CONNECTICUT LAW JOURNAL

Published in Accordance with General Statutes Section 51-216a

VOL. LXXXII No. 3 July 21, 2020 254 Pages

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CONNECTICUT LAW JOURNAL
(ISSN 87500973)

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

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

RICHARD J. HEMENWAY, *Publications Director*

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

Syllabuses and Indices of court opinions by
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Tel. (860) 757-2250

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

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

THE RESERVE REALTY, LLC, ET AL. *v.* WINDEMERE RESERVE, LLC, ET AL. (SC 19979) (SC 19982) THE RESERVE REALTY, LLC, ET AL. *v.* BLT RESERVE, LLC, ET AL. (SC 19981)

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

Syllabus

A tying arrangement is an agreement by a party to sell one product (the tying product) but only on the condition that the buyer also purchase a different product (the tied product) or, alternatively, agree not to purchase that product from another seller.

Pursuant to this court's decision in *State* v. *Hossan-Maxwell*, *Inc.* (181 Conn. 655), tying arrangements are per se illegal whenever a seller has sufficient economic power with respect to the tying product to appreciably restrain competition in the market for the tied product and a not insubstantial amount of interstate commerce is affected, and a real estate list-back agreement, which requires the purchaser of real property to use the services of a particular broker when leasing or reselling the property, constitutes a tying arrangement that is per se illegal.

The plaintiffs, R Co., a real estate marketing company, and H, the executor of the estate of J, a broker who, along with S, was a founding member of R Co., sought to recover damages from the defendants, W Co. and B Co., for, inter alia, breach of certain real estate listing agreements pursuant to which J and S allegedly were entitled to certain brokerage fees and commissions. In 2002, a group of developers, D Co., engaged the services of J and S to represent them in negotiating the purchase of a 546 acre parcel of land in the city of Danbury. D Co. then executed an agreement with J and S that gave them the exclusive right to sell or lease the property, or any part thereof, and that required any subsequent purchaser of the property to give J and S that same exclusive right. D Co. purchased the property, and the Danbury Zoning Commission approved D Co.'s plans to develop it, but W Co., which was developing a neighboring parcel of land, appealed the zoning approval. To resolve the zoning appeal, D Co. agreed to sell a portion of the property to W Co. and another portion to B Co. Consistent with the exclusivity provision in D Co.'s agreement with J and S, W Co. and B Co. reluctantly agreed to include in their purchase and sale agreements provisions giving J and S the exclusive right to sell or lease any part of their respective

properties, and W Co. and B Co. subsequently executed separate listing agreements with J and S to that effect. Thereafter, B Co. constructed a luxury apartment complex on its property, and W Co. devised plans to construct commercial office space on its property. B Co. ultimately used its own leasing agent to market the apartments, and the plaintiffs initiated the present action, alleging breach and anticipatory breach of the listing agreements. W Co. and B Co. raised a number of special defenses, including that, under antitrust law, the exclusivity provisions in the purchase and sale agreements constituted illegal tying arrangements in violation of the federal Sherman Act (15 U.S.C. § 1 (2018)) and, therefore, were unenforceable. Following a trial to the court, the trial court concluded, inter alia, that the antitrust defense barred the plaintiffs' claims, and the court rendered judgments for W Co. and B Co. In so concluding, the trial court determined that it was required to follow this court's decision in *Hossan-Maxwell, Inc.*, and that, pursuant to that decision, the uniqueness of the property at issue was sufficient evidence that D Co., as the sole owner of the property, had sufficient economic power to restrain competition in the market for the tied product, which it identified as real estate listing broker's services in the greater Danbury area. The Appellate Court affirmed the trial court's judgments, concluding that the antitrust defense barred the plaintiffs' claims but indicating that it viewed the relevant tying product market to be large areas of undeveloped land in the densely populated Northeastern United States. On the granting of certification, the plaintiffs appealed to this court, claiming that this court should overrule *Hossan-Maxwell, Inc.*, and conclude that list-back agreements, such as the agreements in the present case, are not per se illegal. *Held*:

1. This court concluded, after considering antitrust scholarship on the procompetitive effects of tying arrangements and recent developments in the federal tying jurisprudence of the United States Supreme Court and other federal courts, that a per se ban on list-back agreements is inconsistent with federal antitrust law and, accordingly, overruled its prior decision in *Hossan-Maxwell, Inc.*, to the extent that it held that real estate list-back agreements affecting a not insubstantial volume of commerce are per se illegal; moreover, this court clarified the standard to be used to assess whether a party has stated a valid antitrust challenge to a list-back agreement, pursuant to which the challenging party must allege facts plausibly showing that the sale of the tying product was conditioned on the purchase of the tied product, the seller used actual coercion to force buyers to purchase the tied product, the seller had sufficient economic power in the tying product market to coerce purchasers into buying the tied product, which typically is established by demonstrating that a defendant wields market power in a defined product and geographic market, the tie-in had anticompetitive effects in the tied market, and a not insubstantial amount of commerce was involved in the tied market.

2. This court concluded that, under the facts of the present case, the judgments of the trial court could not be affirmed under the newly clarified standard governing antitrust challenges to list-back agreements and, accordingly, reversed the judgments of the Appellate Court and remanded the cases to that court for consideration of the plaintiffs' remaining claims.

a. The trial court made no findings as to, and W Co. and B Co. did not plead the existence of, a defined product or geographic market for purposes of establishing D Co.'s economic power, but, rather, the trial court simply relied on *Hossan-Maxwell, Inc.*, for the proposition that the uniqueness of residential property was sufficient evidence of D Co.'s economic power and did not explain how it reached its conclusions that the relevant tied product market was limited to the greater Danbury area, that the relevant market was taken to be listing broker's services, and that the 546 acre property constituted the entire tying product market; moreover, because the trial court, the Appellate Court, as well as W Co. and B Co., articulated different but plausible geographic market definitions, expert testimony was necessary to determine whether D Co. held sufficient power in a defined geographic market for real property of some sort such that it could foreclose competition and coerce buyers into accepting supracompetitive prices in some particular product market.

b. The trial court made no findings, and it was unlikely that the record would support any such finding, as to whether the combined price of the tying product and the tied product exceeded the combined market price of those products, which typically must be established in order to satisfy the requirements that the seller had sufficient economic power in the tying product market to coerce purchasers into buying the tied product and that the tie-in had anticompetitive effects in the tied market; there was no reason to believe that the list-back agreements in the present case had an anticompetitive effect on pricing, as there was evidence that D Co. had agreed to sell the parcels to W Co. and B Co. at a reduced price to resolve the zoning appeal and the parcels ultimately were sold for a fraction of their appraised values; moreover, even if W Co. and B Co. felt compelled to accept the broker services of J and S in order to acquire the parcels, such coercion does not bear on whether D Co. and the plaintiffs were able to exert market power or suppress competition, as the fact that W Co. and B Co. individually were willing to accept the unwanted broker services did not imply that, as a general matter, D Co. had market power, and there were various explanations as to why W Co. and B Co. may have been willing, albeit reluctantly, to accept the exclusivity provisions and to agree to use the broker services of J and S.

c. Competition policy generally is not offended when only minor foreclosure of competition in the tied market is possible, and, in the present case, even if the tied product market had been defined narrowly, it was

unlikely that the listing agreements could have permitted J and S to monopolize the market for listing broker services for commercial and multifamily residential properties in the greater Danbury area or that the cost of broker commissions and fees in that narrowly defined market would have increased.

Argued September 18, 2018—officially released March 24, 2020*

Procedural History

Action, in the first case, to recover damages for, inter alia, breach of contract, and for other relief, and actions in the second and third cases to foreclose broker's liens on certain of the defendants' real property, brought to the Superior Court in the judicial district of Danbury, where, in the first case, the court, *Doherty, J.*, granted the plaintiffs' motion to add Century 21 Scalzo Realty, Inc., as a defendant; thereafter, in the first case, the plaintiffs withdrew the action as to the defendant Century 21 Scalzo Realty, Inc., and, in the second case, the plaintiffs withdrew the action as to the defendant The Reserve Master Association, Inc.; subsequently, the first case was tried to the court, *Truglia, J.*; judgment for the named defendant et al., from which the plaintiffs appealed to the Appellate Court; thereafter, in the second and third cases, the court, *Truglia, J.*, rendered judgments discharging the broker's liens in accordance with the parties' stipulations, and separate appeals were filed with the Appellate Court; subsequently, the Appellate Court, *Alvord, Sheldon* and *Schaller, Js.*, affirmed the judgments of the trial court, and the plaintiffs, on the granting of certification, filed separate appeals with this court. *Reversed*; *further proceedings*.

Daniel E. Casagrande, with whom was *Lisa M. Rivas*, for the appellants (plaintiffs).

Christopher Rooney, with whom was *Brian A. Daley*, for the appellees (named defendant et al.).

* March 24, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

ROBINSON, C. J. These certified appeals invite us to revisit *State* v. *Hossan-Maxwell, Inc.*, 181 Conn. 655, 662–63, 436 A.2d 284 (1980), in which this court held that real estate "list-back" agreements—tying arrangements that commit the purchaser of a parcel of real property to use the services of a particular broker when leasing or reselling the property[1]—are per se illegal under state antitrust law. Specifically, we must decide whether, in light of recent antitrust scholarship and developments in federal tying law, *Hossan-Maxwell, Inc.*, should be overruled. We answer that question in the affirmative. Accordingly, we reverse the judgments of the Appellate Court, which, like the trial court, correctly determined that it was required to apply *Hossan-Maxwell, Inc.*, to the present case.

These appeals arise out of a breach of contract action involving the sale and development of 546 acres of the former Union Carbide Corporation (Union Carbide) corporate campus in Danbury (the Reserve). The primary brokers involved in the transactions were Jeanette Haddad (Haddad), a prominent local real estate agent who died in 2013, and Paul P. Scalzo.[2] The plaintiffs are Haddad's husband, Theodore Haddad, Sr., as executor of his wife's estate, and The Reserve Realty, LLC (Reserve Realty), a limited liability company organized by Haddad and Scalzo to market and sell the Reserve

[1] Such agreements may apply only to the initial sale/lease of the property, to all subsequent sales/leases that occur within a specified time frame, or in perpetuity.

[2] Haddad operated under the business name "Jeanette Haddad, Broker," and Scalzo operated through his real estate franchise, Century 21 Scalzo Realty, Inc. (Scalzo Realty). For simplicity, we do not distinguish between those individuals and their corporate entities in this opinion, referring to them, respectively, as "Haddad" and "Scalzo." We note that, subsequent to the filing of their action, Scalzo Realty was added as a necessary party but thereafter was defaulted for failure to plead. Subsequently, the plaintiffs withdrew their action as to Scalzo Realty.

as it became subdivided. The defendants, BLT Reserve, LLC (BLT), and Windemere Reserve, LLC (Windemere), are limited liability companies, the principals and owners of which include Carl R. Kuehner, Jr., and Paul J. Kuehner, whose family is longtime friends and business associates of the Haddad family. In this action, the plaintiffs sought to recover real estate brokerage fees in connection with the sale and/or lease of units in an apartment complex constructed on the Reserve and leased by BLT, and of commercial office space to be constructed on the Reserve by Windemere. After a trial to the court, judgments were rendered in favor of the defendants. The Appellate Court affirmed, agreeing with the trial court that the defendants' antitrust special defense barred the plaintiffs' claims. *Reserve Realty, LLC* v. *Windemere Reserve, LLC*, 174 Conn. App. 130, 132, 165 A.3d 162 (2017).

I

The relevant facts, as found by the trial court or that are undisputed, and complete procedural history are set forth in detail in the opinion of the Appellate Court. See id., 132–38. In brief, following its acquisition by the Dow Chemical Company (Dow Chemical) in 1999, Union Carbide made known that it would entertain offers to sell the Reserve to interested buyers. Garland Warren, then a Union Carbide employee, initially was responsible for overseeing the sale of the parcel.

In early 2002, a group of real estate developers, later known as Woodland Group II, LLC (Woodland), engaged the services of Haddad and Scalzo to represent them in negotiations to purchase the Reserve. Woodland appears to have chosen Haddad and Scalzo in part because Warren had since left Dow Chemical and been employed by Scalzo.

As part of the broker-client relationship, Haddad, Scalzo, and Woodland executed an "Exclusive Right to

Sell—Listing Agreement" (Woodland agreement). The Woodland agreement gave Haddad and Scalzo the exclusive right to sell and/or lease property in the Reserve. The agreement also contained the following provision: "[Woodland] shall make aware to the new purchaser of any part, or of individual lots, or of land, that this [a]greement shall apply to that new purchaser and [Haddad and Scalzo]."

Woodland succeeded in purchasing the Reserve, and the plaintiffs received a commission for facilitating that sale. Woodland subsequently proposed a master plan for the entire 546 acre parcel, which the Danbury Zoning Commission approved in November, 2002. Woodland then continued to use the services of Haddad and Scalzo to market the property to potential buyers.

Efforts to develop the property foundered, however, when Windemere, which was in the process of developing a neighboring parcel of land, appealed Woodland's zoning approval for the Reserve, effectively blocking development of the land. To resolve the zoning dispute, Woodland agreed to sell one portion of the Reserve (parcel 13) to BLT for residential development (a luxury apartment complex, Abbey Woods, had been built at the time of trial), and another portion (parcel 15) to Windemere for commercial development (which had yet to be built at the time of trial).

Consistent with the requirements of the Woodland agreement, and after several rounds of negotiations with Woodland, the defendants reluctantly agreed to include list-back provisions in their purchase and sale agreements for parcels 13 and 15. Specifically, BLT agreed to enter into a listing agreement with Haddad and Scalzo, pursuant to which the brokers would receive a 3 percent commission on the subsequent sale or lease of parcel 13, either as a whole or as individual units. For its part, Windemere agreed to pay Haddad

and Scalzo $1 million for their efforts in leasing the office space that Windemere planned to build on parcel 15. That fee was to be paid in ten annual increments of $100,000, beginning when the first certificate of occupancy was issued.[3] After months of additional negotiations, Woodland and the defendants finalized and memorialized those list-back agreements in July, 2003.[4]

Although Haddad and Scalzo made good faith efforts to market parcels 13 and 15, the real estate market softened in the wake of the 2007–2008 financial crisis, and those efforts were unsuccessful. BLT ultimately proceeded to build a luxury apartment complex on its parcel, units of which it marketed through its own on-site leasing agent instead of through the services of Haddad and Scalzo.

The plaintiffs responded by filing the present action, alleging breach of contract and anticipatory breach, and

[3] It is not entirely clear that the agreements governing parcel 15 are true list-back agreements. Although they include a reference to exclusive listing of that property, those agreements could plausibly be read to mean that the plaintiffs earned the $1 million commission on the completion of the sale of that parcel by Woodland to Windemere, on the basis of the plaintiffs' role in facilitating that sale, and that payment was simply to be delayed until Windemere was able to develop the property. The trial court, for example, having found the parties' various purchase and listing agreements to be ambiguous, concluded that one possible interpretation of the agreements was that the plaintiffs had earned a commission with respect to parcel 15 prior to having performed any services for Windemere. Should these cases ultimately return to the trial court, it will fall to that court to determine whether those agreements are list-back agreements, the enforcement of which potentially implicates antitrust considerations or, rather, merely consideration for the plaintiffs' prior services. Compare, e.g., *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72, 81–82, 102 S. Ct. 851, 70 L. Ed. 2d 833 (1982) (illegality defense should be entertained in those circumstances in which its rejection would be to enforce conduct forbidden by antitrust law), with *Kelly* v. *Kosuga*, 358 U.S. 516, 521, 79 S. Ct. 429, 3 L. Ed. 2d 475 (1959) (rejecting illegality defense when judgment would not have enforced allegedly illegal aspect of contract).

[4] The precise terms of the various contract documents vary, and are ambiguous, in ways that are not directly relevant to the legal issues now before us but that likely will need to be addressed on remand.

seeking, inter alia, specific performance of the listing agreements. In response, the defendants raised a number of special defenses, three of which were at issue in the plaintiffs' appeal to the Appellate Court. Specifically, the defendants argued that the list-back provisions in their purchase and sale agreements were not enforceable by the plaintiffs because those provisions (1) were illegal tying arrangements, (2) did not satisfy the requirements of General Statutes § 20-325a,[5] and (3) were personal and specific to Haddad, who died prior to the trial. *Reserve Realty, LLC* v. *Windemere Reserve, LLC*, supra, 174 Conn. App. 138. Following a bench trial, the trial court ruled for the defendants on all three of these special defenses and rendered judgments accordingly. The Appellate Court affirmed the judgments on the basis of the antitrust defense and, therefore, declined to address the plaintiffs' claims that the trial court reached the incorrect conclusion on the remaining special defenses.[6] Id.

II

The dispositive question in these appeals is whether we should reconsider our tying jurisprudence and overrule *Hossan-Maxwell, Inc.* In part II A of this opinion, we set forth certain well established background principles on which we understand the parties to be in agreement. In part II B and C, we address the legal questions that remain the subject of dispute between the parties.

A

The defendants' first special defense alleges that the list-back provisions in the parties' purchase and sale agreements violate the Sherman Act, 15 U.S.C. § 1 et

[5] Among other things, § 20-325a places certain restrictions on the ability of a real estate broker to bring an action to recover commissions arising out of a real estate transaction.

[6] In order for the plaintiffs to prevail, all three of these defenses must fail on appeal.

seq., and are, therefore, unenforceable. See *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72, 76, 102 S. Ct. 851, 70 L. Ed. 2d 833 (1982) (claim that agreement "was void and unenforceable as violative of §§ 1 and 2 of the Sherman Act"); see also *Hanks* v. *Powder Ridge Restaurant Corp.*, 276 Conn. 314, 326, 885 A.2d 734 (2005) ("contracts that violate public policy are unenforceable" (internal quotation marks omitted)). The section of the Sherman Act at issue provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several [s]tates, or with foreign nations, is declared to be illegal. . . ." 15 U.S.C. § 1 (2018). Although this provision, on its face, prohibits *any* contract in restraint of trade, the United States Supreme Court has added a judicial gloss requiring a contractual restraint to be unreasonable before it will be deemed illegal under the Sherman Act.[7] See, e.g., *Board of Trade* v. *United States*, 246 U.S. 231, 238–41, 38 S. Ct. 242, 62 L. Ed. 683 (1918);

[7] More broadly, this provision of the Sherman Act, which is only a few sentences long, is understood effectively to delegate to the courts the authority to determine what constitutes an unreasonable restraint of trade and, therefore, an antitrust violation. See *In re Cox Enterprises, Inc.*, 871 F.3d 1093, 1097 (10th Cir. 2017). As a result, although antitrust actions and defenses technically are statutory, judicial decisions interpreting and applying the Sherman Act tend to analyze antitrust issues more like common-law questions, with public policy and economic concerns at the forefront, rather than according to traditional methods of statutory construction. See R. Posner, "The Meaning of Judicial Self-Restraint," 59 Ind. L.J. 1, 5–6 (1983); see also 2 P. Areeda & H. Hovenkamp, Antitrust Law (3d Ed. 2007) ¶ 301a, pp. 6–7.

We further note that, to the extent that the trial court read General Statutes § 35-26 literally to prohibit any "contract, combination, or conspiracy in restraint of any part of trade or commerce"; see footnote 8 of this opinion; that court's reading was incorrect. Every commercial contract, by definition, constitutes a restraint of trade. *Procaps S.A.* v. *Patheon, Inc.*, 845 F.3d 1072, 1081 (11th Cir. 2016). If a dog breeder contracts to sell three puppies to a family, commerce in those three puppies is restrained, insofar as no other customer may purchase them. The antitrust laws proscribe only those contracts that *unreasonably* restrain trade. See, e.g., id.; *Tremont Public Advisors, LLC* v. *Connecticut Resources Recovery Authority*, 333 Conn. 672, 695, 217 A.3d 953 (2019).

Elida, Inc. v. *Harmor Realty Corp.*, 177 Conn. 218, 225, 413 A.2d 1226 (1979); see also *Bridgeport Harbour Place I, LLC* v. *Ganim*, 303 Conn. 205, 214, 32 A.3d 296 (2011) ("an act is deemed anticompetitive under the Sherman Act only when it harms both allocative efficiency and raises the prices of goods above competitive levels or diminishes their quality" (emphasis omitted; internal quotation marks omitted)).

The United States Supreme Court generally has reviewed alleged Sherman Act violations under one of two standards. "If a restraint alleged is among that small class of actions that courts have deemed to have . . . predictable and pernicious anticompetitive effect, and . . . limited potential for procompetitive benefit, it will be unreasonable per se . . . . Most antitrust claims, however . . . are analyzed under a rule of reason analysis [that] seeks to determine if the alleged restraint is unreasonable because its anticompetitive effects outweigh its procompetitive effects." (Internal quotation marks omitted.) *Bridgeport Harbour Place I, LLC* v. *Ganim*, supra, 303 Conn. 214–15.

Treating some practices as illegal per se allows courts to recognize and efficiently resolve disputes concerning practices that have little or no positive economic value and are highly likely to be anticompetitive, without the need for parties to engage in costly and complex litigation centering around competing expert testimony. See 9 P. Areeda & H. Hovenkamp, Antitrust Law (3d Ed. 2011) ¶ 1720a, pp. 260–61. On the other hand, presumptively applying a rule of reason to most alleged antitrust violations (1) respects the freedom of competitors and consumers to structure their economic relations as they see fit, (2) recognizes that courts generally are ill-equipped to identify those business practices that deviate from the procompetitive norm and may be too quick to choose economic winners and losers rather than allowing the marketplace to sort things out, and (3) requires proof that a challenged business practice actu-

ally imposes an unreasonable restraint on trade before exposing a defendant to potential antitrust liability. See 7 P. Areeda & H. Hovenkamp, Antitrust Law (3d Ed. 2010) ¶ 1500, pp. 379–82; 9 P. Areeda & H. Hovenkamp, supra, ¶ 1710c, pp. 110–13.

In addition to the Sherman Act, the defendants allege that the list-back provisions in their agreements also violate the Connecticut Antitrust Act, General Statutes § 35-24 et seq. The primary allegation is that the list-back provisions violate General Statutes § 35-26,[8] the state analogue of 15 U.S.C. § 1.[9] It is well established that the state antitrust act was patterned after federal antitrust law. *Bridgeport Harbour Place I, LLC* v. *Ganim*, supra, 303 Conn. 213 n.6. Indeed, General Statutes § 35-44b provides that, in construing the antitrust act, "the courts of this state shall be guided by interpretations given by the federal courts to federal antitrust statutes." For this reason, "we follow federal precedent when we interpret the [Connecticut Antitrust Act] unless the text of our antitrust statutes, or other pertinent state law, requires us to interpret it differently . . . ." (Internal quotation marks omitted.) *Bridgeport Harbour Place I, LLC* v. *Ganim*, supra, 213 n.6; see also *Westport Taxi Service, Inc.* v. *Westport Transit District*, 235 Conn. 1, 15–16, 664 A.2d 719 (1995). Insofar

[8] General Statutes § 35-26 provides: "Every contract, combination, or conspiracy in restraint of any part of trade or commerce is unlawful."

[9] The parties disagree as to whether the defendants' antitrust special defense also can be understood to allege a violation of General Statutes § 35-29, the state analogue of § 3 of the Clayton Act, 15 U.S.C. § 14. Because we conclude that tying arrangements are evaluated under the same legal standard under both the Sherman Act and the Clayton Act, we need not resolve this dispute. See part III C of this opinion. Moreover, although the defendants correctly note that § 35-29 is broader in scope than § 3 of the Clayton Act—insofar as the former statute, unlike the latter, (1) applies to anticompetitive conduct in the provision of services as well as commodities, and (2) is not limited to interstate commerce—the defendants do not contend that anything in the text or history of § 35-29 warrants the application of a different legal *standard*.

as neither party contends that § 35-26 should be interpreted differently from its federal counterpart, we limit our analysis herein to the issue of whether the listing agreements violate 15 U.S.C. § 1.

The defendants allege that the agreements at issue in the present case are illegal tying arrangements. "A tying arrangement is an agreement by a party to sell one product [the tying product] but only on the condition that the buyer also purchase a different (tied) product, or at least agree that he will not purchase that product from any other supplier." *State* v. *Hossan-Maxwell, Inc.*, supra, 181 Conn. 659. In its early antitrust cases, the United States Supreme Court took a dim view of tying arrangements because it assumed that (1) tying confers little, if any, economic benefit or value, and (2) tying allows a monopolist in the tying product to improperly extend or leverage its monopoly position so as to monopolize or obtain an unfair advantage in the market for the complementary, tied product (the dual monopoly profit theory). See *Illinois Tool Works, Inc.* v. *Independent Ink, Inc.*, 547 U.S. 28, 35, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006). Because tying was viewed as being almost invariably anticompetitive, the Supreme Court initially classified tying among those trade practices deemed per se unlawful. See, e.g., *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 609, 73 S. Ct. 872, 97 L. Ed. 1277 (1953).

The issue of the legality of broker list-back agreements under federal and state antitrust law first arose in the late 1970s and early 1980s. Consistent with the United States Supreme Court's then prevailing views on tying arrangements, both this court and our sister courts[10] held such arrangements to be per se illegal

[10] See, e.g., *Miller* v. *Granados*, 529 F.2d 393, 396–97 (5th Cir. 1976); *MacManus* v. *A. E. Realty Partners*, 146 Cal. App. 3d 275, 288, 194 Cal. Rptr. 567 (1983); *King City Realty, Inc.* v. *Sunpace Corp.*, 291 Or. 573, 581, 633 P.2d 784 (1981); see also *In re Real Estate Litigation*, 95 Wn. 2d 297, 301–304, 622 P.2d 1185 (1980) (addressing jurisdictional issues).

and, therefore, generally refused to enforce contracts predicated on such an agreement.

We addressed this issue in *Hossan-Maxwell, Inc.* A brief review of the facts of that case is instructive. In 1966, James F. Hartnett recorded a declaration of covenants and restrictions on certain parcels of residential land in New Milford. *State* v. *Hossan-Maxwell, Inc.*, supra, 181 Conn. 657. That declaration required that a grantee of any of the sixty-four building lots who decided to sell or lease the property through any commissioned broker give exclusive sales and leasing rights to Hartnett for a period of three months. Id., 658. These exclusive rights were intended to run with the land and to bind not only the immediate grantee but all subsequent purchasers. Id. Apparently, Hartnett intended to charge a 6 percent commission for his services, which was consistent with the prevailing market rate. Id., 663, 665 n.7.

In affirming the trial court's judgment declaring the restrictive covenants unenforceable, this court applied not a true per se rule but, rather, the "quasi-per se" rule that the United States Supreme Court articulated in *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958) (*Northern Pacific*). See *State* v. *Hossan-Maxwell, Inc.*, supra, 181 Conn. 660–67. Under the *Northern Pacific* rule, a tying arrangement violates 15 U.S.C. § 1, without the need to demonstrate any anticompetitive effects—that is, without the need for a full rule of reason analysis—if the following conditions are met: (1) the seller has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product, and (2) a "not insubstantial amount of interstate commerce is affected," meaning that more than a de minimis volume of business is foreclosed to competitors by the tie. See id., 661–63.

With respect to the first prong of the *Northern Pacific* rule, economic power for antitrust purposes ordinarily must be demonstrated by proving that a seller has a substantial or dominant position (market power) in a defined product and geographic market. See, e.g., *Smugglers Notch Homeowners' Assn., Inc.* v. *Smugglers' Notch Management Co., Ltd.*, 414 Fed. Appx. 372, 375 (2d Cir. 2011); see also footnote 14 of this opinion. Several United States Supreme Court cases decided prior to *Hossan-Maxwell, Inc.*, however, held that economic power also can be established merely by demonstrating that the tying product at issue is protected as intellectual property or is a unique or especially desirable item, the assumption being that that uniqueness of the tying product can be leveraged to compel an eager buyer to accept the tied product.[11] See, e.g., *International Salt Co.* v. *United States*, 332 U.S. 392, 395–96, 68 S. Ct. 12, 92 L. Ed. 20 (1947); *International Business Machines Corp.* v. *United States*, 298 U.S. 131, 135–37, 56 S. Ct. 701, 80 L. Ed. 1085 (1936); see also *Jefferson Parish Hospital District No. 2* v. *Hyde*, 466 U.S. 2, 17, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984) ("when the seller offers a unique product that competitors are not able to offer . . . [this] [c]ourt has held that the likelihood that market power exists and is being used to restrain competition in a separate market is sufficient to make per se condemnation appropriate" (citation omitted)). In *State* v. *Hossan-Maxwell, Inc.*, supra, 181 Conn. 665, this court read *Northern Pacific* to mean that land—or at least residential land—also is

[11] Although courts sometimes use the terms "economic power" and "market power" interchangeably, in this opinion, for clarity, we use the term "economic power" in the more general sense to encompass all of the various factors that courts have indicated may satisfy the first prong of *Northern Pacific*. These include not only market power (a substantial or dominant share of a defined, distinct market), but also uniqueness, special desirability, a legal monopoly such as a patent, and anything else that might permit a seller to force a buyer to agree to acquire an unwanted tied product.

always unique. Accordingly, a landowner who ties the sale of their land to the purchase of another product or service necessarily has market power for purposes of a court's evaluation of an antitrust challenge. See id.

This court also concluded in *Hossan-Maxwell, Inc.*, that the second prong of the *Northern Pacific* rule was satisfied because, under what the court described as its "very liberal interpretation" of *Northern Pacific*, the estimated $21,000 in annual real estate commissions implicated by the declaration constituted a not insubstantial volume of business that was foreclosed to other brokers. (Internal quotation marks omitted.) Id., 664.

In the four decades since this court held in *Hossan-Maxwell, Inc.*, that any real estate list-back agreement affecting more than a de minimis volume of commerce is per se illegal, neither this court nor, to our knowledge, any federal appellate court has had the opportunity to consider the ongoing vitality of that rule. Although, in addressing this question, we must defer to the trial court's factual findings, our interpretation of federal and state antitrust laws is plenary. See, e.g., *Miller's Pond Co., LLC* v. *New London*, 273 Conn. 786, 798, 873 A.2d 965 (2005); *Westport Taxi Service, Inc.* v. *Westport Transit District*, supra, 235 Conn. 14–15.

B

We turn now to the primary issue presented by the present appeals, namely, whether the reasoning and result of this court's decision in *Hossan-Maxwell, Inc.*, remain consistent with the current views of the United States Supreme Court and the lower federal courts with respect to tying arrangements. The plaintiffs posit that *Hossan-Maxwell, Inc.*, has been vitiated by modern antitrust case law or, at the very least, that we should adopt a more nuanced approach to tying arrangements such as that espoused by Justice O'Connor in her concurring opinion in *Jefferson Parish Hospital District*

No. 2 v. *Hyde*, supra, 466 U.S. 33–42. The defendants respond that *Hossan-Maxwell, Inc.*, remains fully consistent with controlling United States Supreme Court precedent and, therefore, should not be overruled. Because we conclude that the trajectory of federal antitrust law, as informed by recent antitrust scholarship, clearly is diverging from the traditional per se treatment of tying arrangements, we agree with the plaintiffs that the trial court should not have found the list-back agreements at issue in this case unenforceable without first engaging in a full market analysis.

1

Before we review the evolution of the United States Supreme Court's tying jurisprudence, it will be instructive briefly to review some of the developments in antitrust scholarship that precipitated that evolution. Tying was among the first areas in which modern antitrust theory—often associated with the so-called "law and economics" or "Chicago school" of thought—diverged from courts' traditional approach to competition problems. Beginning in the 1970s, antitrust scholars began to challenge the two pillars that had supported courts' per se treatment of tying arrangements, namely, the dual monopoly profit theory and the axiom that tying typically confers no economic benefit or value. Scholars theorized—and purported to demonstrate—that, far from being inherently anticompetitive, most tying agreements are actually procompetitive.[12] See, e.g., D. Carlton & M. Waldman, "Robert Bork's Contributions

[12] A tying arrangement, such as requiring that consumers purchase laces in tandem with a new pair of shoes or commit to buying a vendor's paper when purchasing its photocopy machines, might, for example, result in increased efficiencies, satisfy consumer preferences for bundled sales, protect a seller's good will, or facilitate economically desirable forms of price discrimination. See, e.g., 9 P. Areeda & H. Hovenkamp, supra, ¶ 1703g, pp. 51–54; id., ¶ 1720, pp. 259–61; D. Carlton & M. Waldman, "Robert Bork's Contributions to Antitrust Perspectives on Tying Behavior," 57 J.L. & Econ. S121–26 (2014).

to Antitrust Perspectives on Tying Behavior," 57 J.L. & Econ. S121, S121–22 (2014); R. Posner, "The Chicago School of Antitrust Analysis," 127 U. Pa. L. Rev. 925, 925–26 (1979). They also established that, in most instances, control over a tying product does not allow a monopolist to garner additional profits by cornering the market for a tied product. See, e.g., *Scheiber* v. *Dolby Laboratories, Inc.*, 293 F.3d 1014, 1020 (7th Cir. 2002) ("as [modern] cases and a tidal wave of legal and economic scholarship point out, the idea that you can use tying to lever your way to a second . . . monopoly is economic nonsense"), cert. denied, 537 U.S. 1109, 123 S. Ct. 853, 154 L. Ed. 2d 781 (2003).

At a more fundamental level, recent scholarship has highlighted the difficulty in distinguishing between a packaged sale that is a tie—and, thus, presumptively illegal under traditional antitrust jurisprudence—and a product or service *bundle*, which is presumptively legal and consumer friendly. As one author has explained, "[t]he most robust statement one can make about tying is that it is ubiquitous. Consider the following examples: shoes are sold in pairs; hotels sometimes offer breakfast, lunch or dinner tied with the room; there is no such a thing as an unbundled car; and no self-respecting French restaurant would allow its patrons to drink a bottle of wine not coming from its cellar." C. Ahlborn et al., "The Antitrust Economics of Tying: A Farewell to Per Se Illegality," 49 Antitrust Bull. 287, 287 (2004); see also K. Hylton & M. Salinger, "Tying Law and Policy: A Decision-Theoretic Approach," 69 Antitrust L.J. 469, 526 (2001) ("tying is so pervasive even in competitive markets that there is ample evidence that procompetitive tying is a common occurrence").

Finally, antitrust scholars have cautioned against the use of tying law to resolve "contract dispute[s] in which one side got the benefit of the bargain and then sought to have the contract declared a violation of the Sherman

Act." K. Hylton & M. Salinger, "Reply to Grimes: Illusory Distinctions and Schisms in Tying Law," 70 Antitrust L.J. 231, 239 (2002); see also *Hemlock Semiconductor Operations, LLC* v. *SolarWorld Industries Sachsen GmbH*, 867 F.3d 692, 701 (6th Cir. 2017) ("illegality defenses based on antitrust law are disfavored, especially when allowing the defense would let the buyer escape from its side of a bargain after having received a benefit" (internal quotation marks omitted)). See footnote 3 of this opinion.

2

In the four decades since this court decided *Hossan-Maxwell, Inc.*, the foregoing scholarship has prompted the United States Supreme Court to rethink its approach to tying claims. In *Jefferson Parish Hospital District No. 2* v. *Hyde*, supra, 466 U.S. 32–33, Justice O'Connor authored a concurring opinion, joined by three other members of the court, in which she argued that the tying arrangements at issue—patients obtaining surgery at the defendant hospital were required to use a designated anesthesiology practice—should be evaluated under the rule of reason. More generally, the concurrence, citing to recent antitrust scholarship, argued that "[t]he time has . . . come to abandon the 'per se' label and refocus the inquiry on the adverse economic effects, and the potential economic benefits, that the tie may have."[13] Id., 35 (O'Connor, J., concurring in the judgment). Although a majority of the court continued to apply the *Northern Pacific* quasi-per se rule to tying

[13] Justice O'Connor's concurring opinion went so far as to argue that tying arrangements should be deemed presumptively *legal*, unless (1) the seller has market power in the tying product market, (2) there is "a substantial threat that the tying seller will acquire market power in the [tied product] market," and (3) the tied product is one that some consumers might wish to purchase separately without also purchasing the tying product. *Jefferson Parish Hospital District No. 2* v. *Hyde*, supra, 466 U.S. 37–39. If all three conditions are met, then the antitrust claims would be evaluated under a rule of reason analysis. Id.

claims in its next tying case; see *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U.S. 451, 462, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992); the dissent, penned by Justice Scalia and joined by Justices O'Connor and Thomas, again recognized the "intense criticism of the [court's] tying doctrine in academic circles . . . ." Id., 487.

Finally, in *Illinois Tool Works, Inc.*, a majority of the Supreme Court for the first time expressly repudiated the court's traditional disapproval of tying agreements. Justice Stevens, writing for a unanimous court, undertook "a fresh examination of the history of both the judicial and legislative appraisals of tying arrangements . . . informed by extensive scholarly comment and a change in position by the administrative agencies charged with enforcement of the antitrust laws." (Citation omitted.) *Illinois Tool Works Inc.* v. *Independent Ink, Inc.*, supra, 547 U.S. 33. The court observed that, "[o]ver the years . . . [its] strong disapproval of tying arrangements has substantially diminished. Rather than relying on assumptions, in its more recent opinions the [c]ourt has required a showing of market power in the tying product." Id., 35. Justice Stevens further explained that, whereas the court traditionally had been of the view that "[t]ying arrangements serve hardly any purpose beyond the suppression of competition," that view had evolved with the recognition that "tying arrangements may well be procompetitive . . . ." (Internal quotation marks omitted.) Id., 35–36.

Having thus framed the issue, the court in *Illinois Tool Works, Inc.*, proceeded to expressly overrule one "vestige of [its] historical distrust of tying arrangements . . . ." Id., 38. As we discussed, in previous decisions, the United States Supreme Court had indicated that the first prong of the *Northern Pacific* rule—possession of economic power in the tying product—can be established not only by proving that a seller holds a dominant

position in a defined market for the tying product, but also by demonstrating that the tying product is presumed to be uniquely desirable. In *Northern Pacific* itself, the court suggested that the unique configuration and choice location of the defendant's land was sufficient to confer economic power. *Northern Pacific Railway Co.* v. *United States*, supra, 356 U.S. 7; see also id., 16–20 (Harlan, J., dissenting). In prior decisions, the court had likewise held that the monopoly conferred by a patent presumptively confers market power for purposes of a tying claim. See, e.g., *International Salt Co.* v. *United States*, supra, 332 U.S. 395–96; *International Business Machines Corp.* v. *United States*, supra, 298 U.S. 136–37. Indeed, it was in the context of intellectual property that the Supreme Court initially held that tying arrangements are per se illegal. See *Illinois Tool Works, Inc.* v. *Independent Ink, Inc.*, supra, 547 U.S. 33.

In *Illinois Tool Works, Inc.*, the issue was whether the court should depart from its long established rule that a patent holder presumptively exerts market power over the patented product for purposes of a tying allegation. Id., 31. Overruling several of its prior tying decisions; see id., 38–40; the court held that "the mere fact that a tying product is patented does not support . . . a presumption [of market power]." Id., 31. The court emphasized that its new approach, which requires proof that the seller holds market power in the relevant market, is consistent with "the vast majority of academic literature on the subject." Id., 43–44 and n.4.

3

The parties to the present case disagree as to the scope of the Supreme Court's decision in *Illinois Tool Works, Inc.* The defendants contend that its holding was limited to patented products, whereas the plaintiffs contend that the court intended to depart more fundamentally from its prior view that the uniqueness of a

tying product can presumptively establish economic power for purposes of *Northern Pacific*. The narrow reading advocated by the defendants is consistent with the fact that only the question of patents was before the court in *Illinois Tool Works, Inc.*, and that the court, in overruling its prior patent tying cases, relied on various factors that are specific to the patent context: recent congressional amendments to the patent misuse statutes, new guidance from the federal agencies charged with the enforcement of the antitrust laws, and the views of antitrust scholars regarding the overlap of intellectual property and antitrust law. Id., 41–45.

The plaintiffs' broader reading of *Illinois Tool Works, Inc.*, however, finds support in the manner in which the Supreme Court framed its holding, which appeared to extend beyond the patent context. "Many tying arrangements," the court wrote, "even those involving patents and requirements ties, are fully consistent with a free, competitive market. . . . Congress, the antitrust enforcement agencies, and most economists have all reached the conclusion that a patent does not necessarily confer market power upon the patentee. Today, we reach the same conclusion and therefore hold that, *in all cases involving a tying arrangement*, the plaintiff must prove that the defendant has market power in the tying product." (Citations omitted; emphasis added.) Id., 45–46. The fact that the Supreme Court's restrictive tying jurisprudence originated in the patent context also suggests that that court's recent change of direction with respect to the tying of patented products evinces a broader rethinking of tying generally. Indeed, it would be odd if the Supreme Court were to conclude that holding a patent—a legal monopoly—over a product is not sufficient to confer economic power but that mere ownership of a parcel of land, without more, is sufficient.

Our impression that the plaintiffs have the better of this argument is reinforced by the fact that most of the lower federal courts and our sister state courts that have considered the question have adopted the broader reading of *Illinois Tool Works, Inc.*, and interpreted the decision to mean that the uniqueness of a tying product no longer gives rise to a presumption of economic power. Market power in a defined product and geographic market must be established to satisfy the first prong of *Northern Pacific*, even with respect to unique, nonpatented tying products such as land.[14]

In *Michigan Division-Monument Builders of North America* v. *Michigan Cemetery Assn.*, 458 F. Supp. 2d 474, 476–77 (E.D. Mich. 2006), aff'd, 524 F.3d 726 (6th Cir. 2008), the plaintiffs, a class of independent monument dealers, alleged that the defendant cemeteries violated the Sherman Act by requiring that consumers who wished to buy a burial plot also to purchase monuments and related services from the cemetery. They alleged that this tying scheme was per se illegal because the uniqueness of burial land meant that each cemetery constituted a distinct product and geographic market. Id., 477. The federal District Court, granting the defen-

[14] We note that defining a relevant product and geographic market for purposes of the federal antitrust laws is a highly technical process that typically requires expert testimony. See, e.g., *McWane, Inc.* v. *Federal Trade Commission*, 783 F.3d 814, 829 (11th Cir. 2015), cert. denied, U.S. , 136 S. Ct. 1452, 194 L. Ed. 2d 550 (2016); *Hynix Semiconductor, Inc.* v. *Rambus, Inc.*, Docket No. CV-00-20905 RMW, 2008 WL 73689, *10 n.13 (N.D. Cal. January 5, 2008). The most common test of a proposed market definition asks whether there is sufficient cross-elasticity of demand that a small but significant and nontransitory price increase will lead customers to look elsewhere—both productwise and geographically—for substitutes. See, e.g., *DSM Desotech, Inc.* v. *3D Systems Corp.*, 749 F.3d 1332, 1339–40 (2014); *Theme Promotions, Inc.* v. *News America Marketing FSI*, 546 F.3d 991, 1002 (2008). Only once the relevant product and geographic markets have been carefully defined can the trier of fact assess the relevant antitrust variables, whether it be market share, economic power, market concentration, barriers to entry, or the like.

dants' motion to dismiss the tying claims, concluded that the alleged relevant geographic market—each individual cemetery—failed as a matter of law. Id., 480–85. The court reached that conclusion because, in its view, "the reasoning in [*Illinois Tool Works*, *Inc.*] makes it clear that presumptions, whether based on the uniqueness of a patent or the uniqueness of land, cannot support a valid antitrust claim." Id., 484.

The United States Court of Appeals for the Sixth Circuit affirmed, opining that, under *Illinois Tool Works*, *Inc.*, "[t]he idea that all land is unique . . . is insufficient to support a finding of market power." *Michigan Division-Monument Builders of North America* v. *Michigan Cemetery Assn.*, supra, 524 F.3d 732. The Court of Appeals distinguished the holding of *Northern Pacific*, concluding that, in that case, the Supreme Court had affirmed a finding of economic power not because commercial land in general is unique but, rather, because there was other evidence showing that the specific location of the land lent the seller a competitive advantage that others could not achieve. Id., 733. Specifically, the land at issue in *Northern Pacific* was strategically located in checkerboard fashion within economic distance of key transportation facilities and, therefore, was essential to the business activities of those who purchased or leased it. Id., 732–33; see *Northern Pacific Railway Co.* v. *United States*, supra, 356 U.S. 7.

In so holding, the Sixth Circuit joined several other appellate courts to have rejected—even prior to *Illinois Tool Works*, *Inc.*—the theory that the uniqueness of land, standing alone, is sufficient to create economic power for purposes of the first prong of the *Northern Pacific* rule. See, e.g., *Smugglers Notch Homeowners' Assn.*, *Inc.* v. *Smugglers' Notch Management Co.*, *Ltd.*, supra, 414 Fed. Appx. 376 (rejecting "unique geographic qualities of ski areas" as basis for finding of market

power (internal quotation marks omitted)); *Baxley-DeLamar Monuments, Inc.* v. *American Cemetery Assn.*, 938 F.2d 846, 851 (8th Cir. 1991) ("[A]ll land is unique, but the mere fact that the tying product is real estate does not convey market power. . . . In numerous other tying cases involving real estate as the tying product, courts have held that the real estate must have some particular strategic or competitive importance in order to carry market power." (Citations omitted.)); *McCormick* v. *Bradley*, 870 P.2d 599, 604–605 (Colo. App. 1993) (criticizing and declining to follow *Hossan-Maxwell, Inc.*), cert. denied, Colorado Supreme Court, Docket No. 93SC773 (April 11, 1994); *Vande Guchte* v. *Kort*, 13 Neb. App. 875, 887, 703 N.W.2d 611 (2005) ("we do not accept the notion that the 'uniqueness' of land by itself establishes economic power").

More generally, other federal courts have read *Illinois Tool Works, Inc.*, to broadly hold that market power in a defined product and geographic market *always* must be established to proceed under the quasi-per se rule in *Northern Pacific*. See, e.g., *Auraria Student Housing at the Regency, LLC* v. *Campus Village Apartments, LLC*, 843 F.3d 1225, 1246 (10th Cir. 2016); *Batson* v. *Live Nation Entertainment, Inc.*, 746 F.3d 827, 831–32 (7th Cir. 2014); *Sheridan* v. *Marathon Petroleum Co., LLC*, 530 F.3d 590, 593–94 (7th Cir. 2008); *Compliance Marketing, Inc.* v. *Drugtest, Inc.*, Docket No. 09-CV-01241-JLK, 2010 WL 1416823, *7 (D. Colo. April 7, 2010); *Mediacom Communications Corp.* v. *Sinclair Broadcast Group, Inc.*, 460 F. Supp. 2d 1012, 1027 (S.D. Iowa 2006). It seems clear, then, that a per se ban on list-back agreements, as applied in *Hossan-Maxwell, Inc.*, is inconsistent with federal antitrust law as it has evolved over the past several decades.[15]

[15] Indeed, given the recent evolution of the tying doctrine in the federal courts, it is fair to ask whether the *Northern Pacific* rule, in its present form, should continue to be considered a per se prohibition on tying in any sense. See, e.g., 9 P. Areeda & H. Hovenkamp, supra, ¶ 1728c, pp. 375–76 (explaining that most lower courts now allow defendants to raise defense

C

We next consider three arguments offered by the defendants that have not been fully addressed by the preceding discussion. First, the defendants contend that their antitrust special defense invokes not only the Sherman Act and its state analogues but also General Statutes § 35-29, the Connecticut analogue of § 3 of the Clayton Act, 15 U.S.C. § 14. The point matters, they contend, because, in *Hossan-Maxwell, Inc.*, this court, following what appeared at that time to be the guidance of the United States Supreme Court in *Times-Picayune Publishing Co.* v. *United States*, supra, 345 U.S. 594, concluded that tying claims brought under the Clayton Act or its state analogue need to satisfy only one prong of the rule set forth in *Northern Pacific*. See *State* v. *Hossan-Maxwell, Inc.*, supra, 181 Conn. 662. That is, a tie could be deemed illegal per se merely on the basis of the fact that it foreclosed a not insubstantial volume of trade in the tied product, even if the seller lacked economic power in the tying product market. If that were the case, then the analysis in part II B of this opinion, which addresses only the first prong of the *Northern Pacific* rule, would likely be moot, insofar as the plaintiffs do not dispute that a substantial volume of trade is at issue.

that tying arrangement is affirmatively justified by fact that it confers benefits not available by alternative means); E. Elhauge, "Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory," 123 Harv. L. Rev. 397, 425–26 (2009) ("It . . . now seems likely that a tie can be justified by evidence that the tie is the least restrictive way to achieve efficiencies large enough to offset the anticompetitive effects. Accordingly, today it is more accurate to read Supreme Court precedent on tying as embracing a rule of reason, where anticompetitive effects must be shown or inferred and procompetitive justifications are admissible."); see also *United States* v. *Microsoft Corp.*, 253 F.3d 34, 84 (D.C. Cir.) (rule of reason, rather than per se analysis, governs legality of tying arrangements involving platform software products), cert. denied, 534 U.S. 952, 122 S. Ct. 350, 151 L. Ed. 2d 264 (2001).

Although that reading of *Times-Picayune Publishing Co.* was still considered plausible at the time that *Hossan-Maxwell, Inc.*, was decided, since then, the federal courts and antitrust scholars almost universally have concluded that the standard for tying claims brought under the Clayton Act is no different from the standard for those brought under the Sherman Act. See, e.g., *Sheridan* v. *Marathon Petroleum Co., LLC*, supra, 530 F.3d 592 ("[t]hough some old cases say otherwise, the standards for adjudicating tying under the two statutes are now recognized to be the same"); *De Jesus* v. *Sears, Roebuck & Co.*, 87 F.3d 65, 70 (2d Cir.) ("[W]e have required allegations and proof of five specific elements before finding a tie illegal . . . . These elements are common to claims asserted under either the Sherman or Clayton Acts." (Citation omitted; internal quotation marks omitted.)), cert. denied, 519 U.S. 1007, 117 S. Ct. 509, 136 L. Ed. 2d 399 (1996); *In re Data General Corp. Antitrust Litigation*, 490 F. Supp. 1089, 1100 (N.D. Cal. 1980) ("It was traditionally understood that a tying arrangement would run afoul of [the] Clayton [Act] if it satisfied . . . either . . . of the elements required under the Sherman Act. . . . Recently, however, the neat distinction between tying arrangements that violate [the] Sherman [Act] and those that violate [the] Clayton [Act] has faded beyond recognition." (Citation omitted.)); 2 P. Areeda & H. Hovenkamp, Antitrust Law, (3d Ed. 2007) ¶ 301c, pp. 9–11 and n.28 (referring to *Times-Picayune Publishing Co.* as "one obsolete exception" to prevailing view); H. Hovenkamp, "Tying Arrangements in the Real Estate Market: Federal Antitrust Law and Local Land Development Policy," 33 Hastings L.J. 325, 334 (1981) ("[s]ince *Times-Picayune* [*Publishing Co.*] was decided, [the] distinction between the [Sherman Act and the Clayton Act] has increasingly been disregarded"). Accordingly, we need not resolve the parties' dispute as to whether the defendants ade-

quately pleaded a violation of § 35-29, insofar as the same legal standard applies to tying claims under both federal acts and their state counterparts.

