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MISCELLANEOUS

Bar Examining Committee 1C

November 28, 2022. Alimony shall be modifiable as to amount if the wife earns less than $100,000 per year. Alimony shall not be modifiable as to term."

Postjudgment proceedings in this dissolution case resulted in two prior appeals. The first appeal is not relevant to our discussion. The second appeal concerned, inter alia, the trial court's order requiring the parties to submit to arbitration to resolve their dispute concerning reimbursement for past expenses that each party had incurred on behalf of their minor children. *Budrawich* v. *Budrawich*, supra, 156 Conn. App. 630. On April 21, 2015, this court issued its decision, in which it concluded that "the [trial] court erred in ordering the parties to submit to arbitration to resolve their dispute over unreimbursed expenses because the parties did not execute a voluntary arbitration agreement." Id., 648. This court reversed the judgment only as to the order requiring the parties to submit to arbitration. Id., 650.

The parties also filed several postjudgment motions. The defendant has appealed from the court's rulings on his March 1, 2018 motion for reassignment of the plaintiff's November 25, 2015 motion for order seeking reimbursement for the children's expenses and unreimbursed medical expenses, the plaintiff's April 20, 2017 motion to modify alimony and her December 6, 2017 motion to correct the court's memorandum of decision rendered thereon, and the defendant's March 23, 2018 motion to modify alimony. Additional facts and procedural history will be set forth as necessary.

I

The defendant's first claim on appeal is that the court improperly denied his motion for reassignment of the plaintiff's motion for order. Specifically, he argues that he did not consent to the court's requested extension of time to issue its decision on the plaintiff's motion for order and, therefore, his motion seeking to have the

motion for order reassigned to another judge should have been granted. The plaintiff responds that the defendant has "waived any right to claim that matters before the court are reassigned" by his failure to respond to the court's e-mails requesting an extension and to attend a status conference scheduled following his failure to respond to the e-mails. We agree with the defendant that the court improperly denied his motion for reassignment.

The following additional undisputed facts and procedural history are relevant to this claim. On November 25, 2015, the plaintiff filed a motion for order, alleging that she was owed reimbursement for the children's extracurricular expenses and unreimbursed medical expenses. The court, *Sommer*, *J.*, held hearings over several days, beginning on August 8, 2016, and ending on September 27, 2017. Both parties filed posthearing memoranda of law on October 27, 2017. With the 120 day deadline to issue a decision on the plaintiff's motion for order approaching; see Practice Book § 11-19; the case flow coordinator from the Stamford Superior Court e-mailed the parties on February 16, 2018, on behalf of Judge Sommer, to request a waiver of the 120 day deadline. The defendant did not respond to the e-mail. A status conference was scheduled for February 22, 2018. On that date, the plaintiff's counsel appeared before the court, *Sommer*, *J.*, in Stamford.[1] Neither the plaintiff nor the defendant were present. The plaintiff's counsel informed the court that the plaintiff was not present because she was ill, and that counsel did not know why the defendant was not present.

The court stated that the defendant "had been contacted with the request for the extension of time for

[1] The plaintiff was represented by counsel in the relevant proceedings before the trial court. The plaintiff also filed her own appearance in addition to counsel.

Waiver does not have to be express, but may consist of acts or conduct from which waiver may be implied. . . . In other words, waiver may be inferred from the circumstances if it is reasonable to do so." (Internal quotation marks omitted.) Id., 429–30. "[B]ecause waiver [is a question] of fact . . . we will not disturb the trial court's [finding] unless [it is] clearly erroneous." (Internal quotation marks omitted.) *Northland Two Pillars, LLC* v. *Harry Grodsky & Co.*, 133 Conn. App. 226, 230, 35 A.3d 333 (2012).

We conclude that the court's finding of consent to the requested extension is clearly erroneous. First, Judge Wenzel's suggestion that Judge Sommer had made a finding that the defendant had consented to the extension is inaccurate. Our review of Judge Sommer's remarks during the February 22, 2018 status conference reveals that she stated that the defendant had not responded to the requested extension, had not appeared for the status conference, and that she was proceeding with the agreement of the plaintiff's counsel to the requested extension.

Moreover, although we do not condone the defendant's failure to respond to the case flow coordinator's e-mail requesting his consent to an extension, we cannot construe his silence in failing to respond to an e-mail from the case flow coordinator as a waiver of the 120 day filing deadline. With respect to the defendant's failure to appear for the status conference, we observe that the JDNO notice scheduling the conference, of which Judge Wenzel took judicial notice, incorrectly identified its location as 1061 Main Street in Bridgeport, when the hearing actually took place in Stamford. Again, although we do not condone the defendant's failure to communicate with the court or the plaintiff's counsel following his missing the status conference, we canot construe his failure to appear at the status conference held at the Stamford Superior Court as a

waiver of the 120 day filing deadline. Because the defendant timely filed his motion for reassignment, and there was no evidence in the record to support a finding of consent to an extension or waiver of the 120 day filing deadline, the court was required to order that the matter be reassigned to another judge. See *Reyes* v. *Bridgeport*, supra, 134 Conn. App. 431–32. We thus conclude that the court erred in denying the defendant's motion for reassignment. Accordingly, we reverse the court's ruling on the plaintiff's motion for order.

II

We next address the defendant's claim that the court improperly granted the plaintiff's motion to modify alimony. In his request for relief, the defendant asks this court to "reverse the judgment of the trial court and remand the matter for a new hearing." We agree with the defendant that the court improperly granted the plaintiff's motion to modify alimony and that he is entitled to a new hearing.

Before turning to the merits of the defendant's claim with respect to the plaintiff's motion to modify alimony, we note that the defendant also claims on appeal that the court, following the issuance of its decision on the plaintiff's motion to modify alimony, improperly granted the plaintiff's motion to correct and issued a corrected memorandum of decision. We need not address the defendant's claim with respect to the court's issuance of a corrected memorandum of decision. Because we conclude that the court improperly granted the plaintiff's motion to modify alimony, which requires that we reverse the judgment of the trial court, there remains no judgment that could be corrected. See *Central Connecticut Teachers Federal Credit Union* v. *Grant*, 27 Conn. App. 435, 438–39, 606 A.2d 729 (1992) (declining to address second claim that court improperly increased order of payments from $75 to $150 per month pursuant

his argument that the court, in considering the plaintiff's weekly expenses, improperly failed to reduce the expenses by the amount of uninsured medical expenses that she originally had listed on her financial affidavit but later withdrew. We agree with the defendant.

Although the plaintiff averred on her financial affidavit that she incurs $291 weekly in uninsured medical/dental expenses, she requested, after consultation with her counsel, that the court remove the $291 weekly expense and substitute zero for that amount. Her counsel canvassed her as to that request during the June 9, 2017 hearing, and the court stated that it was "noted for the record." In its memorandum of decision, however, the court found that "[the plaintiff's] combined expenses for medical insurance premiums and uninsured medical expenses constitute approximately 30 percent of her weekly expenses."

A review of the court's mathematical calculations necessarily underlying that 30 percent finding reveals that, despite the plaintiff's request to remove the $291 weekly expense from consideration of her expenses, and the court noting that request, the court failed to do so. The plaintiff listed on her financial affidavit total weekly expenses in the amount of $1593, which, after subtracting the $291 in uninsured medical/dental expenses, amounts to $1302. The plaintiff's financial affidavit shows $141 in weekly expenses for medical/dental insurance premiums. Had the court removed the uninsured medical/dental expenses in accordance with the plaintiff's request and considered only the $141 in medical/dental insurance premium expenses, the court's calculations would have resulted in a finding that the plaintiff's remaining medical/dental insurance premium expenses constituted approximately 11 percent of her total weekly expenses ($141 divided by $1302). Thus, it is evident that the court's finding that "approximately 30 percent of [the plaintiff's] weekly expenses" went

to medical expenses improperly included the $291 in uninsured expenses that the plaintiff abandoned.

In its memorandum of decision, the court identified the "out-of-pocket expenses which the plaintiff incurs due to the medical issues which she faces" as "support[-ing] her claim that she has experienced a substantial change in circumstances." Accordingly, the court's determination of a substantial change in circumstances was premised, at least in part, on its clearly erroneous factual finding regarding the plaintiff's uninsured medical/dental expenses. See *Sargent* v. *Sargent*, 125 Conn. App. 824, 827–28, 827 n.7, 9 A.3d 799 (2011) (reversing court's ruling reducing alimony obligation of defendant where ruling was premised on clearly erroneous finding that defendant incurred expenses of $777 monthly to include plaintiff on his medical coverage; defendant's financial affidavit showed no deduction for medical expenses and expenses associated with medical coverage "costs were borne solely by the defendant's employer and the plaintiff in the form of medical deductibles and co-pays").

The court's clearly erroneous finding as to the plaintiff's expenses requires that the court's judgment modifying the defendant's alimony obligation be reversed and the case remanded for a new hearing on the plaintiff's motion for modification.[10]

[10] We note that the court also made erroneous factual findings with respect to the plaintiff's ability to access her retirement assets and social security benefits. In its November 9, 2017 memorandum of decision modifying alimony, the court found that, "[a]lthough the plaintiff has planned for her retirement she is now faced with unforeseen financial need for support at least seven years before she will be able to receive social security benefits and well before she is able to access her retirement savings." The court subsequently corrected this finding to state: "at least seven years before the recommended age to access social security benefits and well before she is able to access her retirement savings without penalty." See footnote 7 of this opinion. The court also stated, in its articulation, that it had "previously addressed these questions" in its corrected memorandum of decision and that it had "clarified its statement regarding the effect of plaintiff's accessing her retirement assets." Specifically, the court articulated that it "did not find based on its comprehensive review of plaintiff's financial

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

HUGH F. HALL *v.* DEBORAH HALL
(SC 20181)

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

Syllabus

The plaintiff appealed to the Appellate Court from the trial court's judgment of civil contempt rendered against him in the course of marital dissolution proceedings. Following the commencement of the dissolution action, the parties entered into a stipulation, which was approved by the trial court and made a court order. The stipulation required that certain funds be deposited into a joint account and provided that the signatures of both parties were required for withdrawals from that

* This case originally was scheduled to be argued before a panel of this court consisting of Chief Justice Robinson and Justices Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker. Although Justice Mullins was not present when the case was argued before the court, he has read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

account. In contravention of the stipulation, the parties set up a joint account that did not require signatures for withdrawals. After the plaintiff withdrew money from the account and placed it in a separate, personal account, the defendant filed a motion for contempt, which the trial court granted. The trial court thereafter rendered a judgment of dissolution, incorporating the parties' separation agreement, which contained a provision that they would file a joint motion to open and vacate the trial court's contempt finding. Although the parties subsequently filed the joint motion to open and vacate, the trial court denied it. While the plaintiff's appeal to the Appellate Court was pending, that court ordered the trial court to issue an articulation, in which the trial court stated, inter alia, that its decision to grant the defendant's motion for contempt was predicated on its finding that the plaintiff had violated the court's prior order when he initially deposited funds into the noncompliant joint account and on two other occasions when the plaintiff made unilateral withdrawals from the account. The plaintiff claimed in his appeal to the Appellate Court that the trial court had abused its discretion in finding him in contempt without addressing his claim that, in violating the court order, he acted in reasonable reliance on the advice of counsel. The Appellate Court affirmed the trial court's judgment, concluding that, although the plaintiff testified before the trial court that he had consulted with counsel prior to withdrawing funds from the joint account, he did not testify that counsel advised him to do so. With respect to the trial court's denial of the parties' joint motion to open and vacate, the Appellate Court determined that, although the basis for that motion was that the contempt judgment would have a deleterious effect on the plaintiff's career, the trial court properly denied it because the plaintiff had not offered any evidence supporting that assertion. On the granting of certification, the plaintiff appealed to this court. *Held*:

1. The Appellate Court correctly concluded that the trial court did not abuse its discretion in finding the plaintiff in contempt on the basis of his wilful violation of a court order: the plaintiff did not present testimony or other evidence during the hearing on the motion for contempt that would have adequately apprised the trial court that he intended to claim that he acted reasonably in reliance on the advice of counsel, and, although the plaintiff did make that claim for the first time in his motion for reconsideration of the trial court's finding of contempt, he failed to present sufficient evidence to substantiate his claim; moreover, the trial court found three independent violations of the court order by the plaintiff, and, even if this court agreed with the plaintiff that his testimony regarding his consultations with counsel was sufficient to demonstrate that he reasonably relied on the advice of counsel in making the withdrawals, he did not testify that he had consulted with counsel prior to setting up the noncompliant joint account or that he had done so in reasonable reliance on the advice of counsel, and the plaintiff admitted

that he did not recall raising the issue of the noncompliant account with his attorney; furthermore, certain e-mail exchanges between the plaintiff and counsel, which the plaintiff offered as evidence in connection with his motion for reconsideration, did not support his claim that he acted on the advice of counsel but, rather, supported the trial court's conclusion that the plaintiff's dissatisfaction with his attorney's services was not a basis for reconsideration of the court's finding of wilful contempt.

2. The Appellate Court correctly concluded that the trial court did not abuse its discretion in denying the parties' joint motion to open and vacate the finding of contempt: the trial court enjoyed broad discretion in determining whether to grant the joint motion to open and vacate, and the court was not required to grant the motion merely because the parties were in agreement; moreover, the plaintiff failed to offer any evidence that the contempt finding would negatively impact his career, which, the plaintiff contended, formed the basis for the granting of the motion.

Argued October 17, 2019—officially released April 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, *Colin*, *J.*, issued an order in accordance with the parties' stipulation; thereafter, the court, *Tindill*, *J.*, granted the defendant's motion for contempt and rendered judgment thereon, from which the plaintiff appealed to the Appellate Court; subsequently, the court, *Hon. Stanley Novack*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Tindill*, *J.*, denied the parties' joint motion to open and vacate the judgment of contempt, and the plaintiff filed an amended appeal with the Appellate Court, *Lavine*, *Sheldon* and *Bear*, *Js.*, which affirmed the trial court's judgment of contempt, and the plaintiff, on the granting of certification, appealed to this court. *Affirmed.*

** April 13, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Barbara M. Schellenberg, with whom was *Richard L. Albrecht*, for the appellant (plaintiff).

Thomas P. Parrino and *Randi R. Nelson* filed a brief for the Connecticut Chapter of the American Academy of Matrimonial Lawyers as amicus curiae.

Opinion

KAHN, J. The plaintiff appeals[1] from the judgment of the Appellate Court, which affirmed the judgment of civil contempt rendered against the plaintiff. The plaintiff claims that the Appellate Court incorrectly concluded that the trial court did not abuse its discretion in (1) finding the plaintiff in contempt of court on the basis of the wilful violation of a court order, and (2) denying the parties' joint motion to open and vacate the judgment of contempt. We affirm the judgment of the Appellate Court.

The Appellate Court set forth the following relevant facts, which are undisputed. "The parties were married on August 10, 1996, and have three children together. On February 3, 2014, the plaintiff commenced a dissolution action. The parties subsequently entered into a pendente lite stipulation on October 27, 2014, which provided in relevant part: 'The funds currently being held in escrow [by a law firm] in the approximate amount of $533,588 shall be released to the parties for deposit into a joint bank account requiring the signature of both parties prior to any withdrawals . . . .' The court, *Colin*, *J.*, approved the parties' stipulation and made it

[1] This court granted the plaintiff's petition for certification to appeal, limited to the following issues: "(1) Did the Appellate Court properly conclude that the trial court did not abuse its discretion in finding the plaintiff in contempt of court based on the wilful violation of a court order?

"(2) If the answer to the first question is 'yes,' did the Appellate Court properly conclude that the trial court did not abuse its discretion by denying the parties' joint motion to open and vacate the judgment of contempt?" *Hall* v. *Hall*, 330 Conn. 911, 193 A.3d 48 (2018).

a court order. After this order, the parties set up a joint account and transferred the escrow funds into it.

"Approximately one year later, on September 23, 2015, the defendant, Deborah Hall, filed a motion for contempt. She alleged that on September 22, 2015, the plaintiff committed a wilful violation of the October 27, 2014 court order when he withdrew the sum of $70,219.99 from the joint account—the balance of the account at the time—and placed it into a separate, personal account.[2] Following an evidentiary hearing, the court, *Tindill*, *J.*, on December 7, 2015, granted the defendant's motion for contempt." *Hall* v. *Hall*, 182 Conn. App. 736, 738–39, 191 A.3d 182 (2018).

