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CONNECTICUT REPORTS

Vol. 335

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* AMELIA RHODES (SC 20070)

Palmer, McDonald, D'Auria, Mullins, Ecker, Vertefeuille and Prescott, Js.*

Syllabus

Convicted of, among other crimes, criminal possession of a firearm and having a weapon in a motor vehicle, the defendant appealed. The defendant had been driving a car with a passenger, S, a drug dealer with whom the defendant had a long-standing relationship. They drove around for approximately forty-five minutes, stopped at a gas station-convenience store, and then drove for another forty-five minutes. The defendant then stopped the car in the lane of travel as they approached a large, outdoor social gathering, and S exited the car and fired multiple gunshots from a gun he had been carrying. S then reentered the car and instructed the defendant to drive. Police officers witnessed the shooting, and a high-speed police chase ensued, after which the defendant and S were ultimately apprehended. On appeal, the defendant claimed that the state failed to prove beyond a reasonable doubt that she possessed a firearm and, therefore, that there was insufficient evidence to sustain her conviction of criminal possession of a firearm. The defendant also contended that there was insufficient evidence to support her conviction of having a weapon in a motor vehicle. *Held*:

1. There was sufficient evidence from which the jury reasonably could have found that the defendant constructively possessed the firearm that S used in the shooting, as the record contained sufficient circumstantial evidence that the defendant knew that the firearm was in the car and that she was in a position to and intended to control the firearm, and, accordingly, this court upheld the defendant's conviction of criminal possession of a firearm: the jury reasonably could have inferred that, by the time of the police chase, the defendant knew that the firearm was in the vehicle, the defendant likely knew that S was a drug dealer and that he, therefore, often carried a gun, the fact that the defendant was driving and thereby controlling the car suggested that she was able to and intended to control the firearm, the defendant's attempt to flee from the police after the shooting indicated a consciousness of guilt stemming from her knowledge of and intent to exercise control over the gun, the jury reasonably could have inferred that the defendant and S were not just close friends but willing partners in a joint criminal

* This case was originally argued before a panel of this court consisting of Justices Palmer, McDonald, D'Auria, Mullins, Ecker and Vertefeuille. Thereafter, Judge Prescott was added to the panel and has read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

venture, and, in view of the fact that there was no evidence indicating that the firearm was anywhere other than in the area of the front seat, the jury reasonably could have inferred that she was physically in a position to exercise control over it; moreover, there was no merit to the defendant's contention that, because S testified that he had actively sought to conceal the firearm on his side of the car by sitting on it or by keeping it between his seat and the passenger's side door, her conviction of criminal possession of a firearm could not stand, as the jury was not required to credit the testimony of S, who lacked credibility and whose testimony was at odds with other evidence presented and the relationship between S and the defendant, whose interests were aligned; furthermore, this court declined to adopt the defendant's position that, because S allegedly had actual possession of the firearm, she could not have constructively possessed that firearm.

2. The defendant could not prevail on her claim that there was insufficient evidence to support her conviction of having a weapon in a motor vehicle on the ground that the "knowingly has" element of the statute ((Rev. to 2013) § 29-38 (a)) under which she was convicted should be construed to mean "knowingly possesses": constructive possession of a firearm would support a conviction even under the defendant's proposed reading of § 29-38 (a), as constructive possession requires knowledge and control of the object, and, in light of this court's conclusion that there was sufficient evidence that the defendant constructively possessed a firearm in connection with her conviction of criminal possession of a firearm, the defendant also must have knowingly possessed that firearm for purposes of her conviction under § 29-38 (a); moreover, the jury's finding that the defendant constructively possessed a firearm for purposes of her conviction of criminal possession of a firearm rendered any potential instructional error harmless, the trial court did not commit plain error in applying the law concerning the construction of the term "knowingly has" in § 29-38 (a) that existed at the time of the defendant's trial, and this court declined the defendant's request to exercise its supervisory authority over the administration of justice to resolve an issue of statutory construction and evidentiary sufficiency, as that authority is generally reserved for the adoption of procedural rules.

(*One justice concurring separately*; *three justices concurring and dissenting in one opinion*)

Argued September 12, 2018—officially released March 27, 2020**

Procedural History

Two part substitute information charging the defendant, in the first part, with the crimes of attempt to commit assault in the first degree, carrying a pistol without

** March 27, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

a permit, having a weapon in a motor vehicle, interfering with an officer, using a motor vehicle without the owner's permission and reckless driving, and, in the second part, with criminal possession of a firearm, brought to the Superior Court in the judicial district of Fairfield, where the first part of the information was tried to the jury before *Kahn*, *J.*; thereafter, the court, *Kahn*, *J.*, granted the defendant's motion for a judgment of acquittal as to the charge of carrying a pistol without a permit; subsequently, verdict of guilty of having a weapon in a motor vehicle, using a motor vehicle without the owner's permission and reckless driving; thereafter, the second part of the information was tried to the jury before *Kahn*, *J.*; verdict of criminal possession of a firearm; subsequently, the court, *Kahn*, *J.*, rendered judgment in accordance with the verdicts, from which the defendant appealed. *Affirmed*.

Lisa J. Steele, assigned counsel, for the appellant (defendant).

Matthew A. Weiner, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Michael A. DeJoseph*, senior assistant state's attorney, for the appellee (state).

Opinion

D'AURIA, J. The defendant, Amelia Rhodes, challenges her conviction of criminal possession of a firearm in violation of General Statutes (Rev. to 2013) § 53a-217 (a)[1] and having a weapon in a motor vehicle in violation of General Statutes (Rev. to 2013) § 29-38 (a).[2] The evidence presented to the jury at her trial showed that she drove an armed passenger, Lamar Spann, around Bridgeport for ninety minutes, including to and from the place where Spann discharged a weapon. The defendant

[1] Hereinafter, all references to § 53a-217 are to the 2013 revision.

[2] Hereinafter, all references to § 29-38 are to the 2013 revision.

appeals, arguing that there was insufficient evidence to establish that she constructively possessed a firearm under § 53a-217 (a) or that she knowingly had a firearm under § 29-38 (a). We disagree with the defendant and affirm the judgment of the trial court.

As both of the defendant's claims on appeal challenge the sufficiency of the evidence, we first must construe the evidence in the light most favorable to sustaining the verdict and then determine whether, on the basis of those facts and the inferences reasonably drawn from them, the jury reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. See, e.g., *State* v. *James E.*, 327 Conn. 212, 218, 173 A.3d 380 (2017). "On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [jury's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Taupier*, 330 Conn. 149, 187, 193 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 1188, 203 L. Ed. 2d 202 (2019).

With these principles in mind, our review of the record discloses the following relevant facts that the jury could have reasonably found. At the time of the shooting at issue, the defendant and Spann had a relationship going back as many as seven years. Spann had been a drug dealer for much of this time, and, because of the risks involved in that enterprise and the need to coerce payments from customers, he commonly carried a firearm. According to Spann's testimony, the defendant "[m]aybe" knew he was a drug dealer. Between July 29 and August 17, 2013, the two had once or twice gone together to a rental car agency where Spann had rented a black Chevrolet Impala.

On the afternoon of August 17, 2013, Spann left his home, driving the Impala and carrying a nine millimeter semiautomatic handgun that was not equipped with a

silencer. At about 4 p.m., he picked up the defendant at her home. At the defendant's request, she drove the Impala while Spann sat in the front passenger seat.

The defendant and Spann were together in the car for nearly all of the next ninety minutes. For the first forty-five minutes, the defendant drove "around" with no apparent destination. At about 4:45 p.m., they stopped at a gas station-convenience store, and Spann went inside. Surveillance images of him in the store are inconclusive as to whether the gun was on his person or whether it remained with the defendant in the Impala. After Spann reentered the car, the defendant drove for another forty-five minutes. Spann testified that he kept the gun "under [his] lap" or sat on it during this portion of their drive.

At about 5:30 p.m., they approached a large outdoor social gathering near a housing complex on Trumbull Avenue in Bridgeport. The defendant stopped the car in the lane of travel rather than driving toward the sidewalk and stopping there. Spann then exited the car, fired multiple gunshots from the weapon, and reentered the car.

After reentering the car, Spann told the defendant to drive. Unbeknownst to them, however, police officers had been stationed nearby and witnessed the shooting. When the officers attempted to block the Impala with their patrol car, the defendant maneuvered around them and continued along Trumbull Avenue with the officers in pursuit. She proceeded to weave between pedestrians, drive past multiple stop signs without stopping and drive at high rates of speed. After a 1.2 mile car chase, the defendant crashed the car as she approached a highway entrance ramp. Spann testified that, during the car chase, the gun was "on the side of [him] . . . in between the seat and the door."

After the crash, the defendant and Spann fled on foot. The police found the defendant hiding in an unlit sewer

in waist-deep water and arrested her. Spann, who initially evaded the police, testified that he disposed of the gun while the police chased him but was arrested after appearing at the Bridgeport police station and falsely reporting that the Impala had been stolen. The police never recovered the gun. Spann pleaded guilty under the *Alford* doctrine[3] to various charges related to this incident and was sentenced. He did not face additional criminal exposure as a result of his testimony at the defendant's trial. Additional facts will be set forth as necessary.

The record also reveals the following procedural history. The state charged the defendant in a two part substitute information with seven offenses stemming from the incident: (1) attempt to commit assault in the first degree in violation of General Statutes §§ 53a-59 (a) (1) and 53a-49 (a) (2); (2) carrying a pistol without a permit in violation of General Statutes § 29-35 (a); (3) having a weapon in a motor vehicle in violation of § 29-38 (a); (4) interfering with a peace officer in violation of General Statutes § 53a-167a (a); (5) using a motor vehicle without the owner's permission in violation of General Statutes § 53a-119b (a) (1); (6) reckless driving in violation of General Statutes § 14-222 (a); and (7) criminal possession of a firearm in violation of § 53a-217 (a).

After two days of evidence, the trial court granted the defendant's motion for a judgment of acquittal on the charge of carrying a pistol without a permit, stating that "the court certainly heard evidence from which a jury could conclude that [the defendant] constructively possessed the gun" but not that she had "carried [the firearm] on . . . her person," as required by § 29-

[3] Pursuant to *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), a defendant who enters a guilty plea does not admit guilt but, rather, acknowledges that the state's case is so strong that he is willing to enter a plea of guilty.

35 (a).[4] The jury found the defendant not guilty of attempted assault and interfering with an officer but found her guilty of having a weapon in a motor vehicle, using a motor vehicle without the owner's permission, and reckless driving. The jury then separately heard evidence of the defendant's prior convictions for the sale of hallucinogens or narcotics in violation of General Statutes § 21a-277 (a) and stealing a firearm in violation of General Statutes § 53a-212, and found her guilty of criminal possession of a firearm.

The defendant appealed to the Appellate Court, and the appeal was transferred to this court. See General Statutes § 51-199 (c); Practice Book § 65-1. On appeal, the defendant challenges her conviction of criminal possession of a firearm and having a weapon in a motor vehicle.[5] We reject both of these claims.

I

The defendant claims first on appeal that the state failed to prove beyond a reasonable doubt that she "possessed" a firearm and, therefore, that there was insufficient evidence to convict her of criminal possession of a firearm under § 53a-217 (a). She argues that the evidence established only that she and the firearm were in the same car at the same time and that, on the basis of this alone, the jury could not reasonably infer that she possessed the firearm. We disagree and conclude that the record contains sufficient circumstantial evidence, beyond mere proximity, that the defendant knew the firearm was in the car, was in a position to control it, and intended to control it. We therefore conclude that there was sufficient evidence from which the jury reasonably could have found that the defendant constructively possessed a firearm.

[4] General Statutes § 29-35 (a) provides in relevant part: "No person shall carry any pistol or revolver upon his or her person, except when such person is within the dwelling house or place of business of such person, without a permit to carry the same issued as provided in section 29-28. . . ."

[5] The defendant does not challenge her conviction of using a motor vehicle without the owner's permission and reckless driving.

"A party challenging the validity of the jury's verdict on grounds that there was insufficient evidence to support such a result carries a difficult burden." (Internal quotation marks omitted.) *Gagliano* v. *Advanced Specialty Care, P.C.*, 329 Conn. 745, 754, 189 A.3d 587 (2018). In particular, before this court may overturn a jury verdict for insufficient evidence, it must conclude that "no reasonable jury" could arrive at the conclusion the jury did. *State* v. *Terwilliger*, 314 Conn. 618, 660, 104 A.3d 638 (2014). Although "the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense . . . each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Taupier*, supra, 330 Conn. 187.

A

1

A defendant is guilty of criminal possession of a firearm if (1) the defendant "possesses" a firearm, (2) the defendant is a convicted felon, and (3) the firearm is operable.[6] The defendant disputes only whether she "possessed" the firearm for purposes of § 53a-217 (a).

" 'Possess' means to have physical possession or otherwise to exercise dominion or control over tangible property . . . ." General Statutes § 53a-3 (2). Therefore, possession may be actual or constructive. See, e.g., *State* v. *Butler*, 296 Conn. 62, 77, 993 A.2d 970 (2010). This court consistently has held that constructive possession is "possession without direct physical contact." (Internal quotation marks omitted.) *State* v. *Johnson*, 316 Conn. 45, 58, 111 A.3d 436 (2015). It can mean "an appreciable ability to guide the destiny of the

[6] General Statutes (Rev. to 2013) § 53a-217 (a) provides in relevant part: "A person is guilty of criminal possession of a firearm or electronic defense weapon when such person possesses a firearm or electronic defense weapon and . . . has been convicted of a felony . . . ."

[contraband]"; (internal quotation marks omitted) id., 62; and "contemplates a continuing relationship between the controlling entity and the object being controlled. Webster's Third New International Dictionary defines the noun 'control' as the '*power or authority to guide or manage*.' . . . [It] is not the manifestation of an act of control but instead it is the act of being in a *position of control* coupled with the requisite mental intent. . . . [T]his control must be exercised intentionally and with knowledge of the character of the controlled object." (Emphasis added.) *State* v. *Hill*, 201 Conn. 505, 516, 523 A.2d 1252 (1986).

In particular, and important to the defendant's claim, we have observed that "[i]ntent is often inferred from conduct . . . and from the cumulative effect of the circumstantial evidence and the rational inferences drawn therefrom." (Internal quotation marks omitted.) *State* v. *James E.*, supra, 327 Conn. 218. So, too, can knowledge of the contraband and an intent to control it be inferred. See *State* v. *Simino*, 200 Conn. 113, 119, 509 A.2d 1039 (1986) (knowledge is "[o]rdinarily" inferred). However, "mere control or dominion over the place in which the contraband is found is not enough to establish constructive possession . . . . [T]he government is required to present direct or circumstantial evidence to show some connection or nexus individually linking the defendant to the contraband." (Internal quotation marks omitted.) *State* v. *Johnson*, supra, 316 Conn. 62. Under the doctrine of nonexclusive possession, more than one person can possess contraband. *State* v. *Williams*, 258 Conn. 1, 7, 778 A.2d 186 (2001). However, "[w]here the defendant is not in exclusive possession of the premises where the [contraband is] found, it may not be inferred that [the defendant] knew of the presence of the [contraband] and had control of [it], unless there are other incriminating statements or circumstances tending to buttress such an inference." (Internal quotation marks omitted.) Id.

Notably, the defendant has not raised a claim of vagueness or instructional error. See *State* v. *Luurtsema*, 262 Conn. 179, 204, 811 A.2d 223 (2002) (declining to address potential vagueness challenge to criminal statute because "defendant has attacked only the sufficiency of the evidence . . . without reference whatsoever to the constitutionality of the . . . statute"), overruled in part on other grounds by *State* v. *Salamon*, 287 Conn. 509, 513–14, 949 A.2d 1092 (2008). She also does not argue, even with respect to her insufficiency claim, that this court should revisit the definition of "constructive possession" that we consistently have applied. In fact, the language we cite appears almost verbatim throughout her brief, which is consistent with both the statutory definition of possession in our Penal Code; General Statutes § 53a-3 (2); and with our prior decisions interpreting that definition, which were based on our well settled principles of statutory interpretation. See, e.g., *State* v. *Hill*, supra, 201 Conn. 516 (defining "control" under § 53a-3 (2) as "power or authority to guide or manage" (internal quotation marks omitted)).[7] In addressing the jury, the prosecutor, defense counsel, and the trial court all referred to this as the practical ability of the defendant to "go and get" the gun, or the practical ability to obtain actual physical possession of

[7] In *State* v. *Hill*, supra, 201 Conn. 505, we went on to conclude: "The New York construction of an identical statute, however, combined with our approval of the same interpretation in a related context . . . and the common usage of the phrase 'to exercise dominion or control,' ineluctably lead[s] us to conclude that the trial judge's instructions in the present case were not erroneous." (Citation omitted.) Id., 517; see also *People* v. *Manini*, 79 N.Y.2d 561, 573, 594 N.E.2d 563, 584 N.Y.S.2d 282 (1992) ("the [p]eople must show that the defendant exercised 'dominion or control' over the property by a sufficient level of control over the area in which the contraband is found"); *United States* v. *Brown*, 422 F.3d 689, 692 (8th Cir. 2005) ("[c]onstructive possession of the firearm is established if the defendant [had] dominion over the premises where the firearm was located" (internal quotation marks omitted)).

it. Defense counsel made the defendant's physical access to the gun the sole point of his closing argument, focusing specifically and exclusively on whether the gun "was in a place where the defendant could, if she wishes, go and get it . . . ."[8] The prosecutor responded to defense counsel in rebuttal argument,[9] and the court instructed the jury on this theory.[10]

We agree with the United States Court of Appeals for the District of Columbia Circuit that this standard appropriately accounts for the deference we must afford to the jury and the practical problems of proof in the nonexclusive possession context: "[W]e would adhere to that concept in preference to artificial rules restricting evidence-sufficiency rules that would inevitably invade the traditional province of the jury . . . . The judge's task intensifies . . . when the accused's relationship to the premises is shared with others, and consequently the problems of knowledge and control intensify. . . . [I]n full recognition of the increased difficulties that the [g]overnment then faces, we reiterate that the sufficiency of the evidence for jury consideration depends upon its capability plausibly to suggest the likelihood that in some discernible fashion the accused had a *substantial voice vis-à-vis* the [contra-

[8] In his closing argument, defense counsel made the following statements about the defendant's physical access to the gun: "As long as the object is or was in a place where the defendant could, if she wishes, could go and get it, it is in her possession"; "[the defendant has constructive possession] [a]s long as the object is or was in a place where the defendant, if she wishes to, could go and get it"; "could [the defendant] get that gun?"; "[t]here's no information that was presented to you that . . . she can go and get it"; and, "[d]o you think that [Spann] would relinquish that weapon?"

[9] In his rebuttal argument, the prosecutor stated: "It's a Chevy Impala, this is not—it's a limited space. You have pictures of the car. Could she get it? It's right there in the car where she is. She's—she can exercise dominion and control within this relatively small space of the interior of the Chevy Impala."

[10] The court instructed the jury in part: "As long as the object is or was in a place where the defendant could, if she wishes, go and get it, it is in her possession"; the court repeated the instruction after a question from the jury during its deliberations.

band].'' (Emphasis added; footnotes omitted.) *United States* v. *Staten*, 581 F.2d 878, 883–84 (D.C. Cir. 1978). Because the defendant has not asked us to depart from it, and because we are bound by our legislature's definitions and prior decisions of this court, we adhere to our settled understanding of constructive possession.

B

With respect to the facts of the present case, the defendant's challenge is to the sufficiency of the evidence in accordance with established Connecticut law. The record clearly entitled the jury to find that the defendant possessed the car she was driving.[11] Thus, the issue is whether it was reasonable for the jury to infer that she also possessed the firearm within the car.

A case for constructive possession of a firearm often is necessarily built on inferences, and a jury ''may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical.'' (Internal quotation marks omitted.) *State* v.

[11] Apart from disputing her intent to control the firearm, the defendant appears to argue that she even may have lacked the intent to control the car during the chase. At trial, her counsel argued to the jury that she merely was following Spann's orders to drive away from the shooting. Similarly, in her reply brief and at oral argument before this court, her appellate counsel argued that she had no choice but to drive away after the shooting out of fear for her personal safety. The defendant did not raise the affirmative defense of duress in the trial court, however, and, in fact, specifically disclaimed it. The trial court therefore did not instruct the jury on duress. We are not bound to consider a claim not raised until the defendant's reply brief and oral argument. See *State* v. *Jose G.*, 290 Conn. 331, 341 n.8, 963 A.2d 42 (2009); *Grimm* v. *Grimm*, 276 Conn. 377, 393, 886 A.2d 391 (2005), cert. denied, 547 U.S. 1148, 126 S. Ct. 2296, 164 L. Ed. 2d 815 (2006). Nonetheless, her counsel argued to the jury that she was merely following Spann's orders to drive away from the shooting. The jury quite clearly rejected this argument. At any rate, the issue of intent to control the gun pervaded the trial and was for the jury to determine. Given that she continued to drive the car after the shooting until it crashed, we are not persuaded that the evidence, viewed in the light most favorable to sustaining the verdict, prevented the jury from rejecting the argument that she was acting strictly at Spann's behest and finding instead that she intended to control the car.

James E., supra, 327 Conn. 218. A jury also "may draw factual inferences on the basis of already inferred facts." (Internal quotation marks omitted.) *State* v. *Coccomo*, 302 Conn. 664, 670, 31 A.3d 1012 (2011).

The "line between permissible inference and impermissible speculation is not always easy to discern." (Internal quotation marks omitted.) *State* v. *Lewis*, 303 Conn. 760, 768, 36 A.3d 670 (2012). "[P]roof of a material fact by inference from circumstantial evidence need not be so conclusive as to exclude every other hypothesis," but it must suffice to produce "in the mind of the trier a reasonable belief in the probability of the existence of the material fact." (Internal quotation marks omitted.) *State* v. *Copas*, 252 Conn. 318, 339–40, 746 A.2d 761 (2000). "When we infer, we derive a conclusion from proven facts because such considerations as experience, or history, or science have demonstrated that there is a likely correlation between those facts and the conclusion. If that correlation is sufficiently compelling, the inference is reasonable. But if the correlation between the facts and the conclusion is slight, or if a different conclusion is more closely correlated with the facts than the chosen conclusion, the inference is less reasonable. At some point, the link between the facts and the conclusion becomes so tenuous that we call it speculation. When that point is reached is, frankly, a matter of judgment." (Internal quotation marks omitted.) *State* v. *Lewis*, supra, 768–69. We therefore also must bear in mind that "jurors are not expected to lay aside matters of common knowledge or their own observations and experiences . . . . [C]ommon sense does not take flight when one enters a courtroom." (Citation omitted; internal quotation marks omitted.) *State* v. *Otto*, 305 Conn. 51, 70 n.17, 43 A.3d 629 (2012).

Our review of the evidence finds several "circumstances tending to buttress . . . an inference"; (internal quotation marks omitted) *State* v. *Williams*, supra,

258 Conn. 7; that the defendant had the knowledge of and intent to control the firearm that our law requires for a finding of constructive possession, including facts and inferences that reasonably permitted the jury to conclude that, in all probability, she had the ability to "go and get" the gun.

1

There was no serious argument at trial that the defendant lacked knowledge of the gun. At the very least, the jury reasonably could have inferred from the evidence that, by the time of the car chase, the defendant knew that a gun was in the vehicle. Spann exited the car openly carrying the firearm in his hand and fired multiple gunshots within no more than twenty feet of the car. In his testimony, Spann acknowledged that the defendant "[p]robably" heard the gunshots.[12] Spann also testified that he got back into the car with the gun. Spann's testimony was corroborated, in part, by the testimony of

[12] It is undisputed that Spann fired the gun after exiting the car, but he and other witnesses gave conflicting accounts of the details. According to Spann himself, he exited the Impala with the gun in his hand, walked behind the car, and spoke to some acquaintances for five to ten minutes. Then, standing about twenty feet from the car, he fired two or three gunshots up in the air, then "[c]almly, coolly" walked to the car, and got back in. Although Spann testified that the defendant "[p]robably" heard the gunshots and was "shocked" when he reentered the car, he initially claimed that she did not know he was carrying a gun at this point. Later in his testimony, however, he conceded that "[m]aybe" the defendant knew he had a gun by this time.

Three witnesses contradicted the specifics of Spann's story. Two Bridgeport police officers each claimed to have witnessed the shooting from a patrol car parked a few buildings away from where the defendant stopped the car. They testified that Spann fired almost immediately after getting out of the Impala, that he was only a few steps outside of the car when he did so, that he aimed toward either a crowd of people or a building, and that he fired five gunshots. The third witness, a forensics expert, confirmed that five shell casings were found at the scene and that each had been fired from the same nine millimeter semiautomatic handgun. He did not testify as to whether the casings were fired specifically from Spann's gun, presumably because the gun was never recovered. The jury reasonably could have chosen to believe these witnesses instead of Spann.

the police officers who witnessed the shooting and testified that, immediately after firing his weapon, Spann entered the vehicle.

Additionally, the defendant likely knew Spann was a drug dealer and, therefore, that he often carried a gun. See, e.g., *State* v. *Clark*, 255 Conn. 268, 284, 764 A.2d 1251 (2001) ("Connecticut courts repeatedly have noted that [t]here is a well established correlation between drug dealing and firearms" (internal quotation marks omitted)). The jury is permitted to "rely on its common sense, experience and knowledge of human nature in drawing inferences"; *State* v. *Rodgers*, 198 Conn. 53, 59, 502 A.2d 360 (1985); and "may draw factual inferences on the basis of already inferred facts." (Internal quotation marks omitted.) *State* v. *Coccomo*, supra, 302 Conn. 670. On the basis of the defendant's knowledge that Spann was a drug dealer who often carried a gun, it was not "so unreasonable [an inference] as to be unjustifiable" for the jury to infer that she knew that he possessed a gun in the car. (Internal quotation marks omitted.) Id. This evidence and the inferences that reasonably could be drawn therefrom make it impossible for this court to conclude that "no reasonable jury" could have found that the defendant had knowledge of the gun. Thus, the jury reasonably could have inferred that, at the very least, the defendant became aware that the firearm was in the car after the shooting.

2

Our review of the record in the light most favorable to sustaining the verdict leads us to find at least four circumstances, which the jury could have reasonably relied on, that "tend[ed] to buttress . . . an inference"; (internal quotation marks omitted) *State* v. *Williams*, supra, 258 Conn. 7; that the defendant was intentionally "in a position of control" over the gun; *State* v. *Hill*, supra, 201 Conn. 516; or did exercise control over the gun: her control of the car, her flight from the police,

her relationship with Spann, and her physical access to the gun. We discuss each in turn.

First, the fact that the defendant was driving, and thereby controlling, the car that she knew contained the gun suggests that she was able to and intended to control the gun. Although we are mindful that "mere control or dominion over the place in which the contraband is found is not enough to establish constructive possession"[13] and that "some connection or nexus individually linking the defendant to the contraband" is required; (internal quotation marks omitted) *State* v. *Johnson*, supra, 316 Conn. 62; the facts and circumstances of this case provided the jury with ample justification to conclude that the defendant's control of the car, at least in part, supported the jury's conclusion that she also controlled the firearm. Coupled with other evidence, "[o]ne who owns or exercises dominion or control over a motor vehicle in which [contraband] is concealed may be deemed to possess the contraband." (Internal quo-

[13] Our conclusion on these facts does not suggest that the driver of a vehicle is deemed to be in constructive possession of every item she knows to be in a passenger's actual possession. Intent to control *contraband*—an element of constructive possession in Connecticut—may not be inferred "unless there are other incriminating statements or circumstances tending to buttress such an inference." (Internal quotation marks omitted.) *State* v. *Williams*, supra, 258 Conn. 7. Driving the vehicle in which the contraband is located is *one* such circumstance, but we have not suggested that it is dispositive. See, e.g., *State* v. *Martin*, 285 Conn. 135, 149–50, 939 A.2d 524 ("[o]ne factor that may be considered in determining whether a defendant is in constructive possession of [contraband] is whether he is in possession of the premises where the [contraband is] found" (internal quotation marks omitted)), cert. denied, 555 U.S. 859, 129 S. Ct. 133, 172 L. Ed. 2d 101 (2008).

In the present case, additional circumstances under which the defendant operated the vehicle—most notably, that she drove the vehicle to the place where Spann discharged the gun, waited for him to get back in the vehicle with the gun after the shooting, notwithstanding that she was a felon, and drove the vehicle 1.2 miles while being chased by the police in an effort to evade arrest for her participation in the shooting—in our view clearly buttressed an inference of an intent to control the gun contained within the vehicle but perhaps would not support an intent to control, for instance, Spann's cell phone or wallet.

tation marks omitted.) *State* v. *Delossantos*, 211 Conn. 258, 277–78, 559 A.2d 164, cert. denied, 493 U.S. 866, 110 S. Ct. 188, 107 L. Ed. 2d 142 (1989); see, e.g., *State* v. *Winfrey*, 302 Conn. 195, 211, 24 A.3d 1218 (2011) (fact that defendant was driving vehicle in which contraband was found supported inference of constructive possession of that contraband); *State* v. *Bowens*, 118 Conn. App. 112, 123, 982 A.2d 1089 (2009) ("defendant was driving the [car] containing the revolver, which itself suggests control of the firearm"), cert. denied, 295 Conn. 902, 988 A.2d 878 (2010); *State* v. *Sanchez*, 75 Conn. App. 223, 241, 815 A.2d 242 ("[t]he drugs were found in a car [the defendant] was operating and, thus, had control over"), cert. denied, 263 Conn. 914, 821 A.2d 769 (2003).

Second, after Spann had discharged the weapon, the defendant attempted to evade the police, who had begun pursuit, first in the car and then on foot. The jury reasonably could have found that these attempts at flight, coming right after Spann had fired the gun and gotten back in the car, indicated a consciousness of guilt stemming from her knowledge of and intent to exercise control over the gun, leading the jury to find that she possessed it. Specifically, the jury reasonably could have inferred that her maneuver around the patrol car and the ensuing car chase were deliberate—and successful—efforts to prevent the police from finding the firearm and, thus, exertions of dominion or control over it. See, e.g., *State* v. *Butler*, supra, 296 Conn. 79 (defendant's effort to "conceal" contraband supported inference of control); *State* v. *Bowens*, supra, 118 Conn. App. 124 (defendant's effort to "jettison the revolver" supported inference of control); *United States* v. *Chambers*, 918 F.2d 1455, 1458 (9th Cir. 1990) ("[c]onduct by the driver of a vehicle that appears intended to aid a passenger in disposing of the [contraband] is probative of joint possession").

Notably, because of her prior felony convictions, the defendant had been expressly informed that it was illegal for her to possess a firearm[14]—a fact the prosecutor highlighted in his closing argument. The jury was asked to view the car chase in the context of the entire afternoon. Evidence about the periods before, during and after the car chase set forth throughout this opinion bolster the conclusion that the defendant—who disclaimed any argument that she acted under duress—was not just passively following orders when she sped away from the police, weaved around pedestrians, and passed multiple stop signs without stopping over the course of 1.2 miles. To the extent that the jury found her high-speed exit from the crime scene was an effort to escape capture, it reasonably could have inferred her consciousness of guilt on the basis of this evidence. See, e.g., *State* v. *Wright*, 198 Conn. 273, 281, 502 A.2d 911 (1986). "The probative value of evidence of flight depends upon all the facts and circumstances and is a question of fact for the jury." (Internal quotation marks omitted.) Id. Particularly in light of her knowledge that it was illegal for her to possess a gun, it was reasonable for the jury to infer that the defendant's flight was motivated by a belief that she had broken the law by possessing a gun and a desire to escape prosecution for it.

The concurring and dissenting justice takes issue with our conclusion that the record supports the jury's reasonable reliance on the defendant's flight as evidence supporting her intent to control the gun. He prefers his own alternative explanation for the defendant's leading the police on a 1.2 mile high-speed car chase, ending in a crash after which the defendant and Spann fled on foot separately. We are told there are several

[14] The shooting involved in this case is an excellent example of the reasons supporting the legislature's proscription of felons exercising control over guns.

more benign reasons for her flight, including that she was helping Spann, that she feared Spann, that she feared the police or that she was escaping before another crime she had committed was discovered.[15] Defense counsel argued some of these alternative explanations to the jury. In the concurring and dissenting justice's view, the "least plausible" motive was a desire to exercise control over the gun. To judge the plausibility of these explanations, the concurring and dissenting justice relies on and credits the entirety of Spann's testimony, which, as we explain in part I B 3 of this opinion, the jury was not required to credit. Even if the record supported the concurring and dissenting justice's speculative accounting of the defendant's actions, this court consistently has explained that the possibility of other, innocent "inferences from these facts is not sufficient to undermine [the jury's] verdict . . . ." (Internal quotation marks omitted.) *State* v. *Otto*, supra, 305 Conn. 74. "[I]n viewing evidence [that] could yield contrary inferences, the jury is not barred from drawing those inferences consistent with guilt and is not required to draw only those inferences consistent with innocence." (Internal quotation marks omitted.) Id.[16]

[15] Without a hint of irony, the concurring and dissenting justice suggests that, after the defendant's friend, Spann, fired several gunshots on a city street, the defendant led the police on a dangerous high-speed chase because she was worried she might get pinched for unlawfully driving a car she had not rented herself.

[16] In support of his argument about flight, the concurring and dissenting justice cites *Alberty* v. *United States*, 162 U.S. 499, 510, 16 S. Ct. 864, 40 L. Ed. 1051 (1896), for the proposition that, when there are " 'so many reasons' " for the defendant's flight, evidence of flight does not establish guilt. *Alberty* is distinguishable. It was not a sufficiency of the evidence case. Rather, it concerned a jury instruction that "created a legal presumption of guilt so strong and so conclusive that it was the duty of the jury to act on it as axiomatic truth . . . ." Id. There was no such instruction given or challenged in this case. In fact, the concurring and dissenting justice quotes selectively from *Alberty*, which recognized that the weight of flight evidence is up to the jury: "[B]ut [flight] and similar evidence has been allowed upon the theory that the jury will give it such weight as it deserves, depending upon the surrounding circumstances." (Internal quotation marks omitted.) Id. In

Third, the state's overarching theory of the whole case was that the defendant intended to facilitate the shooting by acting as Spann's getaway driver. The prosecutor specifically asked the jury to draw this inference on the basis of evidence of the defendant's yearslong friendship with Spann. The evidence was not just that she associated with a known criminal. Rather, she had made recent trips to the car rental agency with Spann. Spann trusted her enough to allow her to drive the car he rented in his name on the day of the incident.[17] Spann began shooting almost immediately upon getting out of the car, and the defendant waited for Spann to get back in the car after she witnessed the shooting and then drove him from the scene. She could have driven away without him. Instead, she fled from the police, both with Spann and then apart from him, after crashing the car.[18] From all of the evidence, the jury reasonably could

the present case, the jury was instructed consistent with the holding in *Alberty*: "The [s]tate claims that the defendant fled from the scene of the shooting, that she engaged in a police pursuit, and ran from the vehicle . . . . It is for you to decide what that conduct was and what the defendant's purpose or reason was for acting as she did."