Second, the defendants contend that other courts that have considered the issue have agreed with *Hossan-Maxwell, Inc.*, that any list-back agreement that forecloses a not insubstantial volume of broker commissions is per se illegal. That appears to have been the consensus view in the late 1970s and early 1980s. See footnote 10 of this opinion and accompanying text. Although we have identified some contrary authority even from that time period,[16] the important point is that all of the cases on which the defendants rely were decided more or less contemporaneously with *Hossan-Maxwell, Inc.*, and well before the evolution in federal tying law that we discussed in part II B of this opinion. The fact that those cases were decided consistently with *Hossan-Maxwell, Inc.*, is, therefore, of little moment.

Third, the defendants emphasize that, regardless of whether *federal* antitrust law treats land as conferring economic power for purposes of the *Northern Pacific* rule, this court concluded in *Hossan-Maxwell, Inc.*, that land is inherently unique as a matter of Connecticut common law. They contend, therefore, that the logic of that decision remains sound regardless of whether federal law has taken a different direction.

[16] See, e.g., *Fran Welch Real Estate Sales, Inc.* v. *Seabrook Island Co.*, 621 F. Supp. 128, 137–38 (D.S.C. 1985) (summary judgment on real estate list-back claim deemed inappropriate when (1) relevant market had not been defined, and (2) six month exclusive listing agreement was likely too short to unreasonably restrain competition), aff'd, 809 F.2d 1030 (4th Cir. 1987); *Outdoor Resorts of America, Inc.* v. *Outdoor Resorts at Nettles Island, Inc.*, 379 So. 2d 471, 471–72 (Fla. App.) (rule of reason governed claim that purchase of recreational vehicle lot was tied to developer's exclusive right to rent lots at 50 percent commission when not in use), cert. denied, 388 So. 2d 1116 (Fla. 1980); see also *Vande Guchte* v. *Kort*, supra, 13 Neb. App. 887 (holding that builder tie-in contract, which conditioned sale of lot on use of specific builder, was not per se illegal).

It is true that, in *Hossan-Maxwell, Inc.*, our conclusion that the first prong of the *Northern Pacific* rule was satisfied rested in part on the fact that, "[i]n Connecticut, the uniqueness and special characteristics of a particular plot of land have long been recognized. *Anderson* v. *Yaworski*, 120 Conn. 390, 395, 399, 181 A. 205 [1935]." *State* v. *Hossan-Maxwell, Inc.*, supra, 181 Conn. 665. We agree with the plaintiffs, however, that this court's reliance on that principle, and on *Anderson*, was misplaced.

In *Anderson*, this court simply reiterated the well established principle that contracts for the sale of real estate usually may be specifically enforced because each parcel of land has its own particular characteristics such that a buyer may not consider an equivalently priced parcel to be an adequate substitute. *Anderson* v. *Yaworski*, supra, 120 Conn. 395. But the fact that a parcel of land is deemed to be unique for purposes of property and contract law has little, if anything, to do with whether it is unique for purposes of antitrust law. Antitrust law is concerned with whether a seller has economic power—the ability to sell a product at a supracompetitive price—which usually is possible only when a seller controls a substantial share of a defined market for a product for which there are no adequate substitutes. See, e.g., *Sheridan* v. *Marathon Petroleum Co., LLC*, supra, 530 F.3d 594; *American Council of Certified Podiatric Physicians & Surgeons* v. *American Board of Podiatric Surgery, Inc.*, 185 F.3d 606, 622 (6th Cir. 1999); *Queen City Pizza, Inc.* v. *Domino's Pizza, Inc.*, 124 F.3d 430, 436–37 (3d Cir. 1997), cert. denied sub nom. *Baughans, Inc.* v. *Domino's Pizza, Inc.*, 523 U.S. 1059, 118 S. Ct. 1385, 140 L. Ed. 2d 645 (1998).

In theory, a parcel of land could be sufficiently unique to allow the owner to charge a supracompetitive price. This appears to have been the case in *Northern Pacific*,

in which the land at issue afforded unique access to essential transportation facilities.[17] *Northern Pacific Railway Co.* v. *United States*, supra, 356 U.S. 7. But the fact that each house, for example, is unique in various ways does not permit the owner to charge a supracompetitive price when it comes time to sell. Indeed, *Anderson* itself implicitly recognized this concept by noting that the *market value* of a parcel of land may not reflect its *emotional value* in the mind of the purchaser. *Anderson* v. *Yaworski*, supra, 120 Conn. 395–96. At no point does *Anderson* suggest that a property's "peculiar and special" emotional value; (internal quotation marks omitted) id., 396; somehow translates into an above market economic value.

Indeed, many products and services are unique. Land, used cars, purebred dogs, and private piano lessons are examples. But the fact that these things are not wholly fungible does not mean that every seller wields economic power for antitrust purposes. In a sense, the breeder has a tiny monopoly on Fido. There is no other dog in the world quite like him, and his eventual owner may come to think of him as priceless. Still, if the market price for a purebred German shepherd puppy in Hartford is $1200, and if other breeders have other German shepherd puppies for sale at that price, then there is no reason to expect that Fido's breeder will be able to exercise economic power and charge significantly more for him simply because of his inherent uniqueness. By extension, if Fido's breeder began requiring that each puppy buyer also purchase a leash from him, there would be little concern that the sale of Fido might unreasonably restrain competition in the leash market.

[17] In some sense, then, *Northern Pacific* can be understood as an application of the essential facilities doctrine, which applies in antitrust cases in which a monopolist controls access to uniquely necessary infrastructure, such as a railroad or a port. See, e.g., *MCI Communications Corp.* v. *American Telephone & Telegraph Co.*, 708 F.2d 1081, 1132 (7th Cir.), cert. denied, 464 U.S. 891, 104 S. Ct. 234, 78 L. Ed. 2d 226 (1983).

For similar reasons, we repudiate *Hossan-Maxwell, Inc.*, to the extent that it stands for the proposition that the uniqueness of a parcel of land, standing alone, confers market power for purposes of *Northern Pacific*.

D

To reiterate, in light of what we perceive to be the clear trajectory of federal tying law, as informed by modern antitrust scholarship, we overrule *Hossan-Maxwell, Inc.*, to the extent that it held that real estate list-back agreements affecting a not insubstantial volume of commerce are per se illegal. We hold instead that challenges to list-back agreements, like most other forms of tying agreements, are subject to the five element test adopted by the United States Court of Appeals for the Second Circuit in applying *Northern Pacific* and its progeny: "To state a valid tying claim . . . a [party] must allege facts plausibly showing that: [1] the sale of one product (the tying product) is conditioned on the purchase of a separate product (the tied product); [2] the seller uses actual coercion to force buyers to purchase the tied product; [3] the seller has sufficient economic power in the tying product market to coerce purchasers into buying the tied product; [4] the tie-in has anticompetitive effects in the tied market; and [5] a not insubstantial amount of . . . commerce is involved in the tied market." *Kaufman* v. *Time Warner*, 836 F.3d 137, 141 (2d Cir. 2016); accord *Yentsch* v. *Texaco, Inc.*, 630 F.2d 46, 56–57 (2d Cir. 1980). The leading treatise on the subject recognizes this as the prevailing test for tying claims. See 9 P. Areeda & H. Hovenkamp, supra, ¶ 1702, pp. 33–34 and n.1. We further emphasize that the third element of the test, economic power, typically must be established by proving that the defendant wields market power in a defined product and geographic market. *Kaufman* v. *Time Warner*, supra, 143. "[T]he best way to plead market power is to allege facts that, if proven, establish directly that

the price of the tied package is higher than the price of components sold in competitive markets." (Internal quotation marks omitted.) Id.

III

Finally, having clarified the standards that govern antitrust challenges to real estate list-back agreements, we consider whether the trial court's judgments can be affirmed, under the proper legal standard, on the basis of the trial court's express and implicit factual findings. For the reasons that follow, we conclude that they cannot.

A

First, and most important, the defendants did not plead the existence of any particular product or geographic market with respect to either the tying product (land of some sort) or the tied product (real estate broker services of some sort). Nor was any expert testimony introduced that would allow the trial court (1) to define those markets with any sort of precision for purposes of assessing economic power, (2) to quantify Woodland's power over the relevant property market, or (3) to assess the plaintiffs' share or foreclosure of the relevant broker service market.

The trial court did not make any relevant findings in this respect. It simply stated that, under *Hossan-Maxwell, Inc.*, the uniqueness of residential property is sufficient evidence of economic power to satisfy the first prong of *Northern Pacific* and, thus, that Woodland, as the sole owner of the Reserve parcels, had sufficient economic power to restrain competition in the market for the tied product, which it identified as real estate listing broker's services in the greater Danbury area. The trial court did not explain how it reached the conclusion that the relevant tied product market was limited to the greater Danbury area rather than

some larger geographic area, or explain why the relevant market was taken to be listing broker's services rather than a broader market, such as broker's services writ large, or a narrower one, such as the services of listing brokers specializing in large commercial and multifamily residential projects. The court also did not make any findings to support its apparent determination that the Reserve constituted the entire tying product market, such as that the Reserve was uniquely desirable and economically necessary because of its flexible zoning or other distinct characteristics.[18]

The Appellate Court, in affirming the trial court's judgments, implied that, in its view, the relevant tying product market consisted of "large area[s] of undeveloped land . . . in the densely populated Northeast"; the court opined that the Reserve was a rare example thereof. *Reserve Realty, LLC* v. *Windemere Reserve, LLC*, supra, 174 Conn. App. 145. It is unclear on what basis the Appellate Court reached these conclusions. Although there was some evidence in the record suggesting that there were few locations in Fairfield County suitable for building a 450,000 to 1.5 million square foot project, and also that flexible space with the sort of zoning approvals that the Reserve had obtained was very desirable, there is no indication that either (1) the trial court credited that evidence, or (2) the evidence

[18] For these same reasons, the trial court's conclusions that the listing agreements violated General Statutes § 35-27, which prohibits attempted monopolization, and General Statutes § 35-28, which prohibits price fixing arrangements, also cannot be sustained. At the same time, the fact that the necessary market analyses were not performed means that we need not address the plaintiffs' other claims, such as that the Appellate Court incorrectly concluded that the defendants were coerced into agreeing to the list-back provisions and that the Reserve market was foreclosed to other commercial brokers.

We note that there was testimony at trial that three such "floating zone" properties were available in Danbury alone, which would seem to militate against the plaintiffs' theory that the Reserve was uniquely desirable. The trial court neither credited nor declined to credit that testimony.

bore out the Appellate Court's apparent belief that large tracts of undeveloped land represent the relevant product market or that the northeastern United States (however that term might be defined) represents the relevant geographic area. Specifically, there is no evidence in the record by which the Appellate Court could have applied the governing test and determined whether a small but significant and nontransitory increase in price with respect to the Reserve, or portions thereof, could be sustained or would lead customers to look elsewhere for substitute property. See footnote 14 of this opinion.

For their part, the defendants have taken the seemingly contradictory positions that either (1) the Reserve constitutes its own unique, singular product and geographic market, or (2) the relevant property market is national in scope. The fact that the defendants and the courts below were able to articulate four different, facially plausible but incommensurate geographic market definitions—the Reserve itself, the greater Danbury area, the Northeast, and the entire United States—highlights why expert economic testimony is necessary to resolve the issue of whether Woodland held sufficient power in a defined geographic market for land of some particular sort that it could foreclose competition and coerce buyers into accepting supracompetitive prices in some particular product market.

B

The second reason that the judgments cannot be sustained is that, to establish the third and fourth elements of a tying claim—economic power and anticompetitive effect—a buyer typically must be able to establish that the combined price for the tying product plus the tied product exceeded the market price. *Kaufman* v. *Time Warner*, supra, 836 F.3d 143; 9 P. Areeda & H. Hovenkamp, supra, ¶ 1702, p. 36. The trial court made no findings to that effect, and we doubt that the current

record would support such findings. At trial, a representative of Woodland offered undisputed testimony that, as a result of the need to resolve the plaintiffs' administrative appeal, Woodland agreed to a purchase price for parcels 13 and 15 that was significantly lower than what the parties ordinarily would have negotiated at arm's length. He further testified that, following a series of significant price reductions, the land sold for a mere fraction of the appraised value. There is no reason to believe, then, that the list-back agreements, on balance, had an anticompetitive effect on pricing.

We note in this regard that the fact that the defendants may have felt "forced" to accept the plaintiffs' broker services in order to acquire portions of the Reserve, while relevant to the second (coercion) prong of the Second Circuit test, says little to nothing about whether Woodland and the plaintiffs were able to exert market power or suppress competition. There are at least two reasons for this. First, the fact that a few individual buyers were sufficiently interested in a purchase to be willing to accept unwanted strings attached does not imply that, as a general matter, the sellers held market power. See, e.g., *McCormick* v. *Bradley*, supra, 870 P.2d 604–605; see also *Grappone, Inc.* v. *Subaru of New England, Inc.*, 858 F.2d 792, 796–97 (1st Cir. 1988) (" '[M]arket power' . . . means significant market power—more than the mere ability to raise price only slightly, or only on occasion, or only to a few of a seller's many customers. . . . Of course, virtually every seller . . . has some customers who especially prefer its product. But to permit that fact alone to show market power is to condemn ties that are bound to be harmless, including some that may serve some useful social purpose." (Citations omitted; emphasis omitted.)); 9 P. Arreeda & H. Hovenkamp, Antitrust Law, supra, ¶ 1718a, p. 244 (fact that tying arrangement interferes with cus-

tomer choice generally is irrelevant to antitrust analysis).

Second, the record in the present case supports various, possible explanations as to why the defendants were reluctantly willing to accept Woodland's condition that they agree to use the plaintiffs' broker services. It may be, as the defendants contend, that obtaining flexible zoning permits for the Reserve gave Woodland market power because the property became uniquely desirable and, in essence, a market of one. It also may be the case, though, that Woodland offered the defendants a very favorable, below market price for the land, either because Woodland was desperate to terminate the defendants' zoning appeal that was blocking development of the Reserve or because the brokerage requirement itself lowered the value of the property. If the defendants were only "forced" to accept the brokerage provision insofar as that was necessary for them to get a sweetheart deal on the land, and they could have secured comparable land elsewhere at a higher, market price, then competition policy need not be overly concerned that two sophisticated parties, engaged in a unique negotiation, ultimately agreed to include the tie as one of many negotiated provisions.[19] At the very least, expert testimony was necessary to shed light on the

[19] Although the trial court rejected the latter theory in its memorandum of decision, it did so not as the result of any contrary factual findings but, rather, because the court was of the view that, because any leverage that the defendants were able to assert by virtue of their administrative appeal was legal, it was irrelevant to the antitrust analysis. As we have explained, the court was mistaken in that regard.

Notably, the defendants conceded at trial that they proceeded to purchase the land, despite the list-back requirements, because it made good economic sense to do so and they believed that the deal was likely to be profitable. For their part, representatives of Woodland testified that they had procompetitive reasons for agreeing to adopt the list-back provisions in the first place, notably, the enhanced efficiency and quality control stemming from having a single team of brokers coordinate marketing for the Reserve, as well as the ability to negotiate *below market* commission rates.

fair market value of the property and the availability of any comparable properties. See *Grappone, Inc.* v. *Subaru of New England, Inc.*, supra, 858 F.2d 798 (citing *United States Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U.S. 610, 618 n.10, 620 n.13, 97 S. Ct. 861, 51 L. Ed. 2d 80 (1977), for proposition that, "to show market power, [the] plaintiff must show that an appreciable number of buyers accepted the tie *in the absence of other explanations for* [*their*] *willingness . . . to purchase the package*" (emphasis altered; internal quotation marks omitted)).

C

Third, competition policy generally is not offended when only minor foreclosure of competition in the tied market is possible. See 9 P. Areeda & H. Hovenkamp, supra, ¶ 1704a pp. 54–55; id., ¶ 1709a, pp. 88–89. In the present case, even if the tied product market at issue were to be defined narrowly, such as to include only listing broker services for large commercial and multifamily residential properties in Danbury, it seems unlikely on this record either that the listing agreements could have permitted the plaintiffs to monopolize that market or that prevailing brokerage fees would rise as a result.[20]

The land at issue accounts for a very small share—approximately 2 percent—of the total acreage of Danbury, which the trial court assumed to be the relevant geographic market.[21] Common experience suggests that

[20] Of course, should a retrial ultimately be necessary, the parties will have the opportunity to make a record, and the trial court to make findings, about all of these factual issues. In this part of the opinion, we merely explain why, on the present record, we cannot impute to the trial court the findings necessary to sustain the judgment.

[21] The Reserve, taken as a whole, spans 546 acres. We may take judicial notice of the fact that this represents two percent of the 42 square mile area of the city of Danbury. See Connecticut Economic Resource Center, Danbury, Connecticut: CERC Town Profile 2019 (January 16, 2020) p. 1, available at http://s3-us-west-2.amazonaws.com/cerc-pdfs/2019/danbury-2019.pdf (last visited March 23, 2020).

the broker market features relatively low barriers to entry (new brokers easily can enter the market) and limited economies of scale (smaller brokerage companies and even individuals can effectively compete with larger firms because there is limited overhead, etc.). The listing agreements locked in a relatively low commission rate that may even have been below the market rate. Moreover, the agreements appear to apply only to the initial sale of each portion of the property, which represents a new addition to the town's building stock, so there is no long-term foreclosure (unlike in *Hossan-Maxwell, Inc.*) and no foreclosure of the existing building stock. Finally, the defendants testified that it was their ordinary practice to use their own in-house sales personnel, rather than other independent brokers, to market developments of this sort, and, in any event, prospective buyers were not precluded from using their own buyers' brokers, who could obtain a share of the commissions. In short, it seems highly unlikely that these agreements could permit the plaintiffs to corner the market for commercial broker services in Danbury, to the extent that that is the relevant market, or increase the average cost of broker commissions in that market. For all of these reasons, we conclude that, in light of our clarification of the legal standard governing antitrust challenges to tying arrangements, the trial court incorrectly determined that the defendants prevailed on their antitrust special defense.

The judgments of the Appellate Court are reversed and the cases are remanded to that court with direction to consider the plaintiffs' remaining claims.

In this opinion the other justices concurred.

ORDERS

CONNECTICUT REPORTS

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STATE OF CONNECTICUT *v.* CHIFFON MILNER

The defendant's petition for certification to appeal from the Appellate Court, 197 Conn. App. 763 (AC 40322), is denied.

Richard E. Condon, Jr., senior assistant public defender, in support of the petition.

Robert J. Scheinblum, senior assistant state's attorney, in opposition.

Decided July 7, 2020

DILA HASSIEM *v.* O & G INDUSTRIES, INC.

The plaintiff's petition for certification to appeal from the Appellate Court, 197 Conn. App. 631 (AC 41794), is denied.

John T. Bochanis, in support of the petition.

Michael S. Lynch, in opposition.

Decided July 7, 2020

STATE OF CONNECTICUT *v.* EDWARD F. TAUPIER

The defendant's petition for certification to appeal from the Appellate Court, 197 Conn. App. 784 (AC 42115), is denied.

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

Norman A. Pattis, in support of the petition.

Mitchell S. Brody, senior assistant state's attorney, in opposition.

Decided July 7, 2020

NONHUMAN RIGHTS PROJECT, INC. *v.* R.W. COMMERFORD & SONS, INC., ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 197 Conn. App. 353 (AC 42795), is denied.

Jessica Rubin and *Steven M. Wise*, pro hac vice, in support of the petition.

Decided July 7, 2020

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

500 NORTH AVENUE, LLC *v.* PLANNING COMMISSION OF THE TOWN OF STRATFORD (AC 42235)

Alvord, Prescott and Lavery, Js.

Syllabus

The plaintiff landowner appealed from the decision of the defendant planning commission, which had concluded that the plaintiff was required to file an application for subdivision approval in order to revise the lot lines of two abutting properties that it owned. The plaintiff submitted a map of the properties to the town's planning and zoning administrator, seeking a lot line adjustment that would reduce the acreage of one property and increase the acreage of the second property by ten acres. Following a hearing, the commission denied the plaintiff's request for a lot line revision, concluding that the plaintiff's map required subdivision approval because it created a drastic change in the existing lots. Thereafter, the plaintiff appealed to the Superior Court, which rendered judgment dismissing the appeal, from which the plaintiff, on the granting of certification, appealed to this court, claiming, inter alia, that the court improperly concluded that the plaintiff's proposed lot line revision constituted a subdivision under the applicable statute (§ 8-18). *Held*:

1. The Superior Court improperly concluded that there was substantial evidence in the record to support the commission's finding that the plaintiff's proposed lot line adjustment of two adjacent lots constituted a subdivision under § 8-18: because no new lot was created from the boundary adjustment that resulted in three or more parts or lots, the proposed lot line revision did not satisfy the definition of subdivision pursuant to § 8-18; although one of the properties had previously been subject to a first cut, the commission's decision that subdivision approval was required was contrary to the language of § 8-18 as the plaintiff's proposal did not divide that property a second time, resulting in three or more parts or lots.
2. The Superior Court improperly concluded that subdivision approval was required because the proposed lot line revision was more than a minor adjustment: there was nothing in the language of § 8-18 that addresses the degree of the lot line adjustment, rather, the only relevant inquiry

is whether the property was divided into three or more lots, and the mere changing of lot lines or adding additional land to lots, no matter how sizeable, does not constitute a subdivision.

3. The defendants could not prevail on their claim that because the proposed boundary line revision would create a third part, it required subdivision approval, which was based on their claim that the distinction in § 8-18 between "parts" and "lots" could indicate that the legislature meant the words to be read separately, and, therefore, the proposed lot line revision could still satisfy the definition of subdivision by dividing the first property into a third part: this court concluded that the legislature intended the word "parts" to refer to separate but whole, not fractional, members of a tract of land, thus, when the word "parts" is read in light of its commonly approved usage and together with the definition of "resubdivision" in § 8-18, its meaning is plain and unambiguous, and is to be read together with the word "lots" so as to clarify the latter's meaning.

Argued December 9, 2019—officially released July 21, 2020

Procedural History

Appeal from the decision of the defendant denying the plaintiff's application for certain property line revisions, brought to the Superior Court in the judicial district of Fairfield, where the court, *Radcliffe*, *J.*, granted the motion to intervene filed by the defendant Judith Kurmay et al.; thereafter, the matter was tried to the court, *Radcliffe*, *J.*; judgment dismissing the plaintiff's appeal, from which the plaintiff, on the granting of certification, appealed to this court; subsequently, this court granted the plaintiff's motion to substitute JRB Holding Co., LLC, as the plaintiff. *Reversed*; *judgment directed.*

Stephen R. Bellis, for the appellant (substitute plaintiff).

Alexander J. Florek, for the appellee (named defendant).

Joseph A. Kubic, for the appellees (defendant Judith Kurmay et al.).

Opinion

LAVERY, J. The plaintiff, 500 North Avenue, LLC, appeals from the judgment of the trial court dismissing its appeal from the decision of the defendant, the Plan-

ning Commission of the Town of Stratford (commission),[1] concluding that the plaintiff was required to file an application for subdivision approval in order to adjust the lot lines of two abutting properties that it owns by adding ten acres to one property and subtracting that acreage from the other. The plaintiff claims that the court improperly concluded that (1) its proposed boundary line revision of two adjacent lots constituted a subdivision under General Statutes § 8-18 and (2) a subdivision application was required because the proposed revision was more than a " 'minor' " adjustment. In response, the defendants argue that because the proposed boundary line revision would create a third part, it required subdivision approval. We agree with the plaintiff and, thus, reverse the judgment of the trial court.

The record and the court's memorandum of decision reveal the following facts and procedural history. The plaintiff is the owner of two adjacent properties in the town of Stratford (town). The first property is located at 795 James Farm Road and consists of fifteen acres of land. The second property is located at and known as Peters Lane and consists of ten acres of land. On or about March 24, 2017, the plaintiff submitted a Mylar map[2] of the two properties to the town's planning and zoning administrator, Jay Habansky, seeking a lot line adjustment. Specifically, the plaintiff sought to reduce the James Farm Road property from fifteen acres to 4.7 acres and to increase the Peters Lane property from

[1] On August 21, 2017, the court, *Radcliffe, J.*, granted a motion filed by Judith Kurmay and Cathleen Martinez to intervene as defendants. We refer in this opinion to Kurmay, Martinez, and the commission collectively as the defendants, and individually by name where necessary. After this appeal was filed, this court granted the plaintiff's motion to substitute JRB Holding Co., LLC, as the plaintiff. For ease of reference, we refer to 500 North Avenue, LLC, as the plaintiff in this opinion.

[2] "A Mylar map is a map prepared on a thin polyester film suitable for recording on the land records." *Torgerson* v. *Kenny*, 97 Conn. App. 609, 615 n.5, 905 A.2d 715 (2006), cert. denied, 281 Conn. 913, 916 A.2d 54 (2007).

ten acres to approximately twenty acres, thus, reconfiguring the properties.

On May 1, 2017, upon request from Habansky, Attorney John A. Florek[3] submitted a memorandum advising Habansky not to sign or approve the plaintiff's Mylar map. In the memorandum, Florek relied on language from *Goodridge* v. *Zoning Board of Appeals*, 58 Conn. App. 760, 765–66, 755 A.2d 329, cert. denied, 254 Conn. 930, 761 A.2d 753 (2000), in which this court stated: "A minor lot line adjustment between two existing lots, whereby no new lot is created, does not constitute a 'subdivision' as defined by § 8-18 and, thus, does not require municipal approval. . . . To accept every minor adjustment of property . . . as a 'subdivision' under § 8-18 would lead to a substantial increase in applications to municipal planning commissions and in land use appeals." On the basis of this language, Florek concluded that the plaintiff's proposal is a "much more drastic change" than the minor revision in *Goodridge* that did not require municipal approval and, therefore, recommended that Habansky refer the issue to the commission for its determination as to whether the boundary line adjustment constituted a mere lot line revision or a subdivision.

In response to Florek's memorandum, on May 4, 2017, the plaintiff's counsel sent a letter to Habansky explaining that because there was no division of 795 James Farm Road or the Peters Lane property into three or more lots pursuant to § 8-18, there was no subdivision. The letter cited to *McCrann* v. *Town Plan & Zoning Commission*, 161 Conn. 65, 70, 282 A.2d 900 (1971), in which our Supreme Court stated that because "[t]he site in question was created by combining two lots to make one parcel . . . [t]here was no division of a tract into three or more parts or lots and in the absence of the statutory requirement there was no subdivision."

[3] Florek is an assistant town attorney for the town.

Thereafter, Habansky referred the matter to the commission.

On May 16, 2017, the commission held an administrative hearing, in which it considered Florek's memorandum, the plaintiff's objection to Florek's memorandum, and a separate memorandum from Attorney Kurt M. Ahlberg that contained information regarding a prior cut[4] to 795 James Farm Road.[5] In Ahlberg's memorandum, he referenced the prior cut to 795 James Farm Road: "On August 29, 2003, Edward P. Colacurcio conveyed a 0.9197 acre parcel of this tract to Roger K. Colacurcio . . . . This property is now known as 875 James Farm Road. . . . [T]his is the only conveyance of any lot or part of the entire tract whatsoever from the contiguous [fifteen acre parcel known as 795 James Farm Road] since the adoption of the [s]ubdivision [r]egulations by the [t]own in 1956. By virtue of this 'first cut,' the entire [fifteen] acre tract was divided into two parts or lots," which became 795 James Farm Road and 875 James Farm Road. Relying on the recommendations from Florek and Ahlberg, the commission unanimously concluded that the Mylar map should be considered a subdivision "based on the facts that it creates a drastic change in the existing lots and [the lot line adjustment is] made for the purpose of development." The commission therefore concluded that an application for subdivision approval was necessary and denied

[4] "Where a parcel had been previously divided into two pieces and one of them was conveyed to another owner, that was considered a first or 'free cut' of the original parcel so that a subsequent division of the remainder of it into two lots was a subdivision as defined in . . . § 8-18." R. Fuller, 9 Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) § 10:9, p. 316. A "first cut" is also known as a prior cut.

[5] In 2016, the commission had requested that Ahlberg draft a memorandum and render an opinion "as to the title of certain real property known as 795 James Farm Road . . . as well as whether the proposed development of an approximately 3.7 acre parcel of this property which lies along James Farm Road constitutes a subdivision of this entire tract."

the plaintiff's request for a lot line revision. On May 23, 2017, notice of the commission's decision was published in the Connecticut Post. The plaintiff thereafter appealed to the Superior Court pursuant to General Statutes § 8-8 (b).

After considering the briefs and arguments of the parties, the trial court issued a memorandum of decision on June 22, 2018. The court held that there was substantial evidence in the record to support the commission's decision that the 2003 conveyance, as described in Ahlberg's memorandum, constituted a "first cut" of 795 James Farm Road. As such, the court stated that the plaintiff's "[M]ylar map . . . represent[ed] a second division of 795 James Farm Road . . . . Therefore, the reduction of the fifteen . . . acre parcel to 4.7 acres, is not subject to the 'first cut' exemption contained in [§] 8-18 . . . ." The court further held that the commission's decision that the Mylar map required subdivision approval was supported by substantial evidence in the record. Relying on the phrase "minor lot line adjustment" referenced in *Goodridge* v. *Zoning Board of Appeals*, supra, 58 Conn. App. 765–66, the court concluded: "The [M]ylar map filed by [the plaintiff] created no new lots, although it dramatically reconfigured existing parcels. Substantial evidence supports the conclusion that the map was filed, consistent with a desire to develop the 4.7 acre parcel. . . . The court is unable to find, as a matter of law, that a division of property which doubled the size of the Peters Lane parcel, while reducing 795 James Farm Road by ten . . . acres, represents a 'minor' revision."

On July 6, 2018, the plaintiff petitioned this court for certification to appeal, and the petition was granted on September 24, 2018. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The plaintiff first claims that the trial court improperly upheld the commission's decision by concluding that there was substantial evidence in the record to support the commission's finding that the plaintiff's proposed lot line adjustment of the 795 James Farm Road and Peters Lane properties constituted a subdivision for purposes of § 8-18. Specifically, the plaintiff argues that because no new lot was created from the boundary adjustment, subdivision approval was not necessary. We agree.

"Although we employ a deferential standard of review to the actions of zoning [commissions] . . . the issue raised here is one of statutory construction. Issues of statutory construction present questions of law, over which we exercise plenary review." (Citation omitted; internal quotation marks omitted.) *Benson* v. *Zoning Board of Appeals*, 89 Conn. App. 324, 329, 873 A.2d 1017 (2005); see *Clifford* v. *Planning & Zoning Commission*, 280 Conn. 434, 453, 908 A.2d 1049 (2006) (applying deferential standard of review to decision of zoning commission). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history

and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and [common-law] principles governing the same general subject matter." (Internal quotation marks omitted.) *Fedus* v. *Planning & Zoning Commission*, 278 Conn. 751, 756, 900 A.2d 1 (2006).

The issue before this court requires us to interpret the statutory definition of subdivision. Section 8-18 defines a subdivision as "the division of a tract or parcel of land into three or more parts or lots made subsequent to the adoption of subdivision regulations by the commission, for the purpose, whether immediate or future, of sale or building development expressly excluding development for municipal, conservation or agricultural purposes, and includes resubdivision . . . ."

"In interpreting the meaning of the term 'subdivision' in § 8-18, we do not write on a clean slate. In *McCrann* v. *Town Plan & Zoning Commission*, [supra, 161 Conn. 70], [our Supreme Court] examined the meaning of the term 'subdivision' in § 8-18. . . . The court concluded first that the language of § 8-18 is clear and unambiguous. . . . The court then explained that, in order to constitute a subdivision, the clear language of the statute has two requirements: '(1) [t]he division of a tract or parcel of land into three or more parts or lots, and (2) for the purpose, whether immediate or future, of sale or building development.' " (Citations omitted.) *Cady* v. *Zoning Board of Appeals*, 330 Conn. 502, 510, 196 A.3d 315 (2018).

In *Cady*, our Supreme Court further interpreted the language of § 8-18. In that case, the defendant property owner proposed lot line revisions, seeking to reconfigure three lots on its property. Id., 506–507. The zoning enforcement officer concluded that "[t]he land comprising the current [three] lots was originally [four] lots . . . . [The three lots] were subject to a state taking

for road improvements . . . . Therefore, as of the time of the filing of the subject [l]ot [l]ine [r]evision map, it is my opinion there were three preexisting lots . . . and that no subdivision was required . . . .'' (Internal quotation marks omitted.) Id., 507–508. After appealing to the Zoning Board of Appeals of the Town of Burlington, which denied the appeal, the plaintiff filed an appeal with the Superior Court and alleged that the proposed lot line adjustments constituted a subdivision under § 8-18. Id., 508. The trial court agreed and reversed the decision of the board, holding that ''a new subdivision was created because three new lots were created.'' (Internal quotation marks omitted.) Id. Thereafter, our Supreme Court reversed the judgment of the trial court, holding that the ''appropriate inquiry under § 8-18 is whether *one lot* has been divided into *three or more lots*.'' (Emphasis added.) Id., 514.

Because the present case involves the application of § 8-18, we are bound by our Supreme Court's interpretation of the language of that statute in *Cady*. We, therefore, must determine whether the plaintiff's proposed lot line revision divides one lot into three or more lots. In particular, we must determine whether the plaintiff's proposed lot line revision divides 795 James Farm Road into three or more lots. We conclude that it does not.

The following additional facts are relevant to the resolution of the issue presented. Florek, guided by Ahlberg's memorandum, concluded that 795 James Farm Road was ''first cut'' in 2003, thus leaving three abutting parcels of land, 795 James Farm Road, Peters Lane, and 875 James Farm Road. He further concluded that because the plaintiff's proposal sought to ''severely change the character of the lots involved,'' subdivision approval was necessary. Specifically, Florek relied on language from *Goodridge*, concluding that the plaintiff's proposal was not ''minor'' and ''constitute[d] more than a simple lot line revision.'' Florek further relied on *Stones Trail, LLC*

v. *Zoning Board of Appeals*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-06-4010003-S (May 6, 2008), in which the court stated: "[W]here a boundary line adjustment is significant in size and made for the purpose of development, even where no additional lot is created, it does constitute a subdivision of property." (Internal quotation marks omitted.) Accordingly, Florek advised the commission to deny the plaintiff's proposal.[6]

At the administrative hearing, the commission was tasked with deciding whether "(1) an additional lot was or was not created; (2) if [the proposal] is simply a lot line revision; [and] (3) if [the proposal] is a subdivision that is created for the specific purpose of facilitating development." The commission relied on the case law cited in Florek's memorandum and concluded that the plaintiff's proposal should be considered a subdivision, and not a lot line adjustment. On appeal, the trial court upheld the commission's decision, concluding that, although the proposal created no new lot, it "dramatically reconfigured existing parcels," thus, amounting to more than a " 'minor' " revision.[7] The court held that "the [commission] was fully justified in concluding that the [M]ylar map constitutes a subdivision, within the meaning of [§] 8-18 . . . ."

The plaintiff claims that the trial court improperly interpreted the language of § 8-18 in upholding the commission's conclusion that subdivision approval was

[6] The following colloquy transpired at the hearing before the commission:

"[Chairman Silhavey]: Okay. So is there one lot that has now become three?

"[Attorney Florek]: Well . . . that's for you to decide. I can tell you that as it exists right now subsequent to the subdivision regulations there is one lot that has at least become two, that and the remainder, which is [fifteen] acres, okay? Again, the issue whether this is a major revision so that you now have lots—you now have lots that were different, severely different than existed before. That's up to you to decide."

[7] The trial court's memorandum of decision was published on June 22, 2018. Our Supreme Court published its decision in *Cady* on December 11, 2018. As such, the trial court did not have the benefit of the analysis in *Cady* when making its decision.

required for the plaintiff's proposed lot line revision. The principal issue, therefore, presents a question of law "turning upon the interpretation of statutes." (Internal quotation marks omitted.) *Smith* v. *Zoning Board of Appeals*, 227 Conn. 71, 80, 629 A.2d 1089 (1993), cert. denied, 510 U.S. 1164, 114 S. Ct. 1190, 127 L. Ed. 2d 540 (1994).

The trial court's conclusion that the plaintiff's proposed lot line revision met the definition of a subdivision set forth in § 8-18 was inconsistent with the language of the statute. *Cady* indicates that, in determining whether a lot line revision constitutes a subdivision, the question is whether one lot was divided into three or more lots. *Cady* v. *Zoning Board of Appeals*, supra, 330 Conn. 514. The defendants argue that because there was a "first cut" to 795 James Farm Road, the lot line revision would divide the property into a third part or lot. The defendants, however, are considering the proposed reconfiguration of the boundary lines of the property as constituting a division of 795 James Farm Road. No such division has occurred. In fact, the trial court, in its memorandum of decision, stated that "no new lots" were created; therefore, after the lot line revision, there remains the same number of lots, three, as existed before the revision, namely, 795 James Farm Road, Peters Lane, and 875 James Farm Road, which was created from the first cut of 795 James Farm Road. This first cut is the only division of 795 James Farm Road. We agree with the trial court that no new lots were created from the plaintiff's proposed lot line revision. Because there was not a second division of 795 James Farm Road that resulted in three or more parts or lots, however, the proposed lot line revision does not satisfy the definition of subdivision pursuant to § 8-18.

The commission asserts that *Cady* instructs this court that "[§] 8-18 . . . directs our attention to the original tract of land from which the initial division of the property was made." The commission argues that we must

look to the configuration of 795 James Farm Road when the town adopted its planning and zoning regulations on February 1, 1956. Because the first cut of 795 James Farm Road took place after the adoption of the town's planning regulations, the commission contends that "any further division of 795 [James Farm Road] would require subdivision approval." We are unpersuaded.

We acknowledge that 795 James Farm Road was subject to a first cut in 2003. We conclude, however, that because the plaintiff's proposal does not divide 795 James Farm Road a second time, resulting in three or more parts or lots, the commission's decision that subdivision approval was required is contrary to the language of § 8-18. As the court properly indicated, there simply was no additional lot created. Three lots existed before the proposal and three lots remain. Accordingly, the plaintiff's proposed lot line revision does not constitute a subdivision under § 8-18.

II

The plaintiff next claims that the trial court improperly relied on language from *Goodridge* in upholding the commission's decision and concluding that subdivision approval was required because the lot line revision was more than "minor." Specifically, the plaintiff cites to *Cady*, to argue that "[our Supreme Court] found that nothing in the plain language of . . . § 8-18 indicates that the determination of whether a particular proposal constitutes a subdivision depends on the degree of the lot line adjustment." Judith Kurmay and Cathleen Martinez, the intervening defendants, however, attempt to distinguish the present case from *Cady*, stating that "[t]he application of *Cady* to this case is like comparing an apple to a pineapple." The commission likewise contends that because *Cady* involved land that had not been previously subject to a " 'first cut,' " the court's holding should not apply to the present case. We are not persuaded by the defendants' arguments.

Cady implicitly overruled this court's decision in *Goodridge* in regard to the subject matter of the size of a proposed lot line revision. In particular, our Supreme Court explained that the use of the phrase " 'minor lot line adjustment' " is not supported by the language of the statute. *Cady* v. *Zoning Board of Appeals*, supra, 330 Conn. 515. The court stated: "Nothing in the plain language of § 8-18 indicates that the determination of whether a particular proposal constitutes a 'subdivision' depends on the degree of the lot line adjustment. Indeed, § 8-18 does not address a lot line adjustment or the size of an adjustment at all; instead, it addresses 'the division of a tract or parcel of land . . . .' Similarly, § 8-18 does not address the creation of a new lot, but only the division into 'three or more parts . . . .' To be sure, the phrase 'division of *a* tract or parcel of land into *three* or more parts or lots' demonstrates that the creation of *one* new lot does not constitute a subdivision." (Emphasis in original; footnote omitted.) Id., 516–17.

In the present case, the trial court's conclusion that subdivision approval was required because the proposed lot line revision of 795 James Farm Road was "more than minor," was based on its reliance on the language of *Goodridge*. In light of the holding in *Cady*, however, we conclude that the trial court's reasoning is flawed. As *Cady* indicated, there is nothing in the language of § 8-18 addressing the degree of the lot line adjustment. The only relevant inquiry is whether the property was divided into three or more lots. The mere changing of lot lines or adding additional land to lots, no matter how sizeable, does not constitute a subdivision. It is well established that "a court must construe a statute as written. . . . Courts may not by construction supply omissions . . . or add exceptions merely because it appears that good reasons exist for adding them. . . . The intent of the legislature, as this court has repeatedly observed, is to be found not in what the

legislature meant to say, but in the meaning of what it did say. . . . It is axiomatic that the court itself cannot rewrite a statute to accomplish a particular result. That is the function of the legislature." (Internal quotation marks omitted.) *Tuxis Ohr's Fuel, Inc.* v. *Administrator, Unemployment Compensation Act*, 127 Conn. App. 739, 744, 16 A.3d 777 (2011), aff'd, 309 Conn. 412, 72 A.3d 13 (2013).

Even though the proposed lot line adjustment in the present case includes a nearly ten acre change in the size of the two properties, the degree of a lot line adjustment is not determinative of the need for subdivision approval. As such, the trial court's reliance on the term "minor" was improper. Because we have determined that 795 James Farm Road has not been divided into three or more lots and no new lots will be created from the proposed lot line adjustment, we conclude that subdivision approval of the plaintiff's proposed lot line adjustment was not necessary.

III

Kurmay and Martinez assert one final argument that we are compelled to address, namely, that the language of § 8-18 includes the terminology "parts or lots . . . ." They argue that, although "there may be the same number of [p]arcels before and after the proposed 'lot line adjustment' . . . 795 [James Farm Road] . . . would be divided into a third part. This third part . . . is . . . intended to be merged into the Peters Lane property. Neither 795 [James Farm Road] or Peters Lane [have] actually been subdivided into 'lots.' " At oral argument before this court, the defendant explained that, even if the property was not divided into three or more lots, the distinction in § 8-18 between "parts" and "lots" could indicate that the legislature meant the words to be read separately, and, therefore, the proposed lot line revision could still satisfy the definition of subdivision by dividing 795 James Farm Road into a third part. We disagree.

The determination of whether the word "parts" as used in § 8-18 indicates something different from a building lot requires the application of well established principles of statutory construction, which we previously set forth in part I of this opinion.

Although our Supreme Court in *McCrann* and *Cady* determined that the language of § 8-18 is clear and unambiguous, neither case analyzed the meaning of the phrase "parts or lots . . . ." We are therefore required to determine whether the plaintiff's proposed lot line revision creates multiple parts, as opposed to lots. With the principles of statutory construction in mind, we begin our analysis by examining the language of the statute.

Section 8-18 provides in relevant part that " 'subdivision' means the division of a tract or parcel of land into three or more parts or lots made subsequent to the adoption of subdivision regulations by the commission, for the purpose, whether immediate or future, of sale or building development expressly excluding development for municipal, conservation or agricultural purposes, and includes resubdivision; 'resubdivision' means a change in a map of an approved or recorded subdivision or resubdivision if such change (a) affects any street layout shown on a such map, (b) affects any area reserved thereon for public use or (c) diminishes the size of any lot shown thereon and creates an additional building lot, if any of the lots shown thereon have been conveyed after the approval or recording of such map . . . . "

Section 8-18 does not define the word "parts" or the word "lots." Moreover, after thorough research, we have uncovered no appellate case law that has interpreted the word "parts," as used in § 8-18, to have a meaning that is separate and distinct from the word "lots." Our Supreme Court has held that "in the absence of a statutory definition, we turn to General Statutes § 1-1 (a),

which provides in relevant part: 'In the construction of statutes, words and phrases shall be construed according to the commonly approved usage of the language. . . .' To ascertain the commonly approved usage of a word, 'we look to the dictionary definition of the term.' . . . *Chatterjee* v. *Commissioner of Revenue Services*, 277 Conn. 681, 690, 894 A.2d 919 (2006)." *Stone-Crete Construction, Inc.* v. *Eder*, 280 Conn. 672, 677–78, 911 A.2d 300 (2006). Taking into consideration that "[a] statute should be construed so that no word, phrase or clause will be rendered meaningless"; (internal quotation marks omitted) *Verrastro* v. *Sivertsen*, 188 Conn. 213, 221, 448 A.2d 1344 (1982); the use of the dictionary definition is appropriate where, as here, neither the word "parts" nor "lots" has been defined by the legislature.

Furthermore, "[t]he rule of [statutory] construction that the words in a statute must be construed according to their plain and ordinary meaning [is informed by] the doctrine of [in pari] materia, under which statutes [and statutory provisions] relating to the same subject matter may be looked to for guidance in reaching an understanding of the meaning of the statutory term." (Internal quotation marks omitted.) *State* v. *Pommer*, 110 Conn. App. 608, 616, 955 A.2d 637 (citing R. Williams, Jr., "Statutory Construction in Connecticut: An Overview and Analysis," 62 Conn. B.J. 313–14 (1988)), cert. denied, 289 Conn. 951, 961 A.2d 418 (2008). We are further guided by the principle that "the legislature is always presumed to have created a harmonious and consistent body of law . . . . [T]his tenet of statutory construction . . . requires [this court] to read statutes together when they relate to the same subject matter . . . . Accordingly, [i]n determining the meaning of a statute . . . we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of our construction. . . . [T]he General Assembly is always presumed to know all the existing

statutes and the effect that its action or [nonaction] will have upon any one of them." (Internal quotation marks omitted.) *Stone-Crete Construction, Inc.* v. *Eder*, supra, 280 Conn. 678.

Merriam-Webster's Collegiate Dictionary defines the word "part" as "one of the often indefinite or unequal subdivisions into which something is or is regarded as divided and which together constitute the whole . . . one of the several or many equal units of which something is composed or into which it is divisible . . . ." Merriam-Webster's Collegiate Dictionary (11th Ed. 2003), pp. 902–903.

Applying this definition and the canons of construction outlined in the preceding paragraph, we conclude that the legislature intended the word "parts" to refer to separate but whole, not fractional, members of a tract of land. Specifically, the purpose of the inclusion of "parts" is to elucidate the meaning of the word "lots" by clarifying that the type of lot referred to in § 8-18 is a piece of property, which comprises "one of . . . several or more . . . units" that together can constitute a whole. This inherent divisibility demonstrates that a part or lot of a piece of property can be separated from the whole and can take on its own independent existence. In turn, this independent existence of a lot can only be accomplished if the "units" of the whole property are a constituent part of a tract of land that has been divided so as to become a subdivision.

Our conclusion is further supported by the fact that, when creating the statutory definition of subdivision, the legislature included the definition of resubdivision in its meaning. In the definition of resubdivision, the legislature used only the words "lot," "lots," and "building lots" to impart the type of land that is to be considered in a resubdivision. There is no use of the word "parts." As highlighted above, this court has previously explained that "[s]tatutes should be read as to harmonize with each other, and not to conflict with each

other." (Internal quotation marks omitted.) *Furhman* v. *Dept. of Transportation*, 33 Conn. App. 775, 778, 638 A.2d 1091 (1994). In light of the legislature's specific inclusion of the definition of resubdivision within the definition of subdivision and the fact that statutes should be read to harmonize with each other, we must presume that the legislature intended the two definitions to be read together and to be construed, wherever possible, to avoid conflict between them. Typically, " '[t]he use of the disjunctive 'or' between the two parts of the statute indicates a clear legislative intent of separability.' " *Bahre* v. *Hogbloom*, 162 Conn. 549, 557, 295 A.2d 547 (1972). Because Kurmay's and Martinez' interpretation of the definition of subdivision, which includes the division of land into "parts" as well as "lots" and that the "or" is to be used disjunctively, would create a conflict with the definition of resubdivision, we conclude that their interpretation is not workable. In other words, we conclude that "or" is not meant to be used as a disjunctive conjunction, and, instead, the term "parts or" is intended to clarify the meaning of the word "lots," and the two words are meant to be read together.

Moreover, Kurmay's and Martinez' interpretation of the definition of subdivision is inconsistent with prior judicial interpretations of the statute. In *Cady* v. *Zoning Board of Appeals*, supra, 330 Conn. 514, our Supreme Court concluded that the "appropriate inquiry under § 8-18 is whether one *lot* has been divided into three or more *lots*." (Emphasis added.) The absence of the word "parts" in *Cady* is consistent with our understanding that the word is not meant to have a meaning that is separate and distinct from that of "lots."

As such, we conclude that when the word "parts," as used in the definition of subdivision pursuant to § 8-18, is read in light of its commonly approved usage and together with the definition of resubdivision, its meaning is plain and unambiguous because it is susceptible

to only one reasonable interpretation. We conclude that the word "parts" is to be read together with the word "lots" so as to clarify the latter's meaning.

Lastly, the defendants argue that the proposed lot line revision was submitted solely for the purposes of development and, therefore, meets the definition of subdivision pursuant to § 8-18. The defendants, however, fail to recognize that, as stated in *McCrann*, to meet the statutory definition of a subdivision, we must first determine if there was a division of a tract or parcel of land into three or more parts or lots. *McCrann* v. *Town Plan & Zoning Commission*, supra, 161 Conn. 70. Next, we must determine whether this division was done for the purpose of development. Id. As we have concluded in parts I and II of this opinion, 795 James Farm Road has not been divided into three or more parts or lots. Because the first requirement of the statute was not met, an analysis as to whether the proposed lot line adjustment is being conducted for the purposes of development is not necessary. See id. (concluding that "[t]here was no division of a tract into three or more parts or lots and in the absence of this statutory requirement there was no subdivision").