The plaintiff filed a motion seeking reconsideration of that decision on December 21, 2015. The trial court, after hearing oral argument from the parties, denied the relief requested in that motion on January 4, 2016, without issuing a written decision. After the court rendered judgment on the defendant's motion for contempt; see footnote 2 of this opinion; on January 27, 2016, the parties entered into a separation agreement, which the court, *Hon. Stanley Novack*, judge trial referee, accepted on that date and incorporated into the judgment of dissolution. Section 10 of the separation agreement provides in relevant part: "The parties stipu-

[2] "The plaintiff also filed a motion for contempt on September 24, 2015, alleging that the defendant violated the same October 27, 2014 order on various occasions. The court granted the plaintiff's motion in part and denied it in part. The defendant did not submit a brief in this appeal and, therefore, does not challenge the contempt judgment as to her. As discussed in this opinion, however, the court's contempt judgment against the defendant is partially implicated by this appeal insofar as the joint motion to open and vacate the judgments of contempt sought to vacate the court's judgments of contempt rendered against each of the parties. Because the judgment of contempt against the defendant is not otherwise implicated by this appeal, however, references in this opinion to the judgment of contempt refers to the judgment rendered against the plaintiff." (Emphasis omitted.) *Hall* v. *Hall*, 182 Conn. App. 736, 739 n.1, 191 A.3d 182 (2018).

late and agree that they will file a joint motion to open and vacate the findings of contempt in that they believe such findings could interfere with the parties' future employment. . . . The parties understand that this motion must be filed within four (4) months of each of the orders and it is within the discretion of the [c]ourt to act thereon." On January 27, 2016, the plaintiff filed an appeal with the Appellate Court from the trial court's contempt judgment and its January 4, 2016 decision on his motion for reconsideration.

On February 1, 2016, relying on § 10 of the separation agreement, the parties filed a joint motion to open and vacate the judgment of contempt in part. On March 9, 2016, the trial court, *Tindill*, *J.*, denied the motion without issuing a written decision. On March 28, 2016, the plaintiff filed an amended appeal with the Appellate Court, challenging the denial of the motion to open and vacate.

On July 15, 2016, the plaintiff filed a motion requesting that the trial court articulate, inter alia, the factual and legal bases for its decision on his motion for reconsideration. The plaintiff's July 15, 2016 motion for articulation also requested an articulation of the factual and legal bases for the court's denial of the parties' joint motion to open and vacate the judgment of contempt. The trial court denied the motion for articulation on July 27, 2016. On October 26, 2016, the Appellate Court granted the plaintiff's motion for review of the trial court's denial of the plaintiff's motion for articulation and ordered the trial court to issue both an articulation of the basis for its decision on the plaintiff's motion for reconsideration and a written memorandum of decision setting forth the factual and legal bases for the denial of the joint motion to open and vacate the contempt judgment. On January 9, 2017, in compliance with the order of the Appellate Court, the trial court issued both a memorandum of decision setting forth the factual and

legal bases for its denial of the joint motion to open and vacate and an articulation setting forth the legal and factual bases for its denial of the relief requested in the plaintiff's motion for reconsideration. In the trial court's articulation, the court clarified that its decision granting the defendant's motion for contempt was predicated on its finding that the plaintiff had thrice violated its October 27, 2014 order: when the plaintiff initially deposited the funds in the joint account, which did not comply with the court order, and on two separate occasions when the plaintiff made unilateral withdrawals from that account, $237,643.11 on April 28, 2015, and $70,219.99 on September 22, 2015.

The Appellate Court affirmed the judgment of the trial court. As to the plaintiff's claim that the trial court abused its discretion in finding him in contempt without addressing the plaintiff's claim of reasonable reliance on the advice of counsel, the Appellate Court's review of the record revealed that, although the plaintiff had testified that he had consulted with counsel prior to withdrawing funds from the joint account, he did not testify that he was advised by his counsel to do so. *Hall* v. *Hall*, supra, 182 Conn. App. 748. In rejecting the plaintiff's second claim, that the trial court abused its discretion in denying the motion to open and vacate the judgment of contempt, the Appellate Court reasoned that, although the basis for that motion was that the judgment would have a deleterious effect on the plaintiff's career, the trial court properly had denied the motion because the plaintiff had not offered any evidence supporting that assertion. Id., 755–56. This certified appeal followed.

I

We first address the plaintiff's claim that the Appellate Court incorrectly concluded that the trial court acted within its discretion in finding the plaintiff in

contempt on the basis of the wilful violation of a court order. The plaintiff contends that the trial court abused its discretion because it failed to consider his testimony during the hearing on the motion for contempt that, when he violated the October 27, 2014 order, he was relying in good faith on his counsel's advice. The plaintiff further claims that the Appellate Court incorrectly concluded, based on its review of the record, that, during the contempt hearing, the plaintiff had not adequately apprised the trial court of his reliance on this theory. We agree with the Appellate Court's conclusion that the record does not support the plaintiff's claim that the trial court abused its discretion in failing to consider whether the plaintiff's actions were not wilful because he reasonably relied on the advice of counsel. As we explain herein, the plaintiff did not present testimony or evidence during the hearing on the motion for contempt that would have adequately apprised the trial court that he intended to claim that he acted reasonably in reliance on the advice of counsel. Although the plaintiff did make that claim for the first time in his motion for reconsideration, he failed to submit sufficient evidence to substantiate the claim and to warrant reconsideration of the contempt judgment.

The following additional, undisputed facts and procedural history, as set forth by the Appellate Court, are relevant to our resolution of this claim. "After the parties set up the joint bank account pursuant to the court's October 27, 2014 order, they knew that the account did not comply with that order 'the very first day' they opened it. More specifically, the joint account they set up permitted online access and, therefore, did not require signatures from either party, as required by the order, prior to the withdrawal or transfer of funds. The plaintiff testified that banks no longer require dual signatures on accounts. Nonetheless, the court order mandating that the funds be placed in an account 'requiring

the signature of both parties prior to any withdrawals' was not modified before the defendant filed her motion for contempt." Id., 741.

On April 28, 2015, the plaintiff unilaterally withdrew $237,643.11 from the joint account and moved the money to a savings account solely in his name. The plaintiff testified that he did so because he was concerned that the defendant, who struggled with addiction and had previously "squandered funds" in connection with her substance abuse problems, would "go on another bender" and deplete the money in the joint account. On September 22, 2015, the plaintiff unilaterally withdrew the remaining amount in the joint account, $70,219.99, and placed it into a separate, personal account.

The court heard testimony and received evidence on the motion for contempt on three separate days, over the course of several months. During the hearing, the plaintiff, who is an attorney licensed to practice law in two states and, at the time of these proceedings, was employed as a senior vice president of a bank, testified at various times that he had "consulted with counsel" during the pendency of the case. Specifically, he testified on two occasions that he had consulted with counsel prior to the September 22, 2015 withdrawal from the joint account. On November 2, 2015, the court asked the plaintiff whether he was represented by counsel when he made the September 22, 2015 withdrawal from the joint account. The plaintiff responded: "Yes, I did consult with counsel." On December 2, 2015, the defendant's counsel questioned the plaintiff as to why he did not immediately move the money from the joint account when he learned in August, 2015, that the defendant had relapsed. In the context of that line of questioning, the court asked the plaintiff when he removed the money from the joint account. The plaintiff responded:

"Sometime in September, [2015], after consulting with my counsel about the situation."

The plaintiff also testified that, on two occasions, after discussions with counsel, he had determined *not* to unilaterally withdraw money from the joint account in August, 2015, when he learned that the defendant had relapsed. The plaintiff offered the following testimony to explain the timing of his withdrawal: "That's when I was discussing with my counsel the appropriate course of action, because once there was the violation by [the defendant] of the verbal agreement that we had online access, where we'd agreed we would just not do it even though the court order said something different from what we were doing, we were—we thought [we] were about to settle the entire case, we felt that it was best to just see it through. And it was only when the settlement process fell completely apart and she appeared to be acting erratically, we became more concerned that something had to be done." When the court subsequently asked him what prevented him from withdrawing the funds prior to September, 2015, he testified: "Nothing prevented me. It was more in discussion with counsel on what was the appropriate thing to do in that period of time when we were at the eve of settling the case."

At one point during the hearing, the plaintiff explained that, because he had consulted with counsel during the "entire process," he believed he should not be found in contempt. Specifically, the plaintiff testified: "I believe that what I was doing was in order to comply with Judge Colin's orders from October, 2014. And that I was not utilizing the funds in any way in violation of the spirit of that agreement and that I took steps to try and work with [the defendant] to comply with the order, set up a compliant account, but at that point in time, there was no further cooperation on her side. Furthermore, I would say throughout the entire process, I was

consulting with counsel about what was the proper course of action." At the end of the hearing, the parties waived their right to present argument to the court and agreed that the record was sufficient to allow the court to decide the motion for contempt.

The plaintiff presented no testimony that he consulted with counsel prior to setting up the joint account. In fact, when the court asked the plaintiff when his or the defendant's counsel became aware that the joint account did not comply with the court order, the plaintiff first responded that he could not recall whether he notified his counsel of the problem. When the court followed up by asking whether he had contacted his counsel to explain that he had set up a noncompliant account, the plaintiff responded that he did not believe that either he or the defendant had raised it as an issue with their respective counsel.

The trial court's December 7, 2015 memorandum of decision found that the October 27, 2014 order was clear and unambiguous, and that the defendant had engaged in self-help and wilfully violated the order when he unilaterally withdrew funds from the joint account on April 28, 2015, and September 22, 2015.[3] It is evident in reviewing the memorandum of decision that the trial court, at the time it issued its decision, was unaware of any intent by the plaintiff to raise the claim that his violations of the order were not wilful because he reasonably relied on the advice of counsel.

[3] In a subsection of the memorandum of decision entitled "Plaintiff's Violations of the Order," the court made clear that it considered the plaintiff's two unilateral withdrawals from the joint account to have violated the October 27, 2014 order. Although the court also stated that the joint account did not comply with the order, it did not expressly state that it found that the parties had violated the order when setting up the joint account. As we explained in this opinion, however, the trial court later clarified that it found that the setting up of the joint account was a violation of the court order.

The plaintiff does not dispute that his actions violated the October 27, 2014 order.

The court summarized its understanding of the arguments advanced by the plaintiff in support of his claim that the violations were not wilful as follows: "He offers a variety of reasons: (1) the original account did not 'comply' with the court order in that two signatures were not required for withdrawal, (2) he learned that the defendant had relapsed . . . and was using cocaine and drinking alcohol as of August 13, 2015, (3) the defendant [had] previously misappropriated tens of thousands of dollars in marital assets, (4) the parties were working amicably toward resolution of their differences and had reached agreement . . . and (5) the plaintiff did not wish to pursue the proper legal channels for compliance with the court order due to exorbitant legal fees which would only further diminish the marital estate to be divided." In its decision, the court rejected each of the arguments it understood the plaintiff to be advancing and made no reference to any argument by the plaintiff that his violations of the October 27, 2014 court order were not wilful because he had reasonably relied on the advice of counsel.

On December 21, 2015, two weeks after the court issued its memorandum of decision granting the defendant's motion for contempt, the plaintiff, representing himself, moved for reconsideration, arguing that the court had misapprehended the facts and had failed to address the issue of whether his actions were not wilful because he acted in reasonable reliance on the advice of counsel. In his motion for reconsideration, the plaintiff conceded that, during the hearing on the motion for contempt, his counsel did not pursue the theory that his violations of the court order were not wilful because he was acting on the advice of counsel. Specifically, the plaintiff argued: "During a hearing on the [motion for contempt] the court inquired of the plaintiff as to whether in moving funds from the parties' joint account he acted on the advice of counsel, to which he testified

that he had. The plaintiff's counsel did not pursue this line of questioning and *did not raise it in an oral argument*." (Emphasis added.) In his motion for reconsideration, the plaintiff claimed for the first time that his counsel had directed him to move the funds, and also alleged that his counsel had intentionally concealed that fact from the court. The plaintiff requested that, on reconsideration, the trial court consider additional information—e-mail exchanges between the plaintiff and his counsel—that he claimed demonstrated that he relied on the advice of counsel when he withdrew funds from the joint account in violation of the court order. In support of his motion for reconsideration, the plaintiff alleged that a contempt finding "could negatively impact his career and earnings potential." On December 24, 2015, the plaintiff, through his new counsel, filed an amendment to his motion for reconsideration to correct the date that he transferred the funds from the joint account into his personal account.

In its articulation of the factual and legal bases for its decision on the plaintiff's motion for reconsideration, the trial court noted that, "[i]n reaching its decision to deny [the relief requested in] the motion, the court heard argument from counsel for each party and carefully reviewed the motion, the [plaintiff's] amendment thereto, and reconsidered the evidence submitted during the course of the multiple day hearing."[4] In reaching

[4] Both the plaintiff and the Appellate Court's decision characterize the trial court's denial of the motion for reconsideration as a refusal to consider his claim that he did not act wilfully because of his reliance on the advice of counsel and his attachments in support of that claim. Although we understand how the trial court's summary denial of the motion might lead to the plaintiff's conclusion, a review of the record and the trial court's articulation of its decision on the motion for reconsideration demonstrates that its order is more properly characterized as a grant of the motion for reconsideration but a denial of the relief requested therein. In its articulation, the trial court specifically referred to and addressed the arguments raised in the motion for reconsideration, including the plaintiff's advice of counsel claim.

the merits of the plaintiff's motion for reconsideration, the trial court rejected the plaintiff's assertions that the court had misapprehended the facts and that his conduct was not wilful because he relied on the advice of counsel who subsequently refused to report it to the court. Specifically, the trial court noted that "the [plaintiff's] dissatisfaction with the services and counsel of his attorney of record during the evidentiary hearing [on the motion for contempt] is not a basis for reconsideration of the court's finding of wilful contempt based on the evidence . . . ." The court also rejected the plaintiff's reliance on the Appellate Court's decision in *O'Brien* v. *O'Brien*, 161 Conn. App. 575, 591 n.15, 128 A.3d 595 (2015), rev'd, 326 Conn. 81, 161 A.3d 1236 (2017), in support of the proposition that "a party may shield [himself] . . . from a finding of wilful contempt by showing that [he] relied on the advice of legal counsel." The trial court noted that, contrary to the plaintiff's argument, the Appellate Court took no position on that question in *O'Brien*. See id. The trial court also noted that, in light of its factual finding that "the act of transferring funds by the [plaintiff] in violation of the court order was intended to circumvent the [defendant's] access," the present case was factually distinguishable from *O'Brien* because, in *O'Brien*, the trial court declined to hold the plaintiff in contempt inasmuch as it found that the plaintiff's actions were not wilful or contumacious. The trial court in the present case also considered it significant that "the [plaintiff] is a licensed attorney in New York and Massachusetts and therefore has a better understanding and appreciation of the law and legal procedures than the average litigant or layperson . . . ."

Because the crux of the plaintiff's claim is that the trial court abused its discretion in failing to address an argument that he raised to that court in support of his claim that his actions were not wilful, we must first

resolve the threshold issue of whether he did in fact apprise the trial court of that argument. Our review of the record reveals that the plaintiff's motion for reconsideration was the first time that he had argued that his actions were not wilful because he undertook them in reasonable reliance on the advice of counsel to withdraw funds from the joint account. As we have detailed in this opinion, at the contempt hearing, the plaintiff testified on numerous occasions that he consulted or had discussions with counsel. We agree with the Appellate Court, however, that the plaintiff has not pointed to *any* testimony or any other evidence presented during the contempt hearing demonstrating that his counsel advised him to withdraw money unilaterally from the joint account and that he made the withdrawals in reasonable reliance on that advice.[5] Having established that the plaintiff adequately raised, in his motion for consideration, his claim that he acted on advice of counsel, we now turn to the claims that he raised before the trial court and that court's bases for its contempt order and subsequent denial of the relief requested in his motion for reconsideration.

