CONNECTICUT LAW JOURNAL

Published in Accordance with General Statutes Section 51-216a

VOL. LXXXII No. 10 September 8, 2020 83 Pages

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CONNECTICUT LAW JOURNAL
(ISSN 87500973)

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

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

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

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

CONNECTICUT APPELLATE REPORTS

Vol. 199

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

PETRICIA S. WEAVER *v.* SCOTT A. SENA
(AC 42411)

Keller, Prescott and Devlin, Js.

Syllabus

The plaintiff appealed to this court from the judgment of the trial court granting the motion filed by the defendant to modify custody of the parties' minor child. The trial court had previously approved the parties' written agreement under which they agreed to share joint legal custody of the child, with the child living with the plaintiff and the defendant having visitation rights. The parties had further agreed that, in the event of an impasse, the plaintiff would have final decision-making authority in certain matters pertaining to the child. The defendant alleged that the plaintiff was incapable of fostering a healthy relationship between him and the child and that she continuously interfered with his access to and time with the child. The court ordered that primary physical custody was to be transferred to the defendant, who would have final decision-making authority in matters pertaining to the child. *Held*:

1. The plaintiff could not prevail on her claim that the trial court improperly modified custody without first finding that a material change in circumstances had occurred and improperly determined that modification was in the best interests of the child: although the court did not explicitly find a material change in circumstances, an implicit finding of a change in circumstances will satisfy the threshold predicate for modification, as there was ample evidence that the plaintiff's efforts to embroil the child in the custody dispute and alienate him from the defendant had intensified, which constituted a material change in circumstances; furthermore, it was not improper for the court to agree with most of the findings of the psychologist who conducted a child custody psychological examination but to decline to follow his recommendation that the child should continue to reside with the plaintiff, as the psychologist testified that the plaintiff's efforts to interfere with the defendant's relationship with the child had not curtailed and that the custody arrangement would need to be changed if the plaintiff's behavior continued unabated; moreover, in granting the motion to modify, the court did not

abuse its discretion in placing more weight on certain statutory (§ 46b-56 (c)) factors other than ones the plaintiff believed may have been favorable to her, and the order transferring final decision-making authority to the defendant was not improper, as the court reasonably could have concluded that, coupled with the practical rationale of affording such authority to the primary physical custodian, the plaintiff's emotional difficulties and untreated mental health issues would interfere with her role as the final decision maker.

2. The plaintiff's unpreserved claim that the trial court violated her right to due process by unduly limiting her case-in-chief was unavailing, as she failed to raise a claim of constitutional magnitude and, thus, failed to establish the existence of a constitutional violation: although the plaintiff asserted that the court limited her ability to put on evidence by continually admonishing and bullying her, the admonitions by the court were necessary to keep her focused on the issues, she identified only a single comment by the court as an example of its conduct, and she did not identify evidence that she was prevented from presenting; moreover, despite the plaintiff's claim that the court unduly limited her case-in-chief by affording her only one hour to present her case, she could not claim that her constitutional right to be heard was violated, as she was afforded more time to present her case than she requested, she did not identify evidence that she would have introduced if she had been afforded more time, and she did not allege how she was harmed by the time limitation imposed by the court.

Argued May 13—officially released September 8, 2020

Procedural History

Action for custody of and support for the parties' minor child, brought to the Superior Court in the judicial district of New London at Norwich, where the defendant filed a cross complaint; thereafter, the court, *Hon. Joseph J. Purtill*, judge trial referee, rendered judgment in accordance with the parties' separation agreement; subsequently, the court, *Hon. Joseph Q. Koletsky*, judge trial referee, granted the defendant's motion to modify custody of the parties' minor child, and the plaintiff appealed to this court. *Affirmed.*

Cody A. Layton, with whom were *Drzislav Coric* and, on the brief, *Aleyshia F. Young*, for the appellant (plaintiff).

Campbell D. Barrett, with whom were *Johanna S. Katz* and, on the brief, *Jon T. Kukucka*, for the appellee (defendant).

Opinion

DEVLIN, J. The plaintiff, Petricia S. Weaver, appeals from the judgment of the trial court granting the motion filed by the defendant, Scott A. Sena, to modify custody of the parties' minor child. The plaintiff claims that the trial court erred in granting the defendant primary physical custody of, and final decision-making authority in matters pertaining to, the parties' minor child, who was then eleven years old and had resided with the plaintiff since his birth, in the absence of a finding of a material change in circumstances and in contravention of the minor child's best interests. The plaintiff also contends that the trial court violated her constitutional right to due process by "unduly limiting her case-in-chief." We affirm the judgment of the trial court.[1]

[1] In addition to transferring primary physical custody of the minor child to the defendant, the trial court ordered that the plaintiff's visitation and telephone calls with the minor child be supervised. The court also ordered the plaintiff to undergo a psychiatric evaluation. She has also challenged these orders on appeal.

On May 21, 2019, while this appeal was pending, the plaintiff filed an application for an emergency ex parte order of custody, in addition to a motion to modify custody. Both of the plaintiff's motions were scheduled to be heard on June 3, 2019.

On June 4, 2019, the parties entered into an agreement whereby, inter alia, counsel would "cooperate to immediately secure a [PhD] level 1 therapist for the minor child that is in network (Cigna) and is reasonably close in proximity to the [d]efendant's home." Once that therapist was secured, the plaintiff would commence unsupervised visitation with the minor child every two out of three weekends from Friday at 7 p.m. to Sunday at 5 p.m. The parties agreed that their counsel would contact James J. Connolly, the psychologist who performed the child custody evaluation in this case, to ascertain whether the psychiatric evaluation that the plaintiff had undergone was the type of evaluation that he anticipated was necessary in December, 2018, and that if it was not, Connolly would further articulate his expectations regarding that evaluation, and the plaintiff would "cooperate with [the] evaluation immediately." The parties also agreed that the minor child would be allowed to call either party between 7 and 7:30 p.m. each evening for no more than five minutes. Because the terms of this agreement superseded

The following procedural history is relevant to our review of the plaintiff's claims on appeal. The minor child was born to the parties, who were never married, on May 6, 2007. In March, 2008, the plaintiff filed this action against the defendant seeking orders of custody and support as to the minor child. In July, 2008, the trial court, *Hon. Joseph J. Purtill*, judge trial referee, approved the parties' agreement that they would share joint legal custody of the minor child, the plaintiff would have primary physical custody, and the defendant would have visitation rights.

Since the entry of those initial orders, the parties have engaged in extensive litigation regarding the custody of and visitation with the minor child. Prior to the December 10, 2018 orders, from which the present appeal was taken, the parties most recently, on May 18, 2016, entered into an agreement whereby, inter alia, they would continue to share joint legal custody of the minor child, who would continue to reside with the plaintiff. The parties agreed that the defendant, who resides in Massachusetts, would continue to have visitation with the minor child during the school year pursuant to prior court orders, essentially every other weekend and certain holidays. The parties further agreed that, in the event of an impasse, the plaintiff would have final decision-making authority in educational, medical and religious decisions. The court adopted the parties' agreement and further ordered that the minor child would spend three weeks of vacation each summer

the December, 2018 orders pertaining to the restrictions that were placed on the plaintiff's visitation and telephone calls with the minor child, and the order that she undergo a psychiatric evaluation, there is no practical relief that we can afford to the plaintiff on her appeal from those orders. Accordingly, the plaintiff's challenges to those December, 2018 orders, which are no longer in effect, are moot. See *Thunelius* v. *Posacki*, 193 Conn. App. 666, 686, 220 A.3d 194 (2019). The plaintiff did not amend her appeal to challenge the June 4, 2019 superseding orders, which, as noted, were entered by agreement of the parties.

with the plaintiff and the remainder of the summer with the defendant.

On January 3, 2018, the defendant filed a motion to modify, seeking immediate physical custody of the minor child and supervised visitation for the plaintiff. In his motion, the defendant alleged that the plaintiff had demonstrated that she was incapable of fostering a healthy relationship between him and the minor child and that she continuously interfered with his access to and time with him. The defendant cited to two specific instances in December, 2017, when the plaintiff's interference with his relationship with the minor child demonstrated her increased efforts to manipulate the minor child and alienate him from the defendant.

Following a four day hearing, the trial court, *Hon. Joseph Q. Koletsky*, judge trial referee, issued a memorandum of decision on December 10, 2018, ordering, inter alia, that it was in the best interests of the minor child that primary physical custody be transferred to the defendant in Massachusetts "immediately upon the end of the last day of school prior to Christmas vacation at [the minor child's] school at 12:30 p.m." and that the plaintiff would have supervised visitation with the minor child in Massachusetts. The court ordered that the defendant would have final decision-making authority.[2] The court further ordered that the plaintiff would not have any unsupervised telephone calls with the minor child until she received mental health treatment and until further order of the court. The court retained jurisdiction over the case, ordered the plaintiff to submit to a psychiatric evaluation, and prohibited the plaintiff from filing any further motions without receiving prior permission from the court. The court explained

[2] The court did not set forth a specific visitation schedule, nor did it specify the issues on which the defendant would be afforded final decision-making authority.

that the foregoing orders were necessitated by the "emotional difficulties of the minor child [that] have been caused in large part by [the plaintiff's] behavior, being driven, as it is, by her serious mental [health] issues, which, to date, have largely not been treated effectively." This appeal followed.[3]

I

The plaintiff challenges the trial court's decision to transfer primary physical custody of the minor child to the defendant. Specifically, the plaintiff claims that the court improperly modified custody without first finding that a material change in circumstances had occurred since the entry of the prior order. She also challenges the trial court's determination that modification was in the best interests of the minor child. We are not persuaded.

"General Statutes § 46b-56 provides trial courts with the statutory authority to modify an order of custody or visitation. When making that determination, however, a court must satisfy two requirements. First, modification of a custody award must be based upon [inter alia] a material change [in] circumstances which alters the court's finding of the best interests of the child . . . .[4] Second, the court shall consider the best interests of the child and in doing so may consider several factors.[5]

[3] On December 20, 2018, the plaintiff filed a motion to set aside and, or, reargue, which the trial court denied on that same day.

On February 13, 2019, the plaintiff filed an amended motion to set aside and, or, reargue. The court summarily denied the motion on February 19, 2019.

[4] Modification of a custody award also may be based on "a finding that the custody order sought to be modified was not based upon the best interests of the child." (Internal quotation marks omitted.) *Clougherty* v. *Clougherty*, 162 Conn. App. 857, 868, 133 A.3d 886, cert. denied, 320 Conn. 932, 134 A.3d 621 (2016). Neither party in this case claimed that the May 18, 2016 order was not in the best interests of the minor child.

[5] General Statutes § 46b-56 (c) provides: "In making or modifying any order as provided in subsections (a) and (b) of this section, the court shall consider the best interests of the child, and in doing so may consider, but shall not be limited to, one or more of the following factors: (1) The

. . . Before a court may modify a custody order, it must find that there has been a material change in circumstances since the prior order of the court, but the ultimate test is the best interests of the child. . . . These requirements are based on the interest in finality of judgments . . . and the family's need for stability. . . . The burden of proving a change to be in the best interest of the child rests on the party seeking the change. . . .

"Not all changes occurring in the time between the prior custody order and the motion for modification are material. . . . Although there are no bright-line

temperament and developmental needs of the child; (2) the capacity and the disposition of the parents to understand and meet the needs of the child; (3) any relevant and material information obtained from the child, including the informed preferences of the child; (4) the wishes of the child's parents as to custody; (5) the past and current interaction and relationship of the child with each parent, the child's siblings and any other person who may significantly affect the best interests of the child; (6) the willingness and ability of each parent to facilitate and encourage such continuing parent-child relationship between the child and the other parent as is appropriate, including compliance with any court orders; (7) any manipulation by or coercive behavior of the parents in an effort to involve the child in the parents' dispute; (8) the ability of each parent to be actively involved in the life of the child; (9) the child's adjustment to his or her home, school and community environments; (10) the length of time that the child has lived in a stable and satisfactory environment and the desirability of maintaining continuity in such environment, provided the court may consider favorably a parent who voluntarily leaves the child's family home pendente lite in order to alleviate stress in the household; (11) the stability of the child's existing or proposed residences, or both; (12) the mental and physical health of all individuals involved, except that a disability of a proposed custodial parent or other party, in and of itself, shall not be determinative of custody unless the proposed custodial arrangement is not in the best interests of the child; (13) the child's cultural background; (14) the effect on the child of the actions of an abuser, if any domestic violence has occurred between the parents or between a parent and another individual or the child; (15) whether the child or a sibling of the child has been abused or neglected, as defined respectively in section 46b-120; and (16) whether the party satisfactorily completed participation in a parenting education program established pursuant to section 46b-69b. The court is not required to assign any weight to any of the factors that it considers, but shall articulate the basis for its decision."

rules for determining when a material change in circumstances warranting the modification of custody has occurred, there are several relevant considerations, including whether . . . the change affects the child's well-being in a meaningful way." (Citations omitted; emphasis omitted; footnotes added; footnote omitted; internal quotation marks omitted.) *Clougherty* v. *Clougherty*, 162 Conn. App. 857, 868–70, 133 A.3d 886, cert. denied, 320 Conn. 932, 134 A.3d 621 (2016).

"Our standard of review of a trial court's decision regarding custody [and] visitation . . . orders is one of abuse of discretion. . . . [T]he trial court's decision on the matter of custody is committed to the exercise of its sound discretion and its decision cannot be overridden unless an abuse of that discretion is clear. . . . The controlling principle in a determination respecting custody is that the court shall be guided by the best interests of the child. . . . In determining what is in the best interests of the child, the court is vested with a broad discretion. . . . [T]he authority to exercise the judicial discretion under the circumstances revealed by the finding is not conferred upon this court, but upon the trial court, and . . . we are not privileged to usurp that authority or to substitute ourselves for the trial court. . . . A mere difference of opinion or judgment cannot justify our intervention. Nothing short of a conviction that the action of the trial court is one which discloses a clear abuse of discretion can warrant our interference. . . .