The record reveals that the plaintiff's proposed lot line revision simply reconfigures two conforming lots into two differently shaped, yet conforming, lots. There is no division that results in the creation of three or more lots. Accordingly, we conclude that the trial court's judgment upholding the commission's decision requiring subdivision approval deviated from the plain language of § 8-18. We, therefore, reverse the judgment of the trial court dismissing the plaintiff's appeal.

The judgment is reversed and the case is remanded with direction to render judgment sustaining the plaintiff's appeal.

In this opinion the other judges concurred.

JESSICA BROWN *v.* BRETT BROWN
(AC 42576)

Lavine, Moll and Devlin, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the order of the trial court requiring her to reimburse the defendant a certain prorated portion of unallocated alimony and child support that she received in the year in which she remarried. The parties' separation agreement, which had been incorporated into the dissolution judgment, required the defendant to pay the plaintiff a specified percentage of his gross annual compensation in any calendar year, which payments were to terminate on, inter alia, the plaintiff's remarriage. In the year in which the plaintiff remarried, the defendant paid the plaintiff 40 percent of bonuses and severance payments he received from a former employer a few months before her remarriage. The court granted the defendant's postjudgment motion for order requesting reimbursement, in which he claimed that, when the plaintiff remarried in August of a year in which she was entitled to receive unallocated support, she was only to receive those benefits, specifically the bonus and severance payments, on a prorated basis. In the plaintiff's objection to the motion for reimbursement, she claimed that, because the separation agreement did not contain a provision for prorating unallocated support, she had no obligation to refund any part of the unallocated support she received that year. The parties, upon the plaintiff's remarriage, stipulated to the defendant's monthly child support obligation, which was entered as an order of the court. The defendant filed a cross appeal from the trial court's denial of his motion for modification of child support, in which he claimed that a reduction in his earned income constituted a substantial change in circumstances from the date when the court entered the parties' child support stipulation as an order of the court. On the plaintiff's appeal and the defendant's cross appeal to this court, *held*:

1. The trial court improperly granted the defendant's postjudgment motion for reimbursement of unallocated support and ordered the plaintiff to repay the defendant a portion of the unallocated support he paid her in the year of her remarriage: the relevant portion of the parties' separation agreement was clear and unambiguous, and the trial court improperly read a term into the separation agreement when it concluded that it was implicit that the defendant's gross annual compensation was to be prorated, the relevant language in the separation agreement did not contain the word prorated, and, to the contrary, additional language from the separation agreement provided that the defendant was to make all payments from his additional and/or incentive compensation to the plaintiff within fifteen days of receipt of such payment by the defendant,

and no paragraph of the agreement set forth conditions under which the plaintiff may have been required to return unallocated support at the time she was entitled to receive it; furthermore, the parties did not seek to unbundle alimony and child support in the defendant's unallocated payments at the time the parties stipulated to the defendant's child support obligation and arrearage, retroactive to the month of the plaintiff's remarriage, and the fact that there was no mention of an overpayment at that time did not support the defendant's position that the parties intended to prorate unallocated support that terminated before the end of a calendar year.

2. The defendant could not prevail on his claim in his cross appeal that the trial court improperly denied his motion for modification of child support by concluding that the reduction in his earned income did not constitute a substantial change in circumstances: any claim that the court failed to consider the defendant's argument regarding deviations from child support guidelines or that the court failed to consider child support guidelines failed, as at the time that the defendant filed his motion, he did not plead that the amount of child support he was paying pursuant to the parties' stipulation deviated from the child support guidelines but, instead, that he had experienced a substantial change in circumstances due to his loss of earned income, and the court was not required to consider the presumptive child support under the guidelines, as the evidence demonstrated the defendant's ability to maintain his lifestyle, spending habits, travel and assets, and, thus, he failed to carry his burden to demonstrate clearly and definitely that he experienced a substantial change in circumstances notwithstanding his diminution in salary and period of unemployment.

Argued March 2—officially released July 21, 2020

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Schofield*, *J.*; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Tindill*, *J.*, entered the parties' stipulation regarding child support as an order of the court; subsequently, the court, *Heller*, *J.*, granted the defendant's motion for order requesting reimbursement of unallocated support and denied the defendant's motion to modify child support, and the plaintiff appealed and the defendant cross appealed to this court. *Reversed in part*; *further proceedings*.

Samuel V. Schoonmaker IV, with whom, on the brief, were *Wendy Dunne DiChristina* and *Peter M. Brymiczka*, for the appellant-cross appellee (plaintiff).

Leslie I. Jennings, for the appellee-cross appellant (defendant).

Opinion

LAVINE, J. This appeal concerns the judgment rendered by the trial court when it adjudicated two postdissolution motions filed by the defendant, Brett Brown. The plaintiff, Jessica Brown,[1] appeals from the decision of the court ordering her to reimburse the defendant certain unallocated alimony and child support (unallocated support), claiming that the court misinterpreted the parties' separation agreement. The defendant cross appeals from the court's denial of his motion for modification of child support. We agree with the plaintiff's claim but reject the defendant's claim. We, therefore, reverse that portion of the trial court's judgment with respect to its order to the plaintiff to reimburse the defendant unallocated support and affirm the trial court's judgment with respect to its denial of the defendant's motion to modify child support.

The following procedural history is relevant to our resolution of the parties' appeals. The parties were married in August, 2000, and together had three children, who were minors on February 26, 2013, when the court, *Schofield*, *J.*, rendered judgment dissolving their marriage.[2] The judgment of dissolution incorporated the parties' separation agreement (agreement) by reference. Paragraph 4.1 of the agreement obligated the defendant to pay the plaintiff unallocated support "during his lifetime, until her death or remarriage, or February 28, 2017, whichever event shall first occur . . . ." The plaintiff remarried on August 8, 2015, automatically terminating

[1] The plaintiff is now known as Jessica Drbul.

[2] The children still were minors at the time the trial court, *Heller*, *J.*, decided the motions at issue in this appeal.

the defendant's unallocated support obligation.[3] On October 19, 2015, the plaintiff filed a motion to "fix" child support in accordance with paragraph 5.1 of the agreement, following the termination of unallocated support.[4] On June 20, 2016, the parties stipulated to the defendant's monthly child support obligation, which the court, *Tindill*, *J.*, entered as an order of the court.[5] In July, 2016, Judge Tindill accepted the parties' stipulation as to the amount of the defendant's child support arrearage, which the defendant paid.[6] See footnote 4 of this opinion.

On October 24, 2016, the defendant filed a motion in which he sought to have the court order the plaintiff to reimburse him for what he claimed was his overpayment of unallocated support in 2015. On January 9, 2017, the defendant filed a motion to modify his child support obligation on the basis of a substantial change in circumstances due to the loss of his employment. The plaintiff opposed both of the defendant's motions. The parties appeared before the court, *Heller*, *J.*, to argue the defendant's motions on September 11, 2018.

[3] The plaintiff does not dispute that her right to alimony terminated at the time she remarried. See *Mihalyak* v. *Mihalyak*, 30 Conn. App. 516, 521, 620 A.2d 1327 (1993) (time certain alimony termination provision in dissolution judgment is self-executing).

[4] Article V of the separation agreement is titled "Child Support." Paragraph 5.1 provides: "Upon the termination of the unallocated alimony and child support pursuant to Article IV hereof, the parties shall determine the amount of child support to be paid by the [defendant] during his lifetime to the [plaintiff] for the support of each of the minor children and in the event they are unable to agree, the amount of such child support payments shall be determined by a court of competent jurisdiction. The amount of child support shall be paid retroactive to the date of the termination of the unallocated alimony and support payments."

[5] Nothing in the file indicates that the parties submitted child support guidelines at the June, 2016 hearing or that Judge Tindill made a finding as to the presumptive child support under the guidelines.

[6] At the time the parties stipulated to the defendant's child support arrearage in July, 2016, the defendant did not seek a credit against his child support arrearage on the basis of an overpayment of unallocated support that he paid in 2015.

On January 30, 2019, the court issued a memorandum of decision in which it granted the defendant's motion for reimbursement of unallocated support and ordered the plaintiff to pay the defendant $81,358.40. The court, however, denied the defendant's motion to modify child support. The present appeal and the present cross appeal followed.[7]

We begin with the standard of review applicable to postdissolution matters. An appellate court "will not disturb trial court orders unless the trial court abused its legal discretion or its findings have no reasonable basis in the facts. . . . As has often been explained, the foundation for this standard is that the trial court is in a clearly advantageous position to assess the personal facts significant to a domestic relations case. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Notwithstanding the great deference accorded the trial court in dissolution proceedings, a trial court's ruling . . . may be reversed if, in the exercise of its discretion, the trial court applies the wrong standard of law." (Citations omitted; internal quotation marks omitted.) *Gabriel* v. *Gabriel*, 324 Conn. 324, 336, 152 A.3d 1230 (2016).

I

THE PLAINTIFF'S APPEAL

The plaintiff claims that the court erred by granting the defendant's motion for order, postjudgment, and ordering her to repay the defendant $81,358.40 of the unallocated support he paid her in 2015. The plaintiff

[7] We recognize that the parties have filed appeals from separate decisions of the trial court that were issued in one memorandum of decision. There is precedent for denominating the appeals as an appeal and a cross appeal. See *Commissioner of Public Health* v. *Freedom of Information Commission*, 311 Conn. 262, 267 n.3, 86 A.3d 1044 (2014).

claims that the court misinterpreted the agreement, failed to enforce its intended terms, and added terms to the agreement. We agree with the plaintiff and, therefore, reverse in part the judgment of the trial court.

The agreement was incorporated by reference into the February 26, 2013 judgment dissolving the parties' marriage. Article IV of the agreement, titled Unallocated Alimony and Support, required the defendant to pay the plaintiff unallocated support pursuant to certain terms. The relevant paragraphs of article IV follow:

"4.1. Commencing as of the first day of March, 2013, the [defendant] shall pay to the [plaintiff], during his lifetime, until her death or remarriage, or February 28, 2017, whichever event shall first occur, the following percentages of the '*gross annual compensation*' *as hereinafter defined* in any calendar year.[8] . . . [In a year in which the defendant earned up to $1 million, the plaintiff was entitled to 40 percent of gross annual compensation, not to exceed $400,000.][9]

"4.2. All payments made from the [defendant's] base salary shall be made in cash and in equal monthly installments on the first day of each calendar month, in advance. All payments from the [defendant's] additional and/or incentive compensation *shall be made by the* [*defendant*] *to the* [*plaintiff*] *within fifteen . . . days of receipt* of such payments by the [defendant].

"4.3. (a) '*Gross annual compensation in any year*' *shall be defined* to include any and all earnings of any nature whatsoever *actually received* by the [defendant] in the form of cash or cash equivalents, or which the

[8] The agreement contained a chart governing the amount of unallocated support the defendant was to pay the plaintiff in a particular year depending on the amount of gross annual compensation that he received. The chart contained five levels of increasing annual compensation and corresponding reductions in the percentage of that compensation to which the plaintiff was entitled as unallocated support. In other words, as the defendant's compensation increased, the plaintiff's entitled percentage of it decreased.

[9] There is no dispute that the defendant earned less than $1 million in 2015.

[defendant] is entitled to receive, from any and all sources including in relation to the services rendered by the [defendant] by way of his past, current or future employment, including but not limited to salary and bonus . . . .[10]

"(c) The [defendant] shall take no action for the purpose of defeating the [plaintiff's] *timely right to receive alimony* and, in particular, shall take no action to reduce, divert, delay or defer income for the purpose of reducing, limiting or delaying the [defendant's] alimony obligation to the [plaintiff].

"4.4. The alimony payments pursuant to paragraph 4.1 hereof shall be non-modifiable as to duration by the parties or a court of competent jurisdiction and any decree of any court incorporating all or a portion of this [a]greement shall preclude such modification. The alimony payments pursuant to paragraph 4.1 shall otherwise be modifiable pursuant to [General Statutes § 46b-86 (b)].

"4.5. For each year in which the [defendant] is obligated to pay unallocated alimony and support to the [plaintiff], the [defendant] shall provide the [plaintiff] with his year-end [pay stub], W-2s, K-1s and 1099s and a copy of his federal tax return when filed with the taxing authority. In addition, the [defendant] shall provide the [plaintiff] evidence, including pay stub or distribution sheet, *each time he receives* any change in salary or bonus *within seven . . . days of receipt* or filing. In addition, the [defendant] shall provide the [plaintiff] *within seven . . . days* of his receipt, with all statements evidencing the award of restricted share units and stock options and any other deferred or incentive compensation, including but not limited to documentation reflecting when and under what circumstances the restrictions lapse and/or the options may be exercised.

[10] Paragraph 4.3 (b) pertains to the defendant's self-employment, if any, and is not implicated in the present appeal.

"4.6. In the event the [defendant] changes employment and receives compensation incident thereto, in replacement of deferred or incentive compensation to which the [plaintiff] was entitled to share as income subject to the provisions of this Article IV, she shall be entitled to share in the replacement compensation to the extent she would have shared in the original deferred or incentive compensation.

"4.7. *The* [*defendant*] *shall take no action for the purpose of defeating the* [*plaintiff's*] *timely right to receive unallocated alimony and support* and, in particular, shall take no action to reduce, divert, delay or defer income for the purpose of reducing, limiting or delaying the [defendant's] unallocated alimony and support obligation to the [plaintiff] pursuant to this Article IV." (Emphasis added; footnotes added.)

In its memorandum of decision, the court found that the defendant had requested that it "order the plaintiff to reimburse him for the unallocated alimony and child support that he overpaid in 2015. According to the reconciliation prepared by [the defendant's] prior counsel in August, 2016, the defendant paid the plaintiff $288,309.51 in 2015, but he should have paid her $206,951.11.[11] The difference of $81,358.40 is largely due to the defendant's paying the plaintiff 40 percent of the bonuses and severance payments that he received in

[11] The defendant represented in his motion for order, postjudgment, that he had "paid the plaintiff $288,309.51 [unallocated support] in calendar year 2015, and claim[ed] that he [had] overpaid the [unallocated support] in the amount of $81,251.91. Pursuant to the following calculations, [he claimed that the] plaintiff should have received $207,057.60 as [unallocated support]:

"2015 Gross Annual Income 40 [percent] Multiplied by [0].5833

"$877,440.45 $354,967.18 $207,057.60"

In a footnote in its memorandum of decision, the court noted that "the defendant in his proposed orders ask[ed] that the plaintiff be ordered to reimburse him the sum of $81,251.91. In his memorandum of law re: portion of bonus income paid in 2015 includible in annual alimony calculation[s] . . . the defendant claims that the overpayment of [unallocated support] was $81,240.07."

March and April, 2015 from RBS and [Jefferies, LLC]. The defendant made these payments a few months before the plaintiff remarried." (Footnote added and footnote omitted.) The court continued that, at oral argument on September 11, 2018, the defendant contended that he had overpaid unallocated support in 2015 because the plaintiff was only entitled to receive 40 percent of his gross annual compensation on a prorated basis (i.e., for seven months, not for the entire year), in view of her remarriage in August, 2015. The plaintiff countered that the agreement did not contain a provision for prorating unallocated support and, therefore, she had no obligation to refund any part of the unallocated support she received in 2015.

The court determined that the defendant's obligation to pay the plaintiff unallocated support terminated when the plaintiff remarried and further determined that, pursuant to paragraph 4.1 of the agreement, "the plaintiff was entitled to receive 40 percent of the defendant's 'gross annual compensation in any year,' as defined in paragraph 4.3 of the [agreement], between $0 and [$1 million]. . . ." Although the court agreed with the plaintiff that nothing in the agreement "states explicitly that the defendant's annual unallocated . . . support obligation should be prorated if it terminated prior to the end of a calendar year," the court found that "[t]here is also nothing in the . . . agreement to suggest that the plaintiff would be entitled to a windfall if she remarried shortly after the defendant paid her 40 percent of his annual bonus, or that the defendant would be entitled to keep 100 percent of his annual bonus if he received it a few weeks after the plaintiff remarried."

As part of its analysis, the court set forth *a portion* of paragraph 4.5 of the agreement that requires the defendant in each year he is obligated to pay unallocated support to provide the plaintiff with his "year-end [pay stub], W-2s, K-1s and 1099s and a copy of his

federal tax return . . . .”[12] The court found that, beginning in 2013, and continuing for each year in which he had an unallocated support obligation, the defendant was to provide his year-end tax documents to the plaintiff, including 2015 when his unallocated support obligation terminated in August of that year. The court determined that the defendant would have had to provide the plaintiff with year-end tax documents in 2017, had his unallocated support obligation continued until February 28, 2017, when his obligation terminated under the terms of the agreement. The court concluded that the plaintiff had a right to review the defendant's tax documents to confirm that she had received the proper percentage of his “gross annual compensation” for that portion of the year, whether it was seven months or two months or twelve months.

The court also stated that “[i]mplicit in paragraph 4.1 is that the defendant's [unallocated support] obligation, which was based on his gross annual compensation, was to be prorated when it terminated prior to December 31. Otherwise there would be no need to review the defendant's year-end tax documents for the year in which the [unallocated support] terminated; the only documents required would be evidence of income received to the date of termination.” The court found that “the parties intended that the defendant's [unallocated support] obligation would be prorated if it terminated prior to the end of the year.”[13] The court, there-

[12] The remainder of paragraph 4.5 provides: “In addition, the [defendant] shall provide the [plaintiff] evidence, including pay stub or distribution sheet, each time he receives any change in salary or bonus *within seven . . . days of receipt or filing*. In addition, the [defendant] shall provide the [plaintiff] within seven . . . days of his receipt, with all statements evidencing the award of restricted share units and stock options and any other deferred or incentive compensation, including but not limited to documentation reflecting when and under what circumstances the restrictions lapse and/or the options may be exercised.” (Emphasis added.)

[13] In support of its determination regarding the parties' intent, the court cited *King* v. *Colville-King*, Superior Court, judicial district of Waterbury, Docket No. FA-08-4018279-S (February 20, 2015), and *Upton* v. *Upton*, Supe-

fore, granted the defendant's motion and ordered the plaintiff to reimburse the defendant $81,358.40.

Our resolution of the plaintiff's claim turns on our construction of article IV of the agreement. We are guided by the principles of contract construction and the applicable standard of review. "It is well established that a separation agreement that has been incorporated into a dissolution decree and its resulting judgment must be regarded as a contract and construed in accordance with the general principles governing contracts. . . . When construing a contract, we seek to determine the intent of the parties from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . When only one interpretation of a contract is possible, the court need not look outside the four corners of the contract. . . . Extrinsic evidence is always

rior Court, judicial district of Fairfield, Docket No. FA-06-4017460-S (May 11, 2007) (clarified in a subsequent memorandum of decision dated February 20, 2008), as situations in which the court prorated alimony payments. Those cases are distinguishable in that they do not concern the construction of a separation agreement but, rather, the manner in which the court resolved payment of alimony from bonuses when events beyond the control of the parties transpired.

In *King* v. *Colville-King*, supra, Superior Court, Docket No. FA-08-4018279-S, the alimony payer's bonuses initially were to be paid monthly as he received them. His employer, however, changed its bonus payment schedule from monthly to annually in the final year in which alimony was to be paid. The court ordered the final bonus payment to be prorated at the end of the year to maintain the integrity of the original judgment. In *Upton*, the trial court failed to include a schedule of alimony payments in its judgment of dissolution. It opened the judgment in February, 2008, to rectify the omission and issued an order regarding regular payments on the basis of the payer's base pay and a prorated schedule for bonus compensation. *Upton* v. *Upton*, Superior Court, judicial district of Fairfield, Docket No. FA-06-4017460-S (February 20, 2008).

admissible, however, to explain an ambiguity appearing in the instrument. . . . When the language of a contract is ambiguous, the determination of the parties' intent is a question of fact. . . . When the language is clear and unambiguous, however, the contract must be given effect according to its terms, and the determination of the parties' intent is a question of law. . . .

"A contract is unambiguous when its language is clear and conveys a definite and precise intent. . . . The court will not torture words to impart ambiguity when ordinary meaning leaves no room for ambiguity. . . . Moreover, the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous. . . .

"In contrast, a contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . [A]ny ambiguity in a contract must emanate from the language used by the parties." (Internal quotation marks omitted.) *Grogan* v. *Penza*, 194 Conn. App. 72, 78, 220 A.3d 147 (2019). "If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous." (Internal quotation marks omitted.) Id., 79. "A word is ambiguous when it is capable of being interpreted by reasonably well-informed persons in either of two or more senses. . . . Ambiguous also means unclear or uncertain . . . [or] that which is susceptible of more than one interpretation or understood in more ways than one." (Citation omitted; internal quotation marks omitted.) *Bijur* v. *Bijur*, 79 Conn. App. 752, 760, 831 A.2d 824 (2003). Importantly, an agreement is not ambiguous because it does not contain a certain provision or is allegedly incomplete. See *Massey* v. *Branford*, 118 Conn. App. 491, 499, 985 A.2d 335 (2009), cert. denied, 295 Conn. 913, 990 A.2d 345 (2010).

"[T]he threshold determination in the construction of a separation agreement . . . is whether, examining

the relevant provisions in light of the context of the situation, the provision at issue is clear and unambiguous, which is a question of law over which our review is plenary." (Internal quotation marks omitted.) *Fazio* v. *Fazio*, 162 Conn. App. 236, 244, 131 A.3d 1162, cert. denied, 320 Conn. 922, 132 A.3d 1095 (2016). On the basis of our plenary review of article IV of the agreement, we conclude that it is clear and unambiguous.[14]

In his brief, the defendant argues that "to effectuate the intent of the parties that the plaintiff share in the defendant's 'gross annual compensation,' that entitlement must be read to mean that, in this instance, the plaintiff shall share in 40 [percent] of *all* 'gross annual compensation' received by the defendant in 2015, prorated for the seven out of twelve months of 2015 in which she was entitled to receive [unallocated support] . . . ." (Emphasis added.) We disagree, as paragraph 4.1 does not contain the word *all*. As the plaintiff points out in her reply brief, the term "gross annual compensation in any calendar year" does not include the term prorated.

"Gross annual compensation in any calendar year" is defined in paragraph 4.3 (a) of the agreement and provides, in part, " 'Gross annual compensation in any year' shall be defined to include any and all earnings of any nature *whatsoever actually received by the* [*defendant*] in the form of cash or cash equivalents, or which the [defendant] is entitled to receive, from any and all sources including in relation to the services rendered by the [defendant] by way of his past, current

[14] The relevant portion of paragraph 4.1 of the agreement provides: "Commencing as of the first day of March, 2013, the [defendant] shall pay to the [plaintiff] . . . until her . . . remarriage . . . the following percentage of the 'gross annual compensation' as hereinafter defined in any calendar year . . . ." The court misstated this portion of paragraph 4.1 in its memorandum of decision when it wrote that "the plaintiff was entitled to receive 40 percent of the defendant's 'gross annual compensation in any year,' as defined in paragraph 4.3 . . . between $0 and [$1 million] . . . ."

or future employment, including but not limited to salary and bonus . . . .'' The paragraph defines what types of payments constitute gross annual compensation. It does not provide that gross annual compensation is the sum total of the gross annual compensation that the defendant receives in a year.

Significantly, paragraph 4.3 (a) does not address when the defendant is to pay the plaintiff the relevant percentage of the gross annual compensation he receives. The time in which he is to make unallocated support payments to the plaintiff is set forth in paragraph 4.2, to wit: ''All payments made from the [defendant's] base salary shall be made . . . on the first day of each calendar month, in advance. All payments from the [defendant's] additional and/or incentive compensation shall be made by the [defendant] . . . *within fifteen . . . days of receipt of such payment* by the [defendant].'' (Emphasis added.)

A ''contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision must be given effect if it is possible to do so. . . .'' (Internal quotation marks omitted.) *Grogan* v. *Penza*, supra, 194 Conn. App. 79.

Pursuant to paragraphs 4.1, 4.2, and 4.3 (a) of the agreement, in the year 2015, the defendant was required to pay unallocated support to the plaintiff from the *gross annual compensation that he actually received* until August 8, 2015, when his unallocated support obligation terminated due to the plaintiff's remarriage. The defendant received bonuses and severance pay, which by definition is gross annual compensation, in March and April, at a time in which he was required to pay the plaintiff 40 percent thereof within *fifteen days*. None of those three paragraphs, or any other paragraph in the agreement, sets forth conditions under which the plaintiff may have been required to return unallocated

support that she received at a time she was entitled to receive it.[15]

The case of *Bijur* v. *Bijur*, supra, 79 Conn. App. 752, is instructive. In *Bijur*, the defendant filed a motion seeking reimbursement of alimony he claimed that he had overpaid the plaintiff. The issue in the case centered on the meaning of the word *retirement*. Id., 755. The defendant retired in the sense that he had stopped working on February 4, 2001. Id., 754–55. He paid the plaintiff alimony in February, 2001, but in no month thereafter. The plaintiff filed a motion for contempt in which she alleged that the defendant had failed to pay her alimony pursuant to the terms of the separation agreement, which required the defendant to pay alimony when he retired subject to the distribution of his pension. Id., 756. A subissue in the case was the meaning of pension distribution. The trial court denied the defendant's motion for reimbursement and ordered the defendant to pay the plaintiff retroactively to the date of his pension distribution, but did not find him to be in contempt. Id. The defendant appealed to this court, claiming that the trial court had misinterpreted the parties' separation agreement with respect to the duration of his alimony obligation. Id., 756–57. This court found that the meaning of *retirement* in the separation agreement was ambiguous and that the parties had offered reasonable but differing interpretations of *that portion of* the agreement. Id., 761. After resolving the distribution question, and therefore the date of the defendant's retirement (March 1); id., 764; this court reversed the trial court's judgment ordering the defendant to pay the plaintiff alimony retroactively to March, but affirmed the trial

[15] As stated previously, the plaintiff was entitled to receive unallocated support until she remarried. The only factor in the agreement limiting the plaintiff's receipt of unallocated support was a cap of $400,000 in a year in which the defendant received gross annual compensation of $1 million or less. The unallocated support that the defendant paid the plaintiff in 2015, $288,309.51, did not approach the $400,000 cap.

court's decision denying the defendant's motion for disgorgement from the plaintiff on a per day, prorated basis for the month of February, following the day he stopped working, for the following reasons. Id., 766.

"It is well settled that in a dissolution of marriage action, the distribution of assets rests within the sound discretion of the court . . . . To conclude that the court abused its discretion by refusing to order the plaintiff to refund the money, we must determine whether the court incorrectly applied the law or could not reasonably have concluded as it did. . . .

"Periodic alimony is a type of permanent alimony paid at scheduled intervals. The purpose of periodic alimony is primarily to continue the duty to support the recipient spouse. . . . [T]he right to enforce each periodic payment accrues on each payment as it matures. . . . The periodic alimony payment matures when it becomes due." (Citations omitted; emphasis omitted; internal quotation marks omitted.) Id., 766–67; see also 24A Am. Jur. 2d 121, Divorce and Separation § 666 (2008). The *Bijur* defendant was required to make alimony payments on the first day of the month in advance. Because he paid his February alimony obligation on the first of the month, he was not entitled to a per diem disgorgement for the remainder of the month. *Bijur* v. *Bijur*, supra, 767.

In the present case, paragraph 4.2 required the defendant to pay the plaintiff gross annual compensation in the form of bonuses and severance pay within fifteen days of its receipt. In March and April, 2015, the plaintiff was entitled to receive unallocated support. The defendant was obligated to pay the plaintiff unallocated support from the bonus and severance pay he received in March and April, 2015. His unallocated support payment matured and became due fifteen days after he received each payment. The defendant, therefore, was not entitled to reimbursement for that which he was obligated to pay the plaintiff at the time.

The plaintiff also claims that the court improperly added terms to the agreement when it stated, "[i]mplicit in paragraph 4.1 is that the defendant's unallocated [support] obligation, which was based on his gross annual compensation, was to be prorated when it terminated prior to December 31." The term *prorated* is not found anywhere in the agreement. "In interpreting a contract courts cannot add new or different terms." (Internal quotation marks omitted.) *Stratford* v. *Winterbottom*, 151 Conn. App. 60, 73, 95 A.3d 538, cert. denied, 314 Conn. 911, 100 A.3d 403 (2014). "The intention of the parties to a contract is to be determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. The question is not what intention existed in the minds of the parties but *what intention is expressed in the language used*." (Emphasis added.) *Ives* v. *Willimantic*, 121 Conn. 408, 411, 185 A. 427 (1936). The agreement contains no provision that the unallocated support was to be prorated if it terminated prior to the end of a calendar year.[16]

An agreement is not ambiguous because it does not contain a provision or is allegedly incomplete. In *Massey* v. *Branford*, supra, 118 Conn. App. 498–99, this court affirmed the judgment of the trial court, which rejected the plaintiffs' claim that the settlement agreement was incomplete because it did not include the name of a nonparty. See also *Kostak* v. *Board of Education*, Superior Court, judicial district of Litchfield,

[16] In concluding that prorating was called for, the court relied on the provisions of the agreement requiring the defendant to provide calendar year-end pay stubs and tax documents. The court minimized the significance of the defendant's obligation to provide the plaintiff with evidence of bonus and severance payments within seven days of receipt or a change in his base compensation. Those requirements indicate that the defendant was to apprise the plaintiff of his compensation as he received it. The plaintiff therefore was able to determine whether she was receiving timely payments. The plaintiff also has argued on appeal that the purpose of the defendant's providing year-end tax documents was for recalculation of child support under article V of the agreement. See part II of this opinion.

Docket No. CV-86-0043374-S (June 26, 2006) (rejecting plaintiff's claim that settlement agreement was incomplete because certain term was not included in it).

The evidence in the present case indicates that each of the parties has a high net worth and *is* accustomed to sophisticated financial matters. See part II of this opinion. At the time they were divorced, the parties were represented by experienced counsel who specialized in dissolution matters. Had the parties wanted to include a pro rata provision, or a true-up as it is sometimes called, in the agreement, they could have done so. Pro rata and true-up provisions commonly are incorporated in separation agreements. See, e.g., *Grogan* v. *Penza*, supra, 194 Conn. App. 75[17]; *Nadel* v. *Luttinger*, 168 Conn. App. 689, 693, 147 A.3d 1075 (2016).[18] The parties did not include language providing for the unallocated support that the defendant paid the plaintiff to be prorated if the support obligation terminated before December 31. "A court cannot ignore or disregard the language of the agreement because in hindsight an additional or more expansive term would have been better for one of the parties." *Grogan* v. *Penza*, supra, 80; see also *Crews* v. *Crews*, 295 Conn. 153, 169, 989 A.2d 1060 (2010). The court, therefore, improperly read a term into the agreement when it concluded that it was *implicit* that the defendant's gross annual compensation was to be prorated.

Child support and alimony are not delineated in an order of unallocated support. This court has stated, in

[17] "The alimony paid by the [plaintiff] to the [defendant] shall be paid in three components (monthly . . . and quarterly payments totaling $160,000 based on the first $550,000 of [the plaintiff's] income, and a year-end [true-up] alimony payment based on gross income of the [plaintiff] between $550,000 and $750,000)." (Internal quotation marks omitted.) *Grogan* v. *Penza*, supra, 194 Conn. App. 75.

[18] "Within [thirty] days after filing of the [defendant's] tax return in which the receipt of the restricted stock units are reflected, the parties shall true-up to share equitably the tax burden on the vesting of the [restricted stock units]." (Internal quotation marks omitted.) *Nadel* v. *Luttinger*, supra, 168 Conn. App. 693.

the context of a motion for modification of child support, that "[b]ecause an unallocated order incorporates alimony and child support without delineating specific amounts for each component, the unallocated order, along with other financial orders, necessarily includes a portion attributable to child support in an amount sufficient to satisfy the [child support] guidelines. . . . Thus, to decide a motion to modify in this situation, a trial court must determine what part of the original decree constituted modifiable child support and what part constituted nonmodifiable alimony." (Citation omitted; internal quotation marks omitted.) *Malpeso* v. *Malpeso*, 165 Conn. App. 151, 165–66, 138 A.3d 1069 (2016). In other words, before the court may rule on the motion to modify, it must unbundle the unallocated support. Id.

In the present case, the plaintiff's right to unallocated support terminated in August, 2015. In June, 2016, the parties stipulated that the defendant's child support obligation was $4250 per month with step-downs as each one of their children reached the age of majority. A few weeks later, the parties stipulated to the defendant's child support arrearage retroactive to August, 2015. As noted in part II of this opinion, no court determined the defendant's child support obligation at the time of dissolution in 2013, or in June, 2016, when Judge Tindill accepted the parties' child support stipulation. See footnote 20 of this opinion. The fact that the parties did not seek to unbundle alimony and child support in the defendant's unallocated payments at that time is telling. It does not appear that, at the time the parties negotiated the defendant's child support obligation and related arrearage, the defendant claimed an overpayment of unallocated support to offset the arrearage. If the parties had intended to prorate the unallocated support the plaintiff received for only seven months in 2015, any claimed overpayment would have been taken into account and placed on the record. The fact that

there was no mention of an overpayment in June or July, 2016, does not support the defendant's position that the parties intended to prorate unallocated support that terminated before the end of a calendar year.

For the foregoing reasons, the judgment of the trial court with respect to the granting of the defendant's motion for order, postjudgment, is reversed and the case is remanded with direction to deny the motion.

II

THE DEFENDANT'S CROSS APPEAL

In his cross appeal, the defendant claims that the court improperly denied his motion for modification of child support by concluding that the reduction in his earned income did not constitute a substantial change in circumstances. We disagree.

"[General Statutes §] 46b-86 governs the modification of [a] child support order after the date of a dissolution judgment. . . . Section 46b-86 (a)[19] permits the court to modify . . . child support orders in two alternative circumstances. Pursuant to this statute, a court may not modify [a] child support order unless there is first either (1) a showing of a substantial change in the circumstances of either party *or* (2) a showing that the final order for child support substantially deviates from the child support guidelines . . . ." (Emphasis added; footnote added and omitted; internal quotation marks

[19] General Statutes § 46b-86 (a) provides in relevant part: "Unless and to the extent that the decree precludes modification, any final order for the periodic payment of . . . support . . . may, at any time thereafter, be . . . modified by the court upon a showing of a substantial change in the circumstances of either party or upon a showing that the final order for child support substantially deviates from the child support guidelines established pursuant to section 46b-215a, unless there was a specific finding on the record that the application of the guidelines would be inequitable or inappropriate. There shall be a rebuttable presumption that any deviation of less than fifteen per cent from the child support guidelines is not substantial and any deviation of fifteen per cent or more from the guidelines is substantial. . . ."

omitted.) *De Almeida-Kennedy* v. *Kennedy*, 188 Conn. App. 670, 675–76, 205 A.3d 704 (quoting *Weinstein* v. *Weinstein*, 104 Conn. App. 482, 491–92, 934 A.2d 306 (2007), cert. denied, 285 Conn. 911, 943 A.2d 472 (2008)), cert. denied, 332 Conn. 909, 210 A.3d 566 (2019).

The following additional facts are relevant to our resolution of the defendant's cross appeal. As noted previously in part I of this opinion, the parties stipulated in June, 2016, that from the time his unallocated support obligation terminated in August, 2015, the defendant's child support obligation was $4250 a month, subject to a one-third reduction when each one of the parties' children reached the age of majority. On January 9, 2017, the defendant filed a motion to modify his child support obligation because "he ha[d] been terminated from his employment and no longer ha[d] any earned income." He moved "for an order modifying his child support obligation to an amount that is consistent with the current . . . child support guidelines." The defendant did not plead that the amount of child support that he was paying pursuant to the parties' stipulation deviated from the child support guidelines.

The parties appeared before the court to argue the defendant's motion for modification of child support in September, 2018. The defendant testified at length on both direct and cross-examination regarding his income, employment, and expenses. When ruling on the motion, the court recited the procedural history regarding the defendant's child support obligation, specifically, that paragraph 4.1 of the agreement required the defendant to pay unallocated support to the plaintiff until her remarriage. When the plaintiff remarried on August 8, 2015, the defendant stopped paying her unallocated support. In June, 2016, the parties stipulated to the defendant's child support obligation; the defendant agreed to pay the plaintiff child support in the amount of $4250

per month retroactive to August, 2015.[20] See footnote 21 of this opinion.

In addition, the court found that at the time of the June, 2016 child support stipulation, the defendant was a bond trader employed by Jefferies, LLC, where his annual base salary was $400,000. According to his May 20, 2016 financial affidavit, the defendant's gross base monthly income from employment was $33,333 and his net monthly income from employment was $19,580. His total monthly income, however, was $28,345, which included his net base monthly employment, interest, dividend, and bonus income. He reported monthly expenses of $38,180. His assets were valued at $10,166,496 and his liabilities at $3600.[21]

[20] Paragraph 4 of the June, 2016 stipulation provided that the "defendant's obligation to pay the plaintiff $4250 per month shall be reduced by one-third . . . as each child attains age eighteen, or if a child is still attending high school when he attains age eighteen . . . until a child completes his high school education or attains age nineteen . . . whichever event shall first occur." Paragraph 4 also provided that it "shall be without prejudice to either party's right to file a motion to modify the child support and/or the amount of the automatic reduction." Under paragraph 5 of the stipulation, the defendant acknowledged his obligation under the separation agreement to pay for the children's education, medical insurance, and unreimbursed medical expenses.

[21] In a footnote, Judge Heller stated that there were no child support guidelines worksheets in the file for the June, 2016 hearing. The court further stated that "[c]hild support guidelines worksheets that were prepared by counsel in connection with the June, 2016 stipulation were admitted into evidence as [p]laintiff's [e]xhibits 10 and 11 [at the September 11, 2018 hearing]. Counsel for the defendant also prepared a child support guidelines worksheet for the September 11, 2018 hearing based on the parties' May, 2016 financial affidavits, which was admitted into evidence as [d]efendant's exhibit S. The defendant's presumptive weekly child support obligation range[d] from $690 to $2115 on these child support guidelines worksheets. *Nothing in the court file reflects the court's findings in June, 2016, as to the presumptive weekly child support obligation and any deviation from the guidelines. The parties offered no evidence in that regard during the September 11, 2018 hearing.*" (Emphasis added.)

We have reviewed the record and found no evidence that Judge Tindill unbundled the unallocated support and determined what portion of the unallocated support was designated for child support. See *Malpeso* v. *Malpeso*, supra, 165 Conn. App. 165 (unallocated support orders incorporate

The court found that the defendant's employment with Jefferies, LLC, ended in January, 2017, and he was given one month's salary as severance. The defendant was unemployed from that time until August 22, 2017, when he joined Stifel, Nicolaus & Co., Inc. (Stifel), as a bond trader with an annual base salary of $250,000. The defendant's September 11, 2018 financial affidavit indicated a gross monthly salary of $20,833 and a net monthly salary of $12,485. His net average monthly commissions were $151. The defendant estimated his monthly income from interest and dividends to be $5590. His total monthly expenses were $40,420, his assets were valued at $11,044,794, and his liabilities were valued at $4909. Stifel lent the defendant $150,000, a loan forgivable over three years.

With respect to the plaintiff, the court found that she had not worked outside her home since she became pregnant with the parties' eldest child. Her May 18, 2016 financial affidavit reflected an average monthly income of $1648 from interest and dividends. Her monthly expenses were $41,027. She had assets valued at $6,309,279 and no liabilities. The plaintiff's September 6, 2018 financial affidavit reflected a net monthly income from investments of $6296 and monthly rental income of $1458. She reported monthly expenses of $37,697, which included private school tuition for the parties' children that was paid for by the defendant and household expenses that were paid for by her husband.[22]

alimony and child support without delineating amounts for each; unallocated order necessarily includes portion attributable to child support); see also *Tomlinson* v. *Tomlinson*, 305 Conn. 539, 558, 46 A.3d 112 (2012).

Judge Heller's decision indicates that she did not consider the child support guideline worksheets submitted by the parties when she determined that the defendant had not met his burden to demonstrate that there had been a substantial change in circumstances. Her decision was predicated on the defendant's financial affidavits.

[22] The court noted the plaintiff's testimony that her net monthly rental income may not be accurate on her current financial affidavit and that she may have made an error in her tax calculations.

The court acknowledged the principles of law governing the modification of child support. Section 46-86 (a) governs the modification of a child support order after the date of dissolution and provides in relevant part: "Unless and to the extent that the decree precludes modification . . . any final order for the periodic payment of . . . support . . . may, at any time thereafter, be . . . set aside, altered or modified . . . upon a showing of a substantial change in the circumstances of either party . . . ." See also *Weinstein* v. *Weinstein*, supra, 104 Conn. App. 482. "To obtain a modification, the moving party must demonstrate that circumstances have changed since the last court order such that it would be unjust or inequitable to hold either part to it." *Borkowski* v. *Borkowski*, 228 Conn. 729, 737–38, 638 A.2d 1060 (1994).

The court recognized that under the substantial change in circumstances provision of § 46b-86 (a), "[w]hen presented with a motion for modification, *a court must first determine* whether there has been a substantial change in the financial circumstances of one or both of the parties. . . . Second, if the court finds a substantial change in circumstances, it may properly consider the motion and . . . make an order for modification. . . . A party moving for a modification of [a support] order must clearly and definitely establish the occurrence of a substantial change in the circumstances of either party that makes the continuation of the prior order unfair and improper. . . . The party seeking modification bears the burden of showing the existence of a substantial change in the circumstances." (Emphasis added; internal quotation marks omitted.) *Light* v. *Grimes*, 156 Conn. App. 53, 65, 111 A.3d 551 (2015); *Fox* v. *Fox*, 152 Conn. App. 611, 621, 99 A.3d 1206, cert. denied, 314 Conn. 945, 103 A.3d 977 (2014) (same). In determining whether there has been a substantial change of circumstances of one or both of the parties, "the trial court is limited to considering

events arising after the dissolution decree or the most recent modification thereof." *Olson* v. *Mohammadu*, 310 Conn. 665, 675, 81 A.3d 215 (2013).

"In the context of a trial court's consideration of a motion to modify, *the guidelines become relevant only after a change in circumstances has been shown, if that is the ground urged in support of modification* . . . or in determining whether the existing child support order substantially deviates from the guidelines, if that is the ground urged in support of modification." (Citation omitted; emphasis added.) *Mullin* v. *Mullin*, 28 Conn. App. 632, 635–36, 612 A.2d 796 (1992).

"Because the establishment of changed circumstances is a condition precedent to a party's relief, it is pertinent for the trial court to inquire as to what, if any, new circumstance warrants a modification of the exiting order." *Borkowski* v. *Borkowski*, supra, 228 Conn. 738. A court's findings on the basis of financial affidavits alone are inadequate to support a modification without any record that the court had evaluated the circumstances surrounding the payer's claimed inability to pay. See *Olson* v. *Mohammadu*, supra, 310 Conn. 676; *Sanchione* v. *Sanchione*, 173 Conn. 397, 407, 378 A.2d 522 (1977).

In the present case, the court determined that June, 2016, was the starting point for its determination as to whether there had been a substantial change in the parties' circumstances when Judge Tindill entered the parties' child support stipulation as an order of the court.[23]

[23] Both parties submitted child support guideline worksheets at the September, 2018 hearing, but Judge Heller did not indicate which, if either, set of worksheets she relied on in determining that there had been no substantial change in circumstances. In a footnote, the court stated that "[c]hild support guidelines worksheets that were prepared by counsel in connection with the June, 2016 stipulation were admitted into evidence as [p]laintiff's [e]xhibits . . . . Counsel for the defendant also prepared a child support guidelines worksheet for the September 11, 2018 hearing based on the parties' May, 2016 financial affidavits, which was admitted into evidence as [d]efendant's [e]xhibit . . . . The defendant's presumptive weekly child support obligation ranges from $690 to $2115 on these child support guidelines worksheets.

Judge Heller examined the evidence presented at the September 11, 2018 hearing to determine whether the defendant clearly and definitely had established that there was a substantial change in circumstances. The court found that in September, 2018, the defendant's financial circumstances had not changed substantially since June, 2016.[24] Significantly, the court found that the defendant was able to maintain his lifestyle even though he had not been employed from January until August, 2017. Although his net monthly base salary had declined by 36 percent, his assets at the time of the 2018 hearing exceeded $11,000,000 and his monthly expenses and liabilities were essentially unchanged from June, 2016. The court considered the defendant's total financial picture on the basis of the evidence presented and found that he had "failed to establish the threshold requirement of . . . § 46b-86 (a)—he has not shown that a substantial change in his financial circumstances has occurred since the parties entered into the June, 2016 stipulation." The court therefore denied the defendant's motion to modify his child support obligation.

Nothing in the court file reflects the court's findings in June, 2016, as to the presumptive weekly child support obligation and any deviation from the guidelines. The parties offered no evidence in that regard during the September 11, 2018 hearing." Judge Heller also made no finding regarding the presumptive child support under the guidelines.

[24] The court did not specifically find the amount of the defendant's total net income in 2017 or earnings to the date of the 2018 hearing. In its memorandum of decision, the court refers to the figures on the defendant's financial affidavits. The court made no finding as to whether it considered the defendant's deferred compensation to be income. The defendant retained his RBS deferred compensation pursuant to the property distribution in the agreement. Neither party filed a motion for articulation seeking clarification of the court's finding.

General Statutes § 46b-82 does not define income. In such instances, we look to the ordinary meaning of the word. See General Statutes § 1-1 (a); see also *Gay* v. *Gay*, 70 Conn. App. 772, 800 A.2d 1231 (2002), aff'd, 266 Conn. 641, 835 A.2d 1 (2003). Income is defined as "a gain or recurrent benefit that is [usually] measured in money and for a given period of time, derived from capital, labor, or a combination of both, includes gains from transactions in capital assets, but excludes unrealized advances in value . . . ." (Internal quotation marks omitted.) *Gay* v. *Gay*, supra, 778.

The court found the amounts listed on his financial affidavit, but did not find his total net income for either 2017 or 2018.[25] Neither party requested an articulation for that purpose. See Practice Book § 66-5. The court concluded that the defendant had failed to establish the threshold requirement of § 46b-86 (a) that there had been a substantial change in his financial circumstances since the parties entered into the 2016 child support stipulation and denied the defendant's motion for modification of child support obligation.

On appeal, the defendant claims that the court improperly concluded that his reduction in income did not constitute a substantial change in circumstances because the court improperly (1) considered his assets and expenses when it determined that his significant reduction in income did not constitute a substantial change in circumstances, (2) failed to consider that the decrease in the defendant's income decreased the presumptive child support order by more than 15 percent, (3) considered his income only as of the date of the hearing, rather than at both the time he filed the motion for modification of child support and the date of the hearing on that motion,[26] (4) included other income for purposes of his support obligation, (5) con-

[25] The court found pursuant to the defendant's September 11, 2018 financial affidavit that he had a gross monthly salary of $20,833 and a net monthly salary of $12,485. He reported gross monthly average commissions of $403, but he testified that his gross monthly average commissions were actually $803. His estimated monthly interest and dividend income is $5590. His total net monthly income is $18,226 according to his current financial affidavit. He reported total monthly expenses of $40,420. His assets are valued at $11,044,794. His liabilities total $4909. He also had a contingent debt to Stifel of $150,000.

[26] A trial court has discretion to modify retroactively child support to different amounts especially during long periods of time while a motion is pending. See *Zahringer* v. *Zahringer*, 124 Conn. App. 672, 689, 6 A.3d 141 (2010). The defendant filed one motion for modification of child support in January, 2017. He did not amend the motion or file another motion for modification of child support when he found new employment in August, 2017. The defendant does not claim that he argued for two modified child support orders during the September, 2018 hearing. He, however, did file

sidered as income the return on his capital contribution in an investment, (6) considered the exercise of stock units awarded to him as part of the property division of the parties' assets at the time of dissolution, and (7) imputed a rate of return on his investments that he did not realize.[27] He also claims that with his income at the time he filed the motion for modification of child support and at the time the motion was heard, the decrease in presumptive child support was greater than 15 percent from the most recent order, thereby providing a presumptive substantial change in circumstances.[28]

proposed orders in which he proposed that the court determine his presumptive support obligation pursuant to the guidelines for the period of time that he was unemployed, find that he overpaid the plaintiff, and order her to reimburse him for the overpayment. He also proposed that the court determine his presumptive child support obligation pursuant to the guidelines for the time he found new employment to the date of the September, 2018 hearing, find that he overpaid the plaintiff, and order the plaintiff to reimburse him for the overpayment.

The court did not address the defendant's proposed orders in its memorandum of decision. The defendant did not file a motion for articulation, asking the court to articulate whether it had considered his proposal for separate orders for the respective periods of time. It is the appellant's burden to provide an adequate record for review. See *State* v. *Feliciano*, 74 Conn. App. 391, 402, 812 A.2d 141 (2002), cert. denied, 262 Conn. 952, 817 A.2d 110 (2003). "In a situation in which the court has not set forth the factual and legal basis for a discretionary ruling, and the appellant has failed to seek an articulation in accordance with Practice Book § 66-5, we must presume that the court acted correctly and can only conclude that there has been an abuse of discretion if such abuse is apparent on the fact of the record before us." *Bank of New York Mellon* v. *Horsey*, 182 Conn. App. 417, 430, 190 A.3d 105, cert. denied, 330 Conn. 928, 194 A.3d 1195 (2018). Inasmuch as the defendant sought two modification of child support orders on the basis of the child support guidelines in a case in which the court did not find a substantial change in circumstances, we cannot conclude that the court abused its discretion.

[27] In its memorandum of decision, the court did not discuss the defendant's rate of return on his investments. We decline to address the claim further.

[28] The defendant did not allege that the order that entered in June, 2016, deviated from the child support guidelines. The defendant's motion for modification of child support alleged the "[d]efendant represents that he has been terminated from his employment and no longer has any earned income." He requested that the court enter a child support order consistent with the current child support guidelines. At the hearing on September 11,

The plaintiff responded in her brief that the trial court properly found that there had been no substantial change in the defendant's financial circumstances by comparing his September, 2018 financial affidavit with his May, 2016 financial affidavit. The plaintiff acknowledges, as did the trial court, that the defendant had sustained a decline in earned income but contends that the defendant's overall financial situation had not changed substantially. Although the defendant's base salary was $400,000 in 2016 and had decreased to $250,000 in 2018, in 2016, his assets were valued at $10,166,496 and his liabilities totaled $3600. In 2018, his assets were valued at $11,044,794 and his liabilities at $4909. Even though the defendant had been unemployed from January to August in 2017, his net worth increased by $878,298. In early 2017, he received a deferred cash payment of $1.3 million from RBS, his former employer, and a second deferred payment in 2018. The plaintiff also argued that the court found no evidence that the defendant's lifestyle had changed between June, 2016 and September, 2018. In addition to his earned income, in 2017, he received approximately $66,000 in dividends and interest from his investment portfolio. The plaintiff noted that, according to the defendant's financial affidavits, his expenses were greater than his earned income, indicating that he supported his lifestyle, in part, with returns from his investments.