"Contempt is a disobedience to the rules and orders of a court which has power to punish for such an offense." (Internal quotation marks omitted.) *In re Leah S.*, 284 Conn. 685, 692, 935 A.2d 1021 (2007). Our review of a trial court's judgment of civil contempt involves a two part

[5] The plaintiff argues that the Appellate Court improperly engaged in fact-finding when it reviewed the record to determine whether he argued to the trial court that he acted in reasonable reliance on the advice of counsel. To the contrary, the Appellate Court's analysis, like our own, focuses on whether the trial court was adequately apprised of the plaintiff's intent to argue that he had acted in reliance on the advice of counsel. The only available method for resolving that issue is to review the record. The Appellate Court properly considered all of the evidence that the plaintiff introduced that arguably could have alerted the trial court to his reliance on that theory and concluded it was inadequate. Nothing in that analysis involved fact-finding.

inquiry. "[W]e first consider the threshold question of whether the underlying order constituted a court order that was sufficiently clear and unambiguous so as to support a judgment of contempt. . . . Second, if we conclude that the underlying court order was sufficiently clear and unambiguous, we must then determine whether the trial court abused its discretion in issuing, or refusing to issue, 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." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Parisi* v. *Parisi*, 315 Conn. 370, 380, 107 A.3d 920 (2015). "Whether a party's violation was wilful depends on the circumstances of the particular case and, ultimately, is a factual question committed to the sound discretion of the trial court. . . . Without a finding of wilfulness, a trial court cannot find contempt and, it follows, cannot impose contempt penalties." (Citation omitted.) *O'Brien* v. *O'Brien*, 326 Conn. 81, 98–99, 161 A.3d 1236 (2017).

The trial court found *three* independent violations of the October 27, 2014 order by the plaintiff—the opening of the noncompliant, joint account and the two unilateral withdrawals. Even if we agreed with the plaintiff that his testimony, during the evidentiary hearing, regarding his consultations with counsel was sufficient to demonstrate that he reasonably relied on the advice of counsel in making the unilateral withdrawals—and we do not—he did not testify that he had consulted with counsel prior to setting up the joint account or that he did so in reasonable reliance on the advice of counsel. To the contrary, when questioned by the court, the plaintiff admitted that he did not recall raising the issue of the noncompliant, joint account with his attorney.

Likewise, the plaintiff's motion for reconsideration does not support his claim that his conduct was not wilful because he acted on the advice and at the direction of his counsel. The evidence proffered in support of his claim consisted of e-mail exchanges between him and his counsel. The e-mail exchanges are not entirely clear because they lack some context, but they do appear to involve a discussion of whether the plaintiff should move funds from the joint account without first obtaining the defendant's approval. A reasonable reading of them reveals the following: The plaintiff e-mailed his counsel on September 8, 2015, requesting that a "motion for permission to control the joint funds" be filed, highlighting that the defendant had taken funds from the account. In response, on the same day, the plaintiff's counsel reminded him that "[he] suggested [the plaintiff] move the funds out of [the] Chase [account] and into a joint account with controls. That didn't happen?" The plaintiff responded by indicating that he did not do so because he had been out of town, had been busy, "[had] to time things carefully," and "need[ed] access to that money more than [the defendant did]." The plaintiff's counsel urged him to "just move the funds" to an account with joint controls in compliance with the court order, which would obviate the need for a motion for permission to control the joint funds, because the plaintiff would then "have control. Not exclusive . . . mutual control as the stip[ulation] intended." When the plaintiff continued to insist on filing a motion for exclusive control over the joint funds, his counsel responded, "move funds Monday, notifying [the defendant]. No motion." The plaintiff's counsel also reminded the plaintiff that, although the stipulation required the defendant to sign off on his withdrawals from the joint account, it also "entitled [the plaintiff to] take [$8000] out a month to pay for expenses in excess of [his] income . . . ." Contrary to

the plaintiff's claim, it is reasonable to conclude that the exchanges do not establish that he acted on the advice of counsel. The e-mail exchanges support the trial court's conclusion that the plaintiff's "dissatisfaction with the services and counsel of his attorney of record during the evidentiary hearing is not a basis for reconsideration of the court's finding of [wilful] contempt based on the evidence . . . ." Given the plaintiff's failure to present sufficient evidence to support a finding that he acted on advice of counsel,[6] the trial court's denial of the relief requested in the plaintiff's motion for reconsideration was not an abuse of discretion.

II

We next consider whether the Appellate Court correctly concluded that the trial court did not abuse its discretion by denying the parties' joint motion to open and vacate the judgment of contempt. The plaintiff argues that, in denying the joint motion, the trial court improperly ignored the stipulation of the parties that they believed that a contempt finding "could interfere with the parties' future employment." (Internal quotation marks omitted.) We are not persuaded.

The following additional facts and procedural history are relevant to our resolution of this question. Consistent with § 10 of the parties' separation agreement, on February 1, 2016, within the four month period set by General Statutes § 52-212a, the parties filed a joint motion to open and vacate the judgment of contempt. In the joint motion, the parties submitted that it would be in the interest of justice for the court to vacate the

[6] Because we conclude that the plaintiff did not establish that his actions were not wilful because he acted in reasonable reliance on the advice of counsel, we need not resolve whether such a defense would have had merit. Neither this court nor the Appellate Court has addressed the issue of whether acting on the advice of counsel is a viable defense in a contempt proceeding. See *Baker* v. *Baker*, 95 Conn. App. 826, 832 n.7, 898 A.2d 253 (2006).

findings of contempt as to both parties and to leave the compliance orders in force. See footnote 2 of this opinion. The plaintiff's counsel argued in support of the motion that a contempt finding would have a deleterious effect on the plaintiff's career. The plaintiff's counsel further noted that, as an attorney who "has licenses in the securities field," the plaintiff is required to report to licensing organizations whether he had been held in contempt. During the hearing on the joint motion to open, the trial court questioned the plaintiff's claim that he was in a unique position because he had securities certifications and licenses, observing generally that others are subject to similar oversight and reporting requirements. The plaintiff did not introduce any evidence to support his claim that a contempt finding would negatively impact his career.

In the trial court's memorandum of decision, issued in compliance with the order of the Appellate Court, the court set forth the factual and legal bases for its denial of the motion to open and vacate the judgment of contempt. The court observed in its decision that there had been no evidence presented that "the parties' circumstances are unique or distinguishable such that findings of [wilful] contempt, made after due process of law in accordance with applicable rules of practice and statutory authority, should be vacated in the interests of justice." (Footnote omitted.) The court also noted that the plaintiff had not argued during the hearing on the motion for contempt that a finding of contempt would negatively impact his career.

We begin by setting forth the principles that guide our review. "We do not undertake a plenary review of the merits of a decision of the trial court to grant or to deny a motion to open a judgment. . . . In an appeal from a denial of a motion to open a judgment, our review is limited to the issue of whether the trial court has acted unreasonably and in clear abuse of its dis-

cretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action. . . . The manner in which [this] discretion is exercised will not be disturbed so long as the court could reasonably conclude as it did." (Internal quotation marks omitted.) *Reville* v. *Reville*, 312 Conn. 428, 440, 93 A.3d 1076 (2014).

The primary basis that the trial court relied on in denying the parties' motion to open and vacate the judgment of contempt was that the plaintiff presented no evidence to support his claim that a contempt finding would negatively impact his career. The court also considered that, prior to arriving at its finding that the plaintiff had wilfully violated the October 27, 2014 court order, it had given ample opportunity to the parties to present argument and to introduce evidence on the motion for contempt. Based on this record, we conclude that the Appellate Court correctly concluded that the trial court did not abuse its discretion in denying the motion to open and vacate the judgment of contempt.

We find unpersuasive the plaintiff's reliance on the fact that the motion to open and vacate the judgment of contempt was made jointly and was pursuant to the parties' stipulation that they would seek to have the judgment of contempt vacated. The trial court enjoyed broad discretion in determining whether to grant the motion to open and vacate the judgment of contempt—neither the parties' joint motion nor their stipulation narrowed the breadth of that discretion. See *O'Brien* v. *O'Brien*, supra, 326 Conn. 96 ("It has long been settled that a trial court has the authority to enforce its own orders. This authority arises from the common law and is inherent in the court's function as a tribunal with the power to decide disputes."), citing *Papa* v. *New Haven Federation of Teachers*, 186 Conn. 725, 737–38, 444 A.2d 196 (1982). In *O'Brien*, this court noted that a trial

court's enforcement power is "necessary to preserve its dignity and to protect its proceedings." (Internal quotation marks omitted.) *O'Brien* v. *O'Brien*, supra, 96–97, quoting *Allstate Ins. Co.* v. *Mottolese*, 261 Conn. 521, 530, 803 A.2d 311 (2002); see also *Middlebrook* v. *State*, 43 Conn. 257, 268 (1876) ("[a] court of justice must of necessity have the power to preserve its own dignity and protect itself"). A party to a court proceeding must obey the court's orders unless and until they are modified or rescinded, and may not engage in "self-help" by disobeying a court order to achieve the party's desired end. The court was not required to grant the motion merely because the parties were in agreement.

The plaintiff points to various aspects of the record that he claims the trial court and the Appellate Court should have considered in determining whether he had offered any evidence in support of his assertion that his employment would be negatively impacted by the contempt finding. Specifically, he points to the following: (1) the joint stipulation, in which the parties stated that they believed that the contempt finding could interfere with the plaintiff's employment, (2) the trial court's finding that the plaintiff is an attorney employed as the senior vice president of a bank, and (3) the defendant's representation that she "would like to move forward with her life." (Internal quotation marks omitted.) None of this information calls into question the trial court's finding that the plaintiff failed to offer any evidence that the contempt finding would negatively impact the plaintiff's career.

The plaintiff also argues that, in its memorandum of decision setting forth the factual and legal bases for its denial of the joint motion to open and vacate the judgment of contempt, the trial court improperly discussed both the possible reasons that may have motivated the defendant to join the motion to open and vacate, and the amount of time that the court spent

hearing argument and receiving evidence on the motion for contempt. We find neither of these arguments persuasive. The trial court's decision properly focused on the failure of the plaintiff to produce evidence that a finding of contempt could negatively impact his career. Neither the court's discussion of the defendant's possible motives in agreeing to the stipulation nor its discussion of the amount of time the court allocated to the contempt hearings calls that determination into question.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

MARY BETH FARRELL ET AL. *v.* JOHNSON AND JOHNSON ET AL.
(SC 20225)

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

Syllabus

The plaintiffs, M and V, sought to recover damages from, among others, the defendant H, a urogynecologist, for, inter alia, lack of informed consent and innocent misrepresentation in connection with an unsuccessful surgery in which H implanted a mesh product in M's body for the purpose of treating M's pelvic organ prolapse. M experienced bleeding and pain after the procedure, and, despite several follow-up procedures to alleviate the pain and to remove the mesh product, her pain continued. M subsequently was diagnosed with nerve damage. Prior to trial, the plaintiffs sought to introduce into evidence two articles from medical journals containing certain statements regarding the limited data about the mesh product used in the present case and the experimental nature of the implantation procedure, including statements that patients should consent to the surgery with an understanding of the risks and experimental nature of the procedure. The plaintiffs claimed that the statements in the articles were admissible to demonstrate that H knew or should have known that the mesh surgery was experimental and the subject of medical controversy, and that H failed to properly advise M of the risks associated with the mesh product. Following a hearing, the trial court determined that the articles were being offered not for purposes of notice but for the truth of the matter asserted therein and, therefore,

were inadmissible hearsay. At the conclusion of the trial, the court directed a verdict in favor of H and another remaining defendant on the innocent misrepresentation claim. The jury subsequently returned a verdict in favor of the defendants on the remaining claims, and the trial court rendered judgment thereon. Thereafter, the plaintiffs appealed to the Appellate Court, which affirmed the trial court's judgment. The Appellate Court concluded, inter alia, that the trial court did not abuse its discretion by excluding the two journal articles on the ground that they were inadmissible hearsay and that the trial court properly directed a verdict for the defendants on the innocent misrepresentation claim because innocent misrepresentation claims primarily apply to business transactions, typically between a buyer and seller. On the granting of certification, the plaintiffs appealed to this court. *Held*:

1. The Appellate Court correctly concluded that the trial court did not abuse its discretion in declining to admit into evidence the two journal articles offered by the plaintiffs on the ground that those articles were inadmissible hearsay: the plaintiffs could not introduce the articles for the nonhearsay purpose of proving what H, as a physician, knew or reasonably should have known with respect to the experimental nature of the mesh product and procedure, as the plaintiffs failed to meet their burden of demonstrating that H read or reasonably should have read the contents of the articles; moreover, the defendants contested the authority of the articles, and the trial court did not abuse its discretion in excluding them for the purpose of establishing that they were so authoritative in the field that H should have been on constructive notice of their content.
2. The Appellate Court properly upheld the trial court's decision to direct a verdict for the defendants on the plaintiffs' innocent misrepresentation claim, this court having concluded that such a claim does not lie in the context of the present case: innocent misrepresentation claims in Connecticut generally are governed by § 552C of the Restatement (Second) of Torts, which requires that the misrepresentation occur in a "sale, rental or exchange transaction with another," and, in the present case, the plaintiffs and H were not parties to such a commercial transaction because M sought out the services of H not to purchase the mesh product but primarily for the provision of medical services, namely, the implantation of the mesh product; moreover, this court rejected the plaintiffs' claim that liability for innocent misrepresentation should be extended to statements made by physicians in the course of providing medical services because, although § 552C of the Restatement (Second) of Torts acknowledges that claims for innocent misrepresentation may be brought in the context of other types of business transactions, the provision of medical care often requires physicians to provide medical opinions rather than statement of facts, and a physician who makes a false statement of fact still may be liable for misrepresentation; furthermore, even if this court assumed that innocent misrepresentation claims could be pursued in the product liability context, that was of no conse-

quence because the plaintiffs did not seek to recover from H for product liability, and this court declined to apply the doctrine of strict liability for innocent misrepresentations made in the course of providing medical treatment, as such liability would be doctrinally inconsistent with the existing framework governing claims against physicians arising from acts of omission or commission during physician-patient communications.

Argued October 25, 2019—officially released April 15, 2020*

Procedural History

Action to recover damages for, inter alia, the defendants' alleged negligent misrepresentation, and for other relief, brought to the Superior Court in the judicial district of Waterbury and tried to the jury before *Zemetis*, *J.*; thereafter, the court directed a verdict for the defendants on the plaintiffs' innocent misrepresentation claim; subsequently, the jury returned a verdict for the defendant Brian J. Hines et al. on the remaining counts, and the court rendered judgment thereon, from which the plaintiffs appealed to the Appellate Court, *Lavine*, *Keller* and *Bishop*, *Js.*, which affirmed the trial court's judgment, and the plaintiffs, on the granting of certification, appealed to this court. *Affirmed.*

Brenden P. Leydon, with whom, on the brief, was *Jacqueline E. Fusco*, for the appellants (plaintiffs).

David J. Robertson, with whom were *Heidi M. Cilano* and, on the brief, *Malaina J. Sylvestre*, for the appellees (defendant Brian J. Hines et al.).

Opinion

ROBINSON, C. J. This certified appeal requires us to consider (1) when exhibits that otherwise would constitute inadmissible hearsay may be admitted to prove notice on the part of the defendant, Brian J. Hines, and (2) whether the tort of innocent misrepresentation extends to communications made by a physician during the provision of medical services. The plaintiffs, Mary

* April 15, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Beth Farrell and Vincent Farrell,[1] appeal, upon our grant of their petition for certification,[2] from the judgment of the Appellate Court affirming the judgment of the trial court, rendered after a jury trial, in favor of the defendants Hines and Urogynecology and Pelvic Surgery, LLC,[3] on numerous tort claims, including informed consent, innocent misrepresentation, and negligent misrepresentation, following an unsuccessful pelvic mesh surgery on Mary Beth. See *Farrell* v. *Johnson & Johnson*, 184 Conn. App. 685, 688, 195 A.3d 1152 (2018). On appeal, the plaintiffs challenge the Appellate Court's conclusions that the trial court properly (1) excluded two medical journal articles from evidence as hearsay when they had been offered to prove notice, and (2) directed a verdict for the defendants on their innocent misrepresentation claims. We disagree and, accordingly, affirm the judgment of the Appellate Court.

The Appellate Court's opinion sets forth the following background facts and procedural history. "At some point in 2007, Mary Beth's gynecologist diagnosed her with pelvic organ prolapse. As her condition worsened, her gynecologist recommended that she see Hines, a [urogynecologist], with whom she consulted in late Octo-

[1] For the purpose of simplicity, we refer to each of the plaintiffs individually by first name when appropriate.

[2] We granted the plaintiffs' petition for certification to appeal, limited to the following issues: "Did the Appellate Court correctly determine that the trial court did not improperly rule that the journal articles, offered to prove notice, were inadmissible as hearsay?" And "[d]id the Appellate Court correctly conclude that the theory of innocent misrepresentation is not applicable in the present case and that the trial court properly directed a verdict in favor of the defendants on this claim?" *Farrell* v. *Johnson & Johnson*, 330 Conn. 944, 944–45, 197 A.3d 389 (2018).