"The trial court has the opportunity to view the parties [firsthand] and is therefore in the best position to assess the circumstances surrounding a dissolution action, in which such personal factors as the demeanor and attitude of the parties are so significant. . . . [E]very reasonable presumption should be given in favor of the correctness of [the trial court's] action. . . . We are limited in our review to determining whether

the trial court abused its broad discretion to award custody based upon the best interests of the child as reasonably supported by the evidence." (Internal quotation marks omitted.) *Baker-Grenier* v. *Grenier*, 147 Conn. App. 516, 519–20, 83 A.3d 698 (2014). "We further note that a trial court's factual findings may be reversed on appeal only if they are clearly erroneous. To the extent that the plaintiff claims that the trial court should have credited certain evidence over other evidence that the court did credit, it is well settled that such matters are exclusively within the province of the trial court." *Peters* v. *Senman*, 193 Conn. App. 766, 779, 220 A.3d 114 (2019), cert. denied, 334 Conn. 924, 223 A.3d 380 (2020).

In this case, the defendant moved to modify custody on the ground that "the defendant has had two [recent] visits with the minor child in which the child has been crying and screaming [that] he doesn't want to go and wants to be home with his mother." The defendant alleged that "[t]his conduct on the part of the minor child is completely opposite the child's desire and demeanor just [one month earlier]." Because the minor child's newly expressed position "mirror[ed] the plaintiff's desires and requests in all of her motions," the defendant alleged, "the minor child is being manipulated and, or, 'coached,' by the plaintiff such that the plaintiff is essentially encouraging parental alienation between the minor child and the defendant."[6]

Although the trial court did not explicitly find a material change in circumstances, this court has held that an implicit finding of a change in circumstances will satisfy the threshold predicate for modification. See *Schade* v. *Schade*, 110 Conn. App. 57, 63, 954 A.2d 846, cert. denied, 289 Conn. 945, 959 A.2d 1009 (2008); see

[6] The defendant also alleged that the plaintiff took the minor child to the police department following one of his weekend visitations with the defendant so that the minor child could express to a police officer his desire not to visit the defendant but to stay with the plaintiff.

also *Hibbard* v. *Hibbard*, 139 Conn. App. 10, 22–23, 55 A.3d 301 (2012); *Lambert* v. *Donahue*, 78 Conn. App. 493, 506, 827 A.2d 729 (2003). The defendant's motion was based on recent and new allegations that the minor child was being "coached" and "manipulated" by the plaintiff in an effort to alienate him from the defendant. The escalation of the plaintiff's efforts to interfere with the defendant's relationship with the minor child, particularly the increasing emotional impact of those efforts on the child, which, the trial court found, was directly caused by the plaintiff's untreated mental health issues, was the focal point of the modification hearing. There is ample evidence in the record that the plaintiff's efforts to embroil the minor child in this custody dispute and alienate him from the defendant had intensified, as alleged in the defendant's motion to modify, constituting a material change in circumstances since the entry of the prior order.[7]

The plaintiff also challenges the trial court's determination that modification was in the best interests of the minor child. At the modification hearing, in addition to his own testimony, the defendant presented the testimony and written report of James J. Connolly, a licensed psychologist, who had been ordered by the court to conduct a child custody psychological evaluation. Connolly issued a thirty-one page report outlining the findings of his evaluation, which was admitted into evidence at the hearing and supported by his testimony at the hearing. Connolly opined, inter alia, that the plaintiff "is continuing to feel the psychological effects of [her] extremely abusive upbringing," particularly "very

[7] In his brief to this court, the defendant, who is represented by counsel, argues that he was not required to show a material change in circumstances because he sought only to modify physical custody, not legal custody, and that a motion to modify physical custody equates to a motion to modify visitation. The case cited by the defendant does not support this proposition, and we have found no other case that supports this novel argument.

substantial levels of anxiety along with some depression," and that she "appears to have transferred many of her feelings of anger and hypervigilance relating to her traumatizing family of origin to her feelings concerning [the defendant] . . . ." Connolly observed: "In addition to very powerful levels of anxiety and depression (which are currently not being treated in an effective fashion due to [her] failure to pursue adequate mental health treatment in the form of psychiatric and psychotherapeutic services), she also manifests a rather serious personality disorder . . . primar[ily] character[-ized] . . . [by] histrionic and compulsive tendencies of a quite substantial nature." As a result, the plaintiff "has a highly excessive level of concern about her son's . . . contacts with [the defendant]. [The plaintiff's] poorly controlled feelings of grievance and rage against [the defendant] and her overall state of uncontrolled emotionality appear to have created substantial obstacles for the ongoing relationship between [the defendant] and [the minor child]. [The plaintiff's] insistence that she has somehow or other dealt with the impact of her highly traumatic family of origin and that she is not subject to her untreated emotional disorder is entirely unfounded and misguided. Her protestations that she is not persistently interfering in [the minor child's] relationship with [the defendant] rang very untrue to this evaluator."

Connolly found that, although the minor child "was not suffering from a significant disorder of thought, mood, or anxiety at the present time," he was "experiencing a good deal of situational stress related to the internecine custody dispute between his biological parents." Connolly observed: "Although [the minor child] is experiencing substantial stress, he does not appear to have succumbed as of this point in time to an emotional disorder. He appears to be operating under the strong sense that he must act as his mother's protector and

defender, and this has certainly increased his personal stress." Connolly posited: "Let me be very clear about a basic matter that is the most important and troubling issue in this case: [*The plaintiff's*] *currently untreated psychological problems are the primary problem in this child custody matter and the primary issue that threatens the long-term psychological well-being of* [*the minor child*]." (Emphasis in original.) Connolly conditioned his recommendation that the plaintiff retain primary physical custody of the minor child on two requirements: that she immediately undertake "regular mental health treatment to address her serious psychological difficulties" and that she cease "her efforts to disrupt [the minor child's] visits with [the defendant]." If the plaintiff did not "fulfill in a serious way both of these conditions," Connolly opined that "transferring primary residence of [the minor child] to his father may be in order."

The plaintiff argues that the best interests of the minor child could have been served only if the trial court entered an order wholly consistent with Connolly's recommendations, specifically, maintaining primary physical custody of the minor child with her. It is clear from the trial court's decision that it afforded considerable weight to Connolly's opinion. Despite his misgivings pertaining to the plaintiff, Connolly opined that the minor child should continue to reside with her, but he noted that her efforts to interfere with the defendant's relationship with the minor child had not curtailed, even after repeated court intervention, and he foresaw that the custody arrangement would need to be changed if the plaintiff's behavior continued unabated. Rather than wait until the situation further deteriorated, the trial court declined to follow Connolly's recommendation to maintain primary physical custody of the minor child with the plaintiff. Because the court was entitled to accept or to reject all of part

of a witness' testimony, even the testimony of expert witnesses; see, e.g., *Petrov* v. *Gueorguieva*, 167 Conn. App. 505, 528–29, 146 A.3d 26 (2016); it was not improper for the court to agree with most of Connolly's findings but decline to follow his recommendation.[8]

In granting the defendant's motion to modify, the trial court clearly considered the statutory factors set forth in § 46b-56 (c), specifically, subdivision (6), "the willingness and ability of each parent to facilitate and encourage such continuing parent-child relationship between the child and the other parent as is appropriate, including compliance with any court orders," subdivision (7), "any manipulation by or coercive behavior of the parents in an effort to involve the child in the parents' dispute," and subdivision (12), "the mental and physical health of all individuals involved, except that a disability of a proposed custodial parent or other party, in and of itself, shall not be determinative of custody unless the proposed custodial arrangement is not in the best interests of the child . . . ." General Statutes § 46b-56 (c). The plaintiff argues that other statutory factors that the court should have considered in determining the best interests of the minor child weighed in her favor. Although the plaintiff may be correct in her assertion that other statutory factors may have been favorable to her, it was not an abuse of discretion for the court to place more weight on other statutory factors. The record amply supports the court's determination that, due to the emotional difficulties and untreated mental health issues of the plaintiff and her associated efforts to interfere with the defendant's relationship with the

[8] The plaintiff also contends that the evidence was insufficient to prove parental alienation because the defendant enjoys a positive relationship with the minor child. Connolly concluded that this is so despite the plaintiff's best efforts. The plaintiff's argument that she should maintain primary physical custody because she has not fully succeeded in her efforts to alienate the minor child from the defendant underscores her inability to grasp the gravity of her conduct.

minor child, it was in the best interests of the minor child to transfer primary physical custody to the defendant.

For the same reason, we cannot conclude that the trial court improperly afforded the defendant final decision-making authority in matters pertaining to the minor child. The court reasonably could have concluded that the plaintiff's emotional difficulties and untreated mental health issues would interfere with her role as the final decision maker. Coupled with the practical rationale of affording such authority to the primary physical custodian, the court's order transferring final decision-making authority to the defendant was not improper. Accordingly, we cannot conclude that the trial court abused its discretion in granting the defendant's motion to modify.

II

The plaintiff, who was self-represented at the hearing on the motion to modify, also claims that the trial court violated her constitutional right to due process by "unduly limiting her case-in-chief." The plaintiff concedes that her claims of constitutional error were not preserved at trial and seeks review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), under which "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond

a reasonable doubt." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 239–40.

The plaintiff claims that the trial court violated her constitutional right to be heard and cites the following: "A fundamental premise of due process is that a court cannot adjudicate any matter unless the parties have been given a reasonable opportunity to be heard on the issues involved . . . . Generally, when the exercise of the court's discretion depends on issues of fact which are disputed, due process requires that a trial-like hearing be held, in which an opportunity is provided to present evidence and to cross-examine adverse witnesses." (Citation omitted; internal quotation marks omitted.) *Szot* v. *Szot*, 41 Conn. App. 238, 241, 674 A.2d 1384 (1996). With these principles in mind, we turn to the plaintiff's claims of constitutional error.

The plaintiff first argues that the court violated her right to due process by "limiting [her] ability to put on evidence and by continually admonishing . . . and bullying her." In support of this claim, the plaintiff argues that, "on the third day of trial, the trial court told [the] plaintiff that it did not know if she could testify and that it could not imagine what else she needed to say, although [she] had not yet testified." The plaintiff does not identify evidence that she was prevented from presenting, and this singular quoted comment is the only example of "continually admonishing" and "bullying" cited by the plaintiff. It is not the role of this court to scour the record in search of support for a party's claim on appeal. See, e.g., *In re Omar I.*, 197 Conn. App. 499, 567 n.16, A.3d , cert. denied, 335 Conn. 924, A.3d (2020). We nevertheless have carefully reviewed the transcripts of the four day trial in this case. Although the record reveals that the trial court often expressed impatience and frustration with the plaintiff, we reject the plaintiff's characterization of the court's conduct as "bullying." In fact, the

court's admonitions to the plaintiff, though frequent, were necessary to keep her focused on the issues at hand. Because the plaintiff has failed to allege any action by the court that implicates a fundamental right, she has failed to raise a claim of constitutional magnitude. Even if the plaintiff's claim could be construed as constitutional, she has failed to establish the existence of a constitutional violation.

The plaintiff also argues that the trial court unduly limited her case-in-chief by affording her only one hour to present her case, including the presentation of evidence, her testimony and her closing argument.[9] Although the trial court did so limit the plaintiff, it did so only after asking the plaintiff how much time she needed to present her case.[10] When the court asked the plaintiff how much time she needed to testify, the plaintiff first told the court that she needed thirty minutes but then quickly reconsidered and said fifteen minutes. The plaintiff also told the court that her closing argument would take thirty minutes. The court suggested that she use thirty minutes to testify and another

[9] The plaintiff also claims that the court violated her due process right to access the court by directing the clerk's office not to docket motions that she or her attorney filed after the hearing at issue. Because the plaintiff's argument in this regard consists of a single sentence, we consider this claim inadequately briefed and, thus, decline to address it. See, e.g., *Amity Partners* v. *Woodbridge Associates, L.P.*, 199 Conn. App. 1, 8 n.7, A.3d (2020).

[10] To the extent that the plaintiff claims generally that the trial court improperly excluded exhibits that she sought to introduce into evidence, such a claim is evidentiary in nature, and, thus, fails to meet the second prong of *Golding*. See, e.g., *In re Antonio M.*, 56 Conn. App. 534, 544, 744 A.2d 915 (2000). To the extent that the plaintiff may be arguing that evidentiary errors implicated her due process right to a fair trial and, thus, rose to the level of a constitutional violation, she has failed to identify specific exhibits that were improperly excluded from evidence. She has thus failed to demonstrate the existence of any evidentiary errors or that any such alleged errors were "crucial, critical [and significant]," and, thus, her claim also fails under the third prong of *Golding*. (Internal quotation marks omitted.) *State* v. *Turner*, 334 Conn. 660, 675, 224 A.3d 129 (2020).

thirty minutes for closing argument. The plaintiff so proceeded.[11] The plaintiff cannot claim that her constitutional right to be heard was violated when she was afforded more time to present her case than she requested. Moreover, the plaintiff has not identified what evidence she would have introduced if she had been afforded more time and has thus not alleged how she was harmed by the time limitation imposed by the court. Accordingly, the plaintiff's claims of constitutional error fail.

The judgment is affirmed.

In this opinion the other judges concurred.

[11] In her reply brief, the plaintiff argues that she "very clearly conveyed to the trial court her desire to present additional evidence." The pages of the record to which she cites in support of this claim immediately precede the discussion regarding how long the plaintiff needed to present her case. The plaintiff was thereafter permitted to testify and introduce exhibits into evidence.