On the basis of our review of the record, particularly the evidence regarding the defendant's ability to maintain his lifestyle, spending habits, travel, and assets[29];

2018, counsel for the defendant argued that the court should enter a child support order consistent with the income shared model. The defendant did not argue that the rebuttable presumption that a 15 percent difference in the presumptive child support amount applied.

[29] At the hearing on September 11, 2018, the defendant testified as follows in response to questions from the plaintiff's counsel:

"Q.: [W]hen you lost your job in December of 2016, did you do anything to try to reduce your expenses?

"A.: Do anything?

the briefs of the parties; and their oral arguments, we conclude that the court did not abuse its discretion by denying the defendant's motion for modification because the defendant failed to carry his burden to demonstrate clearly and definitely that there has been a substantial change in circumstances notwithstanding his diminution in salary and period of unemployment.

We acknowledge that the decrease in the defendant's earned income may have created a rebuttable presumption of a greater than 15 percent deviation from the child support guidelines, but neither Judge Tindill nor Judge Heller ever made a finding as to the presumptive child support under the guidelines. In 2016, the defendant agreed to pay child support of $4250 per month without a finding as to the presumptive amount under the guidelines. It is apparent to us from the memorandum of decision that Judge Heller determined that the defendant's overall financial circumstances, which had improved between 2016 and 2018, did not represent a substantial change of circumstances and, therefore, the presumption was rebutted.

"Q.: Make any changes.

"A.: I mean I—with regard to my boys, I kind of try to keep a lot of the stuff status quo, especially like keeping the [nannies] that were around. I generally thought I was a frugal person by nature. I mean. . . .

"Q.: Okay. So, is it your testimony that there's nothing specific that you can recall you did to try to spend less money even during a period when you weren't working?

"A.: I probably didn't do anything to spend less money.

"Q.: On your financial affidavit, your current one . . . . The September 1 . . . 2018. Looking at page 3, letter K, entertain, travel, and visitation. You see that, sir?

"A.: Yup.

"Q.: Trips and vacations. You list 1750 a month, which is about $21,000 a year. Where did you derive that figure or how did you arrive at that figure?

"A.: For this year or for in general?

"Q.: For inclusion on that affidavit, sir.

"A.: *I try to keep a lot of the vacations and stuff I do from year to year consistent. So I'm sure it's similar to.*

"Q.: When you say vacations from year to year, does that include travel with your sons as well as not with your sons?

"A.: Yes." (Emphasis added.)

First, as a matter of law, we conclude that any claim that the court failed to consider the defendant's argument regarding deviations from the child support guidelines or that the court failed to consider the child support guidelines fails. The basis of the defendant's motion for modification was a substantial change in circumstances due to his loss of earned income, not a deviation from the child support guidelines. The court carefully examined the evidence, including the defendant's testimony regarding his income and spending habits, and the defendant's financial affidavit and determined that there had not been a substantial change in his financial circumstances. Unless the defendant had demonstrated a substantial change in circumstances, which he did not, there was no need for the court to consider the child support guidelines.[30]

The defendant's claims that the court improperly considered his assets and expenses and included "other income" as requested by the plaintiff when it found that there had been no substantial change in circumstances are without merit. The court did not address the defendant's "other income," whatever it may be. The court found that there was no substantial change in circum-

[30] As noted, § 46b-86 (a) permits a trial court to modify child support orders in two alternative cases, to wit: upon a showing of a substantial change in circumstances *or* upon a showing that the final order for child support deviates from the guidelines. In the present case, the defendant grounded his motion for modification of child support on a substantial change in circumstances, not a deviation from the child support guidelines. See footnote 21 of this opinion. At the hearing on the defendant's motion for modification, however, the defendant argued for a modification of his child support obligation because "our child support guidelines are income share models." He did not argue that the 15 percent substantial change provision of § 46b-86 (a) was a factor for the court to consider.

To repeat, the guidelines are relevant only if the movant demonstrates a substantial change in circumstances *or* that the existing child support order substantially deviates from the guidelines, depending on the ground urged in support of modification. See *Mullin* v. *Mullin*, supra, 28 Conn. App. 635–36. In the present case, the defendant grounded his motion for modification of child support on a substantial change in circumstances and failed to demonstrate such a change.

stances on the basis of the defendant's lifestyle between 2016 and 2018, which had not changed despite a nearly 40 percent reduction in his base salary and months of unemployment. As to the court's consideration of the source of the defendant's income, the child support guidelines "include bonus and deferred compensation in the definition of gross income. Regs., Conn. State Agencies § 46b-215a-1 (11) (A). A court must consider earned and unearned income from *all sources* in calculating gross income to fashion child support obligations. . . . Id., § 46b-215a-1 (11)." (Emphasis in original; internal quotation marks omitted.) *Hendricks* v. *Haydu*, 160 Conn. App. 103, 117, 124 A.3d 554 (2015). Moreover, questions involving modification of child support depend on conditions as they exist at the time of the hearing. See *Tomlinson* v. *Tomlinson*, 305 Conn. 539, 558, 46 A.3d 112 (2012). "[T]he determination of a parent's child support obligation must account for all of the income that would have been available to support the children had the family remained together." *Jenkins* v. *Jenkins*, 243 Conn. 584, 594, 704 A.2d 231 (1998). Our Supreme Court has stated that it "broadly interprets the definition of gross income contained in the guidelines to include items that, in effect, increase the amount of a parent's income that is available for child support purposes." (Emphasis omitted; internal quotation marks omitted.) *Hendricks* v. *Haydu*, supra, 113; see also *Unkelbach* v. *McNary*, 244 Conn. 350, 360, 710 A.2d 717 (1998). For the foregoing reasons, we conclude that the court did not abuse its discretion when it denied the defendant's motion for modification of child support.

The judgment is reversed with respect to the granting of the defendant's motion for order, postjudgment, for reimbursement of unallocated support and the case is remanded with direction to deny the defendant's motion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ALFRED P. MAYO (AC 41562)

Lavine, Prescott and Bishop, Js.

Syllabus

Convicted of the crime of breach of the peace in the second degree in connection with an encounter with S, the mayor of New Britain, the defendant appealed to this court, claiming that the evidence was insufficient to support his conviction. S had been hosting an event for children in a public park when the defendant arrived on a bicycle that had a political campaign sign affixed to it and began passing out business cards to children. When an aide to S asked the defendant to leave because his presence was inappropriate and a safety issue for the children, the defendant screamed profanities. Thereafter, when S approached the defendant and asked him to stop yelling profanities, he grabbed her wrist, threw her arm down abruptly and shouted profanities at her. *Held* that the evidence was sufficient to support the defendant's conviction of breach of the peace in the second degree in violation of statute (§ 53a-181 (a) (1)), as his conduct and use of profanities occurred in a public place and constituted fighting, or violent, tumultuous or threatening behavior; the evidence was sufficient for the jury to determine that the defendant acted with the requisite intent required by § 53a-181 (a) (1), and the jury was free to consider that the defendant intended the harm to S as a natural result of his physical actions toward her.

Argued March 16—officially released July 21, 2020

Procedural History

Substitute information charging the defendant with the crimes of assault in the third degree and breach of the peace in the second degree, brought to the Superior Court in the judicial district of New Britain, geographical area number fifteen, and tried to the jury before *Graham*, *J.*; verdict and judgment of guilty of breach of the peace in the second degree, from which the defendant appealed to this court. *Affirmed.*

Peter G. Billings, assigned counsel, for the appellant (defendant).

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, was *Brian Preleski*, state's attorney, for the appellee (state).

Opinion

PER CURIAM. The defendant, Alfred P. Mayo, appeals from the judgment of conviction, rendered after a jury trial, of breach of the peace in the second degree in violation of General Statutes § 53a-181 (a) (1). On appeal, the defendant claims that there was insufficient evidence adduced at trial to support his conviction. We affirm the judgment of conviction.

The jury reasonably could have found the following facts. On July 30, 2015, the mayor of New Britain, Erin Stewart, hosted the annual Pencil Hunt (event) at Walnut Hill Park, a public park in New Britain. Counselors from Camp TotalRec[1] hid candy and pencils for the participating children in a section of the park reserved for the event. As the host, Stewart was in attendance.

Shortly before the event was to begin, the defendant arrived at the park with a political campaign sign affixed to the back of his bicycle. The defendant then climbed off his bicycle and passed out business cards to the children at the event. This made several adults at the event uncomfortable, including Stewart; Matthew Schofield, the recreation services coordinator for the New Britain Parks and Recreation Department; and Justin Dorsey, Stewart's deputy chief of staff. Dorsey approached the defendant and asked him to leave because his presence was "inappropriate" and a "safety issue" for the children. In response, the defendant screamed profanities at Dorsey, yelling, "[i]t's a fucking park . . . ."

Thereafter, Stewart approached the defendant and advised him that the children were listening and that it was inappropriate to be yelling such profanities. She requested that he "please stop" and leave before she called the police. The defendant then grabbed Stewart's

[1] Camp TotalRec is a summer day camp for students in elementary and middle school.

wrist and threw her arm down, leaving a red mark on her wrist and causing her pain. Stewart backed away from the defendant and informed him that the police would be called. The defendant continued to shout profanities, calling Stewart a "[fucking] racist" and yelling that she "[didn't] know what the [fuck she was] talking about."

As a result of the defendant's physical contact, Stewart went to see Elaine Jeffrey, the public health nurse for the city. Stewart told Jeffrey that "she was grabbed by a political opponent and that as soon as she was grabbed she felt the pain." Jeffrey examined Stewart and advised her that, if the pain worsened, she should consult her doctor or visit an emergency department.

The defendant subsequently was charged with assault in the third degree in violation of General Statutes § 53a-61 (a) (1) and breach of the peace in the second degree in violation of § 53a-181 (a) (1). Following a trial, the jury found the defendant guilty of breach of the peace in the second degree and not guilty of assault. The court rendered judgment in accordance with the jury's verdict and sentenced the defendant to six months of incarceration. This appeal followed. Additional facts will be set forth as necessary.

The defendant claims that there was insufficient evidence to support his conviction of breach of the peace in the second degree. Specifically, the defendant claims that the state failed to prove beyond a reasonable doubt that his conduct rose "to the level of physical fighting, or physically violent, threatening or tumultuous behavior."[2] The state counters that the evidence that the defen-

[2] In his brief, the defendant also claims that the alleged profanities and verbal language cannot serve as the basis of the alleged crime, as it would violate the first amendment to the United States constitution. He claims further that the court failed to instruct the jury on fighting words. The defendant's claims are unpersuasive because his speech was part of his conduct. See *State* v. *Szymkiewicz*, 237 Conn. 613, 620, 678 A.2d 473 (1996) ("speech can be proscribed not only when accompanied by actual physical

dant grabbed Stewart's wrist and threw it down with such force that it left a mark and caused her pain constituted sufficient evidence for the jury to conclude that the defendant engaged in fighting, violent, threatening or tumultuous behavior. We agree.

We first set forth our well established standard of review. "In reviewing the sufficiency of the evidence to support a criminal conviction we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"We note that the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

"Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of

conduct, but also when it can be identified as fighting words"); see also *State* v. *Andriulaitis*, 169 Conn. App. 286, 299, 150 A.3d 720 (2016) (this court concluded that "we need not decide whether the defendant's language portended physical violence or amounted to fighting words because the defendant's conduct consisted of more than mere speech"). Therefore, because the defendant's speech in the present case was accompanied by physical contact, we do not consider the defendant's claim that his verbal language cannot serve as the basis of the alleged crime because it violates the first amendment to the federal constitution.

evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . In evaluating evidence, the [finder] of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [finder of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . .

"Finally, [a]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonabledoubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Bagnaschi*, 180 Conn. App. 835, 840–42, 184 A.3d 1234, cert. denied, 329 Conn. 912, 186 A.3d 1170 (2018).

To convict the defendant of breach of the peace in the second degree in violation of § 53a-181 (a) (1), the state must prove beyond a reasonable doubt that "(1) the defendant engaged in fighting or in violent, tumultuous or threatening behavior, (2) that this conduct occurred in a public place and (3) that the defendant acted with the intent to cause inconvenience, annoyance or alarm, or that he recklessly created a risk thereof." *State* v. *Simmons*, 86 Conn. App. 381, 386–87, 861 A.2d 537 (2004), cert. denied, 273 Conn. 923, 871 A.2d 1033, cert. denied, 546 U.S. 822, 126 S. Ct. 356, 163 L. Ed. 2d 64 (2005). "[T]he predominant intent [in a breach of the peace charge] is to cause what a reason-

able person operating under contemporary community standards would consider a disturbance to or impediment of a lawful activity, a deep feeling of vexation or provocation, or a feeling of anxiety prompted by threatened danger or harm." *State* v. *Wolff*, 237 Conn. 633, 670, 678 A.2d 1369 (1996).

In the present case, the evidence was sufficient for the jury to conclude that the defendant's conduct occurred in a public place and that it constituted fighting, violent, tumultuous or threatening behavior. The evidence was sufficient, as well, for the jury to determine that the defendant acted with the requisite intent required by § 53a-181 (a) (1). During trial, the state presented evidence that the defendant engaged in physical conduct, which was accompanied by the use of profanities. Specifically, the state presented the testimony of Stewart, who stated that she was present in a public park when accosted by the defendant and that after she had asked the defendant to leave the event, he grabbed her wrist and threw her arm down "abruptly." The defendant's physical actions caused a red mark on Stewart's arm and enough pain that she sought medical attention. The jury was free to consider that the defendant intended this harm as a natural result of his conduct. See *State* v. *Dijmarescu*, 182 Conn. App. 135, 154, 189 A.3d 111, cert. denied, 329 Conn. 912, 186 A.3d 707 (2018).

In sum, there was overwhelming evidence that the defendant's behavior was sufficient for the jury reasonably to have found that the defendant engaged in violent, tumultuous or threatening behavior in a public place. Therefore, we conclude that the state satisfied its burden of proving beyond a reasonable doubt that the defendant committed breach of the peace in the second degree.

The judgment is affirmed.

STATE OF CONNECTICUT *v.* DHATI COLEMAN (AC 42157)

Keller, Elgo and Devlin, Js.

Syllabus

Convicted, on a conditional plea of nolo contendere, of the crimes of assault in the first degree, robbery in the first degree and criminal possession of a firearm, the defendant appealed to this court, claiming, inter alia, that the trial court improperly denied his motions to dismiss the charges against him because he was not brought to trial within a reasonable period of time in violation of his right to a speedy trial under the sixth amendment and his right under the Interstate Agreement on Detainers (§ 54-186 et seq.) to a final disposition of his case within 180 days from the date on which he requested a speedy disposition. The defendant had been arrested in 2017 in connection with a shooting he was alleged to have committed in 2014. DNA was recovered from a cap that was left at the scene of the shooting. Shortly after the shooting, the police received information that the defendant had fled to Maine and obtained a warrant authorizing the taking of a DNA sample from him that was to be compared with the DNA sample from the cap. The DNA samples were not sent to the state's forensics laboratory until 2016, when the laboratory matched the defendant's DNA with that on the cap. In July, 2016, the police submitted to the state's attorney's office a draft arrest warrant application for the defendant, which was not signed by the affiant until February, 2017, and by the court until March, 2017, when the defendant was in federal custody in New Hampshire. The defendant was not returned to Connecticut and arrested until August, 2017. After the defendant entered his plea but prior to sentencing, he filed a second motion to dismiss, claiming that the state had failed to comply with the 180 day requirement for a final disposition of his case pursuant to § 54-186 et seq. The trial court denied the defendant's motion to dismiss, reasoning that there had been no objection to the course of the proceedings under § 54-186 et seq., and rendered judgment in accordance with the defendant's plea. *Held*:

1. The defendant could not prevail on his claim that his right to due process was violated because the state's three year delay in filing charges against him caused him actual substantial prejudice and was unreasonable and unjustifiable:

   a. The trial court properly concluded that the defendant failed to prove that actual substantial prejudice resulted from the preaccusation delay; the defendant's claim that he was prevented from gathering documentary, exculpatory evidence or that there was any witness who could have provided exculpatory testimony was speculative, and his assertion that he was unable to secure video surveillance from the area of the crime scene was unsupported by evidence that such surveillance video existed or that it would have been exculpatory.

b. The defendant's claim that the trial court improperly rejected his assertion that the state deliberately delayed his arrest to gain a tactical advantage over him was unavailing; it was not the role of this court to reexamine the evidence considered by the trial court or to construe it differently and in the light favorable to the defendant.

2. The defendant's express waiver of any claim stemming from the postarrest delay in bringing him to trial was fatal to his assertion of a violation of his rights to a speedy disposition of his case under the sixth amendment and § 54-186 et seq.

Submitted on briefs April 6—officially released July 21, 2020

Procedural History

Substitute information charging the defendant with two counts each of the crimes of assault in the first degree and robbery in the first degree, and with one count each of the crimes of larceny in the second degree, carrying a pistol without a permit, criminal possession of a pistol or revolver, criminal possession of a firearm and criminal possession of ammunition, brought to the Superior Court in the judicial district of New Haven, where the court, *Blue*, *J.*, denied the defendant's motion to dismiss; thereafter, the defendant was presented to the court, *Clifford*, *J.*, on a conditional plea of nolo contendere to one count each of assault in the first degree, robbery in the first degree and criminal possession of a firearm; subsequently, the court, *Clifford*, *J.*, denied the defendant's motion to dismiss and rendered judgment in accordance with the plea, from which the defendant appealed to this court. *Affirmed.*

Tamar R. Birckhead, assigned counsel, filed a brief for the appellant (defendant).

Kathryn W. Bare, assistant state's attorney, *Patrick J. Griffin*, state's attorney, and *Michael Pepper*, supervisory assistant state's attorney, filed a brief for the appellee (state).

Opinion

DEVLIN, J. The defendant, Dhati Coleman, appeals from the judgment of conviction, rendered after a condi-

tional[1] plea of nolo contendere, of assault in the first degree in violation of General Statutes § 53a-59 (a) (1), robbery in the first degree in violation of General Statutes § 53a-134 (a) (2) and criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1). On appeal, the defendant claims that the trial court should have dismissed the charges against him because (1) the three year delay between the date of the commission of the crimes in this case and his arrest (preaccusation delay) violated his right to due process under the fourteenth amendment to the United States constitution, and (2) once he was arrested, the state failed to bring him to trial within a reasonable period of time in violation of his right to a speedy trial under the sixth amendment to the United States constitution[2] and his right under the Interstate Agreement on Detainers (IAD), General Statutes § 54-186 et seq., to a final disposition of his case within 180 days from the date on which he requested a speedy disposition. We disagree and, accordingly, affirm the judgment of the trial court.

The defendant filed two motions to dismiss the charges against him. In denying his first motion to dismiss, the trial court, *Blue*, *J.*, set forth the following relevant factual

[1] General Statutes § 54-94a provides: "When a defendant, prior to the commencement of trial, enters a plea of nolo contendere conditional on the right to take an appeal from the court's denial of the defendant's motion to suppress or motion to dismiss, the defendant after the imposition of sentence may file an appeal within the time prescribed by law provided a trial court has determined that a ruling on such motion to suppress or motion to dismiss would be dispositive of the case. The issue to be considered in such an appeal shall be limited to whether it was proper for the court to have denied the motion to suppress or the motion to dismiss. A plea of nolo contendere by a defendant under this section shall not constitute a waiver by the defendant of nonjurisdictional defects in the criminal prosecution."

[2] The defendant also claims that his right to be brought to trial in a reasonable amount of time was violated under article first, § 8, of the Connecticut constitution. Because he did not, however, brief that claim, we do not address it. See, e.g., *Riddick* v. *Commissioner of Correction*, 113 Conn. App. 456, 468, 966 A.2d 762 (2009), appeal dismissed, 301 Conn. 51, 19 A.3d 174 (2011).

and procedural history. "[The defendant] was arrested for the crimes alleged in this case on August 30, 2017. The state subsequently filed a long form information charging [him] with two counts of assault in the first degree, two counts of robbery in the first degree, larceny in the second degree, carrying a pistol without a permit, criminal possession of a pistol or revolver, criminal possession of a firearm, and criminal possession of ammunition. The charges arise from the alleged shooting of one Martin Carpentino in New Haven on August 7, 2014. . . .

"Carpentino was shot in a residential area of New Haven on August 7, 2014. He drove to a gasoline station several blocks away and called 911. According to the arrest warrant application, 'Carpentino described the shooter as a black male, five foot, ten inches, tall, short curly hair, thin but not skinny, wearing a puffy green vest, and last seen fleeing in an unknown direction on foot.' A police canvass of the area of the shooting failed to turn up any witness to the shooting. Other clues were subsequently developed.

"DNA was recovered from a baseball cap left at the scene of the shooting and sent to the state forensic laboratory. On September 17, 2014, a DNA profile from the cap was entered into state and national databases. . . . [The defendant] also left a cell phone in a motor vehicle connected to the crime.

"On August 14, 2014, the police received information from an informant that [the defendant] was the shooter and had fled to Maine. As a result, on September 9, 2014, the court . . . signed a search and seizure warrant authorizing a DNA sample to be taken from [the defendant] and compared with the DNA sample taken from the cap. . . .

"[The defendant] was arrested on an unrelated drug charge in New Haven on September 9, 2014. The police obtained a DNA sample from him on that day. On December 23, 2014, [the defendant] entered a plea of

guilty to the drug charge and was sentenced by the court . . . to seven years, execution suspended after two years, followed by three years of conditional discharge, to be served concurrently with his 'present sentence.' . . .

"On September 22, 2014, the police showed Carpentino an array of photographs, including a photograph of [the defendant]. Carpentino said that he was '90 percent sure' that the man depicted in [the defendant's] photograph was his assailant.

"The investigation then stopped for over a year. In December, 2015, Brian Diange, the New Haven [police] detective in charge of the shooting case, realized that the DNA sample taken from [the defendant] on September 9, 2014, had never been sent to the state forensic laboratory for comparison with the DNA taken from the baseball cap. A formal request for analysis was submitted on February 9, 2016. . . . On March 18, 2016, the laboratory matched [the defendant's] DNA with that on the cap.

"On July 14, 2016, the New Haven police submitted a draft arrest warrant to the office of the New Haven State's Attorney. The personnel in that office were not satisfied with the original draft [of the warrant], and discussions between the police and the state's attorney continued for several months. On February 28, 2017, a final draft of the arrest warrant application was signed by the affiant. On March 3, 2017, the court . . . signed the warrant.

"By this time, [the defendant] was in federal custody in New Hampshire. On May 31, 2017, the state's attorney received a letter from [the defendant] requesting a speedy trial under the [IAD]. On August 30, 2017, [the defendant] was returned to Connecticut and arrested for the crimes now in question.

"[The defendant] was arraigned in the Superior Court on August 31, 2017. On September 24, 2017, he agreed

to toll his rights to a speedy trial under the constitution and the [IAD]. A series of such waivers has continued, with minor interruptions, to the present time." (Citations omitted.)

On January 19, 2018, the defendant filed a memorandum of law in support of a motion to dismiss that he subsequently filed on January 24, 2018 pursuant to General Statutes § 54-193 (b). The defendant argued that his right to due process under the fourteenth amendment to the United States constitution was violated because the preaccusation delay of three years was deliberate and unreasonable and caused him to suffer substantial prejudice by denying him "the opportunity for a global resolution of [all of] the claims against him as well as the opportunity to properly develop a defense to the claims [at issue in this case]."

On January 24, 2018, the day that the defendant filed his motion to dismiss, the court commenced an evidentiary hearing on it, which continued on March 20 and 29, 2018. On April 27, 2018, the defendant filed another memorandum of law in support of his motion to dismiss, adding that the preaccusation delay resulted in the violation of his right to a speedy trial under the sixth amendment to the United States constitution. He also added that the delay violated his rights under the IAD.[3] On May 2, 2018, the state filed an objection to the defendant's motion, and the court heard argument on May 17, 2018. By way of a memorandum of decision filed May 18, 2018, the court denied the defendant's motion to dismiss on the grounds that the defendant had failed to prove that the preaccusation delay caused him actual substantial prejudice or that the reasons for that delay were wholly unjustifiable. The court further

[3] The precise nature of the defendant's claim under the IAD in his first motion to dismiss is difficult to ascertain. He did not, however, argue in his first motion to dismiss that his right to a final disposition within 180 days had been violated.

found that the defendant had waived any claim as to postarrest delay and, thus, rejected his claim under the IAD.

On June 1, 2018, the defendant entered conditional pleas of nolo contendere to assault in the first degree in violation of § 53a-59 (a) (1), robbery in the first degree in violation of § 53a-134 (a) (2) and criminal possession of a firearm in violation of § 53a-217 (a) (1). The court ordered a presentence investigation, over the defendant's objection,[4] and continued the case to August 9, 2018, for sentencing.

On August 7, 2018, the defendant filed a second motion to dismiss on the ground that the state failed to comply with the "180 day requirement of a final disposition of the defendant's case" under the IAD.

On August 9, 2018, at the sentencing hearing, the court, *Clifford*, *J.*, first addressed the defendant's second motion to dismiss. The court orally denied the defendant's motion, reasoning: "[Under the IAD] [t]he trial must commence within 180 days, obviously, unless [the defendant enters] pleas. I don't believe the sentencing also must occur within 180 days. The whole purpose of the statute is that these things be resolved within a time period. Resolved, to me, is either a trial or a plea. Because, what if it's a trial that starts on the 150th day and the trial takes three months; it's a major case, then you're well beyond 180 days. . . .

"No one objected on the record. The only one who objected was the defendant [who] did not want a presentence report. No one indicated that it was violating the [IAD]. . . .

"Obviously a presentence [investigation] report is mandated, normally. It can be waived under certain circumstances. It takes two sides to waive something.

[4] The defendant objected to the presentence investigation on the sole ground that it was a "waste of the court's time."

It did not happen here. . . . I will deny the motion to dismiss . . . .''

The trial court then imposed on the defendant a total effective sentence of nine years incarceration, followed by five years of special parole, and ordered that he receive credit for jail time he had served since August 30, 2017, the date that he was returned to Connecticut to face the charges in this case. This appeal followed.

On appeal, the defendant challenges the denial of both of his motions to dismiss the charges against him. ''Because a motion to dismiss effectively challenges the jurisdiction of the court, asserting that the state, as a matter of law and fact, cannot state a proper cause of action against the defendant, our review of the court's legal conclusions and resulting denial of the defendant's motion to dismiss is de novo. . . . Factual findings underlying the court's decision, however, will not be disturbed unless they are clearly erroneous. . . . The applicable legal standard of review for the denial of a motion to dismiss, therefore, generally turns on whether the appellant seeks to challenge the legal conclusions of the trial court or its factual determinations.'' (Citation omitted; internal quotation marks omitted.) *State* v. *Samuel M.*, 323 Conn. 785, 794–95, 151 A.3d 815 (2016). With these principles in mind, we address the defendant's claims in turn.

I

The defendant first claims that the trial court erred in rejecting his argument that his right to due process was violated because the three year preaccusation delay caused him actual substantial prejudice and was unreasonable and unjustifiable.[5] We are not persuaded.

[5] Although the defendant argued in his motion to dismiss that his sixth amendment right to a speedy trial was violated by the preaccusation delay, his sixth amendment claim on appeal is limited to the time period following his arrest.

"The role of due process protections with respect to preaccusation delay has been characterized as a limited one. . . . [T]he [d]ue [p]rocess [c]lause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment. . . . This court need only determine whether the action complained of . . . violates those fundamental conceptions of justice which lie at the base of our civil and political institutions . . . and which define the community's sense of fair play and decency . . . . The due process clause has not replaced the applicable statute of limitations . . . [as] . . . the primary guarantee against bringing overly stale criminal charges. . . .

"[T]o establish a due process violation because of preaccusation delay, the defendant must show both that actual substantial prejudice resulted from the delay and that the reasons for the delay were wholly unjustifiable, as where the state seeks to gain a tactical advantage over the defendant. . . . [P]roof of prejudice is generally a necessary but not sufficient element of a due process claim . . . . [Additionally] the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." (Citation omitted; internal quotation marks omitted.) *State* v. *Pugh*, 190 Conn. App. 794, 806–807, 212 A.3d 787, cert. denied, 333 Conn. 914, 217 A.3d 635 (2019).

A

The defendant first challenges the trial court's determination that he failed to prove that he suffered actual substantial prejudice as a result of the preaccusation delay.[6] As to prejudice, the trial court reasoned: "No credible evidence supports [the defendant's] contention

[6] The trial court concluded that the defendant was arrested prior to the expiration of the five year statute of limitations applicable to the crimes with which he was charged. See General Statutes § 54-193 (b). The defendant has not challenged that conclusion.

[that actual substantial prejudice resulted from the preaccusation delay] here. The defendant's claim in this regard rests on the testimony of his investigator, Kevin Johnson, who testified that he was hired on October 5, 2017, and was subsequently unable to locate potential witnesses to the shooting in question. Johnson was not, however, a credible witness. He testified on direct examination that Darryl Wilson, a potential witness, 'didn't want to talk' to him. On cross-examination, Johnson was forced to admit that Wilson was, in fact, willing to talk to him but did not know anything about the incident. When pressed by the court, Johnson failed to comprehend the difference between these two propositions. In the court's view, this brings the credibility of Johnson's entire testimony into serious question.

"Even if Johnson's entire testimony were to be believed, however, nothing in the evidence would substantiate a finding that evidence helpful to the defendant would have been discovered had he been arrested earlier. There is, for example, no claim that an alibi witness has died or disappeared since the time of the shooting. Any claim that potential witnesses, once located, would have provided evidence helpful to the defendant lies wholly in the realm of speculation."

On appeal, the defendant renews his argument that the preaccusation delay deprived him of the opportunity to develop a defense to the charges against him. He reiterates his claim that he was unable to locate witnesses to the crime because many of them had relocated. The trial court rejected the defendant's claim on the ground that Johnson was not credible when he testified about his inability to locate and interview witnesses. Because the trial court is the sole arbiter of credibility; see *Pena* v. *Gladstone*, 168 Conn. App. 175, 187, 146 A.3d 51 (2016) ("[q]uestions of whether to believe or to disbelieve a competent witness are beyond our review" (internal quotation marks omitted)); its finding in this regard must stand.

Moreover, as the trial court aptly noted, the defendant failed to prove that there was any witness who could have provided exculpatory testimony on his behalf and, thus, that his claim in this regard was merely speculative. The defendant's claim that the preaccusation delay prevented him from gathering documentary evidence that "could have been exculpatory" is also speculative. He contends that he was unable to secure video surveillance from the gas station, traffic cameras or neighboring businesses that "could have included critical information that was exculpatory or otherwise pertinent to [his] defense . . . ." The defendant's argument is unsupported by any evidence that such surveillance video ever existed or that it would have been exculpatory. Consequently, his claim in this regard also is unavailing. Accordingly, the trial court properly concluded that the defendant failed to prove that actual substantial prejudice resulted from the preaccusation delay in this case.[7]

B

The defendant also challenges the trial court's conclusion that he failed to prove that the reasons for the preaccusation delay were wholly unjustifiable. In so concluding, the trial court first noted: " '[P]rosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied that they will be able to establish the suspect's guilt beyond a reasonable doubt.' *United States* v. *Lovasco*, 431 U.S. [783] 791, [97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977)]. . . .

[7] The defendant also argues that the preaccusation delay prevented him from including the charges in this case with his federal charges in negotiating a global resolution of them. He further contends that the state was able to use the federal charges against him at his state sentencing hearing and that the preaccusation delay prevented him from participating in rehabilitative programs in federal prison that otherwise might have been available to him. Although these may have been consequences of the defendant's arrest in this case, they cannot reasonably be construed as due process violations arising from the preaccusation delay.

" 'There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the [f]ourth [a]mendment if they act too soon, and a violation of the [s]ixth [a]mendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction.' *Hoffa* v. *United States*, 385 U.S. 293, 310, [87 S. Ct. 408, 17 L. Ed. 2d 374] (1966)."

Applying the foregoing principles to the facts of this case, the court reasoned: "Although the police arguably had probable cause to arrest [the defendant] prior to the actual time of his arrest, the police cannot be faulted for doing a thorough investigation, including [the] DNA analysis. Similarly, the state's attorney cannot be faulted for requesting revisions in the initial arrest warrant application to strengthen the force of that application.

"The one portion of the preaccusation delay that, at least with the benefit of hindsight, is subject to criticism is the seventeen month delay between the taking of [the defendant's] DNA on September 9, 2014, and the submission of that DNA to the state forensic laboratory on February 9, 2016. No legitimate reason for this delay appears in the record. This was, however, a delay caused by negligence rather than recklessness or a tactical decision to disadvantage the defendant. . . .

"Nothing remotely resembling an improper reason for the preaccusation delay in question here appears in the record. The defendant has consequently failed to establish either prong of the applicable due process test."

On appeal, the defendant argues that the trial court erred in rejecting his claim that the state deliberately delayed his arrest to gain a tactical advantage over him. In so arguing, the defendant essentially asks this court to reexamine the evidence that was considered by the trial court, but to construe that evidence differently and in the light favorable to him. It is not the role of this court to do so. "The function of an appellate court is to review, and not to retry, the proceedings of the trial court." (Internal quotation marks omitted.) *LM Ins. Corp.* v. *Connecticut Dismanteling, LLC*, 172 Conn. App. 622, 638, 161 A.3d 562 (2017).

"We do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached . . . nor do we retry the case or pass upon the credibility of the witnesses." (Internal quotation marks omitted.) *In re Brooklyn O.*, 196 Conn. App. 543, 548, A.3d (2020). "Weighing the evidence and judging the credibility of the witnesses is the function of the trier of fact and this court will not usurp that role." (Internal quotation marks omitted.) *Iino* v. *Spalter*, 192 Conn. App. 421, 478, 218 A.3d 152 (2019). Accordingly, the defendant's challenge to the trial court's determination that the preaccusation delay was not unjustifiable must fail.

II

The defendant also claims that, once he was arrested, the state failed to bring him to trial within a reasonable period of time in violation of his right to a speedy trial under the sixth amendment to the United States constitution and his right under the IAD to a final disposition of his case within 180 days from the date on which he requested a speedy disposition. We disagree.

The following additional history is relevant to the defendant's claims. On May 17, 2018, at the hearing on the first motion to dismiss, the following colloquy occurred:

"The Court: So, if I could ask just that; it's my understanding that your client is arraigned on August 31, 2017 . . . in Connecticut, and then he's brought to part A, he's brought before Judge Clifford, and starting on September . . . 24th [or] it could be [September] 29th, the speedy trial—he began a series of waivers of his right to a speedy trial because, at that point, he didn't want—he might've wanted it dismissed but he didn't want a speedy trial; is that fair to say?

"[Defense Counsel]: That's correct, Your Honor, yes.

"The Court: And that would seem—you still have your due process argument in terms of what happened prior to that time, but in terms of subsequent—

"[Defense Counsel]: There's no claim to any subsequent, Your Honor.

"The Court: Okay. So . . . it would really seem that this boils down to due process, correct, incorrect?

"[Defense Counsel]: Correct, Your Honor, yes."

On the basis of the foregoing, the trial court concluded that "the defendant conceded that he does not complain of any postarrest delay" and, thus, that he waived any claim arising from the period of time following his arrest in this case. We agree.

"[W]aiver is [t]he voluntary relinquishment or abandonment—express or implied—of a legal right or notice. . . . [W]aiver may be effected by action of counsel. . . . When a party consents to or expresses satisfaction with an issue at trial, claims arising from that issue are deemed waived and may not be reviewed on appeal. . . . Thus, [w]aiver . . . involves the idea of assent, and assent is an act of understanding. . . . The rule is applicable that no one shall be permitted to deny that he intended the natural consequences of his acts and conduct. . . . In order to waive a claim of law it is not necessary . . . that a party be certain of the correctness of the claim and its legal efficacy. It is enough

if he knows of the existence of the claim and of its reasonably possible efficacy. . . . Connecticut courts have consistently held that when a party fails to raise in the trial court the constitutional claim presented on appeal and affirmatively acquiesces to the trial court's order, that party waives any such claim. . . .

"Both our Supreme Court and this court have stated the principle that, when a party abandons a claim or argument before the trial court, that party waives the right to appellate review of such claim because a contrary conclusion would result in an ambush of the trial court . . . . This principle applies to review pursuant to [*State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989)]. [A] constitutional claim that has been waived does not satisfy the third prong of the *Golding* test because, in such circumstances, we simply cannot conclude that injustice [has been] done to either party . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Grasso*, 189 Conn. App. 186, 225–26, 207 A.3d 33, cert. denied, 331 Conn. 928, 207 A.3d 519 (2019).

The defendant, for the first time, on appeal, raises his claim that he was denied his sixth amendment right to a speedy trial by virtue of an alleged delay following his arrest. The defendant has not addressed his failure to raise this issue before the trial court and has not asked for review of this claim under *State* v. *Golding*, supra, 213 Conn. 239–40, as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).[8] Even if

[8] Under *Golding*, as modified by *In re Yasiel R.*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40.

he had sought *Golding* review, to which he arguably would be entitled on this claim of constitutional magnitude, his express waiver of any claim stemming from the postarrest delay is fatal to his claim.[9] In light of that express waiver, his claim under the IAD is likewise without merit.[10]

Accordingly, we conclude that the trial court properly denied the defendant's motions to dismiss.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JAMAL SUMLER (AC 43024)

Prescott, Devlin and Bishop, Js.

Syllabus

Convicted, after a jury trial, of the crimes of murder, conspiracy to commit robbery in the first degree and carrying a pistol without a permit, and, after a trial to the court, of the crime of criminal possession of a pistol or revolver, the defendant appealed. The defendant's conviction stemmed from an incident in which he shot and killed a convenience store clerk while he and another individual were robbing the store. Prior to trial, the defendant filed a motion in limine to preclude the state from introducing testimony from his former probation officer, D, regarding her identification of him in a surveillance video from a grocery store, and a motion to suppress two statements that he made during a conversation with a

[9] We note that, despite claiming in his statement of issues and in the conclusion of his appellate brief that the trial court erred in concluding "that the defendant had entirely waived the IAD right by conceding that he did not allege any postarrest delay," the defendant did not brief this claim.

[10] Because the defendant expressly waived his claim to any alleged postarrest delay, we need not address his various arguments pertaining to the commencement of that 180 period—whether it began on the date that he requested a speedy disposition under the IAD, the date that he was taken into custody in Connecticut, the date of his first court appearance or even the date that he became a suspect in the subject crimes. Likewise, we need not resolve the issue of whether "final disposition" under the IAD occurred when the defendant entered his nolo contendere plea or upon sentencing.

to suppress two statements that he made during a conversation with a police officer while he was being transported to the police department following his arrest for violation of probation. Following a hearing, the trial court denied both motions. *Held*:

1. The defendant's unpreserved claim that the trial judge violated his constitutional right to due process by improperly failing to recuse himself from presiding over the defendant's trial because he previously had signed search and seizure and arrest warrants against the defendant in this case was unavailing: because the defendant did not assert actual bias on the part of the trial judge, his claim necessarily failed, and, therefore, he could not prevail pursuant to *State* v. *Golding* (213 Conn. 233), as he did not demonstrate the existence of a constitutional violation; moreover, this court was not persuaded by the defendant's assertion that the trial judge's failure to recuse himself constituted plain error because, at minimum, it created an appearance of impropriety, as the judge's conduct was not expressly prohibited by our rules, statutes, or case law, and, therefore, it did not constitute plain error or even error at all.
2. The trial court did not abuse its discretion in admitting D's testimony identifying the defendant in the surveillance video from the grocery store; contrary to the defendant's contention that D's testimony constituted her opinion on an ultimate issue reserved to the jury, namely, his criminal culpability, in violation of the applicable rule (§ 7-3) of the Connecticut Code of Evidence, and, although the defendant's presence in the grocery store may have been relevant to his participation in the acts that were committed at the convenience store, D did not express an opinion regarding the identity of the person who committed the crimes at the convenience store, and, therefore, her testimony did not constitute a legal opinion about the defendant's guilt as to the crimes with which he was charged.
3. The defendant could not prevail on his claim that the trial court improperly denied his motion to suppress the statements he made to a police officer while he was being transported to the police department following his arrest, which was based on his claim that those statements were made during custodial interrogation without his being advised of his rights pursuant to *Miranda* v. *Arizona* (384 U.S. 436); the trial court properly determined that the officer's conversation with the defendant did not constitute custodial interrogation for *Miranda* purposes because the officer's questions were not reasonably likely to elicit incriminating statements from the defendant.

Argued March 9—officially released July 21, 2020

Procedural History

Substitute information charging the defendant with the crimes of felony murder, murder, conspiracy to commit robbery in the first degree, criminal possession of

a pistol or revolver and carrying a pistol without a permit, brought to the Superior Court in the judicial district of New Haven, where the court, *Vitale*, *J.*, granted the defendant's motion to sever the charge of criminal possession of a pistol or revolver; thereafter, the court denied the defendant's motions to preclude certain evidence; subsequently, the charges of felony murder, murder, conspiracy to commit robbery in the first degree and carrying a pistol without a permit were tried to the jury before *Vitale*, *J.*, and the charge of criminal possession of a pistol or revolver was tried to the court; verdict and judgment of guilty; thereafter, the court vacated the conviction of felony murder, and the defendant appealed. *Affirmed.*

Naomi T. Fetterman, with whom, on the brief, was *Peter G. Billings*, for the appellant (defendant).

Laurie N. Feldman, deputy assistant state's attorney, with whom, on the brief, were *Patrick Griffin*, state's attorney, and *Lisa D'Angelo*, assistant state's attorney, for the appellee (state).

Opinion

PRESCOTT, J. The defendant, Jamal Sumler, appeals from the judgment of conviction rendered following a trial in which a jury found him guilty of felony murder in violation of General Statutes § 53a-54c, murder in violation of General Statutes § 53a-54a (a), conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-134 (a) (2), and carrying a pistol without a permit in violation of General Statutes § 29-35 (a), and the trial court, *Vitale*, *J.*, found him guilty of criminal possession of a pistol or revolver in violation of General Statutes § 53a-217c (a) (1). The defendant claims that the court (1) improperly failed to recuse itself from the defendant's trial because Judge Vitale previously had signed warrants for the defendant's arrest and for the search of his home, (2) abused

its discretion by allowing opinion testimony of the defendant's identity on video surveillance footage, and (3) improperly denied the defendant's motion to suppress statements that he made to a police officer while being transported to the police department. We disagree and, therefore, affirm the judgment.

The following facts, which reasonably could have been found by the respective finder of fact, and procedural history are relevant to this appeal. On April 6, 2015, the defendant and two other individuals, Dwayne "Hoodie" Sayles and Leighton Vanderberg, were travelling together in a green Ford Focus driven by Vanderberg. The defendant sat in the front passenger seat and was wearing sweatpants, a gray hoodie, and dark sneakers. Sayles sat in the backseat and was wearing gray sweatpants, a white T-shirt, and white sneakers.[1]

The three men drove to Eddy's Food Centre (Eddy's) located at 276 Howard Avenue in Bridgeport. Once they arrived, the defendant exited the car, while Vanderberg and Sayles remained inside. Before going into the store, the defendant removed a black revolver from his waistband and put it in the center console of the car. He went into Eddy's for a few minutes, returned to the car, and then went back into the store a second time. Upon his return to the car the second time, the defendant handed Sayles a pair of black gloves. He also retrieved his revolver and put it in the waistband of his sweatpants.

Thereafter, the three men drove to the Fair Haven section of New Haven. Vanderberg pulled onto Kendall Street toward Fulton Terrace and parked the car, intending to smoke "dutches."[2] Not having enough cigars, someone suggested that they buy more cigars from a nearby store. The defendant and Sayles then

[1] At some point, Vanderberg gave Sayles a navy blue sweatshirt from his car, which Sayles put on over his white T-shirt.

[2] A "dutch" is a marijuana filled cigar.

exited the vehicle and walked up Fulton Terrace, with the defendant a few steps in front of Sayles, while Vanderberg remained in the car. The defendant entered the Pay Rite convenience store (Pay Rite) connected to a CITGO gas station located at 262 Forbes Avenue.

Pay Rite surveillance videos captured the defendant, wearing a black mask, black gloves, a gray hoodie, gray sweatpants, and dark sneakers, walk to the counter and point a gun at the clerk, Sanjay Patel, the victim in this case. While pointing the gun at the victim, the defendant walked behind the counter. The surveillance footage captured a second individual—later determined to be Sayles—dressed in a black mask and black gloves, a navy blue hoodie, black sweatpants, and white sneakers, entering the store and walking up to the counter. The victim struggled with the defendant and picked up a wooden stool. Sayles then pulled out a gun, aimed it at the victim, fired, and put the gun away in his hoodie pocket. The defendant, pointing his gun at the victim, used his other hand to pass items over the counter to Sayles, who put the items in his pocket before turning and leaving the store. As the defendant bent down to take more items, the victim hit him on his upper body with the stool. The defendant then shot the victim and ran out of the store. The victim subsequently died from his injuries.[3]

A witness, Jonathan Gavilanes, who was across the street from Pay Rite with his father, heard the gunshots and saw flashes. Subsequently, he saw the defendant and Sayles run out of the store onto Fulton Terrace.

[3] The cause of death was determined to be gunshot wounds from five bullets in his chest and abdomen and one in his hand. Jill Therriault, who worked in the division of scientific services of the Department of Emergency Services and Public Protection as a forensic science examiner in the firearm and toolmark unit, testified that the bullets had been fired from two different guns. One of the guns was .25 caliber and the other was .38 caliber.

Gavilanes' father checked inside Pay Rite and directed Gavilanes to call 911.[4]

Meanwhile, Sayles was the first to return to the car; he was still wearing the black gloves and holding a box of cigars. The defendant followed soon thereafter. The three men then drove toward Church Street South, an apartment complex where Sayles' apartment was located. After they parked in a nearby parking lot, Sayles threw the navy blue sweatshirt that he had been wearing into a dumpster. He also took the cigars out of their box and threw the box in the dumpster. Sayles then gave Vanderberg some cigars and twenty dollars as a contribution to gas money.

The three men then went to Sayles' apartment. Once inside, Vanderberg asked Sayles and the defendant about what had happened at Pay Rite. At first, neither individual told Vanderberg any specific details regarding the incident. Later, however, the defendant admitted to Vanderberg that he had "stretched" the store clerk, which Vanderberg testified at trial meant to him that the defendant had robbed the clerk.[5]

[4] The New Haven Police Department responded to a report that a person had been shot at Pay Rite. After arriving at the scene, Officer Elsa Berrios observed multiple cigars on the sidewalk at the corner of Fulton Terrace and Kendall Street; they were collected and photographed as part of the investigation.

[5] The following line of questioning between Vanderberg and the prosecutor occurred at trial:

"Q. It was just you and the defendant?

"A. Yes.

"Q. Okay. Tell us how that conversation came to be, what you said?

"A. Well, we was—when I was leaving out, he was like everybody come out here and smoke real quick. Something like that. And I just kept looking at him. I was like, yo, what really happened? What are you playing? He was like, nah, it wasn't really much. He was like just some—like some silly shit. I ended up like, I mean, robbing him. That's it.

"Q. He ended up—he said he ended up robbing him? Is that the exact words that he used?

"A. More like stretched him. . . .

"Q. Well what I'm asking you, is that what he said, stretched him? And what does that mean to you?

"A. Robbed him."

Vanderberg did not learn of the death of the victim until the next morning, when one of his friends asked if he had heard about it. He later saw news coverage of the incident at Pay Rite. After seeing the coverage, Vanderberg contacted the police and provided a statement on April 14, 2015.[6] When shown still photographs from the surveillance video from Pay Rite at the time of the incident, Vanderberg identified the subjects as the defendant and Sayles. On April 15, 2015, the police also obtained video surveillance footage from Eddy's, which showed the defendant purchasing a pair of dark colored gloves before leaving the store, reentering the store shortly thereafter, and purchasing a second pair of dark colored gloves.

On April 17, 2015, the defendant was arrested at his home on a warrant for violating his probation. The police immediately applied for a search and seizure warrant for his home, asserting that there was probable cause to believe that evidence of the robbery and murder that took place at Pay Rite would be found therein. The court, *Vitale, J.*, reviewed the application and issued a search and seizure warrant for the defendant's home.[7]

On May 14, 2015, the police submitted an application for an arrest warrant, asserting that probable cause existed to charge the defendant for the robbery and murder of the victim. Judge Vitale also reviewed this application and issued the arrest warrant. The state subsequently filed a long form information charging the defendant with felony murder, murder, conspiracy to commit robbery in the first degree, criminal possession of a pistol or revolver, and carrying a pistol without a permit.

[6] Vanderberg pleaded guilty to one count of aiding and abetting robbery in the first degree in another matter and agreed to testify for the state in this matter pursuant to a plea agreement.

[7] The police executed the search and seizure warrant at the defendant's home and seized, among other things, the following items as evidence: a plastic bag containing nine millimeter rounds and .38 caliber rounds, a pair of dark gray sweatpants, black knit gloves, and a black face mask.

The defendant elected a jury trial but moved to sever the count alleging criminal possession of a pistol or revolver and sought a bench trial on that count.[8] The motion was granted, and the state filed two substitute informations.

Prior to trial, the defendant also filed a motion in limine to preclude the state from introducing testimony from the defendant's former probation officer, Jayme DeNardis, concerning her identification of the defendant in the Eddy's surveillance footage. Citing *State* v. *Finan*, 275 Conn. 60, 881 A.2d 187 (2005), the defendant argued that DeNardis' testimony was inadmissible because it pertained to an ultimate issue of fact for the trier, namely, whether the defendant was the individual who committed the crimes. The court denied the motion in limine.

