object of the parties in making the contract" [internal quotation marks omitted]); *Metropolitan National Bank* v. *Adelphi Academy*, Docket No. 7389/08, 2009 N.Y. Misc. LEXIS 1261, *10 (N.Y. Sup. May 27, 2009) (decision without published opinion, 886 N.Y.S.2d 68 [N.Y. Sup. 2009]) ("for a breach to be material it must be so substantial that it defeats the object of the parties in making the contract; the breach must go to the root of the agreement between the parties").

Section 7 of the CSA was a confidentiality provision in which the parties agreed, among other things, "to maintain in the strictest confidence and not disclose . . . the contents and terms of [the CSA] . . . [and] not to use or provide any information relating to any claim arising out of an investment in the [f]unds to any other person in connection with the initiation of any lawsuit, claim, arbitration or action related to or concerning any investment in PCM, POF or any other investment vehicle managed by PIM." There is no dispute among the parties with respect to the interpretation of this provision.

A

The defendants first argue that the court erroneously found that the plaintiff had not materially breached the CSA[19] by violating § 7 when it requested that Reed Smith contact the SEC regarding the investigation, commenced the 2013 New York action seeking an injunction to prevent PCM from utilizing the UBS litigation holdback, and colluded with the Schneider Group. We conclude that the court's finding was not clearly erroneous.

In the present case, as indicated previously in this opinion, the purpose of the CSA was to settle and resolve the disputes among the parties. At the outset of the CSA, it is acknowledged that the parties "wish[ed] to resolve any and all disputes . . . between them," and that the "sole purposes" of the CSA were to end "the [2010] New York [a]ction and the [a]rbitration . . . ." The objective of the CSA, therefore, was the resolution of the pending claims, which entailed the plaintiff's withdrawal and release of claims and the defendants' distribution of certain payments to the plaintiff. Thus, the court's finding that the plaintiff's actions did not constitute a material breach of the CSA is supported by the evidence that § 7 was not central to the CSA.

Moreover, the court's finding is supported by the evidence regarding the circumstances in which these communications were made. Philip Chapman, the managing member of the general partner of the plaintiff, testified that the then ongoing SEC investigation was viewed as an impediment to the return of the plaintiff's holdbacks, and that the communications were intended to stop the legal fees from draining those holdbacks. Thus, the plaintiff's communications to the SEC were made regarding an ongoing investigation in which the

[19] The court, without extensive elaboration, specifically concluded that the plaintiff's actions constituted a partial breach that caused the defendants to suffer no damages.

plaintiff's interests were potentially involved. Further, there was evidence presented that the 2013 New York action was filed by the plaintiff to obtain an accounting and an injunction that would enjoin the defendants from accessing or utilizing the plaintiff's holdbacks, which were secured by the CSA, because the defendants had failed to provide the plaintiff with periodic updates as required by the CSA. Essentially, the plaintiff commenced the 2013 New York action in response to the defendants' purported breaches of the CSA. In addition, there was evidence that PIM, prior to the November 16, 2011 letter from Reed Smith, already had disclosed to PCM's investors, including the Schneider Group, that the claims brought by the plaintiff against PCM had been resolved by the CSA.

This evidence supports the court's findings that the plaintiff, by engaging in these communications, did not materially breach the essential purpose of the CSA, which was to resolve the then existing disputes among the parties. The evidence that the plaintiff sought information from the SEC regarding an investigation that may affect the plaintiff's interest, filed an action that alleged that the defendants had breached the CSA, and communicated with the Schneider Group after it already had been advised of the CSA supports the court's finding. In fact, each of these actions were taken to enforce the plaintiff's rights that were at the core of the CSA. The defendants' argument would lead to the absurd result that the defendants could act contrary to the CSA and the plaintiff could do nothing about it because disclosing the defendants' actions would violate the CSA's confidentiality provision. The court was not required to conclude that the parties intended such an outcome. See *Davis* v. *Nyack Hospital*, 130 App. Div. 3d 455, 455–56, 13 N.Y.S.3d 371 (2015) (party permitted to disclose terms of confidential settlement agreement in order to enforce agreement); *Osowski* v.

AMEC Construction Management, Inc., 69 App. Div. 3d 99, 106, 887 N.Y.S.2d 11 (2009) ("disclosure of the terms of a settlement agreement by a settling party to a nonsettling party may be appropriate, despite the presence of a confidentiality clause in the agreement, where the terms of the agreement are 'material and necessary' to the nonsettling party's case"). Consequently, we conclude that the court's finding that the plaintiff had not materially breached the CSA was not clearly erroneous.

B

We now turn to the defendants' second claim that the court erroneously found that the defendants' prior partial delayed payment of the LBIE claim to the plaintiff relieved the plaintiff from its obligations under the confidentiality provision.[20] The defendants reassert their argument, which we rejected in part I of this opinion, that the payment of the LBIE claim proceeds, as a contingent asset, was subject to reduction and reinvestment pursuant to the LPA.[21] Although we need not reach this issue given our conclusion in part II A of this opinion that the plaintiff's disclosures did not constitute a material breach of the CSA, we, nonetheless, conclude that the court's finding that any claimed breach by the plaintiff was excused by the defendants' prior breach of the CSA was not clearly erroneous.

[20] We emphasize that the payment of the LBIE claim proceeds is the subject of the pending 2013 New York action; see footnote 10 of this opinion; and those proceeds are only indirectly implicated here as part of the defendants' counterclaim in which they alleged that they were excused from remitting the proceeds from the UBS litigation.

[21] The gravamen of the defendants' argument on this point is founded in anticipatory repudiation, which requires "proof of a definite and final communication by [the] plaintiff of its intention not to perform . . . ." (Citation omitted.) *1625 Market Corp.* v. *49 Farm Market, Inc.*, 165 App. Div. 3d 426, 426, 84 N.Y.S.3d 142 (2018). This argument is inapposite because there is no allegation that the plaintiff communicated to the defendants that it intended to avoid its obligations under the agreement prior to engaging in the contested communications, or at any time.

In the present case, there was an abundance of evidence to support the court's finding. First, the language of the agreements, as outlined previously in part I of this opinion, supports the court's conclusion that the CSA, read in conjunction with the LPA, obligated the payment of the contingent assets, including the pro rata share of the proceeds of the LBIE claim, to the plaintiff "in cash as soon as practicable following the effective date of the withdrawal . . . ." As the contingent assets could not have been remitted on the date of the execution of the CSA because they had not yet been realized, "as soon as practicable following the effective date of the withdrawal," effectively was the date on which the proceeds from the LBIE claim were received by PCM. Here, shortly after the CSA was signed, the LBIE claim was sold for $9,334,141.55, and, on June 1, 2011, those funds were received in PCM Master's account. Accordingly, the plaintiff was entitled to receive its pro rata share of those proceeds; see footnote 9 of this opinion; approximately $2,994,729.76, as soon as practicable after June 1, 2011.

Nevertheless, the evidence demonstrated that no portion of the LBIE claim proceeds were remitted to the plaintiff until October, 2011, when the plaintiff received $1,022,022.36. In response to requests from Reed Smith as to the valuation of this amount, DLA Piper stated that it had calculated that the plaintiff's share of the LBIE claim was worth $2,132,559, which amount represented 32.08 percent of PCM's 90 percent interest in the LBIE claim owned by PCM Master, minus a performance fee. Neither of DLA Piper's communications, however, provided an explanation as to the basis for the reduction for the performance fee or the balance reserve, nor the reason for which the defendants had remitted less than 48 percent of the total amount that they had calculated the plaintiff's interest in the LBIE claim to be worth. Two years later, shortly after the commencement of the 2013 New York action, the plain-

tiff received the second and final partial distribution of approximately $700,000 in additional proceeds from the LBIE claim, for a total distribution of $1,722,022.36, which was approximately 81 percent of the total amount that the defendants had calculated the plaintiff's interest in the LBIE claim to be worth.

The foregoing evidence supports the court's finding that the defendants were in material breach of their obligations under the CSA in October and November, 2011, which was prior to any of the plaintiff's aforementioned communications. Even if we assume that the defendants' calculation as to the plaintiff's proportionate share of the LBIE claim was correct, the evidence that, prior to any of the contested communications, the plaintiff received less than one half of what the defendants had calculated was the plaintiff's entitlement, more than four months after the funds had been received by PCM without sufficient justification, supports the court's finding that the defendants had materially breached the CSA. On the basis of the foregoing, we conclude that the court's finding that the defendants materially had breached the CSA prior to the plaintiff's purported breach was not clearly erroneous. Therefore, we conclude that the court properly rejected the defendants' breach of contract counterclaim.

III

The defendants also claim that the court improperly concluded that the plaintiff prevailed on its breach of the implied covenant of good faith and fair dealing claim. In support, the defendants reassert their argument, which we rejected in parts I and II of this opinion, that neither the LPA nor the CSA mandate that they remit the entirety of the plaintiff's proportionate share of the UBS litigation proceeds. They argue that, in the absence of such a mandate, the court erroneously found

them liable for breach of the implied covenant of good faith and fair dealing.[22] We disagree.

We begin by setting forth the standard of review and legal principles relevant to this claim. The question of whether certain conduct breached the duty of good faith and fair dealing is a question of fact subject to the clearly erroneous standard of review. See *Renaissance Management Co.* v. *Connecticut Housing Finance Authority*, 281 Conn. 227, 240, 915 A.2d 290 (2007); see also *Landry* v. *Spitz*, 102 Conn. App. 34, 47, 925 A.2d 334 (2007).

Under New York law, "[i]mplicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance. . . . This embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. . . . Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion . . . . The implied covenant of good faith and fair dealing is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement

[22] The defendants also argue that the plaintiff cannot prevail on its breach of the implied covenant of good faith and fair dealing claim because it is merely a recast breach of contract claim. This argument, unlike the defendants' similar claim asserted in part IV of this opinion, was not raised before the trial court and, therefore, it is not properly preserved. See *Eubanks* v. *Commissioner of Correction*, 329 Conn. 584, 598, 188 A.3d 702 (2018) (claim is properly preserved if "articulated below with sufficient clarity" [internal quotation marks omitted]); *Chief Disciplinary Counsel* v. *Rozbicki*, 326 Conn. 686, 695, 167 A.3d 351 (2017) (claim is not reviewable if raised for first time on appeal), cert. denied, U.S. , 138 S. Ct. 2583, 201 L. Ed. 2d 295 (2018); see also Practice Book § 60-5 ("[t]he court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial").

. . . . The implied covenant of good faith encompasses any promises which a reasonable person in the position of the promisee would be justified in understanding were included in the agreement, and prohibits either party from doing anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract . . . .'' (Citations omitted; internal quotation marks omitted.) *Atlas Elevator Corp.* v. *United Elevator Group, Inc.*, 77 App. Div. 3d 859, 861, 910 N.Y.S.2d 476 (2010).

In the present case, the court found that the signatory defendants, PIM, POF, PCM, Schepis, and Canelas, deprived the plaintiff of its right to receive the benefits under the CSA. In particular, the court found: ''The signatory defendants had a clear obligation under the CSA to provide the plaintiff with 32.08 percent of PCM's interest in the UBS [Litigation] proceeds as soon as practicable after receipt. The defendants have done everything but that. The defendants have conducted themselves in a manner in which they have wilfully attempted to thwart the plaintiff's ability to receive the benefits of the CSA. Rather than provide the plaintiff with 32.08 percent of PCM's interest in the UBS [Litigation] proceeds, they have raised claims and counterclaims that arise out of alleged conduct of the plaintiff, which conduct was justified based upon their prior breaches of the CSA with regard . . . to the LBIE [claim] proceeds. At every step of the process, the defendants have conducted themselves not in a way to provide the plaintiff with [its] contractual benefit, but rather to maintain control, use, and possession of as much of the mon[eys] that the plaintiff had a contractual right to for as long as possible in order to maintain the benefit of those mon[eys] for themselves. Accordingly, the court finds that the signatory defendants are all liable for the breach of the covenant of good faith and fair dealing contained in the CSA. Indeed, it is remarkable that [al]though the plaintiff executed the CSA with

the intent of resolving its issues and ending litigation and disputes with the defendants, the defendants' wilful conduct in failing to comply with the CSA has been the primary reason for the continued litigation and excessive expenses incurred by the parties since 2011. The defendants' failure to provide information to the plaintiff until ordered by the court, which might have resolved some of the issues in advance of the litigation, is indicative of their breach of this covenant. The nonsignatory defendants, not having a contractual obligation to the plaintiff, can have no liability under the covenant implied by that contractual relationship."

We conclude that these subsidiary factual findings support the court's finding that at least some of the defendants breached the implied covenant of good faith and fair dealing. At the outset, we reject, for the reasons outlined in parts I and II of this opinion, the defendants' contention that they had no obligation under the CSA to remit the UBS litigation proceeds to the plaintiff. Consequently, the court's findings that the defendants failed to remit those proceeds, wilfully attempted to thwart the plaintiff's ability to receive those proceeds, raised unsupported claims and counterclaims that alleged misconduct by the plaintiff, maintained control over the proceeds so as to retain them as long as possible for their own benefit, continued to prolong the litigation and cause excessive expenses, and failed, until ordered by the trial court, to provide information to the plaintiff that could have resolved some of the issues in advance of this litigation, all support the court's finding. Therefore, we conclude that the court properly concluded that the plaintiff prevailed on its implied covenant of good faith and fair dealing claim.

IV

Because it relates to the extent of the defendants' liability, we next address the plaintiff's claim in its cross appeal that the court improperly concluded that the

plaintiff could not prevail on its conversion claim. The defendants argue that the court properly concluded that a breach of contract claim, alone, cannot support a claim for conversion. The plaintiff argues that the UBS litigation proceeds were a specifically identifiable thing controlled by the plaintiff. We conclude that the court properly concluded that the plaintiff could not prevail on its conversion claim because it merely was a recasting of its breach of contract claim.

We begin by setting forth the standard of review and legal principles relevant to this claim. This claim requires us to interpret the plaintiff's pleadings, which is a question of law subject to plenary review. See *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, 314 Conn. 433, 462, 102 A.3d 32 (2014). Under New York law,[23] "[i]n order to succeed on a cause of action to recover damages for conversion, a plaintiff must show (1) legal ownership or an immediate right of possession to a specific identifiable thing and (2) that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff's right . . . ." (Citations omitted.) *Giardini* v. *Settanni*, 159 App. Div. 3d 874, 875, 70 N.Y.S.3d 57 (2018). "The mere right to payment cannot be the basis for a cause of action alleging conversion . . . ." (Citations omitted; internal quotation marks omitted.) *Zendler Construction Co.* v. *First Adjustment Group, Inc.*, 59 App. Div. 3d 439, 440, 873 N.Y.S.2d 134 (2009).

[23] The plaintiff argues in one sentence, incorporating its contentions advanced in part V of this opinion, that the court improperly determined that New York law, as opposed to Connecticut law, applies to the plaintiff's conversion claim. We decline to review this claim because the plaintiff offers no independent analysis with respect to the applicability of § 12 of the CSA to its conversion claim. See *Estate of Rock* v. *University of Connecticut*, 323 Conn. 26, 33, 144 A.3d 420 (2016) ("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.]); see also *Commission on Human Rights & Opportunities ex rel. Arnold* v. *Forvil*, 302 Conn. 263, 268 n.6, 25 A.3d 632 (2011) (disavowing multiplicity of claims approach).

"It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated . . . . Put another way, where the damages alleged were clearly within the contemplation of the written agreement . . . [m]erely charging a breach of a duty of due care, employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim . . . ." (Citations omitted; internal quotation marks omitted.) *Dormitory Authority* v. *Samson Construction Co.*, 30 N.Y.3d 704, 711, 94 N.E.3d 456, 70 N.Y.S.3d 893 (2018).

"To determine whether a tort claim lies, we have also evaluated the nature of the injury, how the injury occurred and the harm it caused . . . . However, we have made clear that where [the] plaintiff is essentially seeking enforcement of the bargain, the action should proceed under a contract theory . . . ." (Citations omitted; internal quotation marks omitted.) Id. "Generally, a tort cause of action that is based upon the same facts underlying a contract claim will be dismissed as a mere duplication of the contract cause of action . . . particularly where . . . both seek identical damages . . . ." (Citations omitted.) *Duane Reade* v. *SL Green Operating Partnership, L.P.*, 30 App. Div. 3d 189, 190, 817 N.Y.S.2d 230 (2006).

"While a cause of action alleging conversion cannot be predicated upon a mere breach of contract, the contracting party may also be held liable in tort where the conduct which constitutes a breach of contract also constitutes a breach of a duty distinct from, or independent of, the breach of contract . . . ." (Citations omitted.) *Connecticut New York Lighting Co.* v. *Manos Business Management Co.*, 171 App. Div. 3d 698, 699, 98 N.Y.S.3d 101 (2019); see *New York* v. *Shellbank Restaurant Corp.*, 169 App. Div. 3d 581, 582, 95 N.Y.S.3d 60 (conversion claim duplicative of breach of contract claim because "there were no facts pleaded beyond

those that support the contract claim or that would support the existence of a duty separate from the parties' agreement"), appeal dismissed, 33 N.Y.3d 1061, 127 N.E.3d 312, 103 N.Y.S.3d 354 (2019); *Greater Bright Light Home Care Services, Inc.* v. *Jeffries-El*, 151 App. Div. 3d 818, 824, 58 N.Y.S.3d 68 (2017) ("cause of action alleging conversion cannot be predicated on a mere breach of contract" [internal quotation marks omitted]).

In count four of its complaint, the plaintiff incorporated the prior three counts, including the breach of contract count, and alleged, in one paragraph, that the defendants engaged in conversion because "[the plaintiff], being the owner and entitled to the possession and payment of its share of the settlement funds from the UBS litigation and the sums advanced by [the plaintiff] in connection with the UBS litigation, made demand for payment of the sums to which it is entitled, and the defendants . . . including . . . Schepis and Canelas, have refused and neglected to return and pay over to [the plaintiff] the sums to which it is entitled and, without authority from [the plaintiff], converted the same to their own use." The court rejected the plaintiff's conversion claim and rendered judgment on that count in favor of the defendants because, in relevant part: "The plaintiff had a contractual right to be paid certain sums of money pursuant to the CSA. It had neither ownership nor possession of the money itself. . . . Here, the property was neither specific nor did the plaintiff have possession or control of the settlement of proceeds prior to the defendants' conduct. The plaintiff has ple[aded] and proven a breach of contract claim; without more, that claim does not establish conversion." (Citations omitted.)

We need not decide whether the court properly determined that the plaintiff failed to prove conversion on the basis that the UBS litigation proceeds were a specifically identifiable interest because we agree with the court that the plaintiff's conversion claim is merely a

recasting of its breach of contract claim. The plaintiff's conversion claim seeks the same damages as the breach of contract claim, namely, its proportionate share of the UBS litigation proceeds. The plaintiff's conversion claim also alleges the same breach of duty, essentially, the defendants' obligation pursuant to the CSA and the LPA to remit the UBS litigation proceeds to the plaintiff. Accordingly, the plaintiff seeks to enforce the mandates of the CSA and the LPA that the defendants remit its share of the UBS litigation proceeds. In addition, the plaintiff's conversion claim is based on the exact allegations as its breach of contract claim because the plaintiff's complaint entirely incorporates the breach of contract allegations into its count alleging conversion. Indeed, on appeal, the plaintiff does not dispute the court's holding that its conversion claim was simply a breach of contract claim. Therefore, we conclude that the court properly determined that the plaintiff could not prevail on its conversion claim.

V

The plaintiff also claims that the court improperly granted the defendants' motion to strike its Connecticut statutory causes of action on the ground that those claims are barred by § 12 of the CSA, which provides in relevant part that "[a]ny disputes or litigation arising out of this [a]greement shall be governed by New York law." The plaintiff argues that the court improperly interpreted the plain language of § 12 of the CSA to conclude that New York law applies so as to bar its Connecticut statutory causes of action.[24] We disagree.

[24] On appeal, the plaintiff also argues that § 12 of the CSA did not bar its Connecticut statutory causes of action because public policy mandates that Connecticut law apply. We decline to review this claim because it is raised for the first time on appeal and, therefore, is not properly preserved. See *Eubanks* v. *Commissioner of Correction*, 329 Conn. 584, 598, 188 A.3d 702 (2018) (claim is properly preserved if "articulated below with sufficient clarity" [internal quotation marks omitted]); *Chief Disciplinary Counsel* v. *Rozbicki*, 326 Conn. 686, 695, 167 A.3d 351 (2017) (claim is not reviewable if raised for first time on appeal), cert. denied, U.S. , 138 S. Ct. 2583,

The following additional facts and procedural history are relevant to our resolution of this claim. On May 17, 2016, the defendants filed a motion to strike all seven counts of the plaintiff's complaint. The defendants argued in their memorandum of law in support, in relevant part, that counts five and six of the complaint, which alleged Connecticut statutory causes of action sounding in statutory theft and CUTPA, are barred by the choice of law provision in § 12 of the CSA, which provides in relevant part: "Any disputes or litigation arising out of this [a]greement shall be governed by New York law." On June 8, 2016, the plaintiff filed a memorandum of law in opposition to the defendants' motion to strike in which it argued that the choice of law provision was not broad enough to preclude the Connecticut statutory causes of action.

