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CONNECTICUT REPORTS

Vol. 335

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* JEFFREY COVINGTON (SC 20198)

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

Syllabus

Under the statute (§ 29-35 (a)) making it a crime for any person to carry a pistol or revolver on his person outside of a dwelling house or place of business without a permit, the state must prove beyond a reasonable doubt that, inter alia, the barrel of the pistol or revolver the defendant was carrying is less than twelve inches in length.

The defendant was convicted of carrying a pistol or revolver without a permit, among other crimes, in connection with an incident in which several gunshots emanated from an automobile that was occupied by the defendant and his friend, R, who owned the vehicle. Two people suffered gunshot wounds as a result of the shooting. Following the shooting, the defendant drove the vehicle to the residence of his girlfriend's family, where the sister of the defendant's girlfriend, C, observed R remove a handgun from his waistband and hand it to the defendant. At the defendant's trial, the state did not present direct, numerical evidence of the length of the barrel of the firearm that it alleged he had used in connection with the shooting, as the firearm was never recovered by the police, and none of the state's witnesses specifically described its barrel length. The jury, however, was presented with circumstantial evidence about the firearm, which included testimony from C and from a firearms examiner, W, who testified about his examination of the two bullets retrieved from the body of one of the victims. The defendant appealed from the judgment of conviction to the Appellate Court, which rejected the defendant's claim that there was insufficient evidence that he was carrying a firearm with a barrel length of less than twelve inches. On the granting of certification, the defendant appealed to this court. *Held* that the Appellate Court correctly concluded that there was sufficient evidence to sustain the defendant's conviction under § 29-35 (a), as the state presented sufficient, circumstantial evidence to permit the jury reasonably to conclude beyond a reasonable doubt that the barrel of the firearm the defendant carried without a permit was less than twelve inches in length: C testified that, a few hours before the shooting, she observed a gun inside the glove compartment of R's vehicle, the state introduced into evidence a photograph of the interior of R's vehicle that depicted the general size of the glove compartment, and C also testified that, shortly after the shooting occurred, she saw R pull a handgun out of his waistband and hand it to the defendant, and it was not unreasonable for the jury to have concluded, on the basis of such evidence, that a firearm with a barrel of one foot or longer, plus the

additional size and length of the handle, would have been too large and unwieldy to store in the glove compartment of R's vehicle and for R to transport inside his waistband; moreover, the jury's finding that the firearm the defendant was carrying had a barrel length of less than twelve inches was further supported by W's testimony that the bullets recovered from the body of one of the victims were consistent with bullets that would have been fired out of a .32 caliber "handgun or revolver," and by the trial court's instruction to the jury that the term "pistol" or "revolver" means any firearm having a barrel of less than twelve inches in length.

Argued November 14, 2019—officially released March 25, 2020*

Procedural History

Substitute information charging the defendant with the crimes of murder, assault in the first degree, carrying a pistol or revolver without a permit, and criminal possession of a firearm, brought to the Superior Court in the judicial district of New Haven, geographical area number twenty-three, where the charges of murder, assault in the first degree, and carrying a pistol or revolver without a permit were tried to the jury before *Alander*, *J.*; verdict of guilty of carrying a pistol or revolver without a permit; thereafter, the court declared a mistrial as to the charges of murder and assault in the first degree; subsequently, the charge of criminal possession of a firearm was tried to the court, *Alander*, *J.*; finding of guilty; thereafter, judgment of guilty of carrying a pistol or revolver without a permit and criminal possession of a firearm, from which the defendant appealed to the Appellate Court, *Alvord*, *Keller* and *Bright*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Naomi T. Fetterman, with whom was *Aaron Romano*, for the appellant (defendant).

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *Patrick Griffin*, state's attorney, and *John P. Doyle* and *Seth Garbarsky*, senior assistant state's attorneys, for the appellee (state).

* March 25, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

MULLINS, J. In this certified appeal, the defendant, Jeffrey Covington, claims that the Appellate Court improperly affirmed his conviction for carrying a pistol or revolver without a permit in violation of General Statutes § 29-35 (a).[1] In particular, he argues that the state failed to present sufficient evidence that the firearm he was alleged to have been carrying had a barrel length of less than twelve inches. We disagree and, accordingly, affirm the judgment of the Appellate Court.

The Appellate Court's opinion sets forth the following relevant facts, which the jury reasonably could have found at trial. "At or about 8 p.m., on March 24, 2014, the defendant was operating an automobile that was owned by his friend, Derek Robinson. When the defendant drove Robinson's automobile away from the intersection of Whalley Avenue and Ella T. Grasso Boulevard in New Haven, Robinson was in the passenger's seat. A short time later, at approximately 8:50 p.m., Robinson's automobile was parked along Shelton Avenue in New Haven . . . . At that time, the victims, Trayvon Washington and Taijhon Washington, were walking home from a friend's house. They walked past Robinson's automobile while someone was getting into it. . . . Approximately two minutes after they had passed the automobile . . . [it] approached them at a high rate of speed. . . . Then, several gunshots emanated from the automobile. Taijhon Washington suffered fatal gunshot injuries to his chest. Trayvon Washington was shot in the head, resulting in a fractured skull. Although he survived the shooting, he endured extensive medical treatment, and a bullet from that incident remained lodged in his head at the time of trial.

[1] Although § 29-35 (a) was the subject of a technical amendment in 2016; see Public Acts 2016, No. 16-193, § 9; that amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

"Following the shooting, the defendant drove to the residence of his girlfriend's family on Poplar Street in New Haven. He was accompanied by Robinson. The defendant's girlfriend along with some of her family members, including her sister, Dajah Crenshaw, were present at the residence. . . . When the defendant entered the residence, he was holding the keys to Robinson's automobile. Crenshaw observed Robinson remove a handgun from his waistband and hand it to the defendant. Thereafter, the defendant concealed the handgun in a dresser in his girlfriend's bedroom.

"The following day, Crenshaw overheard the defendant having a telephone conversation with Robinson's brother. During the conversation, the defendant referred to a gun, and he asked Robinson's brother if he had buried it. In the days that followed, the defendant made various statements that reflected his involvement in and responsibility for the shooting. Significantly, the defendant admitted to a longtime acquaintance, Margaret Flynn, that he happened to catch Taijhon Washington off guard and had killed him. The defendant elaborated, stating that the shooting occurred while he was in Robinson's automobile but that Robinson was not involved and was unaware that the shooting was going to happen. Moreover, the defendant told Flynn that he had retaliated against Taijhon Washington because, in February [2014], relatives of Taijhon Washington assaulted him." (Footnotes omitted.) *State* v. *Covington*, 184 Conn. App. 332, 335–37, 194 A.3d 1224 (2018); see also id., 336–37 n.3 (describing consciousness of guilt evidence admitted at trial, as well as evidence that, while incarcerated pending trial, "[t]he defendant flippantly acknowledged in the presence of others that he had been the shooter").

The defendant was subsequently charged with, inter alia, carrying a pistol or revolver without a permit in vio-

lation of § 29-35 (a).[2] At the defendant's trial, the state did not present direct, numerical evidence of the length of the barrel of the firearm that it alleged he had used to commit the shooting. The firearm was never recovered by the police, and none of the state's witnesses specifically described its barrel length.

The jury was, however, presented with the following relevant circumstantial evidence about the firearm. Earl Williams, a firearms examiner, testified about his examination of the two bullets retrieved from Taijhon Washington's body. He testified that both bullets were ".32 caliber class bullets" and, although mangled, exhibited discernable "rifling" impressions. Williams explained that rifling impressions are created by firearms that are manufactured with grooves along the inside of the barrel to make the bullets rotate when fired. Williams testified that rifling impressions are typical of "all rifled firearms" and that "handguns, such as pistols and revolvers" leave rifling impressions. Williams explained that shotguns, by contrast, "are a smooth bore" and do not have rifling. Williams further testified that the bullets found in Taijhon Washington's body were "consistent with bullets that would be fired out of a .32 caliber handgun or revolver."[3]

The state also called Crenshaw as a witness. Crenshaw testified that, while riding in Robinson's vehicle a few hours before the shooting occurred, she saw "a gun" inside the glove compartment. Although Crenshaw did

[2] The defendant also was charged with murder in violation of General Statutes § 53a-54a (a), assault in the first degree with a firearm in violation of General Statutes § 53a-59 (a) (5), and criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1). *State* v. *Covington*, supra, 184 Conn. App. 334 and n.1; see footnote 4 of this opinion.

[3] We acknowledge that, on cross-examination, Williams admitted that the bullets were too damaged for him to determine whether they had been fired from a revolver rather than a semiautomatic weapon. Defense counsel then asked Williams: "[B]ased on your examination, you cannot say to any degree of certainty what gun [the bullets] came from, correct?" Williams responded: "That is correct."

not testify about the size of the glove compartment, the state submitted into evidence a photograph of the interior of Robinson's vehicle, which depicted the glove compartment open.

Crenshaw further testified that, when the defendant and Robinson arrived at her residence shortly after the shooting occurred, she saw Robinson carrying "a handgun." Specifically, Crenshaw testified that she saw Robinson "pull [the] gun out of his waistband" and hand it to the defendant, who then hid it inside of a dresser drawer. Crenshaw also testified that she had not seen that firearm before, and that she could not describe what it looked like.

The jury found the defendant guilty of carrying a pistol or revolver without a permit in violation of § 29-35 (a). The trial court imposed a sentence on this conviction of five years incarceration, execution suspended after three years, followed by three years of probation.[4] *State* v. *Covington*, supra, 184 Conn. App. 334 n.1.

The defendant appealed from this conviction to the Appellate Court, claiming that there was insufficient evidence that he carried a firearm with a barrel length of less than twelve inches.[5] Id., 341. In rejecting this claim, the Appellate Court concluded, first, that there

[4] The defendant also was convicted, following a trial to the court, of criminal possession of a firearm and sentenced to ten years incarceration, execution suspended after seven years, followed by three years of probation, to be served consecutively with the sentence imposed on the conviction for carrying a pistol or revolver without a permit. *State* v. *Covington*, supra, 184 Conn. App. 334 n.1. The trial court also required the defendant to register as a deadly weapon offender for a period of five years. Id. The jury was unable to reach a unanimous verdict with respect to the charges of murder and assault in the first degree with a firearm, and the trial court declared a mistrial on those charges. Id. The defendant subsequently was acquitted of these charges following a retrial.

[5] The defendant also claimed that his conviction for criminal possession of a firearm had to be vacated and that he was entitled to a new sentencing hearing. *State* v. *Covington*, supra, 184 Conn. App. 335; see footnote 4 of this opinion. The Appellate Court rejected those claims. *State* v. *Covington*, supra, 350–55. The Appellate Court's resolution of those claims is not at issue in this appeal.

was sufficient evidence from which the jury could have inferred that the defendant, rather than Robinson, was the shooter and, therefore, that he had carried a firearm of some type at the time and place of the shooting. Id., 343–44.

Second, the Appellate Court determined that there was sufficient evidence to permit the jury to conclude beyond a reasonable doubt that the barrel length of the firearm was less than twelve inches. Id., 350. The Appellate Court relied on Williams' testimony that the rifling impressions on the bullets recovered from Taijhon Washington's body were "consistent" with having been fired from a "handgun or revolver," as well as Crenshaw's testimony that, shortly after the shooting occurred, she saw Robinson remove "a handgun" from his "waistband" and hand it to the defendant. (Internal quotation marks omitted.) Id., 345–46. The Appellate Court reasoned that the use of the terms "revolver" and "handgun" by these witnesses permitted the jury to infer that the length of the barrel of the firearm used in the shooting was less than twelve inches. Id., 347–49. The Appellate Court further reasoned that Crenshaw's testimony that Robinson removed the handgun from his "waistband" permitted the jury to conclude "that the barrel of the gun must [have been] less than twelve inches in length." Id., 349.

On appeal to this court,[6] the defendant claims that the Appellate Court incorrectly concluded that there was sufficient evidence that the firearm had a barrel length of less than twelve inches.[7] We disagree.

[6] We granted the defendant's petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly conclude that the state presented sufficient evidence upon which the jury could find the defendant guilty of carrying a pistol [or revolver] without a permit, in violation of . . . § 29-35?" *State* v. *Covington*, 330 Conn. 933, 195 A.3d 383 (2018).

[7] The defendant does not challenge the sufficiency of the evidence with respect to any of the other elements of his conviction under § 29-35 (a). Accordingly, we limit our inquiry to the question of whether there was sufficient evidence of barrel length.

We begin with the general principles governing our review. "The standard of review we apply to a claim of insufficient evidence is well established. 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 [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"We also 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. . . .

"Additionally, [a]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [jury], 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 [jury's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Taupier*, 330 Conn. 149, 186–87, 193 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 1188, 203 L. Ed. 2d 202 (2019).

Section 29-35 (a) makes it a crime for any person to "carry any *pistol or revolver* upon his or her person, except when such person is within the dwelling house or place of business of such person, without a permit to carry the same . . . ." (Emphasis added.) "The term 'pistol' and the term 'revolver', as used in sections 29-28 to 29-38, inclusive, mean any firearm having a barrel less than twelve inches in length." General Statutes § 29-27. The barrel length of the firearm is an essential element of the offense that must be proven beyond a reasonable doubt. See, e.g., *State* v. *McIntyre*, 242 Conn. 318, 334, 699 A.2d 911 (1997); *State* v. *Fleming*, 111 Conn. App. 337, 346–47, 958 A.2d 1271 (2008), cert. denied, 290 Conn. 903, 962 A.2d 794 (2009).

As with any element of a criminal offense, however, the state may prove the length of the barrel with circumstantial evidence. See *State* v. *Williams*, 231 Conn. 235, 251–52, 645 A.2d 999 (1994), overruled in part on other grounds by *State* v. *Murray*, 254 Conn. 472, 487, 757 A.2d 578 (2000). This court has explained that direct, numerical evidence is not required to prove barrel length. Id., 252. In the absence of direct, numerical evidence of barrel length, this element may be satisfied by evidence that is sufficiently indicative of the size of the firearm so as to permit the jury to *reasonably and logically* infer beyond a reasonable doubt that its barrel is less than twelve inches in length. Id.

In *Williams*, as in the present case, the state neither introduced the firearm into evidence nor presented any direct evidence of the size of its barrel. See id. The state instead relied solely on testimony from witnesses that the defendant "pulled a small handgun" out of the pocket of his "waist length jacket." (Internal quotation marks omitted.) Id. On the basis of this testimony, this court held that there was sufficient evidence of barrel length. See id. This court explained that "the jury could have reasonably inferred that the handgun that the

defendant pulled from the pocket of a small sized outer garment that he wore was less than twelve inches long" and that "it is extremely unlikely that anyone would describe as 'small' a handgun that had a barrel of one foot or longer." Id.

Other appellate decisions similarly have upheld convictions under § 29-35 (a) where there was evidence that the firearm could be concealed in a small space or held with only one hand. See, e.g., *State* v. *Fleming*, supra, 111 Conn. App. 348–39 (there was sufficient evidence of barrel length where witnesses testified that defendant pulled firearm from jacket pocket and held it with one hand rather than both hands, and trial witness made gesture with hands at trial that presumably indicated size of gun); *State* v. *Williams*, 48 Conn. App. 361, 372, 709 A.2d 43 ("[i]f the length of the gun barrel were longer than twelve inches, the jury could infer that the defendant might not be able to hold the weapon with only one hand"), cert. denied, 245 Conn. 907, 718 A.2d 16 (1998); *State* v. *Gonzalez*, 25 Conn. App. 433, 444, 596 A.2d 443 (1991) (there was sufficient evidence of barrel length where witness testified that defendant pulled pistol out of back pocket and that pistol was "covered" by defendant's hand), aff'd, 222 Conn. 718, 609 A.2d 1003 (1992); cf. *State* v. *Gray-Brown*, 188 Conn. App. 446, 467 n.7, 204 A.3d 1161 (there was insufficient evidence of barrel length where "there was no [evidence] that [the firearm] could be held in one hand or concealed in a small space"), cert. denied, 331 Conn. 922, 205 A.3d 568 (2019).

In the present case, Crenshaw testified that, a few hours before the shooting, she was inside Robinson's vehicle and observed "a gun" inside the glove compartment. Although the state adduced no evidence of the specific dimensions of the glove compartment, the state did introduce into evidence photographs of the vehicle itself—showing that it was a standard sized sedan—as

well as a photograph of the interior of the vehicle, which depicted the general size of the glove compartment. Crenshaw further testified that, when Robinson and the defendant arrived at her residence shortly after the shooting occurred, she saw Robinson pull "a handgun" "out of his waistband" and hand it to the defendant. The jury reasonably could have inferred from this evidence that the firearm Crenshaw saw on these occasions was the firearm used in the shooting and that, after the shooting, Robinson held it in his waistband until he and the defendant reached Crenshaw's residence for the purpose of concealing it from plain view.[8]

This evidence about the place and the manner in which the firearm was stored and carried is sufficiently indicative of its size to permit the jury reasonably to conclude beyond a reasonable doubt that its barrel was less than twelve inches in length. Indeed, the jury could have viewed the photograph of the interior of Robinson's vehicle and, using its common sense and experi-

[8] We disagree with the defendant's claim that the jury could not reasonably have inferred that the firearm Crenshaw saw Robinson pull from his waistband was the same one she saw earlier that day inside the glove compartment. Although Crenshaw testified that she had never seen the firearm Robinson pulled from his waistband before, the jury was not required to credit this portion of her testimony. "It is without question that the jury is the ultimate arbiter of fact and credibility. . . . As such, it may believe or disbelieve all or any portion of the testimony offered. . . . In the course of [our] analysis [of the sufficiency of the evidence], we assume that the jury credited the evidence favorable to the state and discredited the evidence favorable to the defendant." (Citations omitted.) *State* v. *Hart*, 221 Conn. 595, 604–605, 605 A.2d 1366 (1992).

We therefore presume that the jury credited the pieces of Crenshaw's testimony that support its finding that the barrel of the gun was less than twelve inches in length. Further, although "the jury may not infer the opposite of a witness' testimony solely from its disbelief of that testimony"; id., 605; Crenshaw's testimony that she saw the firearm inside of Robinson's vehicle—the vehicle implicated in the shooting—mere hours before the shooting occurred and then saw him remove a gun from his waistband just after the shooting occurred provided sufficient *affirmative* evidence to permit the jury to draw a reasonable inference that the firearms she saw on these two occasions were one and the same.

ence, reasonably concluded that the glove compartment was a confined space that could have accommodated only a smaller sized, i.e., a shorter barreled, firearm. The waistband of a pair of pants also imposes obvious spatial constraints that we presume the jury was aware of as a matter of common sense and experience. "Jurors are not expected to lay aside matters of common knowledge or their own observation and experience of the affairs of life, but, on the contrary, to apply them to the evidence or facts in hand . . . ." (Internal quotation marks omitted.) *State* v. *Padua*, 273 Conn. 138, 157, 869 A.2d 192 (2005). It was not unreasonable for the jury to have concluded that a firearm with a barrel of one foot or longer—plus the additional size and length of the handle—would have been too large and unwieldy to store in the glove compartment shown in the photograph and for Robinson to transport inside his waistband. The cumulative force of this evidence establishes that the firearm was smaller in size and, thus, did not have a barrel length of or exceeding twelve inches.

The fact that it is "theoretically possible" for certain long barreled firearms to have been arranged to fit in these small spaces does not compel a different result. "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 [jury's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Taupier*, supra, 330 Conn. 187. It certainly would have been preferable for the state to, for example, have asked Crenshaw to compare the length of the barrel of the handgun to a twelve inch ruler; see *State* v. *Williams*, supra, 231 Conn. 252; or to provide some other, more definitive description of its size. Nevertheless, we simply cannot say that no rational fact finder could have concluded beyond a reasonable doubt that

a handgun that could fit in Robinson's waistband and the glove compartment of his vehicle, a Hyundai Sonata, had a barrel length of less than twelve inches.

Moreover, Williams testified that the bullets recovered from Taijhon Washington's body were "consistent" with the bullets that would be fired out of a .32 caliber "handgun *or revolver*." (Emphasis added.) Section 29-27 defines the term "revolver" as "any firearm having a barrel less than twelve inches in length." Indeed, the court instructed the jury in relevant part: "The term 'pistol' or 'revolver' means any firearm having a barrel of less than twelve inches in length. The phrase 'carried a pistol or revolver upon his person' is to be understood in accordance with its ordinary meaning in our language." Given the court's guidance on the meaning of the term "revolver," the jury could have relied on Williams' testimony as some evidence that the firearm was less than twelve inches in length. Although, on cross-examination, Williams testified that he could not say to any degree of certainty what gun the bullets came from, that testimony is not necessarily inconsistent with his previous testimony that the bullets found in Taijhon Washington's body were "consistent with bullets that would be fired out of a .32 caliber handgun or revolver." Accordingly, we conclude that Williams' testimony further supports the jury's finding that the weapon the defendant was carrying had a barrel length of less than twelve inches.

In arguing that the evidence was insufficient, the defendant relies principally on *State* v. *Perry*, 48 Conn. App. 193, 709 A.2d 564, cert. denied, 244 Conn. 931, 711 A.2d 729 (1998). *Perry*, however, is inapposite. In that case, the sole evidence that the barrel length was less than twelve inches came from a witness who testified that the defendant "pulled the gun out of his jacket or coat." (Internal quotation marks omitted.) Id., 197–98. The Appellate Court concluded that this evidence was

insufficient, observing that "some measure of descriptive evidence from which the jury may properly infer the barrel length is necessary in order for the state to satisfy its burden of proof." Id., 198.