The defendant also filed a motion to suppress two statements that he made to the police following his arrest but before he was advised of his constitutional rights: "I'm infatuated with guns," and "I always wanted to be a bank robber." The defendant argued that the admission of these statements would infringe on his *Miranda* rights.[9] The court denied the motion to suppress.

The trial began on October 31, 2017, and concluded on November 7, 2017. The jury found the defendant guilty of all counts submitted to it.[10] The court found the

[8] The defendant stipulated that he had been convicted of a felony prior to April 6, 2015, and, therefore, the court should consider that element of the count as proven.

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

[10] Prior to sentencing, the court vacated the conviction of felony murder, citing *State* v. *Polanco*, 308 Conn. 242, 61 A.3d 1084 (2013), *State* v. *Roberts*, 158 Conn. App. 144, 118 A.3d 631 (2015), and *State* v. *Benefield*, 153 Conn. App. 691, 103 A.3d 990 (2014), cert. denied, 315 Conn. 913, 106 A.3d 305, cert. denied, U.S. , 135 S. Ct. 2386, 192 L. Ed. 2d 172 (2015). The court stated: "Pursuant to those cases, the court vacates the conviction herein for felony murder as violative of double jeopardy. That conviction

defendant guilty of the charge of criminal possession of a pistol or revolver. The defendant subsequently was sentenced to a total effective sentence of ninety years of incarceration. This appeal followed.[11]

I

The defendant first claims that the trial judge improperly failed to recuse himself from presiding over the defendant's trial after having signed search and seizure and arrest warrants against the defendant in this matter. This claim is unpreserved because the defendant failed to seek the disqualification of Judge Vitale in the trial court. Without conceding that the claim is unpreserved, the defendant asserts that he nonetheless would be entitled to prevail on this claim pursuant to the standards set forth in *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), or pursuant to the plain error doctrine. See *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 150, 84 A.3d 840 (2014). Specifically, the defendant asserts that the court's conduct "deprived [him] of a fair determination of guilt, in violation of his rights under article first, § 8, of the Connecticut constitution and his right to due process of law under the state and federal constitutions, U.S. Const., amends. V [and] XIV; Conn. Const., art. I, §§ 8 [and] 9." We disagree.

Generally, we do not consider claims of error on appeal that were not properly raised before the trial court. See Practice Book § 60-5. Unpreserved claims of constitutional error, however, may be reviewed when

may be reinstated if [the defendant's] conviction for murder is subsequently reversed for reasons not related to the viability of the vacated conviction."

[11] This appeal was transferred to this court from our Supreme Court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1 on June 6, 2019.

they allege the violation of a constitutional right. Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40.

Specifically, as it relates to judicial disqualification, the question under *Golding* "is not whether the trial judge's failure to disqualify himself constituted an abuse of discretion, but whether that failure resulted in a violation of the defendant's constitutional right to due process. The United States Supreme Court consistently has held that a judge's failure to disqualify himself or herself will implicate the due process clause only when the right to disqualification arises from *actual bias* on the part of that judge." (Emphasis in original.) *State* v. *Canales*, 281 Conn. 572, 593–94, 916 A.2d 767 (2007). "Recusal is required when, objectively speaking, the probability of actual bias on the part of the judge or [decision maker] is too high to be constitutionally tolerable." (Internal quotation marks omitted.) *Rippo* v. *Baker*, U.S. , 137 S. Ct. 905, 907, 197 L. Ed. 2d 167 (2017).

In the present case, the defendant fails to allege any actual bias on the part of the trial judge. In his appellate brief, the defendant points to the existence of "an appearance that the judge was not fair and impartial in this case and that is contrary to the appearance of justice." The law is clear, however, that the mere appearance of bias is insufficient to implicate a due process violation. See *State* v. *Canales*, supra, 281 Conn.

594. Because the defendant has not asserted actual bias on the part of Judge Vitale, his claim that his constitutional right to due process was violated necessarily fails. See id. Therefore, the defendant cannot prevail pursuant to *Golding* because he has not demonstrated the existence of a constitutional violation.

We turn next to the defendant's argument that Judge Vitale's failure to recuse himself as the trial judge and as the trier of fact with respect to the charge of criminal possession of a pistol or revolver despite his earlier role in signing the search and seizure and arrest warrants constitutes plain error because, at a minimum, it created an appearance of impropriety. We disagree.

"An appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is patent [or] readily [discernible] on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . This determination clearly requires a review of the plain error claim presented in light of the record. . . . In *State* v. *Fagan*, [280 Conn. 69, 87, 905 A.2d 1101 (2006), cert. denied, 549 U.S. 1269, 127 S. Ct. 1491, 167 L. Ed. 2d 236 (2007)], we described the two-pronged nature of the plain error doctrine: [An appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is *both* so clear *and* so harmful that a failure to reverse the judgment would result in manifest injustice." (Emphasis in original; internal quotation marks omitted.) *State* v. *Jamison*, 320 Conn. 589, 596–97, 134 A.3d 560 (2016).

The defendant concedes that "[t]here is no statute or rule that expressly prohibits a judge who issues an arrest warrant or search warrant for a particular defendant, from later presiding at that defendant's trial." Nonetheless, he seems to argue that, under the totality of the circumstances, the court's failure to recuse itself

constitutes a violation of the Code of Judicial Conduct and, thereby, a violation of Practice Book § 1-22 (a).

Practice Book § 1-22 (a) provides in relevant part: "A judicial authority shall, upon motion of either party or upon its own motion, be disqualified from acting in a matter if such judicial authority is disqualified from acting therein pursuant to Rule 2.11 of the Code of Judicial Conduct . . . ." Rule 2.11 of the Code of Judicial Conduct expressly enumerates situations that require disqualification, although they are not exhaustive.[12] The defendant argues that the provision in rule 2.11 (a) that a judge shall disqualify himself when he has a personal bias or personal knowledge of facts in dispute is applicable in this matter. In particular, he argues that by reviewing and signing the search and seizure and arrest warrants, Judge Vitale necessarily reached conclusions about the evidence in the warrants, including the credibility of the state's witnesses. These circumstances, the defendant contends, give rise to an appearance of impropriety as contemplated by rule 2.11.

Although rule 2.11 (a) of the Code of Judicial Conduct instructs that a judge shall disqualify himself or herself when he or she has a personal bias or personal knowledge of facts in dispute, our case law has explicitly clarified that, to require recusal, a judge's potential bias "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."

[12] Rule 2.11 (a) of the Code of Judicial Conduct provides in relevant part: "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding. . . . (4) The judge has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy."

(Internal quotation marks omitted.) *Tracey* v. *Tracey*, 97 Conn. App. 278, 283–84, 903 A.2d 679 (2006). "With certain well-defined exceptions . . . a judge's participation in the preliminary stages of a case, and the knowledge he or she thereby gains, will not ordinarily preclude his or her continued participation in the same case thereafter." (Footnote omitted.) *State* v. *Rizzo*, 303 Conn. 71, 119–20, 31 A.3d 1094 (2011), cert. denied, 568 U.S. 836, 133 S. Ct. 133, 184 L. Ed. 2d 64 (2012).[13]

In the present matter, to the extent that Judge Vitale learned of facts from the warrant applications that were not introduced at trial, and, to the extent that he made preliminary determinations for purposes of the warrants, his act of presiding over the defendant's jury trial and serving as the trier of fact on one of the charges, despite such involvement in the earlier proceedings, is not expressly prohibited by our rules, statutes, or case law. Accordingly, we are not persuaded that the court's conduct was plain error, or even error at all.

II

The defendant next claims that the court abused its discretion by denying his motion in limine to preclude DeNardis from identifying him in a still photograph and a surveillance video from Eddy's, because her "testimony . . . constituted inadmissible lay opinion as to the guilt of the defendant" under *State* v. *Finan*, supra, 275 Conn. 66, and § 7-3 (a) of the Connecticut Code of Evidence. We disagree.

[13] A judge is prohibited from presiding over a proceeding in the following circumstances, as outlined in *Rizzo*: (1) in the case of a court trial, after a new trial is granted or judgment is reversed on appeal and, in the case of a jury trial, after a new trial is granted, (2) hearing a motion attacking the validity or sufficiency of an arrest warrant that the judge signed, (3) a trial for nonsummary contempt charges that arose before the judge, (4) a matter in which the judge previously acted as counsel, (5) a trial and sentencing following the judge's participation in plea negotiations that were unsuccessful, (6) a civil trial in which the judge engaged in settlement discussions. *State* v. *Rizzo*, supra, 303 Conn. 119 n.38.

The following additional facts are relevant to this issue. On April 17, 2015, detectives met with DeNardis, the defendant's previous probation officer.[14] DeNardis viewed a still photograph from video surveillance footage captured from Eddy's on April 6, 2015. She signed the photograph and identified the defendant as the individual in the footage and as being one of her probationers. The defendant filed a motion in limine to preclude DeNardis from testifying at trial as to the identity of the individual captured on surveillance video footage from Eddy's. He claimed that her identification of him in the video would, pursuant to *Finan*, constitute improper testimony as to "the ultimate issue in question: identity."

A hearing was held on October 26, 2017, during which the state presented DeNardis and Detective Christopher Perrone as witnesses.[15] The defendant reiterated his objection to the admission of DeNardis' proffered testimony on the basis that it constitutes her opinion about the ultimate issue of fact—whether he was the individual on the surveillance video committing the crimes with which he was charged—which is prohibited under *Finan*.[16]

The court denied the defendant's motion in limine, concluding that the proffered evidence is not "tantamount to a legal opinion about the defendant's criminal culpability." The court summarized its findings as follows: "The record reflects that . . . DeNardis is not

[14] DeNardis was the defendant's probation officer from June 14, 2013, until April 15, 2015.

[15] Detective Perrone was the lead detective in the case and had initially shown DeNardis the photograph of the defendant for identification purposes on April 17, 2015.

[16] We note that the defendant's argument at the hearing focused primarily on a separate issue that was not raised in the written motion, namely, that DeNardis' identification of the defendant in the video footage from Eddy's arose from unnecessarily suggestive procedures and was unreliable under the totality of the circumstances, in violation of the defendant's right to due process. See *Manson* v. *Brathwaite*, 432 U.S. 98, 113–14, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). The evidentiary issue was only briefly addressed at the end of the hearing. On appeal, the defendant does not challenge DeNardis' identification of the defendant as unnecessarily suggestive.

claimed to be an eyewitness to the crime that occurred in Pay Rite . . . and, further, that the crime now before the court did not occur at Eddy's . . . ." The court then explained that the proffered evidence "does not encompass an ultimate issue before the jury, namely, whether the defendant was one of the individuals present inside of the Pay Rite . . . at the time the crimes before the jury were committed." It explained that the jury could "view the tape, the still photograph from the tape, and the defendant himself to determine if he is the person depicted in the video or not."

At trial, DeNardis testified, among other things, that, in the course of her employment, she met with the defendant fifty-nine times from May, 2013 to April, 2015, and, that on April 17, 2015, she identified the defendant in a still photograph shown to her by New Haven police. She was shown at trial two segments from the surveillance video at Eddy's and identified the defendant as the person in the footage. At the conclusion of the trial, the court instructed the jury that "identification is a question of fact for you to decide, taking into consideration all of the evidence that you have seen and heard in the course of the trial."

We first set forth our standard of review. "Because of the wide range of matters on which lay witnesses are permitted to give their opinion, the admissibility of such evidence rests in the sound discretion of the trial court, and the exercise of that discretion, unless abused, will not constitute reversible error." (Internal quotation marks omitted.) *State* v. *Finan*, supra, 275 Conn. 65–66.

We begin our analysis with § 7-3 (a) of the Connecticut Code of Evidence, which provides: "Testimony in the form of an opinion is inadmissible if it embraces an ultimate issue to be decided by the trier of fact, except that, other than as provided in subsection (b), an expert witness may give an opinion that embraces an ultimate issue where the trier of fact needs expert

assistance in deciding the issue." "[T]he phrase ultimate issue is not amenable to easy definition. . . . It is improper for a witness to offer testimony that essentially constitutes a legal opinion about the guilt of the defendant. . . . An ultimate issue is one that cannot reasonably be separated from the essence of the matter to be decided [by the trier of fact]." (Citation omitted; internal quotation marks omitted.) *State* v. *Holley*, 160 Conn. App. 578, 617, 127 A.3d 221 (2015), rev'd on other grounds, 327 Conn. 576, 175 A.3d 514 (2018).

The defendant argues that DeNardis' identification of him in the video surveillance footage constitutes her opinion on an ultimate issue, namely, his culpability, in violation of § 7-3 of the Connecticut Code of Evidence, as interpreted by our Supreme Court in *Finan*. In *Finan*, the defendant moved to preclude the testimony of certain police officers as to their opinion that he was depicted on surveillance footage of the armed robbery for which he was charged. *State* v. *Finan*, supra, 275 Conn. 62. Our Supreme Court held that the testimony should have been precluded because the officers' opinion went to the ultimate issue in the case, which was "whether the defendant, and not some other person, was one of the two [men] who had committed the robbery." (Internal quotation marks omitted.) Id., 67.

We disagree with the defendant that DeNardis' testimony embraced an ultimate issue for the jury in the present matter. *Finan* is distinguishable because the surveillance footage in *Finan* depicted events that took place at the scene of the crime for which the defendant was charged. Here, the video that was shown to DeNardis was from Eddy's, an entirely separate location from the Pay Rite where the armed robbery took place.

In *Holley*, this court addressed a similar issue involving the identification of a defendant in video footage from a different location. *State* v. *Holley*, supra, 160

Conn. App. 617–18. In that case, the police disseminated to the public still photographs of two individuals from surveillance footage captured on a bus after the individuals committed a home burglary. Id., 583–84. At trial, a woman who knew the defendant identified him as one of the men in the video. Id., 616. This court concluded that the woman's testimony was not precluded by § 7-3 of the Connecticut Code of Evidence because the testimony did not embrace an ultimate issue. Id., 617. Specifically, this court stated that "[t]he defendant's presence on the bus . . . did not directly shed light on [among other things] his conduct at the victim's residence, [or] whether the defendant had the criminal intent related to the offenses with which he was charged . . . ." Id., 618. Therefore, this court concluded that the defendant's presence on the bus was not "the essence of the matters to be decided by the jury." Id.

The analysis conducted by this court in *Holley* is instructive in the present matter. Here, DeNardis' testimony that she recognized the defendant in the surveillance video from Eddy's did not constitute a legal opinion about his guilt as to the offenses with which the defendant was charged in this case, which occurred at Pay Rite. Although the defendant's presence in Eddy's may be relevant to his participation in acts that were committed at Pay Rite, DeNardis did not express an opinion regarding the identity of the person who committed the crimes at Pay Rite. Accordingly, we conclude that DeNardis' testimony did not constitute an opinion on the ultimate issue reserved to the jury, and, therefore, the court did not abuse its discretion in admitting the testimony.

III

Lastly, the defendant claims that the court improperly denied his motion to suppress statements that he made to a police officer after being arrested. Specifically, he claims that the statements were inadmissible because

they were made as a result of custodial interrogation and he had not received his *Miranda* warnings at the time he made those statements. We disagree with the defendant's claim that the statements should have been suppressed.

The following additional facts are relevant to this claim. After the defendant was placed under arrest on April 17, 2015, Officer Jason Aklin was tasked with transporting him to the police department. During the car ride, the defendant, unprompted, asked Officer Aklin what kind of gun he carried. Officer Aklin asked the defendant why he was concerned about that, and the defendant replied, "I'm infatuated with guns. I love them." Officer Aklin then asked the defendant, "What d[id] you want to be growing up?" The defendant replied, "I always wanted to be a bank robber." At the station, the police provided the defendant the required *Miranda* advisement.

The state sought to introduce at trial the two statements that the defendant made to Officer Aklin shortly after he was taken into custody: "I'm infatuated with guns," and "I always wanted to be a bank robber." The defendant filed a motion to suppress these statements, arguing that he made the statements while under custodial interrogation without being properly advised of his *Miranda* rights. A suppression hearing was held on October 26, 2017, during which Officer Aklin testified to his interactions with the defendant on April 17, 2015.[17]

[17] The following colloquy took place at the suppression hearing between Officer Aklin and the prosecutor:

"A. So, while I was transporting [the defendant] back to New Haven Police Department, he asked me what kind of firearm I carry, and just out of the blue. So, in just casual conversation I said, why are you worried about what kind of gun I carry? And then just to change the subject. And his response was, after I asked him why are [you] worried about what kind of firearm I carry, his response was I'm infatuated with guns.

"Q. Okay.

"A. It kind of threw me off a little bit. So, just to change the subject, I just—I asked him . . . what [did] you want to be growing up? You know. And his response to that was, I always wanted to be a bank robber.

The state conceded at the suppression hearing that the defendant was in custody and had not yet received *Miranda* warnings at the time he made the statements. The state argued, however, that, because Officer Aklin's questions were not reasonably likely to elicit incriminating responses from the defendant, the statements need not be suppressed.

The court stated that "[t]he only claim or issue [it] ha[d] been alerted to insofar as the statements are concerned . . . is whether they were the product of interrogation. The defendant bears the burden of proving that interrogation occurred." It found that "[t]here [was] no evidence Officer Aklin was involved in the investigation of the crimes charged . . . [or that he] was familiar with any aspect of the investigation . . . ." After noting that "interrogation" for purposes of *Miranda* refers to "words or actions on the part of the police other than those normally [attendant] to arrest in custody that the police should know are reasonably likely to elicit an incriminating response from the suspect," the court concluded that "the two statements in question made by the defendant were not the result of conduct by Officer Aklin designed to elicit incriminating statements," nor were they reasonably likely to elicit incriminating responses from the defendant. It denied the motion to suppress, and the statements were introduced to the jury at trial.

"Q. Okay. Now when you asked those questions, did you foresee that [the defendant] would make any kind of incriminating responses?

"A. Absolutely not.

"Q. And why did you ask those questions?

"A. You know, I just asked to . . . kind of change the subject off of what kind of firearm I carry kind of.

"Q. Okay. And . . . who started that conversation?

"A. I believe [the defendant] did. . . .

"Q. And did you ask him any questions relating to the case he was being arrested for?

"A. No. No. Because I know I can't, because I would have to Mirandize him. So, I didn't ask him anything regarding the case. . . .

"Q. Okay. Is it uncommon for you to strike up a casual conversation?

"A. Uncommon, no."

We begin by setting forth the applicable standard of review and governing legal principles. "Our standard of review of a trial court's findings and conclusions in connection with a motion to suppress is well defined. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . ." (Internal quotation marks omitted.) *State* v. *Ramos*, 317 Conn. 19, 30, 114 A.3d 1202 (2015).

"It is well established that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. *Miranda* v. *Arizona*, [384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)]. Two threshold conditions must be satisfied in order to invoke the warnings constitutionally required by *Miranda*: (1) the defendant must have been in custody; and (2) the defendant must have been subjected to police interrogation." (Internal quotation marks omitted.) *State* v. *Gonzalez*, 302 Conn. 287, 294, 25 A.3d 648 (2011). "[T]he ultimate determination . . . of whether a defendant already in custody has been subjected to interrogation . . . presents a mixed question of law and fact over which our review is plenary, tempered by our scrupulous examination of the record to ascertain whether the findings are supported by substantial evidence." (Internal quotation marks omitted.) *State* v. *Ramos*, supra, 317 Conn. 30.

"Whether a defendant in custody is subject to interrogation necessarily involves determining first, the factual circumstances of the police conduct in question, and second, whether such conduct is normally attendant to arrest and custody or whether the police should know that such conduct is reasonably likely to elicit an incriminating response." (Internal quotation marks omitted.) Id., 29. "The defendant bears the burden of proving custodial interrogation. . . . [T]he definition of interrogation

[for purposes of *Miranda*] can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response. . . . The test as to whether a particular question is likely to elicit an incriminating response is objective; the subjective intent of the police officer is relevant but not conclusive and the relationship of the questions asked to the crime committed is highly relevant." (Emphasis in original; internal quotation marks omitted.) *State* v. *Smith*, 321 Conn. 278, 288–89, 138 A.3d 223 (2016).

In the present case, we conclude that the trial court properly determined that Officer Aklin's conversation with the defendant did not constitute custodial interrogation for *Miranda* purposes because Officer Aklin's questions were not reasonably likely to elicit incriminating responses from the defendant. In regard to the defendant's first statement ("I'm infatuated with guns"), the record reveals that it was the defendant, and not Officer Aklin, who initiated the exchange between the two by asking the officer about his firearm. It was only in response to the defendant's spontaneous question that Officer Aklin questioned why the defendant was concerned with what type of firearm he carried. Even though the exchange that led to the defendant's second statement ("I always wanted to be a bank robber") was initiated by Officer Aklin, we are of the view that both of Officer Aklin's questions were merely conversational in nature and not made for purposes of eliciting inculpatory statements from the defendant. See *State* v. *Vitale*, 197 Conn. 396, 412, 497 A.2d 956 (1985) (statements made by defendant during general conversation with officer were not result of interrogation). In fact, regarding the second statement, the record indicates that Officer Aklin asked the defendant what he wanted to be when he grew up to change the subject away from firearms, a subject that made the officer uneasy. See *State* v. *Labarge*, 164 Conn. App. 296, 316, 134 A.3d 259 (there was no interrogation where officer's questions

to defendant were made as conversation intended to defuse stressful process and not for purposes of soliciting incriminating information), cert. denied, 321 Conn. 915, 136 A.3d 646 (2016). Moreover, Officer Aklin was not privy to the investigation of the crimes at issue before us. The defendant was arrested for an unrelated violation of probation, and, thus, it would be unreasonable to conclude that Officer Aklin reasonably should have anticipated that his questions would elicit incriminating responses regarding crimes for which the officer was unaware.

For the foregoing reasons, we are not persuaded that, in his exchanges with the defendant on the way to the police department, Officer Aklin should have known that his questions were reasonably likely to elicit incriminating statements from the defendant. Accordingly, we conclude that the court properly denied the defendant's motion to suppress the statements he made to Officer Aklin while in custody.

The judgment is affirmed.

In this opinion the other judges concurred.

THE NORWALK MEDICAL GROUP, P.C., ET AL. *v.* ARTHUR YEE (AC 42511)

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

Syllabus

The plaintiffs, a medical group, together with former physician shareholders of the medical group, sought to vacate an arbitration award in favor of the defendant, who filed an application to confirm the award, which was issued in connection with the plaintiffs' alleged breach of a shareholder employment agreement. The arbitrator denied and dismissed the defendant's claims against the physician shareholders but issued an award on his claim against the medical group. In their application to vacate the award, the plaintiffs claimed that the award was not mutual, final and definite because the arbitrator had failed to allocate arbitration costs, expenses and compensation and set forth a reasoned award with

respect to the issue of attorney's fees, having failed to award attorney's fees to the physician shareholders. The trial court denied the plaintiffs' application to vacate the award, granted the defendant's application to confirm the award and rendered judgments thereon, from which the plaintiffs appealed to this court. *Held* that the trial court properly granted the defendant's motion to confirm the arbitration award: the plaintiffs failed to sustain the heavy burden necessary to vacate an arbitration award pursuant to statute (§ 52-418) as they failed to present a reasoned legal argument for why the award should be vacated on the ground that the arbitrator failed to allocate arbitration costs, expenses and compensation, the arbitrator's award of attorney's fees was reasoned and the arbitrator's failure to explain his decision denying attorney's fees for the physician shareholders did not constitute grounds to vacate the award.

Argued February 11—officially released July 21, 2020

Procedural History

Application to vacate an arbitration award, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendant filed an application to confirm the award; thereafter, the cases were consolidated and tried to the court, *Hon. Taggart D. Adams*, judge trial referee; judgment denying the application to vacate and judgment granting the application to confirm, from which the plaintiff appealed to this court. *Affirmed.*

James C. Riley, with whom, on the brief, was *Thomas P. O'Connor*, for the appellants (plaintiffs).

Anita D. Di Gioia, for the appellee (defendant).

Opinion

DiPENTIMA, C. J. Our courts "undertake judicial review of arbitration awards in a manner designed to minimize interference with an efficient and economical system of alternative dispute resolution. . . . Such a limited scope of judicial review is warranted given the fact that the parties voluntarily bargained for the decision of the arbitrator and, as such, the parties are presumed to have assumed the risk of and waived objection to that decision." (Citations omitted; internal quotation

marks omitted.) *Industrial Risk Insurers* v. *Hartford Steam Boiler Inspection & Ins. Co.*, 258 Conn. 101, 110, 779 A.2d 737 (2001). Led by these overarching principles, we consider the present appeal challenging the propriety of an arbitration award rendered in favor of the defendant, Arthur Yee. The plaintiffs, The Norwalk Medical Group, P.C. (medical group), and thirteen individual physicians (physicians) who formerly were members of the medical group,[1] appeal from the judgment of the trial court denying their application to vacate an arbitration award and the judgment of the trial court granting the application to confirm the arbitration award filed by the defendant. On appeal, the plaintiffs claim that the court improperly confirmed the award because it was not mutual, final and definite due to the failure of the arbitrator to (1) allocate arbitration costs, expenses and compensation and (2) set forth a reasoned award with respect to the issue of attorney's fees. We disagree and, accordingly, affirm the judgments of the trial court.

The following facts, as found by the arbitrator or otherwise undisputed, and procedural history are necessary for our resolution of this appeal. The defendant, a physician licensed to practice medicine in the state of Connecticut, became an employee of the medical group on August 1, 1988, and, some twenty years later, executed a written shareholder employment agreement (agreement) with the medical group on or about July 7, 2008. Paragraph 30 of the agreement provided: "Any controversy, claim, or breach arising out of or relating to this [a]greement shall be submitted for resolution to the American Arbitration Association [(AAA)] before one arbitrator. Such arbitration shall be held in Norwalk, Connecticut, in accordance with the rules and practice of the [AAA] then pertaining, and the judgment upon the award rendered shall be final and determinative

[1] The physicians, former shareholders of the medical group, are Roberta Rose, Marvin Den, Richard Gervasi, Richard G. Huntley, Jr., Donald E. Leone, J. James Lewis, Donald E. McNicol, Andrew M. Murphy, Stuart N. Novack, Paulo A. Pino, Pamela J. Randolph, James Samuel, and Paul B. Wiener.

and may be entered by consent in any court having jurisdiction thereof. The arbitrator shall have no authority to order punitive or exemplary damages but may award reasonable attorney's fees to the prevailing party."

On October 19, 2016, the defendant e-mailed the chief executive officer of the medical group regarding his intention to retire from the practice of medicine prior to the merger of the medical group with another medical practice. The defendant retired from the medical group on or about June 1, 2017.

On August 7, 2017, the defendant filed a demand for arbitration, claiming that the plaintiffs had breached the agreement and sought approximately $220,242 in damages, as well as attorney's fees and arbitration costs. The defendant claimed that, following his retirement, he was entitled to a buy-out from the medical group, pursuant to appendix II of the agreement, in the amount of $215,042. He also sought an additional $5000 for his 250 shares of the medical group.[2] The medical group denied any obligation to pay the defendant. The defendant's demand was directed to all the plaintiffs.

In a response dated August 29, 2017, the plaintiffs denied the defendant's material allegations and asserted that the physicians were not parties to the agreement and that the demand for arbitration had failed to state a claim against these individuals. The plaintiffs further asserted that the medical group had "ceased the active conduct of its business and [was] in the process of winding up its affairs and liquidating its assets. Thus, there is no obligation under the [agreement] on the part

[2] Appendix II of the agreement set forth the "Buy-Out" agreement for nononcology physicians, such as the defendant, and provided as follows: "If a physician completed the purchase of 250 shares of [the medical group] and completed at least 25 years of service with the [medical group], [the physician] will be entitled to 100 [percent] of the Buy-Out Benefit . . . ." The "Buy-Out" was defined as the average of the physician's annual total compensation over the last five full calendar years of employment. Appendix II also provided that the medical group would purchase back the shares of the medical group at the rate of $20 per share.

of any of the [plaintiffs] to pay 'retirement compensation' to [the defendant]."

Following the selection of the arbitrator and an agreed upon schedule of the proceedings, the defendant filed a specification of claims on or about November 8, 2017. In count one, the defendant alleged that the medical group had breached the terms of the agreement in failing to pay him in accordance with appendix II. In count two, the defendant set forth various allegations against the physicians that, in his view, resulted in their personal liability to the defendant. In their answer and special defenses, dated November 27, 2017, the plaintiffs denied most of the defendant's allegations and repeated the special defenses set forth in the August 29, 2017 response.

After the filing of various written submissions, including a motion to dismiss filed by the plaintiffs, prehearing memoranda, a stipulation of uncontested facts, posthearing briefs and proposed orders, and after a three day hearing, the arbitrator issued his decision and award on May 22, 2018. The arbitrator concluded that the medical group had breached its contractual obligation to pay the buy-out to the defendant, but that the individual physicians had no obligation to fund it. All the claims against the individual physicians were "denied and dismissed" by the arbitrator. The arbitrator awarded the defendant $220,242, 10 percent interest from July 27, 2017, the date of the breach, and reasonable attorney's fees. The arbitrator concluded his decision and award with the following statement: "*This* [*a*]ward *is in full settlement of all claims submitted to this* [*a*]*rbitration. All claims not expressly granted herein are hereby denied.*" (Emphasis added.) The defendant's counsel subsequently submitted a claim for $162,526 in attorney's fees.

In their June 11, 2018 motion to modify the decision and award of the arbitrator, the plaintiffs sought to have the arbitrator (1) assess arbitration fees, expenses and

compensation against the defendant regarding his claims against the individual physicians and (2) award attorney's fees to the physicians as "prevailing parties." Four days later, the arbitrator denied the plaintiffs' motion to modify.[3]

On June 19, 2018, the plaintiffs filed an objection to the defendant's demand for attorney's fees. In part, they claimed that the defendant was not entitled to recover attorney's fees for his unsuccessful claims against the physicians and therefore the attorney's fees should only be $53,822.40. The defendant filed a response dated July 2, 2018.

One week later, the arbitrator issued an "amended decision" regarding the issue of attorney's fees. He awarded the defendant attorney's fees in the amount of $149,903, reducing the amount claimed by $12,623 for charges associated with the service of subpoenas and an "improper and unnecessary concurrent state court action . . . ." The arbitrator further determined that the May 22, 2018 decision and award would not be changed in any other aspect. On July 30, 2018, the arbitrator issued an "amended final decision" that "highlighted" the following "key award components": "The total award of contractual breach damages is $220,242. The interest on the damages from July 27, 2017, to June 5, 2018, at 10 [percent] is $18,886.51. The amended award of [attorney's] fees is $149,903. Total award–$389,031.51."

On August 8, 2018, the plaintiffs filed an application to vacate the arbitration award pursuant to General

[3] Specifically, the arbitrator's response to the motion to modify stated: "Having reviewed the June 11, 2018 [m]otion to [m]odify, and noting that there were no challenges as to the computations of [attorney's] fees and costs awarded to the [defendant], and after review of the [defendant's] counsel's letter to the [AAA] dated June 12, 2018, the undersigned denies the [plaintiffs'] [m]otion to [m]odify [a]ward. See [r]ule 40 of the [AAA] Rules."

Rule 40 of the [AAA] rules provides in relevant part: "Within 20 days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator to correct any clerical, typographical, technical,

Statutes § 52-418 and Practice Book § 23-1. Two days later, in a separate action, the defendant filed an application to confirm the arbitration award pursuant to General Statutes §§ 52-408 through 52-424. On October 3, 2018, the plaintiffs moved to consolidate the two actions pursuant to Practice Book § 9-5. On October 16, 2018, the court, *Genuario*, *J.*, granted the motion to consolidate.

The court, *Hon. Taggart D. Adams*, judge trial referee, held a hearing on October 22, 2018, on the parties' concomitant applications. On January 3, 2019, the court issued a memorandum of decision denying the plaintiffs' application to vacate and granting the defendant's application to confirm the arbitration award. Specifically, it rejected the plaintiffs' argument that the arbitrator had failed to make a mutual, final and definite award by failing to allocate the arbitration fees, expenses and compensation as required by rule 39 (d) of the AAA. The court also was not persuaded by the plaintiffs' contention that in not providing the rationale for the attorney's fees issues, the arbitrator had failed to issue a reasoned award.[4] This appeal followed. Additional facts will be set forth as necessary.

As a preliminary matter, we set forth the legal principles and standard of review applicable to our discussion of the plaintiffs' appellate claims and arguments. Generally, "courts favor arbitration as a means of settling private disputes, [and, therefore] we undertake judicial review of arbitration awards in a manner designed to minimize interference with an efficient and economical system of alternative dispute resolution." (Internal quotation marks omitted.) *Asselin & Vieceli Partnership, LLC* v. *Washburn*, 194 Conn. App. 519, 526, 221 A.3d 875 (2019), cert. denied, 334 Conn. 913, 221 A.3d 449

or computation errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided."

[4] The court also rejected the plaintiffs' claim of manifest disregard of the law. That rejection is not a subject of this appeal.

(2020); see also *Benistar Employer Services Trust Co.* v. *Benincasa*, 189 Conn. App. 304, 309, 207 A.3d 67 (Connecticut takes strongly affirmative view of consensual arbitration, as it is considered favored method to prevent litigation, promote tranquility and expedite equitable settlement of disputes), cert. denied, 331 Conn. 932, 208 A.3d 280 (2019).

"The scope of our review of the arbitrator's decision is defined by whether the submission to arbitration was restricted or unrestricted. The significance . . . of a determination that an arbitration submission was unrestricted or restricted is not to determine what the [arbitrator is] obligated to do, but to determine the scope of judicial review of what [he or she has] done. Put another way, the submission tells the [arbitrator] what [he or she is] obligated to decide. The determination by a court of whether the submission was restricted or unrestricted tells the court what its scope of review is regarding the [arbitrator's] decision. . . . The authority of an arbitrator to adjudicate the controversy is limited only if the agreement contains express language restricting the breadth of issues, reserving explicit rights, or conditioning the award on court review. In the absence of any such qualifications, an agreement is unrestricted." (Citation omitted; internal quotation marks omitted.) *Asselin & Vieceli Partnership, LLC* v. *Washburn*, supra, 194 Conn. App. 526–27; see also *Girolametti* v. *Michael Horton Associates, Inc.*, 332 Conn. 67, 81 n.6, 208 A.3d 1223 (2019); *Industrial Risk Insurers* v. *Hartford Steam Boiler Inspection & Ins. Co.*, 273 Conn. 86, 89 n.3, 868 A.2d 47 (2005).

In the present case, the parties' arbitration agreement did not contain express language restricting the breadth of issues, reserving explicit rights or conditioning the award on court review. The parties' agreement imposed no limit or condition on the authority of the arbitrator. See *Alderman & Alderman* v. *Pollack*, 100 Conn. App. 80, 85, 917 A.2d 60 (2007). Therefore, we conclude, and

the parties do not dispute, that the submission to arbitration was unrestricted. See, e.g., *LaFrance* v. *Lodmell*, 322 Conn. 828, 852, 144 A.3d 373 (2016) (submission is unrestricted unless otherwise agreed to by parties).

The scope of our review of an unrestricted submission, as a general matter, is limited. "Judicial review of arbitral decisions is narrowly confined. . . . When the parties agree to arbitration and establish the authority of the arbitrator through the terms of their submission, the extent of our judicial review of the award is delineated by the scope of the parties' agreement. . . . Where the submission does not otherwise state, the arbitrators are empowered to decide factual and legal questions and an award cannot be vacated on the grounds that . . . the interpretation of the agreement by the arbitrators was erroneous. . . . [T]he arbitrators' decision is considered final and binding; thus the courts will not review the evidence considered by the arbitrators nor will they review the award for errors of law or fact. . . .

"When reviewing an unrestricted submission to arbitration, however, our Supreme Court has recognized a few limited circumstances in which a court can vacate an award: (1) the award rules on the constitutionality of a statute . . . (2) the award violates clear public policy . . . [and] (3) the award contravenes one or more of the statutory proscriptions of § 52-418." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Asselin & Vieceli Partnership, LLC* v. *Washburn*, supra, 194 Conn. App. 527–28. "As a routine matter, courts review de novo the question of whether any of those exceptions apply . . . ." (Internal quotation marks omitted.) *Benistar Employer Services Trust Co.* v. *Benincasa*, supra, 189 Conn. App. 310; *Toland* v. *Toland*, 179 Conn. App. 800, 810, 182 A.3d 651, cert. denied, 328 Conn. 935, 183 A.3d 1174 (2018). Only the third circumstance is at issue in the present case.

Section 52-418 provides that an award shall be vacated if the arbitrator exceeded his or her powers or executed

them so imperfectly that a mutual, final and define award was not made. *Westbrook Police Union, Local 1257, Council 15* v. *Westbrook*, 125 Conn. App. 225, 227, 6 A.3d 1164 (2010). "In our construction of § 52-418 (a) (4), we have, as a general matter, looked to a comparison of the award with the submission to determine whether the arbitrators have exceeded their powers. . . . The standard for reviewing a claim that the award does not conform to the submission requires what we have termed in effect, de novo judicial review. . . . Although we have not explained precisely what in effect, de novo judicial review entails as applied to a claim that the award does not conform with the submission, that standard best can be understood when viewed in the context of what the court is permitted to consider when making this determination and the exact nature of the inquiry presented. Our review is limited to a comparison of the award to the submission. Our inquiry generally is limited to a determination as to whether the parties have vested the arbitrators with the authority to decide the issue presented or to award the relief conferred. . . .

"In determining whether an arbitrator has exceeded the authority granted under the contract, a court cannot base the decision on whether the court would have ordered the same relief, or whether or not the arbitrator correctly interpreted the contract. The court must instead focus on whether the [arbitrator] had authority to reach a certain issue, not whether that issue was correctly decided. *Consequently, as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of authority, the award must be enforced. The arbitrator's decision cannot be overturned even if the court is convinced that the arbitrator committed serious error. . . . Moreover,* [*e*]*very reasonable presumption and intendment will be made in favor of the award and of the arbitrator's acts and proceedings. Hence, the burden rests on*

the party challenging the award to produce evidence sufficient to show that it does not conform to the submission." (Emphasis added; internal quotation marks omitted.) Id., 227–28. Guided by these principles, we address the specifics of the plaintiffs' appeal.

I

The plaintiffs first claim that the court improperly confirmed the award because it was not mutual, final and definite due to the failure of the arbitrator to allocate arbitration costs, expenses and compensation as required by rule 39 (d) of the AAA. Specifically, they argue that the failure to include this allocation in the arbitration award requires that it be vacated pursuant to § 52-418 (a) (4). We are not persuaded.

Paragraph 30 of the agreement required the parties to use an AAA arbitration in the event of a dispute arising from the agreement. The AAA Employment Arbitration Rules and Mediation Procedures, effective November 1, 2009, and amended fee schedule effective July 1, 2016, set forth the following in rule 39 (d): "The arbitrator may grant any remedy or relief that would have been available to the parties had the matter been heard in court including awards of attorney's fees and costs, in accordance with applicable law. The arbitrator shall, in the award, assess arbitration fees, expenses, and compensation as provided in Rules 43, 44, and 45 in favor of any party and, in the event any administrative fees or expenses are due to the AAA, in favor of the AAA, subject to the provisions contained in the Costs of Arbitration section."

In the defendant's demand for arbitration, he indicated that the amount of his claim totaled $220,242, and that he also sought attorney's fees and arbitration costs. On this form, the defendant indicated that the flexible fee schedule for individually negotiated con-

tracts applied,[5] and that he had submitted payment of $1650. In a letter dated September 27, 2017, the AAA informed the parties that the arbitrator charged a rate of $500 per hour. During the proceedings, the defendant again requested that the plaintiffs be ordered to pay the arbitration expenses. Following the decision and award, the plaintiffs, in their June 11, 2018 motion to modify the award, argued that the arbitrator was required to allocate the arbitration expenses.

In their application to vacate the award, the plaintiffs argued, inter alia, that the arbitrator had not rendered a mutual, final and definite award because he had "failed to allocate arbitration fees, expenses and compensation as required by the governing AAA rules." They explained further, as a result of this omission, the arbitration award should be vacated pursuant to § 52-418 (a) (4). In his application to confirm the arbitration award, the defendant countered that the arbitrator's award stated that it constituted a full settlement of all claims submitted, and that any claim not specifically granted had been denied. In its memorandum of decision, the trial court concluded that the plaintiff's arguments regarding the allocation of arbitration fees, expenses and costs were "not very persuasive." The court noted that AAA rules 43,[6] 44[7] and

[5] For this type of arbitration, the AAA fee schedule provides that arbitrator compensation is not part of the administrative fees and that, "[u]nless the parties' agreement provides otherwise, arbitrator compensation and administrative fees are subject to allocation by an arbitrator in an award."

[6] Rule 43 of the AAA Rules, entitled "Administrative Fees," provides in relevant part: "As a not-of-profit organization, the AAA shall prescribe filing and other administrative fees to compensate it for the cost of providing administrative services. The AAA administrative fee schedule in effect at the time the demand for arbitration or submission agreement is received shall be applicable.

"AAA fees shall be paid in accordance with the Costs of Arbitration section. The AAA may, in the event of extreme hardship on any party, defer or reduce the administrative fees. . . ."

[7] Rule 44 of the AAA rules, entitled "Neutral Arbitrator's Compensation," provides: "Arbitrators shall charge a rate consistent with the arbitrator's stated rate of compensation. If there is disagreement concerning the terms of compensation, an appropriate rate shall be established by the AAA and confirmed by the parties.

45[8] addressed these items and appeared "to have been respected by the parties." The court concluded: "Frankly, neither side has offered compelling arguments in favor of either vacating or confirming the award based [on] the contention that AAA rule 39 (d) was or was not violated, and the court will not vacate the award on those nebulous arguments and counterarguments."

On appeal, the plaintiffs reassert their argument that the arbitrator failed to allocate the arbitration fees, expenses and compensation in the award pursuant to rule 39 (d). They further contend that, in the absence of the allocation, the award must be vacated. We are not persuaded.

At the outset, we note that the plaintiffs have not provided this court with any legal support for their argument regarding the allocation issue.[9] See, e.g., *Alpert* v. *Bennett Law Firm, P.C.*, United States District

"Any arrangement for the compensation of a neutral arbitrator shall be made through the AAA and not directly between the parties and the arbitrator. Payment of the arbitrator's fees and expenses shall be made by the AAA from the fees and moneys collected by the AAA for this purpose.

"Arbitrator compensation shall be borne in accordance with the Costs of Arbitration section."

[8] Rule 45 of the AAA rules, entitled "Expenses," provides: "Unless otherwise agreed by the parties or as provided under applicable law, the expenses of witnesses for either side shall be borne by the party producing such witnesses.

"All expenses of the arbitrator, including required travel and other expenses, and any AAA expenses, as well as the costs relating to proof and witnesses produced at the direction of the arbitrator shall be borne in accordance with the Costs of Arbitration section."

[9] This court has stated: "[W]e are not required to review claims that are inadequately briefed. . . . We consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited. . . . It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones." (Internal quotation marks omitted.) *NRT New England, LLC* v. *Jones*, 162

Court, Docket No. H-06-1642 (NKJ) (S.D. Tex. August 21, 2007) (party provided District Court with no legal standard that arbitration award should be vacated even if AAA rules had been violated and, therefore, said claim failed), aff'd, 295 Fed. Appx. 725 (5th Cir. 2008).[10] Furthermore, the plaintiffs' position that such a violation of the AAA rules *mandates* that the arbitration award be vacated does not comport with the law. See, e.g., *Circle Industries USA, Inc.* v. *Parke Construction Group, Inc.*, 183 F.3d 105, 109 (2d Cir.) (violation of AAA rules can, under certain circumstances, require vacatur of arbitration award, but party seeking vacatur bears heavy burden of establishing sufficient grounds), cert. denied, 528 U.S. 1062, 120 S. Ct. 616, 145 L. Ed. 2d 510 (1999); *New York Newspaper Printing Pressman's Union No. 2* v. *New York Times Co.*, United States District Court, Docket No. 91 Civ. 4677 (CSH) (S.D.N.Y. May 22, 1992) (violations of AAA rules, although relevant to issue of arbitrator misconduct, are not sufficient in and of themselves to vacate arbitration award).

Finally, we are mindful of the principles applicable to this type of claim. Our Supreme Court has stated that "[a]n award conforming to an unrestricted submission should generally be confirmed by the court." *Garrity* v. *McCaskey*, 223 Conn. 1, 12, 612 A.2d 742 (1992). Further, a heavy burden is placed on a party seeking to vacate an award pursuant to § 52-418 (a). See *Doctor's Associates, Inc.* v. *Windham*, 146 Conn. App. 768, 774, 81 A.3d 230 (2013) (parties consent to arbitration, and, therefore, court will make every reasonable presumption in favor of arbitration award and arbitrator's acts

Conn. App. 840, 856, 134 A.3d 632 (2016); see also *Darin* v. *Cais*, 161 Conn. App. 475, 483, 129 A.3d 716 (2015).

[10] In the absence of precedent from Connecticut courts, this court previously has looked to the federal courts for guidance in examining the AAA rules. See, e.g., *SBD Kitchens, LLC* v. *Jefferson*, 157 Conn. App. 731, 748, 118 A.3d 550, cert. denied, 319 Conn. 903, 122 A.3d 638 (2015); see generally *Nussbaum* v. *Kimberly Timbers, Ltd.*, 271 Conn. 65, 73 n.6, 856 A.2d 364 (2004) (Connecticut appellate courts guided by federal precedent with respect to state statutes comparable to federal law).

and proceedings). With respect to this claim, we agree with the trial court that the plaintiffs failed to present "compelling arguments in favor" of vacating the arbitration award based on an alleged violation of rule 39 (d) of the AAA, and we decline to vacate that award on the basis of their unsupported contentions. The plaintiffs have not produced a well supported, reasoned legal argument containing a cogent analysis to persuade this court that the arbitration award should be vacated on this ground. Accordingly, this claim must fail.

II

The plaintiffs next claim that the court improperly confirmed the award because it was not mutual, final and definite due to the failure of the arbitrator to set forth a reasoned award with respect to attorney's fees. Specifically, the plaintiffs argue that the parties bargained for a reasoned award and the arbitrator failed to meet that standard in granting attorney's fees to the defendant and denying attorney's fees to the physicians. We are not persuaded and agree with the court's rejection of this claim.

The following facts and procedural history are necessary for our discussion. Rule 39 (c) of the AAA rules provides that the arbitration award "shall be in writing . . . and shall provide the written reasons for the award unless the parties agree otherwise." All parties sought attorney's fees. In the May 22, 2018 decision and award, the arbitrator found that no evidence had been presented that the physicians had agreed to personally pay the defendant's buy-out. Thus, he concluded that the physicians had no obligation to fund the buy-out of the defendant and that the claims directed against the physicians were "denied and dismissed." The arbitrator further determined that the medical group had breached the agreement by failing to pay the defendant's buy-out on or about July 27, 2017. The arbitrator awarded the

defendant $220,242 from the medical group, plus interest of 10 percent from July 27, 2017, to June 5, 2018. He also awarded reasonable attorney's fees to the defendant, pursuant to paragraph 30 of the agreement and the AAA rules. The defendant's counsel was instructed to draft a judgment, including the interest calculation and an affidavit of attorney's fees, for review within two weeks of the arbitration award. The arbitrator concluded his decision by stating that his award resolved all of the parties' claims, and that any claim not expressly granted had been denied. In the draft judgment submitted by the defendant's counsel, the interest was calculated in the sum of $18,886.51, and the claimed attorney's fees totaled $162,526.

In the plaintiffs' June 11, 2018 motion to modify the arbitration award, they argued, inter alia, that the arbitrator had failed to address whether the physicians were entitled to attorney's fees as prevailing parties and that there was no legal or logical basis for awarding attorney's fees to the defendant and not awarding attorney's fees to the physicians. The arbitrator denied the plaintiffs' motion to modify on June 15, 2018. In response to the plaintiffs' challenge to the attorney's fees requested by the defendant, the arbitrator issued an "Amended Decision Re: Attorney Fees" on July 9, 2018. In that decision, he awarded the defendant $149,903 in attorney's fees, a reduction of $12,623 from the requested amount of $162,526. He reaffirmed his earlier decision by concluding that "[i]n all other regards, the [d]ecision and [a]ward of [a]rbitrator, dated May 22, 2018 remains the same." Finally, on July 30, 2018, the arbitrator issued an "Amended FINAL Decision" awarding $389,031.51 to the defendant.

In considering the parties' competing motions, the trial court considered the plaintiffs' contention that the arbitrator had failed to issue a reasoned award with respect to attorney's fees, and, therefore, it did not

constitute a mutual, final and definite award pursuant to § 52-418 (a). The court concluded that the arbitrator had explained the reasons for awarding attorney's fees to the defendant and that those fees were reasonable. "Furthermore, the arbitrator had before him ample submissions by the counsel for all parties on the issue of the amount and reasonableness of the fee request and reduced the fee request by [the defendant] for several articulated reasons."

With respect to whether the arbitrator had issued a reasoned award as to his decision to not award attorney's fees to the physicians, the court stated: "On their face the arguments in favor of assessing attorney's fees against [the defendant] in connection with his failed claims against the [physicians] have some appeal. However, the court finds the [rejection of the physicians' claim for attorney's fees] well within the scope of the arbitrator's power and not subject to this court's second-guessing. In addition, and with some reluctance, the court will not vacate the [a]ward because the arbitrator failed to articulate reasons for denying an award of attorney's fees to [the medical group and the physicians]. As noted the denial was well within the arbitrator's discretion. In addition, the court particularly notes that this claim for fees was brought to the arbitrator's attention on numerous occasions. . . . Under these circumstances the court will not vacate a decision, whether the reasons are articulated or not, when the arbitrator had many opportunities to consider and reconsider granting fees, but eventually determined not do so."

On appeal, the plaintiffs reassert that the arbitrator failed to issue a reasoned award with respect to the attorney's fees awarded to the defendant and the denial of attorney's fees to the physicians. They further contend that, as a result of this deficiency, the court erred

in confirming the arbitration award and the entire award must be vacated. We are not persuaded.