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CONNECTICUT APPELLATE REPORTS

Vol. 200

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

CASES ARGUED AND DETERMINED

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OF THE

STATE OF CONNECTICUT

WILLIAM MALDONADO ET AL. *v.* KELLY C. FLANNERY ET AL.
(AC 43154)

Keller, Bright and Bear, Js.*

Syllabus

The plaintiffs, M and H, sought to recover damages from the defendants for personal injuries they allegedly sustained in a motor vehicle accident in which their vehicle was struck by a vehicle driven by the named defendant. Following a trial, at which M and H testified, the jury returned a verdict in favor of the plaintiffs, awarding them economic damages but no noneconomic damages. Thereafter, the trial court granted the plaintiffs' joint motion for additurs, ordered additurs of $8000 to the award to M and $6500 to the award to H, and rendered judgment in favor of the plaintiffs. On the defendants' appeal to this court, *held* that the trial court abused its discretion in granting the plaintiffs' motion for additurs; that court failed to identify the part of the trial record that supported its conclusion that the jury's failure to award noneconomic damages was unreasonable under the facts of this case; moreover, even if the court had sufficiently identified facts in the record to support its order of additurs, this court, after having undertaken a fact intensive analysis, determined that the jury reasonably could have concluded that the plaintiffs failed to prove any noneconomic damages for pain and suffering caused by the subject accident, given the inconsistent and conflicting testimony and evidence, and the jury could have determined that the plaintiffs lacked credibility.

Argued May 29—officially released September 8, 2020

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* The listing of judges reflects their seniority status on this court as of the date of oral argument.

Procedural History

Action to recover damages for personal injuries sustained as a result of the named defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Budzik*, *J.*; verdict for the plaintiffs; thereafter the court granted the plaintiffs' motion for additurs and rendered judgment for the plaintiffs, from which the defendants appealed to this court. *Reversed*; *judgment directed.*

Jack G. Steigelfest, for the appellants (defendants).

Philip F. von Kuhn, for the appellees (plaintiffs).

Opinion

BEAR, J. The plaintiffs, William Maldonado and Geovanni Hernandez, brought a negligence action against the defendants, Kelly C. Flannery and Michael T. Flannery,[1] seeking damages for injuries sustained in an automobile accident. After a jury trial, the jury returned a verdict in favor of the plaintiffs in which it found economic damages for the plaintiffs but no noneconomic damages. The plaintiffs filed a joint motion for additurs requesting that the court order noneconomic damages. The court granted the plaintiffs' joint motion and ordered noneconomic damages. The defendants appeal from the judgment of the court granting the plaintiffs' joint motion for additurs and ordering additurs in the

[1] Michael T. Flannery was the owner of the Ford Taurus sedan that Kelly C. Flannery was operating during the accident. "The family car doctrine is a common-law rule providing that, when a motor-car is maintained by the paterfamilias for the general use and convenience of his family, he is liable for the negligence of a member of the family having general authority to drive it, while the car is being used as a family car . . . ." (Internal quotation marks omitted.) *Cima* v. *Sciaretta*, 140 Conn. App. 167, 170 n.3, 58 A.3d 345, cert. denied, 308 Conn. 912, 61 A.3d 532 (2013). We refer in this opinion to Kelly C. Flannery and Michael T. Flannery collectively as the defendants and to Kelly C. Flannery individually as the defendant.

amount of $8000 to the verdict in favor of Maldonado and $6500 to the verdict in favor of Hernandez. On appeal, the defendants claim that the trial court abused its discretion by granting the plaintiffs' joint motion for additurs because the court's memorandum of decision lacked the specific facts it relied on to justify additurs, and there existed issues of credibility regarding the plaintiffs' testimony about their noneconomic damages. Therefore, the plaintiffs failed to prove their claims for noneconomic damages. We agree that the court abused its discretion in ordering additurs and, accordingly, reverse the judgment of the trial court.

The court set forth the following factual and procedural history in its memorandum of decision on the plaintiffs' joint motion for additurs. "On June 6, 2016, at approximately 3:20 p.m., [the plaintiffs] were driving [a 2004 Ford Econoline van] on Route 4 in Farmington. Maldonado was driving . . . [and] Hernandez was the passenger. . . . [The defendant] was driving a Ford Taurus sedan . . . [and] collided with the rear of [the plaintiffs'] van. Accident photos entered into evidence showed that [the defendant's sedan] sustained serious damage to its front bumper and front hood, while [the plaintiffs'] van sustained minimal visible damage. This disparity in vehicle damage was likely due to the van's sturdy metal rear bumper and the fact that the disparity in the vehicles' height caused [the defendant's sedan] to slide under the van's rear bumper.

"[The plaintiffs] did not complain of injuries at the scene of the accident. [They] sought treatment in the evening on the same day of the accident at the Hospital of Central Connecticut. At that time, [the plaintiffs] complained of pain in their lower backs and neck regions. Maldonado had a contusion on his sternum, presumably from his seat belt. Both [of the plaintiffs] were evaluated and released from the [hospital] on the evening of June 6, 2016.

"Maldonado treated with a chiropractor for approximately [two] months from April to June, 2014 [after a prior motor vehicle accident]. At that time, Maldonado visited the chiropractor [twelve] times and was discharged with no further treatment needed. Hernandez had no prior accidents.

"Subsequent to the 2016 accident, [the plaintiffs] had [magnetic resonance imaging (MRI) scans] and other diagnostics tests related to the accident that the jury reasonably could have concluded caused the plaintiffs no pain or suffering. Nevertheless, the plaintiffs' medical records introduced at trial demonstrate that, from the date of the accident to approximately August of 2018, the plaintiffs did receive treatment that inherently involved some degree of pain. Specifically, Maldonado treated at New Britain Injury & Spine approximately [sixty-two] times. These treatments involved chiropractic manipulation of Maldonado's spine and neck, application of hot and cold packs, electrical stimulation, and, on occasion, mechanical traction. Similarly, Hernandez treated at New Britain Injury & Spine approximately [forty-nine] times. These treatments involved chiropractic manipulation of Hernandez' spine and neck, application of hot and cold packs, and electrical stimulation. Finally, on one occasion, [the plaintiffs] received epidural steroid injections of their lumbar regions at Jefferson Radiology. Maldonado was assigned a 5 [percent] permanent partial disability rating by his chiropractor, [Brian] Pollack. Although the defendants' expert, [Jonas] Lieponis, an orthopedic surgeon, disputed the extent of the plaintiffs' injuries, he agreed that both plaintiffs sustained sprains and/or strains to their neck and lumbar regions.

"In [returning] its verdict in favor of the plaintiffs, the jury awarded $17,228.38 of Maldonado's claimed $18,953.38 in past economic damages for medical costs, as well as $1800 in future economic damages. With

respect to Hernandez, the jury awarded $11,864.94 of the claimed $13,254.94 as past economic damages for medical costs. The jury did not award Hernandez any future economic damages. The jury did not award either plaintiff any noneconomic damages. The plaintiffs' verdict forms stated the amount claimed for past economic damages for each individual medical provider. With the exception of slight reductions for the claimed amounts for chiropractic care at New Britain Injury & Spine, the jury awarded the plaintiffs the requested amounts."

The plaintiffs filed a two count complaint sounding in negligence[2] on July 18, 2017. The case was tried before the jury from January 23 to January 25, 2019. The jury returned its verdict on January 25, 2019, in favor of Hernandez and awarded him economic damages of $11,864.94 and zero noneconomic damages. The jury also returned its verdict in favor of Maldonado and awarded him economic damages of $19,028.38 and zero noneconomic damages. Thereafter, on January 30, 2019, the plaintiffs filed their joint motion for additurs. On June 25, 2019, the court issued a memorandum of decision in which it granted the plaintiffs' joint motion for additurs, concluding that the jury verdict awarding economic damages to each plaintiff, but no noneconomic damages, was internally inconsistent. The court further concluded that the jury could not have properly reached its verdict, that the plaintiffs were not entitled to awards for pain and suffering, on the basis of the evidence adduced at trial. This appeal followed. Additional facts will be set forth as necessary.

A motion for additur is a "statutory creation that allows the court to increase the award of damages when the verdict is inadequate as a matter of law." *Demchak* v. *New*

[2] The plaintiffs' complaint consisted of two counts of negligence. Maldonado alleged negligence in count one, and Hernandez alleged negligence in count two.

Haven, 93 Conn. App. 309, 311–12, 889 A.2d 266 (2006); see General Statutes §§ 52-228a[3] and 52-228b.[4] "The standard of review for determining whether a trial court properly ordered an additur is well settled. [W]e review a decision of the trial court . . . ordering an additur to determine whether the trial court properly exercised its discretion. . . . [T]he jury's decision to award economic damages and zero noneconomic damages is best tested in light of the circumstances of the particular case before it. Accordingly, the trial court should examine the evidence to decide whether the jury reasonably could have found that the plaintiff had failed in his proof of the issue. That decision should be made, not on the assumption that the jury made a mistake, but, rather, on the supposition that the jury did exactly what it intended to do. . . .

"It is axiomatic that [t]he amount of damages awarded is a matter peculiarly within the province of the jury . . . . Moreover, there is no obligation for the jury to find that every injury causes pain, or the amount of pain alleged. . . . Put another way, [i]t is the jury's right to accept some, none or all of the evidence presented. . . . It is the [jury's] exclusive province to weigh the conflicting evidence and to determine the credibility of witnesses. . . . The [jury] can . . .

[3] General Statutes § 52-228a provides in relevant part: "In any jury case where the court orders . . . an increase in the amount of the judgment, the party aggrieved by the . . . additur may appeal as in any civil action. The appeal shall be on the issue of damages only, and judgment shall enter upon the verdict of liability and damages after the issue of damages is decided."

[4] General Statutes § 52-228b provides in relevant part: "No verdict in any civil action involving a claim for money damages may be set aside except on written motion by a party to the action, stating the reasons relied upon in its support, filed and heard after notice to the adverse party according to the rules of the court. . . . No such verdict may be set aside solely on the ground that the damages are inadequate until the parties have first been given an opportunity to accept an addition to the verdict of such amount as the court deems reasonable."

decide what—all, none, or some—of a witness' testimony to accept or reject. . . . The only practical test to apply to a verdict is whether the award of damages falls somewhere within the necessarily uncertain limits of fair and reasonable compensation in the particular case, or whether the verdict so shocks the sense of justice as to compel the conclusion that the jury [was] influenced by partiality, mistake or corruption." (Citations omitted; internal quotation marks omitted.) *Cusano* v. *Lajoie*, 178 Conn. App. 605, 609–10, 176 A.3d 1228 (2017).

On appeal, the defendants argue that the court failed to view the evidence in the light most favorable to sustaining the jury's verdict. Specifically, they argue that the court abused its discretion by granting the plaintiffs' joint motion for additurs because it improperly concluded that the jury verdict awarding economic damages but not noneconomic damages was inconsistent and that the jury could not have reasonably concluded that the plaintiffs were not entitled to awards for pain and suffering. We agree.

Our Supreme Court has stated that "a case-specific standard should apply to the instance in which a party seeks to have a verdict set aside on the basis that it is legally inadequate." *Wichers* v. *Hatch*, 252 Conn. 174, 181, 745 A.2d 789 (2000). This court, thereafter, interpreted and explained *Wichers*: "For more than seventy-five years, judicial decisions have reflected the wisdom of legal realism that case law should reflect the factual circumstances under which the controversy between the parties arose. In that sense, every judicial ruling is case specific. *Wichers* must, therefore, have intended something more. We read *Wichers* as an instruction to a trial court specifically to identify the facts of record that justify the extraordinary relief of additur and as an instruction to an appellate court to inquire whether the facts so identified justify the trial court's exercise

of its discretion to set a jury verdict aside because of its perceived inadequacy." (Footnotes omitted.) *Turner* v. *Pascarelli*, 88 Conn. App. 720, 723–24, 871 A.2d 1044 (2005). "Under *Wichers*, it is not enough to base an additur on a conclusory statement that a jury award was [inadequate] . . . . The question, therefore, is whether the court elsewhere articulated a sufficient factual basis for its decision to order an additur." (Internal quotation marks omitted.) *Cusano* v. *Lajoie*, supra, 178 Conn. App. 610.

In the present case, the court's memorandum of decision granting the plaintiffs' joint motion for additurs lacks the necessary identification of the specific facts that would justify an additur of $8000 to Maldonado and $6500 to Hernandez. See *Wichers* v. *Hatch*, supra, 252 Conn. 181; *Turner* v. *Pascarelli*, supra, 88 Conn. App. 723–24. The court's memorandum of decision describes the facts that the parties offered during the trial, but it does not delineate the specific facts that led to its decision to grant the plaintiffs' joint motion for additurs. In its memorandum of decision, the court concluded that, because the jury awarded damages for medical treatment received by the plaintiffs, the plaintiffs must have suffered compensable pain and suffering. Specifically, the court stated: "Both the inherent underlying symptoms necessary to make [the plaintiffs'] treatments 'reasonable and necessary' in the eyes of the jury, as well as the treatments themselves, all bespeak a level of physical pain suffered by Maldonado and Hernandez. . . . It would be illogical and inconsistent to conclude that the treatments credited by the jury were reasonable and necessary, but that they were not made so because of any neck or back pain suffered by the plaintiffs." This court and our Supreme Court have rejected the notion that because a jury awards economic damages for medical treatment, it therefore must award damages for the pain suffered. See *Wichers* v.

Hatch, supra, 188–89; *Micalizzi* v. *Stewart*, 181 Conn. App. 671, 685, 188 A.3d 159 (2018); *Cusano* v. *Lajoie*, supra, 178 Conn. App. 611; *Melendez* v. *Deleo*, 159 Conn. App. 414, 418–19, 123 A.3d 80 (2015).

Thus, we conclude that the court's failure to identify the part of the record that supported its conclusion that the jury's failure to award noneconomic damages was unreasonable under the facts of this case was an abuse of discretion. See *Cusano* v. *Lajoie*, supra, 178 Conn. App. 611 ("the court abused its discretion by ordering an additur without identifying the part of the record that supported its determination that an award of [zero] noneconomic damages was unreasonable under the circumstances of this case" (internal quotation marks omitted)).