[3] The plaintiffs withdrew the action as to the defendant American Medical Systems, Inc., in July, 2015, and as to the remaining defendants, Johnson & Johnson, Ethicon, Inc., Ethicon Women's Health and Urology, Gynecare, A Division of Ethicon, Inc., and Stamford Hospital, in January, 2016. Accordingly, all references herein to the defendants are to Hines and Urogynecology and Pelvic Surgery, LLC, and we refer to each individually by name when appropriate.

ber, 2008. Hines explained that implanting a mesh product into Mary Beth would be the best surgery to treat her condition. Mary Beth agreed to the surgery, and Hines performed the procedure on November 19, 2008." (Footnote omitted.) Id., 688–89.

"Approximately four days after Mary Beth had returned home from the surgery, she experienced excessive bleeding and abdominal pain. Hines initially diagnosed her with two large pelvic hematomas. Mary Beth continued to follow up with Hines; however, she continued experiencing pain. In February, 2009, Mary Beth underwent another surgery during which Hines attempted to remove the mesh product that he had implanted in her. Hines removed as much of the mesh as possible; however, some of the mesh could not be removed because it was embedded in tissue. After a second surgery to remove the mesh in the summer of 2009, Mary Beth still experienced pain and was diagnosed with damage to the pudendal and obturator nerves." Id., 689.

"Mary Beth underwent several additional procedures, such as nerve blocks and mesh removal, but these procedures did not eliminate the pain. The pain that she experienced eventually caused her to resign her position as a teacher so she could focus on her health. At the time of trial in January, 2016, Mary Beth was considering additional surgery, which she described as 'major.' " Id.

"The plaintiffs served their original complaint on November 15, 2011. The plaintiffs filed the operative, third amended complaint on December 4, 2015, alleging the following claims against the defendants: (1) lack of informed consent; (2) innocent misrepresentation; (3) negligent misrepresentation; (4) intentional misrepresentation; and (5) loss of consortium." Id., 690.

"The plaintiffs' case was tried to a jury in January, 2016. On January 19, 2016, the court directed a verdict in favor of the defendants on the plaintiffs' innocent

misrepresentation claim. On January 20, 2016, the jury returned a verdict for the defendants on the remaining counts, and the court [rendered] judgment on July 13, 2016. The plaintiffs' motion to reargue was denied . . . ." Id.

The plaintiffs then appealed from the judgment of the trial court to the Appellate Court, raising several issues, including that the trial court (1) "abused its discretion by excluding from evidence as hearsay two journal articles," and (2) "improperly directed a verdict in favor of the defendants on the plaintiffs' claim of innocent misrepresentation . . . ." Id., 688. The Appellate Court agreed with the defendants' argument that the trial court did not abuse its discretion by excluding the two journal articles regarding the experimental nature of the surgery on the ground that they were inadmissible hearsay. Id., 699. In addition, the Appellate Court concluded that, under *Johnson* v. *Healy*, 176 Conn. 97, 405 A.2d 54 (1978), and § 552C of the Restatement (Second) of Torts, the trial court properly directed a verdict for the defendants on the innocent misrepresentation claim because "innocent misrepresentation claims primarily apply to business transactions, typically between a buyer and seller, and . . . the theory is based on principles of warranty." *Farrell* v. *Johnson & Johnson*, supra, 184 Conn. App. 703. Accordingly, the Appellate Court unanimously rendered judgment affirming the judgment of the trial court. Id., 708. This certified appeal followed. See footnote 2 of this opinion. Additional facts and procedural history will be set forth as necessary.

I

We first consider whether the Appellate Court properly upheld the trial court's exclusion from evidence of the two articles discussing the experimental nature of the mesh surgery as hearsay. The record reveals the following additional facts and procedural history that

are relevant to our resolution of this claim. The plaintiffs sought to introduce into evidence three journal articles for notice purposes, two of which are at issue in this appeal. Those two articles were (1) American College of Obstetrics & Gynecology, "Pelvic Organ Prolapse," 109 ACOG Prac. Bull. 461 (2007) (ACOG Practice Bulletin), and (2) D. Ostergard, "Lessons from the Past: Directions for the Future," 18 Intl. Urogynecology J. 591 (2007) (Ostergard article). At trial, Hines testified that he received the International Urogynecology Journal as part of his membership in a professional society and that he had read articles in Obstetrics & Gynecology, but he was not aware of and had not read the two specific articles at issue.

The plaintiffs sought to admit the following statement from the ACOG Practice Bulletin: "Given the limited data and frequent changes in marketed products (particularly with regard to type of mesh material itself, which is most closely associated with several of the postoperative risks, especially mesh erosion), the procedures should be considered experimental and patients should consent to surgery with that understanding." With respect to the Ostergard article, the plaintiffs sought to admit the following three statements: (1) "a physician can inform the patient of [the procedure's] experimental nature"; (2) "[t]here is a need for more information with specific graft materials to clarify success and adverse event rates"; and (3) "[w]ithout an adequate evidence base, practitioners cannot determine whether an innovative technique is the most safe and effective method for treating a patient. Without adequate data on the risks and benefits of new treatments, patients are unable to provide a true informed consent."

Both parties submitted briefing on the admissibility of the articles, and the trial court heard argument on January 12, 2016. The trial court, in its ruling, agreed

that the plaintiffs were offering the articles for their truth and that they therefore must be excluded as inadmissible hearsay.[4]

[4] At the hearing on the articles' admissibility, the trial court and the plaintiffs' counsel engaged in the following colloquy:

"The Court: I think that these are hearsay documents. . . . And the fact that they're being described as being offered for notice, I think that [the defendants'] most recent brief is exactly on point with my thinking; that is, that these [articles] are actually being offered for the truth of the matter contained. . . . So, under the circumstances, I think these [articles] are hearsay, and I don't see their existence, the fact [that] they exist, being relevant to any issue we have in front of us. And, for those reasons, I'm going to sustain the objection to the offer of these articles. . . . The fact [that] a medical controversy exists, the fact that, in these various authors' opinions, inadequate study has been done, that physicians have an obligation to advise their patients that inadequate study has been done, that there's not a scientific basis for the use of this mesh product and implantation of this product into patients absent such scientific basis and study. I'm understanding that's the thrust of the case, but that's the truth of the matter contained in each of these three articles. That's why I think that they are hearsay.

"[The Plaintiffs' Counsel]: The fact [that] there was a controversy in the medical community, the claim is that's a fact that should have been related to [Mary Beth].

"The Court: Don't you see that's the truth of the matter contained?

"[The Plaintiffs' Counsel]: No. A publication in a proceeding saying there's a controversy here, it's basically a declaration of fact. The fact it was published shows there is a controversy.

"The Court: No, it doesn't. It shows [that] the articles are published. And, if the question was before us whether these articles were published and that [was] a relevant fact, but not the topics within the articles, not the content of the articles. That's the truth of the matter contained. That the articles exist and that you perceive them to create a medical controversy that Hines should have informed [Mary Beth] of, I understand, but that exactly looks to the truth of the matter contained in these [articles] that there is such a controversy, that he does have such an obligation. . . . I do understand that the purpose of this is to show that three articles exist in journals that he received before he instructed [Mary Beth] as to the risk, benefits and alternatives, and that he either read these and forgot [about] them or didn't read them, and that he had an opportunity to read them. Had he read them, the content of those [articles] would have alerted him that there was a medical controversy or inadequate scientific basis for the implantation of this mesh product . . . here. That seems to me to be the heart of the question as to the adequacy of the instruction. You're saying to me [that] the content of these articles is such that [Hines] should have warned her of [their] contents. I think that's the classic definition of, we're not offering them for the existence of those but, rather, for the truth of the matter contained within them, that there is a controversy."

On appeal, the plaintiffs argue that the journal articles were admissible because they were offered for nonhearsay purposes, specifically, to show that Hines was on notice of a controversy regarding mesh products. In response, the defendants counter that the trial court properly excluded the articles as hearsay because the plaintiffs failed to show that Hines had read the articles and, therefore, that the articles could not be admitted for notice. The defendants also argue that the articles' probative value was outweighed by their prejudicial effect and that, even if the articles were admissible, any error was harmless.

We begin with the standard of review applicable to a trial court's evidentiary decisions. "[We] examine the nature of the ruling at issue in the context of the issues in the case. . . . To the extent [that] a trial court's admission of evidence is based on an interpretation of the [Connecticut] Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. They require determinations about which reasonable minds may not differ; there is no 'judgment call' by the trial court, and the trial court has no discretion to admit hearsay in the absence of a provision providing for its admissibility. . . . We review the trial court's decision to admit evidence, if premised on a correct view of the law, however, for an abuse of discretion. . . . In other words, only after a trial court has made the legal determination that a particular statement is or is not hearsay, or is subject to a hearsay exception, is it vested with the discretion to admit or to bar the evidence based upon relevancy, prejudice, or other legally appropriate grounds related to the rule of evidence under which

admission is being sought."[5] (Citations omitted.) *State* v. *Saucier*, 283 Conn. 207, 217–19, 926 A.2d 633 (2007). "Thus . . . the function performed by the trial court in issuing its ruling should dictate the scope of review." Id., 219. For example, the interpretation of a rule of evidence is a question of law (e.g., constitutes hearsay), but application of that interpreted rule of evidence is discretionary by the trial court (e.g., a hearsay exception applies). Id., 219–20.

"An out-of-court statement offered to establish the truth of the matter asserted is hearsay." (Internal quotation marks omitted.) Id., 223; see Conn. Code Evid. § 8-1 (3). "The hearsay rule forbids evidence of out-of-court assertions to prove the facts asserted in them. If the statement is not an assertion or is not offered to prove the facts asserted, it is not hearsay. . . . This exclusion from hearsay includes utterances admitted to show their effect on the hearer." (Citation omitted; internal quotation marks omitted.) *State* v. *Hull*, 210 Conn. 481, 498–99, 556 A.2d 154 (1989). "Because, however, the effect on the hearer rationale may be misapplied to admit facts that are not relevant to the issues at trial . . . courts have an obligation to ensure that a party's purported nonhearsay purpose is indeed a legitimate one. . . . Evidence is . . . admissible [only] when it tends to establish a fact in issue or to corroborate other direct evidence in the case. . . . Accordingly, an out-of-court statement is admissible to prove the effect on the hearer only when it is relevant for the specific, permissible purpose for which it is offered." (Citations

[5] The plaintiffs contend that, although the Appellate Court utilized the correct legal standard initially, the court then improperly applied abuse of discretion review when it stated: "The court properly determined that the articles were inadmissible hearsay and did not fall within a hearsay exception and, accordingly, did not abuse its discretion in excluding the articles from evidence." *Farrell* v. *Johnson & Johnson*, supra, 184 Conn. App. 699. We disagree. We discuss the difficulty in applying this standard to the present case in footnote 6 of this opinion.

omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Miguel C.*, 305 Conn. 562, 574, 46 A.3d 126 (2012); see also E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 8.3.1, p. 503. "The proffering party bears the burden of establishing the relevance of the offered testimony. Unless such a proper foundation is established, the evidence . . . is irrelevant." (Internal quotation marks omitted.) *State* v. *Davis*, 298 Conn. 1, 23, 1 A.3d 76 (2010).

Notice is a long recognized nonhearsay purpose in Connecticut. More than eighty years ago, this court observed: "Admission of testimony of a witness . . . that the day before the accident he had told [the foreman] . . . that the stone should be removed before someone was injured . . . was not hearsay . . . and was admissible as tending to impute to the defendants notice of the situation and its potential dangers." *Jenkins* v. *Reichert*, 125 Conn. 258, 264, 5 A.2d 6 (1939); see *Rogers* v. *Board of Education*, 252 Conn. 753, 767, 749 A.2d 1173 (2000) (statements in transcript were not inadmissible hearsay because they were offered "for the relevant purpose of showing that the statements had been made in the presence of the plaintiff"); *Whitman Hotel Corp.* v. *Elliott & Watrous Engineering Co.*, 137 Conn. 562, 574, 79 A.2d 591 (1951) (admitting letters from plaintiffs' attorney to defendants to show "the fact of the defendants' knowledge of the claimed effect of their operations, since that knowledge should influence their future conduct").

Although our decision in *State* v. *Saucier*, supra, 283 Conn. 207, contemplates that a hearsay determination, when based on an interpretation of the Code of Evidence, is solely a question of law, it also instructs us to "examine the nature of the ruling at issue in the context of the issues in the case." Id., 217. In the present case, the trial court determined that the two articles were inadmissible hearsay because they were irrelevant

with respect to the plaintiffs' asserted nonhearsay purpose. For a trial court to determine that a statement is admissible nonhearsay, the court must find that it is relevant for some reason other than its truth. See E. Prescott, supra, § 8.3.1, p. 503. The plaintiffs' stated purpose for offering the articles was to show that Hines had "notice . . . that there was a lack of sufficient risk-benefit information upon which informed consent could be made at that time. . . . [T]hat's the heart of this case." Thus, the trial court was required to exercise its discretion by finding facts regarding whether Hines had notice of these articles in order to determine whether they were relevant to the stated nonhearsay purpose. Because the trial court was required to make a "judgment call" in determining whether the articles were admissible nonhearsay, we review the court's determination for abuse of discretion and conclude that the trial court did not abuse its discretion.[6]

The purpose of notice evidence is to show an effect on the hearer. See E. Prescott, supra, § 8.8.1, p. 514 ("[a] statement is not hearsay if offered to prove notice to the hearer"); see also 2 R. Mosteller, McCormick on Evidence (8th Ed. 2020) § 249, pp. 196–200. Therefore, if the offering party has failed to demonstrate that the putative listener has heard or read the statement, it is inadmissible to prove notice. See, e.g., *Rotolo* v. *Digital*

[6] The standard of review set forth in *Saucier* can complicate appellate review of a trial court's hearsay determination. We note that Justice Norcott presciently foreshadowed this difficulty in his concurring opinion in *Saucier*. He disagreed with the majority's conclusion that "whether a statement is hearsay require[s] determinations about which reasonable minds may not differ; there is no judgment call by the trial court, and the trial court has no discretion to admit hearsay in the absence of a provision providing for its admissibility." (Internal quotation marks omitted.) *State* v. *Saucier*, supra, 283 Conn. 240 (*Norcott*, *J.*, concurring in part). Instead, according to Justice Norcott, trial courts' hearsay determinations should receive appellate deference because they often involve the "very kind of case and fact sensitive determination for which a trial court is particularly well suited." Id., 241 (*Norcott*, *J.*, concurring in part).

Equipment Corp., 150 F.3d 223, 224–25 (2d Cir. 1998) (holding that District Court improperly admitted videotape created by plaintiff's competitor for internal use only as notice evidence against defendant because plaintiff presented no evidence that defendant saw tape or reasonably should have seen it); *George* v. *Celotex Corp.*, 914 F.2d 26, 30 (2d Cir. 1990) (plaintiff must first prove that defendant's predecessor "saw the unpublished report or that it reasonably should have seen it as part of the published literature in the industry" because, "before [the] plaintiff can argue [nonhearsay] notice she must show that the defendant was at least inferentially put on notice by the report"); *Betts* v. *Manville Personal Injury Settlement Trust*, 225 Ill. App. 3d 882, 924, 588 N.E.2d 1193 (trial court improperly admitted newspaper and magazine articles for notice purposes because "there [was] no evidence anyone at [the defendant company] read these articles such that notice can be established"), cert. denied, 146 Ill. 2d 622, 602 N.E.2d 447 (1992); 4 C. Fishman, Jones on Evidence (7th Ed. 2000) § 24:27, pp. 263–66 ("In civil litigation as well as criminal, a statement may be nonhearsay because it is relevant to show knowledge or notice. . . . But to be relevant for this nonhearsay purpose, the offering party must establish that the adverse party in fact heard, saw or read the statement." (Footnotes omitted.)); R. Mosteller, supra, § 249, p. 197 n.13 ("[o]f course, there must be evidence that the relevant party could hear the statements or they are inadmissible under a notice theory"); see also *State* v. *Rosales*, 136 N.M. 25, 30, 94 P.3d 768 (2004) (explaining that, if evidence was offered to show that witness heard victim's statement, it could prove motive, but, "[i]f [the witness] was unaware of the victim's claim, then [the defendant's] theory that the evidence was not being offered for its truth is difficult to understand").