Unlike *Perry*, the jury in the present case was provided with sufficient evidence from which it could infer barrel length. The jury was able to assess the size of the glove compartment from the photograph, and there was evidence that the firearm was being carried in a particular area of Robinson's clothing that the jury, applying its common sense and experience, could have inferred was highly unlikely to have accommodated a firearm with a barrel of one foot or longer. This is distinguishable from the vague, and relatively innocuous, testimony at issue in *Perry*.[9]

In sum, viewing the evidence in the light most favorable to sustaining the conviction, as we must, we conclude that the state presented sufficient, circumstantial evidence to permit the jury reasonably to conclude beyond a reasonable doubt that the gun had a barrel of less than twelve inches in length. Accordingly, the Appellate Court correctly determined that there was sufficient evidence to sustain the defendant's conviction under § 29-35 (a).

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

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[9] The defendant's reliance on *State* v. *Gray-Brown*, supra, 188 Conn. App. 446, also is misplaced. In that case, the Appellate Court concluded that there was insufficient, circumstantial evidence of barrel length because, unlike certain prior decisions upholding convictions under § 29-35 (a), "there was no eyewitness who observed the firearm used by the defendant and [who] stated that it could be held in one hand or concealed in a small space." Id., 467 n.7. As we have explained, there was evidence in the present case that the firearm could be and was concealed or stored in small spaces.

ORDERS

CONNECTICUT REPORTS

VOL. 335

MELVIN SHERMAN *v.* COMMISSIONER OF CORRECTION

The petitioner Melvin Sherman's petition for certification to appeal from the Appellate Court, 196 Conn. App. 905 (AC 42265), is denied.

Cheryl A. Juniewic, assigned counsel, in support of the petition.

Linda F. Currie-Zeffiro, senior assistant state's attorney, in opposition.

Decided July 14, 2020

TYE THOMAS *v.* COMMISSIONER OF CORRECTION

The petitioner Tye Thomas' petition for certification to appeal from the Appellate Court, 196 Conn. App. 907 (AC 42454), is denied.

Douglas H. Butler, assigned counsel, in support of the petition.

C. Robert Satti, Jr., supervisory assistant state's attorney, in opposition.

Decided July 14, 2020

LUCIA CINOTTI *v.* SHRED IT U.S.A., LLC, ET AL.

The petition of the plaintiff in error for certification to appeal from the Appellate Court, 196 Conn. App. 907 (AC 43136), is denied.

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

Lucia Cinotti, self-represented, in support of the petition.

Emily E. Holland, in opposition.

Decided July 14, 2020

IN RE COREY C., JR.

The petition of the respondent father for certification to appeal from the Appellate Court, 198 Conn. App. 41 (AC 43478), is denied.

Benjamin M. Wattenmaker, in support of the petition.

Evan O'Roark, assistant attorney general, in opposition.

Decided July 14, 2020

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CONNECTICUT APPELLATE REPORTS

Vol. 199

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

MADELINE G. FAZIO *v.* MICHAEL A. FAZIO
(AC 42635)

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

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court granting the defendant's motion to modify or to terminate alimony. Pursuant to article 3.2 (a) of the parties' separation agreement, which had been incorporated into the dissolution judgment, the defendant was required to pay the plaintiff unallocated alimony until, among other things, the cohabitation of the plaintiff pursuant to statute (§ 46b-86 (b)), or May 31, 2013, whichever event occurred first. The trial court concluded that the plaintiff was cohabitating with another person as defined by § 46b-86 (b) and determined that article 3.2 (a) of the separation agreement was clear and unambiguous and that cohabitation required the immediate termination of alimony. The plaintiff appealed to this court, which reversed the trial court's judgment and ordered a remand, concluding that article 3.2 (a) was ambiguous and that findings of fact were necessary as to the parties' intent regarding whether that article incorporated the remedial aspects of § 46b-86 (b). Thereafter, on remand, the trial court, following an evidentiary hearing, determined that the parties had intended that the plaintiff's cohabitation would result in the immediate termination of her alimony under article 3.2 (a) of the separation agreement, and, accordingly, it granted the defendant's motion to modify or to terminate alimony and terminated his obligation to pay alimony. *Held*:

1. The plaintiff could not prevail on her claim that the trial court erred by concluding that it was bound by the finding of cohabitation made by a prior judge in the case; the plaintiff did not challenge that finding in her prior appeal, and, after this court issued its remand order in that appeal, which was limited to the consideration of whether the parties had intended to incorporate the remedial aspects of § 46b-86 (b) into article 3.2 (a) of the separation agreement, the plaintiff no longer had the ability to raise the cohabitation finding as an issue on remand, and, therefore, the trial court properly construed the limited remand order and properly determined that it was bound by the unchallenged finding of cohabitation.
2. The plaintiff's claim that the trial court erred by failing to make a factual finding as to the parties' intent regarding whether article 3.2 (a) of the separation agreement incorporated the remedial aspects of § 46b-86 (b) was without merit: that court properly followed this court's remand order and, although it did not state specifically that the parties intended that the remedial aspects of § 46b-86 (b) would not apply if the plaintiff

cohabitated, it was not required to do so; moreover, the court, on the basis of the evidence presented and its credibility determinations, properly considered the intent of the parties in drafting article 3.2 (a) and concluded that they intended the immediate, nondiscretionary, termination of alimony in the event of the plaintiff's cohabitation, and implicit in that finding is that the parties did not intend that the remedial aspects of § 46b-86 (b) would apply, and the plaintiff did not claim that the court's findings were clearly erroneous or unsupported by the evidence presented at the hearing on remand.

3. The plaintiff's claim that the trial court erred by exceeding the scope of the remand order in the prior appeal when it made unnecessary and binding factual findings concerning article 3.2 (b) of the separation agreement was unavailing, as that court's consideration of article 3.2 (b) was for the limited purpose of ascertaining the parties' intent as to article 3.2 (a) and nothing more.

Argued May 11—officially released July 28, 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, where the court, *Hon. Stanley Novack*, judge trial referee, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Emons, J.*, granted the defendant's motion to modify or to terminate alimony, and the plaintiff appealed to this court, *DiPentima, C. J.*, and *Prescott* and *Harper, Js.*, which reversed the trial court's judgment and remanded the matter for further proceedings; subsequently, the court, *Colin, J.*, granted the defendant's motion to modify or to terminate alimony, and the plaintiff appealed to this court. *Affirmed.*

Joseph T. O'Connor, for the appellant (plaintiff).

Kevin F. Collins, for the appellee (defendant).

Opinion

BRIGHT, J. The plaintiff, Madeline G. Fazio, appeals from the judgment of the trial court, *Colin, J.*, granting the motion filed by the defendant, Michael A. Fazio, to

modify or to terminate his alimony obligation. On appeal, the plaintiff claims that the court erred by (1) holding that it was bound by the prior finding of the trial court, *Emons*, *J.*, of cohabitation pursuant to General Statutes § 46b-86 (b), (2) failing to make a factual finding as to the parties' intent regarding whether article 3.2 (a) of their separation agreement incorporated the remedial aspects of § 46b-86 (b), and (3) exceeding the scope of the remand order in the prior appeal of this case; see *Fazio* v. *Fazio*, 162 Conn. App. 236, 250–51, 131 A.3d 1162, cert. denied, 320 Conn. 922, 132 A.3d 1095 (2016) (*Fazio I*); by making factual findings that were contrary to the clear and unambiguous language of article 3.2 (b), essentially reforming that article of the agreement, when that article was not at issue. We affirm the judgment of the trial court.

The following facts and procedural history inform our review of the issues on appeal. "The parties were married on May 7, 1988, and they subsequently had three children.[1] On February 9, 2005, the plaintiff filed a marital dissolution action on the ground that the marriage had broken down irretrievably with no hope of reconciliation. On May 19, 2006, the court rendered judgment dissolving the parties' marriage. The judgment incorporated by reference a separation agreement that the parties had signed on May 18, 2006, and that the court found to be 'fair and equitable.'

"Article 3.2 (a) of the separation agreement provides in relevant part: 'Commencing on June 1, 2006, the [defendant] shall pay to the [plaintiff] unallocated alimony and child support in cash until the death of either party, the remarriage or cohabitation of the [plaintiff] pursuant to [§] 46b-86 (b) of the . . . General Statutes, or May 31, 2013, whichever event shall first occur . . . .' Article 3.2 (b) provides in relevant part:

[1] The children all have reached the age of majority, and child support no longer is at issue.

'Commencing on June 1, 2013, the [defendant] shall pay to the [plaintiff] . . . unallocated alimony and child support in cash until the death of either party, the remarriage of the [plaintiff], or November 30, 2019 . . . .' Additionally, article 3.6 of the separation agreement provides: 'The [defendant's] obligation to pay alimony and support to the [plaintiff] pursuant to [a]rticle 3.2 shall be non-modifiable by either party as to the amount and duration, except (1) that the [defendant] shall have the right to seek a modification of [the] amount of alimony and support based on the [plaintiff's] earnings only in the event the [plaintiff] earns in excess of $100,000.00 gross per year and (2) the [plaintiff] shall have the right to seek a modification of the amount of alimony and support in the event the [defendant] is unemployed for a period of six months. The [plaintiff's] right to seek child support shall not be precluded if the [defendant] is unemployed.'

"On July 5, 2012, the defendant filed a postjudgment motion to modify or to terminate unallocated alimony and child support pursuant to § 46b-86 (b)[2] on the ground that the plaintiff was cohabitating with another person. . . . The plaintiff subsequently filed a motion for contempt on the ground that the defendant had failed to pay unallocated alimony and child support as

[2] General Statutes § 46b-86 (b) provides: "In an action for divorce, dissolution of marriage, legal separation or annulment brought by a spouse, in which a final judgment has been entered providing for the payment of periodic alimony by one party to the other spouse, the Superior Court may, in its discretion and upon notice and hearing, modify such judgment and suspend, reduce or terminate the payment of periodic alimony upon a showing that the party receiving the periodic alimony is living with another person under circumstances which the court finds should result in the modification, suspension, reduction or termination of alimony because the living arrangements cause such a change of circumstances as to alter the financial needs of that party. In the event that a final judgment incorporates a provision of an agreement in which the parties agree to circumstances, other than as provided in this subsection, under which alimony will be modified, including suspension, reduction, or termination of alimony, the court shall enforce the provision of such agreement and enter orders in accordance therewith."

provided for in the separation agreement. After a hearing on the motions and the submission of posthearing briefs, [Judge Emons] denied the plaintiff's motion for contempt and granted the defendant's motion to modify or terminate unallocated alimony and child support. The court found that the plaintiff had been living with another person, Adam Monges, from December, 2011 to July, 2012, and that this living arrangement had changed the plaintiff's circumstances as to alter her financial needs because Monges had paid her between $300 and $350 per week. On the basis of those findings, the court concluded that the plaintiff was cohabitating with another person as defined by § 46b-86 (b)." (Footnotes added and omitted.) *Fazio I*, supra, 162 Conn. App. 238–40.

The court also determined that article 3.2 (a) of the separation agreement was clear and unambiguous, and that cohabitation would result in the immediate termination of alimony, and, accordingly, it terminated the defendant's obligation to pay alimony effective December, 2011, the month during which the plaintiff began cohabitating. Id., 240–42. The plaintiff appealed from the judgment, claiming that the court incorrectly had interpreted article 3.2 (a) of the separation agreement to require the immediate termination of alimony. Id., 242. She contended that the parties' incorporation of § 46b-86 (b) was to allow the court to exercise its remedial powers pursuant to § 46b-86 (b) and to consider other remedies, such as the temporary suspension or modification of alimony. Id., 242–43. The plaintiff, on appeal, did not mount a challenge to the court's determination that she had cohabitated as defined by § 46b-86 (b).

In *Fazio I*, this court concluded that article 3.2 (a) of the separation agreement was ambiguous and that findings of fact as to the parties' intent regarding whether article 3.2 (a) of the separation agreement incorporated the remedial aspects of § 46b-86 (b) were

necessary, and we remanded the case to the trial court with direction "to determine the intent of the parties after consideration of all the available extrinsic evidence and the circumstances surrounding the entering of the agreement." Id., 250–51. On remand, the case was assigned to Judge Colin, who proceeded to hold an evidentiary hearing on the parties' intent in drafting article 3.2 (a). After considering the evidence presented, the court held that the parties had intended, under article 3.2 (a), that alimony would terminate if the plaintiff cohabitated, and it granted the defendant's motion to modify or to terminate alimony, terminating the defendant's obligation to pay alimony, effective December, 2011. This appeal followed. Additional facts will be set forth as necessary.

I

The plaintiff claims that Judge Colin erred when he concluded that he was bound by the prior finding of cohabitation made by Judge Emons. She argues that, when this court reversed the judgment in *Fazio I*, it did not limit the issues on remand but, rather, it reversed Judge Emons' decision in toto. Accordingly, she argues, it does not matter that she did not challenge specifically Judge Emons' finding of cohabitation because she successfully obtained reversal of the entire judgment. We disagree.

"Determining the scope of a remand is a matter of law . . . [over which] our review is plenary." (Internal quotation marks omitted.) *State* v. *Tabone*, 301 Conn. 708, 713–14, 23 A.3d 689 (2011). "In carrying out a mandate of this court, the trial court is limited to the specific direction of the mandate as interpreted in light of the opinion. . . . This is the guiding principle that the trial court must observe. . . . Compliance means that the direction is not deviated from. The trial court cannot adjudicate rights and duties not within the scope of the remand. . . . It is the duty of the trial court on remand

to comply strictly with the mandate of the appellate court according to its true intent and meaning. No judgment other than that directed or permitted by the reviewing court may be rendered, even though it may be one that the appellate court might have directed. The trial court should examine the mandate and the opinion of the reviewing court and proceed in conformity with the views expressed therein." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Wendland* v. *Ridgefield Construction Services, Inc.*, 190 Conn. 791, 794–95, 462 A.2d 1043 (1983).

In *Fazio I*, this court was called on, by the limited issue raised by the plaintiff in her appeal,[3] "to interpret a separation agreement incorporated into a dissolution judgment to determine whether the parties intended by their agreement that, in the event of cohabitation, alimony must be immediately and irrevocably terminated, or whether the parties intended that the court be permitted to exercise the equitable and remedial powers set forth in . . . § 46b-86 (b) to consider suspending or modifying alimony instead of irrevocably terminating it." *Fazio I*, supra, 162 Conn. App. 237. We then concluded that "the court [had been] required to make a finding of fact as to the parties' intent regarding whether article 3.2 (a) of the separation agreement incorporated the remedial aspects of § 46b-86 (b)," and we remanded the case to the trial court with direction "to determine the intent of the parties after consideration of all the available extrinsic evidence and the circumstances surrounding the entering of the agreement." Id., 250–51.

[3] This court explained: "The plaintiff's sole claim on appeal is that the court improperly interpreted article 3.2 (a) of the separation agreement to require termination in the event that the plaintiff cohabitated with another person, rather than to allow the court to exercise its remedial powers pursuant to § 46b-86 (b) and consider other remedies such as the temporary suspension or modification of alimony." *Fazio I*, supra, 162 Conn. App. 242. We also explained that "[t]he plaintiff [did] not challenge the court's determination that she cohabitated as defined by § 46b-86 (b)." Id., 240 n.2.

A thorough examination of this court's opinion in *Fazio I* leads us to conclude that the remand order in that appeal was limited to the consideration of whether the parties had intended to incorporate into article 3.2 (a) of the separation agreement the remedial aspects of § 46b-86 (b). The opinion was clear in setting forth the scope of the remand order. This court did not order a new trial on the defendant's motion to modify or to terminate alimony.

Moreover, the plaintiff did not challenge in *Fazio I* Judge Emons' finding that she had cohabitated, which, certainly, was a finding necessary to the judgment. "It is well established that when a party brings a subsequent appeal, it cannot raise questions which were or could have been answered in its former appeals. See *Hartford National Bank & Trust Co.* v. *Tucker*, 195 Conn. 218, 222, 487 A.2d 528, cert. denied, 474 U.S. 845, 106 S. Ct. 135, 88 L. Ed. 2d 111 (1985). Failure to raise an issue in an initial appeal to this court constitutes a waiver of the right to bring the claim. *Hryniewicz* v. *Wilson*, 51 Conn. App. 440, 446, 722 A.2d 288 (1999). . . .

"Furthermore, the [trial] court, on remand, [is] bound by the law of the case doctrine. Underlying the law of the case doctrine is the view that [a] judge should hesitate to change his own rulings in a case and should be even more reluctant to overrule those of another judge. . . . The doctrine provides that [w]here a matter has previously been ruled upon interlocutorily, the court in a subsequent proceeding in the case may treat that decision as the law of the case, if it is of the opinion that the issue was correctly decided, in the absence of some new or overriding circumstance. . . . *Wasko* v. *Manella*, 87 Conn. App. 390, 395, 865 A.2d 1223 (2005). Intervening appellate proceedings, however, change the nature of this seemingly discretionary doctrine. [I]t is a well-recognized principle of law that the opinion of an appellate court, so far as it is applicable, establishes

the law of the case upon a retrial, and is equally obligatory upon the parties to the action and upon the trial court." (Internal quotation marks omitted.) *Detar* v. *Coast Venture XXVX, Inc.*, 91 Conn. App. 263, 266–67, 880 A.2d 180 (2005).

The plaintiff did not challenge in the previous appeal Judge Emons' finding that she had cohabitated. The plaintiff briefed only one issue in that appeal, namely, whether the remedial aspects of § 46b-86 (b) applied to article 3.2 (a) of the separation agreement. After this court issued a limited remand order in *Fazio I*, the plaintiff no longer had the ability to raise the cohabitation finding as an issue on remand. The trial court properly construed the limited remand set forth in *Fazio I*, and it properly determined that it was bound by Judge Emons' unchallenged finding of cohabitation.

II

The plaintiff next claims that the court "failed to make a factual finding as to the parties' intent regarding whether article 3.2 (a) of their agreement incorporated the remedial aspects of § 46b-86 (b)" but, instead, found that "the parties had intended that [the] court should be without discretion to deny the defendant's request for termination once the court found that the plaintiff lived with another person under circumstances [that] altered her financial needs." The defendant argues that "[t]he . . . court did make factual findings of the parties' intent regarding article 3.2 (a) thereby rendering the remedial aspects of § 46b-86 (b) . . . moot." We conclude that the court properly followed the remand order of this court, and it determined that the parties had intended for immediate termination of alimony if the plaintiff cohabitated.

"It is the duty of the trial court on remand to comply strictly with the mandate of [this] court according to its true intent and meaning. No judgment other than that directed or permitted by the reviewing court may be rendered, even though it may be one that [this] court

might have directed. The trial court should examine the mandate and the opinion of the reviewing court and proceed in conformity with the views expressed therein." (Internal quotation marks omitted.) *Ginsberg & Ginsberg, LLC* v. *Alexandria Estates, LLC*, 149 Conn. App. 160, 165, 88 A.3d 1254 (2014). We exercise a plenary standard of review in determining whether the trial court has complied with the strict mandates of a remand order. See id., 165–66.

As explained in part I of this opinion, this court concluded in *Fazio I* that "the [trial] court [had been] required to make a finding of fact as to the parties' intent regarding whether article 3.2 (a) of the separation agreement incorporated the remedial aspects of § 46b-86 (b)," and we remanded the case to the trial court with direction "to determine the intent of the parties after consideration of all the available extrinsic evidence and the circumstances surrounding the entering of the agreement." *Fazio I*, supra, 162 Conn. App. 250–51.

On remand, Judge Colin held a hearing and considered the evidence presented by the parties. He specifically found that the defendant's testimony was credible and that the plaintiff's testimony was not credible. In his written decision, after discussing the evidence, he determined that the parties had intended that the plaintiff's cohabitation would result in the immediate termination of her alimony under article 3.2 (a) of the separation agreement. Although Judge Colin did not state specifically that the parties intended that the remedial aspects of § 46b-86 (b) would not apply if the plaintiff cohabitated, he was not required to do so. Judge Colin, on the basis of the evidence presented, properly considered the intent of the parties in drafting article 3.2 (a), and he concluded that they intended the immediate, nondiscretionary, termination of alimony in the event

of the plaintiff's cohabitation. Implicit in that finding is that the parties had no intent that the remedial aspects of § 46b-86 (b) would apply. Significantly, the plaintiff does not claim that Judge Colin's findings were clearly erroneous or unsupported by the evidence presented at the remand hearing. Accordingly, the plaintiff's claim has no merit.

III

The plaintiff also claims that the court erred by exceeding the scope of the remand order in *Fazio I* when it made unnecessary and binding factual findings concerning article 3.2 (b) of the separation agreement. The defendant argues that the plaintiff's claim is illogical because the plaintiff testified, without objection, during the remand hearing, on the meaning of article 3.2 (b), and that she, therefore, did not object to the trial court's consideration of article 3.2 (b). We conclude that the court's consideration of article 3.2 (b) was for the limited purpose of finding the parties' intent as to article 3.2 (a) and nothing more.

We exercise a plenary standard of review in determining whether the trial court has complied with, or exceeded the scope of, our remand order. See, e.g., *Ginsberg & Ginsberg, LLC* v. *Alexandria Estates, LLC*, supra, 149 Conn. App. 165–66.