[17] Applying its common sense, the jury likely knew that most rental agreements do not permit a person to drive a car rented in another's name. The jury heard evidence that this rental agreement was no exception.

[18] Critical to his insufficiency point, the concurring and dissenting justice insists that the state did not argue its getaway driver theory to the jury on the gun possession charge but only on the attempted assault charge. He attempts to use the jury's acquittal of the defendant on the attempted assault charge to suggest that the jury did not find, on the basis of the evidence of the defendant's close relationship with Spann, that the defendant was the getaway driver as support for its determination that the defendant constructively possessed the gun. This ignores the record and a fundamental maxim of appellate review.

The trial court bifurcated the trial, submitting the criminal possession charge to the jury after it had returned a verdict on the other charges, including finding the defendant not guilty on the charges of attempted assault and interfering with a police officer. Although the prosecutor specifically made the getaway driver argument in his closing relating to the charges the jury first considered, and did not directly repeat it in his closing argument relating to the possession charge, he did argue in connection with the possession charge that the defendant was "well aware of the gun . . . before the shots were discharged" and that the jury could find joint possession,

have inferred that the defendant and Spann were not just close friends but willing partners in a joint criminal venture: specifically, that she was driving him and his

both of which suggest that the shooting was a collaborative effort. Moreover, the prosecutor and the court both noted that the jury could rely on evidence from the first portion of the trial. Forced to admit that it was "not impossible" for the jury to have arrived at what the concurring and dissenting justice contends were inconsistent verdicts, the concurring and dissenting justice nonetheless insists that it was "unlikely, to say the least . . . ." But when we read the record in the light most favorable to sustaining the jury's verdict, the acquittal on the attempted assault charge was not at all factually inconsistent with the jury's guilty verdict on the possession charge, and surely not far-fetched. In fact, there is good reason to believe the jury did just as defense counsel implored it to do on the attempted assault charge, the most serious of the charges the defendant faced: found her not guilty for lack of intent, not because she was not the getaway driver.

An element of assault is intent to cause serious physical injury to another person. See General Statutes § 53a-59 (a) (1). Witnesses to the shooting gave conflicting testimony about where Spann was aiming when he fired the gun. The testimony of the two witnessing police officers was substantially similar in almost all respects but differed on this point—one officer said that Spann fired his gun in the direction of several pedestrians on the sidewalk; the other said that Spann fired toward a building. Spann himself testified that he fired up in the air. See footnote 12 of this opinion. This is not a testimonial discrepancy of an alternative theory the state would be expected to argue to the jury concerning the attempted assault charge—which exposed the defendant to the longest sentence among all of the charges. But defense counsel did make this very argument, underscoring this evidentiary discrepancy to the jury in closing, along with the absence of other eyewitness and forensic evidence of where Spann was aiming.

Finally, factually inconsistent jury verdicts are not just permissible, but unreviewable. See, e.g., *State* v. *Arroyo*, 292 Conn. 558, 585–86, 973 A.2d 1254 (2009) (claims of factual, logical and legal inconsistency between conviction and acquittal are not reviewable), cert. denied, 559 U.S. 911, 130 S. Ct. 1296, 175 L. Ed. 2d 1086 (2010). Rather, a court reviewing the sufficiency of the evidence on one count "should examine only whether the evidence provided sufficient support for the conviction, and not whether the conviction could be squared with verdicts on other counts." *State* v. *Blaine*, 168 Conn. App. 505, 512, 147 A.3d 1044 (2016), remanded in part on other grounds, 325 Conn. 918, 163 A.3d 618 (2017); see *State* v. *Arroyo*, supra, 576–83. The main thesis of the concurring and dissenting justice's alternative narrative—that the jury must have rejected the getaway driver theory in finding the defendant not guilty on the attempted assault charge—conflicts with this elementary rule. On this record, the jury reasonably could have concluded that the state failed to prove beyond a reasonable doubt that, like Spann, the defendant had the intent to cause serious physical injury to another person while still concluding that she and Spann brought the gun to Trumbull Avenue for the purpose of firing it and that the defendant would serve as the getaway driver. But regardless, that is not a question appropriately before us. The only question we may examine is whether there

weapon to and from the scene of a shooting. "[A] defendant's knowing participation in a joint criminal venture in which a particular firearm is intended to play a central part permits the jury to reasonably conclude that the defendant constructively possessed that gun. . . . This is true even if the defendant never intended to use the firearm [her]self . . . ." (Citation omitted.) *United States* v. *Perez*, 661 F.3d 568, 576–77 (11th Cir. 2011), cert. denied, 566 U.S. 952, 132 S. Ct. 1943, 182 L. Ed. 2d 799 (2012), and cert. denied sub nom. *Davila* v. *United States*, 568 U.S. 874, 133 S. Ct. 355, 184 L. Ed. 2d 133 (2012); see, e.g., *State* v. *Williams*, 110 Conn. App. 778, 789, 956 A.2d 1176 (driver's "complicity with the occupants of the car in a criminal enterprise" supported inference of constructive possession), cert. denied, 289 Conn. 957, 961 A.2d 424 (2008); *Logan* v. *United States*, 489 A.2d 485, 492 (D.C. 1985) (evidence that driver "acted in concert" with passenger to dispose of firearm supported inference of constructive possession); *United States* v. *Chambers*, supra, 918 F.2d 1458 (driver's conduct "intended to aid a passenger," and "cooperating" with passenger with actual possession supported inference of constructive possession); *United States* v. *Massey*, 687 F.2d 1348, 1354 (10th Cir. 1982) (evidence of "cooperative venture" and "working relationship" supported inference of constructive possession). That the defendant was the getaway driver, spiriting the gun and Spann away from the scene of the shooting, was a reasonable inference from these facts and supports a finding that the defendant intended to control the gun.[19]

Finally, the defendant sat within arm's reach of the gun throughout the afternoon. Spann testified to this.

was sufficient evidence for the jury to have found the defendant guilty on the criminal possession charge.

[19] Possession under these circumstances does not depend on a criminal conviction of a related offense. But, even if it did, the defendant was in fact convicted of related criminal offenses directly or indirectly involving the gun: having a weapon in a motor vehicle, using a motor vehicle without the owner's permission, and reckless driving.

He also testified that, after firing the gun, he brought it back into the car and sat in the front passenger seat during the car chase, taking the gun with him when he fled from the police on foot after the crash. The two officers who witnessed the shooting corroborated Spann's account, testifying that, after the car stopped, Spann exited the car, fired the gun almost immediately, and reentered the car. Despite the defendant's having Spann testify in her defense, there was never any evidence that the gun was anywhere other than in the area of the front seat, and, therefore, the jury reasonably could have inferred that she was physically "in a position of control" over it, given her proximity to the gun. *State* v. *Hill*, supra, 201 Conn. 516; cf. *State* v. *Boyd*, 115 Conn. App. 556, 568, 973 A.2d 138 (evidence that contraband was found " 'right at [defendant's] feet' " supported inference of constructive possession), cert. denied, 293 Conn. 912, 978 A.2d 1110 (2009); *State* v. *Williams*, supra, 110 Conn. App. 787–88 (evidence that contraband was "within arm's reach" of defendant supported inference of constructive possession). There was no evidence that the gun was anywhere other than in the front passenger seat area at all relevant times, and the defendant does not contend otherwise.

On the basis of these four inferences, we cannot conclude that "no reasonable jury" could have found that the defendant was in a position of control over the gun. The concurring and dissenting justice disagrees, arguing that there was no evidence of particular facts—such as that the defendant was involved in Spann's drug enterprise or that the defendant previously had handled the gun—that would have established a link between the defendant and the gun. Although such facts might have helped to establish constructive possession, the absence of this evidence does not require the conclusion that there was insufficient evidence. See, e.g., *State* v. *Ayala*, 333 Conn. 225, 236, 215 A.3d 116 (2019) (although physical evidence linking defendant to murder would have made state's case stronger, lack of such evidence did not necessarily render state's case weak).

If the defendant were alone in the car and knew a gun was located in the front seat area—for example, if Spann had fired the gun and placed it under the passenger seat of the car, between the seats or in the trash receptacle of the passenger's door, but did not get in the car, and the defendant sped away—there would be no serious argument that the defendant could not "go and get" the gun and, therefore, that she possessed the gun. However, the defendant responds that Spann's testimony that he had exclusive possession of the gun prevented the jury from finding that she was in a position of control over the gun. Specifically, she contends that the pains Spann asserts he took to hide the gun from her defeat the state's attempt to prove her guilty of the possession charge.

The defendant called Spann as a witness in an effort to exonerate her on the gun possession charge on the basis of his testimony that the gun was with him in the front passenger seat and in his exclusive possession during the entire ninety minutes he and the defendant were in the car before the shooting, as well as after the shooting. Specifically, Spann testified that he actively hid or kept the gun from the defendant all afternoon by sitting on it, holding it or keeping it next to him between the seat and the passenger's side door. The jury did not have to credit this evidence, however, which was based entirely on the testimony of an unreliable witness and was at odds with the rest of the evidence of the day's events and the relationship between Spann and the defendant, which suggested that their interests were aligned.

In fact, staking the success of her defense on Spann's testimony could very well have backfired on the defendant. Spann's testimony can be seen as a textbook example of a case of a jury exercising its prerogative to "credit part of a witness' testimony and [to] reject

other parts." *Hicks* v. *State*, 287 Conn. 421, 435, 948 A.2d 982 (2008). Specifically, the jury was entitled to credit Spann's testimony that the gun was located in the area of the front seat while discrediting his claims that he physically held the gun in a way that prevented the defendant from accessing it, such as by keeping it hidden "under [his] lap" the whole time or by holding it "on the side of [him] . . . in between the seat and the door" during the car chase.

Spann was hardly a credible witness. The jury heard that he previously had lied to the police about the incident (e.g., his false claim that the Impala had been stolen) and heard about his potential biases (e.g., that he only came forward to exonerate the defendant after his own conviction and sentencing and, thus, testified without the threat of additional criminal exposure). The jury also heard several inconsistencies within his own testimony (e.g., his inconsistent responses about whether the defendant knew he had a gun) and the contradictory testimony of other witnesses (e.g., his testimony that he fired the gunshots five to ten minutes after getting out of the car against the testimony of two police officers that he fired almost immediately after getting out of the car). The jury repeatedly was made aware of these credibility issues throughout the questioning and reminded of them during the prosecutor's summations.

The jury had good reason to question Spann's credibility: it reasonably could have found his testimony evasive or, at best, ambiguous,[20] and his story about the

[20] Spann's testimony that the gun was between his passenger seat and the side door during the car chase was ambiguous as to whether he was physically holding the gun. The following colloquy occurred during the prosecutor's cross-examination of Spann:

"Q. All right. So, you fire off these shots. You agree the noise is so much she would have heard. You get back in the car, tell her to go, go, go. And the gun's still in your hand?

"A. It was on the side of me.

"Q. It's in your hand, it's not underneath you like it was when you were driving around for forty-five minutes with the gun under your lap?

gun's location not just unbelievable and uncorroborated, but risible. His tale seeking to exonerate the defendant, including his claim that, for the ninety minutes he was with the defendant in the car that day, he assiduously kept the gun where she could not get it, including by sitting on it for stretches of time, strained credibility. Given their relationship, the jury was entitled to view this explanation with skepticism.[21]

This is an excellent example of why we repeatedly admonish appellate courts to leave credibility determinations to the jury and not become a " 'seventh juror' . . . ." *State* v. *Ford*, 230 Conn. 686, 693, 646 A.2d 147

"A. No, it was on the side—it was on the side of the door. Like on the side—in between the seat and the door."

[21] Because the defendant—not the state—called Spann as a witness, this is not a case in which the danger arises that the state might make its case simply by "calling [its] adversary and arguing to the jury that he was not to be believed." *Janigan* v. *Taylor*, 344 F.2d 781, 784–85 (1st Cir.), cert. denied, 382 U.S. 879, 86 S. Ct. 163, 15 L. Ed. 2d 120 (1965). This risk is the main justification for the rule, sometimes referred to as the "antithesis inference," that, when there is no "positive evidence" otherwise supporting the witness' testimony, the jury is not free to infer the opposite of what the witness testified simply because it disbelieved Spann. See, e.g., *State* v. *Alfonso*, 195 Conn. 624, 634, 490 A.2d 75 (1985); *Edwards* v. *Grace Hospital Society*, 130 Conn. 568, 575, 36 A.2d 273 (1944). That is not what occurred here. Spann himself indicated that the gun was located in a part of the car (the area of the front passenger seat) where the defendant could "go and get it" but for Spann's supposed efforts to prevent her from doing so. That was the "positive evidence." Spann's testimony that he immediately got back into the car after firing his weapon was corroborated by the police officers' testimony. The jury could have believed the "positive evidence" of the gun's location without believing Spann's account of his preventative efforts.

The other main reason for barring an antithesis inference is also absent here: reliance on demeanor evidence. If a jury concluded that a witness was lying on the basis of demeanor alone, and inferred the opposite of what the witness claimed, an appellate court would not be able to judge the sufficiency of that inference; on review, nothing in the record could support it. See *State* v. *Hart*, 221 Conn. 595, 605–606, 605 A.2d 1366 (1992) ("[o]ur rule barring the inference of the opposite of testimony . . . is an evidentiary issue concerning the proper method of measuring the sufficiency of the evidence" (citations omitted)). Here, however, we do not have to resort to Spann's demeanor for evidence of his lack of credibility. As previously discussed—and more importantly, in the transcript—the jury heard Spann admit that he had lied to the police about the same incident, admit that he had a motive to be untruthful, provide inconsistent responses to questioning, and contradict the testimony of other witnesses.

(1994); see id. ("[w]e do not sit as the 'seventh juror' when we review the sufficiency of the evidence"). The prosecutor's examination is peppered with frustration and acerbic exchanges as Spann engaged in evasion, sarcasm or flippancy, or so the jury reasonably could have found. In relevant part, the transcript reads:

"Q. All right. Now, you're familiar with the sound that firearms make, correct?

"A. Mm-hmm.

"Q. And you'd agree that from twenty feet away, you can hear a nine millimeter being fired?

"A. *Probably*.

"Q. All right. So, you fired the shots and then get back in the car?

"A. Yeah.

"Q. And when you get back in the car, the gun's not underneath your—your—the gun's in your hand, still, when you get back in the car?

"A. Yeah.

"Q. So, at that point, [the defendant] knows you have a gun? Right?

"A. Well—

"Q. It's a yes or no question.

"A. *Maybe*.

"Q. *Come on. You just fired two or three shots*, you get back in the car, you're yelling at her to go—

"A. I wasn't yelling—

"Q. You—she knows what you do for a living, right?

"A. I mean, I didn't yell at her.

"Q. But she knows what you do for a living, right?

"A. Say that again.

"Q. She knows what you do for a living?

"A. *Maybe*." (Emphasis added.)

The reader can be forgiven for imagining the jurors' eyes rolling during this exchange.[22]

[22] Other examples of Spann's recalcitrance abound, making it hard to imagine that the jury believed much of his testimony in the defendant's defense. Here is one example the jury could have justifiably found to be not just eye-rolling but sidesplitting. Critical to Spann's exoneration of the defendant on the criminal possession charge was that she did not have physical access to the gun or, in the words of defense counsel and the jury instructions, that she could not "go and get it . . . ." So, Spann went to great lengths to insist there was no way the defendant could "go and get" the gun. The following colloquy occurred during the prosecutor's cross-examination of Spann:

"Q. Okay. So, after being out of the car for five to ten minutes, you then remove the nine millimeter from where you had it?

"A. I—I got—I removed it, when I got out of the car. When I got out [of] the car, I took it with me.

"Q. Oh, okay. So, it was not on your person in the car?

"A. It was under my lap, so, when I got out, I took it with me.

"Q. What do you mean, under your lap? You were sitting on it?

"A. Yeah.

"Q. You were sitting on a gun?

"A. Yeah.

"Q. That had to be uncomfortable?

"A. It's not that uncomfortable.

"Q. Driving around for forty-five minutes with a piece of metal under you?

"A. It's not that uncomfortable.

"Q. All right. So—so, you get out of the car and you have to reach back to get the gun off—off the seat?

"A. No.

"Q. Okay. And before you get out of the car, you have to reach under your lap to pull the gun out?

"A. No.

"Q. Hmm. All right. How does the gun then get from under your lap to into your hand?

"A. Open the door, and when I get out, I—it's all one motion. Just—

"Q. Okay.

"A. Yeah.

"Q. With your right hand?

"A. Yeah.

"Q. And then you put the gun in your waistband?

"A. I held it in my hand.

"Q. Okay. So, you get out of the car holding this gun in your hand?

"A. Yeah." (Emphasis added.)

The concurring and dissenting justice and the majority agree that identifying the line between fair inference and speculation is challenging. We obviously both believe that the other engages in speculation. Ironically, it is at this part of our opinion—where we recount in great detail Spann's

In considering this testimony, which the defendant advanced for the jury's consideration, the jury reasonably could have questioned why Spann would go to such lengths to prevent her from having access to the gun. Was he afraid she would use the gun on him? There was no evidence of this. Was he anticipating getting caught and wanting to ensure that she had no criminal liability, or that he would? Using common sense, as the state urged in evaluating this after-the-fact,[23] concocted story, the jury could have rejected that he was that noble,[24] or prescient. In fact, that Spann would have

actual testimony, not repackaged descriptions of his testimony—that we are accused of "appellate storytelling," "conjur[ing] a basis for the jury's verdict" and "engag[ing] in a fictional account of the jury's conduct . . . ." The objective reader will have to decide who is telling stories. The point our opinion emphasizes is that, reading the record in the light most favorable to sustaining the verdict, not this court but the *jury* had good reason to question Spann's credibility; the *jury* reasonably could have found Spann's testimony evasive, ambiguous, sarcastic or flippant; and the *jury* could have found his tale exculpating the defendant "risible." To accept Spann's testimony at face value, as the concurring and dissenting justice does, is simply to substitute a different account than the jury was entitled to believe. It is true that an inference is permissible only "if the evidence produces *in the mind of the trier* [*of fact*] a reasonable belief in the probability of the existence of the material fact." (Emphasis altered; internal quotation marks omitted.) *State* v. *Reynolds*, 264 Conn. 1, 97, 836 A.2d 224 (2003), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004). The key for an appellate court is that the "reasonable belief in the probability" of that fact is for the *trier* to determine. Appellate review of the trier's determination requires studied objectivity. Otherwise, we are simply substituting our view of probability for the trier's. Proof of a material fact "by inference from circumstantial evidence need not be so conclusive as to exclude every other hypothesis." (Internal quotation marks omitted.) Id. Simply because an appellate court can conceive of other possible factual scenarios does not mean that the jury's determination crosses the line from inference into speculation. We may reverse only if the trier's determination of that probability is "so unreasonable [an inference] as to be unjustifiable." (Internal quotation marks omitted.) *State* v. *Coccomo*, supra, 302 Conn. 670.

[23] As support that this version of events was concocted after the fact, immediately after the crash, Spann reported the car stolen to the Bridgeport Police Department. Spann admitted that he lied about the car being stolen. Spann also admitted that he never called the police to provide information that would have shielded the defendant from liability. For example, he never informed the police that the defendant did not know about the gun in the car and had nothing to do with the shooting.

[24] In fact, Spann wore his lack of altruism on his sleeve before the jury. Witness this exchange between the prosecutor and Spann about why, after Spann ditched the gun in a neighborhood yard while eluding the police, he did not go back and recover it or warn others:

felt the need to hide or keep the gun from the defendant is at odds with evidence suggesting that his and the defendant's interests were aligned. For example, the jury heard that Spann and the defendant had a years long friendship; they had recently gone to the car rental agency together at least once and possibly multiple times regarding the Impala; Spann knew where the defendant lived and drove there to pick her up; Spann trusted the defendant enough to let her drive a car rented in his name; Spann and the defendant had spent the previous ninety minutes together in the car; and the defendant waited for Spann to get back in the car after the shooting before fleeing from the police. Conversely, no evidence (other than Spann's claims) suggested that he would have felt the need to keep or hide the gun from the defendant.

If the jury in fact rejected Spann's uncorroborated claim of exclusive possession, not believing that for every moment of the afternoon Spann was carefully holding, sitting on, or secreting the gun in a fashion so that the defendant was never in a position to go and get it, it remains unrefuted that the gun was in the front passenger compartment of the car, within arm's reach of the defendant. Surely, the jury was not compelled to conclude that the gun magically disappeared just because it disbelieved Spann's story of his own exclusive possession. The jury was therefore entitled to infer that the defendant would have had access to and control over it.[25]

"Q. Why didn't you tell anyone where you ditched the gun?

"A. Why?

"Q. I'm asking you why?

"A. Why would I do that?

"Q. Well, let's see, you just dropped a loaded firearm in a residential neighborhood. There could be children around. Don't you think it would be a good idea to let people know; hey, there's a loaded gun in a backyard somewhere.

"A. It would be a good idea. But, I mean, I'm a criminal, that's not what I was thinking at the time."

[25] In *Henderson* v. *United States*, 575 U.S. 622, 135 S. Ct. 1780, 191 L. Ed. 2d 874 (2015), the United States Supreme Court defined control of firearms under the federal felon-in-possession statute, 18 U.S.C. § 922 (g), as "whether [a] felon will have the ability to use or direct the use of his firearms"; id.,

Thus, under this court's definition of "possession," and viewing the evidence in the light most favorable to sustaining the verdict, as we must, we conclude that the facts and inferences reasonably drawn from these facts sufficiently established the defendant's constructive possession of the firearm beyond a reasonable doubt. "[P]roof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [jury], would have resulted in an acquittal." (Internal quotation marks omitted.) *State* v. *Taupier*, supra, 330 Conn. 187. The defendant, the prosecutor and the court each asked the jury to consider whether the defendant could "go and get" the gun. The jury concluded that she could. There is certainly "a reasonable view of the evidence" that supports this conclusion. (Internal quotation marks omitted.) *State* v. *Taupier*, supra, 187. Therefore, we affirm her conviction of criminal possession of a firearm.

630; and offered examples of when someone might have such control. Id., 630–31. The court stated that a felon could control guns that were actually possessed by a third party if the third party was not "independent of the felon's control"; id., 630; or would "allow the felon to exert any influence over [the guns'] use." Id. Here, the gun was in the actual possession of a third party, Spann. But, by allowing the defendant to drive while Spann had the gun, Spann was not "himself independent of [the defendant's] control" and did not prevent her from "exert[ing] any influence over [the gun's] use." Id.

On a record similar to this case, the United States Supreme Court viewed constructive possession consistently with our definition and application. In *Maryland* v. *Pringle*, 540 U.S. 366, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003), the issue was whether the police had probable cause to arrest the defendant for constructive possession of cocaine. Id., 370. The defendant, sitting in the front passenger seat of a car, was one of three occupants of a car the police stopped for speeding at about 3 a.m. Id., 368. Upon a search, the police found $763 in the glove compartment in front of the defendant and five bags of cocaine "behind the [backseat] armrest" next to another occupant; no occupant claimed possession of the cash or cocaine. Id. The court held: "We think it an entirely reasonable inference from these facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine." Id., 372. It added: "[A] car passenger . . . will

C

Alternatively, the defendant argues that the nonexclusive possession doctrine does not apply in this case because Spann actually possessed the firearm. She maintains that actual possession is exclusive—that is, if one party has actual possession, another party may not also have constructive possession. She cites no authority for this proposition, however, basing this argument on the fact that no Connecticut court has yet applied the doctrine in a scenario involving a third party who actually possessed the firearm. She notes that Connecticut courts have applied the nonexclusive possession doctrine only in situations in which the firearm was unattended or there was evidence that the defendant had actually possessed it previously.

We decline to adopt the defendant's position. Even if we assume that Spann actually possessed the firearm for the entire afternoon—which the parties dispute, which the jury may very well have rejected, and which we do not decide—we find nothing in the doctrine itself, its policy, or its application in this or other jurisdictions to suggest that it is limited to cases involving constructive possessors only. As a general concept in our criminal law, "[p]ossession may be joint as where two or more persons have dominion and control over the articles involved and where such persons are all acting at the time pursuant to a common purpose." (Internal quotation marks omitted.) *State* v. *Gabriel*, 192 Conn. 405, 422–23, 473 A.2d 300 (1984). More specifically, this court has tacitly recognized on at least one occasion that "circumstances tending to buttress . . . an inference" of constructive possession; (internal quotation marks omitted) *State* v. *Williams*, supra, 258 Conn. 7; may arise regardless of who physically holds contraband at a given time, citing favorably to a case in which

often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing." (Internal quotation marks omitted.) Id., 373.

a defendant constructively possessed contraband when she drove a vehicle but a third party "sitting beside her, had the [contraband] in a gym bag . . . ." *United States* v. *Crockett*, 813 F.2d 1310, 1316 (4th Cir.) (cited by *State* v. *Delossantos*, supra, 211 Conn. 278), cert. denied, 484 U.S. 834, 108 S. Ct. 112, 98 L. Ed. 2d 71 (1987), and cert. denied sub nom. *Crews* v. *United States*, 484 U.S. 834, 108 S. Ct. 112, 98 L. Ed. 2d 71 (1987).

Outside of Connecticut, courts have applied the nonexclusive possession doctrine in scenarios similar to the present case—namely, to hold that a driver constructively possessed a firearm held by a passenger. E.g., *United States* v. *Richardson*, Docket No. 87-5006, 1987 WL 38924, *3 (4th Cir. November 2, 1987); *Logan* v. *United States*, supra, 489 A.2d 492. Other courts have gone further, holding that a defendant constructively possessed a firearm even though someone else held it *and* the defendant lacked *any* physical connection to it. See, e.g., *People* v. *Casanas*, 170 App. Div. 2d 257, 258, 566 N.Y.S.2d 7 (defendant constructively possessed firearm pointed at victim by codefendant during robbery because "[codefendant's] display of the weapon was part of the original robbery plan"), appeal denied, 77 N.Y.2d 959, 573 N.E.2d 581, 570 N.Y.S.2d 493 (1991); *State* v. *Jennings*, 335 S.C. 82, 87, 515 S.E.2d 107 (App. 1999) (defendant constructively possessed firearm used by friend during robbery because he "directed" and "instructed" friend to retrieve it, display it during robbery, and hide it after robbery). Accordingly, we reject the defendant's argument and affirm the conviction of criminal possession of a firearm.

II

The defendant's second claim on appeal is that there was insufficient evidence to support her conviction of having a weapon in a motor vehicle in violation of § 29-38 (a). A person who "knowingly has" a weapon in a vehicle without a permit is guilty of violating that stat-

ute.[26] The defendant argues that, contrary to the legislature's intent, Connecticut courts have misconstrued the phrase "knowingly has" to criminalize mere knowledge of a firearm's presence in a vehicle "owned, operated or occupied by" the defendant. This construction has arisen from the Appellate Court's interpretation of the statute in *State* v. *Mebane*, 17 Conn. App. 243, 551 A.2d 1268, cert. denied, 210 Conn. 811, 556 A.2d 609, cert. denied, 492 U.S. 919, 109 S. Ct. 3245, 106 L. Ed. 2d 591 (1989). In *Mebane*, a defendant convicted under General Statutes (Rev. to 1985) § 29-38 argued that the jury should have been instructed that "knowingly has" meant "knowingly possesses . . . ." (Internal quotation marks omitted.) Id., 245. The court declined to "limit the scope of the statute" in this way, reasoning: "The statute is not concerned with possession or ownership of a weapon, but rather aims to penalize those who know that there is a weapon inside a motor vehicle." Id., 246.

The defendant now asks this court to overrule *Mebane* and to interpret "knowingly has" to mean "knowingly possesses." She thereby argues that her conviction must be reversed for insufficient evidence, on the basis of her mere knowledge of the firearm's presence in the Impala. Relying on the same grounds, she alternatively raises claims of instructional error and plain error; see Practice Book § 60-5; and asks this court to exercise

[26] General Statutes (Rev. to 2013) § 29-38 (a) provides in relevant part: "Any person who knowingly has, in any vehicle owned, operated or occupied by such person, any weapon, any pistol or revolver for which a proper permit has not been issued as provided in section 29-28 or any machine gun which has not been registered as required by section 53-202, shall be fined not more than one thousand dollars or imprisoned not more than five years or both, and the presence of any such weapon, pistol or revolver, or machine gun in any vehicle shall be prima facie evidence of a violation of this section by the owner, operator and each occupant thereof. . . ."

The defendant claims that there was insufficient evidence only as to the "knowingly has" element. She does not argue that there was insufficient evidence to establish that a proper permit had not been issued. The jury heard uncontested evidence that neither Spann nor the defendant had a permit to carry a firearm.

its supervisory authority over the administration of justice to reverse her conviction.

Even if we were to assume, without deciding, that "knowingly has" means "knowingly possesses," constructive possession of a firearm would support a conviction even under the defendant's proposed reading of the statute. As set forth in part I of this opinion, possession may be actual or constructive, with constructive possession requiring knowledge and control of the object. Because knowledge is a necessary element of constructive possession, a person who constructively possesses an object also knowingly possesses it. Thus, in light of our conclusion that there was sufficient evidence that the defendant constructively possessed a firearm in connection with her conviction under § 53a-217 (a), we reach the same conclusion to support her conviction under § 29-38 (a).

Similarly, the jury's finding that the defendant constructively possessed a firearm under § 53a-217 (a) renders any potential instructional error harmless. Nor do we find plain error in the proper application of the law existing at the time of trial, which was the construction announced in *Mebane*. See *State* v. *Turner*, 334 Conn. 660, 684, 224 A.3d 129 (2020) (it is axiomatic that proper application of law existing at time of trial cannot constitute reversible error under plain error doctrine); *State* v. *Diaz*, 302 Conn. 93, 104 n.8, 25 A.3d 594 (2011) (same). Finally, recognizing that the exercise of our supervisory authority over the administration of justice is generally reserved for the adoption of procedural rules, we decline to exercise it to resolve this issue of statutory construction and evidentiary sufficiency. See, e.g., *In re Yasiel R.*, 317 Conn. 773, 790–91, 120 A.3d 1188 (2015) (adopting procedural safeguard requiring trial courts to canvass parents who do not consent to termination of their parental rights prior to start of termination trial to ensure fairness). Therefore, we affirm the conviction without reaching the merits of the defendant's argument.

The judgment is affirmed.

In this opinion MULLINS, VERTEFEUILLE and PRESCOTT, Js., concurred.

MULLINS, J., concurring. I agree with and join the majority opinion. I write separately to emphasize that the question of whether the state presented sufficient evidence that the defendant, Amelia Rhodes, constructively possessed the firearm in the vehicle, in violation of General Statutes (Rev. to 2013) § 53a-217 (a), is a close one and to comment on the use of flight evidence in this case.

In particular, the majority and the state highlight the fact that the defendant drove the vehicle 1.2 miles, while being chased by the police, in an effort to evade arrest as evidence of her constructive possession of a firearm, which supports her conviction of criminal possession of a firearm.[1] For the reasons set forth in the majority opinion, I ultimately agree that a rational fact finder could have concluded from this evidence that a reason-

[1] After Lamar Spann, the armed passenger in the vehicle driven by the defendant, committed the shooting and got back into the vehicle with the gun, the defendant drove the vehicle onto the curb to avoid the officers' vehicle, which they had attempted to use to block her escape. She then continued to flee at a high rate of speed with the officers in pursuit, narrowly avoiding pedestrians and speeding past stop signs without stopping. It has been established that, "[a]lthough mere proximity to a gun is insufficient to establish constructive possession, evidence of some other factor—including connection with a gun, proof of motive, a gesture implying control, *evasive conduct*, or a statement indicating involvement in an enterprise—coupled with proximity may suffice." (Emphasis added; internal quotation marks omitted.) *United States* v. *Alexander*, 331 F.3d 116, 127 (D.C. Cir. 2003). A driver of a vehicle who evades the police for the purpose of assisting a passenger to dispose of a firearm properly may be found to have constructively possessed that firearm. See *United States* v. *Witcher*, 753 Fed. Appx. 159, 161 (4th Cir. 2018); *State* v. *Bowens*, 118 Conn. App. 112, 123–24, 982 A.2d 1089 (2009), cert. denied, 295 Conn. 902, 988 A.2d 878 (2010); *McDaniels* v. *United States*, 718 A.2d 530, 531–32 (D.C. 1998); *Logan* v. *United States*, 489 A.2d 485, 491–92 (D.C. 1985); cf. *United States* v. *Chambers*, 918 F.2d 1455, 1458 (9th Cir. 1990) ("[c]onduct by the driver of a vehicle that appears intended to aid a passenger in disposing of the drug is probative of joint possession of the drug").

able explanation for the defendant's decision to flee was her intention to keep the firearm away from the police, thereby establishing her constructive possession of that firearm. See footnote 1 of this opinion. Nonetheless, the circumstances surrounding the use of flight evidence in this case give me pause.

Lamar Spann had just committed a shooting in broad daylight and in full view of the police. He then reentered the vehicle while armed, and the police officers, who had just witnessed Spann commit the shooting, were sharply focused on the vehicle and its occupants. Under these circumstances, it is not difficult to understand why someone in the defendant's position might have been reluctant to immediately surrender to the police. The defendant undoubtedly was well aware that the officers could have perceived her as armed and dangerous and, therefore, could have used deadly force against her. Indeed, the police have used deadly force on unarmed suspects for far less. Beyond that, Spann was sitting right next to her with a gun, telling her to "drive, go." Given these facts, it is entirely plausible that the defendant resorted to flight out of fear that surrendering would have placed her personal safety at risk—either at the hands of the police pursuing an armed suspect or the armed suspect sitting next to her.

Nevertheless, in reviewing the sufficiency of the evidence, "we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [jury's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Taupier*, 330 Conn. 149, 187, 193 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 1188, 203 L. Ed. 2d 202 (2019). Applying this standard, this court cannot substitute its judgment for that of the jury about what significance to accord the defendant's evasive conduct. "[T]he fact that ambiguities or explanations [for the defendant's flight] may exist which tend to rebut

an inference of guilt . . . simply constitutes a factor for the jury's consideration. . . . The probative value of evidence of flight depends upon all the facts and circumstances and is a question of fact for the jury." (Citation omitted; internal quotation marks omitted.) *State* v. *Wright*, 198 Conn. 273, 281, 502 A.2d 911 (1986). Indeed, regardless of the alternative theories proposed by the defendant, "the critical point is that the jury could have drawn different inferences from [the] evidence, and our mandate is to affirm when the jury's choice was a rational one—which it was here." *United States* v. *Arnold*, 486 F.3d 177, 182 (6th Cir. 2007), cert. denied, 552 U.S. 1103, 128 S. Ct. 871, 169 L. Ed. 2d 736 (2008).