On June 20, 2016, a hearing was held on the defendants' motion to strike, at which the parties advanced arguments consistent with their written memoranda. At the conclusion of the hearing, the court issued an oral ruling granting the defendants' motion to strike as to counts five and six, and denying the motion as to the remainder of the counts. The court compared and contrasted several decisions cited by the parties and concluded that although § 12 of the CSA, the choice of law provision "is not quite as broad" as compared to

201 L. Ed. 2d 295 (2018). In its written opposition to the defendants' motion to strike, the plaintiff did not argue that § 12 of the CSA was violative of the public policy of Connecticut. At oral argument on the defendants' motion to strike, although the plaintiff's counsel argued in one sentence that Connecticut has an interest in the resolution of this dispute, the plaintiff's counsel did not advance an oral argument that § 12 of the CSA violated the public policy of Connecticut, that New York had no substantial relationship to the parties or transaction, or that New York law is contrary to the fundamental policy of Connecticut. See *Elgar* v. *Elgar*, 238 Conn. 839, 850, 679 A.2d 937 (1996) (concluding that Connecticut law favors choice of law provisions unless application of foreign state law violated Connecticut public policy). To entertain this argument for the first time on appeal would constitute an ambush of the trial judge and the defendants. See *Forgione* v. *Forgione*, 186 Conn. App. 525, 530, 200 A.3d 190 (2018).

other similar cases, "it is still quite broad. It is difficult to see how the specific claims alleged in counts five and six being litigated in this case do not arise out of the [CSA]. Those counts have as the center of the alleged wrongful conduct of the defendants various wrongful [conduct] and schemes that would further their efforts to withhold from the [plaintiff] the amount the [plaintiff] claim[s] [is] due under the CSA. As such, while those counts do not rest on the validity, construction, and enforcement of the agreement, they do arise out of the obligations of the defendants that emanate from that agreement. Sophisticated parties advised by sophisticated counsel chose to have all such disputes governed by New York law." The court, thus, determined that the plaintiff could not bring Connecticut statutory actions against the defendants because, pursuant to § 12 of the CSA, New York law applied to the dispute among the parties.

We next set forth the standard of review and legal principles relevant to this claim. We afford plenary review to this claim because it stems from the court's decision granting a motion to strike; *Levin* v. *State*, 329 Conn. 701, 706, 189 A.3d 572 (2018); and requires us to interpret definitive contract language; see *Joseph General Contracting, Inc.* v. *Couto*, supra, 317 Conn. 575. We incorporate the New York principles of contract interpretation as outlined in part I of this opinion.[25]

Pursuant to New York law, the applicability of a choice of law clause to a particular claim is entirely dependent on the exact language of the clause and

[25] On appeal, the plaintiff acknowledges that New York contractual interpretation principles apply to determine whether the language of § 12 of the CSA bars its Connecticut statutory causes of action, yet, it also argues that Connecticut law leads to the same result. Likewise, the defendants inconsistently argue that the contractual interpretation principles of both states apply. We apply the contract interpretation principles of New York, not Connecticut, because that is the law the parties, in the sentence prior to the one at issue, specifically agreed applied to the interpretation of the CSA: "This [a]greement shall be construed and interpreted in accordance with the laws of the [s]tate of New York."

the nature of the claim. For instance, "[u]nder New York law . . . tort claims are outside the scope of contractual choice-of-law provisions that specify what law governs construction of the terms of the contract . . . ." (Citation omitted; internal quotation marks omitted.) *Coco Investments, LLC* v. *Zamir Manager River Terrace, LLC*, Docket No. 600137-2008, 2010 WL 761237, *5 n.1 (N.Y. Sup. March 3, 2010) (decision without published opinion, 907 N.Y.S.2d 99 [N.Y. Sup. 2010]); see, e.g., *Twinlab Corp.* v. *Paulson*, 283 App. Div. 2d 570, 571, 724 N.Y.S.2d 496 (2001) (choice of law clause applicable to "validity, interpretation, construction and performance" of consulting agreement did not apply to "tort cause of action [that] was based on the appellant's alleged criminal activities, which were unrelated to his duties as a consultant" [internal quotation marks omitted]).

On the other hand, "the use of 'arising out of' language in a contract is considered unambiguous and viewed as reasonably supporting only a broad reading. For example, in the arbitration context, the language 'arising out of' a specified contract is considered 'broadly worded, and hence, encompasses [a plaintiff's] claims of fraudulent inducement directed at the agreement itself.' " *Nycal Corp.* v. *Inoco PLC*, Docket No. 98-7058, 1998 WL 870192, *2 (2d Cir. December 9, 1998) (decision without published opinion, 166 F.3d 1201 [2d Cir. 1998]). "The same analysis of the phrase 'arising out of' is found in insurance law cases." Id., *3; see, e.g., *Turtur* v. *Rothschild Registry International, Inc.*, 26 F.3d 304, 309–10 (2d Cir. 1994) (choice of law clause applicable to "any controversy or claim arising out of or relating to this contract or breach thereof" was "sufficiently broad to cover tort claims as well as contract claims" [emphasis omitted]); *Capital Z Financial Services Fund II, L.P.* v. *Health Net, Inc.*, 43 App. Div. 3d 100, 105, 109, 840 N.Y.S.2d 16 (2007) (choice of law clause

applicable to " 'all issues' concerning 'enforcement of the rights and duties of the parties' " was broad enough to cover tort claims).

In count five of its complaint, the plaintiff alleged, among other things, that the CSA secured its legal ownership in the proceeds of the UBS litigation and that the defendants, without any valid basis, permanently deprived the plaintiff of those proceeds. The plaintiff further alleged that the defendants used the UBS litigation proceeds for themselves and, thus, the defendants' conduct constituted theft under Connecticut's statutory theft statute, § 52-564. In count six of its complaint, the plaintiff alleged that the defendants repeatedly breached the CSA, misappropriated the plaintiff's share of the UBS litigation proceeds, and commenced vexatious and frivolous litigation and arbitration against the plaintiff. The plaintiff alleged that the defendants' conduct constituted unfair and deceptive trade practices in violation of Connecticut's CUTPA statute, General Statutes § 42-110b (a).

We conclude that the relevant language of § 12 of the CSA that "[a]ny disputes or litigation arising out of this [a]greement shall be governed by New York law," barred the plaintiff's statutory theft and CUTPA causes of action. The language "[*a*]*ny disputes or litigation arising out of this* [*a*]*greement*" is broad. (Emphasis added.) The language of this section does not apply only to breach of contract causes of action, and we decline to read it to give it that effect. If the parties intended § 12 to apply only to a claim of breach of the CSA, they could have included such language. Instead, the parties agreed that New York law would apply to *any* disputes or litigation *arising* out of the CSA.

In the present case, the plaintiff's extracontractual statutory causes of action arise out of the CSA because the basis for both claims stems from the CSA. In count

five, the plaintiff alleged that the defendants withheld and utilized for themselves the UBS litigation proceeds. In count six, the plaintiff alleged that the defendants breached the CSA and failed to provide the plaintiff its share of the UBS litigation proceeds. The foundation for both of these claims is the CSA and the defendants' failure to remit the plaintiff's share of the proceeds of the UBS litigation secured thereby. Accordingly, both of these counts constitute a dispute or litigation that arises from the CSA and, thus, are barred by the parties' agreement in § 12 of the CSA that New York law would apply to such claims. Therefore, we conclude that the court properly granted the defendants' motion to strike counts five and six of the plaintiff's complaint.

VI

Having addressed the court's conclusions as to the viability of each of the plaintiff's claims in its complaint that are challenged on appeal, we now turn to the question of which of the defendants are liable to the plaintiff for its claims of breach of contract and the implied covenant of good faith and fair dealing. The defendants claim that the court improperly interpreted the CSA to conclude that all of the defendants that were signatories to the CSA—PIM, POF, PCM, Schepis, and Canelas—were jointly and severally liable for nonpayment of the UBS litigation. The defendants argue that, because payment of the UBS litigation was governed by the LPA, not the CSA, only Northeast, as the general partner of PCM at the time the UBS litigation was resolved, had the obligation to remit the UBS litigation. The plaintiff argues that the court's conclusion was proper, yet, in its cross appeal, it claims that all of the defendants should be held liable pursuant to a piercing the corporate veil or alter ego theory, and that the court improperly declined to consider these theories despite the fact that they had been pleaded and briefed. We reject the plaintiff's piercing and alter ego claims, and we agree with the defendants that the court improperly con-

cluded that all of the defendant signatories to the CSA are liable. We, however, conclude that PIM, PCM, and Northeast are liable for the nonpayment of the UBS litigation proceeds.

A

The plaintiff claims that the court improperly declined to consider its piercing the corporate veil and alter ego theories. It argues that, if the court had considered these theories, it would have determined that all of the defendants were liable for nonpayment of the UBS litigation proceeds. We disagree with the plaintiff's interpretation of the trial court's judgment.

"The interpretation of a trial court's judgment presents a question of law over which our review is plenary. . . . As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole." (Internal quotation marks omitted.) *Olson* v. *Mohammadu*, 310 Conn. 665, 682, 81 A.3d 215 (2013). "[A] trial court opinion must be read as a whole, without particular portions read in isolation, to discern the parameters of its holding." (Internal quotation marks omitted.) *In re Jacob W.*, 330 Conn. 744, 782, 200 A.3d 1091 (2019) (*D'Auria*, *J.*, dissenting).

The following additional procedural history is relevant to this issue. In its complaint, the plaintiff alleged, in describing the relevant parties, that "[t]he defendant entities are all owned or controlled by the defendants Schepis and Canelas"; that "[a]ll of the defendant entities, and nonparty Pursuit Management, are part of the Pursuit Hedge Fund Group, a self-described 'unitary enterprise' under the exclusive control of two individu-

als . . . Schepis and Canelas"; that "[t]he Pursuit Hedge Fund Group includes Pursuit Partners and PIM—both of which are wholly owned and controlled by Schepis and Canelas"; that "[a]t all relevant times . . . Schepis and Canelas controlled and continue to control each of the corporate defendants, and Schepis and Canelas are alter egos of each of the entities they control"; that "Schepis and Canelas have stated in court filings, including in the UBS litigation, that the Pursuit entities operate as a 'unitary enterprise' and are operated as a single entity"; and that "[t]he structure of the Pursuit entities is completely integrated."

In its memorandum of decision in which it rendered judgment partially in favor of the plaintiff, the court held that "[t]he nonsignatory defendants, other than Northeast, cannot be held liable to the plaintiff for breach of a contract or an implied covenant in that contract to which they are not a party. Notably, the plaintiff did not plead a count against any of these defendants sounding in a piercing of the corporate veil or alter ego [theory]. The plaintiff seems to rely upon the finding by the court in the UBS litigation; [*Pursuit Partners, LLC* v. *UBS AG*, Superior Court, judicial district of Stamford-Norwalk, Complex Litigation Docket, Docket No. CV-08-4013452-S (July 3, 2014) (58 Conn. L. Rptr. 501)]; concerning the interrelationship and unitary nature of the various Pursuit hedge fund entities, but the determination of the court in its decision to reconsider its prior ruling dismissing the action was a determination that related to the standing of the plaintiff[s] [in that action]. Nothing in that decision implies or suggests that the same concepts are applicable or control the decision of whether or not nonsignatory defendants are liable for the conduct of the signatory defendants. Indeed, the standards discussed by the court in its memorandum of decision are quite foreign to the traditional standards applied in New York and Connecticut with regard to

piercing a corporate veil." Nevertheless, the court utilized the plaintiff's unitary enterprise theory to conclude that all of the defendants that had signed the CSA were liable. The court held that "[t]he evidence is clear that all of the Pursuit entities were controlled by Schepis and Canelas in a variety of capacities. Indeed, in the UBS litigation, [the plaintiffs] took the position that the Pursuit entities were, and the UBS court found that, the various Pursuit entities constituted a 'unitary set of tightly related entities all working for a common purpose . . . .' [*Pursuit Partners, LLC* v. *UBS AG*, supra, 502]. The evidence before this court is consistent with that finding."

In the present case, construing the court's judgment as a whole, it is apparent that the court, although recognizing that the plaintiff had not separately pleaded these theories, had considered and rejected the plaintiff's piercing the corporate veil and alter ego theories. The court rejected the plaintiff's theories on the ground that the plaintiff's reliance on the holding of *Pursuit Partners, LLC* v. *UBS AG*, supra, 58 Conn. L. Rptr. 501, was inapposite. In that decision, the Superior Court, after reconsideration, vacated its prior dismissal of the UBS litigation and held that Pursuit Partners and PIM had standing to pursue a claim against the defendants in that action because the "unitary interest as described by [the testimony presented] concerning fees and percentages based upon the funds would support a colorable claim of direct injury to the plaintiff[s] in an individual or representative capacity." Id., 506. In the present case, the court determined that the issue of whether Pursuit Partners and PIM had standing to pursue an action against the defendants in the UBS litigation is distinct and does not provide a basis for an alter ego or piercing the corporate veil claim against the defendants who had not signed the CSA.

Although the court did not engage in a discussion of each and every element of the plaintiff's theories, as the plaintiff maintains it should have done, there is no question that it considered and rejected them. We recognize that "[t]rial court judges operate under tremendous time pressure and without the resources available to [our Supreme Court] and the Appellate Court." *In re Jacob W.*, supra, 330 Conn. 782 (*D'Auria*, *J.*, dissenting). This is especially true in cases, as in the present, which involve complicated factual scenarios and a multitude of legal theories asserted by both sides. Therefore, we conclude that the court had considered and rejected the plaintiff's piercing the corporate veil and alter ego theories.

B

The defendants claim that the court improperly interpreted the CSA to conclude that the defendants who were signatories to the CSA—PIM, POF, PCM, Schepis, and Canelas—as well as Northeast, as the successor general partner of PCM, were liable for nonpayment of the UBS litigation. They argue that, because payment of the UBS litigation was governed by the LPA, not the CSA, only Northeast had the obligation to remit the UBS litigation. We agree that the court's conclusion was incorrect, but disagree with the defendants that the proper interpretation of the LPA and CSA requires that only Northeast be held liable for nonpayment of the UBS litigation. For the following reasons, we conclude that PIM, PCM, and Northeast are liable for nonpayment of the UBS litigation.

We afford plenary review to this claim because it requires us to interpret definitive contract language; see *Joseph General Contracting, Inc.* v. *Couto*, supra, 317 Conn. 575; and we incorporate the New York principles of contract interpretation as outlined in part I of this opinion.

The trial court first observed that § 4 of the CSA,[26] which secured the contingent assets, "does not identify which of the parties to the agreement is obligated to make the payments required thereunder or in [any] way suggest the rights and obligations set forth in [§] 4 are rights and obligations that are in any way limited to less than all of the parties to the CSA." The court then relied on the language of an opening paragraph to the CSA, which provided: "NOW, THEREFORE, without admission of fault or liability and for the sole purposes of ending the New York [a]ction and the [a]rbitration and resolving the claims that have been, or could have been, asserted between and among the [p]arties, and any other claims between them, in consideration of the mutual promises made herein, the sufficiency of which is hereby acknowledged, *the* [*p*]*arties hereby agree as follows* . . . ." (Emphasis added.)

The court then reasoned that "[a]ll of the parties understood the close working relationship between the entities and that Schepis and Canelas controlled all the entities. The CSA was executed as a way to settle claims brought in a lawsuit and arbitration proceedings against the individual parties to the CSA, which claims included claims brought against Schepis and Canelas personally. The court must conclude that all of the signatories were undertaking the obligation to protect and ultimately pay the plaintiff [its] interest in the contingent assets. Given the lack of a specific obligor in [§] 4, the interrelationship between the funds and the prior litigation/arbitra-

[26] As outlined previously in this opinion, § 4 of the CSA provided in relevant part that "PCM owns certain contingent assets that were valued at zero . . . for purposes of calculating PCM's NAV. These contingent assets include (a) PCM's proportionate interest in the UBS [l]itigation; and (b) PCM's interest in [the LBIE claim]. Nothing herein . . . shall affect in any way [the plaintiff's] pro rata share . . . of the contingent assets as of February 28, 2011. It is further understood that [the plaintiff's] continued interest in the contingent assets shall be governed by the [LPA] . . . ."

tion, the court concludes that the parties intended that all of the defendants be obliged to perform the various obligations contained therein. More importantly, that is what the express language of the CSA says. . . .

"All the parties made the mutual promises to each other, and the plaintiff was releasing all of the defendants for prior acts. It is simply an incorrect reading of the language 'the parties hereby agree' as suggesting that only some of the parties agree to the benefits and obligations contained therein, particularly when there is no specific language [in § 4][27] . . . that identifies a particular party who is to perform a particular obligation.

"While [§] 4 of the CSA identifies PCM, as it must, as the owner of the certain contingent assets, it does not limit the obligation to comply with the terms of the agreement to PCM. The parties were aware that PCM and the other Pursuit entities could only act with the consent of its general partner and, therefore, with the consent of Schepis and Canelas, who controlled and managed the general partner. In the absence of such an express limitation, there is no reason to conclude that the parties intended to limit the particular persons or entities that were obliged to perform in a manner that is contradictory to the broad and inclusive language contained in the introductory paragraph. To suggest otherwise is an unwarranted and tortured reading of the CSA." (Footnote added.)

We agree with the court that there was no express limitation in § 4 of the CSA as to which of the defendants had the obligation to remit the UBS litigation proceeds. We disagree, however, with the court's literal interpretation of "the [p]arties hereby agree as follows" language, to hold all of the signatory defendants liable for each

[27] As set forth previously in this opinion, § 3 of the CSA mandated that PIM pay the plaintiff the settlement payment and the redemption payment.

and every obligation in the CSA. In accordance with part I of this opinion, the proper interpretation of § 4 of the CSA is in consideration of the other provisions of the CSA, the LPA, and the circumstances under which the CSA was executed. Conversely, the court, in interpreting the same provision of the CSA to determine which of the defendants were liable for the same nonpayment, failed to consider the LPA or the circumstances under which the CSA was executed. Although not expressly provided for in the CSA, considering the obligations set forth therein in the context of the LPA and the relevant circumstances, the CSA imposes an implied limitation as to which of the defendants were liable for nonpayment of the UBS litigation.

First, under the circumstances, POF cannot be held liable pursuant to § 4 of the CSA because POF was unable to remit the UBS litigation proceeds to the plaintiff. In September, 2009, the plaintiff redeemed its investment in POF, which extinguished its interest in POF except for certain holdbacks to indemnify potential future expenses of POF. When the CSA was executed, on or about April 8, 2011, the plaintiff had no contingent interest in POF and, thus, the CSA did not secure any interest. Rather, § 4 of the CSA secured the plaintiff's contingent interests in two assets that were owned by PCM, not POF. POF, as a distinct hedge fund from PCM, could not have paid the plaintiff the proceeds of the UBS litigation because it had no interest in PCM's portion of the claim. Further, POF was not a signatory to the LPA, which specifically mandated payment as soon as practicable. Therefore, we disagree with the court that POF is liable.

Likewise, we disagree with the court that Schepis and Canelas are individually liable for nonpayment of the UBS litigation proceeds. Although the court found that Schepis and Canelas controlled all of the defendant

entities, it previously had rejected the plaintiff's piercing the corporate veil and alter ego theories. See part VI A of this opinion. Thus, pursuant to New York law, Schepis and Canelas would be liable for nonpayment of the UBS litigation proceeds only if they expressly agreed to be individually liable. See *J.N.K. Machine Corp.* v. *TBW, Ltd.*, 155 App. Div. 3d 1611, 1612, 65 N.Y.S.3d 382 (2017) ("[a]ccording to the well settled general rule, individual officers or directors are not personally liable on contracts entered into on behalf of a corporation if they do not purport to bind themselves individually" [internal quotation marks omitted]); *New York Assn. for Retarded Children, Inc., Montgomery County Chapter* v. *Keator*, 199 App. Div. 2d 921, 923, 606 N.Y.S.2d 784 (1993) ("[i]t is well established that an agent of a disclosed principal does not, absent express agreement, become liable individually on a contract relating to the agency"); *American Media Concepts, Inc.* v. *Atkins Pictures, Inc.*, 179 App. Div. 2d 446, 448, 578 N.Y.S.2d 193 (1992) ("[i]n modern times most commercial business is done between corporations, everyone in business knows that an individual stockholder or officer is not liable for his corporation's engagements unless he signs individually, and where individual responsibility is demanded the nearly universal practice is that the officer signs twice—once as an officer and again as an individual" [internal quotation marks omitted]).

Here, Schepis and Canelas signed the CSA in their personal capacities and on behalf of the corporate signatory defendants. Schepis and Canelas signed the CSA individually because that agreement was executed to resolve the 2010 New York action filed against them. As the court recognized, there is no express provision that obligated Schepis and Canelas to be responsible to remit the UBS litigation proceeds, and, thus, they cannot be held individually liable under that agreement. Furthermore, the fact that Schepis and Canelas signed

the CSA in their individual capacities, alone, does not support the imposition of individual liability because the CSA does not mandate payment. Instead, it is the CSA read in conjunction with the LPA that obligated payment. Schepis and Canelas had not entered into the LPA in their individual capacities; instead, they executed the agreement as managing members of Pursuit Management,[28] which was the general partner of PCM at the time the LPA was executed. There is no express provision in the LPA that mandates that Schepis and Canelas make payments as soon as practicable in their individual capacities; rather, the withdrawal provision at issue obligates the general partner of PCM to remit withdrawals. In the absence of an express agreement by Schepis and Canelas to undertake an individual obligation in either the CSA or the LPA to remit the UBS litigation proceeds as soon as practicable, they cannot be held individually liable.

Consistent with the foregoing, the language of both agreements, viewed under the circumstances, demonstrates that the defendants that are liable for nonpayment are those that both undertook an obligation, and had the ability, to pay the UBS litigation proceeds. Those defendants are PCM, PIM, and Northeast. Under both the CSA and the LPA, PCM, as the owner of the interest in the UBS litigation at issue, and Northeast, as the general partner of PCM, undertook an obligation to remit the proceeds as soon as practicable after they were realized. On receipt of these proceeds, both PCM and Northeast had the ability to remit to the plaintiff its share as soon as practicable. Furthermore, PIM had an ability to pay the UBS litigation proceeds because it had remitted both the settlement payment

[28] The version of the LPA entered into evidence and included in the defendants' appendix on appeal is unsigned. Nevertheless, typed names below the signature lines contained in the LPA support this interpretation.

and the redemption payment on behalf of the defendants, including PCM, pursuant to the CSA. Indeed, this ability is evinced by the April 28, 2011 letter in which PIM informed the remaining investors in PCM that it was effectuating a mandatory withdrawal of the plaintiff pursuant to the recent execution of the CSA. There is no finding suggesting that PIM no longer had the ability or authority to remit payments to the plaintiff on behalf of PCM. Therefore, we conclude that PCM, PIM, and Northeast are liable for their failure to remit to the plaintiff its proportionate share of the UBS litigation proceeds.