Article 3.2 (a) of the separation agreement provides in relevant part: "Commencing on June 1, 2006, the [defendant] shall pay to the [plaintiff] unallocated alimony and child support in cash until the death of either party, the remarriage or cohabitation of the [plaintiff] pursuant to [§] 46b-86 (b) . . . or May 31, 2013, whichever event shall first occur . . . ."

Article 3.2 (b) of the separation agreement provides in relevant part: "Commencing on June 1, 2013, the [defendant] shall pay to the [plaintiff] . . . unallocated alimony and child support in cash until the death of either party, the remarriage of the [plaintiff], or Novem-

ber 30, 2019 . . . .'' According to the parties' separation agreement, unless a named event occurs, the first period of alimony, pursuant to article 3.2 (a), runs from June 1, 2006 to May 31, 2013, and the second period of alimony, pursuant to article 3.2 (b), runs from June 1, 2013 to November 30, 2019.

The plaintiff argues that Judge Emons terminated alimony only under article 3.2 (a) of the separation agreement and that article 3.2 (a) concerns only the first alimony period set forth in the agreement. She further argues that Judge Colin, on remand in *Fazio I*, was ordered by this court to determine the intent of the parties regarding only article 3.2 (a) on the basis that article 3.2 (a) was ambiguous. She contends that Judge Colin did not limit himself to the dictates of the remand order but that he also substantively reformed the clear and unambiguous language of article 3.2 (b) by finding that the list of events resulting in the termination of alimony in that particular article, which concerns only the second period of alimony, contained ''a typographical error,'' and that he then improperly terminated alimony for both periods. We disagree that the court terminated alimony for both periods.

In his April 25, 2014 posttrial brief to Judge Emons, in support of his motion to modify or to terminate alimony, the defendant specifically relied on the language of 3.2 (a) of the separation agreement, arguing: ''Article III provides the terms for [a]limony and [s]upport and the [d]efendant, in the subject motion, *relies specifically on* [*article*] *3.2* (*a*) . . . .'' (Emphasis added.) The defendant did not mention the second period of alimony under section 3.2 (b) of the parties' separation agreement. Judge Emons, in her decision, also did not mention the second period of alimony under article 3.2 (b) but, rather, held that the defendant's obligation to pay alimony was terminated because ''the

court must enforce [article] 3.2 (a) of the separation agreement effective December, 2011." In reviewing Judge Emons' decision, this court noted: "The plaintiff's sole claim on appeal is that the court improperly interpreted article 3.2 (a) of the separation agreement . . . ." *Fazio I*, supra, 162 Conn. App. 242.

Having thoroughly examined *Fazio I* and Judge Colin's decision on remand, we conclude that the statement in Judge Colin's decision regarding article 3.2 (b) of the separation agreement was meant only to aid the court in ascertaining the parties' intent in drafting article 3.2 (a), which this court in *Fazio I* had found to be ambiguous. Article 3.2 (b) was not at issue in the original trial court decision of Judge Emons. The construction of article 3.2 (b), including whether it is ambiguous, whether reformation is appropriate, or whether the plaintiff is entitled to alimony under it, was not raised before Judge Emons, was not before this court in *Fazio I*, was not before Judge Colin, and is not before this court presently.

The judgment is affirmed.

In the opinion the other judges concurred.

CHELSEA GROTON BANK *v.* BELLTOWN SPORTS, LLC, ET AL.
(AC 42709)

Alvord, Elgo and Beach, Js.

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain real property owned by the defendants. The defendants had obtained a loan from the plaintiff, secured by the mortgage, to build a sports facility but, due to construction delays, the facility had a late opening and did not generate enough revenue for the defendants to meet their mortgage obligations. As part of the mortgage transaction, the defendants agreed to obtain a small business loan, which would thereafter be used to pay down the mortgage debt. In order to receive the small business loan, the plaintiff

certified that there was no significant changes in the defendants' financial status, despite its knowledge that the defendants had no working capital to be profitable. The defendants received the small business loan; however, they had already defaulted on the mortgage payments and the plaintiff commenced the foreclosure proceedings. The trial court thereafter rendered a judgment of foreclosure by sale, from which the defendants appealed, claiming that the plaintiff's certification of the defendants' financial status for the small business loan, when it knew that the defendants had no ability to make mortgage payments, constituted misconduct relating to the mortgage, and that the trial court improperly found that the defendants' claims of inequitable conduct did not relate to the mortgage. *Held* that the defendants could not meet their burden of proving an evidentiary basis to establish the existence of a genuine issue of material fact regarding their unclean hands special defense and, therefore, the trial court properly determined that the plaintiff's alleged misconduct failed to sufficiently relate to the making, validity, or enforcement of the mortgage; the defendants failed to allege any conduct by the plaintiff that would have challenged the plaintiff's legal authority to bring the foreclosure action, the defendants conceded that the plaintiff had the right to commence foreclosure on the ground that the defendants defaulted on their mortgage debt, the requirement that the defendants obtain a small business loan to pay down the mortgage debt had been contemplated and agreed to in the original loan documents, and the plaintiff's alleged actions pertaining to the small business loan were not directly and inseparably connected to the foreclosure action, as the small business loan was separate and distinct from the mortgage.

Argued March 3—officially released July 28, 2020

Procedural History

Action to foreclose a mortgage on certain real property of the named defendants et al., and for other relief, brought to the Superior Court in the judicial district of Middlesex where the court, *Domnarski*, *J.*, granted the plaintiff's motion for judgment of foreclosure by sale and rendered judgment thereon, from which the named defendants et al. appealed to this court. *Affirmed.*

Patrick W. Boatman, with whom, on the brief, was *Jenna N. Sternberg*, for the appellants (named defendants et al).

Brian D. Rich, with whom was *Anthony E. Loney*, for the appellee (plaintiff).

Opinion

ELGO, J. The defendants Belltown Sports, LLC (Belltown Sports), Sports on 66, LLC (Sports on 66), and Brian Cutler appeal from the judgment of foreclosure by sale rendered by the trial court in favor of the plaintiff, Chelsea Groton Bank.[1] On appeal, the defendants claim that the court improperly (1) rendered summary judgment as to liability in favor of the plaintiff and (2) concluded that the priority of a Small Business Administration (SBA) loan does not bar the plaintiff's right to foreclose on its mortgage.[2] We disagree and affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. On April 15, 2015, Belltown Sports executed a promissory note (note) payable to the plaintiff in the principal amount of $3,000,000. In order to secure the note, Belltown Sports executed an open-end mortgage deed (mortgage) in favor of the plaintiff on real property located at 265 West High Street in East Hampton (property). Contemporaneous with the execution of both the note and the mortgage, Sports on 66 and Brian Cutler executed a guarantee in which they agreed to pay the debt secured by the note and the mortgage. The loan proceeds were used to construct a 42,000 square foot sports facility (facility) on the property. The facility contains indoor

[1] Although the United States Small Business Administration and the Connecticut Department of Economic and Community Development also were named as defendants in this matter, they have not participated in this appeal. We, therefore, refer to Belltown Sports, Sports on 66, and Brian Cutler as the defendants throughout this opinion.

Belltown Sports is the owner of the property, Sports on 66 is the sole tenant and manager of the property, and Cutler is the sole member of Belltown Sports and Sports on 66.

[2] Because we conclude that the defendants did not meet their burden of providing an evidentiary basis to establish the existence of a genuine issue of material fact regarding the unclean hands special defense, which the defendants acknowledge is "part and parcel" of their theory that the SBA mortgage should take priority over the plaintiff's right to foreclose on the mortgage, we decline to address the merits of their second claim.

turf fields, floating wood basketball courts, batting cages, and a party room.

The defendants also had signed a commitment letter with the plaintiff, which included, among other things, a requirement that, within forty-five to sixty days upon the issuance of a certificate of occupancy, the defendants obtain a loan in the amount of $1,118,150 from the Community Investment Corporation, a lender who provides assistance to Connecticut businesses and is backed by the SBA (SBA loan). The proceeds of the SBA loan were to be paid to the plaintiff in order to reduce the mortgage debt to $1,881,850.

Pursuant to the building loan agreement (agreement) signed by the plaintiff and the defendants on April 15, 2015, the facility was scheduled to be completed by April 1, 2016. Due to several issues that arose during construction, however, the facility was completed approximately eight months late and the grand opening took place on December 17, 2016. Following the grand opening, the plaintiff reminded the defendants of their obligation to obtain the SBA loan. To do so, the defendants were required by the SBA to satisfy any liens and other financial obligations associated with the property, except for the mortgage. To that end, on April 14, 2017, the plaintiff completed an interim lender certification form, wherein it stated that it had "no knowledge of any unremedied substantial adverse change in the condition of [the] [b]orrower and [the o]perating [c]ompany (if any) since the date of [the] loan application to [the] [i]nterim [l]ender. [The] [b]orrower is current on its payments to [the] [i]nterim [l]ender and not otherwise in default on the [i]nterim [l]oan." Because the plaintiff completed the certification and the defendants satisfied all financial obligations associated with the property, the funds of the SBA loan were released to the plaintiff on May 22, 2017. Prior to that release, however, the

defendants had defaulted on their obligation to pay the note, mortgage, and guarantee.

The plaintiff commenced this mortgage foreclosure action on September 26, 2017. The defendants filed their answer and special defenses on December 1, 2017. Specifically, the defendants alleged as special defenses: (1) foreclosure of the plaintiff's mortgage could only be in the amount of $360,000, the total funds advanced by the plaintiff at the closing of the mortgage and (2) the plaintiff acted with unclean hands in its representations to the SBA that there had been no material adverse change in the defendants' financial status and in its representations to the defendants that it would provide a line of credit.

On June 11, 2018, the plaintiff filed a motion for summary judgment as to liability, which was accompanied by a memorandum of law in support of the motion, an affidavit, and appended exhibits, including the mortgage and the note. The defendants filed a memorandum of law in opposition to the plaintiff's motion for summary judgment and an affidavit of Brian Cutler on August 8, 2018. Shortly thereafter, the plaintiff filed a reply to the defendants' opposition to the motion for summary judgment on August 23, 2018. The hearing on the plaintiff's motion took place on August 27, 2018.

Following that hearing, this court decided *U.S. Bank National Assn.* v. *Eichten*, 184 Conn. App. 727, 196 A.3d 328 (2018). In light of that decision, the trial court ordered, sua sponte, the parties to file supplemental briefs on its impact on the pending motion for summary judgment. Only the defendants filed a supplemental brief.

Subsequently, on November 16, 2018, the court granted the plaintiff's motion for summary judgment as to liability. On February 26, 2019, the court rendered a

judgment of foreclosure by sale. This appeal followed. Additional facts will be set forth as necessary.

The defendants claim that (1) their special defense of unclean hands "properly raise[d] a genuine issue of material fact sufficient to deny summary judgment," and (2) the court improperly concluded that the special defense "failed to relate to the mortgage being foreclosed." We disagree.

We begin by setting forth the relevant standard of review and applicable legal principles. "In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. . . . Although the party seeking summary judgment has the burden of showing the nonexistence of any material fact . . . a party opposing summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue. . . . A material fact is one that makes a difference in the outcome of a case. . . .

"Summary judgment shall be granted 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. . . . The trial court must view the evidence in the light most favorable to the nonmoving party. . . .

"Appellate review of the trial court's decision to grant summary judgment is plenary. . . . [W]e must [therefore] decide whether [the trial court's] conclusions are legally and logically correct and find support in the facts that appear in the record. . . .

"In order to establish a prima facie case in a mortgage foreclosure action, the plaintiff must prove by a preponderance of the evidence that it is the owner of the note and mortgage, that the defendant mortgagor has defaulted on the note and that any conditions precedent

to foreclosure, as established by the note and mortgage, have been satisfied. . . . Thus, a court may properly grant summary judgment as to liability in a foreclosure action if the complaint and supporting affidavits establish an undisputed prima facie case and the defendant fails to assert any legally sufficient special defense. . . .

"[A] holder of a note is presumed to be the owner of the debt, and unless the presumption is rebutted, may foreclose the mortgage under [General Statutes § 49-17]. . . . It [is] for the defendant to set up and prove the facts which limit or change the plaintiff's rights . . . .

"[T]he party raising a special defense has the burden of proving the facts alleged therein. . . . If the plaintiff in a foreclosure action has shown that it is entitled to foreclose, then the burden is on the defendant to produce evidence supporting its special defenses in order to create a genuine issue of material fact . . . . Legally sufficient special defenses alone do not meet the defendant's burden. The purpose of a special defense is to plead facts that are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action. . . . Further . . . [t]he applicable rule regarding the material facts to be considered on a motion for summary judgment is that the facts at issue are those alleged in the pleadings. . . . [B]ecause any valid special defense raised by the defendant ultimately would prevent the court from rendering judgment for the plaintiff, a motion for summary judgment should be denied when any [special] defense presents significant fact issues that should be tried. . . .

"Because an action to foreclose a mortgage is an equitable proceeding, the doctrine of unclean hands may be applicable. It is a fundamental principle of equity jurisprudence that for a complainant to show that he is entitled to the benefit of equity he must establish

that he comes into court with clean hands. . . . The clean hands doctrine is applied not for the protection of the parties but for the protection of the court. . . . It is applied not by way of punishment but on considerations that make for the advancement of right and justice. . . . The doctrine of unclean hands expresses the principle that where a plaintiff seeks equitable relief, he must show that his conduct has been fair, equitable and honest as to the particular controversy in issue. . . . Unless the plaintiff's conduct is of such a character as to be condemned and pronounced wrongful by honest and fair-minded people, the doctrine of unclean hands does not apply. . . . The party seeking to invoke the clean hands doctrine to bar equitable relief must show that his opponent engaged in wilful misconduct with regard to the *matter in litigation*. . . . The trial court enjoys broad discretion in determining whether the promotion of public policy and the preservation of the courts' integrity dictate that the clean hands doctrine be invoked." (Citations omitted; emphasis added; internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Eichten*, supra, 184 Conn. App. 743–47.

"In mortgage foreclosure cases, courts require that a viable legal defense directly attack the making, validity or enforcement [of the note and mortgage]. . . . [S]pecial defenses which are not limited to the making, validity or enforcement of the note or mortgage fail to assert any connection with the subject matter of the foreclosure action and as such do not arise out of the same transaction as the foreclosure action." (Citation omitted; internal quotation marks omitted.) Id., 750–51. "[A]n equitable defense of unclean hands [however] need not strictly relate to the making, validity, or enforcement of the note or mortgage, provided the allegations set forth were *directly and inseparably connected* to the foreclosure action." (Emphasis added; internal quotation marks omitted.) Id., 753.

As previously noted, the defendants filed a memorandum of law in opposition to the plaintiff's motion for summary judgment and an affidavit of Brian Cutler attached thereto. Therein, they claimed that three specific acts by the plaintiff support the special defense of unclean hands: (1) before agreeing to lend the defendants $3,000,000, the plaintiff required that Cutler invest into the project all personal funds available to him from any source; (2) the plaintiff certified to the SBA that there was no material adverse change in the defendants' financial status; and (3) the plaintiff represented that it would provide Cutler with additional financing through a $50,000 line of credit. The defendants did not argue, however, either that they were not in default or that the plaintiff did not have the right to foreclose the mortgage—to the contrary, the defendants admitted that they did not have the funds necessary to satisfy their mortgage obligations.

In its memorandum of decision, the court held that "the defendants' claims of inequitable conduct do not relate to the mortgage being foreclosed . . . . The essence of the defendants' claims is that, but for the inequitable conduct of the plaintiff, the defendants would not have proceeded with the transaction with SBA." The court continued: "It is not disputed that the . . . mortgage transaction contemplated that the defendants would enter into the . . . transaction with the SBA. The defendants' claim of unclean hands might be viable if the actions of the plaintiff *prevented* the defendants from entering into the contemplated SBA transaction, which, incidentally, substantially reduced their obligation to the plaintiff. The defendants have failed to establish a genuine issue of material fact as to how the foreclosure of the subject . . . mortgage could have been avoided if the [SBA] transaction *did not* go forward." (Emphasis in original.)

The following additional facts are relevant to our resolution of this claim. As previously noted, when the plaintiff agreed to loan the defendants $3,000,000 to fund the construction of the facility, the defendants agreed to obtain a loan from the SBA, in the amount of $1,118,150, which would be used to pay down the mortgage, pursuant to the mortgage document and the commitment letter. In order to obtain the SBA loan, however, the defendants were required to satisfy all liens and financial obligations associated with the property, including a mechanic's lien and vendor payments totaling $81,935.54. After the defendants satisfied their financial obligations with respect to the property, both the plaintiff and the defendants certified to the SBA that there had been no material adverse change in the defendants' financial status since the application for the original loan secured by the mortgage.

At the time of that certification, however, the defendants had no ability to pay the mortgage and had not provided complete financial information to the plaintiff as required by the loan documents. Additionally, the loan documents required the defendants to hire The Sports Facilities Advisory (SFA), a Florida based company that would develop a business plan for and manage the facility, including hiring a director. SFA, however, quit overseeing the project prior to its completion due to nonpayment. Last, because the facility opened behind schedule—eight months after the intended opening date—the defendants' revenue was substantially less than was expected. Failure to (1) pay the mortgage, (2) provide complete financial information to the plaintiff, (3) employ SFA to oversee the facility, and (4) complete the construction of the facility by the due date all constitute default events as set forth in the loan documents, including the mortgage document. Furthermore, the mortgage provides that the failure to obtain the SBA

loan, in and of itself, constitutes a default event on which the plaintiff may foreclose. Following the plaintiff's and the defendants' certification, the SBA provided the loan to the defendants, who advanced the proceeds from the SBA loan to the plaintiff. Shortly thereafter, the defendants made their June 1, 2017 payment on the SBA loan; however, the defendants failed to make payments toward the mortgage.

On appeal, the defendants argue that the plaintiff's misconduct is related to the mortgage because the "enforcement of a mortgage can include certain post-origination misconduct." To that end, the defendants rely on *TD Bank, National Assn.* v. *M.J. Holdings, LLC*, 143 Conn. App. 322, 71 A.3d 541 (2013), *U.S. Bank National Assn.* v. *Eichten*, supra, 184 Conn. App. 727, and *U.S. Bank National Assn.* v. *Blowers*, 332 Conn. 656, 212 A.3d 656 (2019). That reliance is misplaced. We address each decision in turn.

In *M.J. Holdings, LLC*, the defendants executed a promissory note that was secured by a mortgage on the defendants' interest in several properties. *TD Bank, National Assn.* v. *M.J. Holdings, LLC*, supra, 143 Conn. App. 324. Six years later, the plaintiff commenced foreclosure proceedings following the defendants' default on their loan. Id., 325. In response, the defendants raised several special defenses, including equitable estoppel and breach of a loan modification agreement. Id., 329. The defendants claimed that they had agreed to sell their property based on the promise by the plaintiff that, if the sale occurred and the plaintiff was provided with the net proceeds of the sale, it would modify the defendants' loans, including those subject to the foreclosure, which would have reduced the monthly debt and allowed the defendants to remain current on their obligations. Id., 325–26. The sale was completed and the full amount of the sale proceeds were forwarded to the plaintiff; however, the plaintiff refused to modify the loans and, instead, commenced foreclosure. Id., 326.

On appeal, this court's analysis focused on the decision of our Supreme Court in *Thompson* v. *Orcutt*, 257 Conn. 301, 311–14, 777 A.2d 670 (2001), stating: "In *Thompson*, our Supreme Court considered actions by the plaintiff subsequent to the execution of the note and mortgage—in particular, fraudulent conduct in a bankruptcy proceeding—to be 'directly and inseparably connected' to the foreclosure action to support the defendants' equitable defense of unclean hands. . . . In doing so, our Supreme Court found that [t]he original transaction creating the . . . mortgage was not tainted with fraud, but the plaintiff's ability to foreclose on the defendants' property . . . depended upon his fraudulent conduct in the bankruptcy proceeding. If the . . . mortgage had been administered as an asset of the bankruptcy estate, the plaintiff would have had no means of bringing this foreclosure action. . . . The plaintiff perpetrated the fraud in the bankruptcy court in order to retain title to the . . . mortgage; he would have had no cause to foreclose on the . . . mortgage without the fraud. . . . Thus, although the actions constituting unclean hands occurred after the execution of the original loan documents, those actions directly impacted the enforceability of those loan documents." (Citations omitted.) *TD Bank, National Assn.* v. *M.J. Holdings, LLC*, supra, 143 Conn. App. 328–29. In light of that precedent, this court observed that, despite the fact that it was transacted after the execution of the original loan documents, the loan modification agreement would have allowed the defendants to remain current on their loan obligations. We concluded that "[the] allegations attack[ed] the validity or enforcement of the note and mortgage, which impact[ed] the plaintiff's ability to foreclose thereon, because the defendants alleged that the loan modification agreement would have allowed them to remain current on all their loan obligations." Id., 335.

In the present case, the defendants claim that there was an agreement with the plaintiff that, if the defendants obtained the SBA loan, then the plaintiff would provide them with a $50,000 line of credit "as a bridge loan to run [the] business." To the extent that such a promise was made, unlike in *M.J. Holdings, LLC*, the plaintiff's failure to follow through with that promise did not implicate or impact its ability to foreclose on the mortgage because the promise to extend credit to run the business is dissimilar to a promise to modify a loan. In other words, whether the plaintiff extended that credit would not have altered the defendants' obligations pursuant to the mortgage. Furthermore, the notion of extending a line of credit to the defendants only serves to increase their debt owed to the plaintiff, rather than to bring them current, as would have occurred in *M.J. Holdings, LLC*, had the agreed upon loan modification been effectuated. Additionally, obtaining the SBA loan and giving the proceeds of that loan to the plaintiff as required by the original loan documents, did not, in and of itself, substantially alter the financial status of the defendants—at the end of the transaction, they still owed $3,000,000.