Thus, the presence of alternative explanations for the defendant's flight does not render the evidence insufficient. Ultimately, the motivation for the defendant's flight was a question for the jury. Because the jury rationally could have concluded that disposing of the firearm was a reasonable explanation for the defendant's decision to flee from the police, I am compelled to conclude that there was sufficient evidence of constructive possession of a firearm in the present case.

Accordingly, I respectfully concur.

ECKER, J., with whom PALMER and McDONALD, Js., join, concurring in part and dissenting in part. I respectfully dissent from part I of the majority opinion because I do not believe that the evidence was sufficient to support the conviction of the defendant, Amelia Rhodes, of criminal possession of a firearm in violation of General Statutes (Rev. to 2013) § 53a-217 (a). I concur in part II of the majority opinion, in which the majority upholds the defendant's conviction of having a weapon in a motor vehicle in violation of General Statutes (Rev. to 2013) § 29-38 (a), but on different grounds than those relied on by the majority.

I

A

In no conventional sense of the word did the defendant "possess" the firearm carried by her friend and passenger, Lamar Spann, on the afternoon of August 17, 2013.[1] She did not own it and had no legally cognizable possessory interest in it. She never was in actual physical possession of the firearm; she never physically held it or touched it, even for a moment, and the state never claimed otherwise. Likewise, the jury was presented with no evidence that the defendant herself at any time had the practical ability to obtain actual physical possession of the firearm. Nor was there any evidence that she occupied a position of authority over Spann that would have allowed her to direct him to use the firearm at her command. No evidence was presented that Spann previously had permitted the defendant to use his firearm or would have done so on this occasion upon request. Finally, there was not a shred of evidence at trial that the defendant intended to exercise control over the firearm itself, as opposed to the car in which it was located. Reversal of the defendant's conviction of criminal possession of a firearm is required under these circumstances because these significant evidentiary gaps cannot be filled in without resort to impermissible speculation and surmise.

As in many appeals challenging the sufficiency of the evidence supporting a criminal conviction, resolution of the defendant's claim requires us to determine the point at which permissible inference becomes impermissible speculation. I agree with the majority that where to draw this line in any particular case ultimately is a

[1] The record reflects that Spann was convicted of various crimes arising out of the August 17, 2013 shooting, including criminal possession of the firearm in question. The primary issue on appeal is whether the evidence is legally sufficient to establish beyond a reasonable doubt that the defendant jointly possessed Spann's firearm by operating the vehicle in which Spann was a passenger while he was in actual physical possession of the firearm.

matter of judgment. I further agree that a reviewing court undertaking the task of line drawing must exercise maximum restraint and exhibit great deference to the jury's verdict due to the jury's vital, constitutional role in our system of justice; the majority rightly reminds us that we do not sit as a seventh juror. See *State* v. *Ford*, 230 Conn. 686, 693, 646 A.2d 147 (1994). But there is more to the picture, because the same constitution also imposes limitations on the jury's power to convict an accused in a criminal case—there are other constitutional values at stake in addition to the jury right. In particular, a reviewing court is obligated to ensure that a criminal conviction is supported by evidence sufficient to find a defendant guilty of the crime charged beyond a reasonable doubt. See, e.g., *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); see also J. Newman, "Beyond 'Reasonable Doubt,' " 68 N.Y.U. L. Rev. 979, 980 (1993) (encouraging appellate courts "to take the [reasonable doubt] standard seriously as a rule of law against which the validity of convictions is to be judged"). In my judgment, the evidence in the present case fails to meet that high standard.

The rules governing appellate review in this context are well established. "The two part test this court applies in reviewing the sufficiency of the evidence supporting a criminal conviction is well established. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the jury reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt." (Footnote omitted; internal quotation marks omitted.) *State* v. *Lewis*, 303 Conn. 760, 767, 36 A.3d 670 (2012). "In evaluating evidence that could yield contrary inferences, the trier of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The trier [of fact] may draw whatever infer-

ences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Internal quotation marks omitted.) *State* v. *Drupals*, 306 Conn. 149, 158, 49 A.3d 962 (2012). However, "[b]ecause [t]he only kind of an inference recognized by the law is a reasonable one . . . any such inference cannot be based on possibilities, surmise or conjecture. . . . It is axiomatic, therefore, that [a]ny [inference] drawn must be rational and founded upon the evidence. . . . [T]he line between permissible inference and impermissible speculation is not always easy to discern. When we infer, we derive a conclusion from proven facts because such considerations as experience, or history, or science have demonstrated that there is a likely correlation between those facts and the conclusion. If that correlation is sufficiently compelling, the inference is reasonable. But if the correlation between the facts and the conclusion is slight, or if a different conclusion is more closely correlated with the facts than the chosen conclusion, the inference is less reasonable. At some point, the link between the facts and the conclusion becomes so tenuous that we call it speculation." (Internal quotation marks omitted.) *State* v. *Lewis*, supra, 768–69.

No objective formula or uniform template tells us how to distinguish reasonable inference from impermissible speculation. It should be clear, however, that our appellate review may not rely on speculative guesswork any more than may the jury's verdict. This is not an exercise in appellate storytelling. Yet, I fear that the majority's effort to conjure a basis for the jury's verdict at times propels the majority into the realm of speculation, as when the majority pictures the jurors rolling their eyes or splitting their sides in laughter. See footnote 22 of the majority opinion and accompanying text. There are limitations on the inferences that may be drawn from the evidence. One such limitation is the requirement that an inference be reasonable, which

means that it must be more than merely possible—it must be *probable*. This court has explained that "[a]n inference is not legally supportable . . . merely because the scenario that it contemplates is remotely possible under the facts. To permit such a standard would be to sanction fact-finding predicated on mere conjecture or guesswork. Proof by inference is sufficient, rather, only if the evidence produces in the mind of the trier [of fact] a *reasonable belief in the probability of the existence* of the material fact." (Emphasis in original; internal quotation marks omitted.) *State* v. *Reynolds*, 264 Conn. 1, 97, 836 A.2d 224 (2003), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004); see also *State* v. *Copas*, 252 Conn. 318, 339–40, 746 A.2d 761 (2000) (although "[p]roof of a material fact by inference from circumstantial evidence need not be so conclusive as to exclude every other hypothesis," it must be sufficient to produce "in the mind of the trier [of fact] a reasonable belief in the probability of the existence of the material fact" (internal quotation marks omitted)). Anything less is mere "speculation and conjecture," which is "insufficient to sustain the burden of proof beyond a reasonable doubt . . . ." (Internal quotation marks omitted.) *State* v. *Sivri*, 231 Conn. 115, 131–32, 646 A.2d 169 (1994).

The point is an important one because it operates to prevent the dilution of a constitutional standard. The constitution does not require that the subordinate facts each be proven beyond a reasonable doubt, but it still forbids criminal convictions to be based on guesswork; a reviewing court will draw the line at verdicts resting on merely *possible* factual scenarios as opposed to *probable* ones. This key distinction explains why the majority misses the point when it suggests that this concurring and dissenting opinion reaches its conclusions by substituting its own "alternative explanations" and by preferring more "benign" and "innocent" interpretations of the evidence than those offered by the

majority. The alternatives are provided to demonstrate the speculative nature of the inferences posited by the majority. The analysis, in other words, is intended to demand that the critical inculpatory inferences necessary to reach a guilty verdict in this case were not conjectural on this factual record.

Although the majority correctly points out that "[w]e do not sit as the 'seventh juror' when we review the sufficiency of the evidence"; *State* v. *Ford*, supra, 230 Conn. 693; we also may not abdicate our constitutional responsibility to ensure that a criminal conviction is supported by sufficient evidence to find the defendant guilty beyond a reasonable doubt. Our sufficiency review "is not entirely toothless . . . for [w]e do not . . . fulfill our duty through rote incantation of [the principles governing a review of sufficiency of evidence] followed by summary affirmance." (Citation omitted; internal quotation marks omitted.) *United States* v. *Salamanca*, 990 F.2d 629, 638 (D.C. Cir.), cert. denied, 510 U.S. 928, 114 S. Ct. 337, 126 L. Ed. 2d 281 (1993). Although "[a] jury is entitled to draw a vast range of reasonable inferences from [the] evidence, [it] may not base a verdict on mere speculation"; (internal quotation marks omitted) id.; "and caution must be taken that the conviction not be obtained by piling inference on inference." (Internal quotation marks omitted.) *United States* v. *Jones*, 44 F.3d 860, 865 (10th Cir. 1995).

B

I now turn to the law of constructive possession.[2] Constructive possession is a "legal fiction . . . ." (Internal quotation marks omitted.) *United States* v. *Jones*, 872 F.3d 483, 489 (7th Cir. 2017), cert. denied, U.S. , 138 S. Ct. 936, 200 L. Ed. 2d 211 (2018), and cert. denied,

[2] It is undisputed that the defendant in this case never had actual physical possession of Spann's firearm. Indeed, the trial court granted the defendant's motion for a judgment of acquittal on the charge of carrying a pistol without a permit in violation of General Statutes § 29-35 (a) on the ground that there was no evidence that the defendant had "carried [the firearm] on . . . her person . . . ."

U.S. , 138 S. Ct. 1023, 200 L. Ed. 2d 283 (2018); see id. ("[c]onstructive possession is a legal fiction whereby a person is deemed to possess [a gun] even when he does not actually have immediate, physical control of the [gun]" (internal quotation marks omitted)); *State* v. *Williams*, 110 Conn. App. 778, 787, 956 A.2d 1176 (describing "the legal fiction of constructive possession that can be inferred from the circumstances and can be the equivalent of actual possession"), cert. denied, 289 Conn. 957, 961 A.2d 424 (2008). The doctrine of constructive possession was devised to prevent individuals from evading culpability simply by divesting themselves of physical possession of, or title to, contraband while nonetheless maintaining dominion or control over the contraband in fact. See, e.g., *Henderson* v. *United States*, 575 U.S. 622, 627, 135 S. Ct. 1780, 191 L. Ed. 2d 874 (2015) ("[t]he idea of constructive possession is designed to preclude" individuals from divesting themselves of physical custody and title by "arranging a sham transfer that leaves [them] in effective control of [the contraband]"); *United States* v. *Bentvena*, 319 F.2d 916, 950 (2d Cir.) ("Quite frequently, the ringleaders or overlords of the narcotics business do not stultify themselves by possession when handlers can be so cheaply hired. Therefore, in an effort to bring a modicum of reality into the picture," the courts created the doctrine of constructive possession.), cert. denied sub nom. *Ormento* v. *United States*, 375 U.S. 940, 84 S. Ct. 345, 11 L. Ed. 2d 271 (1963). The doctrine "allow[s] the law to reach beyond puppets to puppeteers." (Internal quotation marks omitted.) *Henderson* v. *United States*, supra, 627.

At a conceptual level, the need for the doctrine of constructive possession arises from an ambiguity in the operative word, "possession."[3] The ambiguity stems

[3] This court long ago observed that, "[a]s to 'possession,' there is no word more ambiguous in its meaning." *Hancock* v. *Finch*, 126 Conn. 121, 122–23, 9 A.2d 811 (1939), citing *National Safe Deposit Co.* v. *Stead*, 232 U.S. 58,

from the fact that "to possess" connotes a direct *physical* relationship between the possessor and the item at issue, at least when used in reference to tangible things; to possess a thing is to have and hold it. See, e.g., Webster's Third New International Dictionary (1961) p. 1770 (defining "possess" as, inter alia, "to have and hold as property").[4] It is this physical aspect of possession that created the need to develop a doctrine of "constructive" possession in the law, because the word must extend beyond a purely physical meaning to serve a useful role in structuring legal relations. Otherwise, "one could only possess what was under his hand." O. Holmes, The Common Law (1881) p. 236.

34 S. Ct. 209, 58 L. Ed. 504 (1914). *Hancock* is a civil case, but courts and commentators alike often have made the same point in connection with the law of criminal possession. One scholarly article begins with this oft-quoted observation: "The word 'possession,' though frequently used in both ordinary speech and at law, remains one of the most elusive and ambiguous of legal constructs." C. Whitebread & R. Stevens, "Constructive Possession in Narcotics Cases: To Have and Have Not," 58 Va. L. Rev. 751, 751 (1972); see also *Henderson* v. *United States*, supra, 575 U.S. 625–30 (addressing definitional difficulty in case requiring court to decide whether person lawfully can transfer gun to third party without thereby illegally possessing it); *State* v. *Schmidt*, 110 N.J. 258, 266–70, 540 A.2d 1256 (1988) (discussing definitional difficulty and wide spectrum of views); *State* v. *Barber*, 135 N.M. 621, 626, 92 P.3d 633 (2004) ("The legal definition of possession is not necessarily rooted in common discourse. . . . Courts differ on whether the legal concept of possession is a common term with no artful meaning or the most vague of all vague terms." (Citation omitted; internal quotation marks omitted.)); 1 W. LaFave, Substantive Criminal Law (2d Ed. 2003) § 6.1 (e), p. 432 ("[t]he word 'possession' is often used in the criminal law without definition, which perhaps reflects only the fact that it is 'a common term used in everyday conversation that has not acquired any artful meaning' "). "Of this chameleon-hued word," says legal lexicographer Bryan A. Garner, "a legal philosopher pessimistically states: The search for [its] proper meaning . . . is likely to be a fruitless one." (Internal quotation marks omitted.) B. Garner, Dictionary of Legal Usage (3d Ed. 2011) p. 688, quoting G. Paton, A Textbook of Jurisprudence (4th Ed. 1972) p. 553.

[4] In light of Spann's testimony that he was sitting on the firearm during most of the relevant time, it is noteworthy that the origin of the word "possession" traces back to the Latin words for "able to sit upon." See Webster's Third New International Dictionary, supra, p. 1770 ("fr[om] *potis* able, possible [and] *sedre* to sit"). No doubt Spann possessed the gun.

Jurists have long recognized that the modifier "constructive" must not be allowed to overwhelm the inherent limitation contained in the operative word, "possession." Judge Edward A. Tamm wrote the following cautionary words on this subject almost fifty years ago: "The rhetorical legerdemain compounded in this area of the law invokes abstractions which appear more designed to achieve a particular result in an individual case than to stabilize and formalize a workable index of objective standards. The more cases one reads on constructive possession the deeper is he plunged into a thicket of subjectivity. Successive cases enumerate a continuing [reinterpretation] which can only be described as judicial whimsy." *United States* v. *Holland*, 445 F.2d 701, 703 (D.C. Cir. 1971) (Tamm, J., concurring); cf. *Berkey* v. *Third Avenue Railway Co.*, 244 N.Y. 84, 94, 155 N.E. 58 (1926) (Cardozo, J.) ("[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it"). The majority's treatment of constructive possession in the present case, in my view, fails to adequately police the outer boundaries of the doctrine and, in doing so, fails to ensure that criminal laws of uncertain scope are interpreted and applied narrowly rather than expansively. See, e.g., *State* v. *LaFleur*, 307 Conn. 115, 126, 51 A.3d 1048 (2012) ("[w]hen the statute being construed is a criminal statute, it must be construed strictly against the state and in favor of the accused" (internal quotation marks omitted)).

Because the very concept of constructive possession is an abstraction, virtually every jurisdiction, including Connecticut, has found it necessary to develop doctrinal aids to help facilitate its application to the facts of any particular case. We begin with our penal code, which provides that " '[p]ossess' means to have physical possession *or otherwise to exercise dominion or control over tangible property* . . . ." (Emphasis added.) General Statutes § 53a-3 (2). Courts have added a judi-

cial gloss to the statutory "dominion or control" language because those words,[5] like the word possession itself, are too broad to illuminate the nature and degree of control that equates to actual physical possession. Some of these judicial refinements are more useful than others. I see no value at all in borrowing, as the majority does, from the formulation articulated in 1978 by the United States Court of Appeals for the District Columbia, which asks if the evidence has the "capability plausibly to suggest the likelihood that in some discernable fashion the accused had a substantial voice vis-à-vis the [contraband]." *United States* v. *Staten*, 581 F.2d 878, 884 (D.C. Cir. 1978). It is likewise unhelpful, in my view, to ask whether the defendant has the "power or authority to guide or manage" the contraband. (Internal quotation marks omitted.) *State* v. *Hill*, 201 Conn. 505, 516, 523 A.2d 1252 (1986). These standards are fine as generic statements describing the doctrine, but they add no practical value because they do little more than substitute one vague term for another and because they fail to provide useful guidance for determining the nature and degree of control, dominion, power or authority that will be considered sufficient to equate to actual physical possession.

Far greater assistance is provided by the simple principle that was invoked by the prosecutor, the defense, and the trial court in the present case to define the essence of constructive possession. The majority describes the consensus in this way: "In addressing the jury, the prosecutor, defense counsel, and the trial court all referred to [constructive possession] as the practical ability of the defendant to 'go and get' the gun [if she wished to do so], or the practical ability to obtain actual physical possession of it." Constructive possession, in

[5] As the trial court properly instructed the jury, the terms "dominion" and "control" are "synonymous, meaning they are different terms used to describe the same thing."

other words, means that the defendant had both the intention and the practical ability to reduce the contraband to her actual physical possession if she so desired.[6] See, e.g., *Henderson* v. *United States*, supra, 575 U.S. 630 (defining constructive possession under federal felon in possession statute, 18 U.S.C. § 922 (g), as "hav[-ing] the ability to use or direct the use of [the] firearms"); *United States* v. *Chauncey*, 420 F.3d 864, 873 (8th Cir. 2005) ("[t]he linchpin of the ownership, dominion, or control required for constructive possession is not direct, physical control, but the ability to reduce an object to actual possession" (internal quotation marks omitted)), cert. denied, 547 U.S. 1009, 126 S. Ct. 1480, 164 L. Ed. 2d 258 (2006); *United States* v. *Jenkins*, 90 F.3d 814, 822 (3d Cir. 1996) (Cowen, J., dissenting) ("the terms dominion and control are to be interpreted as the ability to reduce an object to actual possession" (internal quotation marks omitted)); *United States* v. *Caballero*, 712 F.2d 126, 129 (5th Cir. 1983) ("[i]n essence, constructive possession is the ability to reduce an object to actual possession" (internal quotation marks omitted)); *State* v. *Richards*, 286 S.W.3d 873, 884–85 (Tenn. 2009) (Koch, J., dissenting) (defining constructive possession as "the ability to reduce an object to actual possession" (internal quotation marks omitted)); *State* v. *Jones*, 146 Wn. 2d 328, 333, 45 P.3d 1062 (2002) ("A defendant has actual possession when he or she has physical custody of the item and constructive possession if he or she has dominion and control over the item. . . . Dominion and control means that the object

[6] It is not necessary that the defendant manifest the requisite intention by *exercising* her practical ability to obtain actual physical possession of the contraband, only that she could do so if she so desired. As this court explained in *State* v. *Hill*, supra, 201 Conn. 516, "[t]he essence of exercising control is not the manifestation of an act of control but instead it is the act of being in a position of control coupled with the requisite mental intent. In our criminal statutes involving possession, this control must be exercised intentionally and with knowledge of the character of the controlled object."

may be reduced to actual possession immediately." (Citation omitted.)); cf. *Bulkley* v. *Dolbeare*, 7 Conn. 232, 234–35 (1828) (to have constructive possession of property, "a plaintiff must have such a right as to be entitled to reduce the goods to actual possession, when he pleases" (internal quotation marks omitted)).

Our constructive possession jurisprudence provides additional guidance when, as in the present case, the state's case is not predicated on a claim of exclusive possession of the contraband but, instead, on the theory that the defendant and another person were in joint possession of the contraband. See footnote 1 of this opinion. "[When] the defendant is not in exclusive possession of the premises where the [contraband is] found, it may not be inferred that [the defendant] knew of the presence of the [contraband] and had control of [it], unless there are other incriminating statements or circumstances tending to buttress such an inference." (Internal quotation marks omitted.) *State* v. *Johnson*, 316 Conn. 45, 58, 111 A.3d 436 (2015). "Accordingly, [t]o mitigate the possibility that innocent persons might be prosecuted for possessory offenses . . . it is essential that the state's evidence include more than just a temporal and spatial nexus between the defendant and the contraband." (Internal quotation marks omitted.) *State* v. *Bowens*, 118 Conn. App. 112, 121, 982 A.2d 1089 (2009), cert. denied, 295 Conn. 902, 988 A.2d 878 (2010). "In such cases, the government is required to present direct or circumstantial evidence to show some connection or nexus individually linking the defendant to the contraband." (Internal quotation marks omitted.) *State* v. *Johnson*, supra, 62. Furthermore, there must be "a compelling correlation between the actions of a defendant prior to arrest and the conclusion of dominion and control" in order for a reviewing court to "find that the jury's conclusion was a reasonable inference." *State* v. *Billie*, 123 Conn. App. 690, 701, 2 A.3d 1034 (2010).

C

The remaining task is to apply the foregoing legal principles to determine whether the evidence of constructive possession was sufficient to support the jury's verdict. I agree with the majority that, after the shooting, the evidence plainly was sufficient to support a reasonable inference that the defendant knew that Spann was in actual physical possession of a firearm. As I have discussed, however, driving a car with the knowledge that a passenger is in actual physical possession of a firearm is not enough to support an inference of constructive possession; the state must adduce evidence "*individually linking*" the defendant to the passenger's firearm. (Emphasis added; internal quotation marks omitted.) *State* v. *Johnson*, supra, 316 Conn. 62. The majority believes that "four circumstances" provided the crucial link between the defendant and Spann's firearm: (1) her control of the car; (2) her flight from the police; (3) her relationship with Spann; and (4) her physical access to Spann's firearm. I address each of these circumstances in turn and conclude, for the reasons that follow, that they are insufficient, both individually and collectively, to sustain the defendant's conviction.

First, as the majority acknowledges, when the defendant is not in exclusive possession of the residence or vehicle in which the contraband is found,[7] mere proxim-

[7] The majority's reliance on *State* v. *Delossantos*, 211 Conn. 258, 277–78, 559 A.2d 164, cert. denied, 493 U.S. 866, 110 S. Ct. 188, 107 L. Ed. 2d 142 (1989), to support the proposition that "[o]ne who owns or exercises dominion or control over a motor vehicle in which [contraband] is concealed may be deemed to possess the contraband" is misplaced. In *Delossantos*, the defendant was the "lone occupant of the automobile"; id., 261; and, when a driver is in *exclusive* possession of an automobile, it is reasonable to infer that he or she had both the power and intent to exercise dominion or control over the contents of that automobile. As we explained in *Delossantos*, however, "[w]here the defendant is *not* in exclusive possession of the premises where the [contraband is] found, it may *not* be inferred that [the defendant] knew of the presence of the [contraband] and had control of [it], *unless there are other incriminating statements or circumstances tending*

ity to the contraband and knowledge of its presence are "not enough to establish constructive possession." (Internal quotation marks omitted.) Id. "The driver of a vehicle can transport passengers and their possessions without" being in constructive possession of "every object in the vehicle." *Flores-Abarca* v. *Barr*, 937 F.3d 473, 483 (5th Cir. 2019); see also *State* v. *Foster*, 128 Haw. 18, 30, 282 P.3d 560 (2012) (holding that evidence was insufficient to support defendant driver's conviction of being felon in possession of firearm, even though he knew his passenger was in actual physical possession of firearm, because control over car "is not by itself enough to establish constructive possession of contraband found there" (internal quotation marks omitted)). The United States Court of Appeals for the Fifth Circuit has aptly observed that dominion and control "over the vehicle . . . alone cannot establish constructive possession of a weapon found in the vehicle, particularly in the face of evidence that strongly suggests that somebody else exercised dominion and control over the weapon. . . . Although knowledge of a firearm's presence may be *evidence* of possession, knowing transportation does not conclusively establish constructive possession as a matter of law." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Flores-Abarca* v. *Barr*, supra, 483.

The majority states that there are "additional circumstances under which the defendant operated the vehicle" in the present case that "buttressed an inference of an intent to control the gun contained within the vehicle . . . ." Footnote 13 of the majority opinion. According to the majority, these additional circum-

to buttress such an inference." (Emphasis added; internal quotation marks omitted.) Id., 277. Thus, in the absence of additional evidence—which, for the reasons explained in the body of this opinion, I believe is lacking in this case—the defendant's knowledge of Spann's firearm and her control of the car do not support a reasonable inference that she constructively possessed Spann's firearm.

stances include "that she drove the vehicle to the place where Spann discharged the gun" and that she "waited for him to get back in the vehicle with the gun after the shooting, notwithstanding that she was a felon . . . ."[8] Id. The flaw in the majority's reasoning is that these particular facts have no probative value, unless one assumes that the defendant was Spann's knowing accomplice to a premeditated crime using Spann's firearm, which, as I discuss later in this opinion, is a theory that the jury affirmatively *rejected* by acquitting the defendant of the crime of attempt to commit assault in the first degree in violation of General Statutes §§ 53a-59 (a) (1) and 53a-49 (a) (2). There is no evidence that the defendant even knew about Spann's firearm, much less that he intended to use it, until the moment the shooting occurred. By all accounts, Spann was back in the vehicle within a matter of seconds thereafter. In my view, it is speculative and, therefore, unreasonable to conclude that the defendant's operation of a motor vehicle under these factual circumstances was indicative of an intent to exercise control over *Spann's firearm*, as opposed to the *vehicle* in which Spann carried his firearm.

Simply put, the state failed to adduce any evidence linking the defendant to either Spann's firearm or any related criminality at any time prior to the shooting. There was no evidence, for example, that the defendant was involved in Spann's drug dealing enterprise. There were no drugs, drug packaging materials or significant amounts of cash found on the defendant's person or recovered from the interior of the vehicle. The state offered no evidence of any historical connection between the defendant and Spann's drug dealing. Likewise, there

[8] The majority also observes that the defendant "drove the vehicle 1.2 miles while being chased by the police in an effort to evade arrest for her participation in the shooting . . . ." Footnote 13 of the majority opinion. I address this point later in this opinion in connection with the majority's discussion regarding the significance of the defendant's "flight" immediately following the shooting incident.

was no forensic evidence, such as fingerprint, DNA or ballistic evidence, individually linking the defendant to Spann's firearm, there was not any direct or circumstantial evidence indicating that the defendant had handled Spann's firearm that day or on any prior occasion, and there was no evidence that the defendant requested access to the firearm, reached out for the firearm, or leaned across the front seat in an effort to acquire the firearm from Spann. Nor was there any evidence indicating that Spann would have been willing to surrender physical possession of the firearm to the defendant upon request. The state, moreover, was unable to fill in these gaps using any inculpatory statements made by Spann or the defendant to the police regarding the defendant's possession of the firearm or participation in the shooting. This case, in other words, is devoid of the type of evidence that the courts of this state have found sufficient to link a defendant individually to contraband in nonexclusive possession cases. Cf. *State* v. *Winfrey*, 302 Conn. 195, 210–13, 24 A.3d 1218 (2011) (evidence was sufficient to establish that defendant driver knew of and exercised dominion and control over drugs found in center console of vehicle registered to defendant's wife when, following stop for motor vehicle violation, defendant was seen dropping and swallowing package of suspected heroin to escape criminal liability and had more than $550 in cash and rolling papers on his person at time of arrest); *State* v. *Butler*, 296 Conn. 62, 79, 993 A.2d 970 (2010) (evidence was sufficient to support inference that defendant driver possessed narcotics found in console of vehicle because defendant's "manipulation of the console within which the narcotics were discovered, presumably to conceal that contraband, buttressed the jury's inference that the defendant knew about the narcotics and had control over them," and "there was significant evidence from which it was rea-

sonable for the jury to infer that the defendant was a narcotics dealer"); *State* v. *Bowens*, supra, 118 Conn. App. 123–26 (evidence was sufficient to support defendant driver's criminal possession of firearm conviction because, in addition to fleeing from police, heroin and marijuana were found in car, defendant was in possession of $1293 in cash, shell casing found in car matched bullet from firearm recovered by police, and defendant had personal motive to carry firearm because he had been involved in shooting earlier that day); *State* v. *Sanchez*, 75 Conn. App. 223, 237–42, 815 A.2d 242 (evidence was sufficient to support inference that defendant driver had constructive possession of drugs because defendant was seen smoking marijuana filled cigar, officers smelled marijuana, defendant fled police while discarding cigar, and narcotics were found in plain view in open ashtray), cert. denied, 263 Conn. 914, 821 A.2d 769 (2003); *State* v. *Grant*, 51 Conn. App. 824, 829, 725 A.2d 367 (evidence was sufficient to support inference of constructive possession because "[t]wo experienced detectives familiar with the defendant identified him as the driver of the car and observed him receive money from a female and give her an item from a paper bag in a high drug traffic area," defendant "fled in his car when [a police officer] ordered him to shut off his engine," and defendant was observed "throw[ing] the paper bag from his car"), cert. denied, 248 Conn. 916, 734 A.2d 568 (1999). But cf. *State* v. *Cruz*, 28 Conn. App. 575, 580–81, 611 A.2d 457 (1992) (reversing defendant driver's conviction for possession of marijuana and possession of drug paraphernalia because defendant did not own vehicle in which marijuana seed and rolling papers were found, defendant's statement about past marijuana use was "minimally probative of the issue of dominion and control of the seed," and "[t]he evidence . . . equally supported a conclusion that the defendant was unaware

of the presence of either the seed or the rolling papers and did not exercise dominion and control over them").[9]

This brings us to what I consider the heart of the case. The majority attributes great significance to the fact that the defendant "drove the vehicle 1.2 miles while being chased by the police in an effort to evade arrest" and considers this evasive conduct to be the second circumstance supporting the inference that the defendant was in constructive possession of Spann's firearm. Footnote 13 of the majority opinion. More specifically, the majority concludes that the defendant's flight from the police (1) supported a reasonable inference that she drove the car with an intent to control the firearm itself in order to prevent the police from seizing the firearm after the shooting, and (2) revealed the defendant's consciousness of guilt with respect to the possession charge. I disagree. The issue is *not* whether the defendant's flight was criminal in nature or whether it may have been punishable under some other provision of the penal law, such as having a weapon in a motor vehicle in violation of § 29-38 (a). See part II of this opinion. More narrowly still, the issue is *not* whether the defendant's flight is evidence connecting her to the shooting committed by Spann or whether it reflects a guilty mind with regard to the shooting. Rather, the one issue that matters on appeal is whether the defendant's conduct supports a reasonable inference that she likely was fleeing the scene—not merely to avoid capture, and not merely to avoid her friend being arrested—*with the intention to exercise dominion or control over Spann's firearm*. On this record, I consider such a conclusion wholly speculative.

[9] The difference between the majority opinion and this concurring and dissenting opinion can be summarized as the difference between the view that such additional evidence "might have helped to establish constructive possession," as the majority acknowledges, and my view that the conviction cannot be sustained in the absence of at least some additional evidence of this nature.

"[T]he probative value of evidence of flight is, in large part, dependent upon facts pointing to the motive [that] prompted it." *State* v. *Piskorski*, 177 Conn. 677, 723, 419 A.2d 866, cert. denied, 444 U.S. 935, 100 S. Ct. 283, 62 L. Ed. 2d 194 (1979). "We repeatedly have recognized that evidence of flight from the scene of a crime inherently is ambiguous." *State* v. *Luster*, 279 Conn. 414, 423, 902 A.2d 636 (2006). These observations apply fully to our consideration of the defendant's flight as evidence of her specific intention to control Spann's firearm. The defendant's flight under the circumstances of this case might have been prompted by various possible motivations or some combination thereof. Perhaps she simply was trying to help her friend escape apprehension. Or maybe she fled the scene out of pure undifferentiated fear, resulting from nothing more complicated than the obvious and overwhelming fact that she suddenly found herself in the middle of a highly volatile situation involving criminal activity perpetrated by her friend sitting in the passenger seat. In other words, the defendant could have been motivated by a "fight or flight" instinct, which prompted her to flee rather than to remain at the scene. The defendant might have been motivated by a sense of self-preservation, upon realizing that her very presence in the car, under the circumstances, created a high risk that she herself would be implicated in Spann's criminal activity. In addition, we have come to recognize that social factors unrelated to actual guilt or innocence often will also figure into a person's decision to flee due to that person's concerns about the perceptions that the police may formulate as a result of demographic considerations. See *State* v. *Edmonds*, 323 Conn. 34, 74, 145 A.3d 861 (2016) ("[a]mong some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity

associated with the officer's sudden presence" (internal quotation marks omitted)). Of course, I cannot say which of these (or any other) possibilities describe the actual motivations behind the defendant's flight because I have no way to know. But this is precisely the point. A jury's preference for one psychological explanation over another, like my own, could only be based on guesswork under the present factual circumstances.

If only to demonstrate that we are left merely to speculate among possibilities, I note my own view that, of the various possible inferences that have been proposed to explain why the defendant fled the scene and sought to evade the police, I consider the least plausible to be the idea that her flight, more likely than not, was motivated by a conscious desire to exercise control over Spann's firearm, as distinct from the car in which Spann's firearm happened to be located. Without more—and there is not more on this record—the supposition strikes me as particularly far-fetched. Again, there is no evidence that the defendant exhibited any particularized interest in Spann's firearm or that she, by words or action, demonstrated any "individualized" connection to the firearm. She did not, for example, reach out for the firearm, lean across the front seat and across (or under) Spann's body to grab the firearm, or engage in any other conduct indicating any particularized concern regarding the firearm. Cf. *State* v. *Bowens*, supra, 118 Conn. App. 123–24 (noting, among other indicia of intent, that "the defendant fled from the police and only the revolver was discarded, leaving the heroin and marijuana in the car," which "suggest[ed] that the motivation in fleeing was to jettison the revolver"); *McDaniels* v. *United States*, 718 A.2d 530, 531–32 (D.C. 1998) (upholding defendant's conviction because jury reason ably could have inferred from defendant's flight from police and attempted concealment of weapon that he was part of "an ongoing criminal operation" involving

possession of weapon); *Logan* v. *United States*, 489 A.2d 485, 491–92 (D.C. 1985) (evidence was sufficient to support inference of constructive possession because jury reasonably could have found that defendant driver "pulled the car over and slowed down to permit [the front seat passenger] to open—and hold open—the passenger door (of a two-door vehicle) from the front seat while [the back seat passenger] . . . tossed out the gun from the rear, lower portion of the door"). On this evidentiary record, there are "so many reasons" for the defendant's flight "that it scarcely comes up to the standard of evidence tending to establish guilt . . . ." (Internal quotation marks omitted.) *Alberty* v. *United States*, 162 U.S. 499, 510, 16 S. Ct. 864, 40 L. Ed. 1051 (1896); see also *State* v. *Billie*, supra, 123 Conn. App. 700 (inference of dominion and control over contraband must be based on more than "possibilities, surmise or conjecture").