VII

The seventh issue presented is whether the court properly determined the amount of damages. The plaintiff and the defendants respectively advance a two-prong challenge to the court's damages award. The defendants claim that the court erroneously awarded damages because it (1) failed to reduce PCM's share of the UBS litigation proceeds by 10 percent to account for PCM Master's other investor, which the parties and the court referred to as PCM offshore, and (2) failed to account for a performance fee reduction from the UBS litigation proceeds. The plaintiff claims that the court erroneously awarded damages because it improperly permitted the defendants to retain the remainder of the UBS litigation holdback, and erroneously found that the division of the UBS litigation proceeds to be 52.8 percent to PCM Master and 47.2 percent to POF Master. We reject all of the parties' claims and conclude that the court properly determined the amount of damages.

Before reaching the parties' claims, we first set forth the court's calculation of damages. As set forth previously, the gross UBS litigation settlement amount was $36 million. After deducting $6.9 million for attorney's fees incurred in pursuing the UBS litigation, the net

proceeds from the UBS litigation were $29.1 million. The $29.1 million was then divided between PCM Master and POF Master because both hedge funds had purchased the CDOs from UBS. The court determined that PCM Master was entitled to 52.8 percent and POF Master was entitled to 47.2 percent of those net proceeds.

The court determined, however, that the plaintiff was entitled to only a portion of PCM Master's percentage because the plaintiff was invested in PCM, which was invested in PCM Master, and § 4 of the CSA explicitly applied to PCM's share of the UBS litigation proceeds. The court calculated PCM Master's portion of the net proceeds, 52.8 percent of the $29.1 million net proceeds, to equal $15,364,800. The court further determined that PCM was the sole investor and owned 100 percent of PCM Master and, thus, PCM owned the entirety of the $15,364,800 owned by PCM Master. Accordingly, because the plaintiff's pro rata share of PCM was 32.083612 percent, the court calculated the plaintiff's interest in the UBS litigation proceeds to be $4,929,582.

We next set forth the standard of review applicable to all four of the parties' damages related claims. "The 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 . . . . 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. . . .

"In applying the clearly erroneous standard of review, [a]ppellate courts do not examine the record to determine whether the trier of fact could have reached a different conclusion. Instead, we examine the trial court's conclusion in order to determine whether it

was legally correct and factually supported. . . . This distinction accords with our duty as an appellate tribunal to review, and not to retry, the proceedings of the trial court. . . .

"[I]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . The credibility and the weight of expert testimony is judged by the same standard, and the trial court is privileged to adopt whatever testimony [it] reasonably believes to be credible. . . . On appeal, we do not retry the facts or pass on the credibility of witnesses." (Citations omitted; internal quotation marks omitted.) *FirstLight Hydro Generating Co.* v. *Stewart*, 328 Conn. 668, 679–80, 182 A.3d 67 (2018). Finally, to the extent that we are required to interpret the court's judgment, our review is plenary. See *Joseph General Contracting, Inc.* v. *Couto*, supra, 317 Conn. 575.

A

The defendants first claim that the court failed to reduce PCM's share of the UBS litigation proceeds by 10 percent to account for PCM Master's other investor, PCM offshore. The defendants argue that the court erroneously found that PCM owned 100 percent of PCM Master, when the evidence demonstrated that PCM offshore, which is another entity controlled by Schepis and Canelas, owned 10 percent of PCM Master. The defendants contend that the damages award should be reduced because PCM owned only 90 percent of the net UBS litigation proceeds owned by PCM Master. We disagree.

In the present case, the trial court rejected the defendants' 10 percent claim, reasoning that: "By April, 2010, all of the investors of PCM Master other than PCM had redeemed. On May 6, 2009, Schepis and Canelas deposited $1,100,000 into the PCM Master account. This arguably became the only other investment in PCM

Master other than PCM. It is this deposit which forms the basis for the defendants' claim that PCM is entitled only to 90 percent interest in the proceeds to which PCM Master is entitled. There are several problems with the claim of the defendants. First, the deposit was made after all other investors in PCM Master other than PCM had redeemed; second, the deposit was made after the CDOs had been purchased and after [the UBS litigation] had been instituted; and third, the deposit amounted to little more than parking cash, which Schepis and Canelas retained complete control over in order to assert a claim for a percentage of the UBS [litigation] proceeds. This is verified by the fact that in excess of $1,100,000 was withdrawn from the PCM Master account by August, 2010 (eight months before the CSA had been signed). Essentially, the defendants claim that Schepis and Canelas could gain an interest in a valuable claim (which other investors were pledging substantial assets to prosecute) by parking cash in an account after the fact, which cash could be withdrawn or moved without any risk, or at least without risk comparable to that involved in the CDO transactions which gave rise to the UBS litigation. The claim strains credibility. It was an investment after the initial risk had been taken and was withdrawn before the CSA had been executed. It was managed independent of any risk participated in by the PCM investors. To the extent that PCM Master chose to make investments utilizing the cash, any such returns were not shared by the PCM investors. The second problem with the defendants' position is that the defendants had not been forthcoming in their compliance with the court's discovery orders, both in terms of the timeliness of that compliance and in terms of the completeness of that compliance, which hampers their credibility as to this issue. The records and the testimony are simply not supportive of the defendants' position.

"Finally, Schepis' testimony as to this issue is not particularly credible either. His explanations were not complete. They were inconsistent and varied from his earlier testimony during the [prejudgment remedy] proceedings."

In short, the court rejected the defendants' argument on the basis of its findings regarding the lack of credibility of the defendants' position regarding the $1.1 million deposit, their failure to comply fully with discovery, and the lack of credibility of Schepis' testimony. The court specifically cited evidence that Schepis and Canelas, through PCM offshore, made their investment in PCM Master after the CDOs had been purchased, after the CDOs had lost value, and after the UBS litigation had been commenced. Most significantly, the court found, on the basis of the evidence, that the investment was withdrawn prior to the execution of the CSA. All of this evidence supports the court's finding that PCM was the sole investor in PCM Master and, thus, PCM was entitled to all of PCM Master's share of the proceeds from the settlement of the UBS litigation. Further, to the extent that the court's decision is founded on its credibility determinations, we cannot second-guess those determinations on appeal. See *FirstLight Hydro Generating Co.* v. *Stewart*, supra, 328 Conn. 679–80. Therefore, we conclude that the court's finding that the defendants' 10 percent claim failed was not clearly erroneous.

B

The defendants next claim that the court failed to account for a performance fee reduction from the UBS litigation proceeds. The defendants' argument on appeal is the same one that they made before the trial court: the LPA provides that the general partner of PCM, Northeast at the time, was entitled to a 20 percent performance fee for net economic profit. They argue

that, because the LPA governed the UBS litigation and the UBS litigation proceeds were net economic profit, Northeast was entitled to 20 percent of those proceeds. The plaintiff's argument before us is also the same one as it made before the trial court: the UBS litigation proceeds did not constitute net economic profit because those proceeds only partially recouped prior substantial losses incurred in connection with the CDOs.

The court agreed with the plaintiff. It concluded that the UBS litigation proceeds did not represent a net economic profit but merely were a return of part of PCM's investment. Consequently, the court determined that Northeast was not entitled to a performance fee. We agree with the court.

Because the defendants do not challenge the court's factual finding that the UBS litigation proceeds constituted a net loss, we exercise plenary review over the defendants' claim because it requires us to interpret the definitive language of the LPA, which is a pure question of law. See *Joseph General Contracting, Inc.* v. *Couto*, supra, 317 Conn. 575.

Section 4.02 of the LPA, titled "Allocation of Net Income," governs the allocation of net profits and losses. Section 4.02 (a) provides in relevant part: "[T]here shall be a provisional allocation of net profits . . . or net losses . . . for each calendar year (or other accounting period), to all [p]artners in proportion to the [c]apital [a]ccounts as of the beginning of such period: then, at the end of the calendar year or upon a withdrawal of a limited partner, 20 [percent] of the [l]imited [p]artner's [s]hare of [c]umulative [f]iscal [p]eriod [n]et [e]conomic [p]rofit . . . provisionally allocated to each [l]imited [p]artner for the calendar year . . . allocated to such [l]imited [p]artner's [c]apital [a]ccount since the last reallocation of net profits . . . shall be reallocated to the [g]eneral [p]artner."

Section 1.01 (ab) of the LPA defines "[s]hare of [c]umulative [f]iscal [p]eriod [n]et [e]conomic [p]rofit" to mean, in relevant part, "with respect to each [l]imited [p]artner, an amount determined as of the end of any [a]ccounting [p]eriod including the end of the [f]iscal [y]ear . . . equal to the sum of the amounts (positive or negative) of [n]et [i]ncome or [n]et [l]oss allocable to such [l]imited [p]artner . . . subject to the following modifications. If a [l]imited [p]artner's [s]hare of [c]umulative [f]iscal [p]eriod [n]et [e]conomic [p]rofit for any [a]ccounting [p]eriod shall be a loss—(i.e., negative amount), then such loss shall carry forward into the next [a]ccounting [p]eriod (and. if necessary, into succeeding [a]ccounting [p]eriods) and will reduce such [l]imited [p]artner's [s]hare of [c]umulative [f]iscal [p]eriod [n]et [e]conomic [p]rofit i[f] any, in such next (or succeeding) [a]ccounting [p]eriod." (Internal quotation marks omitted.)

The court interpreted the foregoing language to mean that "the limited partner's share of cumulative fiscal period net economic profits pursuant to the express terms of the LPA must include prior losses that are carried forward into the next accounting period." The court then reasoned that the profits and losses incurred by the plaintiff as a limited partner in PCM prior to the execution of the LPA on April 1, 2009, including the profits and losses associated with the CDOs purchased from UBS, carried forward. The court relied on § 2.01 of the LPA, which provides that the parties agreed "to form *and continue* the [p]artnership as a limited partnership . . . ." (Emphasis added.) The court also relied on § 3.09 of the LPA, which provides in relevant part: "Each [p]artner's [c]apital [a]ccount shall consist initially of the amount of cash and agreed net fair market value of any other property *which it has contributed* to the [p]artnership as a [c]apital [c]ontribution upon its admission to the partnership . . . ." (Emphasis added.)

The court then held that, "[i]n effect, the [plaintiff] experienced a substantial loss in [its] PCM investment as a result of the defendants' decision to purchase the UBS CDOs (through PCM Master). The settlement of the UBS litigation did not result in a net economic profit; rather it represented a recoupment of part of the loss that PCM had earlier experienced. [Northeast] is not entitled to a performance fee based upon profit because it managed to recoup some of the value that it had previously lost. The language of the LPA does not so provide and actually states the opposite." (Footnote omitted.)

We conclude that the court's interpretation is legally and logically correct. Sections 4.02 (a) and 1.01 (ab) of the LPA, when read together, provide that a limited partner's share of cumulative fiscal period net economic profit of PCM includes past losses that were incurred by PCM. Sections 2.01 and 3.09 of the LPA contemplate that these past losses were carried forward from prior to the execution of the LPA. Thus, the LPA definitively provides that losses incurred by a limited partner prior to the execution of the LPA are to be taken into account when determining cumulative fiscal period net economic profit.

In accordance with the foregoing, the court held that the UBS litigation proceeds represented a recoupment of part of the loss that PCM previously had experienced. In essence, the court determined that the UBS litigation proceeds did not constitute a net profit because those proceeds failed to exceed the losses incurred as a result of the purchase and subsequent devaluation of the CDOs. Consequently, because the UBS litigation proceeds constituted a partial recoupment of prior losses, not a net profit, Northeast was not entitled to deduct a performance fee therefrom. Therefore, we conclude that the court properly rejected the defendants' performance fee claim.

C

The plaintiff claims that the court improperly permitted the defendants to retain the remainder of the UBS litigation holdback. The plaintiff maintains that the court found that the $250,000 holdback designated by the CSA to cover expenses incurred in connection with the UBS litigation had not been exhausted. Consequently, the plaintiff argues that the court erroneously failed to award damages for the remainder of the unused UBS litigation holdback. We disagree.

It is undisputed that, pursuant to § 3 of the CSA, the plaintiff was entitled to any unused portion of the UBS litigation holdback. Section 3 (b) (i) of the CSA provides that the redemption payment owed to the plaintiff was "less a holdback in the amount of $250,000 for the purpose of funding necessary costs (other than plaintiff counsel's attorneys fees through trial) associated with the ongoing [UBS litigation] . . . ." Section 3 (b) (ii) provides that "PIM represents and warrants that the holdbacks referenced in [§] 3 (b) (i) reflect [the plaintiff's] pro rata share of the holdbacks that will be assessed with respect to current investors in PCM as of February 28, 2011, and further represents and warrants that use of the holdbacks will be limited to the purposes set forth in [§] 3 (b) (i) and that no part of any prior holdback presently maintained by either of the [f]unds . . . shall be used in connection with the UBS [l]itigation." Section 3 (b) (ii) further provides that "[the plaintiff] shall . . . be entitled to periodic updates on the status of the holdbacks," that the plaintiff will be provided with the opportunity to pay for additional expenses if the holdback is insufficient, and that the plaintiff's interest in the UBS litigation would be extinguished if it failed to pay for such additional expenses.

The court did not address separately whether the plaintiff was entitled to a portion, if any, of the

remaining UBS litigation holdback. The court's damages award also did not include any additional funds that could be attributed to a portion of the UBS litigation holdback. As set forth previously, the entirety of the court's damages award equaled the sum of the plaintiff's pro rata share of PCM's interest in the net proceeds of the UBS litigation, plus interest.

Nevertheless, the court, in a different part of its decision, rejected the defendants' argument that they were permitted to deduct post-CSA expenses from the UBS litigation proceeds. It held, in relevant part: "The plaintiff's obligation to pay post-CSA expenses for the UBS litigation was limited to $250,000, as [its] proportionate share of those expenses. The plaintiff was not obligated to contribute anymore for expenses unless [it], along with other investors, [was] given the voluntary opportunity under the express language of the CSA. The plaintiff was never asked to contribute more to those additional expenses. Moreover, there is insufficient evidence for the court to conclude that the $250,000 holdback specifically earmarked for UBS [litigation] expenses was insufficient to satisfy the plaintiff's obligation for those expenses. The post-CSA expenses incurred as a result of the UBS litigation would have to have exceeded approximately $1,500,000 in order for the plaintiff's $250,000 holdback to be insufficient to cover its proportionate share of expenses. The evidence does not indicate that the post-CSA expenses exceeded that amount." (Footnote omitted.)

The plaintiff argues that the court concluded that the UBS litigation holdback had not been exhausted and, thus, it erroneously failed to award it damages equal to the remainder. We disagree with the plaintiff's interpretation of the court's judgment.

The court definitively concluded that there was *insufficient* evidence to conclude that the UBS litigation holdback had been exhausted. This is critically

different from the inverse conclusion that the plaintiff draws, namely, that there was *sufficient* evidence to establish that the UBS litigation had not been exhausted. In short, the court concluded that it was unable to determine whether the holdback had been exhausted, not that the evidence demonstrated that the holdback had not been exhausted. Indeed, the plaintiff recognized this point in its principal appellate brief: "If the trial court intentionally omitted the holdback from the judgment, it could have only been for one reason: it was impossible to quantify how much [the plaintiff] was entitled to receive back because [the court] found that 'there is insufficient evidence' before it to conclude how much of the holdback had been legitimately used."[29]

In light of the court's conclusion that there was insufficient evidence to establish whether the holdback had been exhausted, and in the absence of any discussion by the court as to whether the plaintiff was entitled to a portion of the UBS litigation holdback, we reject the plaintiff's claim.

D

The plaintiff also claims that the court erroneously found the division of the net UBS litigation proceeds to be 52.8 percent to PCM Master and 47.2 percent to POF Master. The plaintiff argues that the court's finding

[29] The plaintiff additionally argues on appeal that it "satisfied its burden to prove that [the] defendants held $250,000 of its money as a UBS litigation holdback that was now due to be returned; only [the] defendants could prove how much of that legitimately remained and, having failed to do so or to produce the relevant records, the court should have awarded the full $250,000 to [the plaintiff]." Nevertheless, the plaintiff did not make this argument before the trial court and, thus, it is not properly preserved. See *Eubanks* v. *Commissioner of Correction*, 329 Conn. 584, 598, 188 A.3d 702 (2018) (claim is properly preserved if "articulated below with sufficient clarity" [internal quotation marks omitted]); *Chief Disciplinary Counsel* v. *Rozbicki*, 326 Conn. 686, 695, 167 A.3d 351 (2017) (claim is not reviewable if raised for first time on appeal), cert. denied, U.S. , 138 S. Ct. 2583, 201 L. Ed. 2d 295 (2018).

as to the division of those proceeds between PCM Master and POF Master was erroneous because the court relied on the defendants' calculation, which allegedly was incomplete as a result of the defendants' purported failure to comply fully with discovery regarding this issue. The plaintiff contends that the trial court should have drawn an adverse inference against the defendants for their discovery misconduct, and held that the proper division of the net UBS litigation proceeds should have been 56.23 percent to PCM Master and 43.77 percent to POF Master. We disagree.

The court made its division of the UBS litigation between PCM Master and POF Master on the basis of the following findings. "The defendants . . . claim that the net proceeds need to be divided 52.8 percent to PCM Master and 47.2 percent to POF Master. The court agrees with the defendants in this regard. The CSA clearly indicated that the plaintiff was only entitled to PCM's interest. (PCM, of course, had no interest in POF Master). The plaintiff had earlier withdrawn and redeemed its interest in POF and the CSA contains a broad release concerning any claims arising out of the redemption of the plaintiff's interest in POF. At the time the plaintiff executed the CSA, the UBS litigation had already begun and the amended complaints in that case expressly claimed that both PCM Master and POF Master had purchased the troubled CDOs from UBS. The evidence presented to this court established that the ratio of those purchases between PCM Master and POF Master are consistent with the defendants' claims. That evidence consisted [of] testimony from Berg Simpson, [which was a Colorado law firm that pursued the UBS litigation on behalf of Pursuit Partners and PIM], concerning the nature of the claims made in the UBS litigation, the actual trade tickets evidencing the transactions, the amended complaints in the UBS [litigation], which set forth the transactions by which both PCM

Master and POF Master acquired the CDOs. The evidence also demonstrated that the expenses that were incurred in pursuing the UBS litigation were borne in relatively equal amounts by both PCM Master and POF Master. While the [plaintiff] assert[s] that the defendants lack credibility in this regard because Schepis and Canelas have an interest in moving as large a percentage to POF Master as possible because they have a significantly greater interest in POF Master than PCM Master, the court finds the evidence presented sufficient to sustain its finding. Accordingly, the court finds that PCM Master's interest in the net settlement proceeds was 52.8 percent, or $15,364,800."

On appeal, the plaintiff asks this court to override the court's credibility assessments and its weighing of the evidence, which we cannot do. See *FirstLight Hydro Generating Co.* v. *Stewart*, supra, 328 Conn. 679–80. The court specifically rejected the plaintiff's credibility challenge to the position taken by the defendants; on appeal, we cannot second-guess such an assessment. Likewise, to the extent that the plaintiff challenges the court's reliance on the evidence specifically credited in support of its findings, we cannot discredit that evidence on appeal. Further, after review of the evidence cited by the court in support of its conclusion, we conclude that such testimony and exhibits were sufficient to support the court's conclusion.

Moreover, the plaintiff requests that this court reverse the trial court's decision with respect to the division of the UBS litigation proceeds because it failed to impose a negative inference against the defendants for their failure to comply fully with discovery on this issue. See *Glinski* v. *Glinski*, 26 Conn. App. 617, 623, 602 A.2d 1070 (1992) ("[w]hile the trial court may certainly draw adverse inferences from the failure of a party to submit the required financial information, *it is under no obligation to do so*" [emphasis added]); see also

Szegda v. *Szegda*, 97 Conn. App. 426, 430, 904 A.2d 1266, cert. denied, 280 Conn. 932, 909 A.2d 959 (2006). The plaintiff made the exact same argument to the trial court and it necessarily was rejected because the court did not draw such an inference. While the trial court was permitted to draw such an inference, we decline to reverse that discretionary judgment on appeal. The trial court was in the best position to assess the extent to which the defendants produced credible evidence on this issue, and it clearly concluded that the evidence produced by the defendants was sufficient to support its conclusion. Therefore, we conclude that the court's finding as to the division of the net proceeds of the UBS litigation was not clearly erroneous.

In sum, we conclude that the court properly determined the amount of damages.

VIII

The defendants next claim that the court improperly granted the plaintiff's motion to increase the amount of the prejudgment remedy. The defendants argue that the filing of an appeal, without more, did not constitute a sufficient basis for the court to modify, pursuant to § 52-278k, the existing prejudgment remedy. We disagree.

The following additional procedural history is relevant to our resolution of this claim. On June 16, 2016, the court granted the plaintiff's application for a prejudgment remedy in the total amount of $5,421,582. On October 14, 2016, the court rendered judgment partially in favor of the plaintiff against certain defendants in the total amount of $5,422,540, plus 10 percent postjudgment interest per annum. The defendants appealed from that judgment.

On November 8, 2016, during the pendency of this appeal, the plaintiff, pursuant to § 52-278k, filed a motion with the trial court seeking modification of

the previously secured prejudgment remedy attachment amount, seeking to secure from PCM, POF, PIM, Schepis, Canelas, and Northeast an additional $947,731 that it anticipated would accrue during the pendency of this appeal. The plaintiff calculated the $947,731 accrual of interest by multiplying the per diem interest on the judgment, which the plaintiff determined on the basis of the court's award of 10 percent interest per annum on its award of $5,422,540 in damages, by 564.3, the plaintiff's estimation of the average duration of the pendency of similar civil cases before this court, and then adding the probable additional costs associated with levy and execution. In support of its calculation, the plaintiff's attorney submitted an affidavit and attachments that detailed the duration of several recent Appellate Court cases. On December 16, 2016, the defendants filed an opposition to the plaintiff's motion to increase the prejudgment remedy in which they argued, among other things, that § 52-278k does not permit the upward modification of a prejudgment remedy in the present circumstances.