Courts have concluded that articles are admissible, despite hearsay objections, to show whether a party

should have known a fact at issue. See *Coyne* v. *Taber Partners I*, 53 F.3d 454, 461 n.6 (1st Cir. 1995) (allowing newspaper article to show hotel's constructive notice of violent strike); *Toney* v. *Zarynoff's, Inc.*, 52 Mass. App. 554, 562–63, 755 N.E.2d 301 (reversing trial court's exclusion of newspaper articles to show defendants' knowledge of criminal activity in area, even though defendant's operator "had not read them"), review denied, 435 Mass. 1107, 761 N.E.2d 964 (2001). Or, in the context of a manufacturer: "For purposes of determining if it had notice of the hazardous character of its product, [the] defendant was chargeable with knowledge of the entire body of scientific learning and literature relating to that product . . . ." *Marsee* v. *United States Tobacco Co.*, 866 F.2d 319, 326 (10th Cir. 1989). We agree with these decisions insofar as they hold that, if the proponent of an article can demonstrate that another party *should have known* the contents of the article, *because of an independent duty to do so*, it may be admissible to prove notice constructively. For example, manufacturers are "held to the knowledge of an expert in its field . . . and therefore [have] a duty 'to keep abreast of scientific knowledge, discoveries, and advances and is presumed to know what is imparted thereby.' " (Citations omitted.) *George* v. *Celotex Corp.*, supra, 914 F.2d 28.

Physicians possess a duty to stay abreast of the state of medical science in their areas of practice. See *Tomer* v. *American Home Products Corp.*, 170 Conn. 681, 687, 368 A.2d 35 (1976) ("[s]ince the defendants could not be held to standards which exceeded the limits of scientific advances existing at the time of their allegedly tortious conduct, expert testimony tending to show the scope of duties owed could have been properly limited to *scientific knowledge existing at that time*" (emphasis added)); C. Williams, Note, "Evidence-Based Medicine in the Law Beyond Clinical Practice Guidelines:

What Effect Will EBM Have on the Standard of Care?,'' 61 Wash. & Lee L. Rev. 479, 508–12 (2004) (describing duty and listing cases). In the present case, the defendants contested the authoritativeness of the two articles at issue. As such, the trial court did not abuse its discretion by excluding them for the purpose of establishing that they were so authoritative in the field that Hines should have been on constructive notice of their content—that is, that he reasonably should have read them. Put differently, because something is published in a journal does not mean, ipso facto, that it represents the state of medical science at the time, such that a physician is charged with a duty to know its contents. But cf. *George* v. *Celotex*, supra, 914 F.2d 28–30 (determining that asbestos report was relevant to defendant's liability because of defendant's duty to know and because of defendant's use of precise value criticized by report).

In the present case, the plaintiffs failed to meet their burden of demonstrating that Hines read or reasonably should have read the contents of these articles. Although one of the underlying issues in the case was what Hines, as a physician, knew or reasonably should have known with respect to the experimental nature of the mesh, the plaintiffs could not use the articles for that purpose without first establishing that Hines was on actual or constructive notice of the articles' contents. Although Hines testified that he had received or read certain articles in the two journals at issue and had published his own article in one of the journals, those facts alone do not permit an inference that, as a result, he read every article in each issue published by each of the journals. Nor did the plaintiffs argue or present evidence to establish an independent duty establishing that Hines reasonably should have read these two articles, beyond his receipt of one of the journals.[7]

[7] The trial court's other rulings reflected the importance of notice to the admissibility of evidence that otherwise would be hearsay. For example, the trial court admitted a Food and Drug Administration (FDA) public

The plaintiffs argue that proof of knowledge is not necessary to prove notice. On this point, the plaintiffs rely on *Blue Cross of California* v. *SmithKline Beecham Clinical Laboratories, Inc.*, 108 F. Supp. 2d 116 (D. Conn. 2000). In *Blue Cross of California*, the court considered the defendant's motion for summary judgment and concluded that "highly publicized information" released by "the national media and various professional organizations" put the plaintiffs on inquiry notice for statute of limitations reasons. Id., 123–24. The court denied the motion to strike the media reports on hearsay grounds because they showed "inquiry notice of the matters reported therein . . . ." Id., 123 n.5. *Blue Cross of California* is not inconsistent with our decision in the present case. The plaintiffs here have not asserted that the experimental nature of the pelvic mesh was a matter covered in "volumes" by the national media; had they done so, they would have a stronger argument that Hines should have known of that issue. Similarly, we disagree with the plaintiffs' reliance on *Kochan* v. *Owens-Corning Fiberglass Corp.*, 242 Ill. App. 3d 781, 610 N.E.2d 683 (1993), overruled by *Nolan* v. *Weil-McLain*, 233 Ill. 2d 416, 910 N.E.2d 549 (2009). In *Kochan*, the trial court permitted the plaintiffs' expert to summarize articles detailing the dangers of asbestos. *Kochan* v. *Owens-Corning Fiberglass Corp.*, supra, 803. The court held that this evidence was "intended to show when, in [the expert's] opinion, it

health notification into evidence for notice purposes. The FDA notification discussed "[c]omplications [a]ssociated with [t]ransvaginal [p]lacement of [s]urgical [m]esh" for pelvic organ prolapse and stress urinary incontinence and recommended certain actions for physicians. During the plaintiffs' examination of Hines, the plaintiffs established that he was aware of and had read that FDA notification, although he was not sure when he had first seen it. In the court's evidentiary ruling, it explained that the exhibit would be admitted because it showed "the effect on the doctor and what he knew or should have known with respect to the status of this type of surgical procedure so that he could adequately advise his patients as to the risks, benefits, and alternatives."

was generally known or should have been known in the industry that asbestos caused asbestosis and was linked to cancer." Id., 805. In the present case, the court allowed one of the three challenged articles to be admitted through the plaintiffs' expert under the learned treatise exception to the hearsay rule under § 8-3 (8) of the Connecticut Code of Evidence to show what Hines knew or should have known, but the plaintiffs failed to establish such a foundation when offering the ACOG Practice Bulletin and the Ostergard article.[8] Accordingly, we conclude that the Appellate Court properly upheld the trial court's conclusion that those two articles were hearsay and not admissible to prove notice.

II

We next turn to the plaintiffs' claim that the trial court improperly directed a verdict for the defendants on the count of innocent misrepresentation. The record reveals the following additional relevant facts and procedural history. On January 14, 2016, after the close of evidence, the trial court heard arguments on the defendants' motion for a judgment and a directed verdict[9] on several issues, including the innocent misrepresen-

[8] Accordingly, even if we assume, without deciding, that the trial court incorrectly concluded that the two articles were hearsay, we could uphold its evidentiary ruling on the alternative ground; see, e.g., *State* v. *Burney*, 288 Conn. 548, 560, 954 A.2d 793 (2008); that the plaintiffs failed to lay a proper foundation to prove their relevance. See *Price* v. *Rochford*, 947 F.2d 829, 833 (7th Cir. 1991) ("no hearsay problem" because articles reporting plaintiff's bankruptcy were not offered for their truth, but articles had low probative value because plaintiff "offered no specific facts tending to show that any of the defendants read these articles or even that they read the newspapers in which the articles appeared"); *Evans* v. *Hood Corp.*, 5 Cal. App. 5th 1022, 1044, 211 Cal. Rptr. 3d 261 (2016) (trial court properly excluded nonhearsay evidence offered for notice purposes because plaintiff failed to establish that defendants knew about documents, which had low probative value).

[9] The defendants made both a "motion for judgment at the end of [the] plaintiffs' case-in-chief and . . . [a motion] at the end of the evidentiary portion of the case for [a] directed verdict."

tation claim. At this hearing, the plaintiffs argued, inter alia, that the evidence at trial presented several misrepresentations by Hines, including his: (1) explanation that "I believe[d], not correctly, but I believed I had a pretty good understanding of what the risks of using this product were"; (2) failure to disclose certain payments; and (3) statement that the surgery "will improve [the plaintiffs'] sex life . . . ." The trial court indicated it had several questions regarding the applicability to this case of the tort of innocent misrepresentation and requested supporting case law from the plaintiffs. The next day, the trial court granted the defendants' motions for a directed verdict and judgment on the innocent misrepresentation claim and later rendered judgment accordingly.[10]

On appeal, the plaintiffs contend that the Appellate Court improperly upheld the trial court's decision to direct a verdict on the innocent misrepresentation counts because it was both procedurally and substantively improper. The plaintiffs argue that claims for innocent misrepresentation are not limited to economic loss, and, therefore, they should have been allowed to present their claimed pecuniary loss to the jury. In addition, the plaintiffs contend that the requisite commercial transaction existed between the parties because Hines was in the business of performing these types of procedures. The defendants counter that the trial court properly directed a verdict on the claim of innocent misrepresentation because there was no commercial relationship between the parties and because "[t]he mesh product that was used was entirely incidental to

[10] In granting the defendants' motions, the trial court indicated that it would not submit the plaintiffs' innocent misrepresentation claim to the jury because the plaintiffs had failed to produce case law establishing the claim's applicability in the informed consent context. The trial court also stated that it had performed its own research and could not reconcile the existing case law on innocent misrepresentation and its damages calculations with the claims in the present case.

the medical care that [Hines] rendered to [Mary Beth]." The defendants further argue that there was no factual foundation for the innocent misrepresentation claim, which, they contend, is inapplicable in cases arising from the provision of medical services. We agree with the defendants that the trial court properly directed a verdict because a claim for innocent misrepresentation does not lie as matter of law in this context.[11]

"Whether the evidence presented by the plaintiff is sufficient to withstand a motion for a directed verdict

[11] Procedurally, the plaintiffs argue that the trial court improperly allowed the defendants to raise the issue without ever raising the inapplicability of an innocent misrepresentation claim in any dispositive pretrial motions. The plaintiffs also claim that the trial court sua sponte raised the inapplicability of innocent misrepresentation because the defendants argued only that there was insufficient evidence to support a misrepresentation claim. In regard to any procedural impropriety, the defendants contend that they did raise "the legal insufficiency of the plaintiffs' claims by way of a special defense" in their answer because the trial court had earlier precluded them from filing a motion to strike.

The defendants moved for a directed verdict on several issues, including the insufficiency of the evidence to support the plaintiffs' claim of innocent misrepresentation, on January 14, 2016. After the defendants' motion, the trial court discussed the inapplicability of innocent misrepresentation and heard arguments from the parties. The next day, the court directed a verdict on innocent misrepresentation in the absence of any supporting case law from the plaintiffs. This was not improper. Motions for directed verdicts are properly made at the close of a plaintiff's evidence, which the defendants did here. Practice Book § 16-37; see also *State* v. *Perkins*, 271 Conn. 218, 271, 856 A.2d 917 (2004) (*Katz*, *J.*, dissenting) ("a motion for a directed verdict [is] made after the close of the plaintiff's case in a civil trial"). The trial court did not improperly raise the issue sua sponte but, instead, considered the applicability of innocent misrepresentation after the defendants moved for a directed verdict. The defendants' argument regarding the sufficiency of the evidence was a proper mechanism under which the trial court could consider the legal sufficiency of the plaintiffs' claim. See *Fisher* v. *Big Y Foods*, *Inc.*, 298 Conn. 414, 440, 3 A.3d 919 (2010) ("if, as a matter of law, [a claim for innocent misrepresentation] was not implicated by the circumstances of this case, then the trial court was required to direct a verdict in the defendant's favor"). Although this issue might have been more efficiently resolved as a pretrial matter, the trial court did not improperly direct the verdict on the plaintiffs' innocent misrepresentation claim because, as a matter of law, the court could not submit this claim to the jury.

is a question of law, over which our review is plenary. . . . Directed verdicts are not favored. . . . A trial court should direct a verdict only when a jury could not reasonably and legally have reached any other conclusion. . . . In reviewing the trial court's decision [to grant a defendant's motion for a directed verdict] we must consider the evidence in the light most favorable to the plaintiff. . . . A directed verdict is justified if . . . the evidence is so weak that it would be proper for the court to set aside a verdict rendered for the other party." (Citation omitted; internal quotation marks omitted.) *MacDermid, Inc.* v. *Leonetti*, 328 Conn. 726, 744, 183 A.3d 611 (2018). "At the outset, we note that although we do not generally favor directed verdicts . . . [a] verdict may properly be directed where the decisive question is one of law." (Citation omitted; internal quotation marks omitted.) *Red Maple Properties* v. *Zoning Commission*, 222 Conn. 730, 735, 610 A.2d 1238 (1992).

"In Connecticut, a claim of innocent misrepresentation . . . is based on principles of warranty, and . . . is not confined to contracts for the sale of goods. . . . A person is subject to liability for an innocent misrepresentation if in a sale, rental or exchange transaction with another, [he or she] makes a representation of a material fact for the purpose of inducing the other to act or to refrain from acting in reliance upon it . . . even though it is not made fraudulently or negligently. . . . We have held that an innocent misrepresentation is actionable, *even though there* [*is*] *no allegation of fraud or bad faith*, because it [is] false and misleading, in analogy to the right of a vendee to elect to retain goods which are not as warranted, and to recover damages for the breach of warranty." (Citations omitted; emphasis added; internal quotation marks omitted.) *Gibson* v. *Capano*, 241 Conn. 725, 730, 699 A.2d 68 (1997).

The seminal Connecticut case concerning innocent misrepresentation is *Johnson* v. *Healy*, supra, 176 Conn. 97. In *Johnson*, this court discussed the evolution of the common-law cause of action for innocent misrepresentation as an amalgam of tort and contract law. "Traditionally, no cause of action lay in contract for damages for innocent misrepresentation; if the plaintiff could establish reliance on a material innocent misstatement, he could sue for rescission, and avoid the contract, but he could not get affirmative relief. . . . In tort, the basis of responsibility, although at first undifferentiated, was narrowed, at the end of the [nineteenth] century, to intentional misconduct, and only gradually expanded, in this century, to permit recovery in damages for negligent misstatements. . . . At the same time, liability in warranty, that curious hybrid of tort and contract law, became firmly established, no later than the promulgation of the Uniform Sales Act in 1906. In contracts for the sale of tangible chattels, express warranty encompasses material representations which are false, without regard to the state of mind or the due care of the person making the representation. For breach of express warranty, the injured plaintiff has always been entitled to choose between rescission and damages. Although the description of warranty liability has undergone clarification in the Uniform Commercial Code, which supersedes the Uniform Sales Act, these basic remedial principles remain unaffected. At the same time, liability in tort, even for misrepresentations which are innocent, has come to be the emergent rule for transactions that involve a commercial exchange." (Citations omitted; footnote omitted.) Id., 100–101; see also 3 Restatement (Second), Torts § 552C, p. 141 (1977); 3 Restatement (Second), supra, § 524A, p. 51.

In *Johnson*, this court upheld the trial court's verdict for the plaintiffs on their innocent misrepresentation claim. *Johnson* v. *Healy*, supra, 176 Conn. 102–103. The

plaintiffs had relied on affirmative statements by the defendant that "the house was made of the best material, that he had built it, and that there was nothing wrong with it" when deciding to make their purchase. Id., 98–99. Because strict liability for innocent misrepresentation "is based on principles of warranty" that are clearly established in sales of goods, the court considered whether such warranty law extended to sales of real estate. Id., 101–102. The court held that such an extension was appropriate in this context because caveat emptor was no longer a barrier to misrepresentation and warranty law applied in the sale of "new homes . . . ." Id., 102.

In the present case, the plaintiffs seek to extend liability for innocent misrepresentation even further, effectively rendering physicians strictly liable for statements they make in the course of medical treatment. Unlike in *Johnson*, we are not persuaded that these facts dictate an extension of liability.

First, in Connecticut, the tort of innocent misrepresenation generally is governed by § 552C of the Restatement (Second),[12] which requires "a sale, rental or exchange transaction with another" before liability attaches. See *Gibson* v. *Capano*, supra, 241 Conn. 730 (relying on § 552C in innocent misrepresentation case involving sale of property); see also *Bartholomew* v. *Bushnell*, 20 Conn. 271, 274 (1850) (sale of horses); *Little Mountains Enterprises, Inc.* v. *Groom*, 141 Conn. App. 804, 806, 64 A.3d

[12] Section 552C of the Restatement (Second) of Torts provides: "(1) One who, in a sale, rental or exchange transaction with another, makes a misrepresentation of a material fact for the purpose of inducing the other to act or to refrain from acting in reliance upon it, is subject to liability to the other for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation, even though it is not made fraudulently or negligently.

"(2) Damages recoverable under the rule stated in this section are limited to the difference between the value of what the other has parted with and the value of what he has received in the transaction." 3 Restatement (Second), supra, § 552C, p. 141.