The defendant was not in constructive possession of Spann's firearm at the moment prior to taking flight, and she did not acquire constructive possession of the firearm by driving away with Spann still in possession of that firearm. Stated another way, her flight did not change her possessory status vis-à-vis Spann's firearm. The circumstances would be different if the defendant had been involved in the shooting as a principal or accessory, if Spann's firearm was stowed within her reach during the police chase, if Spann had fled and left the defendant with unobstructed access to the firearm, or if the defendant's flight had caused some other change in circumstances creating a direct nexus between the defendant and the firearm itself. But the state established none of these things, by reasonable inference or otherwise.

For much the same reason, flight cannot serve to demonstrate the defendant's consciousness of guilt on these facts. "[C]onsciousness of guilt [is not] an element

of the crime charged; the [g]overnment ha[s] to show that [the defendant intentionally] possessed [the contraband], not that she was aware that she might be involved in some sort of criminal activity." *United States* v. *Morales*, 577 F.2d 769, 773 (2d Cir. 1978). Evidence of this nature is generally understood to be of dubious probative value, and for good reason.[10] See, e.g., *State* v. *Jones*, 234 Conn. 324, 356, 662 A.2d 1199 (1995) (consciousness of guilt evidence "is a species of evidence that should be viewed with caution; it should not be

[10] See, e.g., *Wong Sun* v. *United States*, 371 U.S. 471, 483 n.10, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963) ("we have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime"); *Alberty* v. *United States*, supra, 162 U.S. 511 ("it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses"). In support of its view that evidence of flight "is a species of evidence that should be viewed with caution," the United States Court of Appeals for the First Circuit explained: "Although it is undisputed that flight of an accused can properly be admitted as having a tendency to prove guilt . . . it also is acknowledged widely that, at least in many cases, such evidence is only marginally probative as to the ultimate issue of guilt or innocence. . . . [The inference of guilt] has been questioned by some courts, one of which asserted that men who are entirely innocent do sometimes fly from the scene of a crime for a multitude of reasons, including, for example, hesitation to confront even false accusations, fear that they will be unable to prove their innocence, or protection of a guilty party." (Citations omitted; internal quotation marks omitted.) *United States* v. *Hernandez-Bermudez*, 857 F.2d 50, 54 (1st Cir. 1988); see also *United States* v. *Chipps*, 410 F.3d 438, 449 (8th Cir. 2005) ("courts should be cautious in admitting evidence of flight because it is often only marginally probative of guilt"); *United States* v. *Rodriguez*, 53 F.3d 1439, 1451 (7th Cir. 1995) ("[w]e have long adhered to the [United States] Supreme Court's counsel that courts be wary of the probative value of flight evidence" (internal quotation marks omitted)). Chief Judge David L. Bazelon, quoting Sigmund Freud, provided a psychological basis for questioning the assumption that a suspect's flight necessarily reflects his actual guilt, as sometimes the suspect "is really not guilty of the specific misdeed of which he is being accused, but he is guilty of a similar [misdemeanor] of which [the authorities] know nothing and of which [the authorities] do not accuse him. He therefore quite truly denies his guilt in the one case, but in doing so betrays his sense of guilt with regard to the other." (Internal quotation marks omitted.) *Miller* v. *United States*, 320 F.2d 767, 772 (D.C. Cir. 1963).

admitted mechanically" (internal quotation marks omitted)).

One reason that the probative value of flight evidence is regarded with caution is that the conclusion that flight indicates guilt requires four intermediate inferential steps. "The probative value of flight as evidence of a defendant's guilt depends on the degree of confidence with which four inferences can be drawn: (1) from behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged." (Internal quotation marks omitted.) *State* v. *Scott*, 270 Conn. 92, 105, 851 A.2d 291 (2004), cert. denied, 544 U.S. 987, 125 S. Ct. 1861, 161 L. Ed. 2d 746 (2005). Numerous courts have observed that "[t]he use of evidence of flight has been criticized on the grounds that the second and fourth inferences are not supported by common experience and it is widely acknowledged that evidence of flight or related conduct is 'only marginally probative as to the ultimate issue of guilt or innocence.' " *United States* v. *Myers*, 550 F.2d 1036, 1049 (5th Cir. 1977), quoting *United States* v. *Robinson*, 475 F.2d 376, 384 (D.C. Cir. 1973). For this and related reasons, it is well established that consciousness of guilt alone is insufficient to support a criminal conviction. See *State* v. *Rosa*, 170 Conn. 417, 433, 365 A.2d 1135 ("[t]he flight of the person accused of [a] crime . . . *when considered together with all the facts of the case*, may justify an inference of the accused's guilt" (emphasis added; internal quotation marks omitted)), cert. denied, 429 U.S. 845, 97 S. Ct. 126, 50 L. Ed. 2d 116 (1976); see also *United States* v. *Pagán-Ferrer*, 736 F.3d 573, 594 (1st Cir. 2013) (trial court's instruction that "[n]o one can be convicted of a crime on the basis of consciousness of guilt alone" was proper (internal quotation marks omitted)), cert. denied sub nom. *Vidal-Maldonado* v. *United States*, 573

U.S. 933, 134 S. Ct. 2839, 189 L. Ed. 2d 810 (2014); *United States* v. *Johnson*, 513 F.2d 819, 824 (2d Cir. 1975) (holding that evidence of consciousness of guilt is "insufficient proof on which to convict where other evidence of guilt is weak and the evidence before the court is as hospitable to an interpretation consistent with the defendant's innocence as it is to the [g]overnment's theory of guilt"); *People* v. *Kelly*, 1 Cal. 4th 495, 531, 822 P.2d 385, 3 Cal. Rptr. 2d 677 (under California law, jury may consider evidence of consciousness of guilt, "*but it is not sufficient by itself to prove guilt*" (emphasis in original)), cert. denied, 506 U.S. 881, 113 S. Ct. 232, 121 L. Ed. 2d 168 (1992); *Commonwealth* v. *Toney*, 385 Mass. 575, 585, 433 N.E.2d 425 (1982) (jury cannot "convict a defendant on the basis of evidence of flight or concealment alone"); *People* v. *Yazum*, 13 N.Y.2d 302, 304, 196 N.E.2d 263, 246 N.Y.S.2d 626 (1963) (distinguishing between admissibility and sufficiency of consciousness of guilt evidence).

In the present case, the defendant's flight is not probative of her consciousness of guilt with respect to the theory that she was in possession of Spann's firearm for the same reasons it is not probative of her intent to possess Spann's firearm. Whether she fled out of undifferentiated fear, because she understood immediately that any claim of innocence, however truthful, would not be accepted by law enforcement under the circumstances, because she wanted to protect her friend Spann, or even because she believed herself to be actually guilty of some criminal act relating to the shooting (such as attempted assault or interfering with a police officer, for which she ultimately was acquitted by the jury), it is not reasonable to conclude on this record that she probably fled because she believed herself to be guilty of possessing Spann's firearm. "[T]he interpretation to be gleaned from an act of flight should be made with a sensitivity to the facts of the particular

case" because flight might be indicative of an intent to flee "an entirely different crime . . . ." *United States* v. *Ramon-Perez*, 703 F.2d 1231, 1233 (11th Cir.), cert. denied, 464 U.S. 841, 104 S. Ct. 136, 78 L. Ed. 2d 130 (1983). When a criminal defendant has been charged with multiple crimes, evidence of consciousness of guilt as to *one* crime does not equate to evidence of consciousness of guilt of *a different* crime. See, e.g., *United States* v. *Atchley*, 474 F.3d 840, 853 (6th Cir.) (observing that defendant's "alleged flight could have been due to the murder charge and not the charges here"), cert. denied, 550 U.S. 965, 127 S. Ct. 2447, 167 L. Ed. 2d 1145 (2007); *United States* v. *Hernandez-Bermudez*, 857 F.2d 50, 53 (1st Cir. 1988) ("[T]here is a difference between a consciousness of guilt about possessing cocaine and guilt about intending to distribute the drug. [The] [d]efendant's testimony acknowledged the former, but not the latter. But we doubt that [the defendant's] flight could any more show consciousness of guilt over the *distribution* of cocaine than over its conceded possession." (Emphasis in original.)). I doubt it, but the defendant's flight might have been indicative of her consciousness of actual guilt as to certain criminal offenses that are not at issue in this appeal, such as using a motor vehicle without the owner's permission. See General Statutes § 53a-119b (a). It is not indicative of her consciousness of guilt of the specific crime under consideration—criminal possession of Spann's firearm in violation of § 53a-217 (a).

The majority, quoting *State* v. *Otto*, 305 Conn. 51, 74, 43 A.3d 629 (2012), relies on the uncontroverted but also unhelpful premise that the jury was " 'not required to draw only those inferences consistent with innocence' " to conclude that "the possibility of other, innocent 'inferences from these facts is not sufficient to undermine [the jury's] verdict . . . .' " Of course that is true. It does not follow, however, that the *plausibility*

of the inculpatory inferences is immaterial to our sufficiency review. As we explained in *State* v. *Reynolds*, supra, 264 Conn. 1, "[a]n inference is not legally supportable . . . merely because the scenario that it contemplates is remotely possible under the facts. To permit such a standard would be to sanction fact-finding predicated on mere conjecture or guesswork. Proof by inference is sufficient, rather, only if the evidence produces in the mind of the trier a *reasonable belief in the probability of the existence* of the material fact." (Emphasis in original; internal quotation marks omitted.) Id., 97. Under the factual circumstances of the present case, an inference that the defendant fled the scene of the shooting in order to exercise dominion or control over Spann's firearm is possible but by no means reasonably probable. See id., 97–98 (holding that evidence was insufficient to establish aggravating factor under General Statutes (Rev. to 1991) § 53a-46a (h) (4), even though "it probably would not have been *impossible* for the defendant to have formulated the intent to torture [the victim] in the extremely brief period of time between the firing of the first shot and the firing of additional gunshots" because "the likelihood that the defendant had changed his intent . . . is too remote to be reasonable" (emphasis in original)).

In summary, the evidence of flight adds no force to the otherwise insufficient evidence of constructive possession. Pointing to the defendant's consciousness of guilt or her subjective belief that she may be guilty of a crime cannot provide the state with the evidence of constructive possession that it otherwise lacks.

The third circumstance that the majority relies on, the defendant's relationship with Spann, fares no better and supplies no additional weight to support the defendant's conviction. It is a fundamental precept that mere friendship or association with a known criminal "does not establish a logical connection with the [criminal's]

crime." *State* v. *Kelsey*, 160 Conn. 551, 553, 274 A.2d 151 (1970). Indeed, we previously have observed that it "would clearly be improper" for the jury to infer guilt on the basis of "mere association . . . ." Id., 554; see also *United States* v. *Di Re*, 332 U.S. 581, 593, 68 S. Ct. 222, 92 L. Ed. 210 (1948) (reversing defendant's conspiracy conviction, even though he was present in car in which counterfeit ration coupons were found, because "[p]resumptions of guilt are not lightly to be indulged from mere meetings"); *United States* v. *Nusraty*, 867 F.2d 759, 764 (2d Cir. 1989) (reversing defendant's conviction of conspiracy to possess heroin with intent to distribute because "mere association with those implicated in an unlawful undertaking is not enough to prove knowing involvement").

The claim is especially weak in the present case because the jury affirmatively rejected the state's theory that the defendant intended to facilitate the shooting by acting as Spann's getaway driver. The state pursued its getaway driver theory with respect to the charge of attempt to commit assault in the first degree, but the jury was not persuaded and found the defendant not guilty of aiding Spann in the shooting. Because the trial was bifurcated, the jury considered the charge of criminal possession of a firearm after the defendant had been found not guilty of aiding Spann's attempted assault and interfering with an officer but guilty of having a weapon in a motor vehicle, using a motor vehicle without the owner's permission, and reckless driving. With respect to the criminal possession charge, the jury was not instructed on accessorial liability, and the state did not argue that the defendant constructively possessed Spann's firearm by acting as his getaway driver. Instead, the state argued that the defendant constructively possessed Spann's firearm because "she was aware of . . . the presence of the gun" and she easily could "get it" within the close confines of the motor

vehicle. Thus, although the majority declines to accept this simple fact, the state in its closing argument entirely abandoned its joint criminal venture theory, premised on the defendant being Spann's getaway driver, in favor of a theory that the defendant was in constructive possession of Spann's firearm because she could "exercise dominion and control [over it] within [the] relatively small space of the interior of the [vehicle]."

The majority thus advances a "getaway driver" theory in support of the possessory crime that the state itself did not make in its argument to the jury on that charge. The risk of becoming a seventh juror, it seems, is open to all comers. Our duty to construe the evidence in the light most favorable to sustaining the verdict should not, in my view, be taken as an invitation to substitute new legal theories for the arguments used by the state to obtain the conviction at trial. Cf. *State* v. *Carter*, 317 Conn. 845, 853–54, 120 A.3d 1229 (2015) ("When the state advances a specific theory of the case at trial . . . sufficiency of the evidence principles 'cannot be applied in a vacuum. Rather, they must be considered in conjunction with an equally important doctrine, namely, that the state cannot change the theory of the case on appeal.' "). Moreover, the state did not advance a getaway driver theory on the possession charge for good reason, namely, because the jury already had rejected that theory when it acquitted the defendant of attempted assault by acting as Spann's accomplice in the shooting. The majority's efforts to resurrect the state's abandoned and rejected theory are unavailing.[11]

[11] The majority points out that the verdict finding the defendant guilty on the possession charge is not necessarily inconsistent with the verdict finding the defendant not guilty of attempted assault as an accessory. See footnote 18 of the majority opinion. The majority posits that the jury may have concluded that the defendant shared Spann's intention with regard to shooting the firearm but not his intention to cause serious physical injury. This "asymmetrical intentions" scenario is not impossible as a matter of abstract logic, but it is unlikely, to say the least, that a lay jury entertained (much less adopted) the needle threading theory posited by the majority—particularly

This brings me to the fourth and weakest circumstance relied on by the majority—the fact that "the defendant sat within arm's reach of the gun throughout the afternoon." What this theory ignores is that there was, at all times, an animate physical mass separating the defendant's arm from the firearm, and his name was Lamar Spann. There is no evidence of any kind that Spann's firearm was even momentarily stowed in the center console, the glove compartment, or any other communal space within the vehicle to which the defendant had access. Instead, the evidence before the jury established that Spann had the firearm either on or under his person at all relevant times.[12] Because the firearm was in Spann's exclusive physical possession, the defendant's proximity to Spann in the relatively small confines of the interior of the car is insufficient to support a reasonable inference that she had the ability and intent to exercise

when the state itself never promoted that theory. Logical possibility is not the same as reasonable probability, and it remains highly improbable on this record that the jury decided to convict the defendant of criminal possession of a firearm on the basis of a theory *that was never even advanced by the state with respect to that charge*.

The question, moreover, is not one of theoretical consistency but of evidentiary sufficiency. Even if we were to assume that the jury logically could have adopted a theory of accessorial guilt not argued by the state in support of the charge at issue, by crediting the state's getaway driver theory on the criminal possession charge after rejecting that theory with respect to the attempted assault charge, I disagree with the majority that the jury reasonably could have done so on this evidentiary record. As I previously explained, there was no evidence that the defendant had any knowledge that Spann even was carrying a firearm prior to the shooting; nor was there any evidence of a prior joint criminal activity or any prior planning. I am left to conclude under these circumstances that the evidence necessarily was insufficient to support a reasonable inference that "[the defendant] and Spann brought the gun to Trumbull Avenue for the purpose of firing it and that the defendant would serve as the getaway driver." Footnote 18 of the majority opinion. It seems likely that the state did not argue this inference because the evidence did not support it.

[12] Prior to the shooting, Spann testified that he kept the firearm concealed "under [his] lap . . . ." After the shooting, Spann either held or briefly lodged the firearm "on the side of the door . . . in between the seat and the door."

dominion and control over his firearm, that is, to "go and get it." As the District of Columbia Court of Appeals explained: "[T]here is no 'automobile' exception to the settled general rule that knowledge and proximity alone are insufficient to prove constructive possession of [contraband] beyond a reasonable doubt. . . . As in all other constructive possession cases, there must be something more in the totality of the circumstances—a word or deed, a relationship or other probative factor—that, considered in conjunction with the evidence of proximity and knowledge, proves beyond a reasonable doubt that the [defendant] *intended* to exercise dominion or control over the [contraband], and was not a mere bystander." (Emphasis in original.) *Rivas* v. *United States*, 783 A.2d 125, 128 (D.C. 2001). Although "[i]t may be foolish to stand by when others are acting illegally, or to associate with those who have committed a crime . . . [s]uch conduct or association . . . *without more*, does not establish" constructive possession. (Emphasis in original; internal quotation marks omitted.) Id., 130; see *State* v. *Nova*, 161 Conn. App. 708, 724, 129 A.3d 146 (2015) (reversing defendant's possession of narcotics conviction because defendant's "mere proximity" to contraband and interaction with individual who had snorted some unknown substance was insufficient to establish dominion or control over contraband, and "[t]o conclude otherwise required the [trial] court to engage in impermissible speculation"); *State* v. *Fermaint*, 91 Conn. App. 650, 657–63, 881 A.2d 539 (evidence was insufficient to establish that defendant violated his probation by possessing narcotics because driver of vehicle was in actual physical possession of narcotics, and evidence that defendant, who was passenger in vehicle, engaged in "nondescript furtive movement" before traffic stop and was in proximity to crumbs of crack cocaine found on seat did not establish individual connection between defendant and narcotics), cert. denied, 276 Conn. 922, 888 A.2d 90 (2005).

The majority points out that "[t]he jury did not have to credit" Spann's testimony that the firearm was in his exclusive physical possession before, during, and after the shooting, and that it was "entitled to credit Spann's testimony that the gun was located in the area of the front seat while discrediting his claims that he physically held the gun in a way that prevented the defendant from accessing it . . . ." The argument is that Spann was a drug dealer, a convicted felon, a liar, and the defendant's loyal friend, and, therefore, "[t]he jury had good reason to question [his] credibility . . . ." According to the majority's hypothesis, Spann's "tale seeking to exonerate the defendant" not only "strained credibility"; it was "risible," "sidesplitting," and would cause "the jurors' eyes [to roll] . . . ." I agree with the majority that the jury was free to discredit all, a portion, or none of Spann's testimony. I decline, however, to engage in a fictional account of the jury's conduct at trial, and I strenuously disagree with the majority's suggestion that Spann's testimony can be dissected in a manner that inculpates the defendant in his possessory crime. The argument itself would be risible if the occasion was less solemn. The jury, of course, was free to disbelieve Spann's testimony that he "assiduously kept the gun where [the defendant] could not get it," but it was not free to infer the opposite, namely, that Spann placed the gun in a location to which the defendant had physical access. See, e.g., *Woodall* v. *State*, 97 Nev. 235, 236–37, 627 P.2d 402 (1981) (holding that evidence was insufficient to support defendant's conviction of possession of firearm when defendant's companion "acknowledged that the weapon was his and that [the defendant] knew nothing about its existence," reasoning that "a rational trier of fact could not reject a plausible explanation consistent with [the defendant's] innocence, and thereupon infer [the defendant] to be guilty based on evidence from which only uncertain inferences may be drawn"). "[I]t is axiomatic under Connect-

icut law that, while a [trier of fact] may reject a defendant's testimony, a [trier of fact] in rejecting such testimony cannot conclude that the opposite is true. . . . Thus, under Connecticut law, the [trier of fact] is not permitted to infer, from its disbelief of the defendant's testimony that any of the facts which he denied were true."[13] (Internal quotation marks omitted.) *State* v. *McCarthy*, 105 Conn. App. 596, 619, 939 A.2d 1195, cert. denied, 286 Conn. 913, 944 A.2d 983 (2008). This rule "has been applied uniformly in both criminal and civil contexts"; (internal quotation marks omitted) id., 620; regardless of whether the witness' testimony was proffered by the plaintiff or the defendant. See, e.g., *State* v. *Hart*, 221 Conn. 595, 605–606, 605 A.2d 1366 (1992) (although jury was free to disbelieve testimony of defense witnesses that defendant was not drug-dependent, it was not free to infer opposite); see also

[13] The prohibition against the antithesis inference is not unique to Connecticut; it is "hornbook law" recognized in state and federal courts throughout the country. *Walker* v. *New York*, 638 Fed. Appx. 29, 31 (2d Cir. 2016); see, e.g., id. ("it is hornbook law that a plaintiff does not carry his burden of proving a fact merely by having witnesses deny that fact and asking the jury to decline to believe the denials"); *Grimm* v. *State*, 135 A.3d 844, 859 (Md. 2016) ("[m]any jurisdictions, including Maryland, recognize the doctrine that disbelief of testimony may not alone support a finding in civil and criminal litigation" (internal quotation marks omitted)); *Chapman* v. *Troy Laundry Co.*, 47 P.2d 1054, 1062 (Utah 1935) ("[w]hile the demeanor of the witness in testifying is very important and should be given consideration by the trier of fact, still there must be something more than the batting of an eye, the coloring of the cheek, or the twiddling of the thumbs as a basis for finding facts"); A. Pollis, "The Death of Inference," 55 B.C. L. Rev. 435, 461–62 (2014) ("[C]ourts, including the [United States] Supreme Court, have generally been hostile to accepting the probative value of the antithesis inference, especially without other evidence in support of the party carrying the burden of proof. For example, in 1891, the [c]ourt in *Bunt* v. *Sierra Butte Gold Mining Co.* [138 U.S. 483, 485, 11 S. Ct. 464, 34 L. Ed. 1031 (1891)] held that a plaintiff could not meet his burden of proof by calling the defendant's employees as witnesses in the hope that the jury would disbelieve them. Over the years, numerous cases have similarly rejected the antithesis inference as an adequate basis for submitting a case to the jury. The First Circuit explained that the danger of permitting the antithesis inference was 'obvious,' as it would allow a plaintiff to prove its case solely through impeachment." (Footnotes omitted.)).

State v. *Alfonso*, 195 Conn. 624, 634–35, 490 A.2d 75 (1985) ("[e]ven if the jury did not credit the defendant's denial, it was not entitled to conclude that the marijuana was his without positive evidence supporting such a conclusion," and "the state offered no supporting evidence that would have justified an inference that the defendant possessed the marijuana"); *Novak* v. *Anderson*, 178 Conn. 506, 508, 423 A.2d 147 (1979) ("While it is true that it is within the province of the jury to accept or reject a defendant's testimony, a jury in rejecting such testimony cannot conclude that the opposite is true. . . . A jury cannot, from a disbelief of a defendant's testimony, infer that a plaintiff's allegation is correct." (Citations omitted.)). "Our rule barring the inference of the opposite of testimony" is evidentiary in nature and ensures "the proper method of measuring the sufficiency of the evidence." *State* v. *Hart*, supra, 605–606. Thus, even if the jury disregarded Spann's testimony,[14] given that the state failed to adduce any "[positive] evidence that would have justified an inference that the defendant possessed" Spann's firearm; *State* v. *Alfonso*, supra, 634–35; the evidence was insufficient to support the defendant's criminal possession of a firearm conviction.[15]

[14] The majority states that my analysis "relies on and credits the entirety of Spann's testimony" and "accept[s] Spann's testimony at face value . . . ." Footnote 22 of the majority opinion. I do not understand what prompts this statement, and it is not true. To repeat, the jury was entitled to accept all, some, or *none* of Spann's testimony. Regardless of whether, and to what extent, the jury credited Spann's testimony, there simply is no evidence in the record that the firearm at any time was located anywhere except for where the police saw it—in Spann's physical possession. Without relying on pure speculation, in other words, no reasonable juror could find that Spann probably left his firearm, however briefly, in an area of the vehicle where the defendant could "go and get it" during the high-speed police chase. Guesswork is not the same as reasonable inference.

[15] The majority's reliance on *Maryland* v. *Pringle*, 540 U.S. 366, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003), in support of its definition and application of the constructive possession doctrine is misplaced. In *Pringle*, drugs were found in the common area of a motor vehicle, and the United States Supreme Court observed that the "quantity of drugs and cash in the car indicated

In my view, the majority piles speculative inference on top of speculative inference to uphold the defendant's criminal possession of a firearm conviction. For the reasons previously explained, a driver's knowledge that his or her front seat passenger is in actual physical possession of contraband is insufficient to support a reasonable inference that the driver had dominion or control over that contraband; flight from the police does not vest a driver with constructive possession of contraband that he or she did not possess before taking flight; a defendant's knowing association with a person in actual physical possession of contraband is insufficient to establish that the defendant had the power and intent to control that contraband; disbelief of a witness' testimony cannot supply the state with the positive evidence of guilt that it otherwise lacks; and the accumulated weight of these flawed inferences will not support a criminal conviction that cannot rest independently on any one of them. Accordingly, I dissent from part I of the majority opinion.

II

I agree with the majority that the evidence was sufficient to convict the defendant of the crime of having a weapon in a motor vehicle in violation of § 29-38 (a). In light of what already has been said, however, it should be clear that I do not agree with the majority that the

the likelihood of [all occupants being involved in] drug dealing . . . ." Id., 373. Importantly, there was no evidence "singling out" any one of the occupants of the vehicle as the owner of the drugs, and the court cautioned that " '[a]ny inference that everyone on the scene of a crime is a party to it must disappear if the [g]overnment . . . singles out the guilty person.' " Id., 374, quoting *United States* v. *Di Re*, supra, 332 U.S. 594. In the present case, Spann not only confessed to his exclusive ownership and possession of the firearm, he also pleaded guilty to carrying the firearm without a permit and criminal possession of the firearm. Given that the state "single[d] out" and convicted "the guilty person," any inference that the defendant was involved in Spann's criminal possession of the firearm "must disappear" in the present case. (Internal quotation marks omitted.) Id.

defendant's conviction can be sustained on the basis of a finding that she constructively possessed Spann's firearm. I nonetheless would uphold the defendant's conviction because possession is not an essential element of the crime. What is required instead is proof that the defendant "(1) owned, operated or occupied the vehicle; (2) had a weapon in the vehicle; (3) knew the weapon was in the vehicle; and (4) had no permit or registration for the weapon." *State* v. *Davis*, 324 Conn. 782, 801, 155 A.3d 221 (2017); see also *State* v. *Owens*, 25 Conn. App. 181, 186, 594 A.2d 991 ("[t]here are four elements that the state must prove in a prosecution for a violation of . . . § 29-38: (1) that the defendant owned, operated or accepted the vehicle; (2) that he had a weapon in the vehicle; (3) that he knew the weapon was in the vehicle; and (4) that he had no permit or registration for the weapon"), cert. denied, 220 Conn. 910, 597 A.2d 337 (1991). The state is not required to prove possession—actual or constructive—to obtain a conviction under § 29-38 (a). See *State* v. *Owens*, supra, 187–88 ("[t]he clear intent of § 29-38 is to make it a crime to have a weapon in a motor vehicle, and '[t]he statute is not concerned with possession or ownership of a weapon, but rather aims to penalize those who know that there is a weapon inside a motor vehicle' "), quoting *State* v. *Mebane*, 17 Conn. App. 243, 246, 551 A.2d 1268, cert. denied, 210 Conn. 811, 556 A.2d 609, cert. denied, 492 U.S. 919, 109 S. Ct. 3245, 106 L. Ed. 2d 591 (1989).

The defendant concedes that, under our current case law, the evidence is sufficient to sustain her conviction because the jury reasonably could have found that she operated a motor vehicle, there was a weapon inside the vehicle, she knew there was a weapon inside the vehicle, and the weapon had no permit or registration. The defendant asks this court to reconsider and overrule our case law defining the essential elements of the crime of having a weapon in a motor vehicle, arguing

that "[t]his court has misinterpreted the legislative intent of [the] statute" because the legislature intended the term "knowingly has" in § 29-38 (a) to be construed as "knowingly possesses."

The defendant failed to preserve her statutory construction claim in the trial court, and it is well established that this court generally will not review claims raised for the first time on appeal unless the requirements for review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015),[16] have been satisfied or reversal is warranted under the plain error doctrine or our supervisory authority. The defendant's statutory construction claim fails under the second prong of *Golding* because it is not a claim of constitutional magnitude alleging the violation of a fundamental right. See *State* v. *Golding*, supra, 240 (observing that nonconstitutional claims "do not warrant special consideration simply because they bear a constitutional label"); see also *State* v. *Rodriguez-Roman*, 297 Conn. 66, 93, 3 A.3d 783 (2010) (declining to review insufficiency of evidence and instructional impropriety claims because "the defendant has clothed what can only be described as a nonconstitutional claim in constitutional garb"). The defendant also cannot prevail under the plain error doctrine because "[i]t is axiomatic that the trial court's proper application of the law existing at the time of trial cannot constitute reversible error

[16] Under *State* v. *Golding*, supra, 213 Conn. 233, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis in original; footnote omitted.) Id., 239–40; see *In re Yasiel R.*, supra, 317 Conn. 781 (modifying third prong of *Golding*).

under the plain error doctrine." *State* v. *Diaz*, 302 Conn. 93, 104 n.8, 25 A.3d 594 (2011). Lastly, this is not one of those rare cases that merits the invocation of the "extraordinary remedy" of reversal under our supervisory authority. (Internal quotation marks omitted.) *State* v. *Reyes*, 325 Conn. 815, 822–23, 160 A.3d 323 (2017); see id. ("[T]he supervisory authority of this state's appellate courts is not intended to serve as a bypass to the bypass, permitting the review of unpreserved claims of case specific error—constitutional or not—that are not otherwise amenable to relief under *Golding* or the plain error doctrine. . . . Consistent with this general principle, we will reverse a conviction under our supervisory powers only in the rare case that fairness and justice demand it. [T]he exercise of our supervisory powers is an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of [the] utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole." (Citations omitted; internal quotation marks omitted.)). There being no basis for reversal, I would uphold the defendant's conviction of having a weapon in a motor vehicle.

For the foregoing reasons, I dissent from part I of the majority opinion upholding the defendant's conviction of criminal possession of a firearm in violation of § 53a-217 (a) and concur in part II of the majority opinion upholding the defendant's conviction of having a weapon in a motor vehicle in violation of § 29-38 (a).

ORDERS

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STATE OF CONNECTICUT *v.* KERLYN M. TAVERAS

The state's petition for certification to appeal from the Appellate Court, 183 Conn. App. 354 (AC 38602), is granted, limited to the following issue:

"Did the Appellate Court properly hold that the trial court erred in finding that the defendant had violated

a condition of his probation by committing breach of the peace in the second degree at a preschool?"

Bruce R. Lockwood, senior assistant state's attorney, in support of the petition.

James B. Streeto, senior assistant public defender, in opposition.

Decided September 29, 2020

MARIA HAMANN ET AL. *v.* BERNARD CARL

The named plaintiff's petition for certification to appeal from the Appellate Court, 196 Conn. App. 583 (AC 41608), is denied.

George W. Kramer, in support of the petition.

Jeffrey R. Babbin and *Richard Luedeman*, in opposition.

Decided September 29, 2020

MARIA HAMANN ET AL. *v.* BERNARD CARL

The defendant's cross petition for certification to appeal from the Appellate Court, 196 Conn. App. 583 (AC 41608), is denied.

Jeffrey R. Babbin and *Richard Luedeman*, in support of the petition.

Decided September 29, 2020

STATE OF CONNECTICUT *v.* PRINCE A.

The defendant's petition for certification to appeal from the Appellate Court, 196 Conn. App. 413 (AC 41962), is denied.

John C. Drapp III, assigned counsel, in support of the petition.

Melissa Patterson, assistant state's attorney, in opposition.

Decided September 29, 2020

MTGLQ INVESTORS, L.P. *v.*
KEVIN HAMMONS ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 196 Conn. App. 636 (AC 42750), is denied.

Geoffrey K. Milne, in support of the petition.

J.L. Pottenger, Jr., and *Jeffrey Gentes*, in opposition.

Decided September 29, 2020

MERRITT MEDICAL CENTER OWNERS CORP., INC.
v. CHARLES D. GIANETTI ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 197 Conn. App. 226 (AC 41566), is denied.

Juda J. Epstein, in support of the petition.

Decided September 29, 2020

STATE OF CONNECTICUT *v.* AUBURN W.

The defendant's petition for certification to appeal from the Appellate Court, 198 Conn. App. 558 (AC 42126), is denied.

Daniel J. Krisch, assigned counsel, in support of the petition.

Timothy J. Sugrue, assistant state's attorney, in opposition.

Decided September 29, 2020

STATE OF CONNECTICUT *v.* TREIZY LOPEZ

The defendant's petition for certification to appeal from the Appellate Court, 199 Conn. App. 56 (AC 42146), is denied.

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

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

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

Decided September 29, 2020

ELIZABETH A. FRY, EXECUTRIX (ESTATE OF JAMES E. FRY) *v.* ANGELO P. LOBBRUZZO ET AL.

The defendant Barbara Murray's petition for certification to appeal from the Appellate Court (AC 43479) is dismissed.

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

Barbara Murray, self-represented, in support of the petition.

Decided September 29, 2020

THE BANK OF NEW YORK MELLON, TRUSTEE *v.* WILLIAM J. RUTTKAMP ET AL.

The defendant Shlomit Ruttkamp's petition for certification to appeal from the Appellate Court (AC 43974) is dismissed.

Shlomit Ruttkamp, self-represented, in support of the petition

Victoria L. Forcella, in opposition.

Decided September 29, 2020

SEAN OLBRYCH *v.* KASTER MOVING COMPANY

The plaintiff's petition for certification to appeal from the Appellate Court (AC 44125) is denied.

Sean Olbrych, self-represented, in support of the petition.

Patrick T. Paoletti, in opposition.

Decided September 29, 2020

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CONNECTICUT APPELLATE REPORTS

Vol. 200

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

LAURI ROSS *v.* BENJAMIN ROSS
(AC 42950)

Keller, Bright and Bear, Js.*

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the postjudgment orders of the trial court modifying the original unallocated alimony and child support order and awarding the plaintiff attorney's fees. The parties' separation agreement, which was incorporated into the dissolution judgment, required the defendant to pay the plaintiff 40 percent of his annual gross base cash salary and 25 percent of his gross cash bonus as unallocated alimony and child support from September, 2016 to March, 2023. In December, 2016, the defendant filed a motion for modification in which he sought to reduce his unallocated alimony and child support payments, alleging that there was a substantial change in circumstances because, inter alia, two of the parties' children had reached the age of majority. The trial court granted the motion for modification and ordered that the percentage of annual gross base salary that the defendant is obligated to pay to the plaintiff as unallocated alimony and child support be reduced to 37.5 percent, retroactive to the date the motion was filed. The court also ordered the defendant to pay $27,500 of the plaintiff's attorney's fees. *Held*:

1. The trial court abused its discretion when it determined the amount of the modified unallocated alimony and child support order; in modifying the original unallocated alimony and child support order, that court failed to unbundle the child support award from the alimony award and failed to consider and apply the child support guidelines and, thereby, to make a finding, as required by the guidelines, as to the presumptive amount of child support payable by the defendant to the plaintiff for the relevant dates, and, if necessary, a finding as to whether, on the basis of the child support guidelines, those amounts were inequitable or inappropriate and a deviation from the guidelines was appropriate.
2. This court declined to reach the merits of the defendant's claim that the trial court abused its discretion by ordering him to pay $27,500 of the plaintiff's attorney's fees; because that court's modified unallocated alimony and child support order will be reconsidered in its entirety on remand, its award of attorney's fees to the plaintiff was remanded for reconsideration in light of the newly calculated child support and alimony awards that will be issued at that time.