Furthermore, even if we were to determine that the court sufficiently had identified facts in the record to support its order of additurs, we would be required to review its findings and conclusions in the light most favorable to sustaining the jury's verdict, rather than the court's decision. See id. To determine whether it was reasonable for the jury to have concluded that the plaintiffs proved that they had suffered injuries and incurred reasonable and necessary medical expenses but did not prove that they had suffered compensable pain and suffering, we must undertake the same type of fact intensive analysis articulated by our Supreme Court in *Wichers* v. *Hatch*, supra, 252 Conn. 188–90. "Because in setting aside a verdict the court has deprived a litigant in whose favor the verdict has been rendered of his constitutional right to have disputed issues of fact determined by a jury . . . the court's action cannot be reviewed in a vacuum. The evidential underpinnings of the verdict itself must be examined. Upon issues regarding which, on the evidence, there is room for reasonable difference of opinion among fair-minded men, the conclusion of a jury, if one at which

honest men acting fairly and intelligently might arrive reasonably, must stand . . . .'' (Citation omitted; internal quotation marks omitted.) Id., 189. Thus, we must carefully examine the specific facts and circumstances of the present case to determine whether the jury could have concluded that, although the plaintiffs' economic damages were compensable, they failed to prove that they had suffered noneconomic damages.

In reviewing this issue, our decision in *Cusano* v. *Lajoie*, supra, 178 Conn. App. 605, serves as a useful guide. In *Cusano*, similar to the present case, the plaintiff and the defendants were in a motor vehicle accident in which the defendants' vehicle rear-ended the plaintiff's vehicle. Id., 607. During trial, issues arose regarding conflicting evidence and questions of credibility. See id., 612–13. Specifically, conflicting evidence was presented during trial regarding how much time from work the plaintiff missed because of the accident. Id., 612. Furthermore, conflicting evidence was presented regarding the pain suffered by the plaintiff and the medical treatment he sought after the accident, including the dates of those treatments. Id., 612–13. This court concluded: ''After reviewing the evidence adduced at trial . . . the jury's verdict was within the parameters of fair and reasonable compensation. The jury reasonably could have determined . . . that the plaintiff had not proven any noneconomic damages for pain and suffering . . . .'' Id., 613–14.

Similarly, in the present case, conflicting and inconsistent evidence was presented during trial. Here, the jury heard testimony from both Maldonado and Hernandez. Maldonado testified that, while he was approaching a red light in his vehicle, he saw a vehicle approaching quickly from behind and did not have time to move out of the way. Thereafter, during cross-examination, Maldonado testified that during the same incident, he looked back and tried to avoid the approaching vehicle

because he thought it was going to collide with his vehicle. Further, Maldonado could not explain why his medical records indicated that he had told his physician that he did not know he was going to be rear-ended. Later, Maldonado admitted that he was involved in a prior motor vehicle accident in April, 2014, that resulted in chest and neck pain. After that accident, he treated with a chiropractor for approximately two months. The medical records introduced as evidence from those treatments demonstrated that up until the 2016 accident, Maldonado continued to suffer low back and neck pain from the 2014 accident.

Also during trial, Maldonado testified that he never went to the hospital after his 2014 accident; however, on cross-examination, after being questioned about hospital records demonstrating X-ray reports postdating the 2014 accident, Maldonado altered his testimony by stating that he did not remember if he went to the hospital. Further, the emergency room record made after the 2016 accident demonstrated that Maldonado last visited the hospital prior to the 2016 accident for "chronic pain/sciatica." He also testified that for approximately fifteen years he had done heavy lifting at his workplace but, after the 2016 accident, he was unable to do so. MRIs ordered early in the course of Maldonado's chiropractic treatment after the 2016 accident revealed degenerative disc disease in his back. Lastly, Lieponis testified via videotaped deposition that Maldonado's cervical arthritic changes were degenerative and preexisted the 2016 accident and that his lumbar changes were degenerative in nature and not traumatically caused by the 2016 accident.

During trial, the jury also heard Hernandez' testimony. Hernandez testified that, in the ten years prior to the 2016 accident, he had been convicted of approximately six felonies, the majority of which were drug

related. When Hernandez was questioned about the specific number of convictions against him, he testified that he did not remember because his memory "is shot." Hernandez further testified that the medical information he provided to his physician may not have been completely accurate because of his memory problems. In regard to back pain that Hernandez alleged he had been experiencing, he testified that, once the treatment with his physician concluded, he did not seek out a new physician. Instead, Hernandez testified that, "out in the street, I would just self-medicate [because] they took my Percocet away. [E]very time I would feel some pain, I would just go to my friends and [they gave] me some of their medications."

Additionally, Hernandez testified that, at the scene of the accident, he was offered medical attention but declined it, and he did not tell his boss, when returning the company van, that he was in an accident or that he was in pain. MRIs of Hernandez' back introduced into evidence demonstrate that he suffered from multilevel disc degeneration and disc extrusions. After reviewing the MRIs, Lieponis opined that the multilevel degenerative changes and extrusions in his back were not traumatic in origin and were unrelated to the 2016 accident.

On the basis of the two verdict forms that the jury submitted to the court at the conclusion of the trial, it is reasonable to conclude that the jury resolved the conflicting evidence by rejecting the plaintiffs' noneconomic damages claims for pain and suffering because the plaintiffs failed to meet their burden of proving their noneconomic damages claims. As our Supreme Court articulated in *Wichers*: "[I]f there is a reasonable basis in the evidence for the jury's verdict, unless there is a mistake in law or some other valid basis for upsetting the result other than a difference of opinion regarding the conclusions to be drawn from the evidence, the trial court should let the jury work [its] will." (Internal

quotation marks omitted.) *Wichers* v. *Hatch*, supra, 252 Conn. 189.

After reviewing the evidence adduced at trial, we conclude that the jury reasonably could have found that the plaintiffs failed to prove noneconomic damages for pain and suffering caused by the 2016 accident. The jury was not required to believe the plaintiffs' testimony but, instead, could have determined that the plaintiffs lacked credibility. See *Wall System, Inc.* v. *Pompa*, 324 Conn. 718, 741, 154 A.3d 989 (2017) ("if there are inconsistencies in a witness' testimony, [i]t is the exclusive province of the trier of fact to weigh conflicting testimony and make determinations of credibility, crediting some, all or none of any given witness' testimony" (internal quotation marks omitted)).

The judgment is reversed and the case is remanded with direction to deny the motion for additurs and to render judgment in accordance with the jury's verdict.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* SHAILA M. CURET (AC 41372)

Prescott, Devlin and Bear, Js.*

Syllabus

Convicted, on a conditional plea of nolo contendere, of possession of narcotics with intent to sell, the defendant appealed to this court. Z, a police officer, responded to a 911 call of an attempted robbery and report of gunshots made by C, a resident of the defendant's apartment building. C reported seeing two men enter the building and then heard loud knocking on the door of the defendant's apartment, followed by an altercation that started in front of the defendant's apartment and moved to the laundry room, which was directly beneath C's apartment. C informed the 911 dispatcher that he believed someone had tried to break into the defendant's apartment and that the two men he had observed

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

enter the building had later fled in two separate vehicles. He also indicated that he had discovered a knife. When Z arrived at the apartment building, he spoke with C regarding the incident and then conducted an investigation of the building. Z observed pry marks and fresh paint chips on the floor near the defendant's apartment and that the laundry room was in disarray. In the laundry room, Z found a black and white flip flop sandal that matched one he had seen outside the building, a spent shell casing on the floor, and a bullet hole in the doorframe of the laundry room exit door. He also found what appeared to be a small, fresh blood like stain on the wall adjacent to the exit door of the laundry room. On the basis of his observations and the fact that C had discovered a knife, Z believed that someone may have been shot or stabbed. He proceeded to interview the residents of the building and determined that no one was injured. When he knocked on the door of the defendant's apartment, however, he received no response, discovered the door was locked when he tried to open it, and he could not see into the apartment because the blinds were closed. Z then called his superior officer, T, and explained the evidence and his belief that someone may be injured inside the defendant's apartment. T, along with other officers, responded to the scene and the decision was made to breach the defendant's apartment. A search revealed that no one was in the apartment but, while searching, Z observed in plain view two scales covered in white residue, clear plastic bags, and a safe in the closet. The officers then stopped searching and obtained a search warrant for the items in plain view. On appeal, the defendant claimed that the trial court improperly denied her motion to suppress the evidence seized by the police following the warrantless entry into her apartment because there were no exigent or emergency circumstances that permitted the officers to enter her apartment without a warrant. *Held*:

1. The trial court improperly concluded that the entry into the defendant's apartment was lawful under the exigent circumstances exception to the warrant requirement and improperly denied the defendant's motion to suppress; the facts found by the court did not provide an objective basis for the police to conclude that they had probable cause to enter the defendant's apartment as Z knew that the two men involved in the altercation had exited the building without entering the defendant's apartment, there was no evidence that a third party had been involved in the altercation, all the evidence of the altercation was found in the laundry room, the door to the defendant's apartment was locked and there was limited evidence that directly pertained to the apartment, and, in his 911 call, C stated that he did not believe that the residents of the defendant's apartment were home.
2. The trial court improperly concluded that the entry into the defendant's apartment was justified under the emergency doctrine and improperly denied the motion to suppress; there was no objectively reasonable basis for the police to believe that an emergency existed because, although

Z had been responding to a possible burglary, there was no evidence to clearly demonstrate that a victim or bystander had been injured, as there were no witnesses who observed either individual involved in the altercation enter the defendant's apartment nor was any individual observed leaving the defendant's apartment to engage in the altercation, there was no evidence that anyone had actually gained access to the defendant's apartment, the apartment door was locked, the small blood like stain found in the laundry room would not lead a reasonable police officer to believe that a person in a locked apartment in a separate area of the building was in need of immediate aid, especially when there was no blood like stains on or outside the apartment door or any bullet holes or shell casings, like those found in the laundry room, and, when viewed under the totality of the circumstances, the lack of response to Z's knocking would lead a reasonable officer to infer that the apartment was unoccupied, not that an emergency existed, and the fact that one hour passed from the time Z arrived on the scene to the time when the police entered the apartment made it more difficult to conclude that a reasonable officer would believe that an emergency existed, when considered under the totality of the circumstances, as, in that hour, Z did not discover any evidence clearly demonstrating that someone in the defendant's apartment was at risk of losing life or limb, there being no evidence regarding the defendant's whereabouts or whether there was any person inside the apartment.

(*One judge dissenting*)

Argued March 11—officially released September 8, 2020

Procedural History

Information charging the defendant with the crimes of possession of narcotics with intent to sell by a person who is not drug-dependent and operation of a drug factory, brought to the Superior Court in the judicial district of Waterbury, geographical area number four, where the court, *Cremins*, *J.*, denied the defendant's motion to suppress; thereafter, the state filed a substitute information charging the defendant with the crime of possession of narcotics with intent to sell; subsequently, the defendant was presented to the court, *Fasano*, *J.*, on a conditional plea of nolo contendere to the charge of possession of narcotics with intent to sell; judgment of guilty in accordance with the plea, from which the defendant appealed to this court. *Reversed*; *judgment directed.*

Emily H. Wagner, assistant public defender, for the appellant (defendant).

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Amy Sedensky*, senior assistant state's attorney, for the appellee (state).

Opinion

BEAR, J. The defendant, Shaila M. Curet, appeals from the judgment of conviction rendered by the trial court following her conditional plea of nolo contendere[1] to the charge of possession of narcotics with intent to sell in violation of General Statutes § 21a-277 (a) (1) (A). On appeal, the defendant claims that the court improperly denied her motion to suppress evidence seized by the police following a warrantless entry into her apartment because, under the totality of the circumstances, it was unreasonable for the police officers to believe that an emergency existed or exigent circumstances permitted warrantless entry into her apartment. We agree with the defendant and, accordingly, reverse the judgment of the court.

The court found the following facts in its ruling on the defendant's motion to suppress. On June 22, 2015, at approximately 3:55 p.m., Officer Raim Zulali of the Waterbury Police Department was dispatched to an apartment building at 130 Woodglen Drive (building)

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

in Waterbury, in response to a complaint of burglary made by Anthony Cruz, a resident of the building. Cruz had called 911 and stated that he thought he heard two gunshots after he observed two men enter the building. Cruz indicated that one of the men was wearing a hooded sweatshirt and a baseball cap that he had pulled down over his face. He further stated to the operator that he believed that there was an altercation between the two men in the laundry room directly below his apartment. Cruz also stated that he believed someone tried to break into the defendant's apartment on the first floor because he found a knife in the laundry room and paint chips near the door of the defendant's apartment.[2] Lastly, Cruz informed the operator that the two individuals he originally observed had fled from the building in separate vehicles.

After receiving the dispatch, Zulali proceeded to the building. While en route, the display in his police cruiser indicated that someone had attempted to break into an apartment and that there had been significant noise coming from the laundry room, with the possibility of an altercation. The display also indicated that the 911 caller, Cruz, had discovered a knife. Zulali arrived at the building at 4 p.m. After arriving, Zulali called dispatch and requested that it contact Cruz because the door to the building was locked. After a few minutes, Cruz let Zulali into the building.

After entering the building, Zulali spoke with Cruz regarding his 911 call. Cruz stated that, from his window, he had observed a white vehicle parked along Woodglen Drive in front of the building. He then observed a male wearing a hooded sweatshirt and a baseball hat exit the driver's side of the vehicle and

[2] In its ruling on the defendant's motion to suppress, the court relied on Cruz' 911 call. During that phone call, Cruz stated to the operator that he did not believe that anyone presently was in the defendant's apartment.

approach the front door to the building. As the male approached the door, he pulled his baseball cap down and pulled the hood of his sweatshirt over his head. Cruz stated that this made him suspicious of the male because, in doing this, it appeared that the male was trying to conceal his identity. Cruz stated that he did not recognize the male.

Cruz further stated to Zulali that he believed the male might have used a knife to gain access to the building because it was locked. After the male gained entry to the building, Cruz said that he heard someone knocking very hard on the door of the defendant's apartment. He then heard an altercation that started in front of the hallway of the defendant's apartment and moved into the laundry room. The laundry room is located directly below Cruz' apartment and is just a few feet away from the defendant's apartment. Cruz stated that during the altercation in the laundry room, he heard what he believed to be two gunshots. He also stated that, after he heard the two gunshots, he saw one of the males run out of the front door of the building and enter the front passenger seat of the vehicle he had exited earlier and then the vehicle drove away, after which he saw the other male come out the back door and leave in a different car.