781 (2013) (sale of real property); *Matyas* v. *Minck*, 37 Conn. App. 321, 333, 655 A.2d 1155 (1995) (same). The commentary to § 552C of the Restatement (Second) illuminates this language further, explaining that it encompasses "any sale, rental or exchange of land, chattels, securities or anything else of value, such as copyrights, patents and other valuable intangible rights." 3 Restatement (Second), supra, § 552C, comment (c), p. 144; see W. Prosser, Torts (4th Ed. 1971) § 107, p. 711 ("a large group of the American courts have succeeded in prying open the door, and extending strict liability to express representations made in the *course of other commercial dealings*, such as the sale of land, securities, or patent rights" (emphasis added)).

The few courts that have considered this issue have concluded that the provision of professional services is not a commercial transaction for purposes of § 552C of the Restatement (Second). See *Adams* v. *Allen*, 56 Wn. App. 383, 385, 393, 783 P.2d 635 (1989) (holding that "sale, rental or exchange transaction" language in § 552C is inapplicable to physician's representations in course of prescribing medication), overruled on other grounds by *Caughell* v. *Group Health Cooperative of Puget Sound*, 124 Wn. 2d 217, 876 P.2d 898 (1994). Similarly, with respect to other professional services, the United States District Court for the District of Massachusetts granted a motion to dismiss when a plaintiff sought to hold a law firm liable for alleged misrepresentations regarding "the tax advantages of [an] investment" under a theory of innocent misrepresentation because the law firm was "not a party to any sale . . . ." *Norman* v. *Brown, Todd & Heyburn*, 693 F. Supp. 1259, 1260, 1264–65 (D. Mass. 1988).

In the present case, Mary Beth did not seek out Hines for the purpose of purchasing a product; instead, as the complaint alleges, she sought his services in implanting the pelvic mesh. Therefore, Mary Beth's purchase of

the mesh was secondary to the main purpose of the transaction, namely, to seek surgical assistance for her pelvic organ prolapse. Hines, as a urogynecologist and a surgeon, did not function primarily as a seller of pelvic mesh. See *Zbras* v. *St. Vincent's Medical Center*, 91 Conn. App. 289, 294, 880 A.2d 999 ("[t]he transaction in this case, a surgery, clearly was labeled a service rather than the sale of a product"), cert. denied, 276 Conn. 910, 886 A.2d 424 (2005). For these reasons, and in the absence of any authority cited by the plaintiffs to the contrary, we conclude that Hines' provision of medical services did not qualify as a "sale, rental or exchange transaction" under § 552C of the Restatement (Second), and, therefore, a claim for innocent misrepresentation does not lie under our existing innocent misrepresentation precedent.[13] Although the plaintiffs assert that there was a commercial transaction between the parties, the core of their argument necessarily seeks to extend liability for innocent misrepresentations outside of commercial transactions.

Liability outside of "a sale, rental or exchange transaction" is not categorically excluded by the Restatement, as that provision includes a caveat declining to opine on "other types of business transactions, in addition to those of sale, rental and exchange, in which strict liability may be imposed for innocent misrepresentation under the conditions stated in [§ 552C]."[14] 3 Restate-

[13] This conclusion by no means creates a per se rule that physicians may never be held liable for innocent misrepresentations of fact under § 552C of the Restatement (Second). There are a growing number of situations in which a physician may be a party to a commercial transaction as the business of healthcare evolves. See L. Churchill, "The Hegemony of Money: Commercialism and Professionalism in American Medicine," 16 Cambridge Q. Healthcare Ethics 407, 410–12 (2007) (discussing commercialization of practice of medicine). But, outside of the fact that Hines routinely performs such surgeries, the plaintiffs have not presented any persuasive reason that transforms Hines' provision of medical services into a "sale, rental or exchange transaction . . . ."

[14] Comment (g) to § 552C of the Restatement (Second) of Torts explains the caveat: "There have, however, been occasional decisions in which the

ment (Second), supra, § 552C, caveat, pp. 141–42; see also *E. & F. Construction Co.* v. *Stamford*, 114 Conn. 250, 257–59, 158 A. 551 (1932) (building contractor could recover because of town's innocent misrepresentation of amount of rock that contractor would be required to excavate under contract for services). As a result, we next consider whether liability for innocent misrepresentations should be extended to statements made during the provision of medical services.

The plaintiffs argue that, "[i]f someone can be held liable for innocent misrepresentation in the sale of a horse, what possible reason is there to immunize a doctor—who owes a fiduciary duty to his patient—for similar omissions?" In addition, they argue that General Statutes § 52-572m (b),[15] the statute that governs product liability claims, permits recovery for personal injury damages from innocent misrepresentations. The defendants counter that personal injury damages are more appropriately obtained from malpractice actions that

same rule has been applied to other types of business transactions, such as the issuance of an insurance policy or the inducement of an investment or a loan. . . . The law appears to be still in a process of development and the ultimate limits of the liability are not yet determined." 3 Restatement (Second), supra, § 552C, comment (g), p. 145; see also A. Hill, "Damages for Innocent Misrepresentation," 73 Colum. L. Rev. 679, 704 (1973) ("[a]s to why cases like this are relatively uncommon, one may suppose that in some significant classes of contracts, such as those for services, representations of fact are infrequent as compared with representations of opinion; and that in other significant classes, such as those for the sale of real property, the extensive use of form contracts results in severe obstacles to proof of such representations, if made").

[15] General Statutes § 52-572m (b) provides: " 'Product liability claim' includes all claims or actions brought for *personal injury*, death or property damage caused by the manufacture, construction, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging or labeling of any product. 'Product liability claim' shall include, but is not limited to, all actions based on the following theories: Strict liability in tort; negligence; breach of warranty, express or implied; breach of or failure to discharge a duty to warn or instruct, whether negligent or innocent; *misrepresentation* or nondisclosure, whether negligent or *innocent*." (Emphasis added.)

lie in negligence rather than in strict liability. They posit that "[i]t is not difficult to imagine the mischief that can potentially ensue if, rather than having to prove a medical malpractice case through expert testimony, a plaintiff could potentially recover some or all of the same damages by asserting instead that the alleged harm that was suffered at the hands of the physician was due to 'innocent misrepresentation,' in other words strict liability for the doctor not knowing before the procedure was undertaken that the outcome would be unfavorable." We agree with the defendants and conclude that strict liability should not extend to innocent misrepresentations made during the provision of medical services in this instance.

We initially note that the few courts that have considered this issue have uniformly declined to hold physicians strictly liable for statements made in the course of medical treatment. See *Christensen* v. *Thornby*, 192 Minn. 123, 126, 255 N.W. 620 (1934) (declining to hold surgeon strictly liable for representations in absence of negligence or fraudulent intent); *Black* v. *Gundersen Clinic, Ltd.*, 152 Wis. 2d 210, 214, 448 N.W.2d 247 (App.) ("[w]e have not recognized the imposition of liability upon a doctor under the strict liability doctrine based upon misrepresentation"), review denied, 449 N.W.2d 276 (Wis. 1989). Unlike product sellers, the medical profession requires the exercise of a highly particularized skill and is often accompanied by medical *opinions* rather than statements of fact.[16] That is not to say that

[16] Actions for fraudulent and negligent misrepresentation in Connecticut require the representation to be one of fact. See *Glazer* v. *Dress Barn, Inc.*, 274 Conn. 33, 73, 873 A.2d 929 (2005) ("an action for negligent misrepresentation requires the plaintiffs in the present case to prove that [the defendant] made a misrepresentation of fact"); *Crowther* v. *Guidone*, 183 Conn. 464, 467, 441 A.2d 11 (1981) ("[i]t is true that our cases have consistently required that, as one element of fraudulent misrepresentation, a representation be made as a statement of fact"). We need not decide, in this case, whether a false statement made as part of a medical opinion could support a cause of action for misrepresentation. See, e.g., *Van Leeuwan* v. *Nuzzi*, 810 F. Supp. 1120, 1124 (D. Colo. 1993); *Custodio* v. *Bauer*, 251 Cal. App. 2d 303,

a physician can never make a false statement of fact, because, if and when he or she does, a patient may sue the physician for misrepresentation. See, e.g., *Doe* v. *Cochran*, 332 Conn. 325, 342–45, 210 A.3d 469 (2019); *Duffy* v. *Flagg*, 279 Conn. 682, 697, 905 A.2d 15 (2006). But, on the facts presented by this case, the plaintiffs have not pointed to any persuasive policy reason for why this current misrepresentation scheme is insufficient and should be extended to include innocent misrepresentations.

The plaintiffs argue, however, that public policy permits the recovery of damages for personal injuries resulting from innocent misrepresentations because such claims are permitted as product liability claims under § 52-572m (b). See, e.g., *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 438, 119 A.3d 462 (2015) (legislature has "primary responsibility in pronouncing the public policy of our state" (internal quotation marks omitted)). We disagree. First, the fact that the legislature included the types of damages permitted in a product liability claim in the first sentence of the statute does not suggest that every theory in the following sentence permits such damages in any case against any defendant that implicates a defective product. See footnote 15 of this opinion (quoting text of § 52-572m (b)). Second, and most significant, the plaintiffs did not assert a product liability claim against Hines in this case. Thus, even if we assume without deciding that personal injury damages are permitted for innocent misrepresentation claims in a product liability context, this would be of no consequence in the present case.

Finally, the plaintiffs have not presented any authority applying strict liability for misrepresentations to

314, 59 Cal. Rptr. 463 (1967); see also F. Harper & M. McNeely, "A Synthesis of the Law of Misrepresentation," 22 Minn. L. Rev. 939, 951–52 (1938) (discussing opinion versus fact distinction).

medical services. This is likely because such strict liability for misrepresentations is doctrinally inconsistent with the existing framework governing claims against physicians arising from acts of omission or commission during physician-patient communications. Under the doctrine of informed consent, a physician must "provide the patient with that information which a reasonable patient would have found material for making a decision whether to embark upon a contemplated course of therapy." (Internal quotation marks omitted.) *Duffy* v. *Flagg*, supra, 279 Conn. 691. Permitting a patient to sue for innocent misrepresentation would drastically alter this standard by rendering a physician liable for *any* inaccuracies that may be discovered in the future, not only those a reasonable patient would have found material at the time. This is inconsistent with the "numerous cases holding that a doctor is not liable for failing to warn a patient of risks flowing from an unknown and unknowable condition." *Latham* v. *Hayes*, 495 So. 2d 453, 461 (Miss. 1986) (Anderson, J., dissenting).[17] Because a reasonable patient could not expect to be informed of currently unknown risks, we decline to replace this state's informed consent action with one that would make physicians strictly liable for innocent statements made in the course of treatment.[18]

[17] Cf. *Howard* v. *University of Medicine & Dentistry of New Jersey*, 172 N.J. 537, 553–54, 800 A.2d 73 (2002) ("we are not convinced that our common law should be extended to allow a novel fraud or deceit-based cause of action in this doctor-patient context that regularly would admit of the possibility of punitive damages, and that would circumvent the requirements for proof of both causation and damages imposed in a traditional informed consent setting").

[18] The plaintiffs argue that informed consent actions do not displace claims for misrepresentation against physicians such as those brought under *Duffy* v. *Flagg*, supra, 279 Conn. 682. We disagree. In *Duffy*, this court likely was not envisioning liability for innocent misrepresentations about the treatment to be rendered, as it specifically was considering misrepresentations regarding "the physician's skills, qualifications, or experience," which are topics uniquely within the physician's knowledge. Id., 697. Put differently, it is rather difficult to contemplate that a physician would or could innocently misrepresent his or her own experience in a material way.

Accordingly, we conclude that the Appellate Court properly upheld the trial court's decision to direct a verdict on the plaintiffs' innocent misrepresentation claim.[19]

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

OHAN KARAGOZIAN *v.* USV OPTICAL, INC.
(SC 20257)

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

Syllabus

The plaintiff employee sought to recover damages from the defendant employer, alleging that he was constructively discharged in violation of public policy. The plaintiff had been employed as a licensed optician manager in the defendant's optical department in a JCPenney store and alleged that the defendant improperly required him to provide optometric assistance services to the doctor of optometry in the store. The

[19] Although our case law does not expressly preclude damages for personal injuries arising from innocent misrepresentations, we observe that such liability would be inappropriate in the present case. "The defendant may be subjected to liability for innocent misrepresentation causing *stand-alone economic harm* when the defendant undertakes to guarantee the truth of the matter represented, that is, when his representation is a warranty. Where a warranty is breached, the plaintiff may *recover the contract or loss of bargain measure of damages*." (Emphasis added.) 3 D. Dobbs et al., The Law of Torts (2d Ed. 2011) § 669, p. 661; see 3 Restatement (Second), supra, §552C, comment (f), p. 145 (noting that innocent misrepresentation damages "are restitutionary in nature" and "in effect [restore the plaintiff] to the pecuniary position in which he stood before the transaction," and that, because "the defendant's misrepresentation is an innocent one, *he is not held liable for other damages*; *specifically, he is not liable for benefit of the bargain or for consequential damages*" (emphasis added)); see also *Johnson* v. *Healy*, supra, 176 Conn. 106 ("[t]he proper test for damages was the difference in value between the property had it been as represented and the property as it actually was"). Thus, it appears that this damages calculation would not provide the plaintiffs with any significant relief because the damages for personal injuries stemming from the mesh would be limited to the difference between what the plaintiffs paid for the mesh product and the value of the mesh retained.

plaintiff claimed that, under a declaratory ruling issued by the Board of Examiners for Optometrists and a cease and desist consent order issued by the Board of Examiners for Opticians, employees, including opticians, under the control of unlicensed third parties were prohibited from performing services for licensed optometrists. The plaintiff also alleged that his duties violated the public policy embodied in the statute (§ 31-130 (i)) requiring JCPenney and the defendant to have a staffing permit before providing staffing services to the optometrist. The plaintiff further alleged that he was forced to resign when the defendant refused his requests to be excused from these duties. The defendant moved to strike the plaintiff's complaint on the ground that its allegations could not satisfy the requirements of a constructive discharge claim. The defendant asserted that the declaratory ruling and the cease and desist order were not binding and did not create a private right of action for optometric assistants. The defendant also alleged that the plaintiff's reliance on § 31-130 (i) was misplaced because the plaintiff did not allege that optometrists employed by the defendant charged the defendant for hiring opticians. The trial court, relying on *Brittell* v. *Dept. of Correction* (247 Conn. 148), determined that, to prevail on his constructive discharge claim, the plaintiff was required to demonstrate that the defendant intended to force him to resign. The trial court granted the defendant's motion to strike the plaintiff's complaint and rendered judgment for the defendant. The plaintiff appealed to the Appellate Court, which affirmed the trial court's judgment. The Appellate Court, interpreting and applying *Brittell* in the same manner as the trial court, concluded, inter alia, that there was no allegation in the plaintiff's complaint that reasonably could be construed to claim that the defendant intended to create conditions so intolerable that a reasonable person in the plaintiff's shoes would be compelled to resign. On the granting of certification, the plaintiff appealed to this court. *Held*:

1. The Appellate Court incorrectly interpreted the standard set forth in *Brittell* to require the plaintiff to assert facts demonstrating that the defendant intended to force him to resign, *Brittell* having required the plaintiff to establish only that the defendant intended to create an intolerable work atmosphere; the *Brittell* standard for constructive discharge requires a subjective inquiry into whether the employer intended to create the complained of employment atmosphere or condition and an objective inquiry into whether that atmosphere or condition would have led a reasonable person in the employee's shoes to feel compelled to resign, and that standard does not require the employee to allege facts showing that the employer intended to force the employee to resign.
2. Although the Appellate Court incorrectly applied the standard for constructive discharge in *Brittell*, that court correctly upheld the trial court's granting of the defendant's motion to strike the plaintiff's complaint on the alternative ground that the plaintiff had failed to allege facts establishing that his work atmosphere was so difficult or unpleasant

that a reasonable person in his shoes would have felt compelled to resign, and, accordingly, this court affirmed the judgment of the Appellate Court: nothing in the plaintiff's complaint established that the defendant required him to violate the law, as the declaratory ruling evaluated the circumstances under which an optometrist would be considered an employee of an unlicensed person or entity, and the plaintiff was employed as an optician rather than an optometrist, the declaratory ruling was binding only on those, unlike the plaintiff, who participated in the hearing that led to the ruling, and the ruling, which was intended to provide guidance to optometrists, did not establish criminal liability or inflict repercussions for specific conduct that would compel a reasonable optician in the plaintiff's shoes to resign; moreover, the plaintiff failed to demonstrate that the cease and desist order either applied to him or bound the defendant, as the order required that a store different from the one in which the plaintiff worked not permit a licensed optician to act in the capacity of an optometric assistant to an independent optometrist leasing space in the store, and also failed to demonstrate how the consent order functionally created a work condition so intolerable that a person in the plaintiff's shoes would have been justified in walking off the job as if he had been fired; furthermore, contrary to the plaintiff's claim, § 31-130 (i) was inapplicable, as it requires only that a person who procures or offers to procure employees for employers register with the Commissioner of Labor, and the allegations of the plaintiff's complaint did not suggest that the defendant intended to create conditions different from what the plaintiff would have expected when he agreed to work as a licensed optician manager for the defendant.