On January 4, 2017, after a hearing, the court granted the plaintiff's motion to increase the prejudgment remedy amount by $947,731, to a total of $6,369,313. The court held that "§ 52-278k provides that the court may modify a prejudgment remedy 'at any time' 'as may be warranted by the circumstances.' It is well established that the prejudgment remedy statutes apply and are applicable subsequent to the rendering of a judgment in the trial court, which trial court judgment is pending appeal. *Gagne* v. *Vaccaro*, 80 Conn. App. 436, 451–54, [835 A.2d 491 (2003), cert. denied, 268 Conn. 920, 846 A.2d 881 (2004)]. Based upon the evidence at trial and the circumstances of the pending appeal, the court finds probable cause that the plaintiff will ultimately obtain a final judgment against those parties against whom the court has rendered judgment in the amount of $6,369,313, which amount includes interest at the rate

of 10 percent per annum for the likely period of appeal and probable execution fees. Of course, this is without prejudice to the defendants' right to request a downward modification should they prevail on their pending motion . . . which seeks adjustment of the previously ordered interest rate, and the right of either party to seek further modification 'as may be warranted by the circumstances.' " The defendants thereafter filed an amended appeal to challenge this ruling.

We next set forth the standard of review and legal principles relevant to this claim. "A prejudgment remedy means any remedy or combination of remedies that enables a person by way of attachment, foreign attachment, garnishment or replevin to deprive the defendant in a civil action of, or affect the use, possession or enjoyment by such defendant of, his property prior to final judgment . . . . General Statutes § 52-278a (d)." (Internal quotation marks omitted.) *ASPIC, LLC* v. *Poitier*, 179 Conn. App. 631, 639, 181 A.3d 593 (2018). "A prejudgment remedy is available upon a finding by the court that there is probable cause that a judgment in the amount of the prejudgment remedy sought, or in an amount greater than the amount of the prejudgment remedy sought, taking into account any defenses, counterclaims or set-offs, will be rendered in the matter in favor of the plaintiff . . . . General Statutes § 52-278d (a) (1). . . . Proof of probable cause as a condition of obtaining a prejudgment remedy is not as demanding as proof by a fair preponderance of the evidence. . . . When reviewing a trial court's order on a motion for a prejudgment remedy, our role is fairly limited. . . . We will not upset a prejudgment remedy order in the absence of clear error . . . viewing the evidence in the light most favorable to the plaintiff." (Citations omitted; internal quotation marks omitted.) *J.E. Robert Co.* v. *Signature Properties, LLC*, 309 Conn. 307, 338–39, 71 A.3d 492 (2013).

The authority for a court to modify an existing prejudgment remedy is afforded by § 52-278k, which provides: "The court may, upon any application for prejudgment remedy under section 52-278c, 52-278e, 52-278h or 52-278i, modify the prejudgment remedy requested as may be warranted by the circumstances. The court may, upon motion and after hearing, at any time modify or vacate any prejudgment remedy granted or issued under this chapter upon the presentation of evidence which would have justified such court in modifying or denying such prejudgment remedy under the standards applicable at an initial hearing."

The defendants recognize that a prejudgment remedy may be granted while the case is on appeal. See *Gagne* v. *Vaccaro*, supra, 80 Conn. App. 454 ("a prejudgment remedy is available to a party who has prevailed at the trial level and whose case is on appeal"); *Tadros* v. *Tripodi*, 87 Conn. App. 321, 335 n.9, 866 A.2d 610 (2005) ("[d]espite the apparent contradiction in terms, a prejudgment remedy may be granted after the entry of judgment but before appellate disposition in order to protect assets to satisfy the judgment"). Instead, the defendants argue, without citing any legal authority in support, that the fact that they took "an appeal, without more, [does not] constitute a sufficient basis to amend an existing [prejudgment remedy]."

Viewing the evidence before the court in the light most favorable to the plaintiff, we conclude that it was not clear error for the court to have increased the amount of the prejudgment remedy. The court made its probable cause determination "[b]ased upon the evidence at trial and the circumstances of the pending appeal . . . ." The evidence at trial established that certain defendants were liable to the plaintiff for a total of $5,422,540, and the court awarded the plaintiff 10 percent postjudgment interest per annum. The court also considered the fact that the defendants took an

amended appeal from the October 14, 2016 judgment. Further, the court credited the plaintiff's calculation as to the amount of interest that it estimated would accrue on appeal. The plaintiff's calculation, as supported by an affidavit, was made in part on the basis of the average duration of the pendency of similar cases before this court. Accordingly, the court made its decision on the basis of the amount of the judgment rendered against the defendants, the court's award of postjudgment interest, the fact that the defendants took an amended appeal, and the average pendency of similar civil cases before this court. Viewing these facts in the light most favorable to the plaintiff, it was not clear error for the court to have increased the amount of the prejudgment remedy.[30]

IX

The defendants' final claim is that the court improperly granted the plaintiff's motion for postjudgment discovery in connection with the court's upward modification of the prejudgment remedy amount. We conclude that this claim was not preserved properly, and, thus, we decline to review it.

We begin by setting forth the legal principles relevant to whether a claim properly was preserved for appellate review. "It is well settled that [o]ur case law and rules of practice generally limit [an appellate] court's review to issues that are distinctly raised at trial. . . . [O]nly in [the] most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court. . . . The reason for the rule is obvious: to permit a

[30] We recognize that the effect of our conclusion that the court properly increased the prejudgment remedy, which was entered against PCM, POF, PIM, Schepis, Canelas, and Northeast, is limited by our determination that only PCM, PIM, and Northeast are liable to the plaintiff on its complaint. See part VI of this opinion. The defendants, however, do not argue that the court improperly increased the amount of the prejudgment remedy against only certain parties. Therefore, we do not reach that issue.

party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party." (Internal quotation marks omitted.) *Chief Disciplinary Counsel* v. *Rozbicki*, 326 Conn. 686, 695, 167 A.3d 351 (2017), cert. denied, U.S. , 138 S. Ct. 2583, 201 L. Ed. 2d 295 (2018); see also Practice Book § 60-5 ("court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial"). "[T]he determination of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated below with sufficient clarity to place the trial court [and the opposing party] on reasonable notice of that very same claim." (Internal quotation marks omitted.) *Eubanks* v. *Commissioner of Correction*, 329 Conn. 584, 598, 188 A.3d 702 (2018).

The following additional procedural history is relevant to this claim. On November 8, 2016, during the pendency of this appeal, the plaintiff, pursuant to Practice Book § 13-13, filed a motion with the trial court seeking supplemental asset disclosure from the defendants against which judgment had been rendered, seeking to secure the additional attachment pursued by its motion to modify the amount of the prejudgment remedy. On December 16, 2016, the defendants filed an opposition to the plaintiff's motion to increase the prejudgment remedy, but they did not file a written objection to the plaintiff's motion seeking supplemental asset disclosure. Furthermore, in their objection to the motion to modify, the defendants did not advance any counterargument to the plaintiff's motion for supplemental asset disclosure.

At the hearing held on December 22, 2016, regarding the plaintiff's motions, the defendants' counsel conceded that there was no written objection filed to the

plaintiff's motion for supplemental asset disclosure. Indeed, the defendants' counsel, when asked whether he had a comment on the motion for disclosure of assets, provided the following response: "Well . . . the reason I didn't object [was] because I have to imagine, without prejudice again, that if the [c]ourt increased the [prejudgment remedy] . . . the [c]ourt was going to grant . . . I haven't seen—you know, and I call it pretty fair—I haven't seen a [prejudgment remedy] where the [c]ourt said, well, now I've granted a [prejudgment remedy], but I'm not going to let you . . . disclose the assets. I don't think though that given that the disclosure was who's claiming what, I happen to agree that as long as the gross amount has been attached, that's what counts. I don't think you get each . . . defendant doesn't have to put up that . . . the entire amount."

On the basis of the foregoing, we conclude that the defendants failed to preserve properly their claim that the court lacked authority to grant the plaintiff's supplemental motion for disclosure of assets. The defendants did not file a written objection and they did not make a written counterargument. When asked whether they had any comment on the motion, the defendants' counsel acknowledged that he was not aware of any court that denied a motion for disclosure after it had granted a prejudgment remedy. The defendants' counsel took the position that it was a rare occurrence that a court actually would deny such a motion under the circumstances. Therefore, we decline to review this claim because it was not properly preserved.

The judgment is reversed in part as to counts one and two of the plaintiff's complaint and the case is remanded with direction to render judgment in favor of POF, Schepis, and Canelas on those counts; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JEFFREY TODD PALUMBO (AC 41509)

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

Syllabus

Convicted of the crimes of sexual assault in the fourth degree, sexual assault in the first degree, and risk of injury to a child in connection with his alleged sexual abuse of the minor victim, the defendant appealed. Although the defendant's conviction related to two incidents involving the minor victim, during his trial there was testimony relating to two other alleged incidents of sexual abuse, one of which occurred while the defendant and the victim were hiking alone at a state park. After the defendant testified at trial that, during the hike, there were other people around, the prosecutor asked him a series of questions that focused on whether he previously had told the police during an interview that there were other people around during the hike, and remarked that this was the first time that they were hearing about that information. On appeal, the defendant claimed, for the first time, that the questions referring to the trial as being the first time that the defendant mentioned that other people were in the same area during the hike violated his constitutional right to remain silent pursuant to *Doyle* v. *Ohio* (426 U.S. 610) by introducing evidence of his post-*Miranda* silence. Specifically, he claimed that the questions focused on his silence after he was arrested and received his *Miranda* warnings and, therefore, that his post-*Miranda* silence was used as evidence of guilt. *Held:*

1. The defendant's unpreserved claim that his constitutional right to remain silent pursuant to *Doyle* was violated was unavailing; it was clear from the record that the questions referring to the trial as the first time that the other hikers were mentioned pertained to the defendant's pre-*Miranda* interview that occurred on March 31, 2014, and, therefore, the defendant having failed to demonstrate that an alleged constitutional violation existed, his unpreserved claim failed under the third prong of the test set forth in *State* v. *Golding* (213 Conn 233).
2. The defendant could not prevail on his claim that because the prosecutor's questions sought to elicit evidence of his post-*Miranda* silence, they amounted to prosecutorial impropriety that violated his due process rights: this court has determined that certain of the questions did not violate *Doyle* and the defendant did not argue how those questions would otherwise amount to prosecutorial impropriety, and with respect to the prosecutor's question of whether the defendant told anyone about the presence of the other hikers in the time period between a pre-*Miranda* interview and his arrests in September and November, 2014, even if that question was improper, it did not deprive the defendant of his due process right to a fair trial, as the claimed impropriety was not

pervasive throughout the trial and was confined to a single question that related to uncharged misconduct, it was not central to a critical issue in the case or the defendant's theory of defense, defense counsel objected to the question before it was answered and the objection was sustained, the court's general instructions were sufficiently curative, and the state's case was not particularly strong.

Argued March 4—officially released October 8, 2019

Procedural History

Substitute information, in the first case, charging the defendant with the crimes of sexual assault in the fourth degree and risk of injury to a child, brought to the Superior Court in the judicial district of New London, and substitute information, in the second case, charging the defendant with the crimes of sexual assault in the first degree and risk of injury to a child, brought to the Superior Court in the judicial district of Windham, geographical area number eleven, where the court, *Seeley*, *J.*, granted the state's motion for joinder; thereafter, the matter was tried to the jury; verdicts and judgments of guilty, from which the defendant appealed. *Affirmed*.

Richard Emanuel, for the appellant (defendant).

Nancy L. Chupak, senior assistant state's attorney, with whom, on the brief, were *Anne F. Mahoney*, state's attorney, and *Marissa Goldberg*, assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Jeffrey Todd Palumbo, appeals from the judgments of conviction, rendered following a jury trial, of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2), sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (A), and two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2). On appeal, the defendant claims, pursuant to *Doyle* v. *Ohio*, 426 U.S. 610, 619, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), that the state (1) violated his

constitutional right to remain silent by introducing evidence of his post-*Miranda*[1] silence and (2) engaged in prosecutorial impropriety by attempting to elicit evidence of his post-*Miranda* silence.[2] We affirm the judgments of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to our resolution of this appeal. The defendant started dating the victim's mother, K, on August 8, 2008, when the victim was three.[3] The defendant moved into an apartment in Montville with K and the victim in March, 2009, when K became pregnant with the defendant's child. The defendant continued living there with K and the victim after their son, T, was born, and his older son from a previous relationship, D, moved in with K and the victim as well. The defendant moved out of K's apartment in May, 2012. However, the defendant still had contact with the victim because he and K shared custody of T, and the defendant and D would occasionally go to K's apartment to watch movies and play video games with K, T, and the victim.

K, T, and the victim also would visit the defendant and D at the defendant's apartment in Danielson. Sometimes K would leave the victim alone with the defendant

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

[2] The defendant has raised three additional issues on appeal, claiming that (1) the trial court improperly denied his motions for judgments of acquittal because of insufficient evidence of penetration to support the conviction for sexual assault in the first degree or, alternatively, because the conviction was against the weight of the evidence, (2) he was deprived of his due process rights as a result of prosecutorial impropriety because the state improperly elicited constancy of accusation evidence, which led to an erroneous jury instruction, and the state made comments in rebuttal that misstated evidence, related to the constancy of accusation evidence, and highlighted the defendant's interest in the case, and (3) that the trial court improperly joined his separate cases for trial. We carefully have considered the defendant's claims and conclude that they have no merit.

[3] In accordance with our policy of protecting the privacy interests of the victims of sexual abuse and the crime of risk of injury to a child, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

while she ran errands. On one occasion at the defendant's apartment, the victim was in the defendant's bedroom lying down at the edge of his bed. The defendant told her to take her pants off and she did. She saw that the defendant's "front private went through a hole in his underwear." He told her to touch it. She testified that she did, that it felt "squishy," and that the defendant then touched his penis to her vagina, making "skin to skin" contact. The victim said that it hurt the middle of her vagina.

In December, 2013, the defendant and D went to K's apartment in Montville to watch movies and play video games. While K was outside smoking a cigarette, the victim was standing on the couch. The defendant put his hand inside the victim's pants and rubbed her vagina over her underwear. She told him to stop, but he did not. She told him that she was going to tell her mother, and he responded that her mother would not believe her. When K returned, the victim told K that the defendant made her feel uncomfortable, and K told her to stay in K's bedroom and play on the computer.

When K learned from the victim's grandmother that the victim had told her cousin that she had been abused, K informed Nora Selinger, a school guidance counselor who the victim saw for counseling. After speaking with the victim, Selinger filed a report with the Department of Children and Families (department). The department then forwarded the report to the police.

On March 31, 2014, police officers went to the defendant's house and asked to talk to him about a case they were investigating. The defendant agreed to meet with the police at the police barracks where the police interviewed the defendant. The defendant did not receive *Miranda* warnings, and the interview was taped. On September 12, 2014, the defendant was given *Miranda* warnings and arrested on charges of sexual assault in the fourth degree and risk of injury to a child stemming

from the December, 2013 incident at K's apartment in Montville. On November 12, 2014, he was given *Miranda* warnings and arrested on charges of sexual assault in the first degree and risk of injury to a child arising from his conduct in the bedroom of his apartment in Danielson. The two cases were consolidated for trial.

During the defendant's trial, there was testimony relating to two other alleged incidents when the defendant rubbed the victim's vagina over her underwear. The defendant was not charged for those incidents. One occurred at the defendant's apartment when K was not there, and the other occurred when the defendant and the victim were hiking alone at a state park.

The defendant elected to testify. On cross-examination, the state played portions of his March 31, 2014 police interview and questioned him about the interview and the hiking incident. The defendant testified that, during the hike, there were other people around. The state then asked the defendant a series of questions that focused on whether the defendant previously had told the police that there were other people "around" during the hike. Specifically, the state asked: (1) "That's the first time that we're hearing this. Isn't that correct?"; (2) "And this is the first time that we're hearing that information?"; and (3) "[B]etween March 31st of 2014 and your arrest in September in Montville and in November in—in Danielson, you never told anybody about that?"[4] Defense counsel objected to the last of these three questions, and the objection was sustained.

[4] The questions that the defendant claims constituted *Doyle* violations occurred during the following exchange:

"[The Prosecutor]: Okay. So only the two of you would know what happened out in—in the woods?

"[The Defendant]: Correct. There was a lot of other people there at the time, too, walking around hiking, too, so—

"[The Prosecutor]: You didn't tell the police that when you talked to them.

"[The Defendant]: They didn't ask.

"[The Prosecutor]: *That's the first time that we're hearing this. Isn't that correct*?

The jury found the defendant guilty of sexual assault in the first degree, sexual assault in the fourth degree, and two counts of risk of injury to a child. The court accepted the verdicts and sentenced the defendant to

"[The Defendant]: I do believe I—I don't—actually I don't know if I told them at the time or not. The fact is, is when we were walking around, there were other people there. The place was busy. It was in the middle of summer and it was Green Falls.

"[The Prosecutor]: *And this is the first time that we're hearing that information*?

"[The Defendant]: Nobody inquired previous to it.

"[The Prosecutor]: Well, you're in a two-hour interview with police officers and you have time to talk about other things, you talk about your vaporizer, you talk about your brewing at the beginning of the video?

"[The Defendant]: Yes, when inquired.

"[The Prosecutor]: And you never thought to mention to them that there were a bunch of other people around on this hike?

"[The Defendant]: Well, there's people walking. It's a hiking path at Green Falls. There was people camping there. As we were walking, we passed people, we had conversations with people. So, yes, there's other people, but nothing—again, nothing that I thought of, nothing out of the ordinary, nothing more than a hike, a normal hike.

"[The Prosecutor]: So when you're in an interview room with two police officers being accused of touching a child on a hike—

"[The Defendant]: Yeah.

"[The Prosecutor]: —alone, you didn't think it was helpful information that maybe there were other people around?

"[The Defendant]: I had stated that there were other people around in the beginning. I stated that I had asked a bunch of other people if they wanted to go for a hike, too.

"[The Prosecutor]: So they were back at the campsite?

"[The Defendant]: Those people were, yes.

"[The Prosecutor]: Right. So we're talking about when you were on the hike alone with [the victim].

"[The Defendant]: It just didn't cross my mind. There was people. You hike, you see people.

"[The Prosecutor]: Okay. And so you—so you—

"[The Defendant]: And there was nothing spe—yeah, I mean yeah, there was—

"[The Prosecutor]: So you didn't tell the officers about that?

"[The Defendant]: No. No.

"[The Prosecutor]: *And between March 31 of 2014 and your arrest in September in Montville and in November in—in Danielson, you never told anybody about that*?

"[Defense Counsel]: Objection, Your Honor.

"The Court: Send the jury out." (Emphasis added.)

When the jury returned, the court stated: "All right. I think when we broke there was an objection. That objection is sustained."

a total effective term of ten years mandatory incarceration followed by eight years of special parole. This appeal followed.

I

The defendant claims that the two questions, referring to the trial as being the *first time* that the defendant mentioned that other people were in the same area during the hike with the victim, violated his constitutional right to remain silent pursuant to *Doyle* v. *Ohio*, supra, 426 U.S. 610, by introducing evidence of the defendant's post-*Miranda* silence. Specifically, the defendant argues that the two questions focused on the defendant's silence after he was arrested and received his *Miranda* warnings, and therefore his post-*Miranda* silence was used as evidence of guilt. We disagree.

"In *Doyle* [v. *Ohio*, supra, 426 U.S. 610] . . . the United States Supreme Court held that the impeachment of a defendant through evidence of his silence following his arrest and receipt of *Miranda* warnings violates due process. . . . Likewise, our Supreme Court has recognized that it is also fundamentally unfair and a deprivation of due process for the state to use evidence of the defendant's post-*Miranda* silence as affirmative proof of guilt . . . . *Miranda* warnings inform a person of his right to remain silent and assure him, at least implicitly, that his silence will not be used against him. . . . Because it is the *Miranda* warning itself that carries with it the promise of protection . . . the prosecution's use of [a defendant's] silence *prior* to the receipt of *Miranda* warnings does not violate due process. . . . Therefore, as a factual predicate to an alleged *Doyle* violation, the record must demonstrate that the defendant received a *Miranda* warning prior to the period of silence that was disclosed to the jury. . . . The defendant's claim raises a question of law over which our review is plenary." (Emphasis in original;

internal quotation marks omitted.) *State* v. *Reddick*, 174 Conn. App. 536, 553, 166 A.3d 754, cert. denied, 327 Conn. 921, 171 A.3d 58 (2017), cert. denied, U.S. , 138 S. Ct. 1027, 200 L. Ed. 2d 285 (2018).

The defendant acknowledges that he did not preserve his *Doyle* claim but asserts that it is reviewable under *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 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.

Upon our review of the record, it is clear that the two questions, in which the state referred to the trial as the "first time" that the other hikers were mentioned, pertained to the defendant's March 31, 2014 pre-*Miranda* interview. "[E]vidence of prearrest, and specifically pre-*Miranda*, silence is admissible to impeach the testimony of a defendant who testifies at trial, since the rule of *Doyle* . . . is predicated on the defendant's reliance on the implicit promise of the *Miranda* warnings." *State* v. *Angel T.*, 292 Conn. 262, 286 n.19, 973 A.2d 1207 (2009); see also *State* v. *Esposito*, 223 Conn. 299, 319, 613 A.2d 242 (1992) ("prosecution's use of silence prior to the receipt of *Miranda* warnings does not violate due process"). Because the state's questions clearly focused on the pre-*Miranda* interview, the present situation is distinguishable from the cases the defendant cites in support of his argument that the state's

use of the term the "first time" amounts to a *Doyle* violation. See, e.g., *State* v. *Brunetti*, 279 Conn. 39, 45-46, 83, 86, 901 A.2d 1 (2006), cert. denied, 549 U.S. 1212, 127 S. Ct. 1328, 167 L. Ed. 2d 85 (2007). In *Brunetti*, the defendant was given *Miranda* warnings during a police interview after becoming upset when he was questioned about reddish brown stains on certain clothing, and he provided a confession after receiving a *Miranda* warning. Id., 46. During the trial, the prosecutor asked: "[O]ther than your lawyer, could you please tell . . . the jury when is the first time that you told someone in authority, like a judge, a prosecutor or a police officer, this story about your sweatpants being dipped in blood?" Id., 83. Our Supreme Court concluded that the *Doyle* violation was harmless. Id., 86; see also *State* v. *Apostle*, 8 Conn. App. 216, 220, 512 A.2d 947 (1986) (defendant gave written statement to police after receiving *Miranda* warnings; during final argument, prosecutor focused on defendant not returning to police to correct his statement), superseded by statute on other grounds as stated in *State* v. *Kulmac*, 230 Conn. 43, 58 n.12, 644 A.2d 887 (1994). We, therefore, conclude that the defendant failed to demonstrate that an alleged constitutional violation existed, and thus his unpreserved *Doyle* claim fails the third prong of *Golding*.