Cruz further informed Zulali that he had found a knife in the laundry room and had picked it up because he did not want one of the children in the building to get hurt. Cruz thought that the knife might have been used to get into the building and he stated that he thought one of the residents of the defendant's apartment was involved in the altercation.

During their discussion, Cruz informed Zulali that a male and a female resided in the defendant's apartment and that their vehicle was parked outside in the parking lot. Zulali checked the vehicle and did not see anyone

in it. Also while outside, Zulali observed a black and white flip flop sandal.

Zulali then went back inside to investigate the hallway where the defendant's apartment is located. He observed pry marks and fresh paint chips on the floor near the defendant's apartment. He also observed fresh footprints on the wall of the hallway. Zulali then went into the laundry room to investigate, where he made several observations. First, the laundry room was in disarray and the washing and drying machines appeared to have been moved. Further, he saw a flip flop sandal in the laundry room that matched the black and white one he had seen outside of the building. Zulali also found a spent shell casing on the floor and observed a bullet hole in the doorframe of the laundry room exit door. He also found what appeared to be a fresh, blood like stain on a wall adjacent to the laundry room exit door that measured approximately one-half centimeter in diameter. Zulali also observed a fresh mark on the floor and a hole in the wall, which, through his training and experience, he believed may have been from a ricocheted bullet from a firearm.

Under the totality of the circumstances and the information he gathered, Zulali believed that someone may have been shot or stabbed. Zulali then went door to door and interviewed the residents of the building who were home. After speaking with those residents and determining that no one was injured, he knocked on the door of the defendant's apartment. He did not receive a response after knocking several times, so he attempted to open the door to the defendant's apartment but it was locked. Zulali also attempted to look into the windows of the defendant's apartment, but the blinds were closed.

Zulali then called his superior officer, Sergeant Gaetano Tiso, and explained to him the evidence he found

and his belief that someone might be in the defendant's apartment. Tiso and Officer Michael Garrity responded to the scene. Once they arrived at the scene, Zulali again relayed all of his findings to Tiso, along with his concern that someone injured may be in the defendant's apartment. The officers then requested that a dispatcher place calls to local hospitals to determine whether any gunshot or stabbing victims had been admitted for treatment. Shortly thereafter, approximately four other police officers arrived on the scene. The police officers did not wait for a response to their requested hospital check before the decision was made that an emergency existed that required the breach of the door to the defendant's apartment. Tiso retrieved a battering ram from his police vehicle and it was used to break down the door, at which point six officers, including Zulali and Tiso, entered the apartment. The time that had passed from when Zulali arrived at the building to the entry into the defendant's apartment totaled approximately one hour.

After a search of the defendant's apartment, it was determined that no one was in the one bedroom apartment. While searching the apartment, Zulali observed in plain view two scales covered in white residue, clear plastic bags, and a safe in the closet. At this point, the search stopped and a search warrant was sought for the items that were in plain view.

When the police executed the search warrant, they seized a total of approximately 186 small plastic bags containing cocaine weighing 123.5 grams, 2 plastic bags containing cocaine weighing 43.8 grams, and $41,720 in cash. The defendant was arrested and charged with possession of more than one-half ounce of cocaine in violation of General Statutes § 21a-278 (a) and operation of a drug factory in violation of § 21a-277 (c).

On June 30, 2017, the defendant filed a motion to suppress "any and all evidence seized and derived from

the warrantless search of the defendant's apartment on June 22, 2015." In her memorandum of law in support of the motion to suppress, the defendant argued that the exigent circumstances, emergency, or protective sweep exceptions to the warrant requirement did not apply under the facts and circumstances of the case. Specifically, the defendant contended that the exigent circumstances doctrine was not applicable because the Waterbury police did not have probable cause to enter her apartment, that the exigent circumstances doctrine did not control because it was not objectively reasonable for an officer to believe immediate action was necessary to prevent an exigent circumstance, that the protective sweep doctrine did not permit the warrantless entry into the defendant's home because no reasonable police officer would have believed that there was a dangerous individual inside, and that the emergency doctrine was inapplicable because no reasonable police officer would believe that there was an emergency requiring warrantless entry into her apartment.

The court held a hearing on the motion to suppress on July 14, 17, and 31, 2017. The state presented the testimony of Zulali and the defendant presented the testimony of Cruz. At the conclusion of the suppression hearing on July 31, 2017, the state argued that the emergency doctrine, the exigent circumstances doctrine, and the protective sweep doctrine justified the warrantless entry into the defendant's apartment. Specifically, the state argued that because probable cause existed, the police officers could enter the apartment under the exigent circumstance doctrine. Further, the state argued that because a reasonable officer could believe that someone's life was in danger, the officers were permitted to enter and search the apartment pursuant to the emergency and protective sweep doctrines.

On August 29, 2017, the court denied the defendant's motion to suppress in an oral decision. The court concluded that the officers' warrantless search in order to

render immediate medical aid to someone that may have been involved in a shooting or stabbing was proper under the emergency and exigent circumstances doctrines. The court reasoned that, "[b]ased on the totality of the circumstances . . . a reasonable officer would have believed that an emergency existed, that an injured party might have been involved, [possibly] due to a shooting or stabbing and would be in need of immediate . . . medical attention" and, thus, warrantless entry was reasonable under the emergency and the exigent circumstances doctrines—two of the exceptions to the warrant requirement.[3] In reaching its decision, the court noted that it had relied on the testimony of Zulali and Cruz, including: Zulali's testimony that he received a burglary dispatch for an alleged altercation at the building; Cruz' testimony that he thought he heard two gunshots and observed two suspicious individuals enter the building; Zulali's testimony that he found two matching flip flop sandals, one outside the building and one in the laundry room; Zulali's testimony that he located a knife and paint chips near the door to the defendant's apartment, spent shell casings in the laundry room, bullet markings on the wall and floor of the laundry room, and a blood like stain on the wall of the laundry room; Zulali's testimony that he spoke with all the residents of the building, other than those residing in the defendant's apartment; Zulali's testimony that he knocked on the door of the defendant's apartment and looked in the windows of that apartment but did not receive a response;

[3] In its decision on the defendant's motion to suppress, the court stated that, in its opinion, "the emergency doctrine and the doctrine of exigent circumstances are the key concepts relevant in this particular case." Thus, the court denied the defendant's motion to suppress on the basis of the exigent circumstances and emergency doctrines. Accordingly, we do not review whether the protective sweep doctrine was applicable in the present case as the state has not offered it as an alternative basis on which to sustain the court's denial of the motion to suppress.

Zulali's testimony that he observed fresh footprints on the wall of the hallway where the defendant's apartment was located; Zulali's testimony that the defendant's vehicle was parked in the parking lot; and Zulali's testimony that he believed someone in the defendant's apartment might be injured and in need of medical assistance.

On October 2, 2017, the defendant entered a conditional plea of nolo contendere to one count of possession of narcotics with intent to sell in violation of § 21a-277 (a) (1) (A). See General Statutes § 54-94a. The defendant's plea was entered conditionally with the reservation of her right to take an appeal from the court's ruling on the motion to suppress and the court, *Fasano*, *J.*, made a finding that the motion to suppress was dispositive of the case. Thereafter, the court, *Fasano*, *J.*, rendered a judgment of conviction. The court sentenced the defendant to a term of incarceration of three years, followed by eight years of special parole. This appeal followed.

We note that, "[a]s a general matter, the standard of review for a motion to suppress is well settled. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record. . . . [W]hen a question of fact is essential to the outcome of a particular legal determination that implicates a defendant's constitutional rights, [however] and the credibility of witnesses is not the primary issue, our customary deference to the trial court's factual findings is tempered by a scrupulous examination of the record to ascertain that the trial court's factual findings are supported by substantial evidence. . . . [W]here the legal conclusions of the court are challenged, [our review is plenary, and] we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision . . . .

"Notwithstanding our responsibility to examine the record scrupulously, it is well established that we may not substitute our judgment for that of the trial court when it comes to evaluating the credibility of a witness. . . . It is the exclusive province of the trier of fact to weigh conflicting testimony and make determinations of credibility, crediting some, all or none of any given witness' testimony. . . . Questions of whether to believe or to disbelieve a competent witness are beyond our review. As a reviewing court, we may not retry the case or pass on the credibility of witnesses. . . . We must defer to the trier of fact's assessment of the credibility of the witnesses that is made on the basis of its firsthand observation of their conduct, demeanor and attitude." (Citation omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Kendrick*, 314 Conn. 212, 222–23, 100 A.3d 821 (2014).

I

The defendant claims first that Zulali's warrantless entry into her apartment was unlawful under the fourth and fourteenth amendments to the United States constitution and article first, § 7, of the constitution of Connecticut.[4] Specifically, she argues that the warrantless search was not justified by the exigent circumstances doctrine because there was no probable cause. The state counters that the search was justified by exigent circumstances because an objectively reasonable officer would have probable cause to believe that criminal activity occurred in the defendant's apartment and it was the location where an individual may be injured

[4] Although the defendant claims a due process violation under our state constitution, she does not provide a separate analysis thereunder or argue that the Connecticut constitution provides greater protection than the federal constitution. Accordingly, review of her claims is limited to the federal constitution. See *State* v. *Johnson*, 288 Conn. 236, 244 n.14, 951 A.2d 1257 (2008).

as a result of such criminal activity. We are not persuaded by the state's argument.

"Ordinarily, police may not conduct a search unless they first obtain a search warrant from a neutral magistrate after establishing probable cause. [A] search conducted without a warrant issued upon probable cause is per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions. . . . These exceptions have been jealously and carefully drawn . . . and the burden is on the state to establish the exception. . . . *Our law recognizes that there will be occasions when, given probable cause to search, resort to the judicial process will not be required of law enforcement officers.* [For example], where exigent circumstances exist that make the procurement of a search warrant unreasonable in light of the dangers involved . . . a warrant will not be required. . . .

"The term, exigent circumstances, does not lend itself to a precise definition but generally refers to those situations in which law enforcement agents will be unable or unlikely to effectuate an arrest, search or seizure, for which probable cause exists, unless they act swiftly and, without seeking prior judicial authorization. . . . The test for determining whether exigent circumstances justify a warrantless search or seizure is whether, under the totality of the circumstances, the police had reasonable grounds to believe that if an immediate arrest [or entry] were not made, the accused would be able to destroy evidence, flee or otherwise avoid capture, or might, during the time necessary to procure a warrant, endanger the safety or property of others. . . .

"[N]o single factor, such as a strong or reasonable belief that the suspect is present on the premises, will be determinative in evaluating the reasonableness of a police officer's belief that a warrantless entry or arrest

was necessary. Rather than evaluating the significance of any single factor in isolation, courts must consider all of the relevant circumstances in evaluating the reasonableness of the officer's belief that immediate action was necessary. . . .

"It is well established in Connecticut . . . that the test for the application of the doctrine is objective, not subjective, and looks to the totality of the circumstances. . . . This is an objective test; its preeminent criterion is what a reasonable, well-trained police officer would believe, not what the arresting officer actually did believe. . . . The reasonableness of a police officer's determination that an emergency exists is evaluated on the basis of facts known at the time of entry. . . . [T]he trial court's legal conclusion regarding the applicability of the exigent circumstances doctrine is subject to plenary review." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Correa*, 185 Conn. App. 308, 332–34, 197 A.3d 393 (2018), cert. granted on other grounds, 330 Conn. 959, 199 A.3d 19 (2019).

Before we reach our analysis of whether the exigent circumstances doctrine exception applied to the present facts, we must first determine whether, at the time of the Waterbury police's warrantless entry, probable cause[5] existed to search the defendant's apartment pursuant to the exigent circumstances exception. See *State* v. *Spencer*, 268 Conn. 575, 585–86, 848 A.2d 1183, cert.

[5] We note that the court did not address the issue of whether the police had probable cause to enter the defendant's apartment. Instead, the court concluded that exigent circumstances permitted the warrantless entry to the defendant's apartment. On appeal, however, we may apply the undisputed factual findings of the court's ruling on the defendant's motion to suppress "because whether a set of facts is sufficient to satisfy the probable cause standard is subject to plenary review . . . ." *State* v. *Jones*, 320 Conn. 22, 70 n.26, 128 A.3d 431 (2015). Thus, the court's factual findings are sufficient for our determination of whether probable cause existed to allow the warrantless entry under the exigent circumstances doctrine.

denied, 543 U.S. 957, 125 S. Ct. 409, 160 L. Ed. 2d 320 (2004); *State* v. *Owen*, 126 Conn. App. 358, 366, 10 A.3d 1100, cert. denied, 300 Conn. 921, 14 A.3d 1008 (2011). We conclude that it did not.

"Whether the trial court properly found that the facts submitted were enough to support a finding of probable cause is a question of law. . . . The trial court's determination on [that] issue, therefore, is subject to plenary review on appeal. . . . Probable cause to search exists if: (1) there is probable cause to believe that the particular items sought to be seized are connected with criminal activity or will assist in a particular apprehension or conviction . . . and (2) there is probable cause to believe that the items sought to be seized will be found in the place to be searched. . . . Probable cause, broadly defined, [comprises] such facts as would reasonably persuade an impartial and reasonable mind not merely to suspect or conjecture, but to believe that criminal activity has occurred. . . . Reasonable minds may disagree as to whether a particular affidavit establishes probable cause. . . .

"We consistently have held that [t]he quantum of evidence necessary to establish probable cause exceeds mere suspicion, but is substantially less than that required for conviction. . . . The existence of probable cause does not turn on whether the defendant could have been convicted on the same available evidence. . . . [P]roof of probable cause requires less than proof by a preponderance of the evidence. . . . The probable cause determination is, simply, an analysis of probabilities. . . . The determination is not a technical one, but is informed by the factual and practical considerations of everyday life on which reasonable and prudent [persons], not legal technicians, act. . . . Probable cause is not readily, or even usefully, reduced to a neat set of legal rules. . . .