Equally misplaced is the defendants' reliance on *U.S. Bank National Assn.* v. *Eichten*, supra, 184 Conn. App. 727. The defendants contend that this court in *Eichten* concluded that a defense of unclean hands did not have to relate to the making, validity, or enforcement of the loan at issue. Although the defendants' argument is correct, it is incomplete.

In *Eichten*, the defendant raised several special defenses, including that "the plaintiff is guilty of unclean hands because, although she qualified for a [Home Affordable Modification Program] loan modification upon completion of her trial period payments, the plaintiff did not offer her a loan modification, but instead, placed her in a forbearance program without her consent." Id., 734. The defendant thus argued that there

was a genuine dispute of material fact as to whether the plaintiffs had acted with unclean hands. This court agreed and concluded that "[t]he plaintiff's failure to establish that it adhered to the Treasury Department's directives, which appear to encourage that final determinations on whether to offer the borrower a loan modification be made before the end of the [trial period plan], and the plaintiff's failure to provide an explanation as to its apparent internal approval of the loan modification in March, 2011, which was not communicated to the defendant, create[d] a genuine issue of material fact as to whether the defendant can prevail on her special defense of unclean hands. When viewing the evidence in the light most favorable to the defendant, the unexplained length of time it took the plaintiff to deny the defendant an offer of a permanent modification, almost twenty months, commencing with the date it told her that the only way to explore modification of her loan was to stop paying in November, 2009, and ending with the date it denied her a modification, July 15, 2011, raise[d] the question of whether the plaintiff treated the defendant in a fair, equitable, and honest manner knowing that prolonged delay would place the defendant in an untenable financial situation, such that she could not possibly extricate herself to prevent foreclosure." Id., 749–50.

The plaintiff in *Eichten*, however, argued that the special defense was invalid because it did not relate to the making, validity, or enforcement of the note and mortgage. Id., 750. As in *M.J. Holdings, LLC*, this court's analysis was guided by our Supreme Court's decision in *Thompson* v. *Orcutt*, supra, 257 Conn. 301: "[B]ecause the doctrine of unclean hands exists to safeguard the integrity of the court . . . [w]here a plaintiff's claim *grows out of or depends upon or is inseparably connected* with his own prior fraud, a court of equity will, in general, deny him any relief, and will leave him to whatever remedies and defenses at law he may have.

. . . [*A*]*n equitable defense of unclean hands need not strictly relate to the making, validity, or enforcement of the note or mortgage, provided the allegations set forth were directly and inseparably connected* to the foreclosure action." (Citation omitted; emphasis added; internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Eichten*, supra, 184 Conn. App. 753.

The court in *Eichten* thus concluded that it was "not persuaded . . . that the defendant's unclean hands defense is invalid because it does not relate to the making, validity, or enforcement of the note. First, the defense of unclean hands . . . does not necessarily need to relate to the making, enforcement, or validity of the loan. Second, if the plaintiff did engage in fraudulent conduct by deliberately failing to communicate its internal approval of the loan modification, then that raises questions as to whether, but for this conduct, the plaintiff would have had the legal authority to bring [the foreclosure] action." Id.

Unlike in *Eichten*, the defendants allege no conduct on the part of the plaintiff that would have challenged the plaintiff's legal authority to bring this foreclosure action. On the contrary, as the defendants conceded during oral argument before this court, the plaintiff had the right to commence foreclosure on the grounds that the defendants defaulted on their mortgage. Moreover, the steps taken by the parties were contemplated and agreed to in the original loan documents—namely, that the plaintiff would loan the defendant $3,000,000 to construct the facility, that the defendants would make monthly payments on the mortgage, and that the defendants would obtain a loan from the SBA in order to help pay down the mortgage.

Last, the defendants rely on *U.S. Bank National Assn.* v. *Blowers*, supra, 332 Conn. 656, for the proposition that the trial court wrongly rejected their unclean hands special defense. Specifically, they argue that the trial

court improperly focused "on the SBA mortgage and not the [plaintiff's] loan. The standard articulated by [*Blowers*] makes clear that the focus is on the alleged misconduct of the mortgagee. As the definition of 'enforcement' includes allegations of certain harm resulting from a mortgagee's wrongful postorigination conduct, the fact that the alleged misconduct involved the creation of a second loan obligation should not be determinative." We disagree.

In *Blowers*, after the mortgagee had commenced foreclosure on the mortgage, the mortgagor filed several special defenses, including unclean hands. *U.S. Bank National Assn.* v. *Blowers*, supra, 332 Conn. 659. In support thereof, the mortgagor alleged that the mortgagee committed various acts, which occurred either after the mortgagor's default on the note or after the mortgagee had commenced the foreclosure action, which hindered his ability to obtain a loan modification and increased the debt amount. Id., 661. The mortgagee moved to strike the mortgagor's special defenses, claiming that they were unrelated to the making, validity, or enforcement of the note. Id., 662. The trial court granted that motion, concluding that the alleged misconduct had occurred following execution of the note and, therefore, the special defenses did not relate to the making, validity, or enforcement thereof. Id., 662–63. The mortgagor appealed to this court, which affirmed the judgment of the trial court. See *U.S. Bank National Assn.* v. *Blowers*, 177 Conn. App. 622, 172 A.3d 837 (2017), rev'd, 332 Conn. 656, 212 A.3d 226 (2019).

On appeal to our Supreme Court, the mortgagor challenged, among other things, the propriety of the making, validity, or enforcement test and the proper scope of the enforcement test thereunder. *U.S. Bank National Assn.* v. *Blowers*, supra, 332 Conn. 664. Our Supreme Court clarified that the making, validity, or enforcement test is "nothing more than a practical application of the standard rules of practice that apply to all civil actions

to the specific context of foreclosure actions." Id., 667. The court agreed with the mortgagor that "a proper construction of 'enforcement' includes allegations of harm resulting from a mortgagee's wrongful postorigination conduct in negotiating loan modifications, when such conduct is alleged to have materially added to the debt and substantially prevented the mortgagor from curing the default." Id. The court observed that "appellate case law recognizes that conduct occurring after the origination of the loan, after default, and even after the initiation of the foreclosure action may form a proper basis for defenses in a foreclosure action." Id., 672. The court continued: "These equitable and practical considerations inexorably lead to the conclusion that allegations that the mortgagee has engaged in conduct that wrongly and substantially increased the mortgagor's overall indebtedness, caused the mortgagor to incur costs that impeded the mortgagor from curing the default, or reneged upon modifications are the types of misconduct that are directly and inseparably connected . . . to enforcement . . . . Such allegations, therefore, provide a legally sufficient basis for special defenses in the foreclosure action." (Citation omitted; internal quotation marks omitted.) Id., 675–76. On these grounds, the judgment was reversed and the case was remanded for further proceedings. Id., 678.

In the present case, the defendants outline in their brief the specific conduct of the plaintiff that they contend falls under the clarified test in *Blowers*. Specifically, they argue that the plaintiff falsely certified to the SBA that there were no significant changes in the defendants' financial status; the plaintiff was aware that the defendants did not yet have the necessary working capital to be profitable and needed additional financing; the plaintiff required that the defendants use all of their assets to obtain funding, to the point where there were no other assets available for the defendants to fall back on; and that the defendants only agreed to move forward with the SBA loan at the plaintiff's urging, pro-

vided that the defendants receive a line of credit. As a result of the plaintiff's conduct, the defendants argue that they incurred substantial additional costs to close the SBA loan, "which was used only to benefit" the plaintiff and that, had the plaintiff represented the defendants' actual financial condition, the SBA would not have closed the loan. We are not persuaded.

First, as previously noted, the defendants also certified to the SBA that there were no significant changes in their financial status. Second, the defendants' argument that they were required by the plaintiff to use all of their assets prior to obtaining the subject loan and, then, were urged by the plaintiff to obtain the SBA loan only to pay down the mortgage are the terms that the defendants agreed to at the outset in the original loan documents. Third, to the extent that the defendants incurred substantial additional costs in order to close the SBA loan, there is no evidence connecting those costs with the plaintiff's conduct; in fact, those costs stem from the terms agreed to between the defendants and the SBA. Fourth, the defendants argue that, had the plaintiff represented to the SBA the actual financial status of the defendants, the SBA would not have closed the loan. That argument, even if true, is mere speculation. Moreover, had the plaintiff represented the defendants' true financial status, and had that representation precluded the issuance of the SBA loan, the defendants still would have remained in default, according to the terms of the mortgage, for nonpayment. Under either scenario, the plaintiff would have been well within its right to pursue foreclosure. Lastly, the plaintiff's alleged actions pertaining to the SBA loan are not *directly and inseparably connected* to the foreclosure action, as the SBA loan is separate and distinct from the mortgage.

Accordingly, the defendant's allegations were insufficient to fall within our Supreme Court's clarification of the making, validity, or enforcement test, as set forth in *U.S. Bank National Assn.* v. *Blowers*, supra, 332

Conn. 675—namely, that "allegations that the mortgagee has engaged in conduct that wrongly and substantially increased the mortgagor's overall indebtedness, caused the mortgagor to incur costs that impeded the mortgagor from curing the default, or reneged upon modifications are the types of misconduct that are directly and inseparably connected . . . to enforcement of the note and mortgage." (Citation omitted; internal quotation marks omitted.) Because the defendants did not otherwise meet their burden of providing an evidentiary basis to establish the existence of a genuine issue of material fact regarding the unclean hands special defense; see *U.S. Bank National Assn.* v. *Eichten*, supra, 184 Conn. App. 745; their claim fails.

The judgment is affirmed and the case is remanded for the purpose of setting new law days.

In this opinion the other judges concurred.

CHAD E. COHEN ET AL. *v.* POSTAL HOLDINGS, LLC (AC 42912)

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

Syllabus

The plaintiffs sought to recover damages from the defendant for private nuisance and negligence as a result of harm they allegedly suffered when the parties had been abutting property owners and the real property owned by the defendant allegedly had been in a dangerous condition that the defendant had failed to prevent or to abate. The defendant's predecessor lessors executed a ground lease of the property with U Co., a federal agency, and, subsequently, the defendant became the sole owner and sole lessor of the subject property. The trial court granted the defendant's motion for summary judgment. On the plaintiffs' appeal to this court, *held*:

1. The trial court properly granted the defendant's motion for summary judgment as to the claim of negligence and determined that the defendant did not maintain control of the property and, thus, did not owe a duty of care to the plaintiffs: the ground lease, in clear and unambiguous terms, demised full control of the property to U Co. and divested any

control of the property from the defendant; moreover, this court declined to consider whether the defendant exercised de facto control over the property, as the ground lease clearly and unambiguously provided that U Co. maintained control of the property.

2. The trial court properly granted the defendant's motion for summary judgment as to the plaintiffs' private nuisance claim; the ground lease demised full control of the property to U Co. and provided that U Co.'s responsibility for maintenance shall be fulfilled at such time and in such manner as U Co. considers necessary and provided the defendant no right to enter the property to perform maintenance or repairs or to demand that U Co. maintain the property and, thus, the defendant's inaction with regard to the condition of the property could not be characterized as causing a negligent or intentional interference with the plaintiffs' use and enjoyment of their property.

Submitted on briefs April 22—officially released July 28, 2020

Procedural History

Action to recover damages for private nuisance, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the plaintiffs filed an amended complaint; thereafter, the court, *Krumeich, J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

Beverley Rogers, submitted a brief for the appellants (plaintiffs).

Matthew G. Conway and *Raymond M. Gauvreau* submitted a brief for the appellee (defendant).

Opinion

MOLL, J. The plaintiffs, Chad E. Cohen and Kirsten Cohen, appeal from the summary judgment rendered by the trial court in favor of the defendant, Postal Holdings, LLC, on their operative two count complaint sounding in negligence and private nuisance. On appeal, the plaintiffs claim that the trial court improperly concluded that (1) the defendant was not liable for negligence on the ground that there was no genuine issue of material fact that the defendant did not exercise control over the leased premises at issue and, therefore, did not owe

a duty of care to the plaintiffs, who, at all relevant times, owned abutting property, and (2) the defendant was not liable for private nuisance on the ground that there was no genuine issue of material fact that the defendant did not interfere with the plaintiffs' use and enjoyment of their abutting property. We disagree, and, accordingly, we affirm the summary judgment of the trial court.[1]

The following facts and procedural history are relevant to our resolution of this appeal. In 1982, Connecticut Equities Corp. and Edward H. Benenson (original lessors) executed a ground lease with the United States Postal Service (USPS) pursuant to which the original lessors demised, leased, and rented to USPS real property now known as 26 and 28 Catoonah Street in Ridgefield. Paragraph 8 of the ground lease provided: "[USPS], during the term of this lease and any options hereunder, hereby agrees to save harmless and indemnify the Lessor from all claims, loss, damage, actions, causes of action, expense and liability resulting from the use of the demised property by [USPS] whenever such claims, loss, damage, actions, causes of action, expense and liability arise from the negligent or wrongful act or omission by an employee while acting within the scope of his employment, under circumstances where [USPS], if a private person, would be liable in accordance with the law of the place where the negligent or wrongful act or omission occurred." Paragraph 9 of the ground lease provided in relevant part: "Except as otherwise provided herein, [USPS], at its own cost and expense, shall construct and maintain all buildings, structures and improvements on the demised premises. . . .

[1] In its appellate brief, the defendant argues that we should disregard (1) certain documents included in the appendix to the plaintiffs' principal appellate brief that are not part of the trial court record, and (2) certain "unsupported factual assertions" in the plaintiffs' principal appellate brief. The purportedly improper material cited by the defendant has no bearing on our resolution of the plaintiffs' claims on appeal. Therefore, we need not further address the defendant's argument.

[USPS'] responsibility for maintenance shall be fulfilled at such time and in such manner as [USPS] considers necessary."

In 1983, the original lessors and USPS executed an amendment to the ground lease, which provided, inter alia, that USPS was prohibited from constructing any fences or barriers on the leased premises with the exception of a proposed chain link fence described in the amendment. The amendment further provided that all terms and conditions of the ground lease not modified thereby, which included paragraphs 8 and 9, remained in full force and effect.

Prior to December 13, 2006, Lisa Quattrocchi, Amy Aronson, and the estate of Edward H. Benenson (successor lessors) acquired title to 26 and 28 Catoonah Street as well as the original lessors' interest in the ground lease. On December 13, 2006, the successor lessors and USPS executed a second amendment to the ground lease, which, inter alia, created a new schedule of rents. The amendment further provided that all terms, conditions, and covenants of the ground lease not modified thereby, which included paragraphs 8 and 9, remained in full force and effect.

In 2010, by way of a quitclaim deed, the defendant became the sole owner of 26 and 28 Catoonah Street. In 2011, by way of an assignment and assumption of the ground lease, the defendant became the sole lessor of 26 and 28 Catoonah Street.

On October 8, 2013, the plaintiffs commenced the present action against the defendant, raising one count sounding in private nuisance. In their original complaint, the plaintiffs alleged, inter alia, that 28 Catoonah Street (property)[2] had consisted of an "unused lot with an abandoned structure in an obvious state of severe disrepair and neglect" since approximately 2006, and

[2] The plaintiffs did not allege any liability on the part of the defendant with respect to 26 Catoonah Street, on which USPS operated a postal facility.

that, as a result of the defendant's failure to prevent or to abate the dangerous condition of the property, they were unable to sell their abutting property.

On March 11, 2014, the defendant filed a motion to implead USPS, which the trial court, *Ozalis*, *J.*, granted on April 16, 2014. On May 16, 2014, the defendant served a third-party complaint on USPS, alleging common-law and contractual indemnification. On June 4, 2014, pursuant to 28 U.S.C. § 1442 (a) (1) (2012), USPS removed the matter to the United States District Court for the District of Connecticut. See *Cohen* v. *Postal Holdings, LLC*, United States District Court, Docket No. 3:14CV800 (AWT) (D. Conn. June 4, 2014).

After the matter had been removed to federal court, the plaintiffs filed an amended two count complaint sounding in private nuisance and negligence. The defendant answered the amended complaint and asserted several special defenses.

On June 20, 2014, USPS filed a motion to dismiss the defendant's third-party complaint for lack of subject matter jurisdiction. On January 15, 2015, the District Court granted USPS' motion to dismiss, thereby terminating USPS as a party to the matter.

On October 15, 2015, the defendant filed a motion for summary judgment as to both counts of the plaintiffs' amended complaint. The plaintiffs objected to the motion only insofar as the defendant was moving for summary judgment on their private nuisance claim. On June 1, 2016, the District Court issued its ruling granting the defendant's motion for summary judgment in toto. Thereafter, the plaintiffs appealed from the summary judgment to the United States Court of Appeals for the Second Circuit.

On October 11, 2017, the Second Circuit vacated the District Court's summary judgment on the ground that the District Court, having properly dismissed the defendant's third-party complaint against USPS for lack of

subject matter jurisdiction, lacked supplemental jurisdiction over the plaintiffs' state law claims. See *Cohen* v. *Postal Holdings, LLC*, 873 F.3d 394, 404 (2d Cir. 2017). The Second Circuit remanded the matter to the District Court to remand the plaintiffs' state law claims to the Superior Court for further proceedings consistent with its opinion. Id. On August 2, 2018, the District Court remanded the matter to the Superior Court.

On November 9, 2018, the plaintiffs filed a revised two count complaint, which became their operative complaint, sounding in private nuisance and negligence. In support of both counts, the plaintiffs alleged, inter alia, that, at all relevant times, the property was in a dangerous condition[3] that the defendant had failed to prevent or to abate, thereby causing them harm while they had been abutting property owners.[4] On November 13, 2018, the defendant filed an answer denying the material allegations of the operative complaint and asserting several special defenses.

On December 14, 2018, the defendant filed a motion for summary judgment, accompanied by a supporting memorandum of law and exhibits, as to both counts of the plaintiffs' operative complaint. On January 28, 2019, the plaintiffs filed a memorandum of law in opposition to the motion for summary judgment with appended exhibits. On February 19, 2019, the defendant filed a reply brief with appended exhibits.

On March 28, 2019, after having heard argument on March 25, 2019, the trial court, *Krumeich, J.*, issued

[3] In their original complaint, the plaintiffs alleged that an abandoned structure stood on the property. In their operative complaint, the plaintiffs alleged that the abandoned structure had been razed sometime after June 27, 2014. The plaintiffs further alleged in their operative complaint, inter alia, that the condition of the property attracted unsupervised minors and adults, who trespassed, loitered, and possibly engaged in illicit activities on the property, as well as dangerous wildlife.

[4] The record reflects that the plaintiffs purchased their abutting property in 2001 and sold it in 2014.

a memorandum of decision granting the defendant's motion for summary judgment. On April 17, 2019, the plaintiffs filed a motion to reargue, which the court denied on April 22, 2019. This appeal followed. Additional facts and procedural history will be set forth as necessary.

Before turning to the plaintiffs' claims on appeal, we set forth the relevant standard of review. "Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him [or her] to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A material fact . . . [is] a fact which will make a difference in the result of the case. . . . Finally, the scope of our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Rutter* v. *Janis*, 334 Conn. 722, 729, 224 A.3d 525 (2020).

I

The plaintiffs first claim that the trial court improperly granted the defendant's motion for summary judgment as to their negligence claim on the ground that there was no genuine issue of material fact that the defendant did not exert control over the property and, therefore, did not owe a duty of care to the plaintiffs. We disagree.

"In a negligence action, the plaintiff must meet all of the essential elements of the tort in order to prevail.

These elements are: duty; breach of that duty; causation; and actual injury. . . . The general rule regarding premises liability in the landlord-tenant context is that landlords owe a duty of reasonable care as to those parts of the property over which they have retained control. . . . [L]andlords [however] generally [do] not have a duty to keep in repair any portion of the premises leased to and in the exclusive possession and control of the tenant." (Internal quotation marks omitted.) *Fiorelli* v. *Gorsky*, 120 Conn. App. 298, 308, 991 A.2d 1105, cert. denied, 298 Conn. 933, 10 A.3d 517 (2010). "[L]iability 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." (Internal quotation marks omitted.) *Millette* v. *Connecticut Post Ltd. Partnership*, 143 Conn. App. 62, 70, 70 A.3d 126 (2013).

"Retention of control is essentially a matter of intention to be determined in the light of all the significant circumstances. . . . The word control has no legal or technical meaning distinct from that given in its popular acceptation . . . and refers to the power or authority to manage, superintend, direct or oversee. . . . Unless it is definitely expressed in the lease, the circumstances of the particular case determine whether the lessor has reserved control of the premises or whether they were under the exclusive dominion of the tenant, and it becomes a question of fact and is a matter of intention in the light of all the significant and attendant facts which bear on the issue. . . . Although questions of fact ordinarily are not decided on summary judgment, if the issue of control is expressed definitively in the lease, it becomes, in effect, a question of law." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Fiorelli* v. *Gorsky*, supra, 120 Conn. App. 308–309.

The following additional facts and procedural history are relevant to our disposition of the plaintiffs' claim. In their operative complaint, the plaintiffs alleged that the defendant was liable for negligence because it failed to prevent or to abate the dangerous condition of the property. More specifically, the plaintiffs alleged that the defendant failed either to enforce its purported right under the ground lease to require USPS to maintain the property or to take other action to prevent or to abate the dangerous condition thereof.