Argued May 29—officially released October 13, 2020

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

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Ansonia-Milford, where the court, *Malone*, *J.*, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Hon. Robert J. Malone*, judge trial referee, granted the defendant's motion for modification of alimony and child support, issued certain orders and awarded the plaintiff attorney's fees and costs; subsequently, the court, *Hon. Robert J. Malone*, judge trial referee, issued a clarification of its decision, and the defendant appealed to this court. *Reversed*; *further proceedings*.

Janet A. Battey, with whom, on the brief, was *Olivia M. Eucalitto*, for the appellant (defendant).

Christopher G. Brown, for the appellee (plaintiff).

Opinion

KELLER, J. The defendant, Benjamin Ross, appeals from the judgment of the trial court issuing postdissolution financial orders, as well as awarding attorney's fees and costs in favor of the plaintiff, Lauri Ross. On appeal, the defendant claims that the court (1) abused its discretion by failing to apply the child support guidelines, (2) erred by modifying the unallocated alimony and child support order without first unbundling the child support portion from the original order, and (3) abused its discretion by ordering the defendant to pay the plaintiff's attorney's fees. We reverse the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. The parties' marriage was dissolved on September 4, 2013. The judgment incorporated the parties' separation agreement. The parties have four children, three of whom were minors at the time of the dis-

solution: Noah, who turned eighteen in 2014; Nathaniel, who turned eighteen in 2017; and Claudia, who turned eighteen in May, 2019, and graduated from high school in June, 2019. The separation agreement gave the parties joint legal custody of the minor children, and the plaintiff was given physical custody.

Pursuant to the separation agreement, the defendant was obligated to pay unallocated alimony and child support to the plaintiff. Specifically, the separation agreement provides in relevant part: "Commencing on September 15, 2013, during the lifetime of the parties and until the earlier of the [plaintiff's] remarriage, cohabitation pursuant to statute, or September 15, 2016, whichever shall first occur, the [defendant] shall pay the [plaintiff] on the 15th and last day of each month, as and for unallocated alimony and support the following: (a) [45] percent of his gross base cash salary; and (b) [35] percent of his gross cash bonus. . . .

"Commencing September 16, 2016, during the lifetime of the parties and until the earlier of the [plaintiff's] remarriage, cohabitation pursuant to statute, or March 15, 2023, whichever shall first occur, the [defendant] shall pay to the [plaintiff] on the 15th and last day of each month, as for unallocated alimony and support the following: (a) [40] percent of his gross base cash salary; and (b) [25] percent of his gross cash bonus."

The separation agreement also provides that "[t]he [defendant] shall maintain no less than $2,000,000 of life insurance as long as he is obligated to make payments to the [plaintiff] as hereinbefore set forth in [a]rticle III, and shall name the [plaintiff] as primary beneficiary of said life insurance on his life."

On November 17, 2017, the defendant filed a motion for modification of his unallocated alimony and child support payments. In his motion, the defendant alleged that the following substantial changes in circumstances

had occurred since the dissolution of the marriage: "[T]hree of the parties' four minor children have emancipated.[1] . . . Upon information [and] belief, the plaintiff is engaged and is cohabiting with her fiancé. . . . Upon information and belief, the plaintiff is employed and is earning more than $25,000 per year. . . . The defendant's expenses have increased substantially because he is paying 100 [percent] of the expenses for the parties' two children who are in college. . . . Two million dollars of life insurance is no longer necessary to insure the defendant's alimony and support obligations." (Footnote added.) On the basis of these allegations, the defendant asked the court to "[r]educe the [unallocated] alimony and [child] support payments made by the defendant to the plaintiff," to "[r]educe the amount of life insurance that the defendant is obligated to maintain for the benefit of the [plaintiff]," and to "[o]rder such other and further relief as may be fair and equitable."

On February 23, 2018, the plaintiff filed a motion for attorney's fees in which she moved "under [§] 25-24 of the Practice Book, for an award of [attorney's] fees in order for her to defend and prosecute postjudgment motions."

The court held a hearing on both motions on March 29, April 2, and April 12, 2019.[2] Evidence at trial included the parties' past and current financial affidavits and their current child support guidelines worksheets, filed pursuant to Practice Book § 25-30. In support of her

[1] This is a scrivener's error because it is undisputed that only two of the parties' minor children reached the age of majority since the entry of the dissolution judgment in 2013. In their appellate briefs, both parties acknowledge this error.

[2] The plaintiff also filed a postjudgment motion for contempt on February 26, 2018, and an amended postjudgment motion for contempt on April 1, 2019. The court denied both motions on April 29, 2019. The court's rulings on the aforementioned motions are not relevant to this appeal.

motion for attorney's fees, the plaintiff submitted an affidavit from her attorney, Daniel D. Portanova, in which he represented that he had rendered services to the plaintiff in the amount of $42,582.42 and that there remained a balance to be paid of $82.42.

The parties submitted to the court their current financial affidavits. The parties also introduced into evidence the financial affidavits that each party had submitted at the time of the dissolution of their marriage. As previously noted, the parties also submitted child support guidelines worksheets setting forth the presumptive amount of child support for the one remaining minor child. The plaintiff's worksheet showed a presumptive amount payable from the defendant to the plaintiff of $465 per week. The defendant's worksheet showed a presumptive amount payable by the defendant to the plaintiff of $480 per week.[3]

The defendant also testified as to additional expenses he had paid on behalf of the parties' children. Those expenses included tuition for two of the children to attend college, other college-related expenses, as well as financial assistance that he provided to the children in connection with the purchase of cars, the purchase of car insurance, the purchase of cell phones, health care costs, and other miscellaneous expenses.[4]

The court made the following findings in its April 29, 2019 memorandum of decision: "The [plaintiff] is [forty-six] years of age. She has a [general equivalency diploma] and attended Northeastern University and Southern Connecticut State University. She has been

[3] These worksheets did not address the presumptive amount of supplemental child support that would be applicable to the defendant's bonus income under the child support guidelines.

[4] The dissolution court did not issue an educational support order or reserve jurisdiction to do so in accordance with General Statutes § 46b-56c because the parties explicitly waived their right to request a postmajority educational support order.

treated for depression and anxiety disorders which were diagnosed in February, 2019. She has taken various medications since November, 2018. In February, 2019, she was hospitalized for an overdose. She has a real estate license and works part-time at Bonfire Grill and earns $23 a week as a hostess. She has not worked full-time in a number of years.

"The [defendant] is [forty-seven] years of age and in good health. He attained a [bachelor of arts degree] in finance from Northeastern University. He has been employed with Cohen & Steers, and his annual salary is $330,000. Typically, he receives a cash bonus annually and restricted stock shares annually. In 2018, he received a $274,500 cash bonus and $447,068.70 in restricted shares.

"The present alimony and support order stems from the parties' [dissolution] judgment in article III [§] 3.2 [of the separation agreement] in which it sets forth that, from September 16, 2016 to March 15, 2023 (subject to the [plaintiff's] remarriage or cohabitation), the [defendant] shall pay to the [plaintiff] [40] percent of his gross base salary and [25] percent] of his gross cash bonus.

"The [separation agreement provided the] parties [with] . . . joint legal custody of their three minor children and the [plaintiff with] physical custody of the minor children.[5] The [defendant's] motion to modify the existing award is based partially on two children attaining the age of [eighteen]. The remaining minor child will attain the age of [eighteen] on May 19, 2019, and will graduate from high school in June, 2019.

"The other claims for modification alleged by the defendant were cohabitation and that the plaintiff is employed and earning more than $25,000 (a safe harbor

[5] The dissolution court incorporated the parties' separation agreement into the judgment of dissolution and made its provisions orders of the court.

provision in the judgment).[6] No evidence was provided to meet the statutory, factual or case law criteria [to establish these grounds] and, therefore, [these claims for modification] are denied.

"The defendant further seeks to reduce a judgment order that he maintain two million dollars of life insurance. Article V [of the separation agreement] address[es] the life insurance obligation. The language is clear that the defendant is to maintain no less than two million dollars of life insurance for as long as he is obligated to make payments to the [plaintiff]. Therefore, that portion of the defendant's motion is denied.

"The defendant further alleges as a basis for modification of his payments to the plaintiff that he pays all of his children's postsecondary education and provide[s] automobiles and insurance for his children. These expenditures, while laudatory, are not required by the judgment and could be ceased at any time by the defendant. Therefore, this argument is not persuasive to the court.

"General Statutes § 46b-86, which addresses the modification of [an] alimony or support order, makes reference to [General Statutes] § 46b-82, which provides for a court to consider evidence provided to meet the criteria in that statute.

"Certainly, it is clear that the [defendant's] financial responsibilities have significantly changed as a result of his two children attaining the age of [eighteen] and completing high school. The youngest child [will reach the age of eighteen in May, 2019, and graduate from high school in June, 2019, when] . . . the [defendant's] financial responsibility [for child support] will end . . . . While these . . . [child support] obligations

[6] Section 3.12 of the separation agreement provides as follows: "The [plaintiff] shall be entitled to a safe harbor of $25,000 per year before the [defendant] [may] seek a modification of alimony and support."

have/will and do constitute a substantial change of circumstances, the court must review the other statutory criteria together with the evidence provided.

"The incomes of the parties are essentially the same as they existed at the time of the dissolution of marriage. The defendant's estate, however, has increased substantially from approximately $498,000 to $1,799,197.89. The plaintiff's estate has decreased since the date of the dissolution. While the court has received evidence which provides a picture of the plaintiff's fiscal irresponsibility in her expenditures and weekly expenses, it does not appear . . . that their respective estates are and still would be significantly disparate . . . [even if] a more reasonable lifestyle [were] undertaken by the plaintiff. It is noteworthy that she, based upon her education and work experience, will likely never have the earning capacity of the defendant. She is, however, and has been since the date of the judgment, under/unemployed with little reason.

"Therefore, the court orders that the judgment be modified and that the defendant pay to the plaintiff [as unallocated alimony and child support] 37.5 [percent] of his base annual salary. This modification is retroactive to December 6, 2018 . . . [the effective date of] the defendant's motion for modification. The modification further addresses the youngest child attaining the age of [eighteen] and graduating from high school. . . .

"The final postjudgment motion [filed by the plaintiff] addresses her request for attorney's fees. [General Statutes § 46b-62 (a)] provides guidance [for awarding attorney's fees] as well as [when] a failure of the court to award counsel fees would undermine the court's other financial orders. See *Maguire* v. *Maguire*, 222 Conn. 32, 43–45, 608 A.2d 79 (1992);[7] *Berzins* v. *Berzins*, 306

[7] Section 46b-62 (a) does not provide for the exception stated in *Maguire*, that a court may award attorney's fees when a failure to do so would undermine the court's other financial orders.

Conn. 651, 657, 51 A.3d 941 (2012); *Pena* v. *Gladstone*, 168 Conn. App. 141, 158–59, 144 A.3d 1085 (2016). Therefore, the court orders the defendant to pay the sum of $27,500 to the plaintiff's attorney. . . . for the plaintiff . . . by May 31, 2019." (Footnotes added.)

On May 1, 2019, the defendant filed a motion for clarification with respect to whether the court intended to eliminate his obligation to pay the plaintiff 25 percent of his gross cash bonus as unallocated alimony and support, effective December 6, 2018. On May 3, 2019, the court clarified its order by stating that its order did not alter or modify the percentage of the defendant's gross cash bonus ordered to be paid to the plaintiff as unallocated alimony and support at the time of the dissolution. The defendant filed this appeal on May 17, 2019.

I

First, the defendant claims that the court abused its discretion when it determined the amount of the modified unallocated alimony and child support award. Specifically, he claims that the court failed to consider what portion of the unallocated award constituted child support and what portion constituted alimony. Central to the defendant's claim is that the court, prior to ruling on his motion for modification, failed to first apply the child support guidelines in determining what portion of the 2013 unallocated award, as reduced in 2016 in accordance with the parties' separation agreement and consisting of set percentages of the defendant's gross cash salary and gross cash bonus, should be categorized as child support.[8] We agree.

[8] The defendant makes two claims, one related to the court's failure to apply the child support guidelines and another related to the court's failure to unbundle the child support and alimony from the unallocated order. We, however, consider both of these claims together, as they are inherently intertwined.

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

We first turn to the defendant's assertion that, in ruling on the motion for modification, the court failed to unbundle the child support and alimony awards from the unallocated order that was effective on September 16, 2016, and required him to pay a percentage of both his gross base cash salary *and* gross cash bonus as unallocated child support and alimony. We begin with § 46b-86 (a), which sets forth the manner in which post-dissolution modification of alimony and support orders may occur. Specifically, § 46b-86 (a) provides in relevant part: "Unless and to the extent that the decree precludes modification, any final order for the periodic payment of permanent alimony or support . . . may, at any time thereafter, be continued, set aside, altered or modified by the court upon a showing of a substantial change in the circumstances of either party or upon a showing that the final order for child support substantially deviates from the child support guidelines established pursuant to section 46b-215a . . . ." Our

Supreme Court has interpreted this language generally to "[provide] the trial court with continuing jurisdiction to modify alimony and support orders" after the date of a final judgment of dissolution. *Amodio* v. *Amodio*, 247 Conn. 724, 729, 724 A.2d 1084 (1999); see also *Callahan* v. *Callahan*, 192 Conn. App. 634, 645, 218 A.3d 655 (observing that § 46b-86 (a) permits modification of support order *or* alimony after date of dissolution judgment), cert. denied, 333 Conn. 939, 218 A.3d 1050 (2019).

"Even though an unallocated order incorporates alimony and child support without delineating specific amounts for each component, the unallocated order . . . necessarily includes a portion attributable to child support in an amount sufficient to satisfy the guidelines." *Tomlinson* v. *Tomlinson*, 305 Conn. 539, 558, 46 A.3d 112 (2012). In *Tomlinson*, the unallocated child support and alimony order was nonmodifiable in amount and term of payments. Id., 543. Nevertheless, our Supreme Court ruled that such an order would be modifiable if a change in custody occurred because General Statutes § 46b-224 permits a modification of child support when a change of custody occurs, despite the provisions in § 46b-86 prohibiting the modification of nonmodifiable orders. Id., 549–50. The court then concluded that, to decide a motion to modify on the basis of an order of unallocated child support and alimony, the trial court must determine what part of the original decree constituted modifiable child support and what part constituted alimony. Id., 558.

Malpeso v. *Malpeso*, 165 Conn. App. 151, 165–66, 138 A.3d 1069 (2016), similarly supports the previously stated requirement for modification of unallocated orders in postdissolution matters. In *Malpeso*, this court stated: "In cases such as this one, where the parties

incorporate the child support into an unallocated alimony and child support order that limits the modification of the alimony pursuant to an agreement, modification requires additional considerations. Because an unallocated order incorporates alimony and child support without delineating specific amounts for each component, the unallocated order, along with other financial orders, necessarily includes a portion attributable to child support in an amount sufficient to satisfy the guidelines. . . . Thus, to decide a motion to modify in this situation, a trial court must determine what part of the original decree constituted modifiable child support and what part constituted nonmodifiable alimony." Id. (Citation omitted; internal quotation marks omitted.)[9]

Further, as our Supreme Court has explained, "[g]iven that [t]he original decree [of dissolution] . . . is an adjudication by the trial court as to what is right and proper *at the time it is entered* . . . the trial court must first determine what portion of the unallocated order represented the child support component at the time of the dissolution. Additionally, because questions involving modification of alimony and support depend . . . on conditions as they exist *at the time of the hearing* . . . it is necessary to evaluate the parties' present circumstances in light of the passage of time since the trial court's original calculation." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Tomlinson* v. *Tomlinson*, supra, 305 Conn. 558.

In unbundling an unallocated order, the court "will also need to ascertain the intent of the parties." *Malpeso*

[9] The present case differs from *Tomlinson and Malpeso* in part because, in the present case, the unallocated child support and alimony award is modifiable. Other cases, however, have applied the same unbundling requirements set forth in *Tomlinson* to the modification of unallocated awards that were not unmodifiable. See, e.g., *Coury* v. *Coury*, 161 Conn. App. 271, 297–98, 128 A.3d 517 (2015); *O'Brien* v. *O'Brien*, 138 Conn. App. 544, 553–54, 53 A.3d 1039 (2012), cert. denied, 308 Conn. 937, 66 A.3d 500 (2013).

v. *Malpeso*, supra, 165 Conn. 171; see also *Brent* v. *Lebowitz*, 67 Conn. App. 527, 532, 787 A.2d 621 (court must determine what was intended to be child support within unallocated alimony and child support order to ensure agreement did not run afoul of guidelines), cert. granted on other grounds, 260 Conn. 902, 793 A.2d 1087 (2002) (appeal withdrawn April 25, 2002).

Finally, "[i]n modifying the [unallocated child] support [and alimony] order in a subsequent proceeding, a trial court may consider the same factors applied in the initial determination to assess any changes in the parties' circumstances since the last court order. . . . [General Statutes §] 46b-215b (c) mandates that the guidelines shall be considered in addition to and not in lieu of the criteria for such awards established in [General Statutes §§] 46b-84 [and] 46b-86 . . . . Specifically, § 46b-84 (d) stipulates that the court shall consider the age, health, station, occupation, earning capacity, amount and sources of income, estate, vocational skills and employability of each of the parents, and the age, health, station, occupation, educational status and expectation, amount and sources of income, vocational skills, employability, estate and needs of the child." (Citation omitted; footnote omitted; internal quotation marks omitted). *Tomlinson* v. *Tomlinson*, supra, 305 Conn. 559.

We next turn to the relevant law regarding the defendant's assertion that, in failing to determine what portion of the unallocated order was child support, the court failed to consider and apply the child support guidelines. Section 46b-215b (a) provides in relevant part that the child support and arrearage guidelines "shall be considered in *all* determinations of child support award amounts, including any current support, health care coverage, child care contribution and past-due support amounts, and payment on arrearages and

past-due support within the state. In all such determinations, there shall be a rebuttable presumption that the amount of such awards which resulted from the application of such guidelines is the amount to be ordered. A specific finding on the record that the application of the guidelines would be inequitable or inappropriate in a particular case, as determined under the deviation criteria established by the Commission for Child Support Guidelines under section 46b-215a, shall be required in order to rebut the presumption in such case." (Emphasis added.)

"The finding *must* include a statement of the presumptive support amount and explain how application of the deviation criteria justifies the variance. . . . This court has stated that the reason why a trial court must make an on-the-record finding of the presumptive support amount before applying the deviation criteria is to facilitate appellate review in those cases in which the trial court finds that a deviation is justified. . . . In other words, the finding will enable an appellate court to compare the ultimate order with the guideline amount and make a more informed decision on a claim that the amount of the deviation, rather than the fact of a deviation, constituted an abuse of discretion." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Kiniry* v. *Kiniry*, 299 Conn. 308, 319–20, 9 A.3d 708 (2010); see also *Misthopoulos* v. *Misthopoulos*, 297 Conn. 358, 367–70, 999 A.2d 721 (2010); *Maturo* v. *Maturo*, 296 Conn. 80, 91, 995 A.2d 1 (2010); *Unkelbach* v. *McNary*, 244 Conn. 350, 367–68, 710 A.2d 717 (1998); *Favrow* v. *Vargas*, 231 Conn. 1, 29, 647 A.2d 731 (1994); *O'Brien* v. *O'Brien*, 138 Conn. App. 544, 555, 53 A.3d 1039 (2012), cert. denied, 308 Conn. 937, 66 A.3d 500 (2013); *Budrawich* v. *Budrawich*, 132 Conn. App. 291, 299–300, 32 A.3d 328 (2011).

"In any marital dissolution action involving minor children, it is axiomatic that the court must fashion

orders providing for the support of those children. There is no exception to this mandate, and certainly none for unallocated awards of alimony and child support, which necessarily include amounts for both child support and spousal support. *O'Brien* v. *O'Brien*, supra, 138 Conn. App. 553. Moreover, a trial court is "required to make its child support award in accordance with the applicable statutes and guidelines, and any deviation from the guidelines must be accompanied by a specific finding on the record that the application of the guidelines would be inequitable or inappropriate in a particular case. The fact that the defendant may have requested unallocated alimony and support does not alter the obligations of the trial court in making its award of child support . . . ." *Tuckman* v. *Tuckman*, 308 Conn. 194, 208, 208, 61 A.3d 449 (2013).

"When a court unbundles child support from an unallocated alimony and child support order, the guidelines continue to provide guidance. . . . Even in cases of high income parents, adherence to principles of the guidelines is mandatory. See *O'Brien* v. *O'Brien*, [supra, 138 Conn. App. 551] ('[o]ur Supreme Court [has] emphasized the importance of the mandatory application of the guidelines to *all* cases involving minor children, including those cases involving families with high incomes' . . .) . . . see also General Statutes § 46b-215b (a) (guidelines 'shall be considered in *all* determinations of child support award amounts' . . .)." (Citation omitted; emphasis in original; footnote omitted.). *Malpeso* v. *Malpeso*, supra, 165 Conn. App. 166.

We now turn to the facts of this case. In assessing the defendant's motion for modification, the court found a substantial change in circumstances in that, since the dissolution and original orders, two of the parties' children had reached the age of majority. This finding as to a substantial change in circumstances gave the court

the authority, pursuant to § 46b-86, to modify the unallocated alimony and child support order. See *Malpeso* v. *Malpeso*, 140 Conn. App. 783, 786, 60 A.3d 380 (2013) ("§ 46b-86 (a) . . . permits the court to modify alimony and child support orders if the circumstances demonstrate that: (1) either of the parties' circumstances have substantially changed; or (2) the final order of child support substantially deviates from the child support guidelines" (internal quotation marks omitted)).

However, pursuant to *Tomlinson*, after determining that a substantial change in circumstances existed, the court was then required to determine what portion of the unallocated order, as revised in 2016, constituted child support and what portion constituted alimony. See *Tomlinson* v. *Tomlinson*, supra, 305 Conn. 558. The court, however, did not take the necessary steps to unbundle the 2013 child support and alimony orders relative to the change in the orders that became effective on September 16, 2016.[10] Rather, the court, without any reference to, let alone application of, the child support guidelines, merely reduced the unallocated order based on the defendant's gross base cash salary to be paid by him to the plaintiff by 2.5 percent. It did not provide any rationale for the amount of its stated reduction. Furthermore, the court, despite the fact that the dissolution order also required the defendant to pay 25 percent of his gross cash bonus to the plaintiff as unallocated alimony and child support, made no reduction in that obligation at all, without explanation.[11]

[10] Although the order changed effective September 16, 2016, the order was entered in 2013. The court, thus, was required to determine what the court and parties intended in 2013 as to the financial orders that became effective in 2016.

[11] The record reflects that, in 2013, the court found that the terms of the parties' separation agreement were fair and equitable and incorporated those terms into its judgment, but it did not set forth either a presumptive amount under the guidelines or a reason to deviate therefrom. Unfortunately, the court's failure to make these requisite findings at the time that it relied on the parties' agreement and rendered the judgment of dissolution is not uncommon. It is regrettable in the present case, because it makes the analysis

Despite *Tomlinson* and other subsequent case law, the court's order failed to apply the child support guidelines in determining what portion of the 2013 unallocated order that went into effect on September 16, 2016, constituted the presumptive amount of child support for the two children who, at that time, were minors. Moreover, having failed to determine the presumptive amount of child support under the guidelines, the court was not in a position to, and did not, make a finding as to whether the dissolution court in 2013 determined that application of the guidelines in 2013 would have been inappropriate in this case, thereby justifying a possible deviation therefrom. In particular, the court did not determine how much of the unallocated order the parties intended to constitute child support. Whether based on the guidelines or a deviation therefrom, the amount of child support intended at the time of dissolution to be payable in 2016 from both the defendant's gross salary and gross bonus income should have been subtracted from the total amount of the unallocated 2016 award, and the remaining sum should have constituted the alimony award that became effective on September 16, 2016. Furthermore, in modifying the order, the court did not provide a mathematical explanation for the reduction made on the basis of the fact that, since the time of the original order, two of the parties' children had reached the age of majority.

The court also stated ambiguously that its modification "addressed" the youngest child's attaining the age of eighteen, but it made its order retroactive to December 6, 2018, a date when the youngest child was still a minor. This, too, was improper. Having determined that there was a substantial change in circumstances, the court was required to undertake the necessary statutory analysis, which included unbundling the unallocated

that must be undertaken on remand far more cumbersome than it would be if the court, on remand, was aided by these necessary findings.

order. Simply stating, without explanation, that the modification took into account that the youngest child would soon turn eighteen is not sufficient.

The court's failure to apply the child support guidelines in crafting its modified order was not due to a lack of necessary information provided by the parties. Specifically, both the plaintiff and the defendant provided the court with financial affidavits evidencing their current net weekly incomes,[12] as well as child support guidelines worksheets evidencing the presumptive support amount payable by the defendant to the plaintiff.[13] The defendant also introduced evidence of his net income, both as to cash salary and bonus income, and the court also had before it the parties' financial affidavits at the time of the dissolution in 2013, the date of the previous unallocated child support and alimony order. Moreover, the court also had on file a child support guidelines worksheet that was submitted on September 4, 2013, the date of the dissolution. In the unbundling analysis, and pursuant to the child support guidelines in effect at the time of the court's order, the court was required to apply the guidelines in determining the presumptive amount of any supplemental order based on the defendant's bonus income. See *Maturo* v. *Maturo*, supra, 296 Conn. 96–99 (applying 2005 child support

[12] The plaintiff's net weekly income was $2909, comprised of $23 per week in wages, $3669 per week of unallocated alimony and child support, and $134 per week as partnership income. The defendant's net weekly income was $7994 per week.

[13] The plaintiff provided the court with a child support guidelines worksheet showing that the presumptive support amount payable by the defendant to the plaintiff was $465 per week. The defendant also provided the court with a child support guidelines worksheet showing that the presumptive support amount payable by the defendant to the plaintiff was $480 per week.

We note that neither party attempted to present to the court the presumptive amount applicable to a supplemental child support award based on the defendant's net bonus income. They should be prepared to provide the court with this information on remand.

guidelines); see also Regs., Conn. State Agencies § 46b-215a-1 (11) (A) (iii) (including in gross income "commissions, bonuses and tips"). Despite having this information before it, the court failed to make a finding as to the presumptive child support amount payable by the defendant to the plaintiff, for September 16, 2016, or December 6, 2018, the effective date of the modification, and, if necessary, a finding as to whether, on the basis of the child support guidelines, those amounts were inequitable or inappropriate and a deviation from the guidelines was appropriate.

For the foregoing reasons, we conclude that the court erred in modifying the unallocated alimony and child support award without unbundling the child support award from the alimony award, and, further, erred in failing to consider and to apply the child support guidelines or the principles espoused therein.

The court's failure to unbundle the child support and alimony awards from the unallocated order and failure to apply the child support guidelines requires reversal and a remand for further proceedings. On remand, the court should conduct a hearing to determine, on the basis of evidence presented by the parties, what portion of the award should be applied to child support and what portion should be applied to alimony. In doing so, the court should apply the child support guidelines as they existed in 2013 at the time of the original award to the 2016 award, as modified by the terms of the parties' separation agreement. Specifically, the court must ascertain the intent of the parties with respect to what portion of the unallocated alimony and child support order was intended for child support. See *Malpeso* v. *Malpeso*, supra, 165 Conn. App. 171. The determined amount constituting child support should then be subtracted from the 2016 unallocated award to determine the alimony award in 2016. Then, on the basis of the change in circumstances, the court should determine

whether the alimony portion of the unallocated award in 2016 should be modified. See *Gabriel* v. *Gabriel*, 324 Conn. 324, 340, 152 A.3d 1230 (2016). As we have explained previously in this opinion, this determination must be made on the basis of the parties' intent at the time of the dissolution. See *Malpeso* v. *Malpeso*, supra, 165–66.

The court also must determine, applying the child support guidelines, the appropriate amount of child support for the youngest child due and payable from the effective date of the modification to the date that child attained the age of eighteen, or the date she graduated from high school, whichever was later. Whether that amount and the amount of alimony arrived at after considering the defendant's motion for modification should be combined as a new unallocated order of alimony and child support for this time period, or separated into separate child support and alimony awards also will have to be decided. Ultimately, however, there should be a provision for only an alimony order to be in effect the day after the child support obligation for the youngest child terminated.

II

Finally, the defendant claims that the court abused its discretion by ordering him to pay $27,500 of the plaintiff's attorney's fees. The defendant argues, in broad terms, that the court abused its discretion because the undisputed evidence presented at the hearing demonstrated that the plaintiff was capable of paying her attorney's fees and, in fact, had paid all but $82.42 of the fees charged to her.[14] For the reasons that follow, in light of our conclusion in part I of this opinion that the case must be remanded for further proceedings,

[14] The defendant does not claim that the amount of attorney's fees charged, which totaled $42,582.42, was unreasonable.

we conclude that the issue of attorney's fees should be revisited by the court on remand. Accordingly, we do not reach the merits of this claim.

As this court has observed, "[i]ndividual financial orders in a dissolution action are part of the carefully crafted mosaic that comprises the entire asset reallocation plan. . . . Under the mosaic doctrine, financial orders should not be viewed as a collection of single disconnected occurrences, but rather as a seamless collection of interdependent elements. Consistent with that approach, our courts have utilized the mosaic doctrine as a remedial device that allows reviewing courts to remand cases for reconsideration of all financial orders even though the review process might reveal a flaw only in the alimony, property distribution or child support awards." (Internal quotation marks omitted.) *Barcelo* v. *Barcelo*, 158 Conn. App. 201, 226, 118 A.3d 657, cert. denied, 319 Conn. 910, 123 A.3d 882 (2015).

We observe that an award of attorney's fees issued in connection with a postjudgment motion to modify, rather than at the time of the other financial orders that were issued at the date of the dissolution, is "not part of the mosaic of final financial orders by which the court initially attempted to chart the parties' financial future." *O'Brien* v. *O'Brien*, supra, 138 Conn. App. 555. The award of the attorney's fees at issue in the present claim pertains only to the defense of the requested modification of a single, unallocated alimony and support order. Although the award is not part of the mosaic of financial orders, an analysis of the award nonetheless is necessarily intertwined with the court's modified financial orders. An analysis of whether the court abused its discretion in awarding attorney's fees is dependent on the parties' financial circumstances, *as affected by the court's modified financial orders*, at the time that the request for attorney's fees was considered by the court; see id.; as well as a consideration of

the factors enumerated in § 46b-82, the alimony statute.[15] Because we have determined that the alimony and child support awards must be reconsidered on remand, so too must the award of attorney's fees in light of the possibility that, as compared with the financial orders that are the subject of the present appeal, the court will issue different financial orders on remand in this case.

Accordingly, because the court's modification order will be reconsidered in its entirety on remand, its award to the plaintiff of $27,500 in attorney's fees must also be remanded for reconsideration in light of the newly calculated child support and alimony awards that will be issued at that time.

The judgment is reversed with respect to the court's postdissolution orders modifying the unallocated alimony and child support order and awarding the plaintiff attorney's fees, and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

[15] "[Section] 46b-62 governs the award of attorney's fees in dissolution proceedings and provides that the court may order either spouse . . . to pay the reasonable attorney's fees of the other in accordance with their respective financial abilities and the criteria set forth in [§] 46b-82. These criteria include the length of the marriage, the causes for the . . . dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, [earning capacity] vocational skills, [education] employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to [§] 46b-81 . . . . In making an award of attorney's fees under § 46b-82, [t]he court is not obligated to make express findings on each of [the] statutory criteria. . . . Courts ordinarily award counsel fees in divorce cases so that a party . . . may not be deprived of [his or] her rights because of lack of funds. . . . Where, because of other orders, both parties are financially able to pay their own counsel fees they should be permitted to do so. . . . An exception to th[is] rule . . . is that an award of attorney's fees is justified even where both parties are financially able to pay their own fees if the failure to make an award would undermine its prior financial orders . . . ." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Misthopoulos* v. *Misthopoulos*, supra, 297 Conn. 385–86.

SILVER HILL HOSPITAL, INC. *v.* DAWN KESSLER (AC 42545)

Alvord, Elgo and Pellegrino, Js.

Syllabus

The plaintiff hospital sought to recover damages in connection with unpaid medical services that it provided to the defendant. The hospital billed Medicare for payment, which initially paid the entire balance. Subsequently, Medicare rescinded coverage for a portion of the services after discovering that the defendant had workers' compensation coverage for a portion of those medical expenses. The hospital informed the defendant of this development and asked the defendant to contact Medicare to resolve the coverage dispute. The defendant refused to contact Medicare and did not submit payment for the remaining balance to the hospital. Thereafter, the matter was referred to an attorney fact finder, who issued his report, finding that the defendant owed a balance to the plaintiff and that the defendant failed to prove her special defense of non compos mentis. The trial court overruled the defendant's objection to the fact finder's report and rendered judgment for the plaintiff. On appeal, the defendant claimed, inter alia, that the fact finder's conclusions were not based on evidence presented at trial. *Held*:

1. The defendant's claim that the fact finder's conclusions were not based on evidence presented at trial was unavailing, as there was adequate support in the record for the findings of fact reached by the fact finder; the record contained sufficient evidence for the fact finder to conclude that the plaintiff provided medical services to the defendant, that the defendant owed a balance for the services rendered, and that the defendant had not paid the balance and, therefore, the fact finder's findings were based on evidence presented at trial and were consistent with the applicable rule of practice (§ 19-8).
2. The defendant's claim that the fact finder improperly failed to consider her contention that the plaintiff had a duty to contact Medicare to resolve the coverage issue was unavailing, as the defendant's pleadings did not provide a legal framework from which the fact finder could properly assess whether it was the plaintiff's duty to resolve the coordination of benefits issues; the failure to perform a contractual or legal duty must be alleged as a special defense, and as there was no such special defense properly before the fact finder, the fact finder had no obligation to consider evidence not relevant to the legal issues before it.
3. The trial court properly denied the defendant's objections to the fact finder's report, as there were sufficient subordinate facts contained in the record for the fact finder's recommendations, and there was no legal framework for the fact finder or the trial court to determine whether

the plaintiff failed to perform a contractual or legal duty; the fact finder was not required to determine whether the plaintiff had a duty to dispute Medicare's claim that its liability was secondary, and the trial court appropriately declined to do so as well.