As a general matter, the decision of an arbitrator need not include expansive reasoning to obtain judicial confirmation. See *Bic Pen Corp.* v. *Local No. 134, United Rubber, Cork, Linoleum & Plastic Workers of America*, 183 Conn. 579, 585, 440 A.2d 774 (1981) (arbitrator required only to render award in conformity to submission and need not include explanation of means by which award was reached); see also *Henry* v. *Imbruce*, 178 Conn. App. 820, 827–28, 177 A.3d 1168 (2017) (under federal law, only barely colorable justification for outcome necessary to confirm award). The parties, via the terms of an arbitration agreement, can require that the arbitrator issue a reasoned award, which contains greater details than a standard award. See, e.g., *SBD Kitchens, LLC* v. *Jefferson*, 157 Conn. App. 731, 747–48, 118 A.3d 550 (parties may agree to have arbitrator issue one of several types of arbitration awards, including reasoned award), cert. denied, 319 Conn. 903, 122 A.3d 638 (2015); *Lawson* v. *Privateer, Ltd.*, Superior Court, judicial district of Middlesex, Docket No. CV-06-4006118-S (February 1, 2007) (noting difference between standard award and reasoned award); see also *Tully Construction Co.* v. *Canam Steel Corp*, United States District Court, Docket No. 13 Civ. 3037 (PGG) (S.D.N.Y. March 2, 2015) (noting difference between "general, regular, standard or bare" award, which simply announces result, and "reasoned award," which includes something more than simple result).

In *SBD Kitchens, LLC* v. *Jefferson*, supra, 157 Conn. App. 740–41, this court addressed what constitutes a reasoned award in the arbitration context. In that case, the appellants claimed that the arbitrator's award of punitive damages, consisting of attorney's fees and costs, should be vacated because it was made in manifest disregard of the law. In resolving that claim, we

set forth the meaning of a reasoned award under the AAA rules. Id., 747. First, we explained that the AAA rules do not define the term "reasoned award." Id., 747–48. Second, we noted that, although no Connecticut appellate case law specifically had defined that term, many federal courts had. Id., 748. "The common theme of those federal authorities, with which we agree, is that a reasoned award means something more than a simple result and less than specific findings of fact and conclusions of law." Id.; see also *Leeward Construction Co., Ltd.* v. *American University of Antigua-College of Medicine*, 826 F.3d 634, 640 (2d Cir. 2016).

Next, it is necessary to review briefly the relevant legal principles pertaining to awards of attorney's fees and a prevailing party. "The general rule of law known as the American rule is that attorney's fees and ordinary expenses and burdens of litigation are not allowed to the successful party absent a contractual or statutory exception. . . . This rule is generally followed throughout the country. . . . Connecticut adheres to the American rule. . . . There are few exceptions. For example, a specific contractual term may provide for the recovery of attorney's fees and costs . . . or a statute may confer such rights. . . . [W]e review the trial court's decision to award attorney's fees for abuse of discretion." (Citations omitted; internal quotation marks omitted.) *Broadnax* v. *New Haven*, 270 Conn. 133, 178, 851 A.2d 1113 (2004); see also *Francini* v. *Riggione*, 193 Conn. App. 321, 330, 219 A.3d 452 (2019).

We also note that "[o]ur Supreme Court has stated: [P]revailing party has been defined as [a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded." *Giedrimiene* v. *Emmanuel*, 135 Conn. App. 27, 34–35, 40 A.3d 815 (citing *Wallerstein* v. *Stew Leonard's Dairy*, 258 Conn. 299, 303, 780 A.2d 916 (2001)), cert. denied, 305 Conn. 912, 45 A.3d 97 (2012). In this context, however, the question of whether a party

has, in fact, "prevailed" is a question reserved for the arbitrator, and the propriety of the arbitrator's conclusion is not subject to review for errors of law or fact by the courts. *Comprehensive Orthopaedics & Musculoskeletal Care, LLC* v. *Axtmayer*, 293 Conn. 748, 758, 980 A.2d 297 (2009).

Applying the foregoing legal principles to the facts of the present case, we conclude that the plaintiffs cannot sustain their heavy burden necessary to vacate an arbitration award. In the May 22, 2018 award, the arbitrator concluded that the medical group had breached its contractual obligation to pay the retirement buy-out for the defendant, that the physicians had no personal liability for this buy-out, and that the defendant's claims against the physicians were not viable. The arbitrator awarded attorney's fees only to the defendant, and, following the plaintiffs' motion to modify, declined to modify the award. The arbitrator, in response to a challenge of the attorney's fees awarded to the defendant's counsel, issued an amended decision reducing that award by $12,623. Specifically, the arbitrator explained that he had reduced the award for fees associated with the service of subpoenas and an "improper and unnecessary concurrent state court action . . . ."

It is clear, therefore, that the arbitrator considered and issued a reasoned award regarding the attorney's fees awarded to the defendant. He concluded that the medical group had failed to pay the retirement buy-out to the defendant as required by the agreement and, therefore, as the prevailing party, the defendant was entitled to attorney's fees. Furthermore, the arbitrator reviewed the timesheets submitted by the defendant's counsel and disallowed certain aspects of the claimed fees in the amended decision. We conclude, therefore, that the arbitrator met the reasoned award standard with respect to the attorney's fees awarded to the defendant.

Regarding the denial of attorney's fees to the physicians, we share the concern set forth in the trial court's decision that the arbitrator had failed to explain the basis for denying these fees and agree with the trial court's ultimate conclusion that the arbitration award should nevertheless be confirmed. Our conclusion is informed by the clarification of the reasoned award standard from the United States Court of Appeals for the Second Circuit: "We agree with our sister [c]ircuits, and hold . . . that a reasoned award is something more than a line or two of unexplained conclusions, but something less than full findings of fact and conclusions of law on each issue raised before the panel. A reasoned award sets forth the basic reasoning of the arbitral panel on the central issue or issues raised before it. It need not delve into every argument made by the parties. The award here satisfies that standard: while it does not provide a detailed rationale for each and every line of damages awarded, it does set forth the relevant facts, as well as the key factual findings supporting its conclusions. The summary nature of its analytical discussion reflects only that, as the district court found, [t]he parties had ample opportunity to contest [the plaintiff's] entitlement to compensation for change order work, and the summary nature of the discussion in the decision shows that the panel simply accepted [the plaintiff's] arguments on this particular point. . . . No more is needed." (Citation omitted; internal quotation marks omitted.) *Leeward Construction Co., Ltd.* v. *American University of Antigua-College of Medicine*, supra, 826 F.3d 640.

As explained by the trial court, the issue of whether the physicians were entitled to an award of attorney's fees "was brought to the [a]rbitrator's attention on numerous occasions." The arbitrator declined to exercise his discretion and award these fees several times. Further, the arbitrator explained that, although the defendant was entitled to his retirement buy-out, it was

the medical group, and not the physicians, who had breached the agreement and was financially responsible. The arbitrator set forth his factual finding and key legal conclusions for the decision on the central issue of the case, that is, whether the defendant was entitled to a buy-out pursuant to the terms of the written shareholder agreement. His failure to include details on the subordinate issue of whether the physicians should be awarded attorney's fees, although perhaps regrettable, does not constitute grounds to warrant judicial interference in the arbitration process.[11] To do so would undercut the strong public policy favoring arbitration. As we

[11] The plaintiffs rely on *Smarter Tools, Inc.* v. *Chongqing Senci Import & Export Trade Co., Ltd.*, United States District Court, Docket No. 18-CV-2714 (AJN) (S.D.N.Y. March 26, 2019), appeal dismissed, Docket Nos. 19-943 and 19-1155, 2019 WL 8403145 (2d Cir. November 12, 2019), to support their claim that the arbitrator failed to issue a reasoned award and therefore, it must be vacated. In *Smarter Tools, Inc.*, the plaintiff purchased gas-powered generators from the named defendant. Id. A dispute ensued and arbitration commenced. Id. The parties requested that the arbitrator issue a reasoned award. Id. The named defendant sought payment for the remaining balance on the generators, while the plaintiff contended that the generators were defective and not compliant with certain regulations. Id.

The arbitrator issued a six page final award that detailed the parties and proceedings, ruled on an issue of admissibility, incorporated the parties' stipulation that the plaintiff's outstanding balance totaled approximately $2.4 million, found that the named defendant's claims were "well-founded and supported by the evidence" and determined that the plaintiff's counterclaims were not supported. The arbitrator did not make any findings as to whether the generators were defective, compliant with the applicable regulations or had been unilaterally canceled by the named defendant. The District Court concluded that the arbitrator failed to meet the reasoned award standard because it failed to contain any rationale for rejecting the plaintiff's claims. Id.

We are not persuaded by the plaintiffs' reliance on this nonbinding authority. In that case, the arbitrator failed to provide any explanation or reasoning for his decision on the central issue, that is, whether the generators at issue had been defective or compliant with the governmental regulations. In contrast, the arbitrator in the present case met the reasoned award standard with respect to the principal issue of whether the defendant should receive his buy-out. Further, the subsidiary matter of whether the physicians should receive attorney's fees was presented to the arbitrator, who, in the exercise of his discretion, declined to award them.

noted at the outset, "the parties voluntarily bargained for the decision of the arbitrator and, as such, the parties are presumed to have assumed the risks and waived objections to that decision." *American Universal Ins. Co.* v. *DelGreco*, 205 Conn. 178, 186–87, 530 A.2d 171 (1987); see generally *Industrial Risk Insurers* v. *Hartford Steam Boiler Inspection & Ins. Co.*, supra, 258 Conn. 110; *United States Fidelity & Guaranty Co.* v. *Hutchinson*, 244 Conn. 513, 519–20, 710 A.2d 1343 (1998); *Design Tech, LLC* v. *Moriniere*, 146 Conn. App. 60, 66–67, 76 A.3d 712 (2013). Accordingly, we conclude that the court properly granted the defendant's motion to confirm the arbitration award and properly denied the plaintiffs' motion to vacate.

The judgments are affirmed.

In this opinion the other judges concurred.

STEPHEN S.* *v.* COMMISSIONER OF CORRECTION (AC 42384)

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

Syllabus

The petitioner, who had been convicted of multiple charges involving the sexual abuse of a minor, filed a third petition for a writ of habeas corpus, claiming that his trial counsel and appellate counsel had rendered ineffective assistance. The first two habeas courts denied the first two petitions. The third habeas court rendered judgment declining to issue the writ, determining, pursuant to the applicable rule of practice (§ 23-24 (a) (2)), that the petition was frivolous on its face. The court stated that the petitioner's third petition raised claims that were identical to those raised, litigated and resolved against the petitioner in his first two habeas petitions. The court thereafter granted the petitioner certification to appeal, and the petitioner appealed to this court, asserting that his

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

third petition was not wholly frivolous because the claims it raised were different from the claims raised in his first two petitions. After the parties submitted their briefs to this court, the respondent Commissioner of Correction conceded that the habeas court had erroneously declined to issue the writ and concluded that the matter had to be remanded to the habeas court with direction to issue the writ. *Held* that the habeas court abused its discretion in declining to issue the writ of habeas corpus on the ground that the petitioner's habeas petition was wholly frivolous on its face; the petition alleged cognizable claims of ineffective assistance of trial counsel and prior habeas counsel, and a claim of actual innocence that had not been pleaded in previous petitions, and the petitioner's claims should have survived the screening function of Practice Book § 23-24 and entitled the petitioner to present evidence in support of his claims.

Submitted on briefs March 17—officially released July 21, 2020

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Newson*, *J.*, rendered judgment declining to issue a writ of habeas corpus; thereafter, the petitioner, on the granting of certification, appealed to this court. *Reversed; judgment directed*; *further proceedings*.

Vishal K. Garg, assigned counsel, filed a brief for the appellant (petitioner).

Kevin T. Kane, chief state's attorney, and *Timothy J. Sugrue*, assistant state's attorney, filed a brief for the appellee (respondent).

Opinion

KEEGAN, J. The petitioner, Stephen S., appeals from the judgment of the habeas court declining to issue a writ of habeas corpus pursuant to Practice Book § 23-24 (a) (2) because the petition was "wholly frivolous on its face." On appeal, the petitioner claims that the habeas court improperly declined to issue the writ of habeas corpus because the claims raised in his current habeas petition are different from the claims raised in his two prior habeas petitions, and, therefore, his pleading is not wholly frivolous. After the parties submitted their briefs, the respondent, the Commissioner

of Correction, citing to *Gilchrist* v. *Commissioner of Correction*, 334 Conn. 548, 560, 223 A.3d 368 (2020), conceded that the habeas court erroneously declined to issue the writ and concluded that the matter must be remanded to the habeas court with direction to issue the writ. We agree that a remand to the habeas court is appropriate, and, thus, the judgment is reversed and the case is remanded with direction to issue the writ of habeas corpus.

The following facts and procedural history are relevant to this appeal. Following a jury trial, the petitioner was found guilty of multiple charges involving the sexual abuse of a minor and was sentenced to sixty years of incarceration. The petitioner appealed from the judgment of conviction to this court, claiming that the trial court improperly allowed (1) pornographic materials to be admitted into evidence even though the victim had not specifically identified them, (2) the admission of prejudicial hearsay pursuant to the constancy of accusation doctrine, and (3) prosecutorial misconduct to occur. This court disagreed and affirmed the judgment of the trial court.

Thereafter, the petitioner filed his first petition for a writ of habeas corpus in which he alleged the ineffective assistance of his trial counsel, Martin McQuillan, and his appellate counsel, David T. Grudberg. Specifically, the petitioner claimed that McQuillan had failed (1) to "conduct sufficient consultation regarding the medical proofs available to the state," (2) to "meaningfully challenge the testimony of medical personnel who testified for the state," (3) to "present medical testimony to support the petitioner's declaration of innocence," (4) to "introduce as evidence medical reports concerning the complaining witness' behavior and mental health," (5) to "object to constancy of accusation witnesses," and (6) to "object to the state's attorney's cross-examination of the [petitioner]." Thereafter, the petitioner amended his petition to include a claim that McQuillan

had failed to adequately consult with an expert, and to present expert testimony, regarding child abuse and sexual child abuse "within the context of the criminal case allegations and available information." Additionally, the petitioner claimed that Grudberg had failed (1) to "raise as an issue the trial court's overruling of [the petitioner's] objection to allowing the constancy of accusation witnesses to testify that the [victim] told them about oral, anal and vaginal contact," and (2) to adequately "[present] the prosecutorial misconduct claim regarding the prosecutor's cross-examination of the [petitioner] because he failed to detail all of the instances of claimed misconduct and failed to provide a [harm] analysis."

After a trial on the merits, the habeas court, *T. Santos*, *J.*, concluded that the petitioner had failed to prove any of his claims of ineffective assistance of counsel and, accordingly, denied the petition in a lengthy and comprehensive memorandum of decision. The petitioner appealed from the judgment of the habeas court, claiming that the habeas court erred in denying his claim of ineffective assistance of counsel because his trial counsel failed to sufficiently consult with an expert witness (1) regarding the physical evidence of sexual abuse and (2) in the field of child sexual abuse to refute the prosecution's witness. See *Stephen S.* v. *Commissioner of Correction*, 134 Conn. App. 801, 802, 40 A.3d 796, cert. denied, 304 Conn. 932, 43 A.3d 660 (2012). This court affirmed the judgment of the habeas court. Id.

Thereafter, the petitioner filed his second habeas petition, in which he claimed that McQuillan, his criminal trial counsel; Bruce B. McIntyre, his habeas counsel; and Mary Trainer, his appellate habeas counsel, were ineffective. Specifically, the petitioner alleged that McQuillan failed to properly and adequately to investigate evidence underlying the petitioner's case and to consult with and to present expert testimony needed to refute allegations of sexual assault against the peti-

tioner. McIntyre, he claimed, had failed to properly and adequately raise and argue the petitioner's constitutional right to the effective assistance of counsel pursuant to the sixth and fourteenth amendments to the United States constitution and article first, §§ 8 and 9, of the constitution of Connecticut. Last, the petitioner claimed that Trainer failed to raise a claim on appeal contesting the determination of the habeas court that the petitioner's right to the effective assistance of counsel was not violated when McQuillan failed "to consult with a medical expert." Following a trial, the habeas court, *Fuger*, *J.*, held that the claims asserted against McQuillan were successive to the claims that had been pleaded against him in the first habeas petition. Additionally, the court concluded that the petitioner's claims were "absurd given the fact that he actually consulted with and used" the medical expert in question. Finally, the court concluded that the remaining claims against McIntyre and Trainer were unsupported by the evidence that was presented to the court. The petitioner filed an appeal from the second habeas court's judgment but later withdrew it.

Subsequently, the petitioner filed his third habeas petition, as a self-represented party, which is the subject of the present appeal. Again, the petitioner claimed that McQuillan and Grudberg had been ineffective. Specifically, the petitioner claimed that McQuillan was ineffective in his representation because he failed (1) to file a motion to dismiss the charges, (2) to investigate and to present evidence regarding the petitioner's custody battle with his former wife, (3) to impeach the testimony of his former wife regarding access she and the victim had to his apartment and his belongings, (4) to challenge the testimony of the state's witness, Janet Murphy, a nurse practitioner, regarding her credentials and qualifications, and her physical and psychological examination of the victim, (5) to present the testimony of various medical and psychological experts, (6) to object to,

obtain, challenge, and preserve medical and psychiatric clinic and hospital records relating to the victim that had been redacted at trial, (7) to investigate and to present the testimony of a defense character witness, (8) to move to compel a pretrial competency hearing regarding the victim, and (9) to move for a judgment of acquittal "on a case that was a 'credibility contest.' " Additionally, the petitioner further claimed that Grudberg had failed to raise a claim on direct appeal regarding the redacted records that served as the basis for the claim against McQuillan previously set forth. Last, the petitioner asserted a claim of actual innocence, which was predicated on McQuillan's alleged deficiencies.

Following the filing of the petitioner's petition for a writ of habeas corpus, the court, *Newson*, *J.*, issued a judgment declining to issue the writ: "Pursuant to Practice Book § 23-24 (a) (2) . . . the [petition] is wholly frivolous on its face, to wit: The petition raises claims identical to those already raised, litigated, and resolved against the petitioner in [the first and second habeas actions]." Thereafter, the petitioner filed a motion for rectification requesting that the habeas court "rectify the record to include any materials from the petitioner's prior cases upon which the [court] relied when arriving at its decision." The habeas court denied the petitioner's motion, explaining that rectification is not necessary, as the court may take judicial notice of the petitioner's previous habeas files. Thereafter, the petitioner filed a petition for certification to appeal, which was granted. This appeal followed.

We begin with the standard of review. The habeas court's determination that a petition for a writ of habeas corpus is frivolous, and its decision declining to issue the writ of habeas corpus, are reviewed for an abuse of discretion. *Fernandez* v. *Commissioner of Correction*, 125 Conn. 220, 223, 7 A.3d 432 (2010), cert. denied, 300 Conn. 924, 15 A.3d 630 (2011).

Practice Book § 23-24, titled "Preliminary Consideration of Judicial Authority," provides in relevant part: "(a) The judicial authority shall promptly review any petition for a writ of habeas corpus to determine whether the writ should issue. The judicial authority shall issue the writ unless it appears that . . . (2) the petition is wholly frivolous on its face . . . ." In the present matter, the sole issue before this court is whether the habeas court abused its discretion in declining to issue the petitioner's writ of habeas corpus pursuant to § 23-24 (a) (2) because the petition was "wholly frivolous on its face . . . ."

Although there is limited authority addressing Practice Book § 23-24 (a) (2), we find three cases, *Alvarado* v. *Commissioner of Correction*, 75 Conn. App. 894, 818 A.2d 797, cert. denied, 264 Conn. 903, 823 A.2d 1220 (2003), *Fernandez* v. *Commissioner of Correction*, supra, 125 Conn. App. 220, and *Gilchrist* v. *Commissioner of Correction*, supra, 334 Conn. 548, to be particularly instructive to the resolution of the present appeal.

In *Alvarado*, the self-represented petitioner alleged that his confinement was illegal because a "parole hearing was denied [to him] or the hearing was improper." (Internal quotation marks omitted.) *Alvarado* v. *Commissioner of Correction*, supra, 75 Conn. App. 894–95. Thereafter, the habeas court dismissed the petition for a writ of habeas corpus pursuant to Practice Book § 23-24 (a) (2) because the petition was "frivolous on [its] face," as it failed "to allege specific facts of ineffective assistance of counsel or 'any other claim[s] as to why [the petitioner's] conviction is illegal.' " Id., 895. Upon a review of the record, this court concluded that, because the petitioner failed to allege any specific facts of ineffective assistance of counsel or any other claim as to why his underlying conviction was illegal, the habeas court did not abuse its discretion in declining to issue a writ of habeas corpus pursuant to § 23-24 (a) (2). Id., 896.

In *Fernandez*, the self-represented petitioner alleged that he was a "foreign national, who is being treated as a 'slave' and a 'prisoner of war' in that he is being held at the 'plantation of MacDougall-Walker' [Correctional Institution] in violation of his constitutional rights and 'Geneva Convention Treaties, Convention Against Torture, European Convention on Human Rights and U.S. Human Rights Acts.' " *Fernandez* v. *Commissioner of Correction*, supra, 125 Conn. App. 224. On appeal, this court concluded that, because the petitioner was incarcerated as a result of convictions of crimes of which he had been found guilty, the habeas court did not abuse its discretion in declining to issue a writ of habeas corpus. Id.

Additionally, we find that *Gilchrist*, a recent decision of our Supreme Court, provides clarity as to the precise issue before us, although it is procedurally distinct from the present case. In *Gilchrist*, the self-represented petitioner filed a petition for a writ of habeas corpus. *Gilchrist* v. *Commissioner of Correction*, supra, 334 Conn. 550. He included with the petition an application for a waiver of fees and the appointment of counsel. Id., 551. Thereafter, the habeas court assigned a docket number to the petition and granted the petitioner's application for a waiver of fees but took no action regarding his request for the appointment of counsel. Id. One week later, the habeas court, sua sponte and without providing notice to the petitioner or giving him an opportunity to be heard, rendered judgment of dismissal because the court lacked jurisdiction pursuant to Practice Book § 23-29 (1). Id., 551–52. The habeas court granted the petitioner's petition for certification to appeal, and this court affirmed the habeas court's judgment of dismissal. Id., 552. Our Supreme Court granted the petitioner's petition for certification to appeal. The revised certified question before our Supreme Court was as follows: "Did the Appellate Court properly affirm the habeas court's dismissal of the petition under . . . [Practice

Book] § 23-29 when that dismissal occurred before the habeas court ordered the issuance of the writ pursuant to . . . [Practice Book] § 23-24?" Id. Our Supreme Court answered that question in the negative, explaining that, "when a petition for a writ of habeas corpus alleging a claim of illegal confinement is submitted to the court, the following procedures should be followed. First, upon receipt of a habeas petition that is submitted under oath and is compliant with the requirements of Practice Book § 23-22; see Practice Book §§ 23-22 and 23-23; the judicial authority must review the petition to determine if it is patently defective because the court lacks jurisdiction, the petition is wholly frivolous on its face, or the relief sought is unavailable. Practice Book § 23-24 (a). If it is clear that any of those defects are present, then the judicial authority should issue a judgment declining to issue the writ, and the office of the clerk should return the petition to the petitioner explaining that the judicial authority has declined to issue the writ pursuant to [Practice Book] § 23-24. Practice Book § 23-24 (a) and (b). If the judicial authority does not decline to issue the writ, then it must issue the writ, the effect of which will be to require the respondent to enter an appearance in the case and to proceed in accordance with applicable law. At the time the writ is issued, the court should also take action on any request for the appointment of counsel and any application for the waiver of filing fees and costs of service. See Practice Book §§ 23-25 and 23-26. After the writ has issued, all further proceedings should continue in accordance with the procedures set forth in our rules of practice, including Practice Book 23-29." *Gilchrist* v. *Commissioner of Correction*, supra, 562–63.

In clarifying this procedure, our Supreme Court explained that habeas courts should proceed "with a lenient eye" and "[allow] borderline cases to proceed" when determining whether to issue a writ of habeas

corpus: "To be clear, the screening function of Practice Book § 23-24 plays an important role in habeas corpus proceedings, but it is intended only to weed out obviously and unequivocally defective petitions, and we emphasize that [b]oth statute and case law evince a strong presumption that a petitioner for a writ of habeas corpus is entitled to present evidence in support of his claims." (Internal quotation marks omitted.) Id., 560. As our Supreme Court explained, "[t]he justification for this policy is apparent. If the writ of habeas corpus is to continue to have meaningful purpose, it must be accessible not only to those with a strong legal background or the financial means to retain counsel, but also to the mass of uneducated, unrepresented prisoners." (Internal quotation marks omitted.) Id.

Upon a review of case law in our jurisdiction, we conclude that the facts in both *Alvarado* and *Fernandez* are distinguishable from the present case. In the present case, the petitioner's petition for a writ of habeas corpus alleged cognizable claims of ineffective assistance of trial and prior habeas counsel along with a claim of actual innocence. These claims on their face are not "obviously and unequivocally defective"; id.; but, rather, are cognizable claims that should have survived the "screening function" of Practice Book § 23-24 and entitled the petitioner to present evidence in support of his claims. Specifically, the petitioner alleged a claim of ineffective assistance of second habeas counsel in which he asserted that first habeas counsel had been ineffective for failing to claim that his trial and appellate counsel were ineffective. To support his claim, the petitioner identified specific witnesses' testimony that would have been favorable to him, raised issues pertaining to the adequacy of medical professionals who were called to testify as to the reliability of the allegations against him, and argued that a "toluidine blue dye test" should have been conducted. Addition-

ally, the petitioner asserted a claim of actual innocence, a claim that had not been pleaded in previous petitions. In light of the foregoing facts and case precedent, we conclude that the habeas court abused its discretion in declining to issue the writ on the ground that the petition was wholly frivolous on its face.

The judgment is reversed and the case is remanded with direction to issue the writ and for further proceedings according to law.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* CHARLES J. INGALA (AC 41135)

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

Syllabus

Convicted, on a conditional plea of nolo contendere, of possession of a sawed-off shotgun and criminal possession of a firearm, the defendant appealed to this court. The defendant allegedly fled the scene of a motor vehicle accident and thereafter assaulted a witness to the accident with a sawed-off shotgun. The police met the defendant at his home in an attempt to locate the shotgun. The defendant gave the police permission to search his apartment and the backyard of the property but the search was unsuccessful. The police thereafter conducted a ruse; they stated that they were leaving the property but, instead, continued their surveillance of the defendant to see if he would recover the weapon after the police left. The defendant then walked outside to an area of the property, where he was stopped by the police. The police then resumed their search of that area and seized the shotgun. On appeal to this court, the defendant claimed that the trial court improperly denied his motion to suppress the shotgun because there were no exigent circumstances that permitted the officers to conduct a warrantless search and seizure of the shotgun under the fourteenth amendment to the federal constitution. *Held* that the trial court properly concluded that the search was lawful under the exigent circumstances exception to the warrant requirement and properly denied the defendant's motion to suppress, as the police had strong reason to believe that the defendant had used the sawed-off shotgun to assault the witness earlier that evening and it was likely that the shotgun was on the property despite the defendant's assertions to the contrary; the record indicated that the defendant was visibly

intoxicated and had stated in the presence of the officers that he was willing to resort to violence in response to someone who bullied him, it was reasonable and prudent for the police to believe that the shotgun could have been loaded, and, under the circumstances, it was reasonable for the police to conclude that the defendant believed that the police had all left his property, that the defendant was intent on recovering the shotgun, and that such actions were prompted by the defendant's desire to avoid arrest, and the record sufficiently demonstrated that the police were concerned that the defendant could soon arm himself and present a threat of safety to the officers had the defendant discovered them surveilling the property.

Argued March 10—officially released July 21, 2020

Procedural History

Information charging the defendant with the crimes of interfering with an officer, possession of a sawed-off shotgun, criminal possession of a firearm, and breach of the peace in the second degree, brought to the Superior Court in the judicial district of Waterbury, geographical area number four, where the court, *Cremins*, *J.*, denied the defendant's motion to suppress; thereafter, the state entered a nolle prosequi as to the charges of interfering with an officer and breach of the peace in the second degree; subsequently, the defendant was presented to the court, *Fasano*, *J.*, on a conditional plea of nolo contendere to possession of a sawed-off shotgun and criminal possession of a firearm; judgment of guilty in accordance with the plea, from which the defendant appealed to this court. *Affirmed.*

Adele V. Patterson, senior assistant public defender, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Joseph S. Danielowski*, for the appellee (state).

Opinion

DEVLIN, J. The defendant, Charles J. Ingala, appeals from the judgment of conviction, rendered after a conditional plea of nolo contendere,[1] of possession of a

[1] General Statutes § 54a-94a provides: "When a defendant, prior to the commencement of trial, enters a plea of nolo contendere conditional on the

sawed-off shotgun in violation of General Statutes § 53a-211 and criminal possession of a firearm in violation of General Statutes § 53a-217. The plea followed the trial court's denial of the defendant's motion to suppress the sawed-off shotgun seized by the police. The sole issue in this appeal is whether the warrantless search of the defendant's backyard and the warrantless seizure of the shotgun may be justified under the exigent circumstances exception to the warrant requirement of the fourth amendment to the United States constitution.[2] We affirm the judgment of the trial court.

The following facts and procedural history are relevant to the resolution of the defendant's claims on appeal.[3] At approximately 11 p.m. on August 28, 2016, police officers with the Watertown Police Department were called to the scene of a motor vehicle accident

right to take an appeal from the court's denial of the defendant's motion to suppress or motion to dismiss, the defendant after the imposition of sentence may file an appeal within the time prescribed by law provided a trial court has determined that a ruling on such motion to suppress or motion to dismiss would be dispositive of the case. The issue to be considered in such an appeal shall be limited to whether it was proper for the court to have denied the motion to suppress or the motion to dismiss. A plea of nolo contendere by a defendant under this section shall not constitute a waiver by the defendant of nonjurisdictional defects in the criminal prosecution."

[2] On appeal, the defendant raises numerous arguments in addition to contesting the state's reliance on the exigent circumstances doctrine to justify the warrantless search and seizure. Specifically, the defendant additionally argues that the trial court erroneously determined that (1) the shotgun was abandoned, and (2) the defendant's consent to an earlier search still applied to the later search after the police officers left the backyard and later returned. He also argues that the court implicitly decided that he had a legitimate expectation of privacy in his backyard, thus affording him standing to assert a violation of his fourth amendment rights. In its brief to this court, the state concedes each of these arguments. As a result, the sole issue for this court to decide is whether the exigent circumstances exception applies.

[3] When "the trial court's factual findings in its ruling on [a] defendant's motion to suppress are very limited, in summarizing the relevant facts, we include facts that are implicitly included in the trial court's ruling, and we also look to the record for evidence that supports the trial court's ruling." *State* v. *Kendrick*, 314 Conn. 212, 224, 100 A.3d 821 (2014).

that had occurred in Waterbury near the border of Watertown.[4] Upon arriving at the scene of the accident, the officers learned that one of the vehicles involved had fled the accident. One of the officers, Jeffrey McKirryher, left in an attempt to locate this vehicle. Shortly thereafter, McKirryher was flagged down by George Petro, a motorcyclist, who had seen the accident. Petro told McKirryher that he had spoken to the driver of the vehicle who had left the scene of the accident and that the driver had pointed a sawed-off shotgun at Petro's head. Petro had a cut on his forehead and later explained that the driver had struck him in the head with the shotgun. Petro then informed McKirryher that the driver had fled to a nearby home and led McKirryher to the defendant's home at 411 Falls Avenue in Watertown. Petro indicated that the driver "was down around [the] back" of the property. McKirryher alerted other police officers over his radio of the situation and informed them of his location. Shortly thereafter, four more officers from the Watertown Police Department arrived at 411 Falls Avenue, namely, Officer Jack Conroy, Officer Mark Raimo, Sergeant Jason Demarest, and Sergeant David Ciarleglio.

The officers later described the defendant's home as follows. Falls Avenue runs north to south, and 411 Falls Avenue is located on the western side of the road. The primary structure at 411 Falls Avenue is a multifamily, three-story home with a few separate units. The defendant resides in the basement apartment of this structure. To the north of the property is a wooded area. A large commercial building, which was vacant at the time of the investigation, abuts the property to the west. On the southern border, there is a chain link fence that is approximately four feet high, which separates the

[4] Ultimately, the Waterbury Police Department assumed control over the scene of the accident and conducted a separate investigation to the search for the shotgun at issue in this appeal.

property from a neighboring residential property. The land slopes down from Falls Avenue toward the western edge of the property such that the basement is visible and accessible from the rear of the property. A driveway runs from Falls Avenue to the rear of the property between the home and the northern edge of the property. Both the southern and northern sides of the property were open to the backyard.

After alerting the other officers over his radio, McKirryher walked down the driveway with his service weapon drawn and loudly announced his presence. As he reached the rear of the building, McKirryher saw the defendant's vehicle with severe front end damage parked at the end of the driveway. McKirryher then saw the defendant walk out of his apartment and instructed the defendant to raise his hands. When the police approached the defendant, he was visibly intoxicated. The defendant was placed in handcuffs and McKirryher questioned him about the shotgun. The defendant denied possessing a shotgun. The defendant then gave his consent to the officers to search his apartment and the backyard.

Over the course of approximately one-half hour, the officers searched the backyard and the defendant's apartment, but were unable to locate the shotgun. While the search was being conducted, the defendant was asked several times for the location of the shotgun, to which he repeatedly claimed that there was no shotgun. At one point, Demarest warned the defendant of the potential that a child could stumble across the shotgun in the woods, which appeared to concern the defendant despite his claim that there was no shotgun. When discussing the altercation with Petro, the defendant described Petro as a "bully" and remarked, "Don't bully me. . . . I'll kill ya." During the search, one of the defendant's upstairs neighbors informed Raimo that he had observed the altercation between the defendant and Petro, saw the defendant holding a shotgun, and

believed that he knew where the defendant normally kept the gun inside the basement apartment.

Eventually, the officers decided to return to the front yard and removed the handcuffs from the defendant. As they were walking toward the street, Demarest remarked to the defendant: "We're leaving." This statement was a pretense because, although some officers left, several officers remained. They firmly believed that the shotgun was on the property and they were not going to leave until it was found.

Upon reaching the front yard, two officers—Mckirryher and Conroy—left the scene to resume their nightly patrol duties. Unbeknownst to the defendant, the three officers who remained on the scene—Demarest, Raimo, and Ciarleglio—decided to keep watch over the backyard to see if the defendant would try to locate the shotgun. Demarest waited on the southern side of the front yard where he could see the southwest portion of the backyard. Meanwhile, Raimo and Ciarleglio remained on the northern side of the front yard where they could see the northwest portion of the backyard. Within a few minutes, Demarest saw the defendant walk out of his apartment directly toward the southwest corner of the yard, using the flashlight on his cell phone to illuminate the ground. Seeing this, Demarest was convinced that the defendant was retrieving the shotgun and moved into the backyard to intervene. Demarest stopped the defendant approximately six feet from a bushy area in the southwest corner of the yard. When Raimo and Ciarleglio reentered the backyard, Ciarleglio searched the bushy area and found the shotgun hidden under some scrap wood. The defendant then was placed under arrest.

The defendant was charged with two offenses: possession of a sawed-off shotgun and criminal possession

of a firearm.[5] On May 26, 2017, the defendant filed a motion to suppress the shotgun as evidence, arguing that the search violated his rights under the fourth amendment and article first, § 7, of the constitution of Connecticut, and that none of the exceptions to the warrant requirement of the fourth amendment applied to the seizure of the gun. In response, the state argued, inter alia, that the danger of the defendant arming himself and harming someone with the gun justified the police intervention. The trial court, *Cremins*, *J.*, held a hearing on the motion to suppress and, over the course of two days, heard testimony from all five of the officers involved in the search of the defendant's home. After the parties concluded their arguments on June 8, 2017, the court issued its decision from the bench and denied the motion to suppress. The court found the officers' testimony credible and concluded that the officers reasonably believed that the shotgun was located somewhere on the defendant's property. The court further concluded that the warrantless search of the defendant's backyard was lawful for three reasons: (1) the defendant had abandoned the shotgun and, thus, had no expectation of privacy to it; (2) the second search conducted when the officers returned to the backyard was a continuation of the first search and, therefore, the defendant's consent to the first search extended to the second search; and (3) the probability that the defendant would endanger human lives or destroy evidence constituted an exigent circumstance that excused the warrantless search.

Following the denial of his motion to suppress, the defendant entered a conditional plea of nolo contendere

[5] The defendant also was charged with interfering with an officer in violation of General Statutes § 53a-167a and breach of the peace in the second degree in violation of General Statutes § 53a-181. Following the defendant's conditional plea of nolo contendere to the other two charges, the court entered a nolle prosequi as to each of the remaining charges.

to both charges on the condition that he could appeal the denial of his motion to suppress. The court, *Fasano*, *J.*, accepted the defendant's plea and determined that a ruling on the motion to suppress would be dispositive of the case. Thereafter, the court sentenced the defendant to a term of incarceration of three years for each charge, to be served consecutively, with a mandatory minimum sentence of two years of incarceration. This appeal followed.

We begin by setting forth our standard of review. "As a general matter, the standard of review for a motion to suppress is well settled. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record. . . . [W]hen a question of fact is essential to the outcome of a particular legal determination that implicates a defendant's constitutional rights, [however] and the credibility of witnesses is not the primary issue, our customary deference to the trial court's factual findings is tempered by a scrupulous examination of the record to ascertain that the trial court's factual findings are supported by substantial evidence. . . . [W]here the legal conclusions of the court are challenged, [our review is plenary, and] we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision. . . . Accordingly, the trial court's legal conclusion regarding the applicability of the exigent circumstances doctrine is subject to plenary review." *State* v. *Kendrick*, 314 Conn. 212, 222, 100 A.3d 821 (2014).

"The fourth amendment to the United States constitution provides: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particu-

larly describing the place to be searched, and the persons or things to be seized."[6] (Internal quotation marks omitted.) *State* v. *Liam M.*, 176 Conn. App. 807, 819, 172 A.3d 243, cert. denied, 327 Conn. 978, 174 A.3d 196 (2017).

The trial court analyzed the defendant's motion to suppress under a number of exceptions to the warrant requirement, including the exigent circumstances doctrine, and we agree that this doctrine is implicated by the facts of the present case. "The exigent circumstances doctrine is one of three exceptions to the warrant requirement that are triggered by the need for swift action by the police. All three exceptions, the exigent circumstances doctrine, the protective sweep doctrine and the emergency doctrine, must be supported by a reasonable belief that immediate action was necessary. . . . Of the three, the exigent circumstances doctrine arguably encompasses the widest variety of factual scenarios. [Our Supreme Court] previously [has] recognized the [catchall] quality of the doctrine, explaining that [t]he term, exigent circumstances, does not lend itself to a precise definition but generally refers to those situations in which law enforcement agents will be unable or unlikely to effectuate an arrest, search or seizure, for which probable cause exists, unless they act swiftly and, without seeking prior judicial authorization. . . . There are three categories of circumstances that are exigent: those that present a risk of danger to human life; the destruction of evidence; or flight of a suspect. . . . The exigent circumstances doctrine, however, is limited to instances in which the police initially have probable cause either to arrest or to search." (Citations omitted; internal quotation marks omitted.) *State* v. *Kendrick*, supra, 314 Conn. 225–27.

[6] Although the defendant claims a due process violation under our state constitution, he does not provide a separate analysis thereunder or argue that the Connecticut constitution provides greater protection than the federal constitution. Accordingly, our review of his claims is limited to the federal

Our Supreme Court has adopted a totality of circumstances test to evaluate whether an exigency exists, which inquires "whether, under the totality of the circumstances, the police had reasonable grounds to believe that if an immediate arrest [or entry] were not made, the accused would have been able to destroy evidence, flee or otherwise avoid capture, or might, during the time necessary to procure a warrant, endanger the safety or property of others. This is an objective test; its preeminent criterion is what a reasonable, [well trained] police officer would believe, not what the . . . officer actually did believe. . . . Put simply, given probable cause to arrest or search, exigent circumstances exist when, under the totality of the circumstances, the officer reasonably believed that immediate action was necessary to protect the safety of those present, or to prevent the flight of the suspect, or the destruction of evidence." (Citation omitted; internal quotation marks omitted.) Id., 227–28. The test requires a reasonable belief, not a level of certainty approaching probable cause. Id., 238–39. That said, "[w]hen there are reasonable alternatives to a warrantless search, the state has not satisfied its burden of proving exigent circumstances." (Internal quotation marks omitted.) *State* v. *Liam M.*, supra, 176 Conn. App. 822. Moreover, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Kentucky* v. *King*, 563 U.S. 452, 466, 131 S. Ct. 1849, 179 L. Ed. 2d 865 (2011).

On appeal, the state does not contest that the defendant had a reasonable expectation of privacy, and the defendant does not challenge the trial court's conclusion that the police had probable cause to search the

constitution. See *State* v. *Johnson*, 288 Conn. 236, 244 n.14, 951 A.2d 1257 (2008).

property. Accordingly, we need inquire only into whether the police reasonably believed that immediate action was necessary. The state claims that the defendant's retrieval of the shotgun presented a threat to the safety of the officers on the scene and justified the warrantless search. We agree.[7]

While positioned in the front yard, before the defendant emerged from his apartment, the police had strong reason to believe that the defendant, earlier that evening, had used the sawed-off shotgun—a highly dangerous weapon that is per se illegal—to violently assault Petro, and that it was likely that the shotgun was on the property notwithstanding the defendant's repeated assertions that he had never possessed a shotgun. See General Statutes § 53a-211. While the defendant never verbally threatened the officers, he repeatedly remarked in the officers' presence that he was willing to resort to violence in response to someone who bullied or wronged him. The police also knew that the defendant was intoxicated. Although the police had no indication as to whether the shotgun was loaded, it was reasonable and prudent of them to believe that it could have been loaded.

It was approximately midnight when the police used the pretense that they were all leaving when, in fact, three remained in the front yard. On appeal, the defendant does not challenge the right of the officers to lie to create this pretense, nor does he challenge the officers' right to remain in the front yard. After only a few minutes, the defendant left his apartment and walked toward the back corner of his yard, using his cell phone flashlight for illumination.

[7] On appeal, the state also argues that the risk that the defendant could have destroyed evidence or could have removed the shotgun also justified the warrantless search. Because we conclude that the safety concerns of the police justified the search, we need not address these additional claims of exigent circumstances.

Under these circumstances, it was reasonable for the police to conclude that (1) the defendant believed that the police had all left, (2) he was intent on recovering the shotgun, and (3) such actions were prompted by the defendant's desire to avoid arrest. The officers testified that they were concerned that the defendant would soon arm himself and present a threat to the safety of the officers, and we conclude that such concern was reasonable. At the time that the defendant attempted to retrieve the shotgun from the backyard, Demarest was standing approximately six feet from the southeast corner of the home in the front yard. In the footage from the officers' body cameras submitted to the trial court, the front yard was dimly lit by light coming from the house and from a light post on the edge of the street. Based on this evidence, it certainly would be reasonable for an officer in Demarest's position to conclude that, if the defendant had looked toward the street, he would have seen the silhouette of Demarest standing unobstructed in the front yard and quickly discovered the police surveillance. This posed an imminent threat to the officers' safety if the officers had not intervened and prevented the defendant from arming himself. See *State* v. *Correa*, 185 Conn. App. 308, 338, 197 A.3d 393 (2018) ("the possibility that a suspect knows or may learn that he is under surveillance or at risk of immediate apprehension may constitute exigent circumstances, on the theory that the suspect is more likely to destroy evidence, to attempt escape or to engage in armed resistance" (internal quotation marks omitted)).

On the basis of the totality of the circumstances, the court properly concluded that the search was lawful under the exigent circumstances exception to the warrant requirement and properly denied the defendant's motion to suppress.

The judgment is affirmed.

In this opinion the other judges concurred.

TINA M. CARRICO *v.* MILL ROCK LEASING, LLC, ET AL.
(AC 42460)

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

Syllabus

The plaintiff sought to recover damages for the alleged negligence of the defendant J Co., an independent contractor hired by a possessor of land to render snow and ice removal/remediation services for premises on which the plaintiff slipped on an accumulation of ice and fell to the ground, sustaining injuries. The trial court granted the motion for summary judgment filed by J Co., interpreting the counts against it as sounding in premises liability, and finding that because the plaintiff did not allege that J Co. possessed and controlled the premises, J Co. did not owe a duty to the plaintiff. On the plaintiff's appeal to this court, *held* that the trial court improperly rendered summary judgment as to those counts of the complaint against J Co. by mischaracterizing the plaintiff's claims as sounding in premises liability; the counts against J Co. alleged ordinary negligence in that the plaintiff did not allege that J Co. owed her a duty because it owned or controlled the premises, but that the duty J Co. owed to her arose from the snow services agreement it had with the third-party land possessor, and, pursuant to § 324A of the Restatement (Second) of Torts, because the plaintiff alleged that J Co. undertook to render snow and ice removal/remediation services on the premises, which activity J Co. should have recognized as necessary for the protection of persons such as the plaintiff, J Co. may have been liable to the plaintiff for the injuries she allegedly sustained that resulted from any failure by J Co. to exercise reasonable care in removing/remediating snow and/or ice from the premises.

Argued March 10—officially released July 21, 2020

Procedural History

Action to recover damages for personal injuries sustained as a result of the defendants' alleged negligence, brought to the Superior Court in the judicial district of New London, where the named defendant et al. filed a cross complaint; thereafter, the court, *Swienton, J.*, granted in part the motion for summary judgment filed by the defendant Jones Landscaping, LLC, et al., and the plaintiff appealed to this court. *Reversed*; *further proceedings*.

Kevin G. Smith, with whom, on the brief, was *Kara M. Burgarella*, for the appellant (plaintiff).

Richard E. Fennelly III, with whom, on the brief, was *Jonathan P. Ciottone*, for the appellees (defendant Jones Landscaping, LLC, et al.).

Opinion

DiPENTIMA, C. J. The plaintiff, Tina M. Carrico, appeals from the judgment of the trial court rendering summary judgment in favor of the defendant Jones Landscaping, LLC.[1] On appeal, the plaintiff claims that the court improperly determined that counts three through five of the complaint alleged premises liability claims and did not sound in ordinary negligence. We agree with the plaintiff and reverse the judgment of the trial court.

The following facts, as alleged in the complaint, and procedural history are relevant to our decision. The plaintiff commenced the action in January, 2017, and filed a five count revised complaint on June 22, 2017. In counts one and two, respectively, the plaintiff alleged negligence and vicarious liability against Mill Rock Leasing, LLC (Mill Rock). Counts three through five are identical except that the defendant is identified differently in each count.[2] The plaintiff labeled counts three through five as "negligence" counts and alleged the following. On February 3, 2015, the plaintiff, who was

[1] The plaintiff's complaint contained three identical counts against three limited liability companies with similar names and the same principal place of business. See footnote 2 of this opinion. All references herein to the defendant are to the three entities listed in footnote 2 of this opinion. The complaint also named Mill Rock Leasing, LLC, as a defendant. The counts of the complaint brought against Mill Rock Leasing, LLC, were not part of the defendant's motion for summary judgment. Mill Meadow Development, LLC, was also named in the complaint as a defendant, but the plaintiff later withdrew the complaint as to Mill Meadow Development, LLC.

[2] Counts three through five are alleged against Jones Landcape, LLC, Jones Landscape, LLC, and Jones Landscaping, LLC, respectively.

a lawful business invitee, was walking in the parking lot of a commercial property located at 137-139 Mill Rock Road East in Old Saybrook, when she slipped on an accumulation of ice and fell to the ground, sustaining injuries in the process. Mill Rock owned and controlled the premises. The plaintiff did not allege that the defendant controlled or possessed the premises, but alleged that, at the time of the plaintiff's fall, the defendant "was responsible pursuant to a contract and/or an agreement with . . . Mill Rock . . . to remove and/or remediate snow and ice and to provide ice melt, sand or other abrasive materials and/or chemical deterrents to the parking lot that is the subject of this lawsuit."

On March 26, 2018, the defendant filed a motion for summary judgment as to counts three through five of the revised complaint, arguing, inter alia, that no genuine issue of material fact existed that the defendant did not owe a duty of care to the plaintiff because the defendant did not own, possess, or control the premises where the plaintiff allegedly slipped; rather, the defendant argued that Mill Rock and Mill Meadow Development, LLC, had a nondelegable duty to maintain the parking lot located at 137-139 Mill Rock Road East. The plaintiff filed an objection in which she argued, in part, that genuine issues of material fact existed because counts three through five sounded in ordinary negligence, and, pursuant to the duty of care owed in ordinary negligence actions, the defendant—as an independent contractor hired by the possessor of land, Mill Rock, to render snow and ice removal/remediation services for the premises—owed the plaintiff a duty of care.

The court heard oral argument on the motion on December 17, 2018. In a December 20, 2018 memorandum of decision, the court framed the issue before it as "whether counts three through five of the plaintiff's claims against the defendant . . . sound in ordinary

negligence or negligence based upon a theory of premises liability." In granting the motion, the court interpreted counts three through five of the revised complaint as sounding in premises liability and accordingly granted the motion for summary judgment. This appeal followed.

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

Our resolution of the claim before us is guided by the analysis in two pivotal cases. To place the trial court's decision and the plaintiff's claim in the proper context, we begin our analysis with an overview of these cases. In the first case, *Gazo* v. *Stamford*, 255

[3] In *Larobina* v. *McDonald*, 274 Conn. 394, 399–403, 876 A.2d 522 (2005), our Supreme Court clarified the circumstances under which a motion for summary judgment may be used instead of a motion to strike to challenge the legal sufficiency of a complaint. On appeal, the plaintiff does not challenge the propriety of the court's granting of the defendant's motion for summary judgment on the grounds that the motion improperly challenged the sufficiency of the complaint and that the plaintiff was not given an opportunity to replead. Accordingly, we do not address whether the motion for summary judgment properly was used to challenge the legal sufficiency of counts three through five of the complaint.