In its memorandum of law in support of its motion for summary judgment, the defendant claimed that there was no genuine issue of material fact that it did not have possession or control of the property. The defendant asserted that paragraph 9 of the ground lease contained clear and unambiguous language demising complete possession and control of the property, along with the responsibility for the maintenance thereof, to USPS. Without possession or control of the property, the defendant posited, it did not owe a duty of care to the plaintiffs, and, therefore, it was not liable for negligence.

In their memorandum of law in opposition to the defendant's motion for summary judgment, the plaintiffs argued that there existed a genuine issue of material fact as to whether the defendant exercised control over the property. First, the plaintiffs contended that the terms of the ground lease could be construed to bestow upon the defendant a right, obligation, and duty to prevent or to abate the dangerous condition of the property or to require USPS to maintain the property, and, thus, there existed an ambiguity as to whether the defendant exerted control over the property. The plaintiffs relied on the fact that the portion of paragraph 9 of the ground lease providing that USPS, "at its own cost and expense, shall construct and maintain all buildings, structures and improvements on the demised premises" was conditioned by the qualifying clause "[e]xcept

as otherwise provided herein." The plaintiffs argued that the indemnification language set forth in paragraph 8 of the ground lease signified that the parties contemplated situations in which USPS might engage in negligent conduct in relation to the property that would require the defendant to take action to cure USPS' negligence, provided that USPS indemnify the defendant, thus constituting an exception to USPS' right and obligation regarding construction and maintenance set forth in paragraph 9. Second, the plaintiffs contended that, notwithstanding the terms of the ground lease, they submitted evidence demonstrating that the defendant had exercised de facto control over the property, for example, by paying property taxes that USPS later reimbursed.

In its reply brief, the defendant countered that (1) the indemnification language set forth in paragraph 8 did not provide the defendant with a right to order USPS to maintain the property or alter the fact that the defendant retained no control or possession of the property, and (2) evidence of the defendant purportedly exercising de facto control over the property was immaterial because the ground lease contained unequivocal terms providing that the defendant had no control or possession of, and thus no responsibility to maintain, the property.

In granting the defendant's motion for summary judgment as to the plaintiffs' negligence claim, the trial court first concluded that the ground lease provided that USPS, rather than the defendant, was in possession and control of the property. The court determined that paragraph 9 of the ground lease gave USPS the right to construct on and to maintain the property. Additionally, the court determined that nowhere in the ground lease did the defendant reserve the right to perform maintenance or repairs that USPS failed to undertake, and the court rejected the plaintiffs' proposition that the indemnification language set forth in paragraph 8 of

the ground lease granted such a right. The court then addressed and rejected the plaintiffs' contention that the evidence submitted by them demonstrated that the defendant maintained de facto control of the property. In sum, the court concluded: "[The] [p]laintiffs have failed to submit evidential facts that would raise an issue of fact concerning the [defendant's] control over the property, and thus have provided no basis for recognition of a duty by the [defendant] to maintain or repair the property to abate the conditions of which [the] plaintiffs have complained. Without a duty to act to prevent harm to the plaintiffs, there is no basis for claiming the [defendant's] failure to act was unreasonable."

On appeal, the plaintiffs assert that the court improperly determined that there was no genuine issue of material fact that the defendant did not exert control over the property. Specifically, the plaintiffs claim that (1) the ground lease was ambiguous as to whether the defendant had control of the property, and (2) in the alternative, notwithstanding the terms of the ground lease, evidence that they submitted in opposition to the defendant's motion for summary judgment demonstrated that the defendant exercised de facto control over the property. For the reasons that follow, these claims are unavailing.

A

We first turn to the plaintiffs' claim that the ground lease contained "clearly inapposite and contradictory terms pertaining to issues of control" of the property, and, therefore, the trial court improperly determined that the terms of the ground lease clearly and unambiguously established that the defendant did not exert control over the property. The plaintiffs observe that paragraph 9 of the ground lease provided USPS with the right and obligation to "construct and maintain all buildings,

structures and improvements" on the property "[e]xcept as otherwise provided" in the ground lease. The plaintiffs contend that the indemnification clause set forth in paragraph 8 of the ground lease signaled that "the signatories of the [g]round [l]ease manifestly acknowledged that there could be occasions when . . . USPS might be negligent in its leasehold of the premises and that [the defendant] would cure such negligence, so long as [the defendant] was indemnified by USPS." Thus, the plaintiffs argue, paragraph 8 could be construed as providing the defendant with "the right, obligation, and duty to prevent and [to] abate conditions on its property that might be dangerous or interfere with the rights of others, and to enforce the [g]round [l]ease to prevent such conditions," thereby constituting an exception to USPS' right and obligation to build on and to maintain the property as described in paragraph 9. We are not persuaded.

"In construing a written lease, which constitutes a written contract, three elementary principles must be kept constantly in mind: (1) The intention of the parties is controlling and must be gathered from the language of the lease in the light of the circumstances surrounding the parties at the execution of the instrument; (2) the language must be given its ordinary meaning unless a technical or special meaning is clearly intended; (3) the lease must be construed as a whole and in such a manner as to give effect to every provision, if reasonably possible. . . . A determination of contractual intent ordinarily presents a question of fact for the ultimate fact finder, although where the language is clear and unambiguous, it becomes a question of law for the court." (Citations omitted; internal quotation marks omitted.) *Peter-Michael, Inc.* v. *Sea Shell Associates*, 244 Conn. 269, 275–76, 709 A.2d 558 (1998). "Furthermore, when the language of the [lease] is clear and unam-

biguous, [it] is to be given effect according to its terms. A court will not torture words to import ambiguity [when] the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a [lease] must emanate from the language used in the [lease] rather than from one party's subjective perception of [its] terms." (Internal quotation marks omitted.) *Bristol* v. *Ocean State Job Lot Stores of Connecticut, Inc.*, 284 Conn. 1, 8, 931 A.2d 837 (2007).

Mindful of the foregoing principles, we conclude that the ground lease, in clear and unambiguous terms, demised full control of the property to USPS and divested any control of the property from the defendant. The ground lease contained no express language permitting the defendant to enter the property and to perform maintenance or repairs, or to demand that USPS maintain the property. By comparison, paragraph 9 of the ground lease explicitly provided that USPS, "at its own cost and expense, shall construct and maintain all buildings, structures and improvements on the demised premises," subject to the qualifying clause stating "[e]xcept as otherwise provided" in the ground lease, and that "[USPS'] responsibility for maintenance shall be fulfilled at such time and in such manner as [USPS] considers necessary." We reject the plaintiffs' contention that the qualifying clause of paragraph 9, when read in conjunction with the indemnification language set forth in paragraph 8, raised an ambiguity as to whether the defendant maintained control of the property. We discern no logical connection between the indemnification language of paragraph 8 and the qualifying clause contained in paragraph 9. As the trial court aptly summarized in its memorandum of decision: "A tenant's failure to maintain the property may give rise to a damages remedy, indemnification or even to termination of the tenancy but those remedies are not the functional equivalent of lease terms requiring a tenant

to make repairs or reserving to the landlord the right to step in to make repairs required to maintain the property."[5]

Moreover, our rejection of the plaintiffs' interpretation of the ground lease does not render the qualifying clause of paragraph 9 meaningless. For example, paragraph 21 of the ground lease provided: "It is understood and agreed that as part of the consideration, [USPS] has the right to raze any and all existing structures or improvements, including utilities and lines which now exist on the demised premises and that [USPS] shall not be obligated to rebuild, restore nor make any further [remuneration] for such razing, removal or alteration of such buildings, structures or improvements."[6] Paragraph 21 constituted an exception to USPS' right and obligation to construct and to maintain "all buildings, structures, and improvements" on the property.[7]

[5] The plaintiffs assert that, during argument before the Second Circuit on the appeal from the District Court's summary judgment rendered in favor of the defendant, one of the sitting judges commented that the language of paragraph 9 was ambiguous regarding the extent to which USPS had control of the property. The plaintiffs contend that the comments illustrate that reasonable minds can differ as to whether the language of the ground lease was ambiguous regarding the issue of control of the property. In its decision disposing of the appeal, however, the Second Circuit did not reach the merits of the plaintiffs' claims; instead, it disposed of the appeal on jurisdictional grounds by concluding that the District Court lacked supplemental jurisdiction over the plaintiffs' state law claims. See *Cohen* v. *Postal Holdings, LLC*, supra, 873 F.3d 404. We decline the plaintiffs' invitation to consider any statements made during argument by the judges of the Second Circuit to have precedential or evidential value germane to our analysis.

[6] Paragraph 21 of the ground lease was unaltered by the 1983 and 2006 amendments to the ground lease.

[7] We also observe that the 1983 amendment to the ground lease provided, inter alia, that USPS was prohibited from constructing any fences or barriers on the leased premises other than a chain link fence described in the amendment. The 2006 amendment to the ground lease did not alter the foregoing provision, which constituted another exception to USPS' right and obligation with respect to construction and maintenance set forth in paragraph 9 of the ground lease.

In sum, we conclude that the trial court properly determined that, pursuant to the clear and unambiguous terms of the ground lease, the defendant did not maintain control of the property and, as a result, did not owe a duty of care to the plaintiffs. Thus, the plaintiffs' claim fails.

B

We next turn to the plaintiffs' alternative claim that, notwithstanding the terms of the ground lease, the plaintiffs submitted evidence demonstrating that the defendant exerted de facto control over the property. The defendant argues that the ground lease, in unequivocal terms, expressed that the defendant did not maintain control of the property, and, therefore, it is unnecessary to consider whether the defendant exercised de facto control of the property. We agree with the defendant.

In a premises liability case, it is proper for a court to consider extrinsic evidence to determine whether a lessor reserved control over leased premises *unless* the issue of control is definitely expressed in a lease. As our Supreme Court explained in *LaFlamme* v. *Dallessio*, 261 Conn. 247, 802 A.2d 63 (2002), "[t]he issue of whether the landlord retained control over a specific area of the premises is essentially a matter of intention to be determined in the light of all the significant circumstances. . . . Thus, [*u*]*nless it is definitely expressed in the lease*, the circumstances of the particular case determine whether the lessor has reserved control of the premises or whether they were under the exclusive dominion of the tenant, and it becomes a question of fact and is a matter of intention in the light of all the significant and attendant facts which bear on the issue. . . . In other words, *if the terms of control are not express between the parties*, the question of who retains control over a specific part of the property is an issue of fact and a matter of intent that can be determined

only in light of all the relevant circumstances." (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 257; see also *Fiorelli* v. *Gorsky*, supra, 120 Conn. App. 308–309 ("*Unless it is definitely expressed in the lease*, the circumstances of the particular case determine whether the lessor has reserved control of the premises or whether they were under the exclusive dominion of the tenant, and it becomes a question of fact and is a matter of intention in the light of all the significant and attendant facts which bear on the issue. . . . Although questions of fact ordinarily are not decided on summary judgment, *if the issue of control is expressed definitively in the lease*, it becomes, in effect, a question of law." (Citation omitted; emphasis altered; internal quotation marks omitted.)).[8]

[8] The plaintiffs cite *Martel* v. *Malone*, 138 Conn. 385, 85 A.2d 246 (1951), for the proposition that "even where there is a written lease [that] lodges full control in the lessee, liability can attach to the lessor if, in fact, the lessor exercised actual control." The plaintiffs' reliance on *Martel* is misguided.

In *Martel*, a jury returned a verdict against a lessor for injuries sustained by a third party when he fell down a stairway attached to the outside of a building owned by the lessor that led to a room leased to a lessee. *Martel* v. *Malone*, supra, 138 Conn. 387–88. At the time of the third party's injury, the lessor and the lessee maintained an oral month-to-month lease. Id., 388. The trial court set aside the verdict on the basis that no evidence existed to warrant a finding that the lessor retained control over the stairway. Id., 387. On appeal, our Supreme Court affirmed the trial court's decision. Id., 392. In doing so, the court concluded that, without an express or implied agreement to the contrary, control of the stairway passed to the lessee by virtue of the lease. Id., 390. The court proceeded to determine that (1) there was no evidence of an express agreement providing that the lessor retained control of the stairway, and (2) there was no evidence demonstrating the existence of an implied agreement providing that the lessor retained control over the stairway. Id., 390–92.

Our Supreme Court subsequently cited *Martel* for the proposition that extrinsic evidence was relevant to the issue of control over leased premises when a written lease did not definitely or expressly resolve the issue. See *Panaroni* v. *Johnson*, 158 Conn. 92, 99, 256 A.2d 246 (1969) ("The written lease read as a whole cannot be said to definitely or expressly resolve the issue of control. Thus the actual use of the stairway, the circumstances attending its use, and the evidence as to repairs become relevant to the issue of actual control. *Martel* v. *Malone*, [supra, 138 Conn. 391]."). Thus, *Martel* aligns with the case law establishing that extrinsic evidence concern-

As we concluded in part I A of this opinion, the ground lease clearly and unambiguously provided that USPS, rather than the defendant, maintained control of the property. Therefore, we need not consider whether the defendant exercised de facto control over the property.[9]

II

The plaintiffs next claim that the trial court improperly granted the defendant's motion for summary judgment as to their private nuisance claim on the ground that there was no genuine issue of material fact that the defendant did not interfere with the plaintiffs' use and enjoyment of their property. We disagree.

"A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land. . . . The law of private nuisance springs from the general principle that [i]t is the duty of every person to make a reasonable use of his [or her] own property so as to occasion no unnecessary damage or annoyance to his [or her] neighbor. . . . The essence of a private nuisance is an interference with the use and enjoyment of land." (Citations omitted; internal quotation marks omitted.) *Pestey* v. *Cushman*, 259 Conn. 345, 352, 788 A.2d 496 (2002). "[I]n order to recover damages in a common-law private nuisance cause of action, a plaintiff must show that the defendant's conduct was the proximate cause of an unreasonable interference with the plaintiff's use and enjoyment of his or her property. The interference may be either intentional . . . or the result

ing the issue of control of leased premises may be considered *unless* the issue is definitely expressed in a lease.

[9] In granting the defendant's motion for summary judgment as to the plaintiffs' negligence claim, in addition to concluding that the defendant did not exert control over the property under the terms of the ground lease, the trial court rejected the merits of the plaintiffs' claim that there was evidence demonstrating that the defendant exercised de facto control over the property. Having concluded that the ground lease unequivocally resolved the issue of control, it was unnecessary for the trial court to consider the merits of the plaintiffs' claim regarding de facto control.

of the defendant's negligence." (Citation omitted.) Id., 361. Our Supreme Court has explained that the requirements of a private nuisance claim "relate to the land subject to the nuisance and to the nature of the interference, not to whether the conduct giving rise to the interference was connected with the defendant's ownership or control of any land." *Ugrin* v. *Cheshire*, 307 Conn. 364, 377, 54 A.3d 532 (2012).

The following additional facts and procedural history are relevant to our disposition of the plaintiffs' claim. In their operative complaint, the plaintiffs alleged that the defendant was liable for private nuisance because (1) at the time that it acquired its interest in the ground lease, the defendant was aware that the property was in a dangerous condition, and (2) the defendant failed to enforce its purported right under the ground lease to require USPS to maintain the property or to take other action to prevent or to abate the dangerous condition thereof.

In its motion for summary judgment, the defendant asserted that there was no genuine issue of material fact that it did not engage in conduct that caused the dangerous condition of the property, the maintenance of which was the sole responsibility of USPS, and, therefore, it could not be held liable for any claimed interference with the plaintiffs' use and enjoyment of their property.

In their memorandum of law in opposition to the defendant's motion for summary judgment, the plaintiffs argued that the defendant unreasonably interfered with their enjoyment and use of their property by failing to enforce its purported right under the ground lease to require USPS to maintain the property or to take other action to remediate the dangerous condition thereof, despite knowing of said condition when it assumed the ground lease. In its reply brief, the defendant reiterated that the ground lease conferred on USPS

the sole right and obligation to maintain the property, such that it was USPS' conduct in failing to maintain the property that caused any claimed interference with the plaintiffs' use and enjoyment of their property.

In granting the defendant's motion for summary judgment as to the plaintiffs' private nuisance claim, the trial court concluded that the plaintiffs "failed to produce evidence of conduct by the [defendant] that interfered with [the] plaintiffs' use and enjoyment of their property. . . . [The defendant] had no legal duty to maintain or repair the [property] or to force USPS to do so. . . . Without such [a] duty, the [defendant's] failure to act cannot be characterized as negligent or intentional interference with [the] plaintiffs' use and enjoyment of their property." (Footnotes omitted.)

On appeal, the plaintiffs contend that the trial court improperly concluded that there was no genuine issue of material fact that the defendant did not interfere with their use and enjoyment of their property. More specifically, the plaintiffs assert that the defendant knew that the property was in a dangerous condition when it acquired its interest in the ground lease, but nevertheless failed to enforce its purported right under the ground lease to require USPS to maintain the property or to remediate the property itself and then seek reimbursement from USPS. This claim is unavailing.

As we concluded in part I A of this opinion, the ground lease, in clear and unambiguous terms, demised full control of the property to USPS. The ground lease further provided that USPS' "responsibility for maintenance shall be fulfilled at such time and in such manner as [USPS] considers necessary." The ground lease provided the defendant with no right to enter the property in order to perform maintenance or repairs or to demand that USPS maintain the property. Under these circumstances, the defendant's inaction with regard to

the condition of the property cannot be characterized as causing a negligent or intentional interference with the plaintiffs' use and enjoyment of their property.[10] Accordingly, we conclude that the trial court properly granted the defendant's motion for summary judgment as to the plaintiffs' private nuisance claim.

The judgment is affirmed.

In this opinion the other judges concurred.

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[10] The plaintiffs emphasize that the defendant leased the property to USPS with knowledge that the property was in a dilapidated state. The plaintiffs rely on appellate decisions reflecting that a lessor may be held liable for a nuisance if the nuisance existed when the lease was executed or renewed. See, e.g., *Bergman* v. *Jacob*, 125 Conn. 486, 489–90, 7 A.2d 219 (1939) (lessor not liable for public nuisance caused by condition on premises created by lessee after execution of lease); *Swift & Co.* v. *Peoples Coal & Oil Co.*, 121 Conn. 579, 592, 186 A. 629 (1936) ("Ordinarily a landlord is not liable for a nuisance created upon premises he [or she] has leased where that nuisance did not exist when they were leased or was not a result reasonably to be anticipated from their use for the purpose and in the manner intended. . . . The reason for this rule is that, having leased the premises, the landlord ordinarily is without power to control their use. But if a nuisance arises from the use of the premises during the period of the lease, he [or she] has it within his [or her] power to abate that nuisance at the expiration of the period for which they were rented and if, knowing that it exists he [or she] takes no steps to this end but renews the lease, liability then attaches." (Citations omitted.)); *Calway* v. *William Schaal & Son, Inc.*, 113 Conn. 586, 592, 155 A. 813 (1931) ("it is settled law that where an owner leases premises upon which there is a nuisance which will continue if they are used for the purpose and in the manner intended he [or she] is liable for damages resulting from that nuisance")

In the present case, the plaintiffs did not allege that the property was in a dangerous condition when the ground lease was executed in 1982. Moreover, the defendant did not become the sole lessor of the property until 2011, well after the ground lease had been executed. In addition, the plaintiffs have not identified any evidence in the record reflecting that a renewal of the ground lease occurred between 2011, when the defendant became the sole lessor of the property, and 2014, when the plaintiffs sold their abutting property. Thus, the present case is distinguishable from those situations involving lessors who executed or renewed leases notwithstanding the presence of conditions on the leased premises that constituted nuisances.

VIRLEE KOVACHICH *v.* DEPARTMENT OF MENTAL HEALTH AND ADDICTION SERVICES (AC 41976)

Alvord, Moll and Norcott, Js.

Syllabus

The plaintiff employee sought to recover damages for the defendant employer's alleged violation of the Connecticut Fair Employment Practices Act (§ 46a-51 et seq.). The plaintiff alleged that the defendant discriminated against her on the basis of her disability as a result of the defendant's failure to provide her with a reasonable accommodation and retaliated against her for filing a complaint of disability discrimination. The plaintiff suffered from allergic and non-allergic rhinitis and asthma and was sensitive to scents, and, as a result, she requested a scent-free work environment and a HEPA filter for the office. The defendant's American with Disabilities Act review committee approved the plaintiff's request for a reasonable accommodation. Some employees, however, did not comply with the scent-free working environment designation. The plaintiff filed a complaint with the Commission on Human Rights and Opportunities and it issued a release of jurisdiction to sue. The court rendered judgment for the plaintiff, from which the defendant appealed and the plaintiff cross appealed. *Held*:

1. Contrary to the plaintiff's claim, the defendant's appeal was not moot because it failed to challenge the court's judgment on the plaintiff's retaliation claim; the defendant challenged evidence the trial court admitted and relied on to determine that the defendant failed to engage in the interactive process and this determination was not limited to the plaintiff's discrimination claim and, thus, because the two claims and the trial court's rulings thereon were intertwined, the defendant's appeal sufficiently challenged the court's judgment as to both counts.
2. The trial court improperly imposed liability on the defendant on the basis of inadmissible evidence, and, accordingly, the case was remanded for a new trial; the court impermissibly considered e-mails exchanged between the parties that constituted settlement communications on the issue of liability, and based its finding that the defendant had failed to engage in the interactive process on those e-mails; moreover, in light of this court's reversal of the judgment of the trial court and remand for a new trial, it was not necessary to address the plaintiff's claims raised in her cross appeal.
3. The trial court improperly precluded admission of the plaintiff's deposition responses that had been amended on an errata sheet; the plaintiff's original deposition responses were admissible as they remained a part of the record, and the defendant was permitted to use the plaintiff's deposition testimony, errata sheet notwithstanding, pursuant to the

applicable provision (§ 8-3) of the Connecticut Code of Evidence as a statement made by a party opponent and the applicable rule of practice (§ 13-31 (a) (3)), which allows deposition testimony of a party to be used by an adverse party for any purpose; moreover, once the original responses were entered into evidence, the plaintiff would be permitted to introduce the amended answers and explain the reasons for the change.