4. This court declined to review the defendant's claim that a certain hospital debt collection statute (§ 19a-673d) compelled judgment in favor of the defendant, as the record revealed that § 19a-673d did not appear in the operative pleadings; although the defendant originally pleaded a different statute (§ 19a-673) concerning collections by hospitals from uninsured patients as a special defense, that special defense was ultimately stricken, the defense was not repleaded, and it was not distinctly raised before the fact finder.

Argued May 15—officially released October 13, 2020

Procedural History

Action to recover damages for unpaid medical services, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the matter was referred to Joseph DaSilva, attorney fact finder, who filed a report recommending judgment for the plaintiff; thereafter, the court, *Hon. A. William Mottolese*, judge trial referee, overruled the defendant's objection to the acceptance of the report and rendered judgment in accordance with the fact finder's report, from which the defendant appealed to this court. *Affirmed.*

James T. Baldwin, for the appellant (defendant).

Patrick M. Fahey, with whom, on the brief, was *Michael G. Chase*, for the appellee (plaintiff).

Opinion

ELGO, J. The defendant, Dawn Kessler, appeals from the judgment of the trial court, rendered following a trial before an attorney fact finder, in favor of the plaintiff, Silver Hill Hospital, Inc., on the plaintiff's complaint in the amount of $17,087.15. On appeal, the defendant claims that (1) the fact finder's conclusions were not based on evidence presented at trial, (2) the fact finder failed to consider the issue of whether the plaintiff was

responsible for resolving a coverage dispute issue with Medicare, (3) the court improperly denied her objections to the fact finder's report, and (4) General Statutes § 19a-673d operates as a statutory bar to the plaintiff's debt collection action. We affirm the judgment of the trial court.

This case concerns a dispute over payment for medical services. The record reflects, and the parties do not dispute, that the plaintiff provided inpatient and outpatient services to the defendant from April 22 to June 6, 2014. The plaintiff's charges for those services totaled $59,291.50. The plaintiff billed Medicare,[1] which initially paid the entire sum. Medicare subsequently informed the plaintiff that, according to its records, the defendant had workers' compensation coverage for a portion of those medical expenses. On November 2, 2016, Medicare rescinded coverage for certain services and the plaintiff thereafter returned $17,087.15 to Medicare.

The defendant, as well as her son and her daughter-in-law, were informed of this development and were asked to contact Medicare to resolve the coverage dispute. The plaintiff's witness, Shakia Whitehurst, senior financial counselor for the plaintiff, testified at trial that the defendant refused to contact Medicare to resolve the coordination of benefits issue. In her testimony, the defendant acknowledged that she had not submitted any payment to the plaintiff.[2]

[1] "Medicare is the federal government's health-insurance program for the elderly. See Medicare Act (Title XVIII of the Social Security Act), 42 U.S.C. § 1395 et seq." *Connecticut Dept. of Social Services* v. *Leavitt*, 428 F.3d 138, 141 (2d Cir. 2005).

[2] There was substantial disagreement at trial regarding how, and to what extent, the defendant was informed of the issue as well as who was responsible for calling Medicare in order to dispute coverage. Because these disputes did not relate to any special defense properly before the fact finder, they were irrelevant and were appropriately not resolved by the fact finder. See part II of this opinion.

On May 1, 2017, the plaintiff commenced the underlying action to collect unpaid expenses for services provided to the defendant. In its complaint, the plaintiff alleged that it furnished medical services to the defendant from April 22 to June 5, 2014, and that the plaintiff submitted bills to the defendant totaling $59,291.50. By way of relief, the plaintiff sought the unpaid balance of $17,087.15.

On July 31, 2017, the defendant filed an answer in which she admitted that the plaintiff rendered the services in question but denied owing the unpaid balance. In addition to her answer, the defendant asserted eight special defenses including, inter alia, non compos mentis.[3] Each special defense contained a single conclusory sentence with no supporting factual allegations.

On August 3, 2017, the plaintiff moved to strike all of the special defenses due to the defendant's alleged failure to plead sufficient facts. The court subsequently granted the motion to strike all of the defendant's special defenses except the non compos mentis defense. The defendant thereafter filed a revised answer and asserted the sole special defense of non compos mentis.

Pursuant to Practice Book § 23-53, the matter was referred to an attorney fact finder, Joseph DaSilva, who presided over a one day trial on July 13, 2018. On October 9, 2018, the fact finder issued his report, in which he found that (1) the defendant owed a balance of $17,087.15 to the plaintiff and (2) the defendant failed to prove the sole special defense of non compos mentis. The fact finder therefore recommended that judgment should enter in favor of the plaintiff.

[3] Non compos mentis is a common law contract defense of incapacity that examines "whether at the time of [execution of the instrument the maker] possessed understanding sufficient to comprehend the nature, extent and consequence[s]" of the transaction. (Internal quotation marks omitted.) *Nichols* v. *Nichols*, 79 Conn. 644, 657, 66 A. 161 (1907).

On October 25, 2018, after the fact finder had submitted his report to the trial court, the defendant filed an objection to the findings of fact, arguing, in part, that the fact finder failed to address the issue of whether it was the plaintiff's responsibility to dispute the coverage issue with Medicare and that unspecified "federal code and regulations" prohibited the plaintiff from collecting from the defendant. Because that objection injected legal issues, which had not been raised in the pleadings or the fact finder's report, the court requested that the plaintiff file a memorandum of law addressing those issues. The court thereafter overruled the defendant's objection, concluding that because those issues were not raised in the pleadings, the fact finder had appropriately confined his analysis to the sole special defense raised by the defendant. The court thus rendered judgment in favor of the plaintiff, and this appeal followed.

Before considering the specific claims raised in this appeal, we begin by noting the applicable standard of review. "Attorney fact finders are empowered to hear and decide issues of fact on contract actions pending in the Superior Court . . . . On appeal, [o]ur function . . . is not to examine the record to see if the trier of fact could have reached a contrary conclusion. . . . Rather, it is the function of this court to determine whether the decision of the trial court is clearly erroneous. . . . This involves a two part function: where the legal conclusions of the court are challenged, 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; where the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous. . . . A finding of fact is clearly erroneous when there is no evidence in the

record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Walpole Woodworkers, Inc.* v. *Manning*, 126 Conn. App. 94, 98–99, 11 A.3d 165 (2011), aff'd, 307 Conn. 582, 57 A.3d 730 (2012).

"[B]ecause the attorney [fact finder] does not have the powers of a court and is simply a fact finder, [a]ny legal conclusions reached by an attorney [fact finder] have no conclusive effect. . . . The reviewing court is the effective arbiter of the law and the legal opinions of [an attorney fact finder], like those of the parties, though they may be helpful, carry no weight not justified by their soundness as viewed by the court that renders judgment." (Internal quotation marks omitted.) Id., 99. When the trial court reviews the findings of fact, "[the] reviewing authority may not substitute its findings for those of the trier of the facts." *Wilcox Trucking, Inc.* v. *Mansour Builders, Inc.*, 20 Conn. App. 420, 423, 567 A.2d 1250 (1989), cert. denied, 214 Conn. 804, 573 A.2d 318 (1990). A trial court "may not retry a case or pass judgment on the credibility of witnesses, [and] must review the [fact finder's] entire report to determine whether the recommendations contained in it are supported by findings of fact in the report." (Internal quotation marks omitted.) *LPP Mortgage, Ltd.* v. *Lynch*, 122 Conn. App. 686, 692, 1 A.3d 157 (2010). "The trial court, as the reviewing authority, may render whatever judgment appropriately follows, as a matter of law, from the facts found by the attorney [fact finder]." (Internal quotation marks omitted.) *Beucler* v. *Lloyd*, 83 Conn. App. 731, 735, 851 A.2d 358 (2004), appeal dismissed, 273 Conn. 475, 870 A.2d 468 (2005). With those principles in mind, we turn to the claims presented in this appeal.

I

We begin with the defendant's claim that the fact finder's conclusions were not based on evidence presented at trial. The defendant contends that the fact finder failed to make reference to the witnesses or the exhibits submitted at trial, and that the subordinate facts do not support the conclusions made. We disagree.

Contrary to the contention of the defendant, there is adequate support in the record for the findings of fact reached by the fact finder. The law requires that we determine whether the findings " 'are supported by the evidence,' " not whether the fact finder could have reached a contrary conclusion. *Walpole Woodworkers, Inc.* v. *Manning*, supra, 126 Conn. App. 99. The record before us contains sufficient evidence for the fact finder to conclude that the plaintiff provided inpatient and outpatient medical services to the defendant, that the defendant owes a balance of $17,087.15 for the services rendered, and that the defendant has not paid that balance. We, therefore, conclude that the fact finder's findings were based on evidence presented at trial and consistent with the requirements of Practice Book § 19-8.

II

The defendant also claims that the fact finder improperly failed to consider the defendant's belated contention, which was not raised in the operative pleadings, that the plaintiff had a duty to contact Medicare to resolve the coverage issue. We disagree.

"It is indisputable that the pleadings establish the framework of any legal action." *Commerce Park Associates, LLC* v. *Robbins*, 193 Conn. App. 697, 731, 220 A.3d 86 (2019), cert. denied sub nom. *Robbins Eye Center, P.C.* v. *Commerce Park Associates, LLC*, 334 Conn. 912, 221 A.3d 447 (2020), and cert. denied sub nom.

Robbins Eye Center, P.C. v. *Commerce Park Associates, LLC*, 334 Conn. 912, 221 A.3d 448 (2020) . For that reason, "[t]he court is not permitted to decide issues outside of those raised in the pleadings." *Yellow Page Consultants, Inc.* v. *Omni Home Health Services, Inc.*, 59 Conn. App. 194, 200, 756 A.2d 309 (2000). Further, "[o]nce the pleadings have been filed, the evidence proffered must be relevant to the issues raised therein. . . . A judgment upon an issue not pleaded would not merely be erroneous, but it would be void." (Internal quotation marks omitted.) *Kelley* v. *Tomas*, 66 Conn. App. 146, 160–61, 783 A.2d 1226 (2001).

A party cannot ask a fact finder to find facts related to a specific legal theory unanchored by the pleadings. As the court aptly stated during the hearing on the objection to the findings of fact, a fact finder does not find facts in a vacuum. As such, the fact finder could find facts only within the legal framework as articulated by the pleadings. At the time the fact finder considered the pleadings, the only special defense properly before him was non compos mentis.[4] Notwithstanding this deficiency, the defendant asserts that it was nevertheless appropriate to assert her legal theory as a general denial, and, accordingly, the fact finder should have considered this defense.[5] The defendant's claim that it

[4] The defendant stressed both in her appellate brief and in her objection to the findings of facts that she "expressly asked the fact finder to address in his findings whether or not the plaintiff made any efforts to dispute Medicare's claim that its liability was secondary . . . ." At the same time, the defendant repeatedly made vague references in the proceedings at trial to "federal code and regulations" that allegedly barred the plaintiff from collecting. These codes and regulations are not specified anywhere in the defendant's brief on appeal or in the record before us and were never asserted in the defendant's stricken special defenses. Moreover, we reiterate that the defendant's brief on appeal relies heavily on the effect of § 19a-673d, which appears nowhere in the record, even though the defense originally stricken referenced General Statutes § 19a-673 and the authority argued to the court were limited to allusions to "federal code and regulations."

[5] In her appellate brief, the defendant states that, "[i]nsofar as these special defenses were stricken by the court, the defendant was left to assert these claims in the form of a general denial and present evidence at trial in support

was the plaintiff's responsibility to process the denial of benefits or that the plaintiff was statutorily barred from collecting may not, however, be subsumed under a general denial. "The fundamental purpose of a special defense, like other pleadings, is to apprise the court and opposing counsel of the issues to be tried, so that basic issues are not concealed until the trial is underway." *Bennett* v. *Automobile Ins. Co. of Hartford*, 230 Conn. 795, 802, 646 A.2d 806 (1994). "As a general rule, facts must be pleaded as a special defense when they are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action." Id.; see also Practice Book § 10-50. "A denial of a material fact places in dispute the existence of that fact. Even under a denial, a party generally may introduce affirmative evidence tending to establish a set of facts inconsistent with the existence of the disputed fact. . . . If, however, a party seeks the admission of evidence which is consistent with a prima facie case, but nevertheless would tend to destroy the cause of action, the 'new matter' must be affirmatively pleaded as a special defense." (Citations omitted.) *Pawlinski* v. *Allstate Ins. Co.*, 165 Conn. 1, 6, 327 A.2d 583 (1973). Here, the defendant raised a theory of defense that is not inconsistent with the plaintiff's prima facie case and, instead, purports to statutorily bar the plaintiff from collecting its fees. Because that claim would theoretically destroy the cause of action, the defendant was required to specially plead this defense.

of them." The defendant has provided no legal authority for that proposition. On the contrary, our rules of practice allow a litigant to replead to cure the deficiencies or to seek judgment on the pleadings and to appeal the court's ruling. See Practice Book § 10-44; *Alarm Applications Co.* v. *Simsbury Volunteer Fire Co.*, 179 Conn. 541, 551 n.4, 427 A.2d 822 (1980) (motion to strike granted on ground that complaint lacked essential allegation does not preclude plaintiff from restating cause of action by supplying essential allegation). Rather than cure the deficiencies in the legal claims asserted by pleading facts to support them, which was the basis for the motion to strike, the defendant elected to plead over only the non compos mentis defense.

Without a properly pleaded special defense alerting the plaintiff and the fact finder of this claim, the fact finder had no obligation to consider evidence not relevant to the legal issues before it. In the absence of a special defense, evidence purportedly in support of the claim that the defendant insists the fact finder should have considered is simply irrelevant.

In the present case, the defendant's pleadings did not provide a legal framework from which the fact finder could properly assess whether it was the plaintiff's duty to resolve the coordination of benefits issues. The court correctly noted that the essence of the defendant's defense is that the plaintiff failed to perform a contractual or legally mandated duty. A failure to perform a contractual or legal duty must be alleged as a special defense, and there was no such special defense properly before the fact finder. See *DuBose* v. *Carabetta*, 161 Conn. 254, 260, 287 A.2d 357 (1971). For that reason, the defendant's claim fails.

III

We next address the defendant's claim that the court improperly denied her objections to the fact finder's report. As we have noted, our review is limited to whether the trial court's legal conclusions are legally and logically correct and whether they find support in the facts set out in the memorandum of decision. See *Walpole Woodworkers, Inc.* v. *Manning*, supra, 126 Conn. App. 98–99.

A trial court reviewing the findings of a fact finder is limited by the record presented.[6] A reviewing court

[6] Our rules of practice provide the trial court with six distinct options after reviewing the findings of facts and hearing any objections to the report of an attorney fact finder. The trial court is permitted to "(1) render judgment in accordance with the finding of facts; (2) reject the finding of facts and remand the case to the fact finder who originally heard the matter for a rehearing on all or part of the finding of facts; (3) reject the finding of facts and remand the matter to another fact finder for rehearing; (4) reject the finding of facts and revoke the reference; (5) remand the case to the fact

may not substitute its findings for those of the fact finder or make credibility determinations of witnesses. See *LPP Mortgage, Ltd.* v. *Lynch*, supra, 122 Conn. App. 692; *Wilcox Trucking, Inc.* v. *Mansour Builders, Inc.*, supra, 20 Conn. App. 423.

In the present case, the record before the court included only those claims asserted in the pleadings before the fact finder. After the court thoroughly reviewed the record to determine whether the pleadings supported the legal claims advanced by the defendant, the court concluded that the defendant's objection to the findings of fact raised a new legal issue that was not raised by the pleadings.[7] The court then asked the plaintiff to file a memorandum of law addressing that issue. After a hearing, the court again determined that "the fact finder did not address the issue because it was not raised by the pleadings."

In this case, there were sufficient subordinate facts contained in the record for the fact finder's recommendations, and no legal framework for the fact finder or the trial court to determine whether the plaintiff failed to perform a contractual or legal duty. The fact finder was not required to determine whether the plaintiff had a duty to dispute Medicare's claim that its liability was secondary, and the trial court appropriately declined to do so as well.[8] Accordingly, the court properly denied the defendant's objections to the fact finder's report.

finder who originally heard the matter for a finding on an issue raised in an objection which was not addressed in the original finding of facts; or (6) take any other action the judicial authority may deem appropriate." Practice Book § 23-58.

[7] As the court explained to the defendant, "I looked high and low for a special defense that—that framed that issue. . . . He has to base the facts on some law and you didn't provide him with any law. I looked. I searched high and low. . . . I certainly expected you to have cited some federal U.S. Code that requires that to be done, something like that, but there's absolutely nothing in the record on that."

[8] The defendant also argues that "[t]he trial court's denial of the defendant's objection to the findings of fact on the basis that these were not properly pled is . . . contrary to the court's ruling on the defendant's

IV

As a final matter, the defendant insists that § 19a-673d[9] compels judgment for the defendant, even at this belated stage in the proceedings. The plaintiff responds that because the defendant did not preserve this claim in the proceedings at trial and now raises it for the first time on appeal, we should decline to review it. We agree with the plaintiff.

"We repeatedly have held that [a] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one . . . . [A]n appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. . . . [B]ecause our review is limited to matters in the record, we [also] will not address issues not decided by the trial court." (Citations omitted; internal quotation marks omitted.) *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 619–20, 99 A.3d 1079 (2014); see also Practice Book § 60-5 ("[t]he court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial"). "[B]ecause our review is limited to matters in the record, we will not

request to file a motion for summary judgement." Shortly before the scheduled trial, the defendant requested permission to file a motion for summary judgment. In denying the motion, the court stated that "[t]his is without prejudice to the parties' right to request time to brief any legal defenses or issues they wish to assert as a part of the normal trial and adjudication process." Contrary to the defendant's assertions, that remark did not constitute permission to assert defenses outside of the normal judicial process.

[9] General Statutes § 19a-673d provides in relevant part: "If, at any point in the debt collection process, whether before or after the entry of judgment, a hospital . . . becomes aware that a debtor from whom the hospital is seeking payment for services rendered receives information that the debtor is eligible for hospital bed funds, free or reduced price hospital services, or any other program which would result in the elimination of liability for the debt or reduction in the amount of such liability, the hospital . . . shall promptly discontinue collection efforts and refer the collection file to the hospital for determination of such eligibility. The collection effort shall not resume until such determination is made."

address issues not decided by the trial court." (Internal quotation marks omitted.) *West Farms Mall, LLC* v. *West Hartford*, 279 Conn. 1, 27–28, 901 A.2d 649 (2006).

Our review of the record reveals that § 19a-673d does not appear anywhere in the operative pleadings. Although the defendant originally pleaded General Statutes § 19a-673—a separate statute—as a special defense, that special defense was ultimately stricken and the defense was not repleaded.[10] Section 19a-673d was not raised in the operative pleadings, and it is notably absent from the defendant's objection to the findings of fact and was never raised before the court. Because that issue was not distinctly raised before the fact finder, we decline to review it on appeal.

The judgment is affirmed.

In this opinion the other judges concurred.

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[10] In the initial statement of issues in her principal appellate brief, the defendant also claimed that the court improperly granted the plaintiff's motion to strike the defendant's special defense alleging that the plaintiff was barred from pursuing collection pursuant to § 19a-673d. She thereafter failed to brief that issue in any manner in the brief submitted to this court.

For multiple reasons, that contention is improper. First, we note that the stricken special defense did not reference § 19a-673d, but rather pleaded a violation of § 19a-673, an entirely different statutory provision. Second, the defendant did not preserve that claim before either the attorney fact finder or the trial court and instead has raised the applicability of § 19a-673d for the first time in this appeal. Third, to the extent that the defendant in her statement of issues challenges the propriety of the court's granting of the motion to strike, she has offered no analysis whatsoever of that issue in her appellate brief, rendering that claim inadequately briefed. Accordingly, we decline to review that claim. See, e.g., *Solek* v. *Commissioner of Correction*, 107 Conn. App. 473, 480, 946 A.2d 239 ("[W]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . Where a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned." (Internal quotation marks omitted.)), cert. denied, 289 Conn. 902, 957 A.2d 873 (2008).

MALISA COSTANZO, ADMINISTRATRIX (ESTATE OF ISABELLA R. COSTANZO), ET AL. *v.* TOWN OF PLAINFIELD ET AL.
(AC 42765)

DiPentima, C. J., and Alvord and Keller, Js.*

Syllabus

The plaintiff mother, as the administratrix of her daughter's estate, sought to recover damages in connection with her daughter's drowning death in an aboveground pool from the defendants, the town of Plainfield and two town employees, for their failure to inspect the pool to ensure that mandated safety measures had been installed. The plaintiff was a tenant of the property where the accident occurred. The pool did not have a self-closing or self latching gate, or a pool alarm, which were required as part of the state building code. The defendants filed a notice of intent to seek apportionment pursuant to statute (§ 52-102b), as to the property owners for their alleged negligence in failing to ensure that the pool met all required safety requirements. The defendants also filed an apportionment complaint, as to the former tenants of the property, alleging that they were negligent in failing to notify the defendants that the pool had been constructed and that an inspection was needed. The plaintiff thereafter filed an objection to the defendants' notice of intent to seek apportionment as to the property owners, and an objection to the defendants' apportionment complaint against the former tenants, on the ground that the plaintiff's cause of action in the revised complaint was not grounded in negligence but, rather, an intentional or reckless tort pursuant to the municipal liability statute (§ 52-557n (b) (8)), and, therefore, the apportionment statute was inapplicable. The trial court sustained the plaintiff's objections. On appeal, the defendants claimed that the trial court erred in sustaining the plaintiff's objections on the basis that the plaintiff's revised complaint implicated both exceptions to municipal immunity contained in § 52-557n (b) (8) and that the first exception employed a negligence standard, not a recklessness standard, thus allowing the defendants to seek apportionment. *Held* that the trial court erred in sustaining the plaintiff's objections to the defendants' efforts to seek apportionment: the plaintiff alleged in her complaint that at all relevant times the town's employees acted within the scope of their employment with the town, those employees and thus, the town, knew that a pool had been built at the property and had actual notice that the construction of the pool was completed in violation of the applicable laws and/or that the pool constituted a hazard to health or

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

safety, thereby alleging that the town employees, with actual knowledge of a violation of a law and/or the existence of a hazardous condition, failed to conduct an inspection, in accordance with the first exception of § 52-557n (b) (8), which contains a negligence standard, and unlike the second exception of § 52-557n (b) (8), recklessness is not an element of the actual notice exception; as a result of the plaintiff's allegations of a claim of negligence on the part of the municipal actors, the defendants can seek apportionment as to the negligence of the former tenants and property owners pursuant to the apportionment statute (§ 52-572h (o)).

Argued June 17—officially released October 13, 2020

Procedural History

Action to recover damages for, inter alia, recklessness, brought to the Superior Court in the judicial district of Windham, where the defendants filed an apportionment complaint and a notice of intent to seek apportionment; thereafter, the trial court, *Cole-Chu, J.*, sustained the plaintiffs' objections to the defendants' apportionment complaint and the notice of intent to seek apportionment, and dismissed the notice and the apportionment complaint, and the defendants appealed to this court. *Reversed*; *further proceedings*.

Ryan J. McKone, with whom, on the brief, was *James G. Williams*, for the appellants (defendants).

Stephen M. Reck, for the appellees (plaintiffs).

Opinion

DiPENTIMA, C. J. This case arises out of the tragic drowning of a young child in an aboveground swimming pool. The defendants, the town of Plainfield (town), Robert Kerr and D. Kyle Collins, Jr., appeal from the trial court's orders sustaining the objections of the plaintiff Malisa Costanzo, as administratrix of the estate of the decedent, Isabella R. Costanzo,[1] to the defendants'

[1] In addition to the claims against the defendants brought in her capacity as administratrix of the decedent's estate, Malisa Costanzo, individually and as parent and next friend for her four children, Felicity Costanzo, Gabriel Costanzo, Xavier Costanzo and Giovanni Costanzo, also set forth claims of bystander emotional distress. See *Georges* v. *OB-GYN Services, P.C.*, Conn. , n.1, A.3d (2020) (noting general rule that minor

efforts to commence apportionment actions against the owners of the property where the pool was located and their former tenants who had the pool constructed. We agree with the defendants that the court improperly sustained the plaintiff's objections, and therefore we reverse the judgment of the trial court and remand the case for further proceedings.

The plaintiff alleged the following facts in her revised complaint dated August 28, 2018. The decedent drowned in an aboveground pool located at 86 Gelbas Road in Plainfield on June 22, 2016. At all relevant times, the town employed Kerr as a licensed building official and Collins as a licensed assistant building manager. One of their employment duties was to inspect all pools constructed in the town to ensure compliance with the State Building Code. See, e.g., General Statutes § 29-261.[2] The defendants issued a building permit for this aboveground swimming pool on July 25, 2013; however, Kerr and Collins, in violation of General Statutes § 29-265a,[3] issued that permit without having determined if

children may bring action only by way of parent or next friend). The claims of bystander emotional distress are not the subject of this appeal. In this appeal, we refer to Malisa Costanzo, in her capacity as administratrix of the estate of the decedent as the plaintiff. See id.

[2] General Statutes § 29-261 (b) provides: "The building official or assistant building official shall pass upon any question relative to the mode, manner of construction or materials to be used in the erection or alteration of buildings or structures, pursuant to applicable provisions of the State Building Code and in accordance with rules and regulations adopted by the Department of Administrative Services. They shall require compliance with the provisions of the State Building Code, of all rules lawfully adopted and promulgated thereunder and of laws relating to the construction, alteration, repair, removal, demolition and integral equipment and location, use, accessibility, occupancy and maintenance of buildings and structures, except as may be otherwise provided for."

[3] General Statutes § 29-265a provides: "(a) As used in this section, 'pool alarm' means a device which emits a sound of at least fifty decibels when a person or an object weighing fifteen pounds or more enters the water in a swimming pool.

"(b) No building permit shall be issued for the construction or substantial alteration of a swimming pool at a residence occupied by, or being built

a pool alarm had been installed. The plaintiff further alleged that the State Building Code[4] required the installation of a self-closing and self latching gate for all new pools and that Kerr and Collins had failed to ensure the installation of such a gate prior to issuing the building permit. The purpose of these safety features was to prevent children from drowning.

The plaintiff further alleged that Kerr and Collins were aware of these requirements and that they knew, or should have known, that an inspection of new pools was necessary to ensure compliance with these safety requirements. Finally, the plaintiff alleged that neither Kerr nor Collins had inspected or attempted to inspect the property to ensure that a pool alarm and a self-closing and self latching gate had been installed.

On July 27, 2018, prior to the filing of the revised complaint, the defendants moved for an order directing the plaintiff's counsel to provide a copy of the release agreement between the plaintiff and the owners of 86 Gelbas Road, Jenna Prink and Bruce Prink (Prinks).[5] The court, *Auger*, *J.*, granted the defendants' motion on August 23, 2018.

On October 19, 2018, the defendants filed a notice of their intent to claim that the negligence of the Prinks was a proximate cause of the injuries claimed in the plaintiff's action against the defendants. See General Statutes § 52-102b (c).[6] Specifically, the defendants maintained that, as the owners of the property, the Prinks

for, one or more families unless a pool alarm is installed with the swimming pool."

[4] See 2012 International Residential Code for One- and Two-Family Dwellings, Appendix G, § AG105.2 (8), p. 830 (adopted by the 2016 Connecticut State Building Code pursuant to General Statutes (Rev. to 2015) § 29-252, as amended by Public Acts 2016, No. 16-215, § 5) (aboveground swimming pools must have self-closing and self latching gate installed).

[5] The plaintiff's claim against the Prinks had resulted in a settlement and a release agreement.

[6] General Statutes § 52-102b (c) provides in relevant part: "If a defendant claims that the negligence of any person, who was not made a party to the

bore the responsibility for ensuring compliance with any requirements of the State Building Code, and that the Prinks had failed (1) to schedule an inspection of the pool by the defendants, (2) to obtain a certificate of occupancy for the pool and (3) to prevent their tenants from using the pool without obtaining a certificate of occupancy. The defendants further noted that the plaintiff had rented the property in November, 2014, and that the Prinks knew that four minor children would be living on the property. Finally, the defendants set forth the instances of the Prinks' negligence, including the failure to notify the town of the construction of the pool, the failure to seek an inspection, the failure to obtain a certificate of occupancy and the failure to warn the plaintiff of these omissions. Finally, the defendants contended that the Prinks could be liable for a proportionate share of the damages alleged in the plaintiff's complaint.

A few days later, the defendants filed an apportionment complaint, pursuant to General Statutes § 52-102b,[7]

action, was a proximate cause of the plaintiff's injuries or damage and the plaintiff has previously settled or released the plaintiff's claims against such person, then a defendant may cause such person's liability to be apportioned by filing a notice specifically identifying such person by name and last-known address and the fact that the plaintiff's claims against such person have been settled or released. Such notice shall also set forth the factual basis of the defendant's claim that the negligence of such person was a proximate cause of the plaintiff's injuries or damages. No such notice shall be required if such person with whom the plaintiff settled or whom the plaintiff released was previously a party to the action."

[7] General Statutes § 52-102b (a) provides: "A defendant in any civil action to which section 52-572h applies may serve a writ, summons and complaint upon a person not a party to the action who is or may be liable pursuant to said section for a proportionate share of the plaintiff's damages in which case the demand for relief shall seek an apportionment of liability. Any such writ, summons and complaint, hereinafter called the apportionment complaint, shall be served within one hundred twenty days of the return date specified in the plaintiff's original complaint. The defendant filing an apportionment complaint shall serve a copy of such apportionment complaint on all parties to the original action in accordance with the rules of practice of the Superior Court on or before the return date specified in the apportionment complaint. The person upon whom the apportionment

against Eric Guerin and Merissa Guerin (Guerins), former tenants of the Prinks who occupied the property in 2013 at the time the pool was built. In this one count apportionment complaint, the defendants alleged that the Guerins had prepared and submitted the application for the construction of the aboveground pool to the town. The defendants further claimed that the Guerins specifically were advised that the pool was required to have a self-closing and self latching gate, that an inspection was necessary at the completion of the construction and that Eric Guerin had submitted an affidavit "wherein he attested that he would install a [pool alarm]." The defendants alleged that the Guerins failed to notify them that the pool had been constructed and thus that an inspection was needed. The defendants alleged that these actions amounted to negligence and, additionally, the Guerins negligently failed to obtain a certificate of occupancy for the aboveground pool and failed to notify the Prinks that (1) the aboveground pool did not comply with the requirements of the building code, (2) the town and its officials had not been notified of its construction or the need for an inspection and (3) there was no certificate of occupancy. In conclusion, the defendants claimed that the Guerins could be liable for a proportionate share of the damages alleged in the plaintiff's complaint.

On October 22, 2018, the plaintiff filed an objection to the defendants' notice of intent to seek apportionment as to the Prinks. The plaintiff argued that her complaint set forth a statutory cause of action pursuant to General Statutes § 52-572n (b) (8) alleging recklessness, and that the apportionment statute, General Statutes § 52-572h (o), applied only to claims of negligence.

complaint is served, hereinafter called the apportionment defendant, shall be a party for all purposes, including all purposes under section 52-572h."

On October 25, 2018, the plaintiff filed a similar objection to the defendants' apportionment complaint directed against the Guerins.

The court, *Cole-Chu*, *J.*, held a hearing on November 19, 2018. At the outset, it noted that the objection to the apportionment complaint "could reasonably be construed as a motion to strike." In his argument, the plaintiff's counsel stated that he had not pleaded a negligence cause of action in the revised complaint but rather an intentional or reckless tort pursuant to General Statutes § 52-557n (b) (8), and, as a result, the apportionment statute was inapplicable. He also indicated that the complaint was based on the second exception to municipal immunity contained in § 52-557n (b) (8)[8] with respect to property inspections. The defendants' counsel took the position that the complaint alleged negligence, and not recklessness; he acknowledged that claims of recklessness are not subject to apportionment.

On March 19, 2019, the court issued an order sustaining the plaintiff's objection to the defendants' notice of intent to pursue apportionment as to the Prinks. Specifically, it agreed with the plaintiff's contention that the complaint did not allege negligence such that the apportionment statute did not apply. The court stated that, "[i]f the defendants are found liable to the [plaintiff] on the revised complaint, it will be for reckless disregard for health and safety under all relevant [alleged] circumstances, not for negligence." (Internal quotation marks omitted.) In a separate order, the court dismissed the defendant's notice to seek apportionment, stating that, in sustaining the plaintiff's objection, it had essentially held "that it has no subject matter jurisdiction

[8] The second exception set forth in General Statutes § 52-557n (b) (8) provides in relevant part that a municipality shall not be liable for damages for the "failure to make an inspection . . . unless such failure to inspect . . . constitutes a reckless disregard for health or safety under all the relevant circumstances."

over the proceedings the defendants attempted . . . to set in motion."

The court also sustained the plaintiff's objection to the apportionment complaint filed against the Guerins. It again concluded that the plaintiff had alleged recklessness against the defendants and that therefore the apportionment statute was inapplicable. The court also issued a separate order dismissing the apportionment complaint against the Guerins on the basis of the lack of subject matter jurisdiction.[9] This appeal followed. Additional facts will be set forth as necessary.

On appeal, the defendants claim that the trial court erred in precluding their efforts to seek apportionment.

[9] We note that the parties have not substantively addressed the court's orders "essentially" holding that it lacked subject matter jurisdiction. The defendants have appealed from the court's two orders sustaining the plaintiff's objections and the two orders dismissing the notice to seek apportionment and the apportionment complaint due to the lack of subject matter jurisdiction.

A determination regarding the subject matter jurisdiction of the trial court raises a question of law subject to the plenary standard of review. See *Tatoian* v. *Tyler*, 194 Conn. App. 1, 35, 220 A.3d 802 (2019), cert. denied, 334 Conn. 919, 222 A.3d 513 (2020); see also *Real Estate Mortgage Network, Inc.* v. *Squillante*, 184 Conn. App. 356, 360, 194 A.3d 1262, cert. denied, 330 Conn. 950, 197 A.3d 390 (2018). "Moreover, [i]t is a fundamental rule that a court may raise and review the issue of subject matter jurisdiction at any time. . . . Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction. . . . The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal. . . . [S]ubject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it . . . and a judgment rendered without subject matter jurisdiction is void." (Citation omitted; internal quotation marks omitted.) *Labissoniere* v. *Gaylord Hospital, Inc.*, 199 Conn. App. 265, 275–76, A.3d (2020); *Petrucelli* v. *Meriden*, 198 Conn. App. 838, 846, A.3d (2020).