II

The defendant additionally claims that the state's three questions sought to elicit evidence of the defendant's post-*Miranda* silence and, therefore, amounted to prosecutorial impropriety[5] that violated his due process rights. We disagree.

[5] The defendant raises other instances of prosecutorial impropriety, but as we stated in footnote 2 of this opinion, we conclude that the remainder of the defendant's prosecutorial impropriety claim is without merit. We, therefore, address only the claimed *Doyle* violations that the defendant argues are instances of prosecutorial impropriety.

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

. . . Second, if an impropriety exists, we then examine whether it deprived the defendant of his due process right to a fair trial. . . . [T]he defendant has the burden to show both that the prosecutor's conduct was improper and that it caused prejudice to his defense. . . .

"In determining whether the defendant was deprived of his due process right to a fair trial, we are guided by the factors enumerated by this court in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987). These factors include [1] the extent to which the [impropriety] was invited by defense conduct or argument, [2] the severity of the [impropriety], [3] the frequency of the [impropriety], [4] the centrality of the [impropriety] to the critical issues in the case, [5] the strength of the curative measures adopted, and [6] the strength of the state's case. . . . [A] reviewing court must apply the *Williams* factors to the entire trial, because there is no way to determine whether the defendant was deprived of his right to a fair trial unless the [impropriety] is viewed in light of the entire trial. . . . The question of whether the defendant has been prejudiced by prosecutorial [impropriety] . . . depends on whether there is a reasonable likelihood that the jury's verdict would have been different absent the sum total of the improprieties." (Citations omitted; internal quotation marks omitted.) *State* v. *Sinclair*, 332 Conn. 204, 236-37, 210 A.3d 509 (2019).

The defendant argues that the state's three questions—"That's the first time that we're hearing this. Isn't that correct?"; "And this is the first time that we're hearing that information?"; and "[B]etween March 31st of 2014 and your arrest in September in Montville and in November in—in Danielson, you never told anybody

about that?"—amounted to prosecutorial impropriety because the state attempted to elicit evidence of the defendant's post-*Miranda* silence.

As we discussed in part I of this opinion, the first two questions did not violate *Doyle* and the defendant does not argue how the questions would otherwise amount to prosecutorial impropriety. Therefore, we address only the defendant's arguments as to the state's question of whether the defendant told anybody about the presence of other hikers in the time period between the pre-*Miranda* interview and the defendant's arrests in September and November, 2014. The defendant argues that this last question was improper because it includes a post-*Miranda* time period of two months between the defendant's September and November arrests.

Even if we assume without deciding that the last question was improper, we determine that it did not deprive the defendant of his due process right to a fair trial.[6] See *State* v. *Baltas*, 311 Conn. 786, 827, 91 A.3d 384 (2014) (reaching second step of prosecutorial impropriety analysis by assuming, arguendo, that prosecutor's remarks were improper); see also *State* v. *Ross*, 151 Conn. App. 687, 699, 95 A.3d 1208, cert. denied, 314 Conn. 926, 101 A.3d 271 (2014).

Under our review of the *Williams* factors, we first note that the claimed impropriety was not invited by the defense. Additionally, we conclude that the factors

[6] Our opinion should not be understood to suggest that the prosecutor committed impropriety at any time during her questioning. In *State* v. *Papantoniou*, 185 Conn. App. 93, 111, 196 A.3d 839, cert. denied, 330 Conn. 948, 196 A.3d 326 (2018), this court explained: "The two steps of [our] analysis are separate and distinct, and we may reject the claim if we conclude that the defendant has failed to establish either prong." (Internal quotation marks omitted.) Accordingly, like in *Papantoniou*, we simply assume, solely for the sake of argument, that the prosecutor's question was improper. See id., 112 n.19.

of severity, frequency, centrality of the claimed impropriety, and strength of the curative measures also weigh in favor of the state. In the present case, the claimed impropriety was not pervasive throughout the trial but was confined to a single question that related to uncharged misconduct, and was not central to a critical issue in the defendant's case or his theory of defense. Defense counsel objected to the question before it was answered, the objection was sustained, and the court had previously instructed the jury regarding sustained objections.[7] Although defense counsel failed to request a specific curative instruction, the court's general instruction directed the jury's approach to sustained objections, curing any impropriety. See *State* v. *A. M.*, 324 Conn. 190, 207, 152 A.3d 49 (2016) ("in nearly all cases where defense counsel fails to object to and request a specific curative instruction in response to a prosecutorial impropriety, especially an impropriety that we do not consider to be particularly egregious, and the court's general jury instruction addresses that impropriety, we have held that the court's general instruction cures the impropriety").

Finally, we consider the sixth factor, namely the strength of the state's case. Because there was no physical evidence and the state's case relied on the victim's testimony, which the defendant, in part, corroborated, we cannot conclude that the state's case was particularly strong. Nevertheless, our Supreme Court has "never stated that the state's evidence must have been overwhelming in order to support a conclusion that prosecutorial [impropriety] did not deprive the defendant of a fair trial." (Internal quotation marks omitted.)

[7] On the first day of trial, the court gave the jury the following instruction: "If I sustain [an] objection, you will not hear an answer to the question and you should not wonder why the objection was made and you should not speculate as to what an answer might have been." The court also instructed the jury at the close of evidence that "any question or objection by a lawyer is not evidence . . . testimony that has been excluded or stricken is not evidence and must be disregarded . . . ."

State v. *Stevenson*, 269 Conn. 563, 596, 849 A.2d 626 (2004).

Under the present circumstances, in which the claimed impropriety—one question—was objected to and the objection was sustained before the question was answered, and the court's general instructions were sufficiently curative, we conclude that the defendant was not denied his due process rights and that his prosecutorial impropriety claim fails.

The judgments are affirmed.

In this opinion the other judges concurred.

DANIEL KLEIN *v.* QUINNIPIAC UNIVERSITY
(AC 41964)

Lavine, Keller and Bishop, Js.

Syllabus

The plaintiff sought to recover damages from the defendant private university for negligence in connection with personal injuries he sustained when, while riding his bicycle on the defendant's campus, he hit a speed bump and was thrown over the bicycle's handlebars. The plaintiff alleged that the speed bump was a dangerous, defective and unsafe condition on the defendant's property and that his injuries resulted from the defendant's negligence. The defendant denied any negligence and raised as a special defense that the plaintiff was contributorily negligent. Following a trial, the jury returned a general verdict in favor of the defendant, but no interrogatories were submitted to it. The trial court rendered judgment in accordance with the verdict, and the plaintiff appealed to this court. *Held*:

1. The plaintiff could not prevail on his claim that the trial court erred by declining to instruct the jury on the definition of, and the duty owed to, a licensee: the evidence in the record did not reasonably support a conclusion that the plaintiff was a licensee, as there was no evidence that the defendant explicitly or implicitly expressed a desire that the plaintiff enter its campus or a willingness that he do so, and, contrary to the plaintiff's contention that the defendant impliedly gave him consent to ride his bicycle on the campus because there was a lack of "no trespassing" signs and no gate or the like at each entrance to the campus, the lack of such signs or a gate at each entrance, without some additional evidence demonstrating implied consent, was insufficient to send the

question of whether the plaintiff was a licensee to the jury, and if this court were to adopted the plaintiff's reasoning and permit liability to be imposed in situations such as these, it essentially would require many private properties in the state that are now used for recreational purposes, to be fenced, gated and covered with "no trespassing" signs to bar access by the public, which would have significant societal impact and concomitant cost; moreover, even if this court were to assume that the plaintiff was a licensee, the evidence did not support a finding that the defendant breached any duty to the plaintiff as a licensee because, under the circumstances in this case, the defendant was not required to warn the plaintiff of the obvious dangers of his actions, namely, riding his bicycle over a speed bump as he proceeded down a hill with no intention of obeying the stop sign that lay just beyond the speed bump.

2. The general verdict rule precluded review of the plaintiff's claim that the trial court improperly permitted a certain witness to testify concerning the estimated speed of the plaintiff's bicycle at the time of the accident; because the general verdict rule applied, this court was required to presume that the jury found every issue in favor of the defendant, including that the defendant was not negligent, and, therefore, that rule precluded review of the plaintiff's remaining evidentiary claim, which related only to the defendant's special defense of contributory negligence.

(*One judge dissenting*)

Argued May 16—officially released October 8, 2019

Procedural History

Action to recover damages for the defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of New Haven, and tried to the jury before, *Wahla*, *J.*; verdict and judgment for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

Steven D. Jacobs, with whom, on the brief, was *Richard L. Jacobs*, for the appellant (plaintiff).

James E. Wildes, for the appellee (defendant).

Opinion

LAVINE, J. In this premises liability action, the plaintiff, Daniel Klein, appeals from the judgment of the trial court, rendered after a jury trial, in favor of the defendant, Quinnipiac University. On appeal, the plaintiff claims that the trial court erred by (1) permitting

a witness to testify about the estimated speed of the plaintiff's bicycle at the time of his collision, and (2) refusing to give a jury instruction on the definition of, and the duty owed to, a licensee. For the reasons discussed herein, we affirm the judgment of the trial court.

The jury reasonably could have found the following facts. The weather was clear and sunny on July 30, 2014, and the plaintiff, who was then seventy-one years old, and his friend, Richard Lebov, decided to take a bike ride through the defendant's campus because the "hill" offered a "difficult climb" that was "fun" and "a challenge." The two had ridden their bicycles there the year before. They were not students at the defendant, employed at the defendant, invited onto the campus, or planning to meet anyone on the campus.[1] The campus was not gated, and there were no "no trespassing" signs. Upon entering the campus, there were alternative routes available, one of which would pass by a guardhouse where a public safety officer was sta-

[1] The plaintiff gave the following testimony:

"Q. And on the day of the accident, no one invited you to go onto the campus, is that fair to say?

"A. Correct.

"Q. And no one gave you permission to enter the campus?

"A. Correct.

"Q. You just decided to go up the hill and go onto the campus?

"A. Correct.

"Q. And you never worked there?

"A. Correct.

"Q. You weren't a student there?

"A. Correct.

"Q. You were never a student there?

"A. Never.

"Q. You didn't know anybody who worked there?

"A. Correct.

"Q. So, your sole purpose of going onto the campus that day was just to go for a bike ride?

"A. Correct.

"Q. And [the defendant] is a private university, is that so?

"A. Yes.

"Q. All right. So, you went onto private property to go for your bike ride?

"A. Correct."

tioned at all times.[2] There was a sign posted on the guardhouse directing vehicles to check in.[3]

[2] In our view, the dissent places too much weight on Officer Juan Melendez' following testimony in support of its argument that "visitors without any affiliation with the defendant were generally permitted [on campus] unless they appeared suspicious":

"Q. . . . [I]t's within the—and that person is not affiliated with the university, it's within the discretion of the officer then on duty to let that person up; is it not?

"A. Yes, it is.

"Q. And is it fair to say that unless that person appears to be suspicious in some way that you, as the guard at the guardhouse, would be inclined to exercise your discretion to let that person up.

"A. Yes."

Notably, Officer Melendez additionally testified to the following:

"Q. When you were assigned to the [defendant's] York Hill campus in the guardhouse, what were your—what were your responsibilities?

"A. My responsibilities when I was assigned there was to man that gate, stop traffic, make sure—ask for [identification cards], determine who was coming on campus and what are their nature; what are they there for. One of the reasons they have us ask for student [identification cards] is because we would have people that may want to come on campus that are not students or affiliated with the [defendant], and we do not want to have people that do not belong there there. Because if something happens there could—hurt somebody or do something that they're not, you know, of criminal intent. So, that's why they have us there.

"Q. Is [the defendant] a private university?

"A. It's private.

"Q. And the property of York Hill campus that's private property?

"A. That's a private property. . . .

"Q. Back on July 30, 2014, what was the practice and procedure of guards, such as yourself, public safety officers, if someone had stopped at the guardhouse going up the York Hill campus?

"A. You would ask in—you would ask them for their information, their [identification card], and their business there. If they were a student, faculty, staff, and—you would let them go because they would have a decal on their vehicle."

[3] The dissent's supposition that "the only apparent purpose of the guardhouse was to limit vehicular access" is not supported by the record. The testimony on the issue from Officer Melendez was that "[t]he reason there's a guardhouse is for security reasons. [The defendant has] a student population that [it is] responsible for." Likewise, Barbara Barbuito, the assistant director of facilities for the defendant's York Hill campus, testified as follows:

"Q. Why is there a guardhouse in that location?

"A. There's a guardhouse there so no one enters, other than faculty, students, and student parents, and our staff. . . .

"Q. I mean security, are—are you concerned about the security of the students, their safety at campus?

"A. Yes.

The plaintiff and Lebov took the road to the right that avoided the guardhouse and rode to the top of the

"Q. Is that—could you tell us whether or not that's a reason why there's a guardhouse there?

"A. That is the reason why there's a guardhouse, so, there's only specific people that are allowed past that guardhouse. . . .

"Q. Is the guardhouse occupied?

"A. Yes.

"Q. And who occupies the guardhouse?

"A. Public safety.

"Q. And how often does public safety occupy the guardhouse?

"A. 24/7.

"Q. Does that include the summer time?

"A. Yes.

"Q. And on July 30, 2014, was the guardhouse—did the guardhouse have somebody in it?

"A. Yes.

"Q. Why was there somebody in the guardhouse?

"A. For safety.

"Q. What are the responsibilities of a public safety officer of [the defendant] who's assigned to that guardhouse?

"A. So, he is not to allow anyone, other than a student, staff member, faculty, or a parent up in the area where the dorms are located. . . .

"Q. Could you tell us whether or not it's the responsibility of who's ever assigned to the guardhouse to stop people from entering that area of campus? . . .

"A. Yes.

"Q. Is [the defendant] a private or public university?

"A. Private.

"Q. And is the York Hill campus part of the [defendant]?

"A. Yes.

"Q. Is that private or public?"

"A. Private.

"Q. Does [the defendant] have a policy regarding individuals who come onto the campus who are not students, faculty, staff?

"A. I believe it's a verbal policy that no one is allowed in the areas where the student dorms are.

"Q. And was that policy in place on July 30, 2014?

"A. Yes.

"Q. If someone rode up on a bicycle to the open campus where the guardhouse [was] back on July 30, 2014, what was the procedure that was in place at the time for public safety?

"A. They would stop them, and ask for [identification], and ask them what they were doing on campus.

"Q. And, again, why would they do that?

"A. For the safety of the students."

hill.[4] They rode down the hill on a road that passes near the guardhouse. At the end of the road, there were two bright yellow speed bumps and a stop sign. There was nothing that obstructed the plaintiff's, or Lebov's, view of the speed bumps and the stop sign—especially as it was a clear and sunny day. Both of them saw the bright yellow speed bumps clearly.[5]

At trial, the plaintiff and Lebov each testified that they had no intention of stopping at the stop sign.[6] They

[4] The plaintiff testified to the following on cross-examination:

"Q. Exactly. So, rather than go up to the guardhouse to check in at the guardhouse, you took a right?

"A. Correct.

"Q. You didn't see what the sign said?

"A. Correct.

"Q. Because you avoided the guardhouse by going to the right?

"A. Correct.

"Q. So, obviously, you didn't stop at the guardhouse and check in?

"A. Correct."

On redirect examination the plaintiff testified to the following:

"Q. Did you purposely avoid the guardhouse?

"A. No, I came down by the guardhouse."

[5] The plaintiff gave the following testimony:

"Q. And you saw these speed bumps as you were going down the hill?

"A. Correct.

"Q. And the speed bumps were yellow?

"A. Correct.

"Q. And they were bright yellow?

"A. Yes.

"Q. Yes? And you had no difficulty seeing them?

"A. No."

[6] The plaintiff gave the following testimony:

"Q. My question is, you were not planning on stopping at the stop sign at the bottom of the hill, is that correct?

"A. To make a full stop, no, that—we don't—we never stop, make full stops unless there was traffic or something. That's just what bicyclists do. When we get to a stop sign, we look both ways, if there's nothing coming, we—I mean, we slow until maybe one or two miles an hour. But to stop means we have to get out of our pedals and put our feet down. . . .

"Q. I think you just said that you were going to slow, but, you were—you were not going to stop. Were you planning on stopping that day?

"A. Was I planning on coming to a full stop, probably not. . . .

"Q. Right. So, you didn't plan on stopping?

"A. Not to a full stop, no. . . .

both rode over the first speed bump without incident. When the plaintiff's bicycle made contact with the second speed bump, he flew over the top of his handlebars, hit the ground, and sustained serious injuries. The officer stationed at the guardhouse, Juan Melendez, called dispatch, and the plaintiff received medical assistance.

Officer Melendez had seen the plaintiff and Lebov ride up the hill and had left the guardhouse to survey the area because he thought that they were still in the general area.[7] He turned when he heard a noise and

"Q. My question is this, you didn't plan on stopping at the guardhouse, is that correct?

"A. That's correct.

"Q. Okay. And you didn't plan on stopping at the stop sign, is that correct?

"A. That is correct."

[7] Officer Melendez gave the following testimony:

"Q. Had you seen [the plaintiff] before the moment when you observed him being thrown off the bike?

"A. Yes.

"Q. Where did you observe him?

"A. I saw him come up the hill, and they went out through the backend of the—of the campus where the armed gate is situated.

"Q. So—so you saw him enter the campus?

"A. I saw him en—enter—I saw him go up the campus, but they didn't go by me or by the guardhouse.

"Q. They went up by the wind—by the wind farm.

"A. By the wind farm.

"Q. Okay. Did you call to any—withdrawn. Were there any other officers on campus at that time?

"A. There was another patrol officer.

"Q. Did you call to the other patrol officer to alert him to the presence of—of the bicyclists?

"A. At the time I did not do that. That's one of the reasons why I was out of the guardhouse. I was looking in the general area, seeing traffic, observing my—observing my surroundings. And—I—and usually I was expecting them to come back.

"Q. Okay. So, about how much time passed from the moment when while standing outside of the guardhouse you observed them, the two—there were two riders?

"A. There were two riders.

"Q. When you observed them right up the road past the wind farm to the time when they came back?

"A. Well, when they were coming up the hill, I was still in the guardhouse when they went back through the wind farms. There was a time I couldn't

saw the tire of the plaintiff's bicycle hit the second speed bump and the plaintiff thrown over the handlebars. Officer Melendez was permitted, over objection, to testify that the plaintiff's speed was "conservatively ten miles an hour" or faster because of the hill's incline.

The plaintiff brought the present action, seeking monetary damages, claiming that the speed bump was dangerous, defective, and unsafe and that his injuries resulted from the defendant's negligence. The defendant denied any negligence and raised the special defense that the plaintiff was contributorily negligent. The case was tried to a jury, but no interrogatories were submitted to it. Following the trial, the jury returned a general verdict in favor of the defendant, and the court rendered judgment accordingly. This appeal followed.

The plaintiff first challenges the court's evidentiary ruling permitting Officer Melendez to estimate the speed of the plaintiff's bicycle. Second, he claims that the court improperly refused to instruct the jury that his status could have been that of a licensee and erred by charging the jury only on his status as a trespasser.[8]

tell you how long. And that's when I exited the guardhouse and decided to look around the area; observe my area."

Officer Melendez further testified:

"Q. And can you just explain for the ladies and gentlemen of the jury again, why you were not in the guardhouse and where you were?

"A. I was in front of the guardhouse, towards the left side of it. I was surveying my area, my post. I had [seen] bicycles—bicyclists come up, and I thought they were still in the general area, but they didn't come by my gate. So, I was just surveying my area."

[8] The court instructed the jury on the duty owed to a trespasser as well as to a constant trespasser. Although used infrequently, our Supreme Court has recognized the status of constant trespasser where a heightened duty is owed when the possessor of land has knowledge that trespassers constantly intrude upon a limited area of the land. See *Morin* v. *Bell Court Condominium Assn., Inc.*, 223 Conn. 323, 333, 612 A.2d 1197 (1992). The court charged the jury as follows: "If a possessor of the land has knowledge that the trespassers constantly intrude upon a limited area of the land, the possessor of the land is liable for an artificial condition that caused injury to the trespasser on that part of the land if all of the following are met. The condition is one that the possessor has created or maintains and the condition is

The defendant, however, argues that the general verdict rule applies to this case and precludes a review of the plaintiff's contentions on appeal. The plaintiff argues that although the general verdict rule might insulate the verdict from attack in other circumstances, it does not do so in the present case because the improper jury charge affected both the negligence claim and the contributory negligence special defense. We view the plaintiff's second claim of error with respect to the jury charge to be without merit, and we conclude that the general verdict rule applies to defeat the plaintiff's first claim. We address the plaintiff's second claim first.

The essential issue in this case is whether the plaintiff, an experienced bicyclist, who was injured while riding his bicycle on the York Hill campus of the defendant, a private university, was entitled to have the jury instructed on the definition of, and the duty owed to, a licensee. The trial court decided that the issue was one of law, that the evidence did not support the claim that the plaintiff was a licensee, and that he was not entitled to such a jury charge. On appeal, the plaintiff claims that it was reversible error for the court to take the issue away from the jury, which returned a verdict in favor of the defendant, because, in his view, there was evidence that the defendant implicitly consented to his presence.