4. The trial court erred in concluding that all statements made by employees of the defendant were admissible pursuant to the applicable provision (§ 8-3 (1) (D)) of the Connecticut Code of Evidence; the plaintiff failed to establish, and the trial court did not determine, that the statements sought to be admitted related to a matter within the scope of the declarants' employment and, in the absence of an analysis whether the statements did in fact relate to a matter within the scope of the declarants' employment, the statements should not have been admitted.

Argued December 5, 2019—officially released July 28, 2020

Procedural History

Action to recover damages for, inter alia, alleged employment discrimination, and for other relief, brought to the Superior Court in the judicial district of New London, where the matter was tried to the court, *Hon. Joseph Q. Koletsky*, judge trial referee; judgment for the plaintiff, from which the defendant appealed and the plaintiff cross appealed. *Reversed*; *new trial.*

Clare Kindall, solicitor general, with whom, on the brief, were *William Tong*, attorney general, and *Matthew F. Larock* and *Nancy A. Brouillet*, assistant attorneys general, for the appellant-appellee (defendant).

Jacques J. Parenteau, with whom was *Magdalena Wiktor* for the appellee-appellant (plaintiff).

Michael E. Roberts, *Scott Madeo*, and *Kimberly A. Jacobsen* filed a brief for the Connecticut Commission on Human Rights and Opportunities as amicus curiae.

Opinion

ALVORD, J. The defendant, Department of Mental Health and Addiction Services, appeals from the judgment of the trial court rendered following a court trial in favor of the plaintiff, Virlee Kovachich. The plaintiff filed a cross appeal. On appeal, the defendant claims

that the court improperly (1) admitted into evidence settlement communications between the parties, (2) found that the defendant violated the Connecticut Fair Employment Practices Act (act), General Statutes § 46a-60 et seq., by providing insufficient accommodations to the plaintiff and failing to engage in the interactive process required under the act, (3) precluded the defendant from cross-examining the plaintiff with deposition testimony that was changed through an errata sheet, and (4) determined that hearsay statements by any state employee, including statements from the plaintiff's union representatives, were admissible against the defendant as admissions by a party opponent.[1] On cross appeal, the plaintiff claims that the court improperly denied both her posttrial request to file a second amended complaint to conform to the proof at trial and motion to open the judgment.[2]We agree with the defendant's first, third, and fourth claims and, accordingly, reverse the judgment of the trial court.[3]

The following facts, as found by the trial court or otherwise undisputed, and procedural history are relevant to our resolution of this appeal. The plaintiff worked

[1] In addition, the defendant amended its appeal to challenge the court's award of attorney's fees to the plaintiff and includes such claim in its principal appellate brief. Because we agree with the defendant's first, third, and fourth claims, we reverse the judgment of the trial court, including the award of attorney's fees.

[2] The Commission on Human Rights and Opportunities (commission) was granted permission to file an amicus brief. In its brief, the commission first argued that the court properly found that the defendant failed to accommodate the plaintiff's disability and failed to engage in the interactive process in violation of the act. Next, the commission emphasized that the court, in concluding that the defendant failed to engage in the interactive process in good faith, had "looked, at least in part, to negotiations which occurred once the plaintiff filed her complaint with the commission." The commission then argued that "the confidentiality of the commission's mediation process must be protected for the commission to fulfill its statutory mandate."

[3] In light of our reversal of the judgment of the trial court and remand for a new trial, it is unnecessary for us to address the defendant's second claim and the claims made by the plaintiff in her cross appeal. We address the defendant's third and fourth claims because they are likely to arise on remand.

as a licensed practical nurse for the defendant and primarily was assigned to the Brief Care Unit of the Southeastern Mental Health Authority (SMHA). At some point during her employment with the defendant, the plaintiff began experiencing reactions to scents. On January 24, 2011, the plaintiff submitted to the defendant a medical provider report from her physician, Doron J. Ber, which stated that she "has allergic and non-allergic rhinitis and asthma. These conditions are intermittent, but can be 100 [percent] debilitating." The plaintiff requested from the defendant accommodations in the form of a "scent free work environment" and a "HEPA filter for the office."

In an April 14, 2011 letter, Tommy Wilson, the chairperson of the defendant's review committee pursuant to the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq., notified the plaintiff that "the . . . committee approves your request for a reasonable accommodation." The letter set forth the following as "the committee's final reasonable accommodations": "1. Upon admission to the brief care unit all clients are to turn over all aerosol sprays to be locked up and inventoried by staff with their personal belongings. Upon being discharged from the brief care unit all inventoried aerosol sprays along with their belongings are to be returned. 2. That the scent-free working environment signs remain up on the unit and that all staff is notified of the scent-free environment and what that means. 3. To notify any overtime staff that the brief care unit is scent-free. 4. The agency is to provide a working air filtration system with a HEPA filter; the filter system can be the existing filter system or a portable unit that is able to filter the entire brief care office area. The nurse's station is 294 square feet and the entire unit is 8470 square feet." Following the approval of the plaintiff's accommodations, some employees did not comply with the scent-free working environment designation. In a February 1, 2012 letter to Cheryl Jacques, the director

of SMHA, the plaintiff's counsel sought "to engage in an interactive process with respect [to] the provision of reasonable accommodations for [the plaintiff's] disability and ensuring that she is adequately protected in the workplace." The plaintiff's counsel requested a meeting to discuss the plaintiff's concerns and potential accommodations that could be made to address those concerns. A meeting was held on April 3, 2012. The plaintiff, her counsel, Wilson, and Human Resources Director Theresa Tiska attended. The attendees discussed the plaintiff's requests that the defendant include a notice on the Brief Care Unit overtime sign-up sheet, provide educational materials to coworkers, and take additional action to enforce the scent-free working environment.

On April 13, 2012, the plaintiff filed a complaint with the Commission on Human Rights and Opportunities (commission), alleging that she was denied reasonable accommodations on the basis of a disability. The commission issued a release of jurisdiction to sue on September 9, 2013.[4] On September 30, 2013, the plaintiff commenced the present action.[5] In count one of the operative complaint filed March 4, 2015, the plaintiff alleged that the defendant had discriminated against her in the terms and conditions of her employment by failing to provide reasonable accommodations for the plaintiff's disability and by failing to engage in a good faith interactive process in violation of the act. The plaintiff alleged that she continued to suffer adverse incidents caused by coworkers' violations of the scent-free working environment designation. She alleged that the defendant made no serious effort to educate the workforce and that "[t]he lack

[4] With respect to the plaintiff's claim of retaliation, she filed a complaint with the commission on June 27, 2014, and received a release of jurisdiction on January 22, 2015.

[5] On January 28, 2014, the defendant filed a motion to dismiss, which was granted in part. Specifically, the trial court, *Cole-Chu, J.*, determined that the court lacked jurisdiction over any claims arising prior to October 16, 2011. That ruling is not a subject of this appeal.

of educational efforts has led to misunderstandings and has prevented voluntary compliance with the restriction." She alleged that the defendant refuses to enforce Work Rule 13, which prohibits intentionally interfering with the productivity of another employee, when an employee intentionally interferes with the plaintiff's ability to perform her work by knowingly wearing a chemical-based fragrance. She further alleged that the defendant had "failed to assist its own managers in the implementation of the fragrance free restriction, including [a] policy drafted in April, 2011, to the frustration of on line managers and union delegates responsible for the safety of the employees they work with day-to-day." Lastly, the plaintiff alleged that the defendant "failed to engage in a good faith interactive process designed to solve the reasonable accommodation problem by failing to meet with [the] plaintiff and her representatives and rejecting all of [the] plaintiff's proposals without offering alternative solutions." She alleged that she "has suffered the loss of wages and benefits, including significant compensatory and sick time, and has suffered emotional distress, loss of enjoyment of life and harm to her reputation."

In count two, the plaintiff alleged that the defendant "has retaliated against [her] for filing a complaint of disability discrimination, has failed to engage in a good faith interactive process, and has failed to accommodate her disability." She further alleged that she had been constructively discharged because of her disability. She alleged that the defendant retaliated against her "for opposing the discriminatory conduct [to] which she was subjected by not providing the accommodations sought leading to the constructive discharge" of the plaintiff. She alleged that as a result of the defendant's conduct, she "has suffered damages including, but not limited to, loss of wages, loss of enjoyment of life, emotional distress and attorney's fees and costs." On December

2, 2015, the defendant filed an answer and special defenses. The plaintiff filed her reply on November 30, 2016.[6]

The matter was tried to the court, *Hon. Joseph Q. Koletsky*, judge trial referee, in March and April, 2018. On April 20, 2018, the court issued its oral decision rendering judgment for the plaintiff, determining that the plaintiff had proven her allegations of violations of the act. The court found "that the plaintiff was deprived of $3800 of additional pension income, finding it more probable than not the plaintiff would have worked for two more years but for the wrongful actions of the defendant." The court further found that the plaintiff was constructively discharged. It awarded the plaintiff $125,000 in damages for "emotional distress caused by the actions of the defendant . . . ."

On April 20, 2018, the plaintiff filed a motion for attorney's fees, and the defendant filed an objection on July 17, 2018. The plaintiff filed a memorandum in support of her motion for attorney's fees on July 25, 2018, and the defendant filed an objection on August 22, 2018. At the conclusion of oral argument on August 23, 2018, the court orally granted the motion, awarding the plaintiff attorney's fees in the amount of $415,389.50. The plaintiff subsequently filed a motion to open the judgment and a request for leave to amend her complaint to conform to the proof at trial, both of which were denied. The defendant appealed, and the plaintiff cross appealed.

As a threshold matter, we address the plaintiff's contention that the defendant's appeal is moot because it "does not contest the trial court's factual and legal finding of retaliation violating § 46a-60 (a) (4)." We disagree.

[6] On April 21, 2017, the defendant filed a motion for summary judgment, which was denied by the court, *Bates, J.*, on October 12, 2017.

"Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [a] court's subject matter jurisdiction . . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way." (Internal quotation marks omitted.) *Stamatopoulos* v. *ECS North America, LLC*, 172 Conn. App. 92, 97, 159 A.3d 233 (2017).

The plaintiff argues that each of the claims raised by the defendant on appeal concerns only the plaintiff's claim of discrimination asserted in count one of her complaint. She maintains that "even if this court were to agree with [the] defendant on count one, no practical relief can be provided in light of the trial court's unchallenged finding of retaliation on count two." The defendant responds that the plaintiff and the court relied on the same nexus of facts for both counts and that the plaintiff's "retaliation claims were completely enmeshed with her disability discrimination claims that [the] defendant failed to accommodate her disability and failed to engage in a good faith interactive process." Emphasizing that the court "failed to separate the counts or issue separate findings for the counts," it argues that it has challenged the entirety of the court's ruling. We are persuaded that we have jurisdiction to address the defendant's appellate claims.

We do not construe the defendant's appellate claims as limited to challenging the court's judgment on the plaintiff's discrimination claim only. As we conclude subsequently in this opinion, the court improperly admitted into evidence settlement documents and relied on those documents in support of its determination that the defendant failed to engage in the interactive process. That error is not confined to the plaintiff's discrimination claim. The plaintiff's retaliation count specifically alleged that the defendant had "retaliated against [her] for filing a complaint of disability discrimi-

nation, [had] failed to engage in a good faith interactive process, and [had] failed to accommodate her disability." Thus, we agree with the defendant that the plaintiff's retaliation claim was entwined with her discrimination claim. Because the claims in the trial court and the court's rulings thereon were interrelated, the defendant's appeal sufficiently challenges the court's rendering of judgment on both counts. See *In re Elijah C.*, 326 Conn. 480, 496, 165 A.3d 1149 (2017) (concluding that appeal was not moot for failure to adequately brief challenge to independent basis where challenge to court's second finding was inextricably linked with challenge to first finding and, considering interdependence of claims, respondent's second claim was sufficiently clear to permit court to address it on its merits). Accordingly, we conclude that the defendant's appeal is not moot.

Before turning to the merits of the defendant's claims, we briefly set forth the standard of review applicable to those claims. "When presented with an evidentiary issue, as in this case, our standard of review depends on the specific nature of the claim presented. . . . [T]o the extent a trial court's admission of evidence is based on an interpretation of [law], our standard of review is plenary. . . . A trial court's decision to admit evidence, if premised on a correct view of the law, however, calls for the abuse of discretion standard of review." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Midland Funding, LLC* v. *Mitchell-James*, 163 Conn. App. 648, 653, 137 A.3d 1 (2016).

I

We first address the defendant's claim that the court improperly admitted into evidence settlement communications exchanged between the parties during the mandatory mediation process before the commission and relied on those communications in finding the

defendant liable for violations of the act. We agree with the defendant.

The following additional facts and procedural history are relevant to this claim. On March 1, 2018, the defendant filed a motion in limine arguing, inter alia, that evidence of settlement negotiations, including documents that were part of the commission's mandatory mediation process, were inadmissible. It first maintained that the offers to compromise were inadmissible pursuant to § 4-8 of the Connecticut Code of Evidence. It also argued that the documents were inadmissible because they were part of the mandatory mediation process required by General Statutes § 46a-83.[7]The court reserved ruling on the motion. During the plaintiff's direct examination on March 8, 2018, the plaintiff's counsel sought to introduce into evidence an April 29, 2013 e-mail from the plaintiff's counsel to Assistant Attorney General Jill Lacedonia (exhibit 13). Exhibit 13, which has a subject line stating "RE: Kovachich—request for demand," asks to arrange a time to talk, mentions certain issues on which the parties purportedly reached agreement "at the last mediation session," attaches information regarding policies adopted by certain employers regarding scent-free working environments, and discusses the state of the law surrounding scent-free working environments. It concludes by stat-

[7] Although the motion in limine cited General Statutes § 46a-8, that citation appears to be a typographical error. General Statutes § 46a-83 (d) provides: "Not later than sixty days after the date of sending notice that a complaint has been retained after a case assessment review, the executive director or the executive director's designee shall assign an investigator or commission legal counsel to hold a mandatory mediation conference. A mediation conference may but need not be held if the commission has held a pre-answer conciliation conference. The investigator or commission legal counsel assigned to conduct the mediation shall not be assigned to investigate the complaint. The mandatory mediation conference may not be scheduled for the same time as a fact-finding conference held pursuant to subsection (f) of this section. The mediator may hold additional mediation conferences to accommodate settlement discussions."

ing: "In any event if you are willing to work with me to find a solution then we can see if litigation can be avoided. I am available on Friday."

At trial, the plaintiff's counsel stated that he was seeking to admit exhibit 13 "for the purpose stated that it was compiled by her attorney for the purpose of providing it to the state." The trial court inquired whether it was offered "for the truth," and the plaintiff's counsel responded: "Nope, for the purpose of communication." The defendant's counsel objected to exhibit 13, stating that her "chief objection is these are settlement demands" and seeking to direct the court's attention to the statutory provision governing mandatory mediation at the commission.[8] The court overruled the objection, stating that it was "unable to [perceive] a settlement demand in exhibit 13, and the document is nonhearsay, not offered for the truth of the statements asserted."

The plaintiff's counsel also offered into evidence a May 30, 2013 e-mail from him to Assistant Attorney General Lacedonia (exhibit 14). The e-mail attaches a number of April, 2013 e-mails regarding recent instances of scent exposures. The text of the e-mail states in part: "Virlee is not going to accept a solution that has her apply for disability retirement as you suggested. We thin[k] that is the wrong approach to disability that can

[8] The defendant's counsel was unable to find the citation to the statute on which she sought to rely and asked, "[m]ay I switch, Your Honor, since I was incorrect to [refer to] Tait and LaPlante and the Connecticut Supreme Court for authority?" The court responded: "No. You may not."

The court later stated: "As long as we seem to be stopped for the moment, § 4-8 of the 2018 Code of Evidence titled, 'offers to compromise,' evidence of an offer to compromise or settle a disputed claim is inadmissible on the issues of liability and the amount of the claim. It does not require the exclusion of evidence offered for another purpose, such as proving bias or prejudice of a witness, refuting a contention of undue delay, or proving an effort to obstruct. Statements of fact or admissions of liability made by a party are also excluded from the applicability of the rule. So that's—it's 4-8 of the code."

be accommodated. We are going to move forward with this case. We would like that to be in context of the agency changing its approach—to formally adopt a policy that is endorsed by the highest levels of management, to educate, and to empower supervisors to take action when employees intentionally disrespect the right to breathe despite e-mails asking for awareness. Let me know what solutions your side proposes." The defendant's counsel objected to exhibit 14, stating: "They go to settlement discussions at the [c]ommission . . . and therefore, should not be admitted . . . ." The court overruled the objection and admitted exhibit 14 in full.

The plaintiff's counsel also sought to introduce into evidence a July 22, 2013 letter he wrote to Daniel Salerno, an investigator with the commission, and copied to the plaintiff and Assistant Attorney General Lacedonia (exhibit 12).

Exhibit 12, a letter, begins by stating: "I am writing at your request to clarify the demands of our client with respect to her claim of disability discrimination." The letter asserted the following demands: (1) "[The defendant] will adopt a policy of scent restriction following consultation with the union and its membership will adopt a scent free policy modeled on the attached Human Resources Administrative Rule implemented by the City of Portland, Oregon. The policy will apply to all . . . buildings [controlled by the defendant]. The policy will request that employees refrain from the use of strongly scented products. Supervisors will be permitted to enforce the policy when it becomes apparent that the use of a scent is interfering with a [coworker's] ability to breathe, and by extension, his or her ability to do the job. Discipline will not be imposed for unknowing violation of the scent free restriction; only when the employee knowingly refuses to accommodate

a [coworker's] disability, thereby placing the [coworker] at risk of potential adverse health consequences will progressive discipline be imposed at the discretion of management. The collective bargaining agreement, [a]rticle 34, provides support for this policy: 'The employer shall maintain safe and healthy working conditions. The employer agrees to take reasonable measures to provide a work environment which minimizes the risk of injury to employees.' Work rule # 13 also provides support for the imposition of discipline when an employee knowingly refuses to modify behavior that may cause harm to another employee and prevent that employee from doing the job—'An employee shall not interfere with the productivity of other employees or cause any interruption of work.' " (2) "[The defendant] will educate the [workforce], train supervisors, and post notices in buildings and offices that it controls in order to implement the policy and inform employees and the public of the scent free policy." (3) "[The defendant] will offer scent free classes for mandatory training or provide mandatory training on line." (4) "To the extent that [the defendant] has not done so, it will provide a working air filtration system with a HEPA filter to filter the entire unit where [the plaintiff] is assigned." (5) "[The plaintiff] will be allowed to leave the immediate area when a violation of the scent free restriction occurs that may cause her to sustain adverse health consequences and a safe room will be made available to [the plaintiff] to use for the duration of her shift until the scent restricting her ability to work is removed from the air she is breathing. Additionally, the person violating the scent free restriction will be asked to leave the area and remove the scent before accessing the area again." (6) "[The plaintiff] will not be penalized on the overtime list if she is unable to accept an overtime opportunity because the location is likely to cause her to be exposed to scents harmful to her health. Her place on the overtime list will be preserved and she will be

offered the next overtime opportunity that she is able to take." (7) "All of [the plaintiff's] 67 hours of sick time will be restored or she will be paid the monetary equivalent which we calculate as $2106." (8) "[The defendant] will reimburse and pay [the plaintiff's attorney's] fees which are $16,773 to date." The letter further stated: "We would be happy to meet with representatives of the [defendant] who have authority to discuss and recommend these requests."

When offering exhibit 12 into evidence, the plaintiff's counsel stated that it was offered "not for the truth of the matter asserted, but for the fact that this proposal was presented." The defendant's counsel objected on the basis that it contained settlement discussions and was part of the commission's mediation process and was therefore inadmissible. The court overruled the objection, stating that "[t]hey are highly relevant to the state's ability to react intelligently and legally to requests for accommodation. They are inseparable in my mind between what might be a technical request for settlement, which I doubt, and a perfectly admissible request for reasonable accommodation for an acknowledged disability by the defendant. Therefore, the objection is overruled."

During the defendant's cross-examination of the plaintiff on March 15, 2018, the defendant introduced into evidence a May 3, 2013 e-mail from Assistant Attorney General Lacedonia to the plaintiff's counsel (exhibit OOOOO), which was Lacedonia's reply to the e-mail from the plaintiff's counsel that had been introduced into evidence as exhibit 13. The plaintiff's counsel stated that he had no objection, and the court admitted exhibit OOOOO in full. Exhibit OOOOO states: "Thanks for these materials. They seem to support the position that requests for voluntary compliance in limiting scents in the workplace (which my client has done extensively) is a reasonable accommodation, while mandatory scent free policies are not. I left you a voicemail message

around noon today. I look forward to hearing from you what [the plaintiff] is seeking in resolution of this matter and am hopeful that you have a creative solution that will be workable for all parties."