"The determination of whether probable cause exists under the fourth amendment to the federal constitution . . . is made pursuant to a totality of circumstances test. . . . The probable cause test then is an objective one. . . . This court must not attempt a de novo review where there has already been a determination at a suppression hearing that probable cause exists." (Citations omitted; internal quotation marks omitted.) *State* v. *Correa*, supra, 185 Conn. App. 334–35.

In the present case, the defendant asserts that no reasonable officer would believe that probable cause existed to enter her apartment. Specifically, she asserts that "the trial court found that the officers knew there had been an altercation between two men and also knew that both parties fled the apartment complex," thus, there was no basis on which a reasonable officer would believe that probable cause justified entry in pursuit of a suspect pursuant to the exigent circumstances doctrine. Because we agree with the defendant, and for the reasons discussed below, we conclude that the police lacked probable cause to enter the defendant's apartment.

The facts found by the court do not provide an objective basis for the police to have concluded that they had probable cause to enter the defendant's apartment. First, as previously stated, Zulali knew that two men entered the building, that an altercation ensued, and that the two men who entered the building had subsequently exited it without entering the defendant's apartment. No evidence existed that a third party had been involved in the alleged altercation. Second, the altercation occurred in the laundry room. Additionally, evidence of the altercation, including the knife, the flip flop sandal, shell casings, bullet holes, and the blood like stain, all were found in the laundry room. Third, during Cruz' 911 call, he stated to the operator that

he did not believe the residents of the defendant's apartment were inside the apartment at that time. Fourth, there was limited evidence that directly pertained to the defendant's apartment, including pry marks and paint chips near the defendant's apartment door and Zulali's admission that the door to the defendant's apartment was locked. Thus, there was no reasonable basis to conclude that any activity deriving from the altercation between the two men had occurred in the defendant's apartment. Accepting these facts, it is unlikely that an objectively reasonable officer would conclude that he or she had probable cause to enter the defendant's apartment.

II

The defendant claims next that the court improperly concluded that Zulali's warrantless entry into her apartment was justified under the emergency doctrine. Specifically, she argues that, on the basis of the facts, a reasonable officer could not conclude that entry was necessary to alleviate an emergency. The state counters that it was objectively reasonable for an officer to believe that a person within the defendant's apartment was injured and required immediate assistance pursuant to the emergency doctrine. We are not persuaded by the state's argument.

"It is axiomatic that the police may not enter the home without a warrant or consent, unless one of the established exceptions to the warrant requirement is met. Indeed, [p]hysical entry of the home is the chief evil against which the wording of the fourth amendment is directed. . . .

"Searches conducted pursuant to emergency circumstances are one of the recognized exceptions to the warrant requirement under both the federal and state constitutions. . . . [T]he fourth amendment does not bar police officers, when responding to emergencies,

from making warrantless entries into premises and warrantless searches when they reasonably believe that a person within is in need of immediate aid. . . . The extent of the search is limited, involving a prompt warrantless search of the area to see if there are other victims . . . still on the premises. . . . The police may seize any evidence that is in plain view during the course of the search pursuant to the legitimate emergency activities. . . . Such a search is strictly circumscribed by the emergency which serves to justify it . . . and cannot be used to support a general exploratory search. . . .

"It is well established in Connecticut that the test for the application of the doctrine is objective, not subjective, and looks to the totality of the circumstances. . . . Specifically, the state actors making the search *must have reason to believe that life or limb is in immediate jeopardy and that the intrusion is reasonably necessary to alleviate the threat.* . . . The police, in order to avail themselves of this exception, must have valid reasons for the belief that an emergency exists, a belief that must be grounded in empirical facts rather than subjective feelings. . . . The test is not whether the officers actually believed that an emergency existed, but whether a reasonable officer would have believed that such an emergency existed. . . . The reasonableness of a police officer's determination that an emergency exists is evaluated on the basis of facts known at the time of entry. . . . [T]he emergency doctrine relies on an objective test wherein the reasonableness of the officer's belief is assessed on a case-by-case basis. . . . The three general categories that the courts have identified as justifying the application of the doctrine are danger to human life, destruction of evidence and flight of a suspect. . . .

"Direct evidence of an emergency is not required because the emergency exception to the warrant

requirement arises out of the caretaking function of the police. It has been observed that [t]he police have complex and multiple tasks to perform in addition to identifying and apprehending persons committing serious criminal offenses; by design or default, the police are also expected to reduce the opportunities for the commission of some crimes through preventive patrol and other measures, aid individuals who are in danger of physical harm, assist those who cannot care for themselves, resolve conflict, create and maintain a feeling of security in the community, and provide other services on an emergency basis. . . . As [our Supreme Court] previously has noted, the emergency doctrine is rooted in the community caretaking function of the police rather than its criminal investigatory function. We acknowledge that the community caretaking function of the police is a necessary one in our society. [I]t must be recognized that the emergency doctrine serves an exceedingly useful purpose. Without it, the police would be helpless to save life and property, and could lose valuable time especially during the initial phase of a criminal investigation. . . . Constitutional guarantees of privacy and sanctions against their transgression do not exist in a vacuum but must yield to paramount concerns for human life and the legitimate need of society to protect and preserve life." (Citations omitted; emphasis altered; internal quotation marks omitted.) *State* v. *DeMarco*, 311 Conn. 510, 534–37, 88 A.3d 491 (2014).

Application of these principles leads us to conclude that the entry of the six Waterbury police officers into the defendant's apartment was not justified by the emergency doctrine because a reasonable officer would not have believed that an emergency involving danger to human life existed in the apartment. The state argues that in the court's oral decision on the defendant's motion to suppress, it found that there were specific

factors that led Zulali to conclude that there was an emergency in the defendant's apartment requiring a warrantless entry. We will examine each of these factors in turn. We note, however, that no single factor is determinative and, after examining these factors, we will consider all of them under the totality of the circumstances to evaluate the reasonableness of Zulali's belief that immediate action was necessary. See *State* v. *Kendrick*, supra, 314 Conn. 229.

The first factor that the state claims supports the police's warrantless entry was that Zulali was responding to a possible burglary and an altercation between two males. The state claims that because "burglary is a crime of violence and bystanders are likely to be injured by the perpetrator," it was reasonable for the police to believe that someone in the defendant's apartment was injured. In its brief, the state cites *State* v. *Fausel*, 295 Conn. 785, 798, 993 A.2d 445 (2010) in support of this claim.

In *Fausel*, a police officer observed a vehicle with a license plate attached to the rear bumper with what appeared to be plastic ties and ran its plate number. Id., 788. The plate number, which came back as expired, was also tied to a different vehicle. The owner of the plate had prior arrests for narcotics and weapons. Id. The officer attempted to approach the vehicle but the operator of the vehicle fled at a high rate of speed. Id., 788–89. The officer then radioed a description of the vehicle and operator to the police dispatcher. Id., 789. The police later discovered that the vehicle had stopped at a residential property. Id., 789. Witnesses told police officers that they had observed the operator of the vehicle enter the residence. Id. The police then knocked on the door but did not receive a response. Id. Eventually, the operator of the vehicle appeared and surrendered to the police. Id. The police entered the residence

without a warrant to determine if anyone else was present, injured or if there were any remaining threats. Id. During their sweep, the police identified bags of crack cocaine for which the police later obtained a warrant and seized. Id. The defendant, the owner of the residence, thereafter filed a motion to suppress, claiming that the police improperly entered the residence without a warrant. Id., 790. The trial court denied the motion, which the defendant appealed to this court and, thereafter, upon certification, to our Supreme Court. Id., 791–92. Our Supreme Court concluded that the police were justified in entering the residence under the emergency doctrine because a reasonable police officer could conclude that, on the basis of the individual's "criminal history with weapons and drugs, his extreme attempt to avoid arrest, his reluctance to surrender, and his lack of any apparent connection with the house and its residents," it was necessary to enter the residence immediately to ensure that no one was injured. Id., 798.

The facts of the present case are distinguishable from those in *Fausel*. In the present case, the police did not have knowledge of the identities of the individuals who entered the building. Thus, Zulali was unaware of any prior criminal history involving these individuals. Further, although Cruz observed these individuals enter the building, there was no witness in the present case who observed either individual enter the defendant's apartment, nor did a witness observe anyone emerge from the defendant's apartment to engage in the altercation. Additionally, there was no evidence demonstrating that someone had breached the door to the defendant's apartment. The pry marks and paint chips that Zulali observed demonstrate that someone had attempted to enter the defendant's apartment but was unsuccessful. Also, Zulali tried but could not open the door to the

defendant's apartment. Moreover, Zulali received information that two individuals had entered the building, engaged in an altercation, and then fled from the building in separate vehicles. Zulali was unaware of any evidence that a third party was involved in the altercation and remained in the building or was located in the defendant's apartment. Although crimes like burglary are "likely to involve danger to life in the event of resistance by the victim"; *State* v. *Fausel*, supra, 295 Conn. 798; the evidence in the present case does not clearly demonstrate that there was a victim or bystander that was injured. Further, there was no evidence that the door to the defendant's apartment was breached and that a burglary occurred therein. Instead, the evidence suggests that the attempted entry into the defendant's apartment was unsuccessful and the door was not breached.

The second factor that the state claims supports the police's warrantless entry was the fact that Zulali observed a blood like stain and bullet holes in the laundry room. The state, citing to *State* v. *Blades*, 225 Conn. 609, 621, 626 A.2d 273 (1993), claims that this blood like stain " 'further heightened' [the] belief that a person might be in need of immediate aid."

In the present case, Zulali testified that he observed what he believed to be a blood like stain in the laundry room, approximately one-half centimeter, or less than one-quarter inch, in size. Furthermore, Zulali observed bullet holes, a shell casing, a flip flop sandal and a knife in the laundry room. The state claims that the blood like stain in the present case would lead a reasonable officer to conclude that someone may be in immediate need.

During the hearing on the defendant's motion to suppress, the court found that the blood like stain that Zulali observed in the laundry room measured one-half

centimeter. Also during the hearing, Zulali testified that, aside from the one-half centimeter blood like stain he observed on the wall of the laundry room, he did not observe any other blood like marks in the building. Furthermore, Zulali testified that, as a police officer and first responder, he had responded to many medical calls, and that his training and experience contributed to his decision in determining that someone may have been in need of immediate medical attention. We disagree with the state that this one-half centimeter blood like stain would lead a reasonable officer to believe that a person in a locked apartment in a separate area of the building might be in need of immediate aid. There were neither blood like stains on or outside of the door to the defendant's apartment or leading into the hall toward the direction of the defendant's apartment, nor were there any bullet holes or shells near the door to the defendant's apartment. Thus, a reasonable officer with first responder training commensurate to that of Zulali might likely conclude that there was an altercation in the laundry room and someone might have been injured *in the laundry room* as a result of the altercation but not that someone in the defendant's apartment required emergency medical assistance. The court did not find any facts supporting a theory or conclusion that an injured person in the laundry room retreated to the defendant's apartment or that the *one-half centimeter* blood like stain and other evidence in the laundry room supported the theory that an individual in the defendant's apartment was in need of emergency medical assistance.

The third factor that the state claims supports the police's warrantless entry was the lack of response that Zulali received when knocking on the defendant's apartment and his inability to observe conditions inside the apartment, in conjunction with the fact that there was an unoccupied car parked in the building's parking lot

that allegedly belonged to the defendant. The state argues that these elements "increased the chances that there was a person inside the apartment who was unresponsive as the result of an injury . . . ." The state relies on our Supreme Court's decision in *State* v. *DeMarco*, supra, 311 Conn. 510, to support its argument that a warrantless entry is reasonable on the basis of vehicles on the premises and an inability to look through windows to observe the interior of the residence.

In *DeMarco*, an animal control officer from the Stamford Police Department responded to complaints relating to the defendant's keeping of animals in his residence. Id., 513. The officer left a notice on the front door and a notice on the windshield of an automobile that the defendant typically drove. Id., 539. During that visit, a neighbor informed the officer that the neighbor had not seen the defendant in several days. Id. Thereafter, the officer attempted to reach the defendant by phone but was unsuccessful. Id. The officer returned the next week and observed that the notice was still on the vehicle's windshield and the notice on the door was now lying on the floor of the porch. Id. He also observed that the defendant's mailbox was overflowing with current and dated mail. Id. The officer could hear dogs barking from within the residence and smelled a terrible odor emanating therein. Id. The officer called for backup and attempted to look through the windows but was unsuccessful because the windows were too dirty. Id., 539–40. Firefighters also arrived and determined that the smell could be life threatening and entered the residence. Id., 540.

Our Supreme Court concluded that, on the basis of the notices, the mail that had piled up, "the putrid, overwhelming odor" and the same unmoved vehicle on the premises, a reasonable police officer would believe that an emergency existed inside the defendant's home.

Id. Thus, in *DeMarco*, the fact that the defendant's vehicle had remained unmoved for more than one week was a relevant factor *of many* when viewed through the lens of the totality of the circumstances that justified the warrantless entry of the defendant's residence.

In the present case, when viewed under the totality of the circumstances, the fact that the defendant's alleged vehicle was in the parking lot does not support the conclusion that it was reasonable to believe that an emergency existed in the defendant's apartment. Furthermore, when viewed in conjunction with the fact that no one answered when Zulali knocked on the door to the defendant's apartment, the fact that there was an unoccupied vehicle in the parking lot allegedly belonging to the defendant does not support the inference that there was an emergency in the defendant's apartment. Rather, on the basis of these facts and those discussed previously, a reasonable officer might infer that the defendant's apartment was unoccupied. See *State* v. *Ryder*, 301 Conn. 810, 830–31, 23 A.3d 694 (2011); *State* v. *Geisler*, 222 Conn. 672, 695, 610 A.2d 1225 (1992).

Lastly, the court, in its ruling on the defendant's motion to suppress, found that one hour had elapsed from the time when Zulali arrived at the building to when the six police officers entered the defendant's apartment. We note that the amount of time elapsed is not a dispositive factor in determining the existence of an emergency but one that, when viewed in the totality of the circumstances, makes it more difficult to conclude that a reasonable officer could believe that after the lapse of one hour, an emergency existed in the defendant's apartment in circumstances in which there was no evidence of activity in the apartment. Our Supreme Court's decision in *State* v. *Blades*, supra, 225 Conn. 609, is helpful to our analysis of this factor.