Connecticut's premises liability law has long provided that "[t]he status of an entrant on another's land, be it trespasser, licensee or invitee, determines the duty that is owed to the entrant while he or she is on a landowner's property." (Internal quotation marks omitted.) *Cuozzo* v. *Orange*, 178 Conn. App. 647, 655, 176

one that to the possessor's knowledge is likely to cause death or serious bodily harm to such trespasser. And the condition is of such nature—of such a nature that the possessor has reason to believe that such trespasser will not discover it. And the possessor has failed to use reasonable care to warn such trespassers of [the] artificial condition and the risk involved."

A.3d 586 (2017), cert. denied, 328 Conn. 906, 177 A.3d 1159 (2018). "Ordinarily, the status of one who sustains injury while upon the property of another is a question of fact." (Internal quotation marks omitted.) *Moonan* v. *Clark Wellpoint Corp.*, 159 Conn. 178, 185, 268 A.2d 384 (1970); see also *Roberts* v. *Rosenblatt*, 146 Conn. 110, 112, 148 A.2d 142 (1959). "Where, however, the facts essential to the determination of the plaintiff's status are not in dispute, a legal question is presented." (Internal quotation marks omitted.) *Gargano* v. *Azpiri*, 110 Conn. App. 502, 506, 955 A.2d 593 (2008); see also *Brown* v. *Robishaw*, 282 Conn. 628, 633, 922 A.2d 1086 (2007) ("[i]f . . . the evidence would not reasonably support a finding of the particular issue, the trial court has a duty not to submit it to the jury" [internal quotation marks omitted]).

The plaintiff argues that he asked the court to charge the jury on the definition of and the duty owed to a licensee. He cites in his appellate brief to a proposed jury instruction that states: "A licensee is a person who is privileged to enter or remain on land only by virtue of the possessor's consent, that is, with the possessor's permission or with the possessor's express or *implied consent*." (Emphasis in original.) See Connecticut Civil Jury Instructions 3.9-3, available at http://www.jud.ct.gov/JI/Civil/Civil.pdf (last visited October 3, 2019).[9] He argues that the "evidence reasonably supported a finding that [he], while on the defendant's property on July 30, 2014, was there, if not with the possessor's express consent, then with its implied consent . . . ."

[9] The Connecticut Civil Jury Instructions state on page one of the collection: "This collection of jury instructions was compiled by the Civil Jury Instruction Committee and is intended as a guide for judges and attorneys in constructing charges and requests to charge. The use of these instructions is entirely discretionary and their publication by the Judicial Branch is not a guarantee of their legal sufficiency." Connecticut Civil Jury Instructions, available at https://jud.ct.gov/JI/Civil/Civil.pdf (last visited October 3, 2019).

While the civil jury instruction cited to by the plaintiff contains the phrases "express consent" and "implied consent," those precise phrases do not appear in our case law discussing the classification of someone entering onto someone else's land. Rather, our Supreme Court, guided by § 330 of the Restatement (First) of Torts, has defined a licensee as "a person who is privileged to enter or remain upon land by virtue of the possessor's consent, whether given by *invitation* or *permission*." (Emphasis added; internal quotation marks omitted.) *Laube* v. *Stevenson*, 137 Conn. 469, 473, 78 A.2d 693 (1951); see also *Salaman* v. *Waterbury*, 246 Conn. 298, 305, 717 A.2d 161 (1998) (same).

Although our Supreme Court has made clear that licensee status can be established by demonstrating that the possessor of the land gave someone permission or an invitation to enter the property, only a few cases following our Supreme Court's adoption of the licensee definition discuss such status, and they shed little light on precisely what a plaintiff entrant is required to show in order to establish that it received the requisite consent.

For example, in *Salaman* v. *Waterbury*, supra, 246 Conn. 301, an administrator of a swimmer's estate brought an action against the defendant city for premises liability negligence, after the swimmer drowned while swimming across a reservoir owned by the city. The jury returned a verdict in favor of the plaintiff, but the court ultimately granted the city's motion to set aside the verdict and for judgment notwithstanding the verdict, concluding that there was insufficient evidence to impose either trespasser or licensee liability. Id., 303. This court disagreed and reversed the trial court's judgment. Id. Our Supreme Court then granted certification to appeal. Id., 304. After defining "licensee," the court went on to note that "[i]n order to prove that the decedent was a licensee, the plaintiff was required to prove that the decedent was on the city's land with its

permission or by its express or implied invitation."[10] Id., 306.

In construing this statement by our Supreme Court, it is unclear whether licensee status can also be established by implied permission. One could argue that the absence of the phrase "express or implied" before the word "permission" suggests that the court intended to preclude proof of licensee status by implied permission. One could also argue that our Supreme Court's use of the phrase "implied invitation" was intended to be interchangeable with "implied permission." The court in *Salaman*, however, did not reach the issue of whether the swimmer was in fact a licensee or provide any further analysis on his status. The court concluded that it need not examine the record to determine if there was some evidence from which the jury reasonably might have concluded that the decedent was a licensee because, even if it assumed that the decedent was a licensee, the evidence did not support a finding that the city breached any duty to the decedent as a licensee. Id, 306.

Older case law, however, suggests that implied permission may be sufficient to establish licensee status. For example, in *Katsonas* v. *Sutherland Building & Contracting Co.*, 104 Conn. 54, 132 A. 553 (1926), which was decided prior to our Supreme Court's adoption of its current licensee definition, stated that "when a

[10] Our Supreme Court has explained that a person "might be found to have been impliedly invited if he came to the premises under either of two sets of facts: First, because he was led to believe that [the premises] were intended to be used by visitors or passengers, and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way or place was adapted and prepared or allowed to be so used; or, secondly, he was using them with the acquiescence, actual or implied, of the defendant in pursuance of a matter of mutual interest." (Citation omitted; internal quotation marks omitted.) *Dym* v. *Merit Oil Corp.*, 130 Conn. 585, 588–89, 36 A.2d 276 (1944).

landowner tacitly permits certain acts upon his property, a license to do these acts may be inferred from his failure to object . . . .''

In an attempt to clarify this ambiguity and determine what proof is permissible to establish licensee status, we turn our attention to the comments of § 330 of the Restatement (First) of Torts, the section from which our Supreme Court adopted the licensee definition. Comment (a) to that section states: '' 'Invitation' and 'permission.' An invitation differs from a permission only in this: an invitation is conduct which justifies others in believing that the possessor desires them to enter; a permission is conduct justifying others in believing that the possessor is willing that they shall enter if they desire to do so. It is immaterial whether the consent which creates the license is an invitation originating with the possessor of the land or by a permission given upon request made by the licensee. The important fact is that the entry is by the consent of the possessor and it is immaterial that the suggestion of the visit originates with him or with his licensee.'' 2 Restatement (First), Torts § 330, comment (a), p. 893 (1934).

Furthermore, comment (b) to § 330 of the Restatement (First) of Torts states: '' 'Toleration' and 'permission.' The word 'permission' indicates that the possessor's conduct is such as to give others reason to believe that he consents to their entering the land if they desire to do so. A mere failure to object to another's entry may be a sufficient manifestation of consent thereto if the possessor knows of the other's intention to enter and has reason to believe that his objection is likely to be effective in preventing the other from entering. On the other hand, the fact that the possessor knows of the other's intention to enter and does not prevent it may not be of itself a sufficient manifestation of consent and, therefore, is not necessarily permission. A failure

to take burdensome and expensive precautions against intrusion manifests an unwillingness to go to the trouble and expense of preventing others from trespassing upon the land and expresses toleration of the practically unavoidable rather than consent to their entry as licensees. *Even a failure to post a notice warning the public not to trespass cannot reasonably be construed as an expression of consent* to the intrusions of persons who habitually and notoriously disregard such notices." (Emphasis added.) Id., comment (b), p. 893–94.

Additionally, comment (d) to § 330 of the Restatement (First) of Torts states in relevant part: "License created otherwise than by words. The consent which is necessary to confer a license to enter land, may be expressed by acts other than words. Here again the decisive factor is the interpretation which a reasonable man would put upon the possessor's acts." Id., comment (d), p. 894.

In light of the guidance provided in the comments to § 330 of the Restatement (First) of Torts, and in light of the myriad cases from other jurisdictions recognizing that both express and implied permission is sufficient to render an entrant a licensee; see, e.g., *Fitzsimmons* v. *State*, 42 App. Div. 2d 636, 637, 345 N.Y.S.2d 171 (1973) ("[a] licensee is one who enters the premises for his own benefit without invitation, but with permission, express or implied, of the owner or person in possession"), aff'd, 34 N.Y.2d 739, 313 N.E.2d 790, 357 N.Y.S.2d 498 (1974); we are assuming, arguendo, that express or implied permission, in addition to an express or implied invitation, if established, can render an entrant a licensee.

In the present case, we must determine if the court properly concluded, as a matter of law, that the evidence did not reasonably support a finding that the plaintiff was a licensee. See *Gargano* v. *Azpiri*, supra, 110 Conn. App. 506 ("[w]here . . . the facts essential

to the determination of the plaintiff's status are not in dispute, a legal question is presented" [internal quotation marks omitted]).

We conclude that the essential facts in the present case are not in dispute, and, thus, the determination of the plaintiff's status is a question of law. The essential facts are as follows: The plaintiff is an avid bicyclist; he entered the private campus of the defendant on his bicycle; he did not stop at the clearly visible guardhouse located near the two main roads accessing the buildings on campus, but took the road that avoided it by riding to the right of it; there were no "no trespassing" signs present; there were not gates at every entrance to the campus; the plaintiff was not employed by the defendant at the time of the accident; he was not a student or a parent of a student attending the university; he had no other purpose for being on campus other than his desire to continue his bike ride through the campus, which he had done one previous time a year earlier; and there was no evidence that the defendant knew of the plaintiff's prior bike ride on the campus a year earlier.

On the basis of the record before us, we have little difficulty concluding that the court properly declined to give the jury a licensee instruction. The evidence in the present case did not reasonably support a conclusion that the plaintiff was a licensee—that is, that he received an express or implied invitation or express or implied permission to enter the campus. Indeed, there was no evidence of the defendant's having explicitly or implicitly expressed a desire that the plaintiff enter its campus, nor was there any evidence of the defendant's having expressed a willingness that he do so. See 2 Restatement (First), supra, § 330, comment (a), p. 893.

The plaintiff primarily argues that the defendant impliedly gave him consent to ride his bicycle on the campus because there was a lack of "no trespassing"

signs and no gate or the like at each and every entrance to the campus. The lack of "no trespassing" signs or a gate at each entrance, however, without some additional evidence demonstrating implied consent, is insufficient to send the question of whether the plaintiff was a licensee to the jury. See 2 Restatement (First), supra, § 330, comment (b), p. 894 ("[e]ven a failure to post a notice warning the public not to trespass cannot reasonably be construed as an expression of consent"). Put another way, there is insufficient evidence in the record before us demonstrating that the defendant's conduct, either expressly or implicitly, made others believe that the defendant was willing to let them enter the campus if they desired to do so. If we were to adopt the plaintiff's reasoning and permit liability to be imposed in situations such as these, "no trespassing" signs will go up, along with fences and gates, barring access to many private properties now used for recreational purposes, creating closed enclaves throughout our state. The societal impact, and concomitant cost, of such a ruling would be significant. See, e.g., *Salaman* v. *Waterbury*, supra, 246 Conn. 307 ("A rule requiring a property owner to post warning signs about the dangers inherent in swimming is unreasonable. In Connecticut, a small state, hundreds of miles of shoreline would be exposed to this unreasonable requirement. Property owners who have water on their land are entitled to assume that a reasonable adult would be aware of the risk of drowning in a body of water.") We, therefore, conclude that the court did not err in declining to instruct the jury on licensee status and its corresponding duty of care.[11]

[11] We note that even if it was error for the court not to send the question of whether the plaintiff was a licensee to the jury, the plaintiff's one sentence harmfulness argument contained in his appellate brief was insufficient to address the harm of the court's alleged error. See *MacDermid, Inc.* v. *Leonetti*, 328 Conn. 726, 749, 183 A.3d 611 (2018) ("Specifically, with respect to jury instructions, we have explained that [i]t is axiomatic . . . that not every error is harmful. . . . [W]e have often stated that before a party is entitled to a new trial . . . he or she has the burden of demonstrating that the error was harmful." [Internal quotation marks omitted.]).

Moreover, even if we were to assume that the plaintiff in this case was a licensee, we would be unable to conclude that the evidence supports a finding that the defendant breached any duty to the plaintiff as a licensee. See *Salaman* v. *Waterbury*, supra, 246 Conn. 306. "The duty that a . . . [landowner] owes to a licensee . . . does not ordinarily encompass the responsibility to keep the property in a reasonably safe condition, because the licensee must take the premises as he [or she] finds them. . . . If the licensor actually or constructively knows of the licensee's presence on the premises, however, the licensor must use reasonable care both to refrain from actively subjecting him [or her] to danger and to warn him [or her] of dangerous conditions which the possessor knows of but which he [or she] cannot reasonably assume that the licensee knows of or by reasonable use of his [or her] faculties would observe." (Citations omitted; internal quotation marks omitted.) *Morin* v. *Bell Court Condominium Assn., Inc.*, 223 Conn. 323, 327, 612 A.2d 1197 (1992).

The plaintiff would have been required to establish that the defendant breached the duty owed to a licensee. On the basis of our review of the evidence, no jury reasonably could have concluded that the defendant breached that duty even if one assumes the plaintiff was a licensee. In particular, there was no claim or evidence to support a finding that the defendant actively subjected the plaintiff to danger. Thus, the defendant's duty to the plaintiff, had he in fact been a licensee, would be to "warn him [or her] of dangerous conditions which the possessor knows of but which he [or she]

In light of the court's constant trespasser jury instruction; see footnote 8 of this opinion; which is substantially similar to the licensee instruction the plaintiff seeks, it would have been incumbent upon the plaintiff to address sufficiently the harm with respect to the court's alleged error. See *MacDermid, Inc.* v. *Leonetti*, supra, 328 Conn. 748 ("without adequate briefing on the harmfulness of an alleged error, the defendant is not entitled to review of [the] claim on the merits" [internal quotation marks omitted]).

cannot reasonably assume that the licensee knows of or by reasonable use of his [or her] faculties would observe." (Internal quotation marks omitted.) Id., 329.

We are simply unwilling to conclude that on a sunny and clear day, a plainly visible bright yellow speed bump located on a paved road, even if on a hill, can be considered a hidden, dangerous condition. In fact, there was testimony that speed bumps "are a known hazard to bicyclists." Moreover, there was no evidence before the jury demonstrating that the defendant was aware of this alleged defect. In particular, there was no evidence that the defendant was aware that the way that the speed bump was constructed rendered the premises unsafe. Here, under the circumstances of this case, the plaintiff should have been aware of the dangers of riding his bicycle over a speed bump as he proceeded down the hill with no intention of obeying the stop sign that lay just beyond the speed bumps. See, e.g., *Hanks* v. *Powder Ridge Restaurant Corp.*, 276 Conn. 314, 336 n.12, 885 A.2d 734 (2005) ("[t]he risks inherent in each type of recreational activity will necessarily vary, and it is common knowledge that some recreational activities are inherently more dangerous than others"); see also *Rivera* v. *Glen Oaks Village Owners*, *Inc.*, 41 App. Div. 3d 817, 820, 839 N.Y.S.2d 183 (2007) ("[b]y engaging in a sport or recreational activity, a participant consents to those commonly-appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation") Even if we had assumed the plaintiff was a licensee, we would conclude on the facts of the present case that the defendant was not required to warn the plaintiff of the obvious dangers of his actions.

Lastly, we conclude that the general verdict rule applies to defeat the plaintiff's remaining claim that the court improperly permitted Officer Melendez to estimate the speed of the plaintiff's bicycle. "[The general

verdict] rule operates . . . to insulate a verdict that may have been reached under a cloud of error, but which also could have been reached by an untainted route." *Dowling* v. *Finley Associates, Inc.*, supra, 248 Conn. 376. "[It] applies whenever a verdict for one party could reasonably have been rendered on one or more distinct causes of action or distinct defenses. . . . [A] defendant['s] denial of negligence and . . . allegations of contributory negligence constitute two discrete defenses, either of which could [support a] jury's general verdict. . . . The verdict [could be] predicated on the defendant['s] freedom from negligence or on the plaintiff's comparatively greater negligence. . . . In light of [a] plaintiff's failure to request interrogatories to ascertain the basis of the jury's verdict, [the verdict] must [be] uph[eld] . . . under the general verdict rule, if either defense is legally supportable. . . . Further, if the trial court's instructions to the jury are shown to be proper and adequate as to any of the defenses raised, the general verdict must stand, regardless of error, if any, in the charge as to any other defense."[12] (Citations omitted.) *Staudinger* v. *Barrett*, 208 Conn. 94, 99–100, 544 A.2d 164 (1988).

Because the general verdict rule applies, we must presume that the jury found every issue in favor of the defendant. We, therefore, conclude that the jury found that the defendant was not negligent. The plaintiff's

[12] This court's recent decision in *Farmer-Lanctot* v. *Shand*, 184 Conn. App. 249, 194 A.3d 839 (2018), illustrates this principle. In *Farmer-Lanctot*, two defenses, a denial of negligence and a special defense of contributory negligence, could have supported the general verdict, and there was a claim of instructional error as to each ground. Id., 254. This court, therefore, considered the first claim of instructional error, which pertained to the negligence claim, as part of its analysis into whether there was a properly and adequately instructed defense that supported the verdict. Id., 254–59. This court concluded that the general verdict rule applied because there was no error in the instructions on the negligence claim, and, therefore, it did not need to consider the claimed errors relating to contributory negligence. Id., 258–59.

remaining evidentiary claim, that the court improperly permitted Officer Melendez to estimate the speed of the plaintiff's bicycle, relates only to the contributory negligence special defense. As such, it is precluded by the general verdict rule; see *Segale* v. *O'Connor*, 91 Conn. App. 674, 680, 881 A2d 1048 (2005); and does not require further discussion.

The judgment is affirmed.

In this opinion KELLER, J., concurred.

BISHOP, J., dissenting. In this premises liability action involving serious physical injuries, the plaintiff, Daniel Klein, asserts two claims on appeal: first, that the trial court abused its discretion by permitting a witness to give opinion testimony without adequate foundation, and second, that the court improperly refused to instruct the jury on the definition of and duties owed to a licensee upon a possessor's land. The majority concludes that the court properly refused to give such instruction. Alternatively, the majority concludes that, even if the court's instruction was incorrect, the error did not harm the plaintiff. The majority therefore finds no reversible error in the court's instruction to the jury and, consequently, concludes that the plaintiff's evidentiary claim is barred by application of the general verdict rule. I respectfully disagree.

A pivotal issue at trial was the legal status of the plaintiff on the property of the defendant, Quinnipiac University. The plaintiff asserted that he was there with the permission of the defendant; the defendant claimed, in response, that the plaintiff was a mere trespasser. The trial court determined, as a matter of law, that the plaintiff was a trespasser and, therefore, declined to instruct the jury with respect to the duties owed to licensees. I conclude that this was reversible error. In my view, there was adequate evidence adduced at trial

for the jury to conclude that the plaintiff had entered the defendant's property with the defendant's implied permission, and, accordingly, the trial court erred in refusing to give the requested licensee instruction.[1] In doing so, the court, in essence, directed a verdict against the plaintiff, thereby denying him the opportunity to have his claims fairly decided by a jury of his peers. In my view, this instructional error necessarily prejudiced the plaintiff and, therefore, requires reversal and an order remanding the matter for a new trial. Because the issue of the admissibility of the opinion testimony regarding the plaintiff's speed may arise on retrial, I would also reach the plaintiff's evidentiary claim and conclude that this lay opinion testimony was improperly admitted because the witness rendering the opinion lacked an adequate factual foundation.

The underlying facts, which the jury reasonably could have found, are, in the main, undisputed, with one exception regarding the purpose of a guardhouse on the defendant's premises. On July 30, 2014, the plaintiff

[1] In his request to charge, the plaintiff requested that the court instruct the jury that it was its responsibility to decide, on the basis of the evidence presented, whether the plaintiff was a licensee or a trespasser. Included in the plaintiff's requested charge was a proper statement of the legal definition of one who is a licensee and one who is a trespasser, and also a proper statement of the law regarding the duties owed by a possessor of land to a licensee and to a trespasser. On appeal, the plaintiff asserts that the court incorrectly charged the jury by instructing it solely with regard to the duties owed to a trespasser. From my perspective, this was a fatal error for either of two reasons. First, as is evident from the majority and dissenting opinions in this case, there was a sufficient factual dispute regarding the role of the guardhouse vis-à-vis visitors to the campus to render the question of the plaintiff's status a factual one for the jury's determination. Alternatively, if the court determined that the facts essential to the determination of the plaintiff's status were not in dispute, it should have charged only on the duties owed to a licensee. See *Millette* v. *Connecticut Post Ltd. Partnership*, 143 Conn. App. 62, 69 n.5, 70 A.3d 126 (2013) ("Ordinarily, the status of one who sustains injury while upon the property of another is a question of fact. . . . Where, however, the facts essential to the determination of the plaintiff's status are not in dispute, a legal question is presented." [Internal quotation marks omitted.]).

and a friend, Richard Lebov, both experienced bicyclists, went for an extended bicycle ride that ended on the defendant's York Hill campus in Hamden (campus), which, being situated on a hill, provides a nice view of New Haven and Long Island Sound.[2] The plaintiff and Lebov entered the campus via an access road from Sherman Avenue and proceeded onto the campus. At the time in question, this entrance was not gated, and there were no "no trespassing" signs posted anywhere around the campus or any other signs indicating that access to the campus was restricted in any way. In short, the circumstances were such as to lead a reasonable person approaching the entrance to the defendant's campus from Sherman Avenue to believe that the premises were open to the public without restriction.

The access road from Sherman Avenue terminates well into the interior of the campus, where it intersects with another campus road. At this point, lane use arrows in the right travel lane of the access road indicate that traffic may either proceed straight or turn right. Both routes lead to the top of the campus, where several dormitories and a student center are located. The plaintiff and Lebov turned right at this intersection to continue their ride to the top of the campus.