Argued December 12, 2019—officially released April 15, 2020*

Procedural History

Action to recover damages for the plaintiff's alleged constructive discharge from employment, brought to the Superior Court in the judicial district of New Haven at Meriden, where the court, *Hon. John F. Cronan*, judge trial referee, granted the defendant's motion to strike the revised complaint; thereafter, the court, *Harmon, J.*, granted the plaintiff's motion for judgment and rendered judgment for the defendant, from which the plaintiff appealed to the Appellate Court, *DiPentima, C. J.*, and *Lavine* and *Moll, Js.*, which affirmed the judg-

* April 15, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

ment of the trial court, and the plaintiff, on the granting of certification, appealed to this court. *Affirmed.*

John R. Williams, for the appellant (plaintiff).

Robert M. Palumbos, pro hac vice, with whom was *Elizabeth M. Lacombe*, for the appellee (defendant).

Scott Madeo and *Brian Festa* filed a brief for the Commission on Human Rights and Opportunities as amicus curiae.

Opinion

D'AURIA, J. The plaintiff, Ohan Karagozian, an optician formerly employed by the defendant, USV Optical, Inc.,[1] brought this action for constructive discharge, alleging that (1) the defendant required him to provide optometric assistance services to a doctor of optometry in violation of the public policy of the state of Connecticut, (2) the defendant refused and failed to excuse the plaintiff from those duties, and (3) "[a]s a result, the plaintiff was compelled to resign his position with the defendant . . . ." The defendant moved to strike the plaintiff's corrected revised complaint on the ground that the allegations in the complaint could not, as a matter of law, satisfy the requirements of a constructive discharge claim.[2] The trial court granted the defendant's motion to strike, relying on *Brittell* v. *Dept. of Correction*, 247 Conn. 148, 178, 717 A.2d 1254 (1998), for the proposition that a claim of constructive discharge requires a plaintiff to demonstrate that the employer intended to force the employee to resign. The trial court

[1] The plaintiff alleged that USV Optical, Inc., is a Texas corporation headquartered in New Jersey that owns and operates optical departments in JCPenney stores at various locations in Connecticut.

[2] The operative complaint for purposes of the present appeal is the corrected revised complaint filed on December 19, 2016. The defendant also moved to strike the plaintiff's complaint on the ground that the plaintiff asserted a claim for which no private right of action exists. The trial court did not address that issue, and the parties did not raise it on appeal.

determined that the plaintiff had not only failed to allege this intent requirement in his complaint, but also failed to allege the second requirement of a constructive discharge claim—that his work conditions became so intolerable that a reasonable person in his shoes would have felt compelled to resign.

Interpreting and applying our decision in *Brittell* in the same fashion as the trial court, the Appellate Court affirmed the trial court's judgment, concluding that there was "no allegation in the complaint that reasonably [could] be construed to claim that the defendant *intended* to create conditions so intolerable that a reasonable person would be compelled to resign." (Emphasis in original.) *Karagozian* v. *USV Optical, Inc.*, 186 Conn. App. 857, 867–68, 201 A.3d 500 (2019). We disagree with the Appellate Court's interpretation of *Brittell*, although we affirm its judgment on the alternative ground it identified.

To plead a prima facie case of constructive discharge, a plaintiff must allege that (1) the employer intentionally created the complained of work atmosphere, (2) the work atmosphere was so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign, and (3) the plaintiff in fact resigned. *Brittell* does not, as the Appellate Court has ruled in several cases, require a plaintiff claiming constructive discharge to allege that the employer intended to force the employee to quit, but only to allege that the employer intended to create the *conditions* that the plaintiff claims compelled the employee to quit. However, in the present case, we agree with the Appellate Court and the defendant that the plaintiff failed to sufficiently allege the second requirement of a constructive discharge claim in his complaint. Specifically, the plaintiff's complaint fails as a matter of law to allege that the defendant created a work atmosphere so difficult

or unpleasant that a reasonable person in the plaintiff's shoes would have felt compelled to resign.

The following facts and procedural history, as contained in the record and in the Appellate Court's decision, are relevant to this appeal. The plaintiff's complaint alleged that the plaintiff began working in an optical department operated by the defendant and located in a JCPenney store in Trumbull. As a licensed optician manager, the plaintiff's role involved providing optometric assistant services to the doctor of optometry at the store. His specific duties included, but were not limited to, maintaining records, scheduling appointments, preparing patients for vision examinations, adjusting and repairing glasses, modifying contact lenses, measuring intraocular pressure of eyes using a glaucoma test, and measuring the axial length of eyes using ultrasound equipment. About three months into his employment, the plaintiff asked his supervisors that "he not be required to perform such duties . . . ." According to the plaintiff, he made this request on at least three separate occasions on the basis of his belief that these duties violated the public policy of the state of Connecticut.

As support for his belief that these duties violated the state's public policy, the plaintiff attached to his complaint copies of a declaratory ruling issued by the Board of Examiners for Optometrists on May 1, 2002, and a cease and desist consent order issued by the Board of Examiners for Optometrists and the Board of Examiners for Opticians in February, 2006. In the plaintiff's view, the declaratory ruling "prohibits employees under the control of unlicensed third parties from performing services for licensed optometrists." The cease and desist consent order, the plaintiff alleged, provided that Walmart, Inc., had agreed not to permit licensed opticians to perform the duties of an optometric assistant or to perform services for optometrists by whom

they were not employed. Additionally, the plaintiff alleged that his duties violated public policy, as set forth in General Statutes § 31-130 (i),[3] in that "neither the defendant nor JCPenney had a staffing permit allowing either of them to provide staffing services to the doctor." The plaintiff's complaint alleged that the defendant refused the plaintiff's requests and failed to excuse him from these duties. As a result, the plaintiff claimed, he was compelled to resign his position. He then brought this action for constructive discharge.

The defendant moved to strike the complaint on the ground that the plaintiff's allegations did not, as a matter of law, satisfy the requirements of a constructive discharge claim. Specifically, the defendant argued, the documents on which the plaintiff relied—the declaratory ruling and the cease and desist consent order—were not binding on the parties in the present case and did not create a private right of action for optometric assistants. The defendant also contended that the plaintiff's reliance on § 31-130 (i) was misplaced because his complaint made no allegation that optometrists employed by the defendant charged the defendant for hiring opticians. As to the elements of a constructive discharge claim, the defendant argued that the plaintiff's complaint failed to establish that the employer intentionally created an intolerable work atmosphere that forced the plaintiff to quit.

The trial court agreed with the defendant and granted the motion to strike the complaint. The plaintiff declined to replead and, instead, after the court rendered judg-

[3] General Statutes § 31-130 (i) provides in relevant part: "No person shall engage in the business of procuring or offering to procure employees for persons seeking the services of employees or supplying employees to render services where a fee or other valuable thing is exacted, charged or received from the employer for procuring or assisting to procure or supplying such employees unless he registers with the Labor Commissioner. . . ."

ment in favor of the defendant, appealed to the Appellate Court, which affirmed the judgment of the trial court. The Appellate Court's decision relied on its interpretation of the standard we established in *Brittell* for a constructive discharge claim. The plaintiff then petitioned this court for certification to appeal, which we granted on one issue: "Did the Appellate Court correctly construe and apply *Brittell* v. *Dept. of Correction*, [supra, 247 Conn. 148], in holding that an action for constructive discharge in violation of public policy requires that the plaintiff allege and prove not only that the employer intended to create an intolerable work atmosphere but that the employer intended thereby to force the plaintiff to resign?" *Karagozian* v. *USV Optical, Inc.*, 331 Conn. 904, 201 A.3d 1023 (2019).

On appeal to this court, the plaintiff reasserts his position that a constructive discharge allegation should not focus on the "employer's state of mind but on the objective reality of the working conditions and the impact of that objective reality, not upon the particular worker in question, but upon a hypothetical reasonable person in the worker's position. . . . By requiring the employee to prove . . . that the employer intended to force him to resign, the Appellate Court . . . imposed a requirement that defeats the very purpose of the constructive discharge doctrine." (Citations omitted; emphasis omitted.) Accordingly, the plaintiff urges this court to reverse the Appellate Court's judgment upholding the trial court's decision to strike his complaint.

I

"Because a motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court, our review of the court's ruling . . . is plenary. . . . We take the facts to be those alleged in the complaint that has been stricken and we construe the complaint in the manner most favor-

able to sustaining its legal sufficiency. . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied." (Internal quotation marks omitted.) *Geysen* v. *Securitas Security Services USA, Inc.*, 322 Conn. 385, 398, 142 A.3d 227 (2016).

To evaluate whether the Appellate Court properly upheld the trial court's ruling that the plaintiff failed to allege facts sufficient to support a claim for constructive discharge, we first must determine whether the Appellate Court properly applied the constructive discharge standard that we described in *Brittell* v. *Dept. of Correction*, supra, 247 Conn. 148: "Constructive discharge of an employee occurs when an employer, rather than directly discharging an individual, *intentionally* creates an intolerable work atmosphere that forces an employee to quit involuntarily. . . . Working conditions are intolerable if they are so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 178, quoting *Chertkova* v. *Connecticut General Life Ins. Co.*, 92 F.3d 81, 89 (2d Cir. 1996).

The parties in the present case disagree in their interpretation of the *Brittell* standard, specifically as to the element of intent. The defendant candidly suggests that two different interpretations of the standard are plausible—either that the employer intended to create an intolerable work atmosphere or that the employer intended to create the intolerable work atmosphere and thereby intended to force the employee to quit. The defendant argues that a plaintiff claiming that he was constructively discharged should be required to show that the employer intended to force the employee to resign. As support for its claim, the defendant points to Appellate Court and Superior Court cases that "have consistently applied *Brittell* to require that the employer intend to

force the employee to resign."[4] According to the defendant, the Appellate Court in the present case correctly applied the standard in concluding that the plaintiff had failed to assert facts showing that the defendant intended to force his resignation.

The plaintiff, on the other hand, asserts that the proper interpretation of *Brittell* is that an employer's intent matters only in regard to the creation of the intolerable work atmosphere. He argues that the Appellate Court incorrectly interpreted the standard in *Brittell* by forcing him to show that the employer intended to force him to resign.

We agree with the plaintiff. An examination of our decision in *Brittell* reveals that we required that the plaintiff establish only that the employer intended to create the intolerable work atmosphere, not that the

[4] For example, the defendant relies on *Boucher* v. *Saint Francis GI Endoscopy, LLC*, 187 Conn. App. 422, 202 A.3d 1056, cert. denied, 331 Conn. 905, 201 A.3d 1023 (2019), in which the Appellate Court, interpreting *Brittell*, stated that "the plaintiff has presented no evidence from which it can be inferred that the defendant deliberately sought to force the plaintiff to quit." Id., 433; see also *Horvath* v. *Hartford*, 178 Conn. App. 504, 510–11, 176 A.3d 592 (2017) ("to meet the high standard applicable to a claim of constructive discharge, a plaintiff is required to show . . . that there is evidence of the employer's intent to create an intolerable environment that forces the employee to resign"). In fact, the Appellate Court panel in the present case was following *Horvath*. See *Karagozian* v. *USV Optical, Inc.*, supra, 186 Conn. App. 873 n.15.

The defendant also relies on a Superior Court case in which the court set out the standard for a constructive discharge claim as follows: "To plead a prima facie case of constructive discharge, a plaintiff must allege two elements. First, the plaintiff must show that the defendant acted deliberately to create an intolerable work environment. Deliberateness exists only if the actions complained of were intended by the employer as an effort to force the employee to quit . . . ." *Harrelle* v. *Wendy's Old Fashioned Hamburgers of New York, Inc.*, Docket No. CV-14-6008428-S, 2017 WL 715754, *7 (Conn. Super. January 10, 2017). Applying that standard, the court found that a genuine issue of material fact existed as to whether the employer transferred the employee "for legitimate business reasons or to force the [employee] to quit." Id., *8. In light of our holding today, to the extent that those cases incorrectly applied the *Brittell* standard, we disavow that application.

employer intended to compel the plaintiff to quit. Recent United States Supreme Court precedent, applying federal law on which we relied in *Brittell*, supports our determination.

In *Brittell*, about one year into her employment, the plaintiff, a female correction officer employed by the Department of Correction (department) and assigned to one of its correctional centers, reported to her supervisors several incidents of inmates making obscene comments about her sexuality. *Brittell* v. *Dept. of Correction*, supra, 247 Conn. 150–51. On the basis of one of the plaintiff's reports, the deputy warden met with her and thereafter issued a memorandum to the warden, noting "that all staff had been admonished regarding . . . possible consequences of any harassing statements or actions made to or about fellow staff [persons] . . . that he had advised the plaintiff to report any continued harassing behavior to her supervisors . . . and report[ing] that the plaintiff had declined the help of the employee assistance program . . . ." (Footnotes omitted.) Id., 153.

About seven months later, another incident occurred. Id., 154. The plaintiff reported the matter to a major, who "issued a notice to all employees that defined sexual harassment . . . . A similar notice was read at roll call for seven consecutive days." Id. The plaintiff then filed a written complaint with the warden and informed the major that she had sought psychiatric help. Id., 155. The major thereafter informed her that she should not return to work, and she was placed on medical leave. Id., 157. The plaintiff also contacted the department's affirmative action unit and filed a formal complaint. Id., 158. The affirmative action unit "offered to recommend a transfer for the plaintiff to any institution of her choice within the department . . . . The plaintiff, however, was not amenable to this suggestion." Id., 159. The plaintiff declined the idea of a transfer on three other

occasions: (1) at the suggestion of the affirmative action unit, stating as reasons that she had a new apartment, she did not have a car, and her mother lived nearby; (2) at the suggestion of an employee in the department's personnel department, citing as reasons certain medical problems and that she did not own a car; and (3) at the suggestion of the warden, voicing concern over the possibility that correction officers and inmates from the correctional facility also might be transferred to the same institution, which could lead to a recurrence of the rumors. Id., 159–60. The plaintiff applied for medical leave and continued on unpaid medical leave until she failed to submit necessary medical documentation. Id., 160–61. At that point, her employer considered her to have resigned. Id., 161.

The plaintiff thereafter brought an action in which she alleged that she had been constructively discharged "because the working conditions that she faced became so difficult that a reasonable person similarly situated would have felt compelled to leave . . . ." Id., 162. The trial court, after a court trial, rejected her constructive discharge claim "on the ground that the defendant had offered the plaintiff the opportunity to transfer to any one of a number of other correctional institutions within the general vicinity of her home, but the plaintiff had declined these offers." Id., 163. On appeal to this court, the plaintiff claimed that, "by failing to put an end to the harassment she faced at work for nearly two years, [the department] created a work environment so hostile that any reasonable person in her position would have left." Id., 178. This court, for the first time, set forth the now oft quoted standard for constructive discharge: "Constructive discharge of an employee occurs when an employer, rather than directly discharging an individual, *intentionally* creates an intolerable work atmosphere that forces an employee to quit involuntarily. . . . Working conditions are intolerable if they are so diffi-

cult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id. This quoted language came word for word from a then recent case from the United States Court of Appeals for the Second Circuit, with only one difference—we italicized the word "intentionally." See *Chertkova* v. *Connecticut General Life Ins. Co.*, supra, 92 F.3d 89 (concluding that plaintiff met burden of establishing prima facie case of constructive discharge due to harassment on basis of gender under Title VII of Civil Rights Act of 1964, as amended by Title VII of Civil Rights Act of 1991, 42 U.S.C. § 2000e et seq.).[5]

In the context of the facts in *Brittell*, our emphasis on intent makes sense. The plaintiff in *Brittell* had claimed that the department's failure to remedy the hostile work environment equated to its intentionally having created the work environment of which she complained. See *Brittell* v. *Dept. of Correction*, supra, 247 Conn. 178. Contrary to her argument, the trial court found that the facts supported the department's argument that it had in fact made efforts to remedy the situation and to provide the plaintiff with alternatives. For example, the employer on several occasions offered to transfer the plaintiff to the location of her choice. Id., 159–60. We specifically stated: "Even if we assume, arguendo, that an employer's failure to remedy a hostile working environment may be considered the intentional creation of an intolerable work atmosphere . . . the plaintiff has not met her burden of establishing an essential element of her claim, namely, the existence of an intolerable work atmosphere that would compel a rea-

[5] "We look to federal law for guidance in interpreting state employment discrimination law, and analyze claims under [the Connecticut Fair Employment Practices Act, General Statutes § 46a-51 et seq., the state counterpart to Title VII] in the same manner as federal courts evaluate federal discrimination claims." (Internal quotation marks omitted.) *MacDermid, Inc.* v. *Leonetti*, 310 Conn. 616, 636 n.11, 79 A.3d 60 (2013).

sonable person in that situation to resign. Had the plaintiff established that she was given the choice either to continue working with the officers and inmate population at the correctional center or to leave the employ of the defendant, she might well have prevailed on this element of her claim." (Citation omitted; emphasis omitted.) Id., 179.