In *Blades*, the wife of the defendant had been missing for a period of time. Id., 613. Family members of the

defendant's wife called the New London Police Department expressing their concern. Id. During those phone calls, the police were made aware of the tempestuous relationship between the defendant and his wife. Id., 620. To investigate, the officer called various parties, including the employer of the defendant's wife, and learned that her daughter had also called the employer looking for her. Id., 615. After two hours had passed and the officer had determined that the defendant's wife was missing or may be in danger, the officer traveled to the defendant's apartment, where he gained entry into the apartment and entered the apartment without a warrant. Id., 613. Inside the apartment the officer discovered the defendant's wife, who had been murdered by the defendant. Id.

In that two hour time period in *Blades*, the officer knocked on the defendant's apartment door and identified himself, to which the defendant responded "[m]y wife is in New York"; there were several concerned relatives that called the police and reported that the defendant likely provided a false narrative for his wife's disappearance; the officer contacted the employer of the defendant's wife and learned that she was not there and others had called looking for her; there was a long history of domestic abuse between the defendant and his wife; and the officer observed blood on the interior side of the back door to the building where the defendant's apartment was located. Id., 613–17. Thus, on the basis of this information, the officer concluded that "there was reason to believe that someone was injured or in danger in the apartment and that it would be necessary to enter to protect or preserve life." Id., 616. Our Supreme Court concluded that on the basis of these facts, the police's entry into the defendant's apartment under the emergency doctrine was valid. Id., 624.

In contrast to *Blades*, Zulali did not discover any evidence in the present case that clearly demonstrated

that someone in the defendant's apartment was at risk of losing life or limb. In the one hour that elapsed from the time he arrived to the time that the door of the defendant's apartment was breached, he found no evidence relating to the whereabouts of the defendant or whether there was any person in the apartment. Although in that time period Zulali had interviewed all of the residents in the building, the residents were reluctant to provide Zulali with information but confirmed that they were fine. Zulali did not learn anything new from interviewing the residents of the building. Thus, unlike in *Blades*, where the officer had discovered substantial evidence during his investigation clearly demonstrating that someone was in danger of losing life or limb, Zulali did not glean from his investigation evidence that demonstrated that a warrantless entry was necessary.

While the emergency exception does not require direct evidence of an emergency situation, it does "require, however, that officers know *some* facts at the time of entry that would lead them to reasonably conclude that they could dispense with the necessity of obtaining a warrant supported by probable cause in accordance with the dictates of the fourth amendment." (Emphasis in original.) *State* v. *Ryder*, supra, 301 Conn. 830. Further, the emergency exception requires that the police have "an objectively reasonable basis for believing that an occupant is seriously injured"; (internal quotation marks omitted) *State* v. *Fausel*, supra, 295 Conn. 794; or reason to believe "that life or limb is in immediate jeopardy and that the intrusion is reasonably necessary to alleviate the threat." (Internal quotation marks omitted.) Id., 795. In the present case, there was no objectively reasonable basis for the police to believe that someone in the defendant's apartment was seriously injured or that life or limb was in immedi-

ate jeopardy.[6] Thus, taking all the circumstances into consideration, we conclude that the court's conclusion that it was objectively reasonable for the police to believe that an emergency existed in the defendant's apartment, thus justifying the warrantless entry, was not supported by substantial evidence. The warrantless entry into the defendant's apartment when there was no objectively reasonable basis for believing that an emergency existed violated her rights under the fourth amendment to the United States constitution.

The judgment is reversed and the case is remanded with direction to grant the defendant's motion to suppress and to render judgment dismissing the charge of possession of narcotics with intent to sell.

In this opinion DEVLIN, J., concurred.

PRESCOTT, J., dissenting. Contrary to the majority opinion, I conclude, on the basis of the subordinate facts found by the trial court and the rational inferences drawn from those facts, that the police who responded to the 911 call in this matter reasonably could have believed that an emergency situation existed that justified their warrantless entry into the apartment of the defendant, Shaila M. Curet. Accordingly, I further conclude that the trial court properly denied the defendant's motion to suppress the evidence obtained by the police as a result of their warrantless entry, and I would affirm the judgment of conviction rendered by the court following the defendant's conditional plea of nolo contendere. Therefore, I respectfully dissent.[1]

[6] The most reasonable interpretation of the facts is that two men, after entering the building, unsuccessfully attempted to enter the defendant's apartment.

[1] Because I conclude that the police officers' warrantless entry was reasonable under the emergency doctrine exception to the warrant requirement, I need not reach the issue of whether the police had probable cause to enter the apartment pursuant to the exigent circumstances exception.

Although the majority opinion sets forth in some detail the facts as found by the court in its oral ruling on the defendant's motion to suppress,[2] I summarize them again briefly with an emphasis on those facts most relevant to my determination of whether the police reasonably made a warrantless entry into the defendant's apartment pursuant to the emergency doctrine. On the afternoon at issue, Anthony Cruz, who lived in the defendant's apartment building, called 911 to report what he described as a break-in and loud altercation. Cruz explained to the 911 operator that he had observed an unknown man wearing a hooded sweatshirt enter the apartment building. Thereafter, he heard what he thought were gunshots associated with a loud altercation that was happening in and around the building's laundry room, which was located on the first floor of the building, directly below his apartment. Cruz told the 911 operator that he later saw two men—the individual he originally had observed entering the building and a different, unidentified man—leave the building and depart in separate vehicles. Cruz also relayed to the operator that he had found a knife in the laundry room with white paint on it. He believed someone may have used the knife to try to break into the defendant's apartment, which was located across from the laundry room.[3]

[2] I note that the record does not contain a signed copy of the transcript of the court's oral memorandum of decision as required pursuant to our rules of appellate procedure. See Practice Book § 64-1 (a). "In cases in which the requirements of Practice Book § 64-1 have not been followed, this court has declined to review the claims raised on appeal due to the lack of an adequate record." *State* v. *Brunette*, 92 Conn. App. 440, 446, 886 A.2d 427 (2005), cert. denied, 277 Conn. 902, 891 A.2d 2 (2006). This court nonetheless has reviewed claims on appeal if an unsigned transcript has been provided and we were able to discern the portions of the transcript constituting the court's decision. See id. Because the defendant filed an unsigned transcript of the hearing at which the court rendered its oral ruling on the motion to suppress, I would review her claim despite the technically inadequate record.

[3] Although Cruz told the operator that he did not think anyone currently was at home in the defendant's apartment, there is nothing in the record indicating that Cruz' belief was founded on any personal knowledge or

Officer Raim Zulali was dispatched to respond to the 911 call. Much of the information provided by Cruz to the 911 operator was relayed to him on the display in his police cruiser before he arrived at the scene. When Zulali arrived at the building at around 4 p.m., the apartment building was locked, but he was admitted by Cruz, whom he questioned regarding his 911 call. Cruz told Zulali that he did not recognize the man wearing the hooded sweatshirt, but that he saw him exiting a white vehicle and became suspicious when the man tried to conceal his identity as he approached the front door to the building. Cruz stated that the man may have used the knife that Cruz later found in the laundry room to gain access to the building. Cruz also told Zulali that, shortly after the man gained entry to the building, he heard someone knocking very hard on the door to the defendant's apartment. He then heard an altercation begin, starting in the hallway outside of the defendant's apartment and moving to the laundry room, which was only a few feet away. It was after the altercation had moved into the laundry room that Cruz believed he heard two gunshots. He next saw a man run out the front door of the building and leave in the white vehicle, following which he saw another male exit the building and leave in a different car. Cruz told Zulali that, upon investigating, he found a knife in the laundry room.

Importantly, Cruz also stated that he thought that one of the residents of the defendant's apartment was

observation. Thus, it would have been reasonable for the police not to have placed much weight on his statement in assessing whether an injured person in need of medical care may have been in the defendant's apartment. I also disagree with the majority's suggestion that the trial court's reliance on the 911 call in rendering its ruling on the motion to suppress means that it necessarily credited Cruz' belief regarding the occupancy of the apartment. See footnote 2 of the majority opinion. Further, as I discuss later in my dissent, there were additional facts learned by the police during their investigation that reasonably could be viewed as contradicting Cruz' statement to the operator, including his statement that he thought that one of the residents of the defendant's apartment was a participant in the altercation and the presence of the defendant's vehicle in the building's parking lot.

involved in the altercation. Cruz informed Zulali that a male and a female lived in the defendant's apartment, and that their vehicle still was parked in the parking lot. There is nothing in the record, however, to suggest that Cruz ever indicated to the police that either of the two men that he had observed fleeing from the building after the altercation was the male resident of the defendant's apartment. Zulali checked the vehicle that Cruz had indicated belonged to the residents of the defendant's apartment. The vehicle was unoccupied.

When Zulali inspected the hallway outside of the defendant's apartment, he saw pry marks on the frame of the defendant's apartment door and found fresh paint chips on the floor nearby. He also saw what looked to be freshly made footprints on the wall of the hallway. Inside the laundry room, Zulali observed that the room was in disarray, with the washing and drying machines having been disturbed from their normal positions. Zulali found a single spent shell casing on the floor and observed a bullet hole in the exit side of the doorframe of the laundry room's door. Zulali also observed a mark on the floor and a hole in the wall that he believed may have been caused by a ricocheted bullet. In addition to the evidence of gunfire, Zulali found a small and fresh blood like stain on the wall adjacent to the laundry room door.

On the basis of his observations, Zulali called for additional police assistance and, having developed a concern that someone may have been shot or stabbed during the altercation under investigation, he asked a dispatcher to call area hospitals to ascertain whether any gunshot or stabbing victims recently had arrived for treatment. Zulali went door to door and interviewed residents of the building to determine whether anyone had been injured.[4] He also knocked on the door of the

[4] The court found that Zulali was able to interview someone from each of the units in the apartment building other than the defendant's.

defendant's apartment. When he did not receive any response, he attempted to open the door of the apartment, but it was locked. He also tried to look into the apartment's windows, but the blinds were all closed.

Zulali called his superior officer, Sergeant Gaetano Tiso, explained the evidence that he had found thus far, and expressed his concern that someone might be in the defendant's apartment. Tiso and several additional officers responded to the scene. When they arrived, Zulali again reviewed the evidence with Tiso, repeating his concern that someone might be in the defendant's apartment and injured. The police proceeded to force open the door of the defendant's apartment in a search for any injured occupant.[5] Approximately one hour had passed from the time that Zulali first arrived at the apartment building until the warrantless entry into the defendant's apartment occurred.

As aptly described in the majority opinion, multiple items of inculpatory evidence were observed in plain view by the officers as they conducted their search, which later were seized pursuant to a subsequently obtained warrant. The defendant was arrested and charged with possession of more than one-half ounce of cocaine in violation of General Statutes § 21a-278 (a) and operation of a drug factory in violation of General Statutes § 21a-277 (c). Thereafter, she filed a motion to suppress the evidence seized as a result of the warrantless entry of her apartment, arguing in relevant part that the emergency doctrine was inapplicable because no reasonable police officer would have believed that there was an emergency requiring the warrantless entry into her apartment. The state countered, inter alia, that

[5] The majority notes that six officers, including Zulali and Tiso, entered the apartment and that they breached the door with a battering ram. In my view, the number of officers involved and their means of entry are irrelevant to the issue of whether their entry was reasonable under the emergency doctrine.

the police officers properly entered and searched the defendant's apartment under the emergency doctrine because they reasonably could have believed that someone may have been seriously injured. The court agreed with the state that the officers' warrantless search was reasonable. In reaching its decision, the court relied on the testimony of both Zulali and Cruz, both of whom the court found credible.

The defendant claims on appeal that the court improperly concluded that the police's warrantless entry into her apartment was justified under the emergency exception because no reasonable officer could have concluded that entry was necessary to alleviate an emergency. The state responds that, under the facts known at the time, it was objectively reasonable for an officer to believe that someone may have been in the defendant's apartment who was seriously injured and in need of medical assistance and, thus, the warrantless entry was justified pursuant to the emergency doctrine. I agree with the state.

Before turning to my analysis, I first set forth the relevant legal parameters of the emergency doctrine exception to the warrant requirement and our well settled standard of review governing this claim. "[A] search conducted without a warrant issued upon probable cause is per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions. . . . Searches conducted pursuant to emergency circumstances are one of the recognized exceptions to the warrant requirement under both the federal and state constitutions. . . . [T]he fourth amendment does not bar police officers, when responding to emergencies, from making warrantless entries into premises and warrantless searches when they reasonably believe that a person within is in need of immediate aid. . . . The extent of the search is limited, involving a prompt warrantless search of the area . . . . The police may seize

any evidence that is in plain view during the course of the search pursuant to the legitimate emergency activities. . . . Such a search is strictly circumscribed by the emergency which serves to justify it . . . and cannot be used to support a general exploratory search. . . .

"The state bears the burden of demonstrating that a warrantless entry falls within the emergency exception. . . . An objective test is employed to determine the reasonableness of a police officer's belief that an emergency situation necessitates a warrantless intrusion into the home. . . . [The police] must have valid reasons for the belief that an emergency exists, a belief that must be grounded in empirical facts rather than subjective feelings. . . . The test is not whether the officers actually believed that an emergency existed, but whether a reasonable officer would have believed that such an emergency existed. . . . The reasonableness of a police officer's determination that an emergency exists is evaluated on the basis of facts known at the time of entry." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Blades*, 225 Conn. 609, 617–19, 626 A.2d 273 (1993); see also *State* v. *DeMarco*, 311 Conn. 510, 534–37, 88 A.3d 491 (2014).