Conn. 245, 253, 765 A.2d 505 (2001), our Supreme Court adopted § 324A of the Restatement (Second) of Torts and held that an independent contractor who performs snow removal services pertaining to a third party's sidewalk can be directly liable to a pedestrian who slips on accumulated ice and snow on that sidewalk. The court in *Gazo* specifically held that the defendant, an independent contractor who had entered into a contract with a property owner to clear an abutting sidewalk, owed a direct duty to the plaintiff pedestrian who had slipped on an accumulation of ice and snow on the sidewalk. Id., 248–58. Our Supreme Court stated that the plaintiff's claim was not based on whether the independent contractor "may be liable to the plaintiff on a theory of premises liability, which requires that the party to be held liable be in control of the property. That is not a basis of the plaintiff's claims." Id., 249. In holding that the independent contractor owed the pedestrian a direct duty, our Supreme Court adopted § 324A of the Restatement (Second) of Torts, "at least in the circumstances of the present case, in which it is clear that the service was performed for consideration and in a commercial context"; id., 253; and reasoned that § 324A "recognizes such a duty as a matter of policy." Id., 252. Section 324A provides in relevant part: "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if . . . (b) he has undertaken to perform a duty owed by the other to the third person . . . ." 2 Restatement (Second), Torts § 324A (1965).

In a later case, our Supreme Court iterated that *Gazo* "held that a contractor who undertakes the snow removal duties of a landowner is liable to a plaintiff who slips as a result of the contractor's negligent perfor-

mance. . . . [U]nder § 324A [b] of the Restatement [Second] [the defendant contractor] is subject to liability to the plaintiff for his physical injuries if the plaintiff can show that [the contractor] failed to exercise reasonable care when performing the duty owed by [the landowner who hired the contractor] to the plaintiff. . . . [I]t should be emphasized that [the contractor] may be held liable to the plaintiff [under § 324A (b)] only to the extent that [1] his contractual undertaking permits, and [2] his breach of duty to the plaintiff is part and parcel of [the landowner's] duty to the plaintiff." (Citations omitted; internal quotation marks omitted.) *Demond* v. *Project Service, LLC*, 331 Conn. 816, 826–27, 208 A.3d 626 (2019).

Our Supreme Court in *Gazo* provided the following additional reasons for concluding that the independent contractor owes the pedestrian a direct duty of care. First, it was not beyond the scope of foreseeability to hold the independent contractor liable for the injuries to the pedestrian plaintiff because "the potential for harm from a fall on ice was significant and foreseeable. . . . It is also reasonable to conclude that an ordinary person in [the independent contractor's] position, knowing what he knew or should have known, would anticipate that severe injuries were likely to result from a slip and fall if the sidewalk was not cleared properly of ice and snow. It is not unreasonable, or beyond the scope of foreseeability, therefore, to hold [the independent contractor] accountable for the plaintiff's injuries if they were caused by [the independent contractor's] negligent performance of his contract . . . ." (Citation omitted; internal quotation marks omitted.) *Gazo* v. *Stamford*, supra, 255 Conn. 250–51.

The court further reasoned that, "[s]econd, there are valid public policy reasons for holding [the independent contractor] responsible for his conduct. [The indepen-

dent contractor's] liability to the plaintiff fits comfortably within the general rule that every person has a duty to use reasonable care not to cause injury to those whom he reasonably could foresee to be injured by his negligent conduct, whether that conduct consists of acts of commission or omission. . . . [T]he ultimate test of the existence of the duty to use care is found in the foreseeability that harm may result if it is not exercised . . . . [A] duty to use care may arise from a contract . . . ." (Citations omitted; internal quotation marks omitted.) Id., 251.

Lastly, the court reasoned that it already "adopted an analogous duty in construction cases. . . . We see no meaningful distinction between an independent contractor who has created a dangerous condition on the land, such as installing a faulty septic system or negligently supervising a construction project, and an independent contractor who has agreed to perform a service that is essential to keeping foreseeable third parties safe." (Citations omitted; internal quotation marks omitted.) Id., 253–54.

In the second case relevant to our analysis, *Sweeney* v. *Friends of Hammonasset*, 140 Conn. App. 40, 58 A.3d 293 (2013), this court reasoned that § 324A of the Restatement (Second) of Torts was inapplicable under the circumstances of that case. In *Sweeney*, the plaintiff, who had attended an event at Hammonasset Beach State Park, which was owned by the state of Connecticut, brought an action against the Friends of Hammonasset, a volunteer organization promoting the event, and the president of the organization, after he slipped and fell while walking on a driveway road during the event. Id., 44. This court affirmed the judgment of the trial court, interpreting the complaint as sounding in premises liability. This court reasoned: "Reading the complaint in its entirety, the allegations of negligence pertain to the alleged failure of the defendants either

reasonably to inspect and maintain the defective premises in order to render them reasonably safe or to warn of dangers that the plaintiff, as an invitee of the defendants, could not reasonably be expected to discover. Though these allegations are not inconsistent with a duty under a theory of ordinary negligence, the gravamen of the plaintiff's complaint pertains to the dangerous and unsafe icy conditions of the walking area . . . . Section 324A does not apply because, as the trial court aptly noted, the plaintiff in the present action does not allege that the defendants owed him a duty based upon their arrangement with a third party to render certain services. Rather, he alleges that the defendants owed him a duty based on the services that were rendered to him, as an invitee on the premises. As the plaintiff's allegations stem from an injury caused by a dangerous condition on the premises, liability is dependent on possession and control of the dangerous premises." (Citation omitted; internal quotation marks omitted.) Id., 48–49.

In the present case, the trial court determined that "the plaintiff has not alleged the crucial fact that would clearly create a premises liability case—possession and control. The gravamen of the plaintiff's complaint is that her injuries stemmed from a dangerous condition on the premises, an accumulation of ice. Under *Sweeney* [v. *Friends of Hammonasset*, supra, 140 Conn. App. 48] this allegation is sufficient to find that the negligence alleged is founded on a theory of premises liability. . . . Simply by omitting the crucial element of possession and control of a premises liability cause of action does not automatically result in a cause of action sounding in ordinary negligence. The only theory of liability presented in counts three through five is based upon negligence for failure to exercise due care in responding to the icy conditions in the parking lot. Thus, these counts are properly construed as premises liability

claims." The court noted that, as in *Sweeney*, "the plaintiff in the present action does not allege that the defendant . . . owed [her] a duty based upon its arrangement with a third party to render certain services. For this reason, § 324A of the Restatement (Second) of Torts . . . is . . . inapplicable to the present action . . . ." After concluding that the counts sounded in premises liability, the court granted the motion for summary judgment, reasoning that the defendant "did not owe a duty to the plaintiff because there is no genuine issue of material fact as to whether it owned, possessed or controlled the premises where the plaintiff alleges she was injured. Without possession or control of the premises at issue, the defendant has no duty to the plaintiff, and thus, is entitled to judgment as a matter of law."

On appeal, the plaintiff claims that the court improperly determined that counts three through five of the complaint allege premises liability claims.[4] The plaintiff argues that the reasoning in *Gazo* applies and that the claims at issue sound in ordinary negligence. The defendant counters that the reasoning in *Sweeney* v. *Friends of Hammonasset*, supra, 140 Conn. App. 48, demonstrates that the claims at issue are premises liability claims because the gravamen of the plaintiff's claims against the defendant is an icy condition in the parking lot on the premises. We agree with the plaintiff.

[4] We note that, although the counts of the complaint against Mill Rock may still be pending, this appeal is properly before us because the summary judgment rendered on counts three through five of the complaint disposed of all causes of action against the defendant and is therefore a final judgment pursuant to Practice Book § 61-3. That section provides in relevant part that "[a] judgment disposing of only a part of a complaint . . . is a final judgment if that judgment disposes of all causes of action in that complaint . . . brought by or against a particular party or parties.

"Such a judgment shall be a final judgment regardless of whether judgment was rendered on the granting of a motion to strike pursuant to Section 10-44, by dismissal pursuant to Section 10-30, by summary judgment pursuant to Section 17-44, or otherwise." Practice Book § 61-3; see also *Harnage* v. *Commissioner of Correction*, 141 Conn. App. 9, 13–14, 60 A.3d 308 (2013).

"The interpretation of pleadings is always a question of law for the court . . . . Our review of the trial court's interpretation of the pleadings therefore is plenary. . . . [W]e long have eschewed the notion that pleadings should be read in a hypertechnical manner. Rather, [t]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . [T]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties. . . . Our reading of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension. . . . Although essential allegations may not be supplied by conjecture or remote implication . . . the complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties. . . . As long as the pleadings provide sufficient notice of the facts claimed and the issues to be tried and do not surprise or prejudice the opposing party, we will not conclude that the complaint is insufficient to allow recovery." (Citations omitted; internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 536–37, 51 A.3d 367 (2012).

In granting the defendant's motion for summary judgment, the court concluded that, under a theory of premises liability, one who possesses or controls the premises owes a duty to the plaintiff and concluded that because no genuine issue of material fact existed that the defendant did not possess or control the premises where the plaintiff's alleged injury occurred, the defen-

dant owed no duty to the plaintiff. In contrast, under a theory of ordinary negligence, as advocated by the plaintiff, an independent contractor under certain circumstances owes a duty of care to the plaintiff. See *Gazo* v. *Stamford*, supra, 255 Conn. 248–58. Accordingly, whether the defendant owed the plaintiff a duty in the present case may depend on whether the claims at issue sound in premises liability or ordinary negligence. To assist in our interpretation of the complaint, we examine the following general principles of the duty owed under both types of claims.

"[T]he essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury . . . and [t]he existence of a duty of care is a prerequisite to a finding of negligence . . . . The existence of a duty is a question of law and only if such a duty is found to exist does the trier of fact then determine whether the defendant [breached] that duty in the particular situation at hand. . . . If a court determines, as a matter of law, that a defendant owes no duty to a plaintiff, the plaintiff cannot recover in negligence from the defendant. . . . Duty is a legal conclusion about relationships between individuals, made after the fact, and imperative to a negligence cause of action. . . . We have stated that the test for the existence of a legal duty of care entails (1) a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result, and (2) a determination, on the basis of a public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in the case. . . . Additionally, [a] duty to use care may arise from a contract, from a statute, or from circumstances under which a reasonable person, knowing what he knew or should have known, would anticipate that harm of the

general nature of that suffered was likely to result from his act or failure to act." (Citations omitted; internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, supra, 306 Conn. 538–39.

With respect to the element of duty in a premises liability action, possession and control of the premises by the defendant is dispositive. "Liability for injuries caused by defective premises . . . does not depend on who holds legal title, but rather on who has possession and control of the property. . . . Thus, the dispositive issue in deciding whether a duty exists is whether the [defendant] has any right to possession and control of the property." (Citation omitted.) *LaFlamme* v. *Dallessio*, 261 Conn. 247, 251–52, 802 A.2d 63 (2002); id. (applying principles of premises liability action).

We agree with the plaintiff that the reasoning in *Gazo* applies to the present case. Applying that reasoning, we conclude that counts three through five allege ordinary negligence. The plaintiff does not allege in those counts that the defendant owes her a duty *because* it owned or controlled the premises. Rather, the plaintiff alleges that "Mill Rock . . . owned, leased, possessed, controlled, operated, managed, and/or maintained a commercial property located at 137-139 Mill Rock Road East, Old Saybrook . . . which property included a parking lot . . . ." The plaintiff further alleges that, on February 3, 2015, the defendant "was responsible pursuant to a contract and/or agreement with . . . Mill Rock . . . to remove and/or remediate snow and ice and to provide ice melt, sand or other abrasive materials and/or chemical deterrents to the parking lot that is the subject of this lawsuit" and that her injuries were caused by the negligence and carelessness of the defendant in multiple ways relating to an allegedly inadequate snow and ice removal process, including a failure to "adequately plow, shovel or otherwise remove and/or remediate snow and/or ice in the parking lot . . . ."

Accordingly, the plaintiff alleges that the duty the defendant owed to her arises from the snow services agreement the defendant had with Mill Rock.

In *Gazo*, our Supreme Court did not require that the independent contractor own or control the premises in order to hold that the independent contractor owed the plaintiff a duty of care under a theory of negligence. See *Gazo* v. *Stamford*, supra, 248–58. Similar to the factual circumstances in *Gazo*, in the present case, the plaintiff alleges that the defendant's snow and ice removal/remediation services were rendered to a third party pursuant to an agreement in a commercial context. Pursuant to § 324A of the Restatement (Second) of Torts, because it is alleged that the defendant undertook to render snow and ice removal/remediation services on Mill Rock's premises, which activity the defendant should recognize as necessary for the protection of persons such as the plaintiff, the defendant may be liable to the plaintiff for the injuries she allegedly sustained that resulted from any failure by the defendant to exercise reasonable care in removing/remediating snow and/or ice from the premises.

We also agree with the plaintiff that the present case is distinguishable from *Sweeney* v. *Friends of Hammonasset*, supra, 140 Conn. App. 40. In *Sweeney*, this court reasoned that § 324A of the Restatement (Second) of Torts did not apply because the plaintiff did not allege that the defendants owed a duty to him based on an arrangement the defendants had with a third party to render certain services but, rather, the defendants' duty arose from services that the defendants rendered to him. Id., 49. Unlike in *Sweeney*, the plaintiff in the present case *did* allege that the defendant owed her a duty based on an arrangement it had with a third party to provide services, and does not allege that the defendant owed her a duty based on services rendered *to her*. These critical factual differences between the present

case and *Sweeney* offer further support for the applicability of § 324A here. Additionally, the gravamen of the plaintiff's allegations in counts three through five is that the defendant was negligent in its performance of its agreement with Mill Rock for snow and ice removal/remediation services and, thus, the plaintiff does not allege liability based on control or possession of the premises as would be required in a premises liability claim. Rather, she alleges liability based on the allegedly negligent performance of services under an agreement with a third party, which fits squarely within the ambit of a claim sounding in ordinary negligence pursuant to *Gazo* and § 324A. For the foregoing reasons, we conclude that the trial court improperly rendered summary judgment as to counts three through five of the complaint by mischaracterizing the plaintiff's claims against the defendant as sounding in premises liability.

The judgment is reversed and the case is remanded for further proceedings in accordance with this opinion.

In this opinion the other judges concurred.

GEORGE LABISSONIERE, COEXECUTOR (ESTATE OF ROBERT LABISSONIERE) ET AL. *v.* GAYLORD HOSPITAL, INC., ET AL.

(AC 42581)

Lavine, Moll and Sheldon, Js.

Syllabus

The plaintiffs, coexecutors of the estate of R, sought to recover damages for the alleged medical malpractice of the defendants, a hospital, a physician practice group, and several individual physicians. The plaintiffs, pursuant to statute (§ 52-190a), appended to their complaint an opinion letter authored by M, a physician and general surgeon who was board certified in surgery; the individual physicians were board certified in internal medicine. The plaintiffs alleged in their complaint that the physicians' diagnosis and postsurgical treatment of R was within the medical specialty of surgery, that the physicians were acting outside

the scope of their specialty and, therefore, M could be considered a "similar health care provider" as defined by statute (§ 52-184c (c)). The defendants filed motions to dismiss in which they claimed, inter alia, that the trial court lacked personal jurisdiction over them because M was not a "similar health care provider" to them as defined by § 52-184c (c). The physician practice group also claimed that the trial court lacked subject matter jurisdiction because it was not a legal entity at the time R received treatment. The trial court granted the motions to dismiss on the ground that it lacked personal jurisdiction over the defendants and rendered judgment thereon, from which the plaintiffs appealed to this court. *Held*:

1. The trial court did not lack subject matter jurisdiction over the claim against the physician practice group; it was irrelevant that the physician practice group was not a legal entity at the time that R was treated, as it was a legal entity at the time the action was brought against it and, therefore, the court had subject matter jurisdiction.
2. The trial court properly dismissed the plaintiffs' action for lack of personal jurisdiction; the plaintiffs' unsupported conclusory allegation that the individual physicians were acting outside the scope of their specialty of internal medicine was insufficient to establish that they were acting as surgeons when they treated R and, therefore, the letter authored by M, a surgeon, was not authored by a "similar health care provider."

Argued March 9—officially released July 21, 2020

Procedural History

Action to recover damages for the defendants' alleged medical malpractice, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Dubay*, *J.*, granted the defendants' motions to dismiss and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

Keith Yagaloff, for the appellants (plaintiffs).

Thomas Anderson, with whom, on the brief, was *Cristin E. Sheehan*, for the appellees (defendant Eileen Ramos et al.).

Michael G. Rigg, for the appellee (named defendant).

Laura E. Waltman, with whom, on the brief, was *R. Cornelius Danaher, Jr.*, for the appellee (defendant Sound Physicians of Connecticut, LLC).

Opinion

LAVINE, J. This appeal arises out of a medical malpractice action brought by the plaintiffs, George Labissoniere and Helen Civale, coexecutors of the estate of Robert Labissoniere (decedent), against the defendants, internal medicine physicians, Moe Kyaw, Madhuri Gadiyaram, and Eileen Ramos (collectively, physicians), and their employers, Gaylord Hospital, Inc. (hospital), and Sound Physicians of Connecticut, LLC (Sound Physicians). The plaintiffs appeal from the judgment of the trial court dismissing their claims for lack of personal jurisdiction pursuant to General Statutes § 52-190a.[1] The plaintiffs' central claim on appeal is that the court erred in concluding that the physicians were internists acting within their specialty when they treated the decedent. The plaintiffs therefore assert that the trial court erred in concluding that the opinion letter attached to their complaint, which was written by a surgeon, failed to

[1] General Statutes § 52-190a provides in relevant part: "(a) No civil action . . . shall be filed to recover damages resulting from personal injury or wrongful death . . . whether in tort or in contract, in which it is alleged that such injury or death resulted from the negligence of a health care provider, unless the attorney or party filing the action . . . has made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint . . . shall contain a certificate of the attorney or party filing the action . . . that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant . . . . To show the existence of such good faith, the claimant or the claimant's attorney . . . shall obtain a written and signed opinion of a similar health care provider, as defined in section 52-184c, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. Such written opinion shall not be subject to discovery by any party except for questioning the validity of the certificate. The claimant or the claimant's attorney . . . shall retain the original written opinion and shall attach a copy of such written opinion, with the name and signature of the similar health care provider expunged, to such certificate. . . .

"(c) The failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action."

meet the personal jurisdictional requirement of § 52-190a and the allegations of the complaint did not satisfy the personal jurisdictional exception provided by General Statutes § 52-184c (c).[2] We reject the plaintiffs' claim. Sound Physicians argues on appeal, as an alternative ground for affirmance, that the trial court lacked subject matter jurisdiction over the claim against it because it was not a legal entity at the time that the decedent was treated at the hospital. We disagree that the trial court lacked subject matter jurisdiction. We therefore affirm the judgment dismissing the action for lack of personal jurisdiction over the defendants.

In May, 2015, the plaintiffs instituted a prior action against the physicians and the hospital on the basis of allegations that are substantially similar to those in the present case. In September, 2016, the trial court, *Cobb*, *J.*, dismissed that action for lack of personal jurisdiction because the opinion letter attached to the plaintiffs' complaint was not authored by a "similar health care provider," as required by § 52-190a. This court affirmed the judgment of dismissal on direct appeal. See *Labissoniere* v. *Gaylord Hospital, Inc.*, 182 Conn. App. 445, 185 A.3d 680 (2018) (*Labissoniere I*).

In *Labissoniere I*, the plaintiffs alleged that the decedent was admitted to the hospital on February 14, 2013, for medical care and rehabilitation following a hip replacement surgery performed at St. Francis Hospital and Medical Center (St. Francis Hospital). Id., 448. The plaintiffs further alleged that, while under the care of

[2] General Statutes § 52-184c (c) provides: "If the defendant health care provider is certified by the appropriate American board as a specialist, is trained and experienced in a medical specialty, or holds himself out as a specialist, a 'similar health care provider' is one who: (1) Is trained and experienced in the same specialty; and (2) is certified by the appropriate American board in the same specialty; *provided if the defendant health care provider is providing treatment or diagnosis for a condition which is not within his specialty, a specialist trained in the treatment or diagnosis for that condition shall be considered a 'similar health care provider.'* " (Emphasis added.)

the physicians at the hospital, the decedent suffered from "a retroperitoneal hematoma, a postoperative condition that resulted in irreversible nerve damage, as well as hemorrhagic shock and multiorgan failure, requiring the decedent to be transferred back to St. Francis Hospital as an emergency admission on March 11, 2013."[3] Id. The plaintiffs alleged that the physicians were board certified in internal medicine and that they "provided the decedent with treatment and diagnosis for a postoperative condition which was within the specialty of surgery." In an attempt to comply with § 52-190a (a), the plaintiffs appended to their complaint an opinion letter authored by David A. Mayer, a physician and board certified general surgeon. *Labissoniere* v. *Gaylord Hospital, Inc.*, supra, 182 Conn. App. 448–49.

The physicians and the hospital moved to dismiss the plaintiffs' claims against them for lack of personal jurisdiction on the ground that Mayer was not an internist and, therefore, was not a "similar health care provider," as defined in § 52-184c. Id., 449. The plaintiffs countered that Mayer was a "similar health care provider" pursuant to § 52-184c (c) because the physicians were acting as surgeons during their diagnosis and treatment of the decedent's retroperitoneal hematoma. In ruling on the motion to dismiss, Judge Cobb reasoned that "neither the . . . complaint . . . nor the surgeon's written opinion letter allege[s] or state[s] that the [physicians and the hospital] were acting outside their specialty of internal medicine in treating the [decedent] or that they undertook the diagnosis and treatment of a condition outside of their specialty such that their conduct should be judged against the standards of care applicable to that specialty. Such an allegation and expert opinion is necessary to fall within the exception contained in [§ 52-184c (c)]." (Internal quotation marks omitted.) Id., 451. Accordingly, Judge Cobb dis-

[3] Neither *Labissoniere I* nor the present action alleges a wrongful death cause of action.

missed the plaintiffs' complaint for lack of personal jurisdiction.

On appeal in *Labissoniere I*, the plaintiffs claimed, inter alia, that the court erred in determining that the opinion letter did not comply with § 52-190a, and that the exception set forth in § 52-184c (c) was inapplicable. Id., 454. Specifically, the plaintiffs argued that "the exception in § 52-184c (c) applie[d] because they alleged that the treatment and care the physicians rendered to the decedent fell 'within the specialty of surgery' and, therefore, the physicians were acting outside of their specialty of internal medicine." Id., 456. The physicians and the hospital argued in response that "because the plaintiffs did not allege that the physicians were acting outside the scope of their medical specialty of internal medicine, the exception under § 52-184c (c) did not apply, and the plaintiffs were thus obligated to obtain an opinion letter authored by a physician board certified in internal medicine." Id. This court agreed with the physicians and the hospital, determining that Mayer was not a "similar health care provider" because he was not board certified in internal medicine. Id., 455.

This court further concluded that "the decedent was admitted to the hospital for 'medical care and rehabilitation' following a hip replacement, the actual surgical procedure having been performed at another hospital, by an independent surgeon. While under the . . . care [of the physicians and the hospital], the decedent developed complications, which required treatment and diagnosis by the physicians. Although the physicians appear initially to have misdiagnosed the decedent's postoperative condition, nothing contained in the plaintiffs' complaint or opinion letter suggests that the physicians were not acting as internists. In fact, the crux of the plaintiffs' complaint was that the physicians were negligent in their initial assessment of the decedent's condition, not that the physicians were negligent in performing a surgical procedure." Id., 457. This court thus

concluded that "[b]ecause the plaintiffs here have not alleged that the physicians acted outside the scope of their specialty of internal medicine, the exception to the definition of similar health care provider in § 52-184c (c) does not apply. Accordingly, the plaintiffs were required to obtain an opinion letter from an expert who (1) had training and experience in internal medicine, and (2) was board certified in internal medicine." Id., 459. This court, therefore, affirmed the judgment dismissing the action in *Labissoniere I*. Id.

In January, 2017, while *Labissoniere I* was pending in this court, the plaintiffs commenced the present action against the hospital, the physicians, and Sound Physicians. As previously noted, the plaintiffs' complaint contains allegations that are substantially similar to those set forth in *Labissoniere I*. The plaintiffs also appended the same opinion letter authored by Mayer to the complaint, in which Mayer opined that the conduct of the hospital and the physicians fell below the applicable standard of care by failing to timely diagnose a retroperitoneal bleed in the decedent, conduct a CT scan of the decedent, and transfer the decedent back to St. Francis Hospital. The plaintiffs also named Sound Physicians as a defendant and pleaded a count of negligence against it. The plaintiffs further alleged that the physicians were employed by both the hospital and Sound Physicians.

The plaintiffs again alleged that, on February 14, 2013, the decedent was admitted to the hospital for medical care following a previous hip replacement surgery performed at St. Francis Hospital. They further alleged that, while under the care of the defendants, the decedent developed a retroperitoneal hematoma, which resulted in irreversible nerve damage. The plaintiffs alleged that the diagnosis and treatment of that hematoma and the decedent's postsurgical condition were within the specialty of surgery, and not within the specialty of internal medicine. They also alleged that "[t]he defendants

lacked the specialized training to determine whether the decedent needed intervention for treating the decedent's condition, a retroperitoneal hematoma. The specialized training required was in the area of general surgery." Moreover, the plaintiffs alleged that neither the hospital nor Sound Physicians had a surgeon available for consultation by the physicians.

The plaintiffs alleged that the decedent's injuries were caused by the negligence of the physicians in failing, inter alia, to timely obtain a consultation with a surgeon, to perform diagnostic imaging, and to diagnose and treat the decedent's condition. The plaintiffs further alleged that the hospital and Sound Physicians were negligent in failing to ensure that the physicians did not commit the alleged negligence.

The hospital filed a motion to dismiss for lack of personal jurisdiction on the ground that the plaintiffs failed to comply with § 52-190a because (1) a board certified surgeon is not a similar healthcare provider, (2) merely alleging that the defendants were acting outside the scope of their specialty did not satisfy the statutory requirements of §§ 52-190a and 52-184c (c), (3) the opinion letter failed to detail Mayer's qualifications and, therefore, failed to show that he was qualified to opine as to the care and treatment rendered by internists, and (4) the plaintiffs were engaging in impermissible forum shopping because *Labissoniere I* was filed in the judicial district of Tolland and the present case was filed in the judicial district of Hartford. The hospital subsequently filed a motion to "preclude [the] plaintiffs from contesting [its] motion to dismiss," arguing that the action was barred by the doctrine of collateral estoppel because the plaintiffs had been afforded a full and fair opportunity to litigate the adequacy of Mayer's opinion letter in *Labissoniere I*.[4] The physicians also filed

[4] The hospital later amended its motion to dismiss and memorandum of law in support thereof, asserting collateral estoppel as its primary argument for dismissal.

a motion to dismiss and memorandum of law in support thereof, arguing, among other things, that the plaintiffs had failed to offer an expert opinion authored by a similar health care provider, thus warranting dismissal. Sound Physicians moved to dismiss the count against it by incorporating the same arguments set forth by the hospital and by asserting that the claim against it "should be dismissed because [it] was not a legal entity at the time of the [allegedly negligent treatment of the decedent]." The plaintiffs objected to the defendants' motions on the basis that *Labissoniere I* had been dismissed without prejudice, and, therefore, the present case was not barred by collateral estoppel. The plaintiffs further argued that they had complied with the requirements of § 52-190a, but they did not provide any analytical support for that argument, aside from summarizing case law. The motions were argued before the court, *Dubay, J.*, on October 4, 2018. The plaintiffs asserted at the hearing on the motions that "[t]he issue in the [*Labissoniere I*] complaint was resolved by modifying the pleading to specifically state that it was outside of the medical specialty of the internists."

Subsequently, prompted by Judge Dubay's inquiries at the hearing, both Sound Physicians and the plaintiffs filed supplemental memoranda on the question of subject matter jurisdiction. Sound Physicians argued that "the plaintiffs do not, and cannot, dispute that Sound Physicians was *not* a business entity at the time of [the decedent's] treatment at [the hospital]" and, therefore, the trial court lacked subject matter jurisdiction over the action asserted against it. (Emphasis in original.) The plaintiffs filed a reply, in which they contested Sound Physicians' argument.

On December 7, 2017, Judge Dubay issued a memorandum of decision, in which he sua sponte imposed a stay pending the outcome of the appeal in *Labissoniere I*. While the stay was in effect, this court affirmed the

judgment dismissing *Labissoniere I*. The physicians and the hospital thereafter filed supplemental briefs in support of their motions, arguing that this court's decision in *Labissoniere I* required dismissal of the present action, in which the plaintiffs assert virtually identical allegations as those made in *Labissoniere I*.

On January 23, 2019, Judge Dubay dismissed the plaintiffs' action and issued a memorandum of decision that set forth the following reasoning: " '[A] broad specialty such as internal medicine often overlaps with other medical specialties. . . . [P]hysicians who are board certified in that specialty are often called upon to diagnose and treat a variety of conditions that could fall within a variety of medical specialties.' [*Labissoniere I*, supra, 182 Conn. App. 458]. For this reason, courts have often declined to create scenarios in which health care providers in broad specialties such as internal medicine or emergency medicine may be considered to be working outside their specialty. . . . This is not to say, however, that physicians with broad specialties can never act outside their scope. But given a primary responsibility of an internist or emergency room doctor is to initially diagnose and treat on a wide array of injuries and illnesses, courts will not place negligence in doing so outside their scope, regardless of the type of injury or illness in question.

"In the present case, it is undisputed that the defendant physicians are board certified specialists in internal medicine. Accompanying the plaintiffs' complaint is an opinion letter authored and signed by a board certified general surgeon. To fit the opinion letter [required by] § 52-190a, the plaintiffs rely on the § 52-184c (c) exception.

"The complaint alleges the diagnosis and treatment of the decedent's postsurgical complication was . . . within the specialty of surgery. The complaint also alleges that [the] defendants failed to exercise care

and diligence by, among other claims, failing to timely obtain a consult or perform a CT scan. In sum, the defendant [physicians] allegedly failed to appreciate the decedent's injury for what it was and therefore failed to appropriately diagnose and treat him. Importantly, however, the alleged actions (or inactions), regardless of how negligent, fall within the generally accepted practice of internal medicine and are therefore insufficient to place the defendants outside the scope of their specialty.

"Therefore, given that the defendant physicians are internists who acted within their specialty, the § 52-184c (c) exception does not apply and the plaintiffs are required to present an opinion letter from a physician specializing in internal medicine. Under these circumstances, the court agrees with the defendants that the opinion letter is deficient [pursuant] to § 52-190a, and the motions to dismiss are granted." (Citations omitted.) This appeal followed.

I

We must first address Sound Physicians' claim that the trial court lacked subject matter jurisdiction because it was not a legal entity at the time of the decedent's treatment at the hospital. See *Park National Bank* v. *3333 Main, LLC*, 127 Conn. App. 774, 778, 15 A.3d 1150 (2011) ("Once the question of lack of [subject matter] jurisdiction of a court is raised, [it] must be disposed of no matter in what form it is presented. . . . The court must fully resolve it before proceeding with the case." (Internal quotation marks omitted.)).

"We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . Moreover, [i]t is a fundamental rule that a court may raise and review the issue of subject matter jurisdiction at any time. . . . Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court

lacks discretion to consider the merits of a case over which it is without jurisdiction. . . . The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Internal quotation marks omitted.) Id. "[S]ubject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it . . . and a judgment rendered without subject matter jurisdiction is void." (Internal quotation marks omitted.) *Bruno* v. *Travelers Cos.*, 172 Conn. App. 717, 724, 161 A.3d 630 (2017).

As stated previously, Sound Physicians moved in the trial court to dismiss the claim asserted against it on the basis that it was not a legal entity at the time that the physicians treated the decedent at the hospital. Following oral argument in the trial court, Sound Physicians filed a supplemental memorandum of law, in which it argued that "the plaintiffs do not, and cannot, dispute that Sound Physicians was *not* a business entity at the time of [the decedent's] treatment at [the hospital] (February 14, 2013 to March 11, 2013). Sound Physicians was incorporated and commenced [doing] business in the state of Connecticut on April 25, 2013. . . . Accordingly, the plaintiffs' claim against Sound Physicians is void ab initio and should be dismissed." (Emphasis in original.) Judge Dubay dismissed the claim against Sound Physicians for lack of personal jurisdiction but did not address the issue of subject matter jurisdiction in his memorandum of decision.

On appeal, Sound Physicians argues that "to confer subject matter jurisdiction upon the court, each party to the dispute must be an actual legal entity. An entity [without] legal existence can neither sue nor be sued. It is undisputed that [Sound Physicians] was not a legal entity at the time of the decedent's medical treatment at [the hospital]." Sound Physicians cites numerous

cases in support of this argument, including *Omerin USA, LLC* v. *Infinity Group*, Superior Court, judicial district of Hartford, Docket No. CV-17-6085890-S (May 24, 2018); *Prout* v. *Mukul Luxury Boutique Hotel & Spa*, Superior Court, judicial district of New Britain, Docket No. CV-15-6029341-S (February 28, 2017); *Washington* v. *Tracey*, Superior Court, judicial district of Hartford, Docket No. CV-10-5034700-S (August 3, 2011); and *State* v. *Lamar Advertising of Hartford*, Superior Court, judicial district of Hartford, Docket No. CV-08-5020325-S (April 5, 2011); among others.

There is a critical distinction between those cases and the present one. In each of the cited cases, the Superior Court dismissed the action for lack of subject matter jurisdiction because the plaintiff brought an action against a defendant in its trade name. In the matter at hand, however, the plaintiffs did not sue Sound Physicians in a trade name. The plaintiffs commenced their action on January 11, 2017, against Sound Physicians of Connecticut, LLC, which was and had been a limited liability company in the state of Connecticut since its registration on April 25, 2013. Sound Physicians' emphasis on the fact that it was not a registered legal entity *at the time of the decedent's treatment* is a red herring as it relates to the issue of subject matter jurisdiction. The relevant question is whether Sound Physicians was a legal entity *at the time that it was sued by the plaintiffs*. Because the plaintiffs sued Sound Physicians, a limited liability company, not a trade name, we reject Sound Physician's alternative ground for affirmance.[5]

We now turn to the remaining issue of whether the trial court correctly concluded that personal jurisdiction over the defendants was lacking.

[5] In light of our conclusion herein, we need not address the question of whether a trial court lacks subject matter jurisdiction when a *defendant* is sued in its trade name only. We leave that question open for another day.

II

The plaintiffs claim that the trial court erred in dismissing the action for lack of personal jurisdiction by improperly concluding that the defendant physicians were acting within their specialty of internal medicine and, therefore, improperly concluding that the plaintiffs' opinion letter written by a surgeon was deficient pursuant to § 52-190a and did not fall within the exception created by § 52-184c (c).[6] We are not persuaded.

We begin with the standard of review and the applicable principles of law. "A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction." (Internal quotation marks omitted.) *Bennett* v. *New Milford Hospital, Inc.*, 300 Conn. 1, 10, 12 A.3d 865 (2011). "Our Supreme Court has held that the failure of a plaintiff to comply with the statutory requirements of § 52-190a (a) results in a defect in process that implicates the personal jurisdiction of the court. . . . Thus, where such a failure is the stated basis for the granting [of] a motion to dismiss, our review is plenary. . . . Further, to the extent that our review requires us to construe the nature of the cause of action alleged in the complaint, we note that [t]he interpretation of pleadings is always a question of law for the court. . . . Our review of the trial court's interpretation of the pleadings therefore is plenary." (Citation omitted; internal quotation marks omitted.) *Perry* v. *Valerio*, 167 Conn. App. 734, 739, 143 A.3d 1202 (2016).

[6] Specifically, the plaintiffs claim that the trial court (1) "impermissibly created a new statutory definition of the specialty of internal medicine, and an exception thereto, without the required consideration, deference to the factual allegations in the complaint and the circumstances surrounding [the] decedent's injuries," (2) "erred in finding that the plaintiffs' expert was not a 'similar health care provider' within the meaning of [§§] 52-190a and . . . 52-184c (c)," and (3) erred in dismissing the plaintiffs' claim that the hospital was vicariously and independently liable for the physicians' conduct.

"When a . . . court decides a . . . question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone." (Internal quotation marks omitted.) *Bennett* v. *New Milford Hospital, Inc.*, supra, 300 Conn. 10–11.

"[W]e long have eschewed the notion that pleadings should be read in a hypertechnical manner. Rather, [t]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically . . . . [T]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and to substantial justice between the parties . . . . Our reading of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension . . . . [E]ssential allegations may not be supplied by conjecture or remote implication . . . ." (Internal quotation marks omitted.) *Caron* v. *Connecticut Pathology Group, P.C.*, 187 Conn. App. 555, 564, 202 A.3d 1024, cert. denied, 331 Conn. 922, 206 A.3d 187 (2019).

The plaintiffs argue that the trial court failed to give due deference to the factual allegations in their complaint in making its determination that the challenged actions by the physicians fell within the specialty of internal medicine. Specifically, they argue that the trial court was obligated to accept as true their allegations

that the diagnosis and treatment of the decedent's postsurgical complications were within the specialty of general surgery and outside the specialty of internal medicine. Accordingly, the plaintiffs contend that their opinion letter authored by a surgeon was sufficient to meet the requirements of § 52-190a. The defendants counter that the plaintiffs' mere addition of an allegation that the physicians were acting outside their specialty of internal medicine is insufficient to cure the deficiency that was identified in *Labissoniere I*. The physicians further argue that the complaint is devoid of any factual allegation that the physicians actually rendered surgical care, beyond the conclusory allegation to that effect. We agree with the defendants.

Our resolution of this claim is controlled by this court's decision in *Labissoniere I*, which addressed the same jurisdictional question arising out of the allegations of a complaint that are nearly identical to those in the present case.[7] Accordingly, the narrow question with which we are presented is whether the plaintiffs cured the jurisdictional defect as identified in *Labissoniere I*.[8] The essential allegations in the present complaint are the same as those in *Labissoniere I*. The plaintiffs alleged in both cases that the decedent was admitted to the hospital for medical care following a hip replacement surgery and that the physicians were negligent in failing to timely diagnose the hematoma and consult with a surgeon. The plaintiffs, however, added a conclusory allegation that the physicians had provided the decedent with treatment and diagnosis for a condition that was outside the specialty of internal medicine and within the specialty of surgery, in an

[7] For a more detailed discussion of the jurisdictional question, as it pertains to the broad specialty of internal medicine, see *Labissoniere I*, supra, 182 Conn. App. 445.

[8] One panel of this court may not overrule the decision of a previous panel without en banc consideration. See *Boccanfuso* v. *Conner*, 89 Conn. App. 260, 285 n.20, 873 A.2d 208, cert. denied, 275 Conn. 905, 882 A.2d 668 (2005), and cert. denied, 275 Conn. 905, 882 A.2d 668 (2005).

attempt to comply with the statutory requirements. The plaintiffs' argument that we must accept as true that new conclusory allegation is unavailing. See *Caron* v. *Connecticut Pathology Group, P.C.*, supra, 187 Conn. App. 564 ("[e]ssential allegations may not be supplied by conjecture or remote implication" (internal quotation marks omitted)). Whether the physicians were acting as internists or surgeons is undoubtedly an essential allegation, and the plaintiffs failed to allege any *facts* from which we can infer that the physicians were indeed acting outside the scope of internal medicine, irrespective of the label that they attach to their claim. We, therefore, decline to accept as true the plaintiffs' unsupported conclusory allegation that the physicians were acting as surgeons.[9]

In light of the foregoing, it is still the case that "nothing contained in the plaintiffs' complaint or opinion letter suggests that the physicians were not acting as internists. In fact, the crux of the plaintiffs' complaint was that the physicians were negligent in their initial assessment of the decedent's condition, not that the physicians were negligent in performing a surgical procedure." *Labissoniere I*, supra, 182 Conn. App. 457. Accordingly, we conclude that the trial court properly dismissed the plaintiffs' action for lack of personal jurisdiction.

The judgment is affirmed.

In this opinion the other judges concurred.

[9] The plaintiffs' claim brings to mind a story attributed to Abraham Lincoln. He used to refer to a boy who, when asked how many legs his calf would have if he called a tail a leg, replied "five," to which the response was made that *calling* a tail a leg does not *make* it a leg. A. McClure, "Abe" Lincoln's Yarns and Stories: A Complete Collection of the Funny and Witty Anecdotes that Made Lincoln Famous as America's Greatest Story Teller (1901) p. 409. Similarly, simply claiming that the physicians were acting as surgeons, and not as internists, does not make it so in light of the factual allegations in the complaint.

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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.

STATE *v.* ROBERT LEE GRAHAM, SC 20153
Judicial District of Hartford

Criminal; Whether Statements Were Obtained in Violation of *Edwards* v. *Arizona* Ban against Further Interrogation of Suspect in Custody Who Invokes *Miranda* Right to Counsel; Whether Statements Were Obtained in Violation of *Miranda* Right to Remain Silent. On August 12, 2015, the victim, Tashauna Jackson, was reported as missing to the Hartford police. On August 13, 2015, the defendant called the police after a confrontation with friends of the victim, with whom he had a relationship. He was asked to come to the police station to discuss the victim's disappearance. He agreed, drove to the station in his truck, and participated in an interview with two police officers. At 4:50 p.m., the defendant stated that he wanted to leave but stayed after a suggestion that he complete a formal statement. The defendant repeated that he wanted to leave at 5:19 p.m. but agreed upon request to wait five more minutes. At 5:20 p.m., after learning of a parking complaint regarding a van registered to the defendant, one of the officers asked the defendant if he owned another vehicle. The defendant lied, stating that he owned a van but that it was in New York. The interview ended at 7:02 p.m., when the defendant said, "I want my attorney right now." The van was towed to the station, and the defendant consented to a search of it, which yielded evidence of interior damage and blood stains. On August 18, 2015, the victim's body was discovered. The defendant called the police to inquire if the victim's body had been found. An officer told him that an unidentified body had been found and requested that he come to the station for another interview, to which he agreed. During the interview, the defendant was asked about matters such as the blood stains found in the van and why he had previously lied about the location of the van. He was later arrested and charged with the victim's murder. Before trial, the defendant sought to suppress, among other things, his August 13 statements after 4:50 p.m. as obtained in violation of his *Miranda* right to remain silent, which he argued was invoked with his requests to leave. He also sought to suppress his August 18 statements as obtained in violation of *Edwards* v. *Arizona*, 451 U.S. 477 (1981), which provides that a suspect in custody who invokes his *Miranda* right to counsel may not be subject to further interrogation, and *Maryland* v. *Shatzer*, 559 U.S. 98 (2010), which provides that *Edwards* does not apply when there has been a break in *Miranda*

custody of more than fourteen days between interrogations. The defendant argued that he invoked his right to counsel at the beginning of the August 18 interview for purposes of *Edwards* and that, in the alternative, his invocation of his right to counsel at the end of the August 13 interview extended to his August 18 interview under *Shatzer*. The trial court denied the defendant's suppression requests. It concluded that the August 13 interview was not custodial for purposes of *Miranda* until 5:24 p.m., when the promised five minute waiting period expired but the questioning nonetheless continued, because the defendant was free to leave at any point beforehand, including when he made his requests at 4:50 p.m. and 5:19 p.m. The trial court further concluded that *Edwards* and *Shatzer* only apply to custodial interrogations and that the August 18 interview was not custodial. After a jury trial, the defendant was found guilty and convicted of murder. He appeals, claiming that the trial court improperly denied his motions to suppress his statements from his August 13 interview after 4:50 p.m. and his statements from his August 18 interview.

STATE *v.* JOSE R., SC 20184
Judicial District of Hartford

Criminal; Whether Defendant's Due Process Right to a Fair Trial and Fifth Amendment Right to Remain Silent Violated by Prosecutor's Remarks; Whether State Should Have Burden of Proving Harmlessness for All Claims of Prosecutorial Impropriety. The defendant was convicted of, inter alia, four counts of sexual assault in the first degree in connection with the sexual assault of his minor child. At the time of the incidents in question, the defendant was not living with the victim, but he would go to her house about twice a week after school to get her off of the bus and to watch her. The defendant was alone with the victim until her mother came home from work. Approximately two years after the last incident of abuse, the victim told her mother about the sexual assaults. The mother reported the allegations, and the defendant gave statements to the police and to the Department of Children and Families (DCF). At trial, the victim testified about the abuse and that the defendant had used the mother's laptop to show her pornography on at least two occasions. The defendant did not testify, and, during closing argument and rebuttal, the state argued that there were various inconsistencies between the out-of-court statements the defendant made to DCF and the police, including that he initially denied being alone with the victim. After the jury returned a guilty verdict as to all charges, the defendant was given, for each conviction of first degree sexual assault, concurrent

sentences of twenty-five years imprisonment, execution suspended after twenty years, followed by ten years of probation. The defendant appeals to the Supreme Court, claiming that his sentence is illegal because, at the time of the incidents giving rise to his convictions, General Statutes (Rev. to 2013) §§ 53a-29 and 53a-70 did not authorize the court to sentence an offender convicted of a class A felony to a period of probation. The state agrees, acknowledging that a subsequent 2015 amendment to § 53a-70 (b) (3) that allows for such a sentence does not apply retroactively. The defendant goes on to argue on appeal that there were fifteen instances of prosecutorial impropriety during closing and rebuttal argument that deprived him of his due process right to a fair trial and, by implicitly referring to his failure to testify, infringed on his fifth amendment right to remain silent. As part of that claim, the defendant urges the Supreme Court to revisit its decision in *State* v. *Payne*, 303 Conn. 358 (2012), in which the court clarified who has the burden of proof as to whether improper remarks by a prosecutor amounted to harmful error. The court in *Payne* held that a defendant has the burden of proving harmful error if he is alleging the deprivation of his right to a fair trial while the state has the burden of proving harmlessness beyond a reasonable doubt if a defendant is claiming the violation of a specifically enumerated constitutional right. The defendant points out that the distinction in *Payne* complicates the harmful error analysis here because the state has the burden of proof as to his fifth amendment claim while he has the burden as to his due process claim. The defendant asks the Supreme Court to do away with the distinction and require the state to have the burden of proving harmless error for all claims of prosecutorial impropriety.

The Practice Book Section 70-9 (a) presumption in favor of coverage by cameras and electronic media does not apply to the case above.

STATE *v.* ANTRON GORE, SC 20211
Judicial District of Hartford

Criminal; Whether Identification of Defendant in Surveillance Video Still Photograph Constituted Improper Opinion Evidence on Ultimate Issue in Case; Whether Trial Court Properly Denied Defendant's Motion For New Trial Based on Alleged Juror Misconduct. The victim, Jason Reddick, was shot and killed in an incident that began in a gas station and ended in a nearby parking lot. Subsequently, Detective Jeffrey Placzek interviewed Caron Canty, a friend of the defendant, and showed him a still photograph of the

shooter taken from video recorded by surveillance cameras. Canty identified the person in the photograph as the defendant. The defendant was charged with the victim's murder. At trial, Canty denied identifying the defendant in the photograph. Thereafter, Detective Placzek testified that Canty had identified the person in the photograph as the defendant during a pretrial interview. The defendant objected, arguing that evidence of Canty's pretrial identification should not be admitted because it was an opinion on the ultimate issue in the case, namely, the identification of the shooter, prohibited by § 7-3 of the Connecticut Code of Evidence. In support, he relied on *State* v. *Finan*, 275 Conn. 60 (2005), where the Supreme Court held that testimony from several police officers that the person depicted in a surveillance video of a robbery was the defendant based on his mannerisms, his distinctive walk, and his profile constituted improper opinion testimony on the ultimate issue in the case. The trial court overruled the defendant's objection and concluded that *Finan* was not applicable because Canty's identification was not based on an opinion. It explained that, given Canty's long association with the defendant and how the photograph depicted the person's face, Canty's identification of the defendant in the photograph was a fact-based determination, and therefore, admissible under *State* v. *Felder*, 99 Conn. App. 18, 25 n.6, cert. denied, 281 Conn. 921 (2007). During jury deliberations, the court granted the jury's request for a magnifying glass but later denied its request for a second magnifying glass. The jury found the defendant guilty of murder. The defendant filed a motion for a new trial based on juror misconduct after it was discovered that two jurors brought in two magnifying glasses during deliberations that several jurors used to review the photographic evidence. The trial court denied the defendant's motion for a new trial. On appeal, the defendant claims that the trial court improperly admitted Canty's identification of the defendant through Placzek's testimony because it constituted improper opinion evidence on the ultimate issue in the case under *Finan*. In addition, the defendant claims that his motion for a new trial should have been granted because the jury's actions, including using the two unauthorized magnifying glasses and requesting information that was not admitted into evidence, disregarded the trial court's instructions prohibiting the jury from performing independent investigations and requiring the jury to consider only evidence admitted in court.

STATE *v.* JOSEPH A. STEPHENSON, SC 20272
Judicial District of Stamford/Norwalk

Criminal; Whether Appellate Court Improperly Raised, Sua Sponte, Issue of Sufficiency of Evidence of Intent Element; Whether Evidence of Intent was Sufficient. The defendant was scheduled to begin jury selection in a trial for two felony charges that were pending against him at the Norwalk Superior Courthouse. Two days before the start of jury selection, a silent alarm was triggered at the courthouse at approximately 11:00 p.m. Upon arrival, the state police discovered a broken window in an interior office shared by two assistant state's attorneys. On the floor were a duffel bag with six unopened canisters of industrial strength kerosene and several case files lying in a disorganized pile. The defendant was charged with and convicted of burglary in the third degree, attempted tampering with physical evidence and attempted arson in the second degree in connection with the break-in at the courthouse. He appealed, and the Appellate Court (187 Conn. App. 20) reversed the judgment of conviction. The Appellate Court held that there was insufficient evidence to prove an essential element common to all three crimes of which the defendant was convicted, that is, that the defendant entered the courthouse with the intent to tamper with physical evidence in order to impair the availability of his case files for use against him in the prosecution of the pending felony charges. The Appellate Court found that there was no evidence that the defendant was in the office where the files were located, that he had removed the files that were found on the floor or that his file was among those on the floor. The Appellate Court noted that the state argued that the defendant's intent to tamper with physical evidence could be inferred from his handling of the files but found that the evidence presented did not prove that the defendant had touched, altered, destroyed, concealed or removed any of the files or address any reason why the defendant might have wanted to tamper with his case files. Rather, the Appellate Court found, the evidence showed only that the defendant entered the courthouse through the broken window, walked through the office and dropped the duffel bag on the floor. The Appellate Court concluded that, in the absence of any evidence that the defendant ever touched the files and did so with the intent to tamper with the files or their contents, the jury reasonably could not have inferred that the defendant had the intent required to prove him guilty of the three crimes of which he was convicted. The state has been granted certification to appeal, and the Supreme Court will decide whether (1) the Appellate Court improperly raised, sua sponte, the issue of sufficiency of the evidence with respect to the

element of intent and (2) the Appellate Court correctly concluded that the evidence was insufficient on the element of the defendant's intent to commit the crime of tampering with physical evidence.