Across from the intersection at which the plaintiff and Lebov turned right is a road that leads directly to the dormitory area of the campus. Situated at the entrance to this road, in the median, is a guardhouse staffed at all times by a public safety officer. The guardhouse is flanked on both sides by two yellow painted speed bumps. A sign posted on the front of the guardhouse states that "all vehicles must stop and be registered." It is noteworthy that the sign at the guardhouse was directed only to vehicles and that, at the time in question, there were no signs posted requiring that

[2] The plaintiff and Lebov had been bicycle riding together on a regular basis over the course of twenty-five years, logging well over 20,000 miles.

users of the roadway coming from the Sherman Avenue entrance proceed across the intersection to the guardhouse instead of turning right as did the plaintiff and Lebov.

The route to the right of the intersection, taken by the plaintiff and Lebov, leads past a wind farm before connecting with the other end of the guardhouse road at the top of the hill. As with the Sherman Avenue entrance and the access road, there were no signs restricting traffic from taking the road leading past the wind farm. Nor were there any signs posted indicating that this road was one-way or that bicyclists or pedestrians using the road were going against the flow of traffic. Although there was a vertical swing arm gate located at some point along this road, the arm was in the upright position at the time in question. The open position of the gate's arm certainly does not suggest that travelers, be they students, staff, or visitors on that road, were unwelcome.

When the plaintiff and Lebov reached the intersection and turned right along the road up the hill toward the wind farm,[3] the safety officer on duty, Juan Melendez, observed them but remained inside the guardhouse. Also, he did not attempt to alert the other officer on duty to their presence. This inaction by Melendez supports the plaintiff's view that it was not part of Melendez' duty to screen, generally, visitors to the campus who did not seek access via the guarded roadway to the dormitories. Indeed, when the plaintiff and Lebov

[3] There was no evidence adduced at trial to suggest that the plaintiff and Lebov had decided to take the road to the right at the intersection in order to avoid the guardhouse at the entrance to the guarded road. Indeed, they both explicitly testified that they had not purposely avoided the guardhouse; rather, they chose to follow the route they had previously taken in order to pass by the wind farm. Moreover, the guardhouse straddling the road leading directly to the student dormitories did not appear to relate, in any way, to pedestrians, bicyclists, or those driving motor vehicles on campus who did not seek to travel on the guarded road.

had taken a bicycle ride along a similar route on the campus the previous year, no one had attempted to stop them, and there had been nothing to suggest in any manner that their presence had been unwelcome.[4]

After a minute or two, Melendez exited the guardhouse to survey the area, as he was expecting to see the plaintiff and Lebov come back. While standing in front of the guardhouse surveying the area, Melendez "heard a noise" and "instinctively" turned to his right, whereupon he observed the front wheel of the plaintiff's bicycle hit the second speed bump, causing the plaintiff to be thrown into the air over his handlebars and to hit the ground. The plaintiff sustained serious physical injuries as a result.[5]

The plaintiff commenced the present action by service of process on the defendant on March 11, 2015. In the operative second amended complaint filed on October 24, 2017, the plaintiff alleged that the bottom most speed bump in the egress lane of the guardhouse road was in a dangerous, defective, and unsafe condition and that he had been injured as a result of the defendant's negligence in allowing this dangerous condition to exist, failing to inspect the speed bump to ensure that it was in a reasonably safe condition, failing to remedy the condition, and failing to warn of the condition.[6] The defendant denied the plaintiff's allegation of negligence and raised the special defense of

[4] On the previous occasion, they had cycled into the campus and taken the same road past the wind farm. On that occasion, they had circled around counterclockwise past the dormitories before leaving the campus via a rear access road. There had been no "no trespassing" signs, and the only gate along their route had been up.

[5] The plaintiff sustained a brain bleed and broke one of his femurs, a hip, and four ribs. He required surgery to repair his femur.

[6] The plaintiff also specifically alleged that he had been a business invitee of the defendant. After the parties presented their evidence at trial, however, the plaintiff's counsel conceded that a business invitee instruction was not warranted and, instead, requested an instruction on the duties owed by a land possessor to a licensee. Although the plaintiff had not alleged in the operative complaint that he had been a licensee, the defendant did not object

contributory negligence. The matter was tried to a jury beginning on April 16, 2018, but no interrogatories were submitted to it.

At trial, Melendez testified that he had not seen the plaintiff coming down the hill prior to the plaintiff's collision with the speed bump. Nevertheless, he was permitted to testify, over the objection of the plaintiff's counsel, as to his opinion that the plaintiff's speed going down the hill was ten miles per hour, conservatively. This estimate was in line with that provided by the defendant's expert witness, Christopher Juliano, who opined that the plaintiff had been traveling at approximately 9.8 miles per hour at the time the accident occurred.

Following the conclusion of the defendant's case-in-chief on April 19, 2018, the defendant moved for a directed verdict. During argument on the defendant's motion, the defendant's counsel argued that the only conclusion that could be reached on the basis of the evidence presented was that the plaintiff had been a trespasser and that, consequently, the only duty that the defendant owed was to refrain from intentionally or recklessly injuring the plaintiff. The defendant's counsel, therefore, contended that, because the plaintiff did not allege or prove that the defendant had intentionally or recklessly injured him, he could not prove negligence.

The plaintiff's counsel countered that there was ample evidence to support a conclusion that the plaintiff had been a licensee, which he defined as "a person who is privileged to enter or remain on land only by virtue of the possessor's consent, that is with the possessor's permission or with the possessor's expressed or implied

to the plaintiff's requested instruction on that ground and the arguments presented by counsel to the court concerned only whether the evidence entitled the plaintiff to a charge related to the duties of care owed to a licensee.

consent." More specifically, the plaintiff's counsel argued that the evidence demonstrated that the plaintiff had had the implied consent of the defendant to be on the campus. In support of this argument, the plaintiff's counsel pointed to the following evidence: the lack of any "no trespassing" signs, the lack of any signs restricting access to the campus to any particular categories of people, the lack of any signs directing visitors to stop at the guardhouse to sign in, the arrows on the street pointing in directions away from the guardhouse, the upright position of the arm of the gate along the road leading past the wind farm, Melendez' testimony that visitors without any affiliation with the defendant were generally permitted unless they appeared suspicious, and the lack of any gate at the entrance to the campus.[7]

Although the plaintiff had been proceeding under a theory of implied consent, the court, without explanation, proceeded to summarize the law concerning implied *invitations*. Citing the second edition of American Jurisprudence, the court stated: "An invitation may be implied from dedication, customary use, or enticement, allurement, or inducement to enter [or] manifested by an arrangement of the premises or the conduct of the owner or occupant . . . ." See 62 Am. Jur. 2d 464, Premises Liability § 92 (2018). The court went on to note that this was consistent with Connecticut case law indicating that, for the plaintiff to constitute an *invitee*, "it must appear that [the plaintiff] was expressly

[7] In addition to these specific claims made by the plaintiff, the court heard or saw documentary evidence that should have made it apparent that the guardhouse, about which there was a great deal of testimony, was not situated in a manner to guard the campus against trespassers but served, only, to limit and scrutinize vehicular traffic seeking access up the guarded road to the dormitory area. In my view of the record, testimony related to the guardhouse was minimally relevant to the issue of the plaintiff's status because the guardhouse was a substantial distance from the Sherman Avenue entrance to the campus, and its only apparent purpose was to screen vehicular traffic to the dormitory portion of the campus.

or impliedly invited to use the defendant's premises," which, according to the court, "[was] not the case here." Nevertheless, the court deferred ruling on the defendant's motion for a directed verdict and immediately moved on to a charge conference.

During the charge conference, and in spite of the plaintiff's unequivocal statement that he was claiming to have been a licensee and his explicit disavowal of any claim of invitee status, the court framed the issue regarding the appropriate jury charge in terms of "whether there was an implied *invitation*," citing the principles it had previously noted in the context of the defendant's motion for a directed verdict. (Emphasis added.) The court concluded that, "considering [those principles], the charge . . . [that] is going to be giv[en] is [the] trespasser charge only . . . ."

Following trial, the jury returned a general verdict in favor of the defendant, and the court rendered judgment accordingly. This appeal followed.

I first address the plaintiff's claim that the trial court erred in refusing to instruct the jury regarding the definition of a licensee and the duties owed to a licensee by a possessor of land. The plaintiff argues that the trial court improperly conflated the concepts of implied invitation and implied consent and that there was sufficient evidence to support a finding that he had entered the campus with the defendant's implied consent. The plaintiff, therefore, contends that it was an abuse of discretion for the trial court to refuse to instruct the jury on the definition of and the duties owed to a licensee. The plaintiff further argues that the court's error was harmful because it was tantamount to directing a verdict in favor of the defendant. More specifically, the plaintiff contends that, without a licensee instruction, the jury was left with no choice but to find that he was a trespasser to whom the defendant owed a duty only to refrain from intentionally or recklessly injuring the plaintiff. I agree with the plaintiff.

"A licensee is a person who is privileged to enter or remain upon land by virtue of the possessor's consent . . . ." (Internal quotation marks omitted.) *Laube* v. *Stevenson*, 137 Conn. 469, 473, 78 A.2d 693 (1951), quoting 2 Restatement (First), Torts § 330 (1934). Although such consent may be given by invitation—i.e., "conduct [that] justifies others in believing that the possessor *desires* them to enter the land"; (emphasis added) 2 Restatement (Second), Torts § 332, comment (b) (1965); mere "permission"—i.e., "conduct justifying others in believing that the possessor is *willing* that they shall enter if they desire to do so"; (emphasis added) id.; will suffice. See *Corcoran* v. *Jacovino*, 161 Conn. 462, 466, 290 A.2d 225 (1971) ("[m]ere permission, as distinguished from invitation, is sufficient to make [a] visitor a licensee"). As the majority correctly acknowledges, the great weight of authority indicates that such invitation or permission may be given either expressly or implicitly.

In the present case, there was no evidence adduced at trial of the defendant's having explicitly or implicitly expressed a desire that the plaintiff enter its campus, nor was there any evidence of the defendant's having explicitly expressed a willingness that the plaintiff enter. Accordingly, I agree with the majority that the jury reasonably could not have found the plaintiff to be a licensee by virtue of any express or implied invitation or by an express grant of permission. I disagree, however, that there was insufficient evidence to support a finding that the defendant had tacitly permitted the plaintiff to enter the campus.

As the majority notes, our appellate case law provides little insight as to the proof necessary to establish licensee status by implied permission. I therefore agree that, in such circumstances, it is appropriate to look to the Restatement for guidance. The commentary to § 330 of the Restatement (First) of Torts provides that, "[a]s

in all cases in which one person's consent is important as affecting the legal relations between him and another, it is the *manifestation* of consent which is decisive and not the state of mind which the possessor intended to express." (Emphasis added.) 2 Restatement (First), supra, comment (c), p. 894. In other words, "the decisive factor is the interpretation which a *reasonable man* would put upon the possessor's acts"; (emphasis added) id., comment (d), p. 894; not the possessor's unexpressed intentions or policies.

"In determining whether a particular course of action is sufficient to manifest a consent to enter the land, regard must be had to all the surrounding circumstances." Id. For example, "[i]f a railway company prepares a paved or boarded path between the two platforms of its station, it may or may not give passengers reason to believe that the pathway is prepared for their use. If there is no other means of communication provided between the two platforms, a passenger may reasonably believe that the path is meant for his use. On the other hand, if there is an overhead bridge or a subway plainly visible, even though the pathway is not blocked by a fence or railing, the passenger might not be justified in regarding the path as prepared for him." Id., pp. 894–95.

"In determining this regard is to be had to customs prevailing in the community. The well-established usages of a civilized . . . community entitle everyone to assume that a possessor of land is willing to permit them to enter for certain purposes until a particular possessor expresses unwillingness to admit them. . . . [For instance] if there be a local custom for possessors of land to permit others to enter it for particular purposes, residents in that locality and others knowing of the custom are justified in regarding a particular possessor as conversant with it and, therefore, in construing his neglect to express his desire not to receive them as a sufficient manifestation of a willingness to

admit them."[8] (Internal quotation marks omitted.) Id., p. 895.

Applying these principles in the context of the case at hand, it is plain that there was sufficient evidence adduced at trial to reasonably support a finding that the plaintiff had been a licensee by virtue of the defendant's implied permission. As noted, at the time in question, the Sherman Avenue entrance to the campus was not gated, and there were no "no trespassing" signs posted at the campus entrance or any signs signifying that presence on the campus was restricted in any manner or to any category of individuals. Although one of the roads leading to the dormitories at the top of the campus was guarded by a guardhouse, the other route to the top of the campus taken by the plaintiff was not guarded, and the lane use arrows on the access road from Sherman Avenue suggested that entrants could utilize this other route rather than the guarded road. Additionally, there was no evidence of any signs along the route taken by the plaintiff restricting access to the top of the campus to certain categories of people. Moreover, Melendez' testimony that he took no action to limit or even question the plaintiff upon seeing him turn right at the intersection, or to seek assistance from the other safety officer on duty elsewhere on the campus, supports the conclusion that the plaintiff's presence on the campus was permitted. Finally, given the plaintiff's testimony that he had taken the same route to the top of the campus the previous year without any interference from the defendant's agents, the jury reasonably could have concluded that the prevailing custom on the campus was to permit individuals not

[8] "[W]here it is local custom for possessors of land to permit others to enter their land for particular purposes, it is immaterial that the particular person entering is not a member of the local community, or, if a member of the local community, is ignorant of the custom." 2 Restatement (First), supra, § 330, comment (e), p. 896.

associated with the defendant to enter the campus and to ride, without restriction or interference, to the top of the campus to enjoy the vista it affords.[9] Given this evidence, I have little difficulty in concluding that a properly instructed jury could have determined that a reasonable person in the plaintiff's position justifiably would have inferred from the surrounding circumstances that the defendant was willing to allow the plaintiff to enter the campus and to proceed along the route he took leading past the wind farm to the top of the campus.

The majority's conclusion to the contrary is, in my view, flawed. Preliminarily, I note that the majority appears to accept that, *in some circumstances*, the lack of gates and "no trespassing" signs, without more, may be sufficient to establish implied permission. See 2 Restatement (First), supra, § 330, comment (b), p. 893 ("[a] mere failure to object to another's entry may be a sufficient manifestation of consent thereto if the possessor knows of the other's intention to enter and has reason to believe that his objection is likely to be effective in preventing the other from entering").[10] Thus,

[9] The majority asserts that there is no evidence in the record to indicate that the defendant had been aware of the plaintiff's presence when he rode through the campus the previous year. The majority is mistaken. Although there was no direct evidence of the defendant's awareness, Melendez, the public safety officer on duty at the time the plaintiff was injured, testified at trial that he had been able to see the plaintiff riding up the road toward the wind farm, and Barbara Barbuito, the assistant director of facilities for the campus, testified that the guardhouse is staffed at all times by public safety officers. Given this claim of constant surveillance, the jury reasonably could have inferred from this evidence that, in general, any bicyclist traveling up the road toward the wind farm would have been observed by whoever was then on duty at the guardhouse on this date or at any earlier time.

[10] This is not inconsistent with the observation in comment (b) to § 330 of the Restatement (First) of Torts that "[e]ven a failure to post a notice warning the public not to trespass cannot reasonably be construed as an expression of consent to the intrusions of persons *who habitually and notoriously disregard such notices*." (Emphasis added.) 2 Restatement (First), supra, § 330, comment (b), p. 894. The clear implication of this statement is that, in cases involving an entrant who does not habitually and

the majority's position appears to be that there are additional circumstances in the present case that render the lack of such signs and gates insufficient to establish the plaintiff's status as a licensee. Although the majority does not state explicitly what these additional circumstances are, it appears to rely heavily, if not exclusively, on the fact that the plaintiff did not stop at the guardhouse that straddled the road leading directly to the dormitories at the top of the campus and, instead, took the route to the top of the campus that leads past the wind farm. Ostensibly, the majority interprets the presence of the guardhouse as a manifestation of the defendant's unwillingness to permit persons who are not affiliated with the defendant and have not checked in at the guardhouse to enter into the top of the campus. I respectfully disagree with this interpretation.

Although there was a sign posted on the front of the guardhouse stating that "all vehicles must stop and be registered," there were no signs stating that people coming into the campus by other means—for example, by foot or on bicycle—must also check in at the guardhouse before going to the top of the campus. Nor were there any signs requiring that entrants to the top of the campus utilize the guardhouse road rather than the road that leads past the wind farm. Given these circumstances, a reasonable person in the plaintiff's position may well have concluded that the only apparent purpose of the guardhouse was to limit vehicular access to the road that it guarded and that the presence of the guardhouse therefore had no bearing on the defendant's willingness to allow individuals without vehicles to proceed along the route traveled by the plaintiff to the top of the campus.[11]

notoriously disregard "no trespassing" signs, the absence of such signs may be a sufficient manifestation of consent to the entry.

[11] The majority contends that there is nothing in the record to support the conclusion that the "only apparent purpose of the guardhouse was to limit vehicular access" to the dormitory portion of the campus. For this contention, the majority relies on testimony from Melendez and Barbara

I also respectfully disagree with the majority's speculative assertion that, if this court were to conclude that the plaintiff in this case was a licensee, it essentially would require much, if not all, private property to be fenced, gated, and covered with "no trespassing" signs in order to avoid conferring licensee status on mere trespassers.[12] As previously noted, whether an entrant constitutes a licensee is a *fact specific* inquiry that requires due consideration of *all of the surrounding circumstances*. See 2 Restatement (First), supra, § 330, comment (c). Thus, my conclusion that the lack of "no trespassing" signs and gates was sufficient to warrant a licensee instruction under the particular factual circumstances of the present case cannot reasonably be construed as an indication that, in all premises liability cases, the lack of such signs and gates renders an entrant a licensee as a matter of law.

In sum, I conclude that the trial court erred in refusing to instruct the jury on the definition of and the

Barbuito regarding their respective understandings of the purpose of the guardhouse, as well as testimony about a "verbal policy" regarding the entry of individuals onto the campus who are not affiliated with the defendant. See footnote 3 of the majority opinion. This reliance is misplaced. As previously noted, the decisive factor in determining the issue of a possessor's consent is the interpretation that a reasonable person would put upon the possessor's acts, not the possessor's unexpressed intentions or policies. In the present case, there is no evidence in the record to suggest that the views and policies expressed in Melendez' and Barbuito's testimony were made manifest. Consequently, this testimony is not relevant to the question of how a reasonable person in the plaintiff's position would have interpreted the surrounding circumstances.

[12] In making this assertion, I believe that the majority conflates the notion of notice with prevention. The turning point on whether an entrant is welcomed or is a trespasser is whether the entrant has fair notice. That can be provided, simply, with signs placed at the campus entrances. For example, in the case at hand, a sign stating the following would make clear that the campus is not generally open to the public: "The campus grounds are for the use of the Quinnipiac University community and invited guests. The public is welcomed to the campus only for events open to the public." If there had been such a sign at the Sherman Avenue entrance to the campus, it is likely that this case and the underlying injuries that befell the plaintiff would not have occurred.

duties owed to licensees. As the majority correctly notes, however, "before a party is entitled to a new trial [due to an error in the trial court's jury instructions] . . . he or she has the burden of demonstrating that the error was harmful." (Internal quotation marks omitted.) *MacDermid, Inc.* v. *Leonetti*, 328 Conn. 726, 749, 183 A.3d 611 (2018). In the present case, the plaintiff argues, in essence, that the court's refusal to provide the requested licensee instruction was harmful because "[i]t was tantamount to directing a verdict for the defendant . . . ." I agree.

The record reveals that there was no evidence presented at trial to indicate that the defendant had intentionally injured the plaintiff or that it had engaged in wilful, wanton, or reckless conduct so as to make it liable for injuries to a trespasser. See *Maffucci* v. *Royal Park Ltd. Partnership*, 243 Conn. 552, 558, 707 A.2d 15 (1998) ("a possessor of land is under no duty to keep his or her land reasonably safe for an adult trespasser, but has the duty only to refrain from causing injury to a trespasser intentionally, or by willful, wanton or reckless conduct" [footnote omitted; internal quotation marks omitted]). Consequently, the trial court, by improperly instructing the jury only with respect to the duties owed to trespassers, effectively directed a verdict in the defendant's favor.[13] In my view, this necessarily harmed the plaintiff because it deprived him of

[13] In my view, at the close of evidence, the court had two choices. If the court perceived that the evidence as to the plaintiff's status was controverted because of any ambiguity in the testimony of Melendez as to the scope of his duties, it could have instructed the jury that it was its task, as the fact finder, to determine whether the plaintiff was a trespasser or a licensee. If the court had made this choice, it would then have been appropriate for the court to provide the jury with detailed instructions on the definitions of "licensee" and "trespasser" with corresponding instructions on the duties owed by a possessor of land to a licensee and to a trespasser as requested by the plaintiff.

If, on the other hand, the court determined that the facts were not in dispute, it could have made a determination of the plaintiff's status as a matter of law. The court in the present case chose the latter course and

a fair opportunity to have the jury carry out its constitutional fact-finding function and determine his claims on the basis of correct legal principles.[14] See *Tryon* v. *North Branford*, 58 Conn. App. 702, 716, 755 A.2d 317 (2000) (whether there was breach of duty of care is question of fact to be decided by jury after considering credibility and weight to be accorded evidence). I respectfully disagree with the majority's conclusion to the contrary.

The majority also asserts that there was insufficient evidence presented at trial to support a finding that the defendant breached any duty owed to the plaintiff as a licensee and that, therefore, any error in failing to provide the requested licensee instruction was harmless. As the majority correctly notes, a land possessor who actually or constructively knows of a licensee's presence on the premises must use reasonable care to warn the licensee of dangerous conditions on the land that the possessor knows of but that the possessor cannot reasonably assume the licensee knows of or by reasonable use of his or her faculties would observe. See *Morin* v. *Bell Court Condominium Assn., Inc.*, 223

concluded as a matter of law that the plaintiff had been a trespasser. For the reasons already noted, however, I believe that this determination was both erroneous and fatal to the plaintiff's opportunity to have his claim fairly adjudicated by the jury.