"The purpose of the emergency doctrine is to allow the police to make a warrantless entry to render emergency aid and assistance to a person whom they reasonably believe to be in distress and in need of that assistance." (Internal quotation marks omitted.) *State* v. *Kendrick*, 314 Conn. 212, 230, 100 A.3d 821 (2014). As our Supreme Court has explained, "the emergency doctrine is rooted in the community caretaking function of the police rather than its criminal investigatory function. We acknowledge that the community caretaking function of the police is a necessary one in our society.[6]

[6] "Police often operate in the gray area between their community caretaking function and their function as criminal investigators. Often there is no bright line separating the one from the other; the emergency doctrine relies

[I]t must be recognized that the emergency doctrine serves an exceedingly useful purpose. Without it, the police would be helpless to save life and property, and could lose valuable time especially during the initial phase of a criminal investigation. . . . Constitutional guarantees of privacy and sanctions against their transgression do not exist in a vacuum but must yield to paramount concerns for human life and the legitimate need of society to protect and preserve life." (Citation omitted; footnote added; internal quotation marks omitted.) *State* v. *Blades*, supra, 225 Conn. 619. Importantly, our Supreme Court has warned that, in evaluating the reasonableness of a warrantless intrusion under the emergency doctrine, "[t]he fact that the protection of the public might, in the abstract, have been accomplished by less intrusive means does not, by itself, render the search unreasonable." (Internal quotation marks omitted.) *State* v. *DeMarco*, supra, 311 Conn. 532.

"[I]n reviewing a trial court's ruling on the emergency doctrine, subordinate factual findings will not be disturbed unless clearly erroneous and the trial court's legal conclusion regarding the applicability of the emergency doctrine in light of these facts will be reviewed de novo. . . . Conclusions drawn from the underlying facts must be legal and logical. . . . We must determine, therefore, whether, on the facts found by the trial court, the court properly concluded that it was objectively reasonable for the police to believe that an emergency situation existed."[7] (Internal quotation marks omitted.) *State* v. *Blades*, supra, 225 Conn. 617.

on an objective test wherein the reasonableness of the officer's belief is assessed on a case-by-case basis." *State* v. *Blades*, supra, 225 Conn. 619.

[7] I am cognizant of our Supreme Court's instruction that "when a question of fact is essential to the outcome of a particular legal determination that implicates a defendant's constitutional rights, and the credibility of witnesses is not the primary issue, our customary deference to the trial court's factual findings is tempered by a scrupulous examination of the record to ascertain that the trial court's factual findings are supported by substantial evidence." (Internal quotation marks omitted.) *State* v. *DeMarco*, supra, 311 Conn. 519. In the present case, the defendant does not challenge any of the trial court's

For the following reasons, I conclude, on the basis of the facts known to the police at the time they decided to enter the defendant's apartment without a warrant and the reasonable inferences that may be drawn from those facts, that the police reasonably could have concluded that a medical emergency involving danger to human life existed, thus justifying their warrantless entry.

First, it is significant that Zulali was dispatched to the apartment building in response to a 911 call alerting the police to an attempted burglary during which gunshots may have been fired and a knife was found. As argued by the state on appeal, any burglary comes with a potential for violence; it is objectionably reasonable that any trained law enforcement officer responding to a call of a break-in at an apartment building would contemplate that a resident or bystander encountering the perpetrator might be injured. See *State* v. *Fausel*, 295 Conn. 785, 798–99, 993 A.2d 455 (2010); *State* v. *Ortiz*, 95 Conn. App. 69, 82, 895 A.2d 834, cert. denied, 280 Conn. 903, 907 A.2d 94 (2006).[8] Accordingly, from

factual findings, arguing only that those findings do not support its ultimate legal conclusion.

[8] The majority makes much of the fact that the present case is factually distinguishable from *Fausel*, which the state cites in support of the proposition that burglary is a crime of violence. It is true that, unlike in *Fausel*, the police here were not aware of the identities of the individuals involved in the altercation and, thus, whether they may have had any prior criminal history. Further, no one in the present case witnessed anyone enter the defendant's apartment or observe anyone emerge from the defendant's apartment to engage in the altercation. The majority contends that the pry marks and paint chips that Zulali observed only supported a conclusion that someone other than a resident of the apartment had attempted forcibly to enter the defendant's apartment, but that this was not evidence that the attempt was successful. I disagree that such a conclusion must be drawn from that evidence. Such evidence would have been present whether or not entry was successfully gained. Moreover, this evidence does not bear on the question of whether a resident of the apartment had fled back into the apartment after having engaged in the altercation in and around the laundry room.

In any event, I do not find the majority's discussion of *Fausel* persuasive. Nowhere in the *Fausel* decision does our Supreme Court suggest that all

the outset, responding police, in exercising their community caretaking function, reasonably would have been concerned that someone in the apartment building may have been injured.

Second, there was ample evidence present at the scene from which the police reasonably could have inferred that someone either participating in the altercation that Cruz overheard or a victim of the altercation might have been injured seriously and be in need of medical assistance. Cruz was only an earwitness and never directly observed the altercation. Thus, the mere fact that, after the altercation ended, he saw two men fleeing the scene did not necessarily mean that there were only two persons present during the relevant events. Given the fact that Cruz heard loud banging on the defendant's apartment door immediately preceding the altercation, it is not unreasonable to infer that the altercation involved someone in the defendant's apartment who either interrupted an attempted burglary, was the intended victim of the burglary, or had some other reason to engage in an argument that spilled out into the hallway and into the laundry room. Furthermore, Cruz had indicated to both the 911 operator and Zulali that he had heard what he believed was gunfire at the time of the altercation. His belief was corroborated by the bullet holes and ricochet marks observed in the laundry room, as well as the discovery of a shell casing. The fact that the bullet hole was located on the exit side of the laundry room door supports an inference

the facts and circumstances present in *Fausel* must exist before the police can reasonably exercise their authority to make a warrantless search under the emergency doctrine. In fact, the court clearly states that "there are an infinite variety of situations in which entry for the purpose of rendering aid is reasonable." (Internal quotation marks omitted.) *State* v. *Fausel*, supra, 295 Conn. 798. Our inquiry is whether the specific facts and circumstances confronting the police *in this case* would have led the police to an objectively reasonable belief that a warrantless entry was required to protect life and limb.

that someone may have been trying to escape from the shooter. Further, Zulali observed a fresh blood like stain in the laundry room. It is a reasonable inference to conclude from that discovery, particularly in conjunction with the knowledge of recent gunfire associated with a burglary and some type of altercation, that a person might have been injured and in need of immediate aid. See *State* v. *Blades*, supra, 225 Conn. 621.

Third, the majority's assertion that there was "limited evidence that directly pertained to the defendant's apartment" is belied by the record. There is, in fact, a significant factual basis on which the police reasonably could have linked any injury that occurred in the laundry room to someone who may have been inside the defendant's locked apartment. Cruz indicated to the police that the events originated at the defendant's doorway. Further, Cruz stated that he believed that one of the residents of the apartment was involved in the altercation. It is not an unreasonable inference to conclude that any party injured during the altercation could have fled from the laundry room back into the defendant's apartment, locking the door behind him or her. The pry marks on the doorframe of the defendant's apartment door and the paint chips further link the defendant's apartment to the altercation, either because the altercation began as a result of a break-in or an attempted break-in or because someone attempted to pursue a fleeing victim. In short, under the totality of the circumstances, it would have been reasonable for officers to be concerned that someone shot, stabbed, or otherwise injured during the altercation could have sought refuge in the defendant's apartment and might be in need of medical attention. The fact that no one answered the door could have meant that the injured party had lost consciousness, making the need for an

emergency warrantless entry that much more compelling.[9]

I further agree with the state that the fact that the defendant's vehicle was still at the premises and that the police were unable to look through windows to observe the interior of the residence increased rather than diminished the likelihood "that there was a person inside the apartment who was unresponsive as the result of an injury . . . ."

The majority states that the fact that the defendant's vehicle was found in the parking lot does not support a belief that an emergency existed in the defendant's apartment. I disagree because the evidence cannot be viewed in isolation. As I have already indicated, there was evidence that linked the gunfire and the altercation in the laundry room directly to the defendant's apartment. A reasonable inference to be drawn from the fact that the vehicle owned by one of the residents of the defendant's apartment was still parked outside is that the owner of the vehicle may still be home. When viewed in conjunction with the fact that no one answered when

[9] The majority states that "[t]he court did not find any facts supporting a theory or conclusion that an injured person in the laundry room retreated to the defendant's apartment or that the *one-half centimeter* blood like stain and other evidence in the laundry room supported the theory that an individual in the defendant's apartment was in need of emergency medical assistance." In support of this statement, the majority focuses too narrowly on the size of the stain and the fact that no blood like stains were observed on or outside of the door to the defendant's apartment or in the hallway leading to the defendant's apartment, and that no bullet holes or shells were found near the door to the defendant's apartment. The absence of this evidence, however, does nothing to diminish the significance of the fresh blood like substance that was found or the other evidence that I have indicated connects the altercation in the laundry room with the defendant's apartment. Nor does its absence render the actions taken by the police unreasonable per se. Furthermore, the majority fails in my opinion to take proper account of the fact that the defendant's apartment door was mere feet from the laundry room, not, as the majority suggests, "in a separate area of the building."

Zulali knocked on the door to the defendant's apartment, and all other residents had been accounted for, the presence of the defendant's vehicle lends additional support for a reasonable inference to be drawn that the vehicle's owner was home yet incapacitated and unable to answer the door or call out for help. Certainly, this inference is more compelling than the majority's suggestion that a reasonable officer should have inferred from the vehicle's presence outside the apartment building that the defendant's apartment was unoccupied.

Finally, unlike the majority, I attach far less significance to the fact that one hour of time passed between the police's initial response to the 911 call and their eventual decision to enter the defendant's apartment without a warrant. Although this lapse of time is, of course, not irrelevant to an assessment of the reasonableness of the officers' belief, the amount of time elapsed, as the majority concedes, is not a dispositive factor in the required analysis. After all, in any particular investigation, it may not be until after some additional inquiries or assessment of the evidence gathered by the police has occurred that an officer reasonably may conclude that an emergency situation exists.

In *State* v. *Blades*, supra, 225 Conn. 609, our Supreme Court upheld a warrantless entry into a defendant's apartment on the basis of the emergency doctrine. In *Blades*, the court concluded that the police's entry into the defendant's apartment was reasonable despite the fact that two hours had passed between the time that the police first were contacted about a missing person and when they entered the defendant's apartment without a warrant. Id., 615–16. During those two hours, the officer in *Blades* investigated and discovered blood on the back door of the defendant's apartment building, which eventually led the police to "believe that someone was injured or in danger in the apartment and that it would be necessary to enter to protect or preserve life."

Id., 616. The fact that the police took one hour in the present case to evaluate the evidence and come to the conclusion that an injured person may have been in the defendant's apartment does not, in my mind, render that conclusion objectively unreasonable.[10]

Although the majority opinion states that, in the present case, Zulali did not discover "substantial evidence . . . clearly demonstrating" that someone in the defendant's apartment was at risk of losing life or limb, clear and substantial evidence is not the standard governing our inquiry. In my view, this statement mischaracterizes the relevant legal standard.[11] The standard is one of objective reasonableness under the facts as known at the time. The fact that our Supreme Court may have concluded in a particular case that there was clear, demonstrable evidence supporting the decision by the police to make a warrantless entry in *that particular case* does not mean that the same level of evidence *always*

[10] In analyzing the significance of the one hour time period, the majority makes contradictory use of the fact that the police entered the defendant's apartment before they had received any response from area hospitals about potential shooting or stabbing victims seeking treatment. The majority seems to suggest that the police's failure to wait before entering demonstrated some rush to judgment on the part of the police in entering the defendant's apartment. Yet, in the same breath, the majority suggests that it is partly because the police did not enter earlier that too much time had elapsed for there to have been a true emergency. It is unclear from the majority opinion how the police could have avoided such a catch-22 situation.

[11] The majority's use of the term "substantial evidence" appears to come from boilerplate it cites from *State* v. *Kendrick*, supra, 314 Conn. 222. As that phrase is properly used, it refers to the heightened standard that a reviewing court applies in assessing the subordinate factual findings of a trial court with respect to issues implicating a party's constitutional rights, such as a motion to suppress grounded on an alleged violation of the fourth amendment. See also footnote 6 of this opinion. The majority opinion, however, misapplies the standard by suggesting that a police officer may make a warrantless entry under the emergency doctrine only if there is *substantial* evidence that *clearly* demonstrates the existence of an emergency. But that simply is not the requisite standard. See *State* v. *Blades*, supra, 225 Conn. 618–19.

is necessary to justify entry under the emergency doctrine. To require otherwise would risk placing far too tight of a restriction on the important public safety function we entrust to the police, who often must quickly assess ambiguous or conflicting information and make immediate decisions "in circumstances that are tense, uncertain, and rapidly evolving." (Internal quotation marks omitted.) *Kentucky* v. *King*, 563 U.S. 452, 466, 131 S. Ct. 1849, 179 L. Ed. 2d 865 (2011); see also *State* v. *DeMarco*, supra, 311 Conn. 536–37. In my estimation, and contrary to the analysis of the majority, the fact that Zulali was unable to discover any definitive evidence as to the whereabouts of the residents of the defendant's apartment, including by interviewing other residents, supported the reasonableness of his decision that he needed to be sure that no one was in the apartment injured and in need of medical assistance.[12]

As the majority opinion recognizes, the emergency exception does not require that the police always have *direct* evidence of an emergency situation. Rather, it only requires that they know *some articulable facts at the time of entry* that reasonably could lead them to conclude that they should dispense with the necessity of obtaining a warrant.

On the basis of the totality of the facts, unlike the majority, I conclude that the trial court properly denied the defendant's motion to suppress the evidence found pursuant to the police officers' legitimate emergency entry of her apartment. Accordingly, I would affirm the judgment of the trial court and, thus, respectfully dissent.

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[12] In footnote 6 of its opinion, the majority states that the "*most reasonable* interpretation of the facts is that two men, after entering the building, unsuccessfully attempted to enter the defendant's apartment." This statement admits that *other reasonable* interpretations of the facts also existed. The inquiry for a reviewing court is not to choose the most reasonable scenario, but only to consider if *some* reasonable view of the facts would have led the police to believe that an emergency existed, justifying a warrantless search.

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