We are not persuaded that these proceedings implicated the subject matter jurisdiction of the trial court. In any event, for the reasons set forth in this opinion, we conclude that the court erred, under these facts and circumstances, in rejecting the defendants' efforts regarding apportionment.

Specifically, they argue that the plaintiff's revised complaint implicated both exceptions to municipal immunity contained in § 52-557n (b) (8) and that the first exception employs a negligence, not recklessness standard. As a result, they argue, apportionment is not prohibited pursuant to § 52-572h (o). The defendants further contend that the cause of action recognized in § 52-557n (b) (8) is not excluded from apportionment pursuant to § 52-102b. We agree with the defendants that the plaintiff's revised complaint sets forth allegations that fall within the first exception of § 52-557n (b) (8) and that that exception contains a negligence standard. The trial court erred in sustaining the plaintiff's objections to the defendants' efforts to seek apportionment.

In order to resolve this appeal, we must review the relevant statutes and legal principles regarding municipal liability and apportionment, as they apply to the allegations contained in the plaintiff's revised complaint. "As a matter of Connecticut's common law, the general rule . . . is that a municipality is immune from liability for negligence unless the legislature has enacted a statute abrogating that immunity." (Internal quotation marks omitted.) *Grady* v. *Sommers*, 294 Conn. 324, 334, 984 A.2d 684 (2009); see also *Spears* v. *Garcia*, 263 Conn. 22, 28, 818 A.2d 37 (2003). "The tort liability of a municipality has been codified in § 52-557n. Section 52-557n (a) (1) provides that [e]xcept as otherwise provided by law, *a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties* . . . . Section 52-557n (a) (2) (B) extends, however, the same discretionary act immunity that applies to

Accordingly, we conclude that the court's determination regarding a lack of subject matter jurisdiction was improper.

municipal officials to the municipalities themselves by providing that they will not be liable for damages caused by negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law." (Emphasis added; internal quotation marks omitted.) *Borelli* v. *Renaldi*, Conn. , , A.3d (2020); see also *Northrup* v. *Witkowski*, 332 Conn. 158, 167–68, 210 A.3d 29 (2019); *Ventura* v. *East Haven*, 330 Conn. 613, 629, 199 A.3d 1 (2019). In other words, "the statute provides that municipalities shall be liable for harm caused by ministerial acts in subsection (a) (1) (A) but shall not be liable for harm caused by discretionary acts in subsection (a) (2) (B)." *Ugrin* v. *Cheshire*, 307 Conn. 364, 381, 54 A.3d 532 (2012).[10]

Subsection (b) of § 52-557n defines additional circumstances in which a municipality, or an employee of that municipality, is not subject to liability. Id., 381. Stated differently, "[s]ubsection (a) [of § 52-557n] sets forth general principles of municipal liability and immunity, while subsection (b) sets forth [ten] specific situations in which both municipalities and their officers are immune from tort liability." (Internal quotation marks omitted.) *Elliott* v. *Waterbury*, 245 Conn. 385, 395, 715 A.2d 27 (1998); see also *Martel* v. *Metropolitan District Commission*, 275 Conn. 38, 59, 881 A.2d 194 (2005). Specifically, the relevant language in that section of the statute provides: "Notwithstanding the provisions of subsection (a) of this section, a political subdivision of the state or any employee . . . acting within the scope of his employment or official duties shall not be liable for damages to person or property resulting from . . . (8) [the] failure to make an inspection or making an

[10] Although § 52-557n (a) (1) (A) imposes liability on municipalities for certain negligent acts or omissions of its employees, § 52-557n (a) (2) (A) provides that municipalities are not liable for acts that constitute criminal conduct, fraud, actual malice or wilful misconduct.

inadequate or negligent inspection of any property . . . to determine whether the property complies with or violates any law or contains a hazard to health and safety, unless the political subdivision had notice of such a violation of law or such a hazard or unless such failure to inspect or such inadequate or negligent inspection constitutes a reckless disregard for health or safety under all the relevant circumstances . . . .'' General Statutes § 52-557n (b) (8).

Our Supreme Court has concluded that § 52-557n (b) (8) ''abrogates the traditional common-law doctrine of municipal immunity, now codified by statute, in . . . *two* enumerated circumstances.'' (Emphasis added.) *Ugrin* v. *Cheshire*, supra, 307 Conn. 382; see also *Williams* v. *Housing Authority of Bridgeport*, 327 Conn. 338, 356, 174 A.3d 137 (2017) (§ 52-557n (b) (8) carves out two distinct exceptions to municipal immunity for failure to inspect); see generally *Collins* v. *Greenwich*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-16-6028449-S (February 13, 2018) (''[a]ctual notice of the hazardous condition and recklessness are distinct alternate predicates to liability under [§ 52-557n (b) (8)]'').

We now turn to the matter of apportionment.[11] Section 52-572h (c) provides in relevant part: ''In a negligence action to recover damages resulting from personal injury, wrongful death or damage to property . . .

[11] ''Apportionment does not affect the determination of whether the defendant is liable under a theory of negligence but, rather, affects the determination of his degree of fault once a trier of fact has determined that his breach of a reasonable standard of care was a substantial factor in causing the plaintiff's injuries. . . . Once it is determined that the defendant's conduct has been a cause of some damage suffered by the plaintiff, a further question may arise as to the portion of the total damages which may properly be assigned to the defendant, as distinguished from other causes.'' (Citation omitted; internal quotation marks omitted.) *Henriques* v. *Magnavice*, 59 Conn. App. 333, 338, 757 A.2d 627 (2000).

if the damages are determined to be proximately caused by the negligence of more than one party, each party against whom recovery is allowed shall be liable to the claimant only for such party's proportionate share of the recoverable economic damages and the recoverable noneconomic damages . . . ." Additionally, subsection (o) of § 52-572h provides in relevant part that "*there shall be no apportionment of liability or damages between parties liable for negligence and parties liable on any basis other than negligence*, including, but not limited to, intentional, wanton or reckless misconduct, strict liability or liability pursuant to any cause of action created by statute, except that liability may be apportioned among parties liable for negligence in any cause of action created by statute based on negligence including, but not limited to, an action for wrongful death pursuant to section 52-555 or an action caused by a motor vehicle owned by the state pursuant to section 52-556." (Emphasis added.)

In *Allard* v. *Liberty Oil Equipment Co.*, 253 Conn. 787, 801, 756 A.2d 237 (2000), our Supreme Court stated that the our legislature made it "clear that *the apportionment principles of § 52-572h do not apply where the purported apportionment complaint rests on any basis other than negligence and that these other bases include, without limitation*, intentional, *wanton or reckless misconduct*, strict liability or liability pursuant to any cause of action created by statute." (Emphasis added; internal quotation marks omitted.) See also *Snell* v. *Norwalk Yellow Cab, Inc.*, 332 Conn. 720, 726, 212 A.3d 646 (2019).

In light of the foregoing principles, the plaintiff's claims may be distilled as follows. In her revised complaint, the plaintiff alleged reckless conduct on the part of Kerr and Collins with respect to their failure to conduct an inspection of the aboveground pool to verify the installation of a pool alarm and a self-closing and

self latching gate. Thus, relying on § 52-572h (o) and our Supreme Court's decision in *Allard* v. *Liberty Oil Equipment Co.*, supra, 253 Conn. 787, the plaintiff contends that the defendants were barred from pursuing apportionment actions against the Guerins and the Prinks under § 52-102b (a) and (c), respectively.

We now examine the two exceptions to municipal immunity in § 52-557n (b) (8) to address the plaintiff's contention. At the outset, we note that this task presents a question of law subject to plenary review. See, e.g., *DeMattio* v. *Plunkett*, 199 Conn. App. 693, 698, A.3d (2020). "When construing a statute, [the court's] fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, [the court seeks] to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning . . . [General Statutes] § 1-2z directs [the court] first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) Id., 698–99.

The second exception set forth in § 52-557n (b) (8) indisputably requires recklessness. Specifically, the text of the statute contains the phrase "a reckless disregard for health and safety under all the relevant circumstances . . . ." In *Williams* v. *Housing Authority of Bridgeport*, supra, 327 Conn. 358–74, our Supreme Court conducted a comprehensive analysis of how to assess recklessness in this context. Specifically, the court stated: "We concluded that, particularly when the failure to inspect violates some statute or regulation,

the question of recklessness ordinarily will be one for the jury, taking into account all relevant circumstances. We also concluded that when the failure to inspect is not an isolated incident but results from a general policy of not conducting inspections of a certain type, the jury reasonably may consider whether the policy itself indicates a reckless disregard for public health or safety." Id., 368–69.

As to the first exception contained in § 52-557n (b) (8), the relevant text abrogates municipal immunity in the case of a failure to inspect property or in the making of an inadequate or negligent inspection to determine if the property complied with or violated any law, or presented a hazard to health and safety when "*the political subdivision had notice of such a violation of law or such a hazard* . . . ." (Emphasis added.) General Statutes § 52-557n (b) (8). Stated succinctly, the first exception applies only when the municipality had notice of the violation of law or the hazard. Significantly, it does not contain any reference to recklessness. This exception is limited to instances of negligence with respect to the inspection of property for compliance with or violation of any law or the presence of a hazard to health and safety.

Having concluded that the first exception of § 52-557n (b) (8) contains a negligence, rather than a recklessness, standard, we now turn to the allegations contained in the plaintiff's revised complaint. If these allegations set forth a claim pertaining to the first exception of § 52-557n (b) (8) and negligent conduct, then § 52-572h (o) does not prevent apportionment at this stage of the proceedings.

"[T]he interpretation of pleadings is always a question of law for the court. . . . Our review of the trial court's interpretation of the pleadings therefore is plenary. . . . [W]e long have eschewed the notion that pleadings should be read in a hypertechnical manner. Rather,

[t]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . [T]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties. . . . Our reading of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension. . . . Although essential allegations may not be supplied by conjecture or remote implication . . . the complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties." (Internal quotation marks omitted.) *Carrico* v. *Mill Rock Leasing, LLC*, 199 Conn. App. 252, 261, A.3d (2020); see also *Lynn* v. *Bosco*, 182 Conn. App. 200, 213–15, 189 A.3d 601 (2018); *Harborside Connecticut Limited Partnership* v. *Witte*, 170 Conn. App. 26, 34, 154 A.3d 1082 (2016).

In count one of her revised complaint, the plaintiff alleged that at all relevant times, Kerr and Collins acted within the scope of their employment with the town. She also claimed that Kerr and Collins knew that all new pools required a pool alarm and a self-closing and self latching gate and that a permit cannot be issued without verification of these safety features. She further averred that these two town employees knew that these safety features were mandatory and vital to save the lives of children, who often reside at homes where new pools are constructed. The plaintiff then specifically alleged that (1) Kerr and Collins were aware that a pool had been constructed at 86 Gelbas Road, (2) they could

see the pool from the public road that they drove on repeatedly, (3) they could see that a self-closing and self latching gate had not been installed, and (4) they never inspected or attempted to inspect the pool, or otherwise determined if a pool alarm or a self-closing and self latching gate had been installed. We construe the complaint broadly and realistically rather than narrowly and technically. *Morton* v. *Syriac*, 196 Conn. App. 183, 192, 229 A.3d 1129, cert. denied, 335 Conn. 915, 229 A.3d 1045 (2020). We conclude, therefore, that the plaintiff set forth a claim alleging that the town's employees, and thus the town, knew that a pool had been built at the property, had actual notice that the construction of this pool was completed in violation of the applicable laws and/or that the pool constituted a hazard to health or safety.

We therefore conclude that the plaintiff has alleged that Kerr and Collins, with actual knowledge of a violation of law and/or the existence of a hazardous condition, failed to conduct an inspection, in accordance with the first exception of § 52-577n (b) (8). Unlike the second exception of § 52-577n (b) (8), recklessness is not an element of the actual notice exception. As a result of the plaintiff's allegations of a claim of negligence on the part of the municipal actors, the defendants could seek apportionment as to the negligence of the Prinks and Guerins under § 52-572h (o). Accordingly, we conclude that the trial court erred in sustaining the plaintiff's objections to the notice of apportionment as to the Prinks and to the apportionment complaint filed against the Guerins.

The judgment is reversed and the case is remanded with direction to overrule the plaintiff's objections to the notice of apportionment and the apportionment complaint and for further proceedings in accordance with this opinion.

In this opinion the other judges concurred.

CHRISTOPHER CASIRAGHI *v.* PAULA CASIRAGHI
(AC 42299)

Alvord, Prescott and Moll, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court granting the defendant's motions for contempt. He claimed that the court improperly determined that he wilfully had failed to comply with his financial obligations to the defendant despite a lack of any finding by the court regarding his assertion that he lacked the ability to pay and found that his investment in a certain franchise, C Co., breached the parties' separation agreement despite also finding that he was current on his financial obligations to the defendant at the time that the investment was made. *Held*:

1. The trial court's findings that the plaintiff engaged in wilful violations of his financial obligations were clearly erroneous and it was an abuse of discretion for the court not to have considered the issue of the plaintiff's ability to pay or to have rejected that defense before finding that his failure to meet his financial obligations was wilful: the plaintiff unquestionably raised as a defense that he no longer could fully satisfy his financial obligations as set forth in the dissolution judgment because he had suffered a considerable drop in income due to health problems, and, in support, provided evidence regarding his finances; moreover, the court expressly credited some of the plaintiff's evidence in its written decision and made no indication that it did not credit any of the financial information provided by the plaintiff and the defendant provided no contrary financial records to the court, and the court's finding of wilfulness stood in direct contradiction to the facts found related to the plaintiff's ability to pay; accordingly, the plaintiff met his burden of both raising the inability to pay defense and presenting evidence supporting it that was at least in part credited by the court.
2. The trial court's interpretation of the parties' separation agreement was clearly erroneous, and its finding that the plaintiff breached the agreement by investing in C Co. could not stand; the only evidence before the court was that the plaintiff's investment in C Co. occurred in July, 2015, which unquestionably was before the earliest date on which the plaintiff's obligation to make a lump sum installment payment arose pursuant to the agreement, December, 2015, and, because the agreement limited the plaintiff's right to make such investments only in the event that he was not current on his lump sum payment obligations, and no such obligation existed at the time he invested in C Co., the court's finding was a misinterpretation of the express terms of the agreement.

Argued February 20—officially released October 13, 2020

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Stanley Novack*, judge trial referee, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Hon. Michael Shay*, judge trial referee, granted two motions for contempt and denied a motion for contempt filed by the defendant, and granted certain other relief, and the plaintiff appealed to this court. *Reversed in part*; *further proceedings*.

Christopher Casiraghi, self-represented, the appellant (plaintiff).

Paula Casiraghi, self-represented, the appellee (defendant).

Opinion

PRESCOTT, J. The plaintiff, Christopher Casiraghi, appeals from the judgment of the trial court rendered on three postdissolution motions for contempt filed by the defendant, Paula Casiraghi.[1] Specifically, the court

[1] According to the plaintiff's appeal form and his statement of the issues on appeal, the plaintiff ostensibly also appeals from the court's denial of his own postdissolution motions, which sought (1) a downward modification of his unallocated alimony and child support obligation, (2) relief from the payment terms of a lump sum property distribution award, and (3) an opportunity to reargue these rulings and its granting of the motions for contempt. The plaintiff, however, has not briefed any specific claims of error with respect to these other rulings and, thus, has abandoned those aspects of his appeal. See *Corrarino* v. *Corrarino*, 121 Conn. App. 22, 23 n.1, 993 A.2d 486 (2010) (failure to brief claims of error with respect to rulings listed on appeal form constitutes abandonment of any claim that could have been raised); see also *Traylor* v. *State*, 332 Conn. 789, 809 n.17, 213 A.3d 467 (2019) ("[r]aising a claim at oral argument is not . . . a substitute for adequately briefing that claim"). Although we are solicitous of self-represented parties, "the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law." (Internal quotation marks omitted.) *Tonghini* v. *Tonghini*, 152 Conn. App. 231, 240, 98 A.3d 93 (2014). "It is necessary to this court's review of a party's claims on appeal that his brief contain, inter alia, argument and

granted two of the motions for contempt, concluding that the plaintiff wilfully had failed to pay in full his unallocated alimony and child support obligation to the defendant or to make required installment payments toward the satisfaction of a lump sum property distribution award. The court denied a third motion for contempt that alleged that the plaintiff wilfully violated the parties' separation agreement (agreement), which was incorporated into the dissolution judgment, by making a postdissolution investment in a CrossFit franchise, but nonetheless made a finding that the investment had breached the parties' agreement.[2]

On appeal, the plaintiff claims that the court improperly (1) determined that he wilfully had failed to comply with his financial obligations to the defendant despite a lack of any finding by the court regarding his assertion that he lacked the ability to pay, and (2) found that his investment in the CrossFit franchise breached the parties' agreement despite also finding that he was current on his financial obligations to the defendant at the time that the investment was made, which, according to the express terms of the agreement, rendered the investment permissible.[3] For the reasons that follow,

analysis regarding the alleged errors of the trial court, with appropriate references to the facts bearing on the issues raised." *Zappola* v. *Zappola*, 159 Conn. App. 84, 86, 122 A.3d 267 (2015).

[2] Although the court denied the motion for contempt, the plaintiff is aggrieved by the court's adverse factual finding with respect to that motion because any breach of the agreement could be used against him in subsequent contempt proceedings. See *McKeon* v. *Lennon*, 131 Conn. App. 585, 607, 27 A.3d 436, cert. denied, 303 Conn. 901, 31 A.3d 1178 (2011).

[3] Both parties were represented by counsel at the time of the dissolution judgment and throughout the postjudgment proceedings that underlie this appeal. Each has elected, however, to appear as a self-represented party before this court. The briefs provided to this court lack needed clarity with respect to the issues being raised and analysis of those issues. See footnote 1 of this opinion. Nonetheless, we address all issues properly raised and sufficiently briefed, albeit not necessarily in the same order. With respect to additional claims of error that the defendant has attempted to raise for the first time in her appellee's brief, all such claims are unreviewable because she failed to file her own appeal or a cross appeal challenging those aspects of the court's judgment. See also footnote 12 of this opinion.

we agree that the court improperly granted the defendant's motions for contempt regarding the unallocated support orders and the installment payments on the lump sum property award because the court failed to consider and to determine whether the plaintiff had the ability to pay. We further agree that the court's finding that the plaintiff breached the agreement by investing in the CrossFit franchise was clearly erroneous. We accordingly reverse those aspects of the trial court's judgment, including the court's remedial orders, and remand for further proceedings on the improperly granted motions for contempt. We otherwise affirm the judgment of the court.

The record reveals the following relevant facts and procedural history. The plaintiff and the defendant married in August, 1997. For decades, the plaintiff has owned and operated a successful business that specializes in the installation and repair of paddle tennis courts. As the trial court indicated in its memorandum of decision, the plaintiff considers his business to be the premier company in this field, and it has operated, at least until recently, profitably and without significant competition. The business requires the plaintiff to travel all over the country, particularly between the months of January and July, to conduct tours of inspection that the court described as "fly-drive weekends in which he traditionally views and assesses literally hundreds of paddle tennis courts."

In December, 2012, the plaintiff filed for a dissolution of the parties' marriage, and, on September 11, 2014, the trial court, *Hon. Stanley Novack*, judge trial referee, rendered a judgment of dissolution on the stipulated ground that the parties' marriage had broken down irretrievably.[4] The court's dissolution judgment incorporates by reference a comprehensive, written agreement entered into by the parties, both of whom were

[4] The parties have three daughters from the marriage, who, at the time of the dissolution judgment, were fourteen, twelve, and nine years old.

represented by counsel. Of particular relevance to the issues in the present appeal are articles II, V, and VI of that agreement.

Article II of the agreement addresses the division of the parties' real property. It provides in relevant part that, following the dissolution of the parties' marriage, the parties would continue to own their former marital residence in Wilton as tenants in common, but that the defendant would have the exclusive use and occupancy of the home. The parties agreed to share equally in most of the ownership and maintenance expenses postdissolution, including with respect to, inter alia, payment of the mortgage, real estate taxes, and an existing home equity line of credit. The plaintiff is also responsible for one third of the cost of the homeowners insurance. Pursuant to the agreement, the defendant can elect to sell the marital residence at any time following the dissolution of the parties' marriage in accordance with the terms set forth in the agreement provided that, at the latest, she list the home for sale sixty days before their youngest daughter's completion of high school.[5] See footnote 4 of this opinion.

Pursuant to article V of the agreement, the plaintiff agreed to complete a lump sum property distribution of $485,950 to the defendant on or before December 1, 2024. The plaintiff further agreed to satisfy this obligation by making, at a minimum, ten annual installment payments of $48,595, which were due each year on December 1, beginning in 2015. Payments are to include "all interest due and payable on the remaining balance."[6] Simple interest of 3 percent is to accrue on any unpaid

[5] The agreement provides that the defendant is entitled to any equity left in the property provided that 50 percent of that amount is to be credited as an offset against any balance remaining on the plaintiff's lump sum property obligation to the defendant as described in article V of the agreement, and, if such credit exceeds any balance due, the resulting overage is to be paid directly to the plaintiff.

[6] The plaintiff is permitted under the agreement to prepay all or any part of the lump sum obligation at any time.

balance of the lump sum property distribution beginning on March 1, 2019. The agreement also provides, however, that, notwithstanding the 3 percent interest provision, "if the [plaintiff] tenders late a payment due under this [a]rticle V for any reason, defined as more than thirty days following December 1 in any given year, interest shall thereafter accrue on the remaining principal balance at a rate of [10] percent per annum." The plaintiff further agreed that the lump sum property payment as set forth in article V of the agreement is to take "precedence to [his] undertaking any new business ventures or opportunities" and that he would not open any new business or make any capital investment in a business of more than $25,000 "unless he [was] current on his obligations to the [defendant] pursuant to this [a]rticle V." Significantly, paragraph B of article V expressly provides that the plaintiff's obligation to make any lump sum property installment payments and the accrual of any interest on that obligation is "suspended . . . during any month that the [plaintiff] has paid all of the obligations set forth in [article II]," which, as we have discussed, pertains to the ownership and maintenance of the former marital residence.

Article VI of the agreement sets forth the plaintiff's obligation to make monthly unallocated alimony and child support payments to the defendant for a period of twelve years. For the first seventy-eight months, the plaintiff is required to pay to the defendant $16,666.66 per month, amounting to $200,000 per year, following which the payments would step down to $11,666.66 for an additional thirty months, and, finally, to $9000 a month through the end of August, 2026. Article VI expressly preserves the plaintiff's rights to seek modification pursuant to General Statutes § 46b-86 (b),[7] but

[7] General Statutes § 46b-86 (b) provides in relevant part that, following a dissolution of marriage awarding alimony, "the Superior Court may, in its discretion and upon notice and hearing, modify such judgment and suspend, reduce or terminate the payment of periodic alimony upon a showing that the party receiving the periodic alimony is living with another person under

precludes him from seeking modification on the basis of any increase in the defendant's earnings unless they exceed $75,000 annually. It further precludes the plaintiff from seeking a downward modification for all other reasons other than a "medical catastrophe" that prevents him from operating his business or a declaration of a recession by the National Bureau of Economic Research, provided such recession also has a measurably negative effect on his own employment, income, or business.

At the time of dissolution, the plaintiff was in reasonably good health. In February, 2015, however, the plaintiff was diagnosed with atrial fibrillation. In July, 2015, he had open-heart surgery to repair his heart's mitral valve, which was followed by what the trial court found was "a four month period of recovery [in which] his activities, including driving, were limited." Although the plaintiff was current with his unallocated support obligations through the end of 2015, starting in January, 2016, he unilaterally began reducing his payment from $16,667 to $10,000 per month.

In February, 2016, the plaintiff filed a motion seeking a downward modification of the unallocated support order, arguing that he had suffered a serious decline in his health that rendered him unable to continue to operate his business in the same manner and pace that he had at the time of dissolution. The plaintiff also filed a motion seeking relief from the payment terms of the lump sum property distribution. According to the plaintiff, his declining health rendered his ability to comply

circumstances which the court finds should result in the modification, suspension, reduction or termination of alimony because the living arrangements cause such a change of circumstances as to alter the financial needs of that party. In the event that a final judgment incorporates a provision of an agreement in which the parties agree to circumstances, other than as provided in this subsection, under which alimony will be modified, including suspension, reduction, or termination of alimony, the court shall enforce the provision of such agreement and enter orders in accordance therewith."

with the payment schedule set forth in the parties' agreement impossible. He clarified that he was not seeking a modification of the total amount of the lump sum property distribution but, rather, was asking the court to order only his obligation to make annual payments suspended for two calendar years, to reduce the amount of each annual payment by one half, and to extend the number of annual payments as needed to allow for full payment at the lower annual rate.[8]

In March, 2016, the defendant filed several motions for contempt. One motion claimed that the plaintiff had failed to make the required monthly, unallocated support payments to her in May, 2015, and in January, February, and March, 2016. Another motion claimed that the plaintiff had failed to make the first annual installment payment toward the lump sum property distribution, which the defendant argued had become due on December 1, 2015.[9]

In May, 2016, the defendant filed objections to the plaintiff's motion to modify the unallocated support orders and to his motion seeking to alter the payment terms of the lump sum property distribution. The defendant argued that, under the express terms of the parties'

[8] The plaintiff captioned his motion as a motion "to effectuate judgment," making the argument that, because he was not seeking a reduction in the total amount of the lump sum distribution, the court could, pursuant to its general authority to make orders necessary to effectuate a dissolution judgment, alter the payment terms that were set forth in the parties' agreement. The court clearly rejected this argument by denying the motion, and this is among those determinations that the plaintiff has failed properly to challenge in the present appeal. See footnote 1 of this opinion.

[9] Another motion for contempt concerned the plaintiff's alleged failure to pay his share of certain medical and extracurricular expenses for the children. Although the court denied that motion, concluding that the defendant had failed to demonstrate that the plaintiff's actions were wilful, it nevertheless concluded that the plaintiff owed the defendant an arrearage of $3494.71 with respect to these items and incorporated that amount into the cumulative total arrearage owed to the defendant.

agreement, which the court incorporated into the dissolution judgment, the plaintiff could seek a modification only in the event of a "medical catastrophe" that "prevent[ed] him from operating his business . . . ." According to the defendant, although the plaintiff's asserted medical situation may have resulted in a *decline* in the business, it did not *prevent* operation of the business. Further, the defendant argued that the plaintiff had received a full medical clearance from his physicians and that he continued to participate in physically strenuous leisure activities such as ice hockey and CrossFit. With respect to the requested changes to the lump sum property distribution order, the defendant argued that the court lacked any authority to modify the property settlement terms to which the parties had agreed.

The plaintiff subsequently filed an objection to the defendant's motion for contempt regarding his lump sum property payment obligation. According to the plaintiff, he had been paying his portions of the ownership and maintenance expenses for the former marital home as required under article II of the agreement and, accordingly, his obligation to begin payment of the lump sum property distribution was suspended in accordance with paragraph 5.1 B of article V of the agreement, which provided that any payments and interest accrual "shall be suspended . . . during any month that the [plaintiff] has paid all of the obligations set forth in paragraph 2.1 [of article II]." Because his obligation to make payments regarding the lump sum property distribution was suspended, he argued, he could not have violated a court order by not making a payment on December 1, 2015, as alleged in the defendant's motion for contempt.[10]

[10] In its decision granting the motion for contempt, the trial court failed to address this argument.

On September 15, 2016, the defendant filed another motion for contempt. The defendant claimed in this motion that the plaintiff had opened a new business called CrossFit Science Park and had invested in excess of $25,000 in this new business despite not being current on his obligations to the defendant under article V of the agreement. The defendant argued that this was in direct violation and wilful disregard of paragraph 5.1 H of article V of the agreement, which prohibits such investments if the plaintiff was in arrears on his obligations to the defendant.

As a result of numerous continuances requested by both parties and additional delays related to discovery disputes, the court, *Hon. Michael Shay*, judge trial referee, did not hear argument on what the court described as the parties' "plethora of motions" until May 23, 2018. That hearing continued the following day and, subsequently, to August 21, 2018. Each party filed updated financial affidavits and child support guideline worksheets with the court.

On October 4, 2018, the court issued a memorandum of decision disposing of the parties' various motions. With respect to the plaintiff's motion to modify the unallocated support orders, the court concluded that the divorce decree unambiguously limited the plaintiff's right to seek a downward modification of the support orders to three grounds, only one of which was implicated by the plaintiff's motion. Relevant to the plaintiff's motion to modify was the provision that the plaintiff could seek modification if he suffered a "medical catastrophe" that "prevents him from operating his business." Although the court recognized that the plaintiff's heart surgery and atrial fibrillation were serious medical conditions that were "somewhat debilitating" to the plaintiff and, in the absence of the parties' agreement, likely would have constituted a substantial change in circumstances warranting modification, his adverse

medical condition did not constitute a "catastrophe" within the usual meaning of that term nor, despite the negative impacts on the business and loss of income, did it prevent him from operating his business. Accordingly, in light of the constraints on modification of the support orders placed on the court by the parties' agreement, the court denied the motion to modify.

The court also denied the plaintiff's so-called motion to effectuate the judgment, in which he had sought relief from his obligations under the lump sum property distribution award. The court first recognized that the lump sum property payment was an award of marital property and that, generally, such awards are not subject to postjudgment modification. As argued by the plaintiff, the court recognized its authority to enter orders merely effectuating rather than modifying the terms of a marital property settlement. The court concluded, however, that the relief requested by the plaintiff would alter the details of the parties' agreement and, thus, constituted an impermissible modification. The court also rejected the plaintiff's argument that his performance should be excused under the doctrine of impossibility, concluding that the parties had contemplated the risk that the plaintiff might be unable to meet his obligation due to an unexpected occurrence and provided contractual contingencies, including the accrual of interest and the application of future proceeds from the sale of the marital home against the obligation.

The court granted the defendant's motion for contempt regarding unallocated child support and alimony payments. The court determined that the support orders were clear and unambiguous, and that the plaintiff breached the orders by unilaterally choosing to reduce his unallocated support payments to the defendant from $16,666.66 per month to $10,000 per month, resulting in an arrearage of $213,333.12. The court indicated that

the defendant had "demonstrated by clear and convincing evidence that the [plaintiff]'s actions amount[ed] to wilful contempt," although the decision is silent as to the nature of this evidence.

The court also granted the defendant's motion for contempt regarding the lump sum property award, finding that the plaintiff was in arrears on his obligation to make annual payments toward the lump sum property distribution. The court found that article V of the parties' agreement, incorporated into the judgment as an order of the court, was clear and unambiguous. The court further found that, as of the date of the hearing, the plaintiff had "failed and neglected to make any annual lump sum payments to the [defendant] commencing December 1, 2015," and that this failure constituted a breach of the court's order. As a result of that breach, the court concluded that the plaintiff was in arrears on his obligation in the amount of $145,785 plus monthly accrued interest of $137,685.72. The court again indicated that the defendant had "demonstrated by clear and convincing evidence that the [plaintiff]'s actions amount[ed] to wilful contempt." The court did not discuss the evidence and, as previously noted; see footnote 10 of this opinion; failed to address the plaintiff's argument that his duty to pay was suspended by his continued payment of his obligations pertaining to the former marital residence.

The court denied the defendant's other motion for contempt concerning the plaintiff's investment in the CrossFit franchise. The court found that, although the plaintiff had breached the parties' agreement, his "actions were made in good faith, with the reasonable expectation that his financial situation would improve" and that the defendant had "failed to meet her burden of proof, by clear and convincing evidence, that the [plaintiff]'s actions amounted to wilful contempt." The plaintiff had argued that his investment in the CrossFit franchise had occurred in 2015 at a time when he was

current on his obligations to the defendant and, therefore, the investment technically had not breached the agreement. The court never expressly addressed that argument in concluding that the plaintiff was in breach.

By way of relief, the court found that the total arrearage owed by the plaintiff to the defendant was $500,298.55, and ordered him to make monthly installment payments of $5000, beginning on November 1, 2018, until the sum was paid in full.[11] The court also awarded the defendant $75,000 as "a contribution toward the legal fees and costs of suit incurred by [her] in connection with this case," which the plaintiff was ordered to pay in monthly installments of $2500 beginning on November 1, 2018. Finally, the court ordered a contingent wage withholding order pursuant to General Statutes § 52-362 (b) to secure future unallocated support payments. The court found that the plaintiff earned net income from employment of $180,700 based on gross income of $283,000, and that the plaintiff also received additional unspecified income from a rental property.

On October 22, 2018, the plaintiff filed a motion for reargument, asserting many of the same arguments he now makes on appeal.[12] The plaintiff sought reargument of the court's findings of contempt regarding the

[11] This amount later was amended by the court to $510,298.55, to reflect additional arrearages accumulated by the plaintiff for failing to pay in full his unallocated support obligations in September and October, 2018, which were not accounted for in the court's original October 4, 2018 decision. The change was made in response to a subsequent motion for contempt filed by the defendant and granted by the court. Additional motions for contempt against the plaintiff currently are pending before the trial court.

[12] On October 23, 2018, the defendant filed a "motion for articulation" with the trial court in which she essentially challenged the court's finding that the plaintiff was current on his obligations to the defendant through 2015 and, accordingly, sought changes to the court's calculation of the arrearage owed to her by the plaintiff. She also filed a motion to reargue, seeking an order for immediate payment of all arrearages rather than monthly installment payments. On October 24, 2018, the defendant filed a second motion to reargue raising additional issues. The court denied all three motions on November 6, 2018.

lump sum property distribution and unallocated support orders and its determination that his CrossFit investment had breached the parties' agreement. The plaintiff also sought reargument of the court's conclusions that the doctrine of impossibility was inapplicable and that the 10 percent interest penalty provision was not void and unenforceable as against public policy. Finally, the plaintiff sought reargument of the "structure of the court's order for payment of the arrearage and counsel fees." The court denied the motion for reargument on November 6, 2018, without comment. This appeal followed.

Following oral argument, we ordered the trial court to issue an articulation responding to the following questions: "In holding the plaintiff in contempt with respect to his obligation to pay the defendant $200,000 per year in unallocated alimony and child support, did the trial court conclude that he had an ability to pay such support notwithstanding its finding that his net yearly income as of August 21, 2018 was $180,700? If the court concluded that the plaintiff had the ability to make such payments, what facts did it find or rely upon in reaching that conclusion? In holding the plaintiff in contempt for failing to make annual lump sum property payments to the defendant pursuant to article [V, paragraph] 5.1 A and C of the parties' separation agreement, did the trial court find, pursuant to [paragraph] 5.1 B, that the plaintiff had not paid his obligations set forth in article [II, paragraph] 2.1 of the agreement? If the court concluded that the plaintiff had not complied with [paragraph] 2.1, what facts did it find or rely in reaching that conclusion?"