In its oral decision issued on April 20, 2018, referencing the good faith interactive process, the court found that the process "did not continue after the plaintiff's attorney's letter to . . . Assistant Attorney General Jill Lacedonia. The court infers that from no evidence of any response whatsoever."

On appeal, the defendant argues that the court improperly admitted into evidence exhibits 12, 13, and 14. The plaintiff responds that the "trial court properly admitted [exhibits] 12, 13, and 14 because the e-mails were not offers of compromise and the proposal was part of [the] plaintiff's effort to find a solution to the question of reasonable accommodation." She argues that exhibits 13 and 14 "were directed to counsel for the defendant and contained information and case law that supported [the] plaintiff's claim for enforcement of the scent-free restriction; there was no 'demand' despite the appearance of the word 'demand' in [the] subject line of the e-mail." She further argues that exhibit 12 communicated the "plaintiff's proposal for reasonable accommodation and sought a meeting to further discuss the matter. While the letter does indicate a desire to 'clarify demands,' the letter is primarily designed as a proposal for a good faith discussion with a request to meet with appropriate officials of the [defendant]." We agree with the defendant.

We begin our analysis by setting forth relevant legal principles. "It has long been the law that offers relating to compromise are not admissible on the issue of liability." *Simone Corp.* v. *Connecticut Light & Power Co.*, 187 Conn. 487, 490, 446 A.2d 1071 (1982). Section 4-8 (a) of the Connecticut Code of Evidence provides the general rule that "[e]vidence of an offer to compromise

or settle a disputed claim is inadmissible on the issues of liability and the amount of the claim." The rule does not require the exclusion of "[e]vidence that is offered for another purpose, such as proving bias or prejudice of a witness, refuting a contention of undue delay or proving an effort to obstruct a criminal investigation or prosecution, or . . . statements of fact or admissions of liability made by a party." Conn. Code Evid. § 4-8 (b) (1) and (2). "This rule reflects the strong public policy of promoting settlement of disputes." *Miko* v. *Commission on Human Rights & Opportunities*, 220 Conn. 192, 209, 596 A.2d 396 (1991). Pursuant to General Statutes § 46a-84 (e), hearing officers appointed by the commission are prohibited from receiving in evidence "[a]ny endeavors or negotiations for conciliation, settlement or alternate dispute resolution."[9]See also *Miko* v. *Commission on Human Rights & Opportunities*, supra, 210. Moreover, § 46a-83 (j) protects from disclosure "what has occurred in the course of the commission's processing of a complaint, provided the commission may publish the facts in the case and any complaint that has been dismissed and the terms of conciliation when a complaint has been adjusted."[10]

[9] General Statutes § 46a-84 (e) provides: "A human rights referee or attorney who volunteers service pursuant to subdivision (18) of section 46a-54 may supervise settlement endeavors. In employment discrimination cases only, the complainant and respondent, with the permission of the chief referee, may engage in alternate dispute resolution endeavors for not more than three months. The cost of such alternate dispute resolution endeavors shall be borne by the complainant or the respondent, or both, and not by the commission. Any endeavors or negotiations for conciliation, settlement or alternate dispute resolution shall not be received in evidence."

[10] With regard to mediation generally, General Statutes § 52-235d prohibits the disclosure, with certain exceptions, of oral or written communications received or obtained during the course of a mediation, which the statute defines as "a process, or any part of a process, which is not court-ordered, in which a person not affiliated with either party to a lawsuit facilitates communication between such parties and, without deciding the legal issues in dispute or imposing a resolution to the legal issues, which assists the parties in understanding and resolving the legal dispute of the parties." Section 52-235d (c) further provides that "[a]ny disclosure made in violation of any provision of this section shall not be admissible in any proceeding."

We next set forth our standard of review. A trial court's decision as to whether to admit settlement communications, and for what purpose, is reviewed for an abuse of discretion. See *Monti* v. *Wenkert*, 287 Conn. 101, 126, 947 A.2d 261 (2008); *Bugryn* v. *Bristol*, 63 Conn. App. 98, 111, 774 A.2d 1042, cert. denied, 256 Conn. 927, 776 A.2d 1143 (2001), cert. denied, 534 U.S. 1019, 122 S. Ct. 544, 151 L. Ed. 2d 422 (2001). "[A] trial court may exercise its discretion with regard to evidentiary rulings, and the trial court's rulings will not be disturbed on appellate review absent abuse of that discretion. . . . In our review of these discretionary determinations, we make every reasonable presumption in favor of upholding the trial court's ruling. . . . Evidentiary rulings will be overturned on appeal only where there was an abuse of discretion and a showing by the [appellant] of substantial prejudice or injustice." (Internal quotation marks omitted.) *Bugryn* v. *Bristol*, supra, 111.

Turning to the documents at issue, exhibit 12 is addressed to Salerno, an investigator with the commission, and copied to the plaintiff and Assistant Attorney General Lacedonia. It makes clear that the purpose of the communication is to provide a response to Salerno's "request to clarify the demands of our client with respect to her claim of disability discrimination."[11] With respect to exhibits 13 and 14, both communications

[11] The mandatory mediation process is set forth in General Statutes § 46a-83 (d), which provides: "Not later than sixty days after the date of sending notice that a complaint has been retained after a case assessment review, the executive director or the executive director's designee shall assign an investigator or commission legal counsel to hold a mandatory mediation conference. A mediation conference may but need not be held if the commission has held a pre-answer conciliation conference. The investigator or commission legal counsel assigned to conduct the mediation shall not be assigned to investigate the complaint. The mandatory mediation conference may not be scheduled for the same time as a fact-finding conference held pursuant to subsection (f) of this section. The mediator may hold additional mediation conferences to accommodate settlement discussions."

are addressed to Assistant Attorney General Lacedonia. The subject line of exhibit 13 is "RE: Kovachich—request for demand," and it discusses issues on which the parties purportedly reached agreement "at the last mediation session." It concludes by stating: "In any event if you are willing to work with me to find a solution then we can see if litigation can be avoided." Last, exhibit 14 discusses the plaintiff's intention of moving forward with the case, restates certain of her previous requests of the defendant, and asks Assistant Attorney General Lacedonia to respond with "solutions your side proposes." Given the content of the communications, we conclude that the court abused its discretion in admitting the challenged evidence on the basis that it did not constitute settlement communications.

Turning to the requirement that the appellant show substantial prejudice, we note that the court, after admitting into evidence the settlement communications, relied on those communications to conclude that the interactive process "did not continue after the plaintiff's attorney's letter to . . . Assistant Attorney General Jill Lacedonia. The court infers that from no evidence of any response whatsoever."[12] Thus, it is

[12] In order to prevail on a reasonable accommodation claim, a plaintiff is required to show that "(1) he is disabled within the meaning of the [statute], (2) he was able to perform the essential functions of the job with or without a reasonable accommodation, and (3) [the defendant], despite knowing of [the plaintiff's] disability, did not reasonably accommodate it. . . . If the employee has made such a prima facie showing, the burden shifts to the employer to show that such an accommodation would impose an undue hardship on its business." (Internal quotation marks omitted.) *Festa* v. *Board of Education*, 145 Conn. App. 103, 114, 73 A.3d 904, cert. denied, 310 Conn. 934, 79 A.3d 888 (2013). "Once a disabled individual has suggested to his employer a reasonable accommodation, federal law requires, and [our Supreme Court] agree[s], that the employer and the employee engage in an informal, interactive process with the qualified individual with a disability in need of the accommodation . . . [to] identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. . . . In this effort, the employee must come forward with some suggestion of accommodation, and the employer must make a good faith effort to participate in that discussion." (Citation

apparent that the court impermissibly considered the plaintiff's settlement communications on the issue of liability. Accordingly, we agree with the defendant that the trial court erred in admitting exhibits 12, 13, and 14 into evidence and grounding its finding that the defendant had failed to engage in the interactive process on the inadmissible settlement communications. Compounding its error, the court incorrectly "[inferred] . . . from no evidence of any response whatsoever" that the interactive process "did not continue after the plaintiff's attorney's letter to . . . Assistant Attorney General Jill Lacedonia." Contrary to the court's finding, a reply e-mail, exhibit OOOOO, was admitted into evidence as a full exhibit, and that e-mail further references a voicemail that Lacedonia left for the plaintiff's counsel.

The plaintiff argues that the exception to the general rule of inadmissibility for evidence that is offered for another purpose is applicable. The plaintiff maintains that because "the documents were offered as evidence of efforts made by [the] plaintiff to engage [the] defendant in an interactive good faith discussion, the evidence was clearly offered for another purpose, a recognized exception to the rule." In support of this argument, the plaintiff cites federal cases that "have admitted evidence of compromise offers and negotiations for the purpose of showing that the parties engaged in the interactive process . . . ." In *Griesinger* v. *University of Cincinnati*, United States District Court, Docket No. 1:13-cv-808 (KLL) (S.D. Ohio March 25, 2016), the United States District Court for the Southern District of Ohio concluded that offers of accommodations made by counsel for the defendant to the plaintiff's counsel with respect to a skills assessment needed prior to completing a practicum, including, inter alia, advance notice of the skills to be tested, individual instructions, and an opportunity to watch

omitted; internal quotation marks omitted.) *Curry* v. *Allan S. Goodman, Inc.*, 286 Conn. 390, 416, 944 A.2d 925 (2008).

other students' skills tests, could be admissible for the purpose of showing that the university engaged in the interactive process to reach a reasonable accommodation. In a previous decision from the United States District Court for the Southern District of Ohio, *Linebarger* v. *Honda of America Mfg., Inc.*, 870 F. Supp. 2d 513, 521 n.2 (S.D. Ohio 2012), the court found that interactions between counsel regarding accommodations offered to an employee in the form of two additional unscheduled break periods were not barred by rule 408 of the Federal Rules of Evidence where the communications were made in an effort to reach a consensus on a reasonable accommodation. In *Cook* v. *Morgan Stanley Smith Barney*, United States District Court, Docket No. H-13-1321 (GHM) (S.D. Tex. August 15, 2014), the United States District Court for the Southern District of Texas denied a motion to strike the affidavit of the defendant's counsel, which stated that "during the interactive process to see if there was any accommodation that could be made to facilitate [the plaintiff's] return to work . . . [the plaintiff's counsel] advised that his client would not be returning to work at [the defendant] and would move forward with filing a claim against [the defendant]." (Internal quotation marks omitted.) The court stated that the evidence contained in the affidavit was used to support the defendant's argument that the plaintiff had refused to return to work without a change in supervisor. Id. The court concluded that the evidence was being used "not to show liability but to show that [the defendant] was engaging in the interactive process." Id. In *Williams* v. *British Airways, PLC*, United States District Court, Docket Nos. 04-CV-0471, 06-CV-5085 (CPS) (SMG) (E.D.N.Y. September 27, 2007), the United States District Court for the Eastern District of New York stated that "settlement discussions may be considered in the ADA context for the purpose of assessing a party's participation in the interactive process." The court considered statements contained in an

affidavit detailing settlement discussions that occurred during a conference with a magistrate. Id.

We note that, unlike the cases cited by the plaintiff, the present case concerns settlement communications that occurred within the context of the commission's mandatory mediation program. The general rule that evidence of attempted settlements is not admissible against either party to the settlement negotiations is consistent with the statutory protections afforded conciliation efforts before the commission. As set forth previously, § 46a-84 (e) prohibits hearing officers from receiving in evidence "[a]ny endeavors or negotiations for conciliation, settlement or alternate dispute resolution . . . ." Relatedly, § 46a-83 (j) protects from disclosure "what has occurred in the course of the commission's processing of a complaint, provided the commission may publish the facts in the case and any complaint that has been dismissed and the terms of conciliation when a complaint has been adjusted."

As the commission's amicus brief explains, the act "relies heavily on conciliation as a means of eliminating discriminatory employment practices. To further this process, the act bars absolutely the disclosure of conciliation endeavors and postpones disclosure of complaints until they have been dismissed or adjusted. The obvious purpose of providing confidentiality is to encourage compromise, while premature disclosure might force the parties into public postures, which would inhibit or prevent settlements." *Green* v. *Freedom of Information Commission*, 178 Conn. 700, 703, 425 A.2d 122 (1979). As the commission argues, "[w]eakening the safeguards which generally preclude parties from offering settlement or compromise evidence into the record would have a chilling effect on the commission's mediation efforts, eviscerating the conciliatory purpose and expeditious nature of the commission's administrative process. This remains the case even when such evidence relates to details of the interactive

process." We agree with the commission's sentiment and conclude that the trial court imposed liability on the defendant on the basis of inadmissible evidence. Accordingly, we reverse the judgment of the court and remand the matter for a new trial.

II

In light of the fact that we are remanding the matter for a new trial, we address, as a matter likely to arise on remand, the defendant's claim that the court improperly precluded admission of the plaintiff's deposition responses "because [the] plaintiff had amended those responses on an errata sheet." The plaintiff responds that, "because [the] defendant chose to accept the changes made to the errata sheet, [the] plaintiff's prior testimony was not admissible."[13] We agree with the defendant.

The following additional procedural history is relevant to our resolution of this claim. The plaintiff was deposed on April 7, 2017, and the defendant filed a motion for summary judgment on April 21, 2017. The plaintiff subsequently executed an errata sheet, in which she amended eleven deposition responses, three of which amendments are relevant for purposes of this appeal. The plaintiff changed her response that she had her hair permed every six to eight weeks between 2010 and 2014, to "I did not have my hair permed between 2010 and 2014."[14] Next, the plaintiff testified during her

[13] The plaintiff further argues that, "[r]egardless of the correctness of the trial court's ruling enforcing the discovery order, [the] defendant cannot demonstrate harmfulness." In light of our resolution of the claim raised in part I of this opinion, in which we have concluded that the defendant is entitled to a reversal of the judgment and a new trial, it is unnecessary that, in relation to the defendant's third and fourth claims, we undertake an analysis of whether such errors were harmful.

[14] The plaintiff also indicated on the errata sheet "see also page 173:7-8." The testimony on that page relates to a February, 2013 incident in which a coworker came to work after having gone to a hair salon, and the plaintiff experienced a reaction. When asked whether she would have problems when she had gone to the hair salon on her own during that time, the plaintiff responded: "I was not going to the hairdressers back then."

deposition that she had not discussed with SMHA officials transferring to a position that did not involve direct patient care. In her errata sheet, the plaintiff amended her response to state: "I asked Tommy Wilson on two occasions to find employment elsewhere." Finally, the plaintiff testified during her deposition that she "did not take any" steps to notify management that the accommodations were not working. In her errata sheet, she changed that response to state: "I frequently e-mailed management notifying them of the continued scent exposures." In her errata sheet, the plaintiff stated as the reason for each of the eleven changes that "I was having difficulty concentrating on the task at hand due to the stress of losing my father, concern for my mother's health, who I had left in Florida to attend the deposition, and my own physical illness."

On May 30, 2017, the defendant filed a motion to suppress the errata sheet, in which it argued, inter alia, that the plaintiff's changes to her deposition responses were material and substantive and that they "effectively destroy the usefulness of the prior deposition." The plaintiff filed an objection. In its ruling denying the motion to suppress, the court, *Bates*, *J.*, agreed with the defendant that many of the corrections made on the errata sheet were "actually changes in the deposition testimony . . . ." The court declined to strike the corrections, stating that "the majority of courts which have faced this request have taken another approach . . . they allow the disputed errata sheet items to remain in the court records under seal. . . . However, as a condition of allowing the altered deposition testimony to remain in the court records, the party who took the deposition has the right to reopen the deposition at the expense of the deponent and engage in examination of the deponent regarding these 'new facts.' " (Citation omitted.) The court then directed the defendant "to identify any 'corrections' noted by the plaintiff that it is willing to accept." The court stated that the defendant

then could notice a new deposition of the plaintiff to explore the changes. The court ordered the plaintiff to bear the cost of the new deposition. On July 6, 2017, the defendant, in response to the court's order directing it to identify any corrections it was willing to accept, filed a notice stating, "[n]otwithstanding that the plaintiff's changes are internally contradictory, the defendant will accept these changes and proceed on the pending motion for summary judgment."[15](Footnote omitted.)

During the cross-examination of the plaintiff at trial, on March 8, 2018, the defendant's counsel asked the plaintiff whether she had her hair permed regularly from 2010 through 2014. The plaintiff testified that she "did not go to a hairdresser at all between that timeframe." The defendant's counsel indicated that she would like to enter as full exhibits portions of the plaintiff's deposition testimony as admissions of the plaintiff. The plaintiff's counsel responded: "[T]he issue that we would have with that is that the pages of the deposition that tend to be used, at least some of them, were corrected by an errata sheet and so what's being offered is not the actual answer." The issue was not resolved and was raised again on March 14, 2018. The plaintiff's counsel informed the court that the defendant, in response to the court's order on the motion to suppress the errata sheet, had filed a pleading in which it accepted the changes made in the errata sheet. The issue again was not resolved because the defendant's counsel stated that she intended to inquire of the witness on a different topic.

The next day, on March 15, 2018, in connection with the cross-examination of the plaintiff, the defendant's counsel sought to introduce into evidence an excerpt

[15] We are not persuaded by the plaintiff's argument that "because [the] defendant chose to accept the changes made to the errata sheet, [the] plaintiff's prior testimony was not admissible." The defendant's pleading, in which it "accepted" the changes, merely provided the court with notice that it would proceed on its pending motion for summary judgment rather than notice a new deposition to address the amendments.

of the plaintiff's deposition testimony as an admission of the plaintiff. The excerpt contained the plaintiff's original deposition testimony that she had her hair permed every six to eight weeks. The plaintiff's counsel objected on the basis that "an errata sheet was filed with the change accepted . . . ." The defendant's counsel responded that the original testimony was "still an admission of a party opponent," and that while the plaintiff's counsel may wish to enter into evidence the errata sheet, it "does not change the fact that she made the statement" and "[i]t doesn't erase her testimony." The court stated that it disagreed with the interpretation of the defendant's counsel. In response, counsel referred the court to § 8-3 of the Connecticut Code of Evidence,[16] containing the hearsay exception for a statement by a party opponent, and Practice Book § 13-31 (a) (3), permitting the use of the deposition of a party by an adverse party for any purpose. Following argument, the court sustained the plaintiff's objection to the "offer of the proffered exhibit with respect to hair coloring unless the errata sheet is incorporated."

The defendant's counsel then sought to impeach the plaintiff with the original deposition testimony, on the basis that the original testimony constituted a prior inconsistent statement.[17] The plaintiff objected, and the

[16] The defendant's counsel also cited the commentary to § 8-3 (1) (A) of the Connecticut Code of Evidence, which provides in relevant part: "If the statement at issue was made by a party opponent in a deposition, the statement is admissible in accordance with Practice Book § 13-31 (a) (3). That provision permits an adverse party to use at trial, for any purpose, the deposition of a party . . . . This rule of practice was deemed 'analogous' to the hearsay exception covered by Section 8-3 (1) in *Gateway Co.* v. *DiNoia*, 232 Conn. 223, 238 n.11, 654 A.2d 342 (1995) (construing Practice Book [1978–97] § 248 [1] [c], predecessor to Practice Book § 13-31 [a] [3])."

[17] The defendant's counsel asked the plaintiff: "Ma'am, at your deposition on April 7, 2017, do you recall being asked, do you color your hair, and your response was, on occasion. Then you were asked, do you ever have your hair permed, and you said, on—I had on occasion. And then you were asked, when's the last time you had your hair permed. You said, months ago. Then you were asked, question: Okay. Between 2010 and 2014, did you ever have your hair permed? Yes."

court sustained the objection, stating, "[y]ou're simply reading from the deposition and the objection is sustained because it's not inconsistent with any testimony that I recall." The defendant's counsel again asked the plaintiff whether she recalled testifying at her deposition regarding having her hair permed, and whether she ever had her hair permed between 2010 and 2014. The plaintiff's counsel objected, and the court stated that it was the same objection he had sustained previously. The defendant's counsel responded that she had asked the plaintiff only regarding coloring her hair, not perming it. The following exchange then occurred:

"The Court: You read all the way through hair perm and [the plaintiff's counsel] objected and I sustained the objection. There will be no more—there will be no more questions on page sixty-one and sixty-two of the deposition, period.

"[The Defendant's Counsel]: Your Honor, I believe I only read through line four on page sixty-two.

"The Court: Most recently, yes.

"[The Defendant's Counsel]: Okay.

"The Court: Before the break, however, you read almost the entire pages when [the plaintiff's counsel] objected and I sustained it. Once more, there will be no further questions on pages sixty-one and sixty-two of the deposition for any reason whatsoever.

"[The Defendant's Counsel]: May I make an offer of proof, Your Honor?

"The Court: No, you may not. It is not a relevance objection, therefore, you do not have the right to make an offer of proof. Please put a question."

On appeal, the defendant argues that the trial court improperly precluded admission of the plaintiff's original deposition responses. We agree with the defendant.

We first set forth relevant principles of law. Practice Book § 13-31 (a) governs the use of depositions in court proceedings and provides in relevant part that "any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were there present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions: (1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. . . . (3) The deposition of a party . . . may be used by an adverse party for any purpose." Practice Book § 13-31 (a) (3), permitting the use of the deposition of a party by an adverse party for any purpose, is consistent with the rules of evidence permitting a statement by a party opponent to be admitted into evidence as an exception to the hearsay rule. See *Gateway Co.* v. *DiNoia*, 232 Conn. 223, 238, 654 A.2d 342 (1995).