[14] Contrary to the majority's suggestion, the harmfulness of the trial court's error is not ameliorated by the fact that the court also instructed the jury regarding the duty owed to a constant trespasser. See footnote 11 of the majority opinion. The duty owed to a constant trespasser only arises when "[a] possessor of land . . . knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area thereof . . . ." (Internal quotation marks omitted.) *Morin* v. *Bell Court Condominium Assn., Inc.*, 223 Conn. 323, 333, 612 A.2d 1197 (1992). The majority does not dispute that there was no evidence adduced at trial that trespassers constantly intrude into the top of the campus. Therefore, to the extent that the majority implies that the court's constant trespasser instruction in some way negates the harm caused by the court's failure to instruct the jury with regard to the definition of and duties owed to a licensee, I respectfully disagree.

Conn. 323, 327, 612 A.2d 1197 (1992). The majority notes that speed bumps in general are a known hazard to bicyclists and that the particular speed bump at issue in the present case was plainly visible to the plaintiff. Accordingly, it concludes that the plaintiff knew or had reason to know of the speed bump and the risk involved in riding his bicycle over it.

Respectfully, I believe this conclusion to be premised on a fundamental misunderstanding of the nature of the plaintiff's claim.[15] The majority construes the plaintiff's claim to be that the defendant's premises were in a dangerous condition by virtue of the mere existence of the speed bump. The plaintiff made no such claim. Rather, the plaintiff alleged in his complaint, and offered evidence at trial to prove, that the *improper manner* in which the speed bump was *constructed* rendered the premises dangerous. Specifically, he claimed that the speed bump was defective in that "the height of the downhill side of the . . . speed bump was [five] inches above grade, whereas the uphill height of the speed bump was [one and five-eighths] inches above grade; the speed bump profile was not uniform; the transition from [the] speed bump to [the] roadway surface was not smooth; [and] the speed bump, with its downhill height of [five] inches, was unreasonably high for a road with a 10 [percent] downhill grade." Given the

[15] Moreover, in asserting that the court's instruction, even if erroneous, caused the plaintiff no harm, the majority takes up an issue not raised or briefed by the appellee. As has been well established by our Supreme Court, it is improper for this court, on review, to decide a case on a basis not raised or briefed by a party on appeal. See *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 156 n.24, 84 A.3d 840 (2014) ("[W]e have long held that, in the absence of a question relating to subject matter jurisdiction, the [reviewing] [c]ourt may not reach out and decide a case before it on a basis that the parties never have raised or briefed. . . . To do otherwise would [unfairly] deprive the parties of an opportunity to present arguments regarding those issues." [Internal quotation marks omitted.]).

technical nature of these alleged defects, the jury reasonably could have concluded that they would not have been obvious to the plaintiff, even if the speed bump itself was plainly visible to him as he was riding down the hill. Moreover, although there was no evidence presented that the defendant had actual knowledge of the defective condition of the speed bump, the around-the-clock presence of a safety officer at the guardhouse, which is adjacent to the speedbump, is sufficient, in my view, to charge the defendant with such knowledge.

In sum, I conclude that the trial court's refusal to give the plaintiff's requested licensee instruction and its decision to instruct only on the duties owed by a possessor of land to a trespasser constitutes reversible error. Because this error left the jury with no "untainted" route to the verdict, I do not find the general verdict rule applicable in the present case. See *Cavaliere* v. *Olmsted*, 98 Conn. App. 343, 347–48, 909 A.2d 52 (2006) (holding that general verdict rule did not apply because, even if this court assumed that jury rejected plaintiff's allegations of negligence *and* found him contributorily negligent, *both* of those determinations were undermined by trial court's failure to instruct jury regarding proper standard of care, and, therefore, there was no "untainted route" to verdict); *Monterose* v. *Cross*, 60 Conn. App. 655, 661, 760 A.2d 1013 (2000) (same).

Because I would reverse the judgment of the trial court on the basis of the instructional error, the plaintiff's claim of evidentiary error—that the trial court improperly admitted Melendez' testimony regarding his estimation of the plaintiff's speed—need not be addressed. Nevertheless, because the issue could arise on retrial, I briefly address it.

The following standard of review and legal principles are relevant to the resolution of this claim. "Our standard of review regarding challenges to a trial court's

evidentiary rulings is that these rulings will be overturned on appeal only where there was an abuse of discretion and a showing by the [plaintiff] of substantial prejudice or injustice. . . . Additionally, it is well settled that even if the evidence was improperly admitted, the [plaintiff] must also establish that the ruling was harmful and likely to affect the result of the trial." (Internal quotation marks omitted.) *Bank of New York* v. *Savvidis*, 174 Conn. App. 843, 849, 165 A.3d 1266 (2017).

Pursuant to § 7-1 of the Connecticut Code of Evidence, "[i]f a witness is not testifying as an expert, the witness may not testify in the form of an opinion, *unless the opinion is rationally based on the perception of the witness* and is helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue." (Emphasis added.) Thus, although our Supreme Court has stated that "lay witnesses are competent to offer opinions on such matters as the speed of an automobile . . . *they may only testify on the basis of observed facts*." (Citation omitted; emphasis added.) *Acampora* v. *Asselin*, 179 Conn. 425, 427, 426 A.2d 797 (1980).

Here, it is undisputed that Melendez had not seen the plaintiff riding down the hill toward the guardhouse; he had only observed the plaintiff at the moment his bicycle hit the second speed bump. Consequently, Melendez' opinion that the plaintiff had been traveling at approximately ten miles per hour had no basis in "observed facts." Indeed, his subsequent testimony makes clear that Melendez' opinion was not based on his actual perception of *the plaintiff* but on his estimation of how fast a *hypothetical person* traveling down the hill would have been going: "[I]f you were asking me if I knew how fast [the plaintiff] was going down that hill, I can't tell you that I saw him go down the hill. But because I work there, I know the incline of that hill, how steep it is. I could tell you approximately

how fast *somebody* would be able to go down that hill on a bicycle." (Emphasis added.) Thus, the trial court erred in admitting Melendez' opinion testimony. Although it is unlikely that this error affected the result of the trial in light of Juliano's expert opinion testimony that the plaintiff had been traveling at approximately 9.8 miles per hour, this error should not be repeated in the event of a retrial.

In sum, I would reverse the judgment of the trial court and remand the case for a new trial. Accordingly, I respectfully dissent.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 193

ERIC STIGGLE *v.* COMMISSIONER
OF CORRECTION
(AC 41336)

Alvord, Prescott and Flynn, Js.

Argued September 16—officially released October 8, 2019

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Kwak*, *J.*

Per Curiam. The appeal is dismissed.

JOSE CORDERO *v.* COMMISSIONER
OF CORRECTION
(AC 41825)

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

Argued September 18—officially released October 8, 2019

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Kwak*, *J.*

Per Curiam. The appeal is dismissed. See *Mitchell* v. *Commissioner of Correction*, 68 Conn. App. 1, 8, 790 A.2d 463 (declining to review claim where petitioner neither alleged nor briefed that habeas court abused

its discretion when it denied petition for certification to appeal), cert. denied, 260 Conn. 903, 793 A.2d 1089 (2002).

JOHN DOE ET AL. *v.* MICHELLE SULZICKI ET AL.
(AC 41706)

Alvord, Bright and Eveleigh, Js.

Argued September 17—officially released October 8, 2019

Plaintiffs' appeal from the Superior Court in the judicial district of Fairfield, *Bellis*, *J.*

Per Curiam. The judgment is affirmed.

LAWRENCE GOLDSTEIN *v.* YING HU ET AL.
(AC 42090)

Lavine, Elgo and Moll, Js.

Argued September 20—officially released October 8, 2019

Named defendant's appeal from the Superior Court in the judicial district of Stamford-Norwalk, Housing Session at Norwalk, *Spader*, *J.*

Per Curiam. The judgment is affirmed.

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SUPREME COURT PENDING CASES

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

USSBASY GARCIA *v.* ROBERT COHEN et al., SC 20285
Judicial District of Hartford

Negligence; Whether Appellate Court Properly Held that General Verdict Rule Precluded Review of Plaintiff's Claim on Appeal. The plaintiff sustained injuries when she fell on the stairs outside of her second floor apartment. She brought this action against the defendants, the owners of the building, alleging that her injuries were proximately caused by the defendants' negligence in that they failed to keep the stairs clear and safe. The defendants denied the claims and asserted, as a special defense, that the plaintiff's injuries were caused by her own negligence. At the end of the trial, the plaintiff submitted a request to charge and proposed jury interrogatories, but the trial court denied the request to charge and it did not submit interrogatories to the jury. The jury returned a general verdict for the defendants, and the plaintiff moved to set aside the verdict on the grounds that the court failed to properly charge the jury pursuant to the plaintiff's request to charge and that the court failed to submit the proposed interrogatories to the jury. The trial court denied the motion and the plaintiff appealed, claiming that the trial court erred in failing to instruct the jury that the possessor of real property has a nondelegable duty to maintain the premises. The Appellate Court (188 Conn. App. 380) affirmed the judgment, finding that the general verdict rule precluded review of the plaintiff's claim. Under that rule, an appellate court will presume that the jury found every issue in favor of the defendant where the jury returned a general verdict for the defendant, where the defendant had both denied the allegations of the complaint and pleaded a special defense, and where interrogatories were not submitted to the jury. The Appellate Court held that the plaintiff's failure to object to jury deliberation without interrogatories was the functional equivalent of a failure to request interrogatories. The Appellate Court also noted that the plaintiff did not claim on appeal that the court erred by failing to submit her interrogatories to the jury. The Supreme Court subsequently granted the plaintiff's petition for certification to appeal as to the following issues: (1) Did the Appellate Court properly hold that the general verdict rule applies when a plaintiff's proposed jury interrogatories are rejected by the trial court and the plaintiff thereafter does not object when the case is submitted to the jury without jury interrogatories? (2) Did the Appellate Court

correctly conclude that the plaintiff did not claim on appeal that the trial court improperly failed to submit her interrogatories to the jury?

JOHN STRANO et al. *v.* DARWYN AZZINARO et al., SC 20309
Judicial District of Middlesex

Negligence; Intentional Infliction of Emotional Distress; Whether Appellate Court Correctly Determined that Trial Court Properly Granted Motion to Strike Complaint for Failure to State Claim of Intentional Infliction of Emotional Distress. The plaintiffs, John Strano and his minor son, brought this action against the defendants, a Boy Scouts troop leader and the Boy Scouts of America Corporation, seeking damages for intentional infliction of emotional distress stemming from the minor plaintiff's expulsion from a Boy Scouts troop. The complaint alleged that after Strano asked the defendants to intervene to protect the minor plaintiff from bullying by a fellow troop member, the troop leader sent Strano a letter expelling the minor plaintiff from the troop for the stated reason that Strano's presence at troop meetings was disruptive. It also alleged that the minor plaintiff is autistic, that the defendants knew he required services at school to address deficits in his social skills, and that the defendants failed to take adequate disciplinary action against the bully. The plaintiffs claimed that the defendants punished Strano's son in order to cause Strano pain and distress and that the plaintiffs suffered extreme emotional distress as a result of the defendant's conduct. The defendants moved to strike the complaint, claiming that it failed to plead facts establishing that the defendants engaged in extreme and outrageous conduct. Under the "extreme and outrageous" standard, the alleged conduct must exceed the bounds of civilized behavior. The trial court granted the motion and subsequently rendered judgment on the stricken complaint. The plaintiffs appealed, and the Appellate Court (188 Conn. App. 183) affirmed the judgment, concluding that the plaintiffs failed to allege facts sufficient to support the conclusion that the defendants engaged in extreme and outrageous conduct towards them. The Appellate Court noted that the minor plaintiff's vulnerability and the defendants' position of authority were relevant to its analysis of the minor plaintiff's claim, but nevertheless concluded that neither the expulsion itself nor the manner in which it was carried out exceeded the bounds of civilized behavior. The court emphasized that there were no allegations that the son was expelled for being autistic, that the defendants encouraged bullying or that the expulsion letter was abusive or degrading. The plaintiffs appeal, and the Supreme Court

will decide whether the Appellate Court correctly determined that the trial court properly granted the defendants' motion to strike the plaintiffs' complaint for failure to state a claim of intentional infliction of emotional distress.

JOHN COUGHLIN *v.* CITY OF STAMFORD et al., SC 20319
Compensation Review Board

Heart and Hypertension Benefits Under General Statutes § 7-433c; Whether Plaintiff who Previously was Awarded § 7-433c Benefits for Hypertension was Required to File New Claim for Benefits for Coronary Artery Disease. General Statutes § 7-433c provides that members of municipal police or fire departments are eligible for benefits for death or disability caused by hypertension or heart disease, without needing to prove that the injury arose out of their employment. In 2011, while he was employed as a member of the defendant city of Stamford's fire department, the plaintiff was diagnosed with hypertension and his claim for § 7-433c benefits was accepted. In 2016, nearly three years after he retired from the fire department, the plaintiff was diagnosed with coronary artery disease, and he sought additional benefits under § 7-433c. The plaintiff, relying on a doctor's report, claimed that his coronary artery disease was a new manifestation of, or "flowed from," his hypertension, for which he had already filed a timely notice of claim. Accordingly, he claimed that he did not need to file another claim for benefits for the new injury. The Workers' Compensation Commissioner rejected the plaintiff's argument and denied his claim for § 7-433c benefits for coronary artery disease because it was a separate malady that was not diagnosed until after he had retired from the fire department. In reaching that conclusion, the commissioner relied on the Supreme Court's decision in *Holston* v. *New Haven Police Dept.*, 323 Conn. 607 (2016), in which the court held that hypertension and heart disease are treated as two separate diseases under § 7-433c. The plaintiff appealed to the Compensation Review Board (board), which disagreed with the commissioner's application of *Holston*, finding that the unchallenged medical report established that the plaintiff's coronary artery disease was compensable as a sequela, or subsequent manifestation, of his hypertension, as opposed to a distinct heart disease for which the plaintiff was obligated to file a timely new claim for § 7-433c benefits. The defendant city appeals, claiming that the board erred in finding that the plaintiff is entitled to benefits for his coronary artery disease as a sequela of his hypertension. The defendant argues that *Holston*

established that hypertension and heart disease are separate disease processes under § 7-433c and that other appellate precedent establishes that a plaintiff is not entitled to recover § 7-433c benefits for a condition or impairment of health that arose after the plaintiff's retirement.

KARLA WOLFORK, ADMINISTRATRIX (ESTATE OF DAEONTE WOLFORK-PISANI) *v.* YALE MEDICAL GROUP et al., SC 20344
Judicial District of New Haven

Torts; Medical Malpractice; Whether Trial Court Properly Granted Motion to Open Judgment of Dismissal; Whether Administrator of Estate Had Standing to File Motion to Open Judgment. Following her son's death, Karla Wolfork was appointed as the administratrix of his estate, and, thereafter, she commenced this medical malpractice action. Wolfork's attorney informed the trial court that their expert no longer supported the plaintiff's malpractice claims and, as a result, she would withdraw the case after obtaining permission from the Probate Court. The trial court ordered the parties to file all necessary paperwork by June 28, 2016, or the case would be dismissed. Also, around this time, the decedent's biological father, Damian Pisani, was appointed as co-administrator of the estate by the Probate Court. Wolfork successfully sought an extension of time to file the withdrawal to August 27, 2016, for purposes of scheduling a hearing with the Probate Court and Pisani to confirm that she could withdraw the action. When Wolfork did not withdraw the action by the extended deadline, the trial court dismissed it on September 29, 2016. On December 20, 2016, the Probate Court removed Wolfork as co-administrator and appointed Pisani as the sole administrator. Thereafter, on January 24, 2017, Pisani filed a motion to open the judgment of dismissal, arguing that, due to mistake, accident or fraud, he had been prevented from requesting a further extension of time to withdraw or pursue this action. He claimed that, after the Probate Court ordered Wolfork to turn over the case file to him for the hearing she requested, he expected Wolfork to ensure that the case remained open until the parties met with the Probate Court. He also asserted that he did not receive notice of the dismissal deadline and that he was not aware that Wolfork had failed to request further extensions of time. The defendants objected, claiming that Pisani did not have standing because he did not move to be added as a party or to be substituted as the plaintiff. The defendants also claimed that Pisani's motion to open should be denied because it was not "verified by the

oath of the complainant or his attorney," as required by General Statutes § 52-212 (c). Pisani responded that § 52-212 was inapplicable because the court had not rendered a default judgment or a judgment of nonsuit. He claimed that General Statutes § 52-212a authorized the trial court to open the judgment within four months and did not require him to verify his motion to open. The trial court found that Pisani was prevented from filing the withdrawal by reasonable cause due to the proceedings in the Probate Court regarding the removal of Wolfork as the co-administrator. As a result, the court granted Pisani's motion to open the judgment and granted his motion to be substituted as the plaintiff in his capacity as administrator. The defendants appeal, claiming that the trial court improperly granted Pisani's motion to open because he lacked standing, which deprived the trial court of jurisdiction, and because Pisani failed verify his motion to open as was required by § 52-212. They further argue that Pisani failed to sufficiently demonstrate that a good cause of action existed at the time the action was dismissed and that he was prevented from prosecuting the action by mistake, accident, or other reasonable cause.

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

John DeMeo
Chief Staff Attorney

NOTICES

BAR EXAMINING COMMITTEE

Notice of Amendment of Regulations

At its meeting on September 27, 2019, the Connecticut Bar Examining Committee voted to amend Article III-1 of its Regulations to allow applications for admission by UBE score transfer to be filed within five (5) years after an applicant attains a UBE score and to amend Article IV of its Regulations so that motion applicants without any history of discipline, including administrative discipline, will no longer be required to take the MPRE or a course in professional responsibility.

Jessica F. Kallipolites
Administrative Director
Connecticut Bar Examining Committee

ARTICLE III

ADMISSION BY EXAMINATION AND ADMISSION BY TRANSFER OF A UNIFORM BAR EXAMINATION SCORE

Art. III-1.

. . . . .

(B) The application for admission by transfer of a Uniform Bar Examination (UBE) score (for which the official forms obtainable from the administrative director must be used) shall be filed within ~~3~~ five (5) years after attaining a total scaled score of 266 or higher on the UBE taken in any jurisdiction, together with the fee prescribed by Article X (2). A score is considered to have been attained on the date of the administration of the UBE that resulted in the score. Applications for admission by transfer of a UBE score may be filed concurrently any time after an application to sit for the UBE in another jurisdiction is filed with that jurisdiction. Any such concurrent application for admission by transfer of a UBE score must include a copy of the application filed in the other UBE jurisdiction in which the applicant will take the UBE. UBE scores for such concurrent applications must be transferred to the administrative office no later than 31 December for a July exam and no later than 30 June for a February exam. It is the applicant's responsibility to ensure that his or her qualifying UBE score is transferred to the administrative director by the National Conference of Bar Examiners (NCBE). Applicants shall submit official transcripts of undergraduate and legal education sufficient to satisfy the committee that the applicant's educational qualifications meet the requirements of Section 2-8 of the Rules.

. . . . .

ARTICLE IV

MULTISTATE PROFESSIONAL RESPONSIBILITY EXAMINATION

Art. IV-1.

(A) All persons seeking admission to the practice of law in Connecticut by examination or by UBE score transfer or a military spouse seeking a temporary license to practice as an attorney in Connecticut~~, or upon motion without examination~~ shall, prior to being recommended for admission to the bar, produce evidence of satisfac-

tory completion of the Multistate Professional Responsibility Examination. The passing score on the Multistate Professional Responsibility Examination shall be a scaled score of eighty (80) and must be achieved within four years before or within one year after the date the applicant files his or her application for admission to the Connecticut bar.

(B) Applicants for admission without examination without any history of discipline, including administrative discipline, in any jurisdiction in which he or she is licensed or has been licensed shall not be required to produce evidence of satisfactory completion of the Multistate Professional Responsibility Examination, but shall be required to provide evidence that he or she does not have any history of discipline, including administrative discipline, in any jurisdiction in which he or she is licensed or has been licensed.

(C) Applicants for admission without examination with any history of discipline, including administrative discipline, in any jurisdiction in which he or she is licensed or has been licensed shall, prior to being recommended for admission to the bar, produce evidence of satisfactory completion of the Multistate Professional Responsibility Examination. The passing score on the Multistate Professional Responsibility Examination shall be a scaled score of eighty (80) and must be achieved within four years before or within one year after the date the applicant files his or her application for admission to the Connecticut bar

Art. IV-2.

In lieu of the Multistate Professional Responsibility Examination an applicant may, prior to being recommended for admission to the bar, submit evidence of satisfactory completion of a course in professional responsibility/legal ethics offered by a law school approved by the bar examining committee as part of its regular curriculum. To be acceptable, the course must be completed with a grade of either ''C'' or ''Pass'' within four years before or within one year after the date the applicant files his or her application for admission to the Connecticut bar.

Art. IV-3.

In lieu of the requirements set forth in Articles IV-1(C) and IV-2, an applicant for admission without examination who is a full-time faculty member or full-time clinical fellow at an accredited Connecticut law school may, prior to being recommended for admission to the bar, submit evidence of a scaled score of eighty (80) on the Multistate Professional Responsibility Examination or a grade of either ''C'' or ''Pass'' in a course in professional responsibility/legal ethics offered by a law school approved by the bar examining committee as part of its regular curriculum.

Notice of Reinstatement

Pursuant to § 2-54 of the Connecticut Practice Book, notice is hereby given that on October 1, 2019, in Docket Number HHD-CV-17-6084248 Robert O. Wynne, juris # 404770, stipulated as follows:

1. The interim suspension imposed by the Court on March 18, 2019 shall be terminated and the Respondent shall be reinstated, effective immediately

David Sheridan
Presiding Judge

Notice of Resignation of Attorney and Appointment of Trustee

Pursuant to Practice Book Sec. 2-54, notice is hereby given that on September 19, 2019 in case bearing docket number HHB-CV19-6054983-S, Kevin E. Creed, juris number 413715, of Bristol, Connecticut, resigned from the bar of the State Connecticut and waived his privilege of reapplying to the bar in the future.

Notice is given that Attorney Frank E. Rudewicz, of West Hartford, Connecticut, is appointed trustee to protect the interests of the clients of Kevin E. Creed.

The Court (Morgan, J.)