STATE *v.* ERNEST FRANCIS, SC 20353
Judicial District of Hartford

Criminal; Whether Appellate Court Correctly Concluded That Sentencing Judge Did Not Substantially Rely on Materially Inaccurate Information About Defendant. The defendant was convicted of murder and sentenced in 1992 to fifty years of incarceration. In 2016, he filed a motion to correct an illegal sentence pursuant to Practice Book § 43-22 and claimed that his sentence was imposed in an illegal manner because the sentencing court substantially relied on materially inaccurate information regarding his criminal history and how he committed the murder. The trial court denied the motion to correct. The defendant appealed, and the Appellate Court (191 Conn. App. 101) affirmed the trial court's judgment. The Appellate Court rejected the defendant's claim that the trial court erroneously denied the motion to correct where he argued that the sentencing court substantially relied on materially inaccurate information in the presentence investigation report because that information influenced how the sentencing court characterized him during the sentencing. That information provided that the defendant previously had been convicted of conspiracy to sell cocaine, where he had instead been convicted of conspiracy to possess cocaine, and that he previously had been convicted of assault in the second degree of an elderly person, where he had instead been convicted of assault in the third degree. The Appellate Court determined that the trial court did not abuse its discretion in denying the motion to correct where the sentencing court had not substantially relied on the inaccurate information from the presentence investigation report because it invoked other factors regarding the defendant's past criminal history in determining his sentence, such as that he had three felony convictions before the age of nineteen, that he was involved in drugs, and that he was on probation when he committed the murder. The Appellate Court also rejected the defendant's claim that the trial court erroneously denied his motion to correct where he argued that the sentencing court substantially relied on materially inaccurate information regarding how he committed the murder because that information affected how the sentencing court viewed the deliberateness and violence of the murder. The defendant took the position that the sentencing court incorrectly stated

that the victim had suffered a "graze" wound before he was fatally stabbed because the trial evidence indicated that the victim had only sustained one stab wound. The Appellate Court determined that the information was not materially inaccurate, where there was evidence that the defendant had made multiple stabbing motions towards the victim before fatally stabbing him, and that the sentencing court did not substantially rely on the information, where the sentence was "clearly predicated" on the fatal stab wound and not the graze wound. The defendant has been granted certification to appeal, and the Supreme Court will decide whether the Appellate Court correctly concluded that the sentencing judge did not substantially rely on materially inaccurate information about the defendant.

ERNEST FRANCIS *v.* BOARD OF PARDONS AND PAROLES et al., SC 20377
Judicial District of Stamford/Norwalk

Trial Court Jurisdiction; Whether Plaintiff's Declaratory Judgment Action Concerning Parole Eligibility is Ripe for Adjudication. The plaintiff was convicted of murder and sentenced to fifty years of incarceration on April 15, 1992. The plaintiff filed this action seeking a declaratory judgment that he is eligible for parole under General Statutes § 54-125g and ordering the defendants to factor his eligibility for early release under the statute into his time sheet. The plaintiff claimed that, without a parole eligibility date, he is not able to participate in certain rehabilitation programs. The defendants argued that the plaintiff's action is not ripe for adjudication because it asks the court to decide a question about a statute that will likely never apply to him. Specifically, the defendants argued that, because the plaintiff earns good time credits that continually reduce his sentence, he will be released from custody long before he can satisfy the parole eligibility requirements of § 54-125g. A person such as the defendant who is convicted of murder is eligible for parole under § 54-125g when there are "six months or less to the expiration of the maximum term or terms for which such person was sentenced," provided the person has "served ninety-five percent of the definite sentence imposed." The trial court noted that an action is not ripe for adjudication when it presents a hypothetical injury that is contingent on an event that has not transpired and may never transpire. The trial court then found that, although the parties' views as to when the plaintiff will be eligible for parole differed greatly, the earliest possible date is not until 2024. The trial court concluded, therefore, the action

is not yet ripe for adjudication and must be dismissed. The plaintiff appealed, and the Appellate Court (189 Conn. 906) affirmed the judgment dismissing the action. The plaintiff has been granted certification to appeal, and the Supreme Court will decide whether the Appellate Court properly upheld the trial court's dismissal of the plaintiff's declaratory judgment action as not ripe.

STATE *v.* JAVIER VALENTIN PORFIL, SC 20379
Judicial District of Waterbury

Criminal; Whether Evidence of Constructive Possession Was Sufficient to Sustain Defendant's Conviction of Possession of Narcotics with Intent to Sell, Where Narcotics at Issue Were Found in Common Area Over Which Defendant Did Not Have Exclusive Possession. The police received an anonymous call from an individual who stated that the defendant had outstanding warrants and was selling narcotics from the front porch of a three-story multifamily house. Upon arriving at the house, an officer observed the defendant, who was sitting alone on the front porch, engage in two hand-to-hand transactions with individuals who approached him from the street. During each incident, the defendant had a brief conversation with the individual, entered the house through the open front door, and returned moments later to conduct an item-for-item exchange with the individual on the street, who then immediately left the area. When the police attempted to arrest him, the defendant ran through the open front door, up the staircase and into the second floor apartment. The police searched the house and, although they were unable to find the defendant, they found a brown paper bag containing a digital scale, rubber bands, and 171 bags of heroin in plain view on the second floor landing. Approximately six months later, the police arrested the defendant, and the state charged him with possession of narcotics with intent to sell by a person who is not drug-dependent. The relevant law provides that where, as here, the defendant is not in exclusive possession of the place where the contraband is found, it may not be inferred that the defendant knew of the presence of the narcotics and had control of them unless there are other incriminating statements or circumstances tending to support such an inference. A jury found the defendant guilty as charged, and the defendant appealed, claiming that the state failed to produce sufficient evidence to prove that he had constructive possession of the narcotics. The defendant argued that the state failed to introduce evidence of any incriminating statements or circumstances linking him to the narcotics and that the

evidence of the hand-to-hand exchanges did not establish his connection to the narcotics because there was no evidence that the items exchanged were either money or narcotics. The Appellate Court (191 Conn. App. 494) rejected his claim, concluding that, in addition to the defendant's temporal and physical proximity to the narcotics, the state presented sufficient evidence of incriminating circumstances to support the inference that the defendant had been selling the narcotics from the porch of the house and had exercised dominion and control of the narcotics. The court reasoned that the inference was supported by evidence such as the street value of the heroin recovered, the particular location in which it was found, and the absence of other individuals observed in that location. The court also noted that the defendant ran away from the police when they approached the house, which indicated his consciousness of guilt. The defendant appeals, and the Supreme Court will decide whether the Appellate Court correctly concluded that the evidence of constructive possession was sufficient to sustain the defendant's conviction.

STATE *v.* KERLYN T., SC 20380
Judicial District of Danbury

Criminal; Jury Trial Waiver; Whether Trial Court Properly Found That Defendant's Waiver of Right to Jury Trial Was Constitutionally Valid. The defendant was charged with aggravated sexual assault in the first degree, home invasion, risk of injury to a minor, assault in the second degree with a firearm, assault in the third degree, unlawful restraint in the first degree, and threatening in the first degree after violent incidents involving the defendant's minor child and the mother of the minor child. The defendant requested and was granted a formal competency evaluation, after which it was determined that he was not competent to stand trial. The defendant was admitted to Whiting Forensic Division for treatment and rehabilitation and later found restored to competency. During subsequent pretrial proceedings, the defendant requested that the trial court provide him with more time to decide whether to elect a jury trial or a court trial. The trial court denied the request. The defendant's attorney was unable to ascertain whether the defendant wanted to elect a jury trial or a court trial and requested a formal competency evaluation on the ground that the defendant was unable to assist with his own defense. The trial court engaged in a lengthy colloquy with the defendant before denying the request. The trial court then addressed the issue of whether the defendant would elect a jury trial or a court trial and, given the

defendant's request for more time to make the decision, provided the defendant with an opportunity to discuss the issue with his attorney. After a recess, the trial court canvassed the defendant, and the defendant waived his right to a jury trial and elected a court trial. The trial court found the defendant guilty and sentenced him. The defendant appealed, and the Appellate Court (191 Conn. App. 476) affirmed his conviction. The Appellate Court denied the defendant's claim that the trial court erred in finding that his jury trial waiver was knowing, intelligent, and voluntary. It rejected the defendant's argument that his waiver was not constitutionally valid because he had been suffering from an unspecified mental illness at the time and noted that he had been found competent to stand trial before the waiver, that he had been able to consult with his attorney regarding the waiver and had stated his satisfaction with his attorney's advice, and that he had demonstrated his understanding of the waiver with clear and unequivocal responses to the trial court's explanations and questions during the canvass. The Appellate Court also rejected the defendant's argument that the canvass was constitutionally inadequate because he was an immigrant without a high school diploma and therefore should have received a more detailed explanation regarding the specifics of a jury trial, observing that the defendant had lived in the United States for all of his adult life and was familiar with the court system due to his past criminal history. The defendant has been granted certification to appeal, and the Supreme Court will decide whether the Appellate Court correctly held that the trial court properly found that the defendant's waiver of his right to a jury trial was constitutionally valid.

The Practice Book Section 70-9 (a) presumption in favor of coverage by cameras and electronic media does not apply to the case above.

A BETTER WAY WHOLESALE AUTOS, INC. *v.*
JAMES SAINT PAUL et al., SC 20386
Judicial District of Waterbury

Arbitration; Whether Parties Can Agree, by Choice of Law Provision in Arbitration Agreement, to Apply Federal Arbitration Act Three Month Limitation Period for Filing Application to Vacate Arbitration Award so as to Supplant or Override General Statutes § 52-420 (b) Thirty Day Limitation Period for Filing Application. The defendants purchased a motor vehicle from the plaintiff, a motor vehicle dealership, and the parties entered into a financing agreement. The agreement contained an arbitration provi-

sion, which provided in relevant part that any arbitration would be governed by the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq. (2012), and not by any state law concerning arbitration. Subsequently, the defendants filed a demand for arbitration, claiming that the plaintiff had violated the federal Truth in Lending Act when it required them to purchase certain contracts as a condition of the financing agreement. After the arbitrator awarded damages and attorney's fees to the defendants, the plaintiff filed an application to vacate the award in the trial court that was within the three month limitation period set forth in 9 U.S.C. § 12 but beyond the thirty day limitation period permitted under General Statutes § 52-420 (b). The defendants sought to dismiss the plaintiff's application to vacate for lack of subject matter jurisdiction on the ground that it was not timely filed pursuant to § 52-420 (b). The trial court dismissed the plaintiff's application to vacate as untimely and granted the defendants' application to confirm the award. The plaintiff appealed, claiming that the trial court erroneously applied the thirty day limitation period for filing an application to vacate set forth in § 52-420 (b), rather than the three month limitation period set forth in 9 U.S.C. § 12 and incorporated into the arbitration provision of the financing agreement. The Appellate Court (192 Conn. App. 245) affirmed the trial court's judgment, ruling that the parties could not, as a matter of law, agree to have the three month limitation period in 9 U.S.C. § 12 apply to a vacatur proceeding in Connecticut state court so as to supplant or override the thirty day limitation period in § 52-420 (b), which is subject matter jurisdictional in nature and applicable to any application to vacate an arbitration award brought in Connecticut state court. In so ruling, the court determined that because § 52-420 (b) sets forth a procedural rule that does not conflict with the FAA's objective of ensuring the enforceability of arbitration agreements in private contracts, § 52-420 (b) was not preempted by the FAA. In addition, the court overruled *Doctor's Associates, Inc.* v. *Searl*, 179 Conn. App. 577 (2018), to the extent it stood for the proposition that the parties can agree, by way of a choice of law provision, to apply the three month limitation period in 9 U.S.C. § 12 to a vacatur proceeding brought in Connecticut state court. The plaintiff was granted certification to appeal, and the Supreme Court will decide whether the Appellate Court correctly concluded that the parties did not avoid the thirty day statutory deadline for filing an application to vacate an arbitration award set forth in § 52-420 (b) by including in their arbitration agreement a choice of law provision stating that any arbitration shall be governed by the FAA, which contains a three month deadline for filing an application to vacate.

WILTON CAMPUS 1691, LLC *v.* TOWN OF WILTON
WILTON RIVER PARK 1688, LLC *v.* TOWN OF WILTON
WILTON RIVER PARK NORTH, LLC *v.* TOWN OF WILTON, SC 20388
Judicial District of New Britain, Tax Session

Taxation; Late Filing Penalty Pursuant to General Statutes § 12-63c (d); Whether Appellate Court Incorrectly Concluded That General Statutes § 12-55 (b) Precluded Tax Assessor From Imposing Late Filing Penalties After Taking and Subscribing to Oath On Grand List. The plaintiff property owners were required, by June 1, 2014, to submit income and expense information to the tax assessor for the defendant town of Wilton regarding their rental properties. The assessor received the required information two days late, and, as a result, the plaintiffs were subject to a 10 percent tax penalty for each property pursuant to General Statutes § 12-63c (d). The assessor had not added the late filing penalties to the plaintiffs' properties when he took the oath and signed the 2014 grant list, but, instead, added them about three months later, as had been his practice for the last twenty years. The certificates of change sent to the plaintiffs stated that the late filing penalties were added pursuant General Statutes § 12-60, which authorizes an assessor to correct "[a]ny clerical omission or mistake in the assessment." The plaintiffs filed separate tax appeals for each property in the Superior Court, which were consolidated. Because the assessor's delay in imposing the penalty was intentional, the trial court rejected the defendant's claim that the assessor had the authority to impose the penalty as a mistake or clerical error under § 12-60. The court went on to find that the assessor improperly imposed the late filing penalties because the penalties were mandatory and General Statutes § 12-55 (b) requires the assessor to "make any assessment omitted by mistake or required by law" before taking the oath and signing the grand list. The court found, however, that the plaintiffs could not avoid paying the late filing penalties because there was no statutory provision allowing for their removal. As a result, the trial court concluded that the effect of the assessor's error was to postpone the plaintiffs' right to appeal the assessor's actions until the next grand list, and it rendered judgments for the defendant. The plaintiffs appealed to the Appellate Court (191 Conn. App. 712), which agreed with the trial court that § 12-60 did not authorize the assessor to add the late filing penalties. The defendant argued on appeal that the assessor properly imposed the late filing penalties after signing the grand list because § 12-55 (a) requires certain penalties, but not the late filing penalty, to be included in the grand list. The Appellate Court disagreed, finding that the defendant's construction of the statute

led to the absurd or unworkable result that a late filing penalty could be imposed at any time. The court held that, because the late filing penalties constituted an assessment required by law, under § 12-55 (b) the assessor was required to impose them before taking and subscribing to the oath on the 2014 grand list. The Appellate Court found that the late filing penalties were therefore invalid and reversed the judgments of the trial court. Following the granting of certification, the defendant appeals to the Supreme Court, which will decide whether the Appellate Court incorrectly concluded that § 12-55 (b) precluded the tax assessor from imposing the late filing penalties under § 12-63c (d) after taking and subscribing to the oath on the 2014 grand list.

STATE *v.* REGGIE BATTLE, SC 20396
Judicial District of Hartford

Criminal; Whether Appellate Court Correctly Determined That, Under General Statutes § 53a-32, Trial Court, Following a Probation Revocation, May Impose a Sentence That Includes a Period of Special Parole. In November, 2005, the defendant was sentenced to twenty years of incarceration, execution suspended after nine years, and five years of probation, after pleading guilty to conspiracy to commit assault in the first degree. In January, 2014, the defendant admitted to a violation of probation and pleaded guilty to two gun offenses. The trial court revoked the defendant's probation, accepted his guilty pleas, and sentenced him to five years of incarceration and six years of special parole for the violation of probation and concurrent five year sentences on the two gun offenses. Thereafter the defendant filed a motion to correct an illegal sentence under Practice Book § 43-22, claiming that the court's imposition of special parole as a component of his 2014 sentence for violation of his probation rendered his sentence illegal because special parole is not one of the available sentencing options following a violation of probation under General Statutes § 53a-32 (d). General Statutes § 53a-32 (d) provides in relevant part: "If [a violation of probation] is established, the court may . . . revoke the sentence of probation . . . . If such sentence is revoked, the court shall require the defendant to serve the sentence imposed or impose any lesser sentence. Any such lesser sentence may include a term of imprisonment . . . followed by a period of probation . . . ." The trial court dismissed the defendant's motion to correct an illegal sentence for lack of jurisdiction. Although it concluded that the defendant's claim did not fall within the ambit of Practice Book " 43-22, it proceeded to consider and reject the merits of the defendant's motion. The defendant appealed, claiming that the trial court improperly con-

cluded that it lacked jurisdiction to consider his motion to correct an illegal sentence and that he should have prevailed on the merits of his sentencing claim. The Appellate Court (192 Conn. App. 128) concluded that the trial court had jurisdiction to consider the defendant's motion to correct an illegal sentence but rejected his sentencing claim. The Appellate Court noted that the trial court in 2014 had the option after concluding that the defendant had violated his probation of sentencing him to serve the remaining unserved portion of his 2005 sentence—eleven years—but instead chose to impose a lesser sentence of five years of incarceration and six years of special parole. The court therefore ruled that the 2014 sentence, including the use of special parole, was not illegal because it fell within the "any lesser sentence" language of § 53a-32 (d). Rejecting the defendant's claim but concluding that the form of the judgment was improper, the court reversed the judgment dismissing the motion to correct an illegal sentence and remanded the case with direction to render judgment denying the motion. The defendant was granted certification to appeal, and the Supreme Court will determine whether the Appellate Court correctly concluded that, under § 53a-32, a trial court, following a probation violation and revocation, may impose a sentence that includes a period of special parole.

NOT ANOTHER POWER PLANT *v.* CONNECTICUT SITING COUNCIL et al., SC 20464
Judicial District of New Britain

Administrative Appeal; Application for Certificate of Environmental Compatibility and Public Need; Whether Connecticut Siting Council Properly Excluded Consideration of Upgraded Pipeline When Balancing Public Benefit and Environmental Impact of Proposed Electric Generating Facility. The plaintiff is a nonprofit association organized for the purpose of conserving the environment and ensuring the thoughtful development of the town of Killingly. The defendant NTE Connecticut, LLC (NTE), is seeking to build an electric generating facility in Killingly. The proposed facility will run on natural gas with diesel used only as a backup fuel. NTE contracted with Eversource to supply natural gas, but the existing pipeline delivers the gas at a pressure insufficient for the proposed facility to function. As a result, the facility cannot operate unless Eversource upgrades about three miles of the existing natural gas pipeline that runs through or abuts several environmentally delicate areas. NTE submitted an application to the defendant Connecticut Siting Council (council) for a certificate of environmental compatibility and public

need with respect to the facility. The application did not detail, and the council did not consider, the environmental impact of upgrading the natural gas pipeline. The council stated that it will consider the upgraded pipeline separately when Eversource submits its own application for a certificate before installing the upgraded pipeline. The council issued the certificate to NTE after concluding that there is a public need for the facility and that the facility's environmental impact could be sufficiently mitigated such that it does not overcome the public benefit. The plaintiff appealed that decision to the Superior Court, claiming that the council's failure to consider the upgraded pipeline was arbitrary and capricious because it improperly "segmented" the project and thereby avoided a proper review of its overall environmental impact by dividing it into smaller components that have no independent utility when viewed in isolation. The trial court found that, although the facility and upgraded pipeline were "inextricably intertwined," the council had not improperly segmented the project because the facility and the pipeline are different "facilities" under the General Statutes, they are owned by two different parties, and the environmental impact of the upgraded pipeline will be considered when Eversource applies for a certificate. The court concluded that the council's procedural decision to consider the facility and the upgraded pipeline separately was therefore reasonable and dismissed the plaintiff's administrative appeal. The plaintiff appeals and claims that the trial court erred in concluding that the council properly balanced the public benefit and environmental impact of the facility. It argues that the council took into account the upgraded pipeline when considering the facility's public benefit but improperly failed to do so when considering the facility's environmental impact. Furthermore, the plaintiff contends that the trial court erred by relying on the fact that Eversource will apply for a certificate with respect to the pipeline, as Eversource can allegedly avoid that process by petitioning the council to declare, without a hearing, that the upgraded pipeline will not have a substantial adverse environmental impact.

The following appeals are pending on the Supreme Court's docket and are in the process of being briefed.

STATE *v.* PATRICIA DANIELS; SC 20376
Judicial District of Fairfield

Criminal; Double Jeopardy; Whether, Following Its Reversal of Surviving Cumulative Conviction, Appellate Court Should Have Ordered Reinstatement of Conviction that had been

Vacated Pursuant to *State* v. *Polanco*. The defendant was convicted following a jury trial of the crimes of intentional manslaughter in the first degree, reckless manslaughter in the first degree, and misconduct with a motor vehicle, which involves the criminally negligent operation of a motor vehicle. The charges stemmed from an incident in which the defendant's vehicle hit the victim's vehicle, causing it to hit a tree and resulting in the victim's death. At the sentencing hearing, the state moved that the trial court vacate the defendant's intentional manslaughter conviction pursuant to *State* v. *Polanco*, 308 Conn. 242 (2013). In *Polanco*, the Supreme Court held that, when cumulative convictions of greater and lesser offenses violate double jeopardy, the appropriate remedy is that one of the convictions be vacated. The trial court vacated the defendant's intentional manslaughter conviction and sentenced the defendant on the remaining convictions. The defendant appealed, claiming that the jury's verdicts were legally inconsistent in that each of the three charged crimes required a mutually exclusive mental state. The Appellate Court (191 Conn. App. 33) reversed in part, ordering that the convictions of reckless manslaughter and criminally negligent operation be vacated and remanding for a new trial on those charges and on the charge of intentional manslaughter. The Appellate Court rejected the state's contention that the case should be remanded with direction to reinstate the intentional manslaughter conviction that had been vacated pursuant to *Polanco*. The state was granted certification to appeal, and the Supreme Court will consider whether the Appellate Court improperly ordered a new trial on all three charges rather than ordering that the defendant's intentional manslaughter conviction, which had been vacated for sentencing purposes under *State* v. *Polanco*, be reinstated.

STATE *v.* JEFFREY K. WARD, SC 20427
Judicial District of Hartford

Criminal; Whether Trial Court Lacked Jurisdiction over Motion to Correct Illegal Sentence Because Defendant Failed to set Forth Colorable Claim that he was Incompetent at Time of Sentencing. The defendant pleaded guilty to manslaughter in the first degree and assault in the first degree and was sentenced to twenty-five years of incarceration. The defendant filed a motion to correct, claiming that his sentence was imposed in an illegal manner in that (1) he was incompetent at the time of sentencing; and (2) the sentencing court failed to order, sua sponte, that a competency evaluation and hearing be conducted before sentencing on the basis of information

known to it. The trial court dismissed the motion to correct, finding that it lacked subject matter jurisdiction over it. The defendant appealed, and the Appellate Court (193 Conn. App. 794) affirmed the judgment. The Appellate Court held that the trial court did not err in dismissing the motion to correct for lack of subject matter jurisdiction, as the defendant failed to set forth a colorable claim that his sentence was imposed in an illegal manner. The Appellate Court found that the defendant's motion failed to establish any possibility that he was incompetent at the time of sentencing or that there was sufficient information before the sentencing court requiring a competency examination and hearing prior to sentencing. Specifically, the Appellate Court found that, while the transcripts of several pretrial proceedings and the sentencing hearing that the defendant submitted in support of his motion to correct showed that the parties and the sentencing court were aware that the defendant had a history of mental health issues, nothing indicated that he had been incompetent when he was sentenced or that a competency evaluation and hearing prior to sentencing were required. The Appellate Court further found that the police report, psychiatric report and psychiatric records on which the defendant had also relied in support of his claim could not be viewed reasonably to support a conclusion that he was incompetent at the time of sentencing, as those records suggested that the defendant had a history of mental health issues and was at risk of experiencing symptoms in the future but failed to demonstrate that there was any likelihood that he was incompetent when sentenced. The defendant was granted certification to appeal, and the Supreme Court will consider whether the Appellate Court properly determined that the trial court did not have jurisdiction over the defendant's motion to correct an illegal sentence on the ground that the motion, on its face, did not raise a colorable claim that the defendant was incompetent at the time of his sentencing.

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.

Jessie Opinion
Deputy Chief Staff Attorney

NOTICES OF CONNECTICUT STATE AGENCIES

PAID FAMILY & MEDICAL LEAVE INSURANCE AUTHORITY

NOTICE OF INTENT TO ADOPT PROCEDURES RELATING THE APPLICATION TO UTILIZE A PRIVATE PLAN

In accordance with sections 1-121 and 31-49o of the Connecticut General Statutes, notice is hereby given that the Board of Directors of the Connecticut Paid Family and Medical Leave Insurance Authority (''hereinafter the CT Paid Leave Authority'') intend to adopt the following procedures to be followed by employers seeking to apply to the CT Paid Leave Authority for approval to meet their obligations relating to the provision of paid leave insurance benefits for employees through a private plan.

All written comments regarding these procedures must be submitted by August 21, 2020 to the CT Paid Leave Authority via email at PFMLIAComments@ct.gov.

Procedures for Employers to Apply for Approval to Utilize a Private Plan

1. Employer registers with the CT Paid Leave Authority on the portal, providing or verifying employer's name, address, contact information, industry code and total number of employees.
2. Employer completes the application for a private plan:
    a. Employer specifies whether:
        i. It has contracted with an insurer that has a Declaration of Insurance approved by the Connecticut Insurance Department (''hereinafter referred to as ''CID'').
            A. This option is available only during the period of time the CID accepts such Declarations, hereinafter referred to as the ''interim period'');
        ii. It has obtained coverage with an insurance with a CID-approved policy; or
        iii. It is choosing to self-insure using a CID-approved self-insurance policy form.
    b. The employer must produce a copy of the Declaration of Insurance (during the interim period only) or the policy. The CT Paid Leave Authority will verify with CID that the CID has approved the form of the declaration or the policy.
        i. During the interim period, if the employer applies on the basis of a CID-approved Declaration of Insurance, the CT Paid Leave Authority may provisionally approve the private plan contingent upon the requirement that the employer must resubmit its application after the Declaration is replaced by a CID-approved policy and its employees have voted to approve the policy.
            A. An employer who has received provisional approval from the CT Paid Leave Authority is exempted from the obligation to remit contributions.
            B. Per the Notice To All Insurance Companies Authorized To Conduct Business In Connecticut Concerning Paid Family And Medical Leave Insurance, as part of Insurance Declaration process, the employer must acknowledge that if the policy is not

in force on January 1, 2022, the employer will be responsible for contributions pursuant to Conn. Gen. Stat. § 31-49g, retroactive to January 1, 2021, and furthermore, that the employer may not collect retroactive contributions from covered employees to satisfy this requirement.

ii. An employer that seeks a self-insurance option must furnish a bond running to the state in the form determined by the CT Paid Leave Authority and in the amount established by the CID.

iii. The CT Paid Leave Authority will approve an application for a self-insured private plan only if the employer's application demonstrates how it can administer claims in a sustainable and legally compliant manner, such as utilizing a Third Party Administrator or demonstrating that it has the capacity to administer the claims process in-house.

A. The CT Paid Leave Authority shall draft procedures detailing the factors it shall consider in its analysis of whether an employer has demonstrated that it can administer claims in a sustainability and legally compliant manner.

c. Employer provides documentation that the plan has been approved by a majority vote of its employees and that the vote complied with the CT Paid Leave Authority requirements:

i. ''A majority vote of the employer's employees'' means that at least 50% + 1 of the total number of employees employed by the employer voted in favor the plan.

A. It does **not** mean at least 50% + 1 of the number of employees who participated in the vote.

ii. During the interim period, if the employer applies on the basis of a CID- approved Declaration of Insurance, the CT Paid Leave Authority may provisionally approve the private plan contingent upon the requirement that the employer submits an updated application with documentation that it held a vote on the full CID-approved **policy;** the CID-approved policy was approved by a majority vote of its employees; and the vote complied with the CT Paid Leave Authority requirements.

iii. Requirements for the employee vote:

A. All employees on the employer's payroll as of the date of the vote, including full-time, part-time and probationary employees, as well as any regular employees who are on a paid or unpaid leaves of absence (such as vacation, medical, military, educational, disciplinary, etc.) on the day of the vote, shall be afforded the opportunity to vote.

B. The employer must provide the employees with a copy of the CID-approved insurance policy (or, during the interim period only, the CID-approved Declaration of Insurance) and instructions about the voting process at least two weeks before the vote commences.

C. The employer may provide additional information about the proposed policy, including information about any benefits provided that exceed the statutory requirements.

D. The employer shall not coerce or threaten the employees in any way in connection with the vote. Evidence that the employer engaged in any coercive or threatening behavior shall be grounds for the CT Paid Leave Authority to deny or revoke the private plan approval.

E. The method of distribution of such documents must be at least as efficient and effective as the manner by which the employer distributes other legally required work-related postings, such as wage & hour, sexual harassment prevention, and workers' compensation information, and benefit information, such as pension/401k summary plan descriptions, open enrollment materials.

F. The employer must ensure that the documents are accessible to employees who are on leave.

G. The employer must ensure that the documents comply with federal and state requirements regarding disability accessibility and language accessibility.

H. The method of voting must be accessible to employees who are on leave.

I. The method of voting must comply with federal and state requirements regarding disability accessibility and language accessibility.

J. The question presented to the employees for the vote shall be: Do you approve the company's private plan to provide benefits required by the CT Paid Family and Medical Leave Insurance Act? Yes or No

K. The method of voting must be anonymous and must be capable of independent, after-the-fact verification.

- The CT Paid Leave Authority strongly recommends that employers utilize electronic and/or on-line tools for voting provided the employer assures that all employees have access to such tools.

L. The employer shall submit documentary proof to the CT Paid Leave Authority that it complied with paragraphs 1 through 7 of this subsection with its application, including but not limited to, a description of the voting procedures, the total number of employees employed, the total number of employees who voted and the numbers of votes for and against the plan

M. Notwithstanding paragraphs 2 through 7 above, if an employer has entered into a collective bargaining agreement with its employers that dictates an alternative method of voting, the employer shall provide the CT Paid Leave Authority with a copy of the relevant collective bargaining agreement and documentation demonstrating its compliance with such agreement.

- Nothing in this process shall diminish any rights provided to any employee or service worker under a collective bargaining agreement.

N. The CT PFMLIA shall have the authority to audit an employer's voting process for compliance with the statute and the Authority's requirements.

d. The Employer shall attest that it will comply and will direct its insurer or Third Party Administrator (as applicable) to comply with the CT Paid Leave Authority's reporting requirements

i. Such reporting requirements will include, but shall not be limited to, annual information on the following: the reasons claimants are receiving family and medical leave compensation, demographic information of claimants, including gender, age, town of residence

and income level, and the total number of claims made and claims denied, and the reasons for any denials.

ii. The CT Paid Leave Authority will establish reporting protocols to ensure that personally identifiable information and other confidential information are transmitted and maintained securely.

e. The Employer shall attest that it will comply and will direct its insurer or Third Party Administrator (as applicable) to comply with any the claims procedures adopted by the CT Paid Leave Authority.

f. The Employer shall attest that it will provide timely and complete responses and will direct its insurer or Third Party Administrator (as applicable) to provide timely and complete responses to any requests by the CT Paid Leave Authority, or its designee, for information relating to claims that the employer threatened or coerced employees in connection with the private plan vote; failed to pay benefits; failed to pay benefits timely and in a manner consistent with the public plan; failed to maintain an adequate security deposit as required by the CID; misused private plan funds; failed to submit reports as required; or failure to comply with sections 31-49e to 31-49t, inclusive of the Connecticut General Statutes.

3. The approval for a private plan shall be effective for one calendar year from the date the CT Paid Leave Authority notifies the employer that its private plan has been approved.

4. The CT Paid Leave Authority may deny or withdraw approval for a private plan if the CT Paid Leave Authority determines that the employer has threatened or coerced employees in connection with the private plan vote; failed to pay benefits; failed to pay benefits timely and in a manner consistent with the public plan; failed to maintain an adequate security deposit as required by the CID; misused private plan funds; failed to submit reports as required; or failure to comply with sections 31-49e to 31-49t, inclusive of the Connecticut General Statutes or has directed its insurer or Third Party Administrator to engage in such actions.

a. The CT Paid Leave Authority shall draft procedures for determining if the denial or withdrawal of approval of a private plan is appropriate that it shall follow upon receipt of information that any of the above-listed events has occurred.

5. The CT Paid Leave Authority may deny applications for a private plan option if it determines based upon actuarial principles that the solvency of the Trust may be jeopardized.

a. The CT Paid Leave Authority shall draft procedures for determining if the denial of approval of a private plan is appropriate based on concerns about the solvency of the Trust.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA) SPA 20-V: COVID-19 Coverage and Payment Updates After Federal Public Health Emergency

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Effective on or after July 25, 2020, SPA 20-V will amend Attachments 3.1-A, 3.1-B, 4.19-B, and 4.19-D of the Medicaid State Plan as described below.

The purpose of this SPA is to continue Medicaid coverage and payment for certain services related to the state's response to the Coronavirus Disease 2019 (COVID-19) pandemic that have been included in CT SPA 20-0015: COVID-19 Disaster Relief, which is the state's Medicaid disaster relief SPA for COVID-19. As a disaster relief SPA, 20-0015 will automatically end-date after the end of the federally declared public health emergency (PHE), including any extensions, so this SPA is necessary to continue certain changes after the end of the federal PHE. At the time this notice is being submitted for publication, the last day of the federal PHE is scheduled to be July 24, 2020. Although the federal government may renew the PHE declaration, at the time federal regulations require public notice to be published, it is not yet known if the federal PHE will be renewed. If the federal PHE is renewed, it is anticipated that the effective date of this SPA may be delayed until after the end of the federally declared PHE. For some of these, as specified below, the change will expire at the end of the state declared PHE, including any extensions. Fee schedules are published at this link: http://www.ctdssmap.com, then select ''Provider'', then select ''Provider Fee Schedule Download'', then Accept or Decline the Terms and Conditions and then select the applicable fee schedule.

Telehealth Coverage and Payment

New telehealth coverage pages will be added to Attachments 3.1-A and 3.1-B to provide that DSS covers telehealth to the extent authorized in its provider manual. Technical changes to existing SPA pages will also be made to remove any language that would otherwise prohibit telehealth coverage.

Effective through the end of the state PHE, Attachment 4.19-B will be amended to reflect that specific codes have been added to the physician and applicable clinic fee schedules to enable audio-only evaluation and management services to be provided by the following categories of providers: physician, physician assistants, advance practice registered nurses (APRNs), certified nurse-midwives, free-standing medical clinics, behavioral health clinics (including enhanced care clinics), outpatient hospital behavioral health clinics, public and private psychiatric outpatient hospital clinics, and family planning clinics fee schedules and may be billed by the providers as specified in the state's provider manual. These codes were set in a manner designed to approximate similar rates for equivalent in-person services, while accounting for differences in the time parameters associated with the in-person and audio-only codes.

Effective through the end of the state PHE, to the extent necessary and to the extent possible within available coding options, Attachment 4.19-B will be amended to enable audio-only psychotherapy to be provided by the following categories of providers: independent licensed behavioral health clinicians (licensed psychologists, licensed clinical social workers (LCSWs), licensed marital and family therapists (LMFTs), licensed professional counselors (LPCs), and licensed alcohol and drug counselors (LADCs)), behavioral health clinics (including enhanced care clinics), outpatient hospital behavioral health clinics, public and private psychiatric outpatient hospital clinics, free-standing medical clinics, rehabilitation clinics, behavioral health FQHCs, physicians, advanced practice registered nurses, and physician assistants. To the extent possible, these codes will be paid at the same rates as equivalent in-person services.

Laboratory Services Coverage and Payment

The laboratory coverage language in Attachments 3.1-A and 3.1-B will be updated to include the state's selection pursuant to 42 CF.R. 440.30(d), to cover laboratory tests (including self-collected tests authorized by the FDA for home use) to diagnose or detect SARS-CoV-2, antibodies to SARS-CoV-2, or COVID-19 or the communicable disease named in the federal Public Health Emergency (PHE) as defined in 42 CFR 440.30(d) or its causes that do not meet one or more conditions specified in 42 CFR 440.30(a) and (b), because such coverage flexibility is intended to avoid transmission of COVID-19 or such other communicable disease. This coverage applies for the duration of any applicable Public Health Emergency and continues during any subsequent period of active surveillance, each as defined in 42 CFR 440.30(d).

In addition, Attachment 4.19-B will be amended to reflect that the laboratory (lab), medical clinic (MC), dialysis clinic (DC), and family planning clinic (FPC) fee schedules will be updated to add payment for specified codes related to testing of COVID-19 that have been added to the Medicare fee schedule. DSS anticipates continuing to have the following Healthcare Common Procedural Coding System (HCPCS) codes on the applicable fee schedules:

Laboratory Fee Schedule:

HCPCS Codes 87635, 86328, 86769, U0003, U0004, U0001, U0002, and 87426.

Clinic Fee Schedules:

HCPCS Code	**Fee Schedule(s)**
87635	DC, MC, FPC
U0001	DC, MC, FPC
U0002	DC, MC, FPC
U0003	FPC

From the end of the federally declared PHE until the end of the state declared PHE, these codes will be paid at 100% of the 2020 Medicare rate. After the state PHE ends, consistent with the reimbursement of other codes on the applicable fee schedule, the reimbursement methodology for the specified codes related to COVID-19 testing will be updated as follows: lab fee schedule will be paid at 70% of Medicare; MC and FPC fee schedules will be paid at 80% of Medicare; and DC fee schedule will be paid at 100% of Medicare.

Relaxing Requirements for Enhanced Care Clinics

Effective through the end of the state PHE, Attachment 4.19-B will be amended to reflect that the following requirements for the Enhanced Care Clinic higher payment rate for behavioral health clinics have been relaxed (no change in the rates, only relaxing the requirements for the provider to be eligible to receive the applicable rates):

i. Suspending all specific time requirements for urgent or emergent cases;
ii. Allowing clinics to temporarily merge sites to consolidate staff due to staffing shortages;
iii. Suspending the state's Mystery Shopper calls; and
iv. Waiving the requirement for extended operating hours.

Payment Changes to Accommodate Addition of Agency-Based PCA and Shelf-Stable Meals, and Emergency Meal Delivery Within the Community First Choice (CFC) Program Pursuant to Section 1915(k) of the Social Security Act and Other CFC Payment Changes

Effective through the end of the state PHE, Attachment 4.19-B will be amended to reflect that the payment methodology for CFC is modified as follows:

The state adds payment for agency-based PCAs as follows based on a fee schedule (no changes to the payment methodology for self-directed PCAs). The fee schedule is as follows:

Personal Care Services: Overnight Per Diem (12 Hour) Shift Agency: $180.63
Personal Care Services: Per Diem (24 Hour) Agency: $243.61
PCA Agency Per Diem Prorated Hourly: $10.15
PCA Agency Overnight Prorated Hourly: $15.05
PCA Agency 15 minute: $4.92
Shelf-Stable Meals: Shelf-stable meals are paid at the following rates:
Meal Service Single Shelf-Stable Meal: $6.50
Meal Service Double Shelf-Stable Meal: $13.50
Kosher Meal Double Shelf-Stable Meal: $13.50

Emergency meal delivery: Flat pick up rate of $8.50 and $1.75 per mile thereafter allocated equally across all participants receiving meals.

Nurse Health Coach: In order to maintain compliance with the Health Insurance Portability and Accountability Act (HIPAA), the following code is added to ensure continuity of coverage to replace a code that was removed from the Healthcare Common Procedural Coding System (HCPCS) national billing code set:

Registered Nurse Health Coach (HCPCS Code S5108): Max fee of $23.80 per 15 minutes

Relaxing Requirement for Payment to Private Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF/IID) Individual Leave Days

Effective through the end of the state PHE, Attachment 4.19-D is amended to reflect that individuals residing at the ICF/IID may exceed the standard home and hospital leave days and the state will pay the ICF/IID for those days without limit during the public health emergency. This change is necessary to ensure the ICF/IID is able to maintain their beds for when the individuals are able to return to the facility at the end of the public health emergency as well as facilitating individuals taking home leave in order to reduce the risk of COVID-19 spreading among the facility residents and staff.

Random Moment Time Study (RMTS)/Time Study Flexibility

In certain situations in which the Medicaid State Plan provides for the use of RMTS in allocating costs for providers paid using a cost-based payment methodology, Attachment 4.19-B is amended to reflect the following flexibilities during the PHE to the extent that the state determines that such flexibility is necessary in order to appropriately reflect the disruptions in staffing, operations, and impact on members during the COVID-19 pandemic, including, as necessary, use of the RMTS average quarter results for the quarters ending December 31, 2020, March 31, 2021, and/or June 30, 2021, or such other quarter(s) as determined by the state, in place of the RMTS results for the quarter ending September 30, 2020 and any other applicable quarter(s) determined by the state. This flexibility applies to all such programs with RMTS in the Medicaid State Plan, including, but not limited to: behavioral health homes pursuant to section 1945 of the Social Security Act, targeted case management for individuals with chronic mental illness (TCM-CMI), Department of Mental Health and Addiction Services' publicly operated behavioral health clinics and outpatient hospitals, and TCM for individuals with intellectual disabilities (TCM-IID).

For private non-medical institution services (PNMI) for adults, the state plan will be modified to require only one time study in PNMI for adults, where two time studies are otherwise required each SFY.

Additionally, for the School Based Child Health program, the state plan will be modified to increase the oversample in developing the statistically valid sample size due to COVID-19 related issues in schools for the 2nd quarter of SFY 2021 and any other calendar quarter(s) determined by the state.

Fiscal Impact

In general, DSS does not anticipate that this SPA will substantially change annual aggregate expenditures because these changes are broadly intended to enable continuity of coverage and payment during COVID-19 for services that would otherwise have been performed in accordance with parameters that were in effect prior to the PHE, as applicable. For the COVID-19 laboratory testing services, compared to the general Medicaid State Plan in effect prior to the PHE, based on information that is available at this time and subject to change in utilization over time, DSS estimates that those services will increase annual aggregate expenditures by approximately $1.5 million.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: http://portal.ct.gov/dss. Scroll down to the bottom of the webpage and click on ''Publications'' and then click on ''Updates.'' Then click on ''Medicaid State Plan Amendments''. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference ''SPA 20-V: COVID-19 Coverage and Payment Updates After Federal Public Health Emergency''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than August 5, 2020.

NOTICES

Supreme Court Sessions

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

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

The first day of each of the sessions for the 2020 - 2021 court year is as follows: September 8, 2020; October 13, 2020; November 16, 2020;

December 7, 2020; January 11, 2021; February 16, 2021; March 22, 2021; and April 26, 2021.

Carolyn C. Ziogas
Chief Clerk

Appellate Court Sessions

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

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

The first day of each of the sessions for the 2020 - 2021 court year is as follows: September 2, 2020; October 5, 2020; November 9, 2020; January 4, 2021; February 1, 2021; March 1, 2021; April 5, 2021; and May 10, 2021.

Carolyn C. Ziogas
Chief Clerk

Docket and case assignment information is available on the Judicial Branch website and at http://appellateinquiry.jud.ct.gov. The electronic posting on the Judicial Branch website is the official notice of the dockets and assignments except for incarcerated self-represented parties and individuals who have an exemption from e-filing who will continue to receive notice by mail. See Practice Book sections 69-1 and 69-3. Notice of the cases the Appellate Court determines should be considered on the court's motion calendar for dismissal or sanction will also be by mail. The information below provides docket and assignment posting dates for both courts for the 2020–2021 court year.

. . . Continued

Supreme Court Docket	Information available on or about
First Term Docket	Posted to the website June 29, 2020
Second Term Docket	Posted to the website August 21, 2020
Third Term Docket	Posted to the website September 25, 2020
Fourth Term Docket	Posted to the website October 23, 2020
Fifth Term Docket	Posted to the website November 25, 2020
Sixth Term Docket	Posted to the website January 11, 2021
Seventh Term Docket	Posted to the website February 9, 2021
Eighth Term Docket	Posted to the website March 15, 2021
Supreme Court Assignment	**Information available on or about**
First Term Assignment	Posted to the website July 30, 2020
Second Term Assignment	Posted to the website September 16, 2020
Third Term Assignment	Posted to the website October 16, 2020
Fourth Term Assignment	Posted to the website November 18, 2020
Fifth Term Assignment	Posted to the website December 22, 2020
Sixth Term Assignment	Posted to the website February 1, 2021
Seventh Term Assignment	Posted to the website March 2, 2021
Eighth Term Assignment	Posted to the website April 8, 2021

Appellate Court Docket	Information available on or about
First Term Docket	Posted to the website July 14, 2020
Second Term Docket	Posted to the website August 24, 2020
Third Term Docket	Posted to the website September 29, 2020
Fourth Term Docket	Posted to the website November 9, 2020
Fifth Term Docket	Posted to the website December 15, 2020
Sixth Term Docket	Posted to the website January 22, 2021
Seventh Term Docket	Posted to the website March 1, 2021
Eighth Term Docket	Posted to the website April 5, 2021
Appellate Court Assignment	**Information available on or about**
First Term Assignment	Posted to the website August 17, 2020
Second Term Assignment	Posted to the website September 22, 2020
Third Term Assignment	Posted to the website October 27, 2020
Fourth Term Assignment	Posted to the website December 8, 2020
Fifth Term Assignment	Posted to the website January 13, 2021
Sixth Term Assignment	Posted to the website February 18, 2021
Seventh Term Assignment	Posted to the website March 26, 2021
Eighth Term Assignment	Posted to the website April 29, 2021

JUDGE TRIAL REFEREE DESIGNEES
ARBITRATION PROCEEDINGS - TRIAL DE NOVO

The following judge trial referees have been duly designated by Chief Justice Richard A. Robinson in accordance with subsection (b) of Connecticut General Statutes § 52-434 to hear proceedings resulting from a demand for a trial de novo pursuant to subsection (e) of Connecticut General Statutes § 52-549z, for the period July 1, 2020 through June 30, 2021:

Hon. Taggart D. Adams
Hon. Gerard I. Adelman
Hon. Richard E. Arnold
Hon. Arnold W. Aronson
Hon. Anthony V. Avallone
Hon. Robert E. Beach, Jr.
Hon. Marshall K. Berger, Jr.
Hon. Jon C. Blue
Hon. John D. Boland
Hon. Richard E. Burke
Hon.Patrick J. Clifford
Hon. Henry S. Cohn
Hon. Leeland J. Cole-Chu
Hon. Richard F. Comerford, Jr.
Hon. Thomas J. Corradino
Hon. Emmet L. Cosgrove
Hon. Juliette L. Crawford
Hon. William T. Cremins
Hon. John F. Cronan
Hon. James J. Devine
Hon. Robert J. Devlin, Jr.
Hon. Edward J. Dolan
Hon. Edward S. Domnarski
Hon. Constance L. Epstein
Hon. Roland D. Fasano
Hon. Francis J. Foley, III
Hon. Stephen F. Frazzini
Hon. Robert G. Gilligan
Hon. James P. Ginocchio
Hon. Susan B. Handy
Hon. Michael Hartmere
Hon. Arthur A. Hiller
Hon. William Holden
Hon. Edward R. Karazin, Jr.
Hon. James G. Kenefick, Jr.
Hon. Edward T. Krumeich, II
Hon. William J. Lavery
Hon. Charles T. Lee
Hon. Joseph A. Licari, Jr.
Hon. Michael A. Mack
Hon. John W. Moran
Hon. Maurice B. Mosley
Hon. John F. Mulcahy, Jr.
Hon. Edward J. Mullarkey
Hon. Thomas V. O'Keefe, Jr.
Hon. Richard N. Palmer
Hon. A. Susan Peck
Hon. Joseph H. Pellegrino
Hon. John W. Pickard
Hon. Patty Jenkins Pittman
Hon. Kenneth B. Povodator
Hon. Barbara M. Quinn
Hon. Dale W. Radcliffe
Hon. Susan S. Reynolds
Hon. Eddie Rodriguez, Jr.
Hon. John J. Ronan
Hon. Angelo L. dos Santos
Hon. Thelma A. Santos
Hon. Philip A. Scarpellino
Hon. Marylouise Schofield
Hon. Jane S. Scholl
Hon. Karen Sequino
Hon. Robert B. Shapiro
Hon. Michael E. Shay
Hon. Joseph M. Shortall
Hon. Mary E. Sommer
Hon. Edward F. Stodolink
Hon. William J. Sullivan
Hon. Lois Tanzer
Hon. George N. Thim
Hon. Kevin Tierney
Hon. David R. Tobin
Hon. John Turner
Hon. Heidi G. Winslow

Hon. Patrick L. Carroll III, Judge
Chief Court Administrator

DIVISION OF CRIMINAL JUSTICE
(Affirmative Action/Equal Opportunity Employer

STATE'S ATTORNEY
JUDICIAL DISTRICT OF HARTFORD

Applications are being accepted for the full-time position of State's Attorney for the Judicial District of Hartford (PCN 4857). The successful applicant shall hold office from the date of appointment through June 30, 2028, and thereafter be subject to appointment to an eight (8) year term. The annual salary is $163,292.17. For a description of this position, please visit our website at www.ct.gov/csao.

At the time of appointment, the successful candidate must be an attorney-at-law and shall have been admitted to the practice of law for at least three years; residency in the State of Connecticut is a prerequisite to appointment. All applicants must complete division of Criminal Justice application forms. These forms may be downloaded from the Division website at www.ct.gov/csao. A job description for this position may also be viewed on this website.

Two (2) complete sets of application forms along with resumes must be sent via U.S. Mail to**:** The Honorable Andrew J. McDonald, Chairman, Criminal Justice Commission, c/o Human Resources - Office of the Chief State's Attorney, 300 Corporate Place, Rocky Hill, CT 06067, Attn: SA-Hartford JD (PCN 4857) and must be postmarked no later than **August 20, 2020**. In addition, an electronic copy (pdf) of application materials should be sent to DCJ.HR@ct.gov. Applications received by facsimile will not be accepted. The Division of Criminal Justice is an Affirmative Action/Equal Opportunity Employer.