To the extent that the defendant was aggrieved by the court's October 4, 2018 rulings or the denial of her subsequent motions to reargue, she did not file an appeal or cross appeal from those judgments and, accordingly, any issues challenging the court's rulings, to the extent that they are raised in her appellee's brief, are not properly before us. See Practice Book § 61-8; *Gagne* v. *Vaccaro*, 311 Conn. 649, 661–62, 90 A.3d 196 (2014).

The court issued an articulation on March 17, 2020. The court indicated that it "made no specific finding that the plaintiff had the ability to pay the unallocated alimony and child support, either at the time of his motion or at the time of the judgment." The court went on to note, however, that the $180,700 of income reported on the plaintiff's updated August 21, 2018 financial affidavit reflected only a partial year's income. The court further indicated that, although it made no specific finding that the plaintiff had not paid all of the obligations set forth in article II, paragraph 2.1 of the agreement, the court believed that the defendant had offered unrebutted evidence that the plaintiff did not pay his share of the homeowners insurance premium in 2016, one of the obligations listed in paragraph 2.1, and, therefore, "the court proceeded as if there was no suspension" of his obligation to begin making the installment payments on the lump sum property distribution order contained in article V of the agreement.[13] We note that the parties were given an opportunity to file supplemental memoranda addressing the trial court's articulation, but neither party filed a response. We turn now to the issues raised by the plaintiff on appeal.

I

The plaintiff first claims that the court improperly granted two of the defendant's motions for contempt.

[13] In its articulation response, the trial court seeks to justify the lack of any findings regarding the plaintiff's ability to pay and the status of his obligations set forth in article II, paragraph 2.1 of the agreement, which was relevant to whether the lump sum property distribution payments were required, by pointing to evidence in the record that arguably may have supported *implicit* findings that he had the ability to pay and that he was not current on his obligations regarding the former marital home. By stating that it never made such findings, however, these recitations of fact, even if they find support in the record, are unavailing because they cannot substitute for the initial lack of findings. See *Koper* v. *Koper*, 17 Conn. App. 480, 484, 553 A.2d 1162 (1989) ("[a]n articulation is not an opportunity for a trial court to substitute a new decision nor to change the reasoning or basis of a prior decision").

Specifically, he claims that the court improperly found him in wilful noncompliance with his unallocated support obligation and with the lump sum property distribution order despite conclusive and unrebutted evidence that he lacked the ability to pay because of a reduction in his annual earnings. We agree that the court failed to give due consideration to whether the plaintiff had the ability to pay his financial obligations, particularly in light of the court's express findings regarding the amount of the plaintiff's net income.[14] This lapse in the court's analysis leaves us with a definite and firm conviction that the court's findings that the plaintiff engaged in wilful violations of his financial obligations are clearly erroneous. Accordingly, we reverse the court's granting of the defendant's motions for contempt and the resulting remedial orders, and remand for further proceedings on the motions, including a new hearing to identify properly any arrearage that may be owed to the defendant and to craft new remedial orders as appropriate.[15]

[14] As previously indicated, with respect to the lump sum property payments, the court failed to address in its decision whether the plaintiff's obligation to make one or more of the lump sum property installment payments at issue was suspended in accordance with the express terms of the agreement because the plaintiff was paying his portion of the ownership and maintenance of the former marital home. The court indicated in its response to an articulation request from this court that it never made any specific finding that the plaintiff was not current on his obligations under article II of the agreement and had "proceeded as if there was no suspension." Although the plaintiff has failed to raise or brief this issue as a claim of error on appeal, the question of whether lump sum property payments were due and owing should be considered by the court on remand in ruling on the motion for contempt and in recalculating the amount of any arrearage owed by the plaintiff. Any suspension of the plaintiff's payment obligation would have affected a proper determination by the court of whether the plaintiff was in contempt for failing to pay the lump sum property order and also would have affected the calculation of the total amount of any arrearage owed to the defendant by the plaintiff. Although the plaintiff has not briefed this issue as a separate basis for reversal of the contempt finding, that does not preclude its consideration by the trial court on remand.

[15] "[E]ven in the absence of a finding of contempt, a trial court has broad discretion to make whole any party who has suffered as a result of another party's failure to comply with a court order." (Internal quotation marks

"Contempt is a disobedience to the rules and orders of a court which has power to punish for such an offense. . . . If the underlying court order was sufficiently clear and unambiguous, we . . . determine whether the trial court abused its discretion in issuing . . . a judgment of contempt, which includes a review of the trial court's determination of whether the violation was wilful or excused by a good faith dispute or misunderstanding. . . . [T]his court will not disturb the trial court's orders unless it has abused its legal discretion or its findings have no reasonable basis in fact. . . . It is within the province of the trial court to find facts and draw proper inferences from the evidence presented. . . . [E]very reasonable presumption will be given in favor of the trial court's ruling, and [n]othing short of a conviction that the action of the trial court is one which discloses a clear abuse of discretion can warrant our interference. . . .

"To constitute contempt, a party's conduct must be wilful. . . . Noncompliance alone will not support a judgment of contempt. . . . The inability of a party to obey an order of the court, without fault on his part, is a good defense to the charge of contempt. . . . The contemnor must establish that he cannot comply, or was unable to do so." (Citations omitted; internal quotation marks omitted.) *Brody* v. *Brody*, 145 Conn. App. 654, 662, 77 A.3d 156 (2013).

Accordingly, a party who is unable to comply with financial orders contained in a dissolution judgment due to a demonstrable inability to pay has a proper defense to a claim of contempt. See, e.g., *Afkari-Ahmadi* v. *Fotovat-Ahmadi*, 294 Conn. 384, 397, 985

omitted.) *Brody* v. *Brody*, 153 Conn. App. 625, 636, 103 A.3d 981, cert. denied, 315 Conn. 910, 105 A.3d 901 (2014). In the present case, the lack of any findings by the court regarding the plaintiff's past or present ability to pay his obligations not only fatally undermines the court's finding of contempt but also the court's remedial orders.

A.2d 319 (2009) ("[i]nability to pay is a defense to a contempt motion" (internal quotation marks omitted)); *Bauer* v. *Bauer*, 173 Conn. App. 595, 600, 164 A.3d 796 (2017) ("inability of an obligor to pay court-ordered alimony, without fault on his part, is a good defense to a contempt motion"). "Whether [a party has] established his inability to pay the order by credible evidence is a question of fact. Questions of fact are subject to the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Because it is the trial court's function to weigh the evidence . . . we give great deference to its findings." (Internal quotation marks omitted.) *Afkari-Ahmadi* v. *Fotovat-Ahmadi*, supra, 397–98.

In the present case, the plaintiff unquestionably raised as a defense before the trial court that he no longer could fully satisfy his financial obligations as set forth in the dissolution judgment beginning in 2016 because he had suffered a considerable drop in income due to his health problems.[16] In support of this defense, the plaintiff provided testimony regarding his finances. Through that testimony, he entered into evidence his federal tax returns for 2014 through 2016. These returns show the

[16] The plaintiff only filed a written objection to the motion for contempt directed at his failure to make installment payments toward the lump sum property award, and, in that objection, argued only that his obligation to make installment payments was suspended under the terms of the agreement and, thus, he could not be in violation for nonpayment. Nonetheless, it is clear from our review of the record, which includes the transcripts of the hearing, as well as other pleadings before the court, that the plaintiff clearly placed the court and the defendant on notice of his claim that he was unable fully to satisfy his payment obligations under the terms of the dissolution judgment because he did not have the financial means to meet his obligations.

plaintiff's net income declined from $474,128 in 2014, when the agreement was executed, to $220,324 in 2015, and $205,595 in 2016.[17] He also submitted yearly profit and loss statements from his business, including one for 2017 showing that his income from the business in 2017 was similar to the two prior years. Finally, he filed a financial affidavit at the August, 2018 hearing from which his 2018 annual gross income could be calculated as $282,880, resulting in a net annual income of $180,700. The record discloses no documentary evidence showing any additional substantial sources of income for the plaintiff.[18]

The court makes no indication in its memorandum of decision that it did not credit any of the financial information provided by the plaintiff. The defendant provided no contrary financial records to the court, and, although the defendant asserted at oral argument before this court and in her testimony to the trial court her belief that the plaintiff was "cooking the books"

[17] We have calculated these net income figures from the plaintiff's 1040 federal income tax returns by taking the adjusted gross income listed on line 37 of the return, adding back to that figure any alimony deducted from the adjusted gross income for that year, and subtracting the total tax liability paid by the plaintiff as listed on line 63 of the return. We chose this method because it is illustrative of the actual net income that was available to the plaintiff to satisfy his financial obligations to the defendant under the divorce decree, including the unallocated support payments. Our calculations are not meant to be viewed as factual findings, which we cannot make; see *Zitnay* v. *Zitnay*, 90 Conn. App. 71, 81, 875 A.2d 583, cert. denied, 276 Conn. 918, 888 A.2d 90 (2005); but merely as reflecting the undisputed evidence that was before the trial court.

[18] The court stated that the plaintiff also received "rental income from his property at 300 Post Road in Westport." This is the only finding by the court of any potential additional income source other than self-employment, but the court does not state the amount of the purported rental income. Form 8582 attached to the plaintiff's 2016 federal tax return lists the net annual rental income from the Post Road property as only $9808. The plaintiff's 2018 financial affidavit, credited by the court, lists no amount of income derived from rental and income producing property. In any event, this relatively small amount of additional income does not alter our analysis.

with respect to the amount of money available to him through his business, she also conceded that her lawyer had not offered evidence of any improper accounting to the court in support of her motions. The court expressly credited the plaintiff's financial affidavit provided to the court at the August, 2018 hearing in its written decision, finding that "the [plaintiff] has a net income from employment in the amount of $180,700 based upon a gross income of $283,000."

It is undisputed that the plaintiff's yearly unallocated support obligation to the defendant alone totals $200,000. On top of that obligation are the additional requirements that the plaintiff pay his share of expenses related to the ownership and maintenance of the former marital home, which the parties agreed amounts to, at a minimum, an additional $40,000 annually. The plaintiff is also required under the parties' agreement to maintain both medical insurance for the children and a $2.5 million life insurance policy benefitting the defendant, which annual premiums total approximately $42,000. To the extent that he is also responsible for making the approximately $48,000 yearly lump sum property distribution installment payments, his total obligations to the defendant and the children exceed $300,000, and this estimate of his total obligations does not account for any of his reasonable and necessary living expenses. In short, the plaintiff's financial obligations appear clearly to exceed the income attributed to him by the trial court.

Although the court explained that it lacked any authority to alter the parties' agreement, it nevertheless failed to set forth any analysis of the plaintiff's finances either at the time of the alleged contempt or as of the date of the hearing on the defendant's motions, and it acknowledges in its articulation that it "made no specific finding that the plaintiff had the ability to pay the unallocated alimony and child support, either at the

time of his motion or at the time of the judgment." A party's inability to pay in accordance with a court order is a proper defense to a motion for contempt; see *Afkari-Ahmadi* v. *Fotovat-Ahmadi*, supra, 294 Conn. 397; and the plaintiff met his burden of both raising that defense and presenting evidence supporting it—evidence that was at least in part credited by the trial court. It was an abuse of discretion for the court not to have considered the issue of the plaintiff's ability to pay or to have rejected that defense out of hand before finding that the plaintiff's failure to meet his financial obligations to the defendant was wilful. Because the court's finding of wilfulness stands in direct contradiction to the facts found by the court related to the plaintiff's ability to pay, we are left with the definite and firm conviction that the finding is clearly erroneous and, thus, cannot stand. Accordingly, we remand for a new hearing at which his defense may be duly considered by the court. Furthermore, because the plaintiff's ability to pay is a fact that also should have been considered by the court in constructing its remedial orders, we necessarily must also reverse those orders.

This decision should not be read as countenancing the plaintiff's decision to engage in self-help by unilaterally reducing his payments to the defendant prior to seeking modification or as taking any position on whether, in fact, the plaintiff has the ability to meet the substantial financial obligations to which he agreed, which agreement also included strictly limiting his rights to seek modification. Nevertheless, because the only evidence presented and relied on by the court in its decision supports the plaintiff's argument that he was unable to continue to pay in full his unallocated support payments and other financial obligations, and the trial court failed to reconcile its findings regarding the plaintiff's income with its determination that the plaintiff's failure to pay the defendant was wilful, we

conclude that the trial court improperly found him in contempt and granted the defendant's motions.[19]

II

The plaintiff also claims that the court improperly determined that his investment in the CrossFit franchise breached the parties' agreement. Specifically, the plaintiff argues that the court misinterpreted the relevant portion of the parties' agreement. We agree.

"Because a separation agreement incorporated into a dissolution decree is in the nature of a contract, we note the following general principles of contract interpretation. A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. . . . [A]ny ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms. . . . A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . When construing the contract, we are mindful that [t]he contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision

[19] The plaintiff raises and briefs as an additional claim on appeal that the court improperly concluded that the requirement in the parties' agreement that he pay 10 percent interest on any outstanding balance if he failed to make timely installment payments toward the lump sum property award was not a penalty that was void as against public policy. Because we reverse the court's decision finding the plaintiff in contempt for failing to make the lump sum property installment payments and having determined that a recalculation is needed regarding the total of any arrearage owed to the defendant, it is unnecessary to resolve any present challenge to the court's application of the 10 percent interest provision. Because it is unclear whether that issue likely is to arise again on remand, we decline to address the issue at this time.

must be given effect if it is possible to do so. . . . In giving effect to all of the language of a contract, the law of contract interpretation . . . militates against interpreting a contract in a way that renders a provision superfluous." (Citations omitted; internal quotation marks omitted.) *Flaherty* v. *Flaherty*, 120 Conn. App. 266, 269–70, 990 A.2d 1274 (2010). Applying these principles to the agreement incorporated into the dissolution judgment in the present case, we conclude that the trial court's interpretation of the agreement was clearly erroneous, and, thus, its finding that the plaintiff breached the agreement cannot stand.

The agreement expressly and unambiguously provides that the plaintiff's obligation to complete the lump sum property transfer to the defendant in accordance with article V of the agreement was to take "precedence to [his] undertaking any new business ventures or opportunities . . . ." To ensure this, the plaintiff agreed to restraints on his right to open or to invest in new business ventures postdissolution. Specifically, the agreement provides that, going forward, the plaintiff, either individually or through his business, could not open any new businesses or make any capital investment in a business of more than $25,000 "*unless he is current on his obligations to the* [*defendant*] *pursuant to this* [*a*]*rticle V.*" (Emphasis added.) The agreement further provided in relevant part that any installment payments toward the satisfaction of the lump sum property award set forth in article V of the agreement "shall be payable annually *commencing on December 1, 2015* . . . ." (Emphasis added.)

In its memorandum of decision, the court found that the provision limiting the plaintiff's right to make postdissolution investments "was certainly clear and unambiguous . . . ." It also found that the plaintiff made an investment in the CrossFit franchise "[a]t some point in 2015," and that "his investment was well in excess

of [$25,000].'' The only evidence before the court was that this investment occurred in July, 2015, which unquestionably was before the earliest date on which the plaintiff's obligation to make a lump sum installment payment arose pursuant to article V of the agreement. The court appears not to have considered this fact, however, in reaching its conclusion that the plaintiff ''was clearly in breach'' of the investment limiting order. Legally and logically, however, because the agreement limited the plaintiff's right to make investments only in the event that he was not current on his lump sum payment obligations, and no such obligation existed at the time he invested in the CrossFit franchise, the court's finding was clearly erroneous and a misinterpretation of the express terms of the agreement. Although we reverse the court's factual finding, because the court denied the motion for contempt, it is unnecessary to reverse the court's judgment on the motion.

The judgment is reversed with respect to the granting of the defendant's two motions for contempt related to the unallocated support orders and the lump sum property distribution award, the related remedial orders, and with respect to the finding that the plaintiff was in breach of the investment limitation provision contained in article V of the agreement, and the case is remanded for a new hearing on the motions for contempt, at which the court may recalculate any arrearage owed by the plaintiff to the defendant and impose reasonable remedial orders as appropriate; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

LA TANYA AUTRY *v.* BRENDAN HOSEY ET AL.
(AC 42869)

Lavine, Prescott and Moll, Js.

Syllabus

The plaintiff sought to recover damages from the defendants, H and city of New Haven, for injuries she sustained when she was struck by a police cruiser driven by H while she was a pedestrian crossing a city street. Following a bench trial, the trial court found in favor of the plaintiff and awarded her economic and noneconomic damages. In calculating the noneconomic damages, the trial court found that the emotional trauma suffered by pedestrians struck by vehicles is "generally greater" than that suffered by the occupants of a motor vehicle involved in an accident. On the defendants' appeal to this court, *held* that the trial court's factual finding that pedestrians struck by motor vehicles suffer greater emotional trauma than occupants of a motor vehicle involved in an accident was clearly erroneous; there was no evidence in the record to support the court's finding and it was not a matter of common knowledge but, rather, a determination subject to verification by medical science and, in light of the weight given by the court to this finding in reaching its award of noneconomic damages and the lack of subjective complaints from the plaintiff regarding any emotional trauma she suffered, the judgment with respect to the award of noneconomic damages was reversed and the matter was remanded for a new hearing in damages.

Argued June 29—officially released October 13, 2020

Procedural History

Action to recover damages for personal injuries sustained as a result of the named defendant's alleged negligence, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Abrams*, *J.*; judgment for the plaintiff, from which the defendants appealed to this court. *Reversed in part*; *further proceedings*.

Audrey C. Kramer, assistant corporation counsel, for the appellants (defendants).

Stephen R. Bellis, for the appellee (plaintiff).

Opinion

PRESCOTT, J. The defendants, Brendan Hosey and the city of New Haven, appeal from the judgment of the trial court rendered, following a trial to the court, in favor of the plaintiff, La Tanya Autry. The plaintiff brought the underlying negligence action against the defendants seeking compensation for damages that she sustained when she was struck by Hosey's police cruiser while she was a pedestrian crossing a city street. On appeal, the defendants claim that the trial court, in its order, improperly calculated noneconomic damages for emotional trauma because the court lacked the necessary evidence to find that pedestrians suffer greater emotional trauma when struck by a vehicle than occupants of a vehicle. We agree with the defendants and, accordingly, reverse in part the judgment of the court and remand the matter for a new hearing in damages.

The court set forth the following facts and procedural history in its memorandum of decision. "A short time after 1 p.m. on October 20, 2015, the plaintiff was waiting on the northwest corner of the intersection of Chapel Street and High Street in New Haven. She had just begun her lunch break from her job at the Yale Art Gallery and was planning to head to Atticus Books, which is located on the south side of Chapel Street. At the same time, the defendant police officer's cruiser was stopped on High Street facing northbound, waiting for the [traffic] light to change so that he could turn left onto Chapel Street, which runs one-way westbound in that area. The day was bright, with the sun behind the defendant's back as he waited for the [traffic] light. The area of Chapel Street where the accident took place was in the shade, the sun being blocked by the building on the southwest corner of the intersection.

"When the [traffic] light changed, the plaintiff began her southbound cross of Chapel Street about a foot

west of the marked crosswalk. At the same time, the defendant began to turn left into the southern lane of Chapel Street. The plaintiff 'cut the corner' as she crossed Chapel Street, so that she was approximately five feet west of the crosswalk when she was struck by the defendant's police cruiser. The impact propelled the plaintiff a foot or two from the point of impact. She was taken by ambulance from the scene and suffered pain to her entire body for a few days after the accident. She suffered ongoing neck and back pain for . . . approximately a year after the accident, but seems to have generally recovered from any accident-related injuries.

"Based on the plaintiff's testimony and the medical records admitted into evidence, the court is satisfied that the [cost of the] plaintiff's course of treatment which totaled $5738 was reasonable under the circumstances. In addition, the court finds that the evidence supports a finding that the plaintiff missed time from work for a short period of time, suffering lost wages in the amount of $626.01.

"The plaintiff and the defendant both provided entirely credible testimony, each appearing to accept the fact that they bore some level of responsibility for the accident. At the time of the accident, the plaintiff was clearly outside the crosswalk by a relatively significant distance and she should have realized that she was in an area with significant vehicular traffic, particularly at that time of day. The defendant, on the other hand, was turning from a sunny area into a shady area, which he should have recognized would diminish his ability to see clearly. In addition, he was operating his vehicle at a place and time where he should have expected significant pedestrian traffic. Based on the foregoing, the court assesses 65 percent of the liability for the accident to the defendant and 35 percent to the plaintiff.

"The court awards the full amount of $6364.83 in economic damages . . . . As relates to the plaintiff's noneconomic damages, while evidence supports the contention that the plaintiff has essentially returned to her pre-accident level of functioning about a year after the accident, her claims of pain during that period were entirely credible. *Perhaps more importantly, the court is of the opinion that the emotional trauma suffered by pedestrians struck by vehicles is generally greater than that suffered by persons involved in auto accidents as drivers or passengers and factors that into its noneconomic damages award of $30,000.*" (Emphasis added.) This appeal followed. Additional facts will be set forth as necessary.

On appeal, the defendants claim that the court improperly premised its award of noneconomic damages on the clearly erroneous factual finding that pedestrians suffer greater emotional trauma than the occupants of a vehicle involved in a motor vehicle accident, when there was no evidence in the record to support that finding.[1] We agree.

We first set forth our standard of review. "On appeal, the function of this court is limited solely to the determination of whether the factual findings of the trial court are clearly erroneous or whether the decision is otherwise erroneous in law." (Internal quotation marks omitted.) *Baretta* v. *T & T Structural, Inc.*, 42 Conn. App. 522, 525, 681 A.2d 359 (1996). "The determination of damages involves a question of fact that will not be

[1] The defendants also claim that the plaintiff failed to plead in her complaint that she suffered emotional trauma. This argument, however, lacks merit because the plaintiff alleged that as a result of the incident, she endured pain and suffering. Emotional trauma is part of pain and suffering. See General Statutes § 52-572h (a) (2) ("'noneconomic damages' means compensation determined by the trier of fact for all nonpecuniary losses including; but not limited to, physical pain and suffering and mental and emotional suffering").

overturned unless it is clearly erroneous." (Internal quotation marks omitted.) *Commerce Park Associates, LLC* v. *Robbins*, 193 Conn. App. 697, 735, 220 A.3d 86 (2019), cert. denied sub nom. *Robbins Eye Center, P.C.* v. *Commerce Park Associates, LLC*, 334 Conn. 912, 221 A.3d 447 (2020), and cert. denied sub nom. *Robbins Eye Center, P.C.* v. *Commerce Park Associates, LLC*, 334 Conn. 912, 221 A.3d 447 (2020). "A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Ventres* v. *Goodspeed Airport, LLC*, 275 Conn. 105, 142, 881 A.2d 937 (2005), cert. denied, 547 U.S. 1111, 126 S. Ct. 1913, 164 L. Ed. 2d 664 (2006).

At trial, the plaintiff offered evidence that, immediately after being struck by Hosey's police cruiser, she was stunned, lay on the ground crying, and experienced intense pain throughout her body. Additionally, for several months following the accident, she experienced pain in her back and left knee. The court stated that it found the plaintiff's claims of pain to be credible. It further stated that "[*p*]*erhaps more importantly* . . . the emotional trauma suffered by pedestrians struck by vehicles is generally greater than that suffered by persons involved in auto accidents as drivers or passengers . . . ." (Emphasis added.) A careful review of the record and transcripts reveals that this factual statement, which explicitly provided an important basis for the court's award of $30,000 in noneconomic damages, is not supported by any evidence presented to the court.

Contrary to the plaintiff's argument, the trial court's statement is not a matter of common knowledge. See *Commissioner of Transportation* v. *Bakery Place Ltd. Partnership*, 83 Conn. App. 343, 348, 849 A.2d 896 (2004) ("[f]acts which are of common knowledge, that is, facts

so well known that evidence to prove them is unnecessary are proper subjects of judicial notice" (internal quotation marks omitted)); see also *State* v. *Tomanelli*, 153 Conn. 365, 368, 216 A.2d 625 (1966) ("proof by evidence concerning a proposition may be dispensed with where the court is justified, by general considerations, in declaring the truth of the proposition without requiring evidence from the party"). Indeed, whether a pedestrian who is struck by a motor vehicle generally suffers greater emotional trauma than a driver or passenger of a vehicle that is struck, is something that would not be "within the knowledge of people generally in the ordinary course of human experience" and is subject to reasonable dispute. Conn. Code Evid. § 2.1 (c) (1) and commentary. To illustrate, consider a hypothetical scenario in which an individual in a car is unexpectedly hit by a police cruiser and suffers physical injuries identical to the plaintiff in this case. To determine whether that individual necessarily would experience less emotional trauma than the plaintiff would require a level of psychological acumen that, in our view, is not a matter of common knowledge.

In addition, although expert testimony generally is not required to prevail on a claim for mental suffering; see *Iino* v. *Spalter*, 192 Conn. App. 421, 477–78, 218 A.3d 152 (2019); our Supreme Court has recognized that "[m]edical science has unquestionably become sophisticated enough to provide reliable and accurate evidence on the *causes* of mental trauma." (Emphasis added; internal quotation marks omitted.) *Rivera* v. *Double A Transportation, Inc.*, 248 Conn. 21, 27, 727 A.2d 204 (1999); see id., 31 (concluding that "mental suffering, even if unaccompanied by physical trauma to the body, constitutes an injury to the person under [General Statutes] § 52-584"). Here, the trial court based its award of noneconomic damages on its unsubstantiated opinion that one category of automobile related

accidents causes a greater amount of emotional trauma than another. Such a determination, which is subject to verification by medical science, is beyond the field of the ordinary knowledge of a trial judge. See *Franchey* v. *Hannes*, 155 Conn. 663, 666, 237 A.2d 364 (1967) ("[t]he rule requiring expert testimony . . . applies when the question involved goes beyond the field of the ordinary knowledge and experience of a trial judge"); *Sickmund* v. *Connecticut Co.*, 122 Conn. 375, 379, 189 A. 876 (1937) (generally, "[t]he effects upon the human system of diseases or injuries . . . are not within the sphere of common knowledge" (internal quotation marks omitted)).

Because there was no evidence before the trial court to support its factual finding regarding the "generally greater" emotional trauma suffered by pedestrians who are injured by a motor vehicle, and, as we have discussed, that fact is not a matter of common knowledge, the finding is clearly erroneous. We now turn to the issue of whether this improper factual finding warrants reversal as to the award of noneconomic damages.

"[W]here . . . some of the facts found [by the trial court] are clearly erroneous and others are supported by the evidence, we must examine the clearly erroneous findings to see whether they were harmless, not only in isolation, but also taken as a whole. . . . If, when taken as a whole, they undermine appellate confidence in the court's [fact-finding] process, a new hearing is required." (Internal quotation marks omitted.) *Osborn* v. *Waterbury*, 197 Conn. App. 476, 485, 232 A.3d 134 (2020). It is true that "[a] plaintiff may recover damages in a personal injury action for pain and suffering even when such pain and suffering is evidenced exclusively by the plaintiff's subjective complaints." (Internal quotation marks omitted.) *Iino* v. *Spalter*, supra, 192 Conn. App. 477–78. Here, however, the plaintiff's subjective complaints of pain and suffering exclusively pertained

to the physical injuries she sustained as a result of the collision. She did not complain or otherwise indicate that she had experienced mental suffering, for instance, by way of losing sleep, experiencing anxiety, or going to see a therapist. Therefore, and in light of the trial court's explicit indication of the importance of its opinion regarding the "generally greater" emotional trauma suffered by pedestrians, we cannot conclude that the error was harmless.

The judgment is reversed only as to the award of noneconomic damages and the case is remanded for a hearing in damages consistent with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

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SUPREME COURT PENDING CASES

The following appeals are fully briefed and eligible for assignment by the Supreme Court in the near future.

STATE *v.* JODI D., SC 20370
Judicial District of Waterbury at G.A. 4

Criminal; Assault of a Disabled Person; Whether General Statutes §§ 1-1f (b) and 53a-60b (a) (1) Were Not Unconstitutionally Vague as Applied to the Defendant; Whether Evidence was Sufficient for State to Prove a Beyond a Reasonable Doubt that Victim was "Physically Disabled" under Those Statutes. The defendant was charged with assault of a disabled person in the second degree in violation of General Statutes § 53a-60b (a) (1) after a physical altercation with her sister. Section 53a-60b (a) provides in relevant part that a person is guilty of assault of a disabled person in the second degree when that person commits assault in the second degree against an individual who is "physically disabled" as defined by General Statutes § 1-1f. Section 1-1f (b) in turn provides in relevant part: "An individual is physically disabled if he has any chronic physical handicap, infirmity or impairment, whether congenital or resulting from bodily injury, organic processes or changes or from illness." At trial, the victim testified about her extensive medical history, including back problems, multiple surgeries, and a nerve condition called fibromyalgia. A physician's assistant who provided treatment to the victim also testified at trial and noted that he had been treating the victim for "chronic pain issues, chronic low back pain and fibromyalgia syndrome" for several years. The defendant was found guilty and convicted of assault of a disabled person in the second degree, and she appealed. The Appellate Court (190 Conn. App. 353) affirmed the defendant's conviction. It rejected her claim that § 53a-60b (a) (1) was unconstitutionally vague as applied to her conduct because the term "physically disabled" as used therein and defined by § 1-1f (b) was impermissibly broad and unclear to the average person. The Appellate Court determined that the meaning of the term "physical disability" as used in §§ 1-1f (b) and 53a-60b (a) (1) was readily ascertainable and that the language of the statutes was "general enough to encompass a wide variety of physical conditions, yet specific enough to provide sufficient notice as to its meaning and, specifically, as to the types of bodily conditions encompassed by the term 'physical disability.' " It accordingly held that "a reasonable person of ordinary intelligence would have anticipated that the statute would apply to the defendant's violent conduct toward the . . . victim," given the language of the

statute and the evidence at trial of the victim's medical history. The Appellate Court also rejected the defendant's claim that the evidence was insufficient to establish that the victim was "physically disabled" under § 53a-60b (a) (1). It concluded that the trial testimony of the victim and the treating physician's assistant were sufficient to establish her physical disability and that the defendant's interpretation of "physical disability," with its focus on conclusive diagnosis, would graft limitations on the governing statutes that were not evident as they were written. The defendant has been granted certification to appeal, and the Supreme Court will decide whether the Appellate Court correctly concluded (1) that §§ 1-1f (b) and 53a-60b (a) (1) were not unconstitutionally vague as applied to the defendant and (2) that the evidence presented by the state at trial was sufficient to prove beyond a reasonable doubt that the victim was "physically disabled" under those statutes.

ISAAC HERNANDEZ *v.* APPLE AUTO WHOLESALERS OF WATERBURY, LLC, et al., SC 20481

United States District Court for the District of Connecticut

Consumer Credit Contracts; Assignee Liability; Whether Holder In Due Course of a Consumer Credit Contract Can Avoid Assignee Liability Under Statute (§ 52-572g) by Reassigning Contract Back to Seller; When is the Limit on Assignee Liability Determined Under § 52-572g; Whether Assignee Liability Under 16 C.F.R. § 433, the "FTC Holder Rule," and § 52-572g is Cumulative. The plaintiff purchased a motor vehicle from the defendant, Apple Auto Wholesalers of Waterbury, LLC, and entered into a retail installment contract with Apple Auto to finance the purchase. In accordance with 16 C.F.R. § 433, commonly referred to as the "FTC Holder Rule," the contract included the following notice: "Any holder of this consumer credit contract is subject to all claims and defenses which the debtor could assert against the seller of goods or services . . . . Recovery . . . by the debtor shall not exceed amounts paid by the debtor . . . ." Shortly thereafter, Apple Auto assigned the contract to the defendant, Westlake Services, LLC. Approximately one month later, before making any payments under the contract, the plaintiff returned the vehicle to Apple Auto, and the plaintiff's attorney, by letter, notified Apple Auto and Westlake that the plaintiff had revoked his acceptance of the vehicle. Westlake thereafter reassigned the contract back to Apple Auto. Subsequently, the plaintiff brought this action in federal court against the defendants, alleging, inter alia, that Apple

Auto breached the implied warranty of merchantability and violated the federal Truth in Lending Act and the Connecticut Unfair Trade Practices Act. The plaintiff claimed that Westlake, as assignee of the contract, was liable for all claims asserted against Apple Auto pursuant to (1) the FTC Holder Rule, and (2) General Statutes § 52-572g (a). That statutes provides in relevant part: "Any holder in due course of a promissory note, contract or other instrument . . . evidencing an indebtedness, signed or executed by a buyer in connection with a credit transaction covering consumer goods, . . . shall be subject to all of the claims and defenses which the buyer has against the seller arising out of the transaction . . . limited to the amount of indebtedness then outstanding . . . provided the buyer shall have made a prior written demand on the seller with respect to the transaction." The plaintiff and Westlake filed cross motions for summary judgment. The District Court, noting that the resolution of the plaintiff's claims against Westlake turned on the applicability of § 52-572g and the FTC Holder Rule, observed that no Connecticut state court has addressed (1) whether a holder in due course's reassignment of a consumer credit contract back to the seller negates that holder's liability under the FTC Holder Rule and/or § 52-572g, and (2) the relationship between the FTC Holder Rule and § 52-572g regarding assignee liability. The District Court therefore certified, and the Supreme Court accepted, the following questions pursuant to General Statutes § 51-199b: (1) When is the limit on assignee liability, "the amount of indebtedness then outstanding," determined under § 52-572g? (2) Can an assignee avoid liability under § 52-572g by reassigning the promissory note, contract or other instrument back to the seller? If so, by when must the assignee reassign the loan to avoid liability? (3) If a retail installment contract includes language mandated by 16 C.F.R. § 433, the FTC Holder Rule, is the assignee liability under this incorporated contractual language cumulative to the statutory liability under § 52-572g?

The summaries appearing here are not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. These summaries are prepared by the Staff Attorneys' Office for the convenience of the bar. They in no way indicate the Supreme Court's view of the factual or legal aspects of the appeal.

Jessie Opinion
Deputy Chief Staff Attorney

NOTICES OF CONNECTICUT STATE AGENCIES

STATE OF CONNECTICUT
DEPARTMENT OF HOUSING

Notice of Issuance of a Certificate of Affordable Housing Project Completion to the Town of South Windsor

In accordance with C.G.S. 8-30g, the Department of Housing (DOH) has issued a Certificate of Affordable Housing Project Completion to the Town of South Windsor. The effective date of this Moratorium shall be the date of publication in the Connecticut Law Journal, and will remain in effect, unless revoked in accordance with the statute, for a four year period. For additional information, please call or write to Laura Watson, Economic and Community Development Agent, DOH, 505 Hudson Street, Hartford, CT 06106, (860) 270-8169.