"[T]he trial court has discretion to admit or exclude deposition testimony offered as evidence under § 248 [now Practice Book § 13-31 (a) (3)]. . . . While it is normally true that this court will refrain from interfering with a trial court's exercise of discretion . . . this presupposes that the trial court did in fact exercise its discretion. [D]iscretion imports something more than leeway in decision-making. . . . It means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." (Internal quotation marks omitted.) *Friends of Animals, Inc.* v. *United Illuminating Co.*, 124 Conn. App. 823, 834–35, 6 A.3d 1180 (2010); see id., 835 (trial court failed to exercise discretion properly where it based its decision to exclude evidence on rule of practice permitting introduction of deposition transcript into evidence where deponent is unavailable, rather than provision stating

that deposition of party may be used by adverse party for any purpose).

Applying these principles to the present case, § 8-3 of the Connecticut Code of Evidence and Practice Book § 13-31 (a) (3) permitted the defendant to use at trial the deposition testimony of the plaintiff, an adverse party, for any purpose, including as a statement by a party opponent or to impeach the testimony of the plaintiff. The issue in the present case, however, arises out of the defendant's effort to use deposition testimony that later was amended by an errata sheet. Practice Book § 13-30 (d), which governs the use of errata sheets, provides in relevant part: "If requested by the deponent or any party, when the testimony is fully transcribed the deposition shall be submitted to the deponent for examination and shall be read to or by the deponent. Any changes in form or substance which the deponent desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the deponent for making them. The deposition shall then be signed by the deponent certifying that the deposition is a true record of the deponent's testimony . . . ."

Our appellate courts have not addressed the question of what use a party may make at trial of deposition testimony that was amended through an errata sheet. Rule 30 (e) (1) of the Federal Rules of Civil Procedure, which contains similar language to Practice Book § 13-30 (d), provides in relevant part: "On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which: (A) to review the transcript or recording; and (B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them." Given the similarity in lan-

guage and the absence of appellate authority interpreting Practice Book § 13-30 (d), we look to cases construing the federal rule for guidance. See *Artie's Auto Body, Inc.* v. *Hartford Fire Ins. Co.*, 287 Conn. 208, 214–15, 947 A.2d 320 (2008).

The United States Court of Appeals for the Second Circuit has stated that "when a party amends his testimony under [r]ule 30 (e), [t]he original answer to the deposition questions will remain part of the record and can be read at the trial. . . . Nothing in the language of [r]ule 30 (e) requires or implies that the original answers are to be stricken when changes are made. . . . This court has recognized that because [a]ny out-of-court statement by a party is an admission, a deponent's original answer should [be] admitted [into evidence] even when he amends his deposition testimony —with the deponent [o]f course . . . free to introduce the amended answer and explain the reasons for the change." (Citations omitted; internal quotation marks omitted.) *Podell* v. *Citicorp Diners Club, Inc.*, 112 F.3d 98, 103 (2d Cir. 1997); see also *Maynard* v. *Stonington Community Center*, United States District Court, Docket No. 3:15cv483 (RNC) (D. Conn. May 17, 2016) (explaining that changes to the form and substance of plaintiff's deposition testimony "will not have the effect of replacing or deleting any of her deposition testimony . . . [r]ather, her changed answers become part of the record generated during discovery" (citations omitted; internal quotation marks omitted)).

The Second Circuit in *Podell* v. *Citicorp Diners Club, Inc.*, supra, 112 F.3d 103, cited *Lugtig* v. *Thomas*, 89 F.R.D. 639 (N.D. Ill. 1981), in which the United States District Court for the Northern District of Illinois explained the policy reason underlying the conclusion that the original deposition answers must remain. It stated: "The witness who changes his testimony on a material matter between the giving of his deposition and his appearance at trial may be impeached by his

former answers, and the cross-examiner and the jury are likely to be keenly interested in the reasons he changed his testimony. There is no apparent reason why the witness who changes his mind between the giving of the deposition and its transcription should stand in any better case. . . . The rule is less likely to be abused if the deponent knows that all the circumstances the original answers as well as the changes and the reasons will be subject to examination by the trier of fact." (Citation omitted.) *Lugtig* v. *Thomas*, supra, 642.

Several trial courts also have endorsed this federal interpretation. See, e.g., *Elisea* v. *CFC Stillwater, LLC*, Superior Court, judicial district of New Haven, Docket No. CV-14-6044056-S (September 15, 2015) (61 Conn. L. Rptr. 162, 168) (finding court's reasoning in *Lugtig* instructive on use of original deposition answers and use of changes made and, in denying motion to suppress errata sheet, stating that "[t]he original answers to the deposition questions, the changes and reasons for same, shall remain a part of the record"); *Bonner* v. *New Haven*, Superior Court, judicial district of New Haven, Docket No. CV-11-6025382-S (February 21, 2014) (relying on *Podell* to conclude that "when a party amends deposition testimony, the court may consider both the revised responses in the errata sheet and the original responses for evidentiary purposes" and considering both original deposition responses and amended errata responses in determining that there existed genuine issue of material fact precluding summary judgment).

We also interpret Practice Book § 13-30 (d) in accordance with the Second Circuit's elucidation of rule 30 (e) of the Federal Rules of Civil Procedure and hold that original deposition responses are admissible notwithstanding amended answers on an errata sheet. In the present case, the court sustained the plaintiff's objection to the offer of the plaintiff's original deposition testimony "unless the errata sheet is incorporated." Thus, the court precluded the defendant from admitting

into evidence the original response. The court should have entered the original response into evidence and, if the plaintiff sought to do so, permitted the plaintiff to "introduce the amended answer and explain the reasons for the change." (Internal quotation marks omitted.) *Podell* v. *Citicorp Diners Club, Inc.*, supra, 112 F.3d 103. Accordingly, the court improperly sustained the plaintiff's objection to the admission of the original deposition responses.

III

We next address, as an issue likely to arise on remand, the defendant's claim that "the trial court erred in ruling that any e-mail from any defendant employee—even the plaintiff's union advocates—constituted an admission of a party opponent." We agree with the defendant.

The following procedural history is relevant to this claim. On March 7, 2018, during the plaintiff's testimony, the plaintiff's counsel sought to admit into evidence e-mails among the plaintiff, two union delegates, Donna Stoll and Paul Cummings, and others. The defendant's counsel objected on the basis that the e-mails contained hearsay, and the plaintiff's counsel responded: "That's fine, Your Honor, because . . . Cummings and . . . Stoll . . . are going to testify. . . . So we'll—to the extent that there's something that needs to come in from them, will be heard from them." Despite that response, the trial court stated that the e-mails may be admissible "given the broadening of our Code of Evidence," and directed the plaintiff's counsel to ask the plaintiff to identify Stoll and Cummings. The following colloquy then occurred:

"[The Plaintiff's Counsel]: So who is Donna Stoll?

"[The Plaintiff]: She's a union delegate.

"The Court: What?

"[The Plaintiff]: Union delegate.

"The Court: Yeah. But employed by the union or employed by—

"[The Plaintiff]: By the state.

"The Court: Anywhere particular to your department?

"[The Plaintiff]: She worked for the Department of Mental Health and Addiction Services at SMHA so, yes.

"The Court: Thank you. Okay.

"[The Plaintiff's Counsel]: And she also—did she work on your unit?

"[The Plaintiff]: The scheduler's office was in the back on the unit in 361 in the Resource Room.

"[The Plaintiff's Counsel]: All right. And who is Paul Cummings?

"[The Plaintiff]: Paul Cummings is also a union delegate.

"The Court: And an employee?

"[The Plaintiff]: Same place.

"The Court: Okay. All right. The objection on hearsay is overruled. So one—4 is [a] full exhibit." Exhibit 4 contained Stoll's and Cummings' responses to the plaintiff's communication regarding a "continued scent noted on" a coworker. Cummings, who testified that he was employed by the defendant as a psychiatric social worker and later a community clinician, responded to the plaintiff's e-mail thread by stating: "I believe BCP is designated as scent free and staff should adhere to this every day."

During the direct examination of Stoll on March 20, 2018, the plaintiff's counsel asked whether she was aware of instances of employees wearing scents intentionally. Stoll responded by recounting an occasion in which a staff member approached Stoll needing her assistance in a union matter. When Stoll met with the

staff member, she was wearing a fragrance, which Stoll described as "quite strong," and the staff member told Stoll: "I just put some perfume on. I hope it doesn't bother you." The defendant's counsel objected to the testimony on the basis that it constituted hearsay, and the court responded: "No. It's a party opponent under the rules." The defendant's counsel stated: "We don't know who it was." Subsequently, Stoll testified that the staff member was Maureen Crooker, a mental health assistant at SMHA.

The defendant's counsel then stated: "I'd like to renew my motion to strike since we now know that it was a union member who wore the fragrance rather than a member of management. So I don't believe it would be [an] admission of a party or conduct of a party." The court overruled the objection, stating: "It is a state employee; union member, management member. That distinction that you [are] raising has been abolished with the 2018 version of the Code of Evidence. We went through this weeks ago and my rulings have been based on the now-effective Code of Evidence which expands greatly, almost similar to the federal rules if not exactly, the rules for statements of a party opponent. The old Connecticut rule is no longer with us. So your renewed objection, as was the prior objection, is overruled because it just isn't—it is hearsay but it is the exception to the hearsay rule of a statement of a party opponent. The party being the state of Connecticut and an employee of the state of Connecticut." The court then told the defendant's counsel: "You know, no more renewals. My ruling is final on this question."

On appeal, the defendant argues that the court improperly concluded that certain statements of the defendant's employees were admissible against the defendant as admissions of a party opponent. We agree with the defendant.

We first set forth relevant legal principles and our standard of review. Section 8-3 (1) (D) of the Connecticut Code of Evidence provides that "a statement by the party's agent, servant or employee, concerning a matter within the scope of the agency or employment, and made during the existence of the relationship" is not excluded by the hearsay rule. Section 8-3 (1) further provides that "[t]he hearsay statement itself may not be considered to establish . . . the existence or scope of the relationship under (D) . . . ." The commentary to § 8-3 (1) (D) of the Connecticut Code of Evidence states that subdivision (D), which was amended effective February 1, 2018, "encompasses the exception set forth in rule 801 (d) (2) (D) of the Federal Rules of Evidence and adopted in a majority of state jurisdictions."[18]Under rule 801 (d) (2) (D) of the Federal Rules of Evidence, in order for evidence to be admissible, "the proponent of the evidence must establish (1) the

[18] The commentary to § 8-3 (1) (D) of the Connecticut Code of Evidence also provides: "The notes of the advisory committee on the 1972 proposed rules express '[d]issatisfaction' with the traditional rule requiring proof that the agent had actual authority to make the offered statement on behalf of the principal. The advisory committee notes cite to '[a] substantial trend [that] favors admitting statements related to a matter within the scope of the agency or employment. *Grayson* v. *Williams*, 256 F.2d 61 [66] (10th Cir. 1958); [see also *Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines Holland*] v. *Tuller*, [292 F.2d 775, 783–84 (D.C. Cir.), cert. denied, 368 U.S. 921, 82 S. Ct. 243, 7 L. Ed. 2d 136] (1961); *Martin* v. [*Savage Truck Line, Inc.*], 121 F. Supp. 417 [418–19] (D.D.C. 1954), and numerous state court decisions collected in 4 [J. Wigmore, Evidence (4th Ed. 1972) § 1078, pp. 166–69 n.2] . . . .' Fed. R. Evid. 801 (d) (2) (D), advisory committee notes. This trend has continued since then. See, e.g., *B & K Rentals & Sales Co.* v. *Universal Leaf Tobacco Co.*, 324 Md. 147, 158, 596 A.2d 640 (1991) (adopting federal approach and observing that '[t]he authorities, both courts and commentators, have almost universally condemned the strict [common-law] rule in favor of the . . . rule set forth in [rule 801 (d) (2) (D) of the Federal Rules of Evidence]'). Connecticut now adopts the modern rule as well, and, in doing so, overrules the line of cases adhering to the common law in requiring proof that the declarant was authorized to speak on behalf of the employer or principal. See, e.g., *Cascella* v. *Jay James Camera Shop, Inc.*, 147 Conn. 337, 341, 160 A.2d 899 (1960); *Wade* v. *Yale University*, 129 Conn. 615, 617–18, 30 A.2d 545 (1943)."

existence of the agency relationship, (2) that the statement was made during the course of the relationship, and (3) that it relates to a matter within the scope of the agency." (Internal quotation marks omitted.) *Crigger* v. *Fahnestock & Co.*, 443 F.3d 230, 238 (2d Cir. 2006). "To the extent [that] a trial court's admission of evidence is based on an interpretation of the [Connecticut] Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review." (Internal quotation marks omitted.) *Customers Bank* v. *Tomonto Industries, LLC*, 156 Conn. App. 441, 445, 112 A.3d 853 (2015).

In the present case, the trial court issued a blanket ruling that statements made by "a state employee, union member, [or] management member" were admissible pursuant to § 8-3 (1) (D) of the Connecticut Code of Evidence, without conducting the analysis required to determine whether the statement related to a matter within the scope of the declarant's employment. Indeed, the plaintiff failed to establish that Crooker's statement to Stoll "concern[ed] a matter within the scope of the agency or employment." See Conn. Code Evid. § 8-3 (1) (D); see also *Henderson* v. *General Electric Co.*, 469 F. Supp. 2d 2, 11 (D. Conn. 2006) (agents' statements did not satisfy rule 801 (d) (2) (D) of the Federal Rules of Evidence, in that statements did not relate to matter within scope of agency relationship and therefore were inadmissible). Similarly, the court admitted the e-mails authored by Stoll and Cummings, both union delegates, without conducting any analysis as to whether the statements contained within those e-mails concerned a matter within the scope of their employment. Accordingly, the court erred in concluding that all statements made by employees of the defendant, including union dele-

gates, were admissible pursuant to § 8-3 (1) (D) of the Connecticut Code of Evidence.

The judgment, including the award of attorney's fees, is reversed and the case is remanded for a new trial.

In this opinion the other judges concurred.

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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.* MICHAEL T., SC 20230
Judicial District of New Haven at G.A. 23

Criminal; Prosecutorial Impropriety; Whether Prosecutor Committed Improprieties in Questioning of Victim by Assuming Facts Not in Evidence and During Closing and Rebuttal Arguments by Referring to Facts Not in Evidence, Vouching for Victim's Credibility, and Appealing to Jurors' Emotions; Whether Trial Court Properly Instructed Jury on Defendant's Decision Not to Testify Per General Statutes § 54-84 (b). The defendant appeals directly to the Supreme Court under General Statutes § 51-199 (b) (3) from his conviction of six counts of sexual assault in the first degree and risk of injury to a minor in connection with the sexual assault of the minor victim. He claims on appeal that the trial prosecutor committed prosecutorial impropriety that deprived him of a fair trial by virtue of how she questioned the victim and conducted her closing and rebuttal arguments. The defendant argues with respect to the questioning of the victim that the prosecutor improperly assumed facts that were not in evidence by asking the victim about whether "the defendant put his private in her private," where the victim had only indicated that "the defendant hurt her private with his private," and by asking the victim about "blood [that] came out of her private," where the victim had answered "his" when asked whether blood came out of her private or the defendant's private. The defendant argues with respect to the prosecutor's closing and rebuttal arguments that she improperly discussed facts not in evidence, vouched for the victim's credibility, and appealed to the jurors' emotions with her references to the difficulties of the jury's experience over the course of the trial and her characterizations of the victim and the sexual assault. The defendant also claims on appeal that the trial court improperly instructed the jury under General Statutes § 54-84 (b) that the defendant did not testify and had a constitutional right not to testify and that the jury "must draw no unfavorable inference from the defendant's failure to testify." Section 54-84 (b) provides: "Unless the accused requests otherwise, the court shall instruct the jury that they may draw no unfavorable inferences from the accused's failure to testify. In cases tried to the court, no unfavorable inferences shall be drawn by the court from the accused's silence." The defendant argues that the trial court improperly denied his request to substitute the words "elected

not to testify" in place of the words "failure to testify" in the jury instruction. He also argues, to the extent that § 54-84 (b) required the trial court to use the words "failure to testify" in the jury instruction, that § 54-84 (b) violated his right not to testify under the fifth amendment of the federal constitution.

The Practice Book Section 70-9 (a) presumption in favor of coverage by cameras and electronic media does not apply to the case above.

GREAT PLAINS LENDING, LLC et al. *v.* STATE OF CONNECTICUT, DEPARTMENT OF BANKING et al., SC 20340
Judicial District of New Britain

Tribal Sovereign Immunity; Whether Trial Court Properly Remanded Matter for Evidentiary Hearing; Whether Trial Court Applied Proper Test to Determine If Plaintiffs Were "Arms of the Tribe"; Whether Plaintiff Tribal Chairman Was Entitled to Immunity from Administrative Orders and Civil Penalties. The plaintiffs Great Plains Lending, LLC and Clear Creek Lending are businesses owned and operated by the Otoe-Missouria Tribe of Indians (tribe) that made or offered loans to Connecticut residents over the Internet. The plaintiff John R. Shotton is the tribal chairman and a corporate officer of Great Plains. The defendant Connecticut Department of Banking (defendant) determined that the plaintiffs were conducting business without having a proper state license and in violation of state banking and usury laws. It issued administrative cease and desist orders and sought to impose monetary penalties on the plaintiffs. The plaintiffs filed a motion to dismiss with the defendant, arguing that they were entitled to tribal sovereign immunity from its orders and penalties. The defendant denied the motion on the ground that tribal sovereign immunity did not apply, and the plaintiffs filed an administrative appeal. The trial court remanded the matter to the defendant with direction to decide the plaintiffs' immunity claims. On remand, the defendant concluded that the plaintiffs had not met their burden of establishing that they were "arms of the tribe" entitled to the sovereign immunity afforded to the tribe. The plaintiffs then filed this administrative appeal. The trial court considered that there are many state and federal multi-factor tests for determining whether a business entity is an "arm of the tribe" for immunity purposes and noted that the defendant applied the test set forth in *Sue/Perior Concrete & Paving, Inc.* v. *Lewiston Golf Course Corp.*, 25 N.E. 3d 928 (N.Y. 2014). It also observed that the plaintiffs advocated for use of the test set

forth in *Breakthrough Mgmt. Group, Inc.* v. *Chukchansi Gold Casino & Resort*, 629 F. 3d 1173 (10th Cir.). The trial court determined that the defendant committed legal error by applying the *Sue/Perior* test, which it characterized as improperly giving "primacy . . . to the financial relationship between the tribe and the commercial entities it has created." The trial court also declined to accept the *Breakthrough* test as the standard and instead concluded that the proper test was set forth in *People ex rel. Owen* v. *Miami Nation Enterprises*, 386 P. 3d 357 (Cal. 2016), which is similar to the *Breakthrough* test but does not include that test's consideration of whether granting "arm of the tribe" status furthers tribal sovereign immunity principles. The trial court stated that the *Miami Nation* test does include, however, the assessment of "functional considerations," evidence of which was not present here. The trial court further concluded that "the viability of the [defendant's] claims against [Shotton] rises and falls with the determination of whether Great Plains and Clear Creek are arms of the tribe." The trial court accordingly ordered that the matter be remanded to the defendant for an evidentiary hearing in accordance with its decision. The plaintiffs appeal and the defendants, the department and its commissioner, cross appeal from the trial court's judgment. Both sets of parties challenge the trial court's determinations regarding the remand order, the proper test for ascertaining "arm of the tribe" status, and whether Shotton is entitled to immunity from the defendant's administrative orders and civil penalties.

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

DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION

NOTICE OF AVAILABILITY OF FORMS FOR THE REPORTING OF OPERATING DATA FOR REGISTERED DIVERSIONS AND SUBMISSION DEADLINE

In accordance with Section 22a-368a of the General Statutes of Connecticut, the Commissioner of the Connecticut Department of Energy and Environmental Protection hereby gives notice that a form for the reporting of operating data for water diversions registered pursuant to Section 22a-368 CGS is available on-line at www.ct.gov/deep/waterdiversionreporting. The deadline for diversion registrants to submit their first completed reporting form is January 31, 2021. This form will contain daily diversion operating data for the year 2020. All registrants expected to submit annual reports were mailed individual notices dated September 30, 2019. Anyone requiring more information regarding this matter may visit the Department's Water Diversion Reporting website at www.ct.gov/deep/waterdiversionreporting or contact the Department by email at deep.waterdiversionreporting@ct.gov or by phone at 860-424-3020. Department staff has limited access to phones during the on-going health crisis therefore email contact is preferred.

July 14, 2020

Katherine S. Dykes
Commissioner
Department of Energy and
Environmental Protection

NOTICES

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.

Application for Reinstatement

DOCKET NO. CV14-6046179-S. CHIEF DISCIPLINARY COUNSEL VS. DRESSLER, LAWRENCE. SUPERIOR COURT, JUDICIAL DISTRICT OF NEW HAVEN AT NEW HAVEN, JULY 17, 2020.

NOTICE: This is to advise that Lawrence Dressler (407011) has filed an Application for Reinstatement to the practice as an attorney in Connecticut. The application, which was filed in the Superior Court for the Judicial District of New Haven on May 20, 2020, has been filed in the following original grievance file: Chief Disciplinary Counsel vs. Dressler, Lawrence (NNH-CV14-6046179). The application will be referred to the Chief Court Administrator for referral to a Standing Committee on Recommendations for Admission to the Connecticut Bar.

Office of the Chief Clerk