Said another way, if the department had intentionally created the intolerable work atmosphere by refusing to address the issue, refusing to make any alteration in the plaintiff's work conditions, or refusing to offer her any relief (i.e., by forcing her to remain at the correctional facility or to quit), the plaintiff could have succeeded on her constructive discharge claim. The trial court in *Brittell* found that the opposite was true. In fact, the department *intentionally* attempted to improve the work atmosphere for the plaintiff by giving her the choice of transferring to another correctional institution, away from the correction officers and inmates who had made the work atmosphere intolerable. In light of our analysis of the facts in *Brittell*, it is clear that our emphasis of the word "intentionally" within the quotation from *Chertkova* v. *Connecticut General Life Ins. Co.*, supra, 92 F.3d 89, manifested an intent that "intentionally" modify the requirement that the employer created the complained of environment. Notably, by contrast, nowhere in *Brittell* did we require or allude to a requirement that the plaintiff establish that the department had intended to force her to quit.

To clarify the intent element of a constructive discharge claim for future cases, the phrase under examination—"[c]onstructive discharge of an employee occurs when an employer, rather than directly discharging an individual, *intentionally* creates an intolerable work atmosphere that forces an employee to quit involuntarily"—should be understood to refer to the employer's intent to create the intolerable work atmosphere itself.

Thus, to plead a prima facie case of constructive discharge, a plaintiff must allege that (1) the employer intentionally created the complained of work atmosphere, (2) the work atmosphere was so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign, and (3) the plaintiff in fact resigned. This standard does not require that the plaintiff allege facts to show that the employer intended to force the employee to resign, only that a reasonable employee would feel compelled to resign. See *Petrosino* v. *Bell Atlantic*, 385 F.3d 210, 229 (2d Cir. 2004) (stating that Second Circuit "has not expressly insisted on proof of specific intent," although in some constructive discharge cases, "where such evidence exists, the mens rea requirement is easily established").

In addition to being consistent with *Brittell* itself, recent United States Supreme Court precedent regarding constructive discharge does not dissuade us, as the plaintiff and the amicus argue, from our interpretation of the intent element. In *Green* v. *Brennan*, U.S. , 136 S. Ct. 1769, 195 L. Ed. 2d 44 (2016), the court explained: "The whole point of allowing an employee to claim 'constructive' discharge is that in circumstances of discrimination so intolerable that a reasonable person would resign, we treat the employee's resignation as though the employer actually fired him. . . . We do not also require an employee to come forward with proof—proof that would often be difficult to allege plausibly—that not only was the discrimination so bad that he had to quit, but also that his quitting was his employer's intent all along." (Citation omitted; footnote omitted.) Id., 1779–80, citing *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 141–43, 124 S. Ct. 2342, 159 L. Ed. 2d 204 (2004).

Quoting the same language, the Commission on Human Rights and Opportunities (commission) filed an amicus brief in the present case, positing that we should

eliminate the element of intent altogether and adopt a completely objective standard. We do not agree with the commission that the court in *Green* completely eliminated the element of intent for a constructive discharge claim. A constructive discharge claim under Title VII requires a plaintiff to prove discrimination by an employer—inherently necessitating proof of an element of intent in creating the workplace condition. See *Pennsylvania State Police* v. *Suders*, supra, 542 U.S. 133 ("[t]o establish [a] hostile work environment [under Title VII], plaintiffs like Suders must show harassing behavior sufficiently severe or pervasive to alter the conditions of [their] employment" (internal quotation marks omitted)).

In *Green*, the plaintiff alleged that he was denied a promotion because of race and alleged that his supervisors threatened to bring criminal charges against him in retaliation for his complaint, thereby forcing his resignation in violation of Title VII. *Green* v. *Brennan*, supra, 136 S. Ct. 1774–75. The case turned on the question of whether the forty-five day limitation period for a constructive discharge claim by a federal civil servant begins to run after the last discriminatory act or when the employee resigns. Id.; see 29 C.F.R. § 1614.105 (a) (1) (2012) (federal civil servants, prior to filing complaint, were required to initiate contact with counselor at their agency within forty days of date of matter alleged to be discriminatory). To answer the question, the court set out the basic elements of a constructive discharge claim. "A plaintiff must prove first that he was discriminated against by his employer to the point where a reasonable person in his position would have felt compelled to resign . . . [and] he must also show that he actually resigned." (Citation omitted.) *Green* v. *Brennan*, supra, 1777. On the basis of, in part, the fact that a constructive discharge claim requires that the employee actually resign, the court concluded that the

limitation period should begin to run when the employee resigns. Id., 1776–77.

In a concurring opinion, Justice Alito stated that the majority ignored a bedrock principle of Title VII cases: "An act done with discriminatory intent must have occurred within the [limitation] period." Id., 1782 (Alito, J., concurring in the judgment). In accordance with this principle, Justice Alito concluded, an employee's resignation triggers a fresh [limitation] period when "the employer makes conditions intolerable *with the specific discriminatory intent of forcing the employee to resign*." (Emphasis in original.) Id., 1785 (Alito, J., concurring in the judgment). However, "[i]f the employer lacks that intent . . . the [limitation] period [should run] from the discriminatory act that precipitated the resignation." Id. The majority responded: "This sometimes-a-claim-sometimes-not theory of constructive discharge is novel and contrary to the constructive discharge doctrine. . . . We do not . . . require an employee to [prove] . . . that not only was the discrimination so bad that he had to quit, but also that his quitting was his employer's plan all along." (Citation omitted; footnote omitted.) Id., 1779–80. The majority rejected requiring that a plaintiff alleging constructive discharge prove specifically that the employer intended to force the employee to resign. See id. The court did not reject the requirement that a plaintiff prove some kind of discrimination, however. Rather, the required discrimination speaks to the first requirement under our standard in *Brittell*—the employer's intent in creating the work condition of which the plaintiff complains. In *Green*, the employer created the complained of condition by promising not to pursue criminal charges against the plaintiff in exchange for his promise to retire or take a position with a considerably lower salary, thereby forcing him to involuntarily resign. Id., 1783.

The constructive discharge requirements in *Green* are not purely objective and align with the standard we established in *Brittell*. If not made perfectly clear in that case, we are now afforded an opportunity to clarify that standard in the present case.[6] The standard contains a subjective inquiry (did the employer intend to create the working condition) and an objective inquiry (the impact the working conditions would have on a reasonable person). To evaluate the working conditions, we evaluate whether a reasonable person in the employee's shoes would have felt compelled to resign. The defendant in the present case argues that the standard should go one step further. It contends that the plaintiff must show that the defendant in fact subjectively intended that a specific employee resign under conditions deemed intolerable by an objectively reasonable person. That kind of showing would be difficult to allege and inconsistent with the aims of the objective requirement. We decline the defendant's request to require that a constructive discharge claim allege facts establishing that the employer intended for the employee to resign.

II

Having set forth the requirements to establish a prima facie case for constructive discharge, we turn to the Appellate Court's analysis in the present case and consider whether the Appellate Court properly upheld the

[6] Although the plaintiff in the present case did not allege a Title VII violation, we perceive no justification for altering the requirements for a constructive discharge claim depending on whether the claim is one for a constructive discharge resulting from race discrimination; *Grey* v. *Norwalk Board of Education*, 304 F. Supp. 2d 314, 320–21 (D. Conn. 2004); gender discrimination; *Usherenko* v. *Bertucci's Corp.*, Docket No. 3:05-CV-756 (JCH), 2006 WL 3791389, *1 (D. Conn. December 21, 2006); a sexually hostile work environment; *Brittell* v. *Dept. of Correction*, supra, 247 Conn. 150; whistleblowing activities; *Horvath* v. *Hartford*, 178 Conn. App. 504, 506, 176 A.3d 592 (2017); or any other intentionally created circumstance resulting in work conditions that would compel a reasonable person to resign.

trial court's granting of the defendant's motion to strike the complaint in its entirety.

Although the Appellate Court quoted the proper standard for a constructive discharge claim, we conclude that the court incorrectly applied the standard. In applying the standard, the Appellate Court upheld the trial court's judgment on the basis of, in part, the plaintiff's failure to allege facts that the defendant intended to force him to quit. See *Karagozian* v. *USV Optical, Inc.*, supra, 186 Conn. App. 867–68. Specifically, the Appellate Court stated: "The plaintiff denies the plain language of *Brittell*, arguing that a more sensible reading of *Brittell* would [lead to the conclusion] that it is the employer's intent to create the work atmosphere in question that matters, rather than an intent that such atmosphere should force an employee to resign." Id., 868. On this point, we conclude that the Appellate Court incorrectly applied *Brittell*, and we reiterate that *Brittell* requires only that plaintiffs allege facts showing that the employer intended to create the conditions of which a plaintiff complains. See part I of this opinion.

On an alternative ground, the Appellate Court upheld the trial court's striking of the plaintiff's complaint, reasoning that the plaintiff had failed to satisfy the second requirement of a constructive discharge claim—he failed to allege facts establishing that the work atmosphere was so difficult or unpleasant that a reasonable person in his shoes would have felt compelled to resign. *Karagozian* v. *USV Optical, Inc.*, supra, 186 Conn. App. 870. We agree. Even when the allegations of the complaint are construed in the light most favorable to sustaining the complaint, we conclude that the plaintiff's allegations do not meet this standard.

In support of his allegation of intolerable work conditions, the plaintiff relied on the declaratory ruling issued by the Board of Examiners for Optometrists, the cease

and desist consent order issued by the Board of Examiners for Optometrists and the Board of Examiners for Opticians, and § 31-130 (i). In his brief to this court, he explained: "No employer may require its employees to violate the law. A reasonable employee, having been instructed to do so, would refuse and resign. The employer is responsible for that resignation, since the sole proximate cause of the resignation was the employer's illegal job requirement." Contrary to the plaintiff's assertion, however, nothing in his complaint establishes that the defendant required him to violate the law. The declaratory ruling evaluated the circumstances under which an optometrist would be considered an employee, and not an independent contractor, of an unlicensed person, firm, or organization so as to comply with General Statutes § 20-133a.[7] We agree with the defendant that the plaintiff cannot rely on the declaratory ruling because the ruling itself provides that it is only "binding upon those who participate[d] in the hearing" that resulted in the ruling. The plaintiff did not participate in the hearing. Moreover, the ruling concerned optometrists. Even if we were to credit the plaintiff's argument that the ruling established a public policy regarding optometrists, the plaintiff's tasks could not have violated that particular policy because he was employed as an optician, not an optometrist. Furthermore, the ruling "[was] intended to provide guidance" to individual licensed optometrists. It did not establish criminal liability or inflict repercussions or potential sanctions for any specific conduct that would compel a reasonable optician in the plaintiff's shoes to resign. See *Sheets*

[7] General Statutes § 20-133a provides in relevant part: "No licensed optometrist shall practice his profession as an employee of any unlicensed person, firm or corporation, provided that said prohibition shall not apply to health service organizations, hospitals, other optometrists or ophthalmologists. . . . No rule of the board shall prohibit the practice of optometry on a lessee or sublessee basis in or on the premises of a retail, commercial or mercantile establishment."

v. *Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 480, 427 A.2d 385 (1980) ("an employee should not be put to an election whether to risk criminal sanction or to jeopardize his continued employment").

Similarly, the plaintiff's complaint failed to show how the cease and desist consent order either applied to the plaintiff or bound the defendant. The order required that Walmart, Inc., not permit a licensed optician to act in the capacity of an optometric assistant to an independent optometrist leasing space in a store owned by Walmart, Inc. We fail to see, because the plaintiff failed to allege, how the cease and desist consent order functionally created a working condition so intolerable that a person in his shoes would have been justified in walking off the job as if they had been fired. We also fail to understand how the defendant—which was not a party to the cease and desist consent order—could be bound by Walmart, Inc.'s agreement that, without admitting any fault, it would change its employment practices.

The statute the plaintiff relies on is also inapplicable. Section 31-130 (i) requires that persons engaged in the business of procuring or offering to procure employees for employers must register with the Commissioner of Labor before they may charge employers for their services. The plaintiff did not allege that the doctor of optometry charged a fee from the defendant for hiring the plaintiff as an assistant. Accordingly, the statute does not implicate the defendant.

Finally, we are not persuaded that the plaintiff's allegations suggest that the defendant intended to create conditions different from what the plaintiff would have expected when he agreed to work as a licensed optician manager at the defendant's operation. The plaintiff's complaint centered around the duties he was in fact hired to perform, not some intolerable work atmo-

sphere that forced him to quit involuntarily. The defendant contends that the plaintiff's allegations included that "he was asked to provide optometric assistant services to the on-site doctor of optometry *from day one*. It defies logic to conclude that, from the very first day of [the] plaintiff's employment, [the defendant] had intended to force [the] plaintiff to quit involuntarily." (Emphasis in original.) We agree with the defendant.

The complaint does not allege that any of the plaintiff's assigned tasks changed between his hire date in June, 2014, and September, 2014, when he first complained to his supervisors. All we know from the complaint is that the plaintiff began working for the defendant in June, 2014, and that the defendant required him to perform the tasks he complains of from "approximately June 28, 2014, to approximately October 17, 2014 . . . ." The complaint does not allege that the plaintiff was unaware of the duties he would be required to perform or that the defendant changed his responsibilities after he was hired. Nor does the complaint suggest that anything changed from what he agreed to perform within the scope of his employment and what he now asserts violates public policy. "In general . . . an employee's dissatisfaction with his job responsibilities and assignments do not suffice to establish a claim of constructive discharge." *Zephyr* v. *Ortho McNeil Pharmaceutical*, 62 F. Supp. 2d 599, 608 (D. Conn. 1999) (finding that plaintiff failed to establish that he was constructively discharged).

By failing to establish that his work conditions were so intolerable that a reasonable person in the plaintiff's shoes would have felt compelled to resign, the plaintiff's complaint fails. The Appellate Court correctly upheld the trial court's striking of the plaintiff's complaint in its entirety.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

ORDERS

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IN RE FAIZ SIDDIQUI

Faiz Siddiqui's petition for certification to appeal from the Appellate Court, 195 Conn. App. 594 (AC 41023), is denied.

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

John R. Williams, in support of the petition.

Kathryn W. Bare, senior assistant state's attorney, in opposition.

Decided October 13, 2020

THOMAS PRIORE *v.* STEPHANIE HAIG

The plaintiff's petition for certification to appeal from the Appellate Court, 196 Conn. App. 675 (AC 41748), is granted, limited to following issue:

"Did the Appellate Court correctly conclude that the defendant's public statements about the plaintiff at the meeting of the Planning and Zoning Commission of the Town of Greenwich were entitled to absolute immunity,

depriving the trial court of subject matter jurisdiction over the plaintiff's defamation action?"

Eric D. Grayson, in support of the petition.

Richard W. Bowerman and *Michael G. Caldwell*, in opposition.

Decided October 13, 2020

STATE OF CONNECTICUT *v.* LORI T.

The defendant's petition for certification to appeal from the Appellate Court, 197 Conn. App. 675 (AC 40384), is granted, limited to the following issues:

"1. Did the Appellate Court incorrectly conclude that General Statutes § 53a-98 (a) (3) was not unconstitutionally vague as applied to the defendant?

"2. Did the Appellate Court incorrectly conclude that the evidence presented was sufficient to prove that the defendant "otherwise refuse[d] to return" her children?"

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

Megan L. Wade, assigned counsel, in support of the petition.

Denise B. Smoker, senior assistant state's attorney, in opposition.

Decided October 13, 2020

DANA BERGER *v.* GUY DEUTERMANN ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 197 Conn. App. 421 (AC 42522), is denied.

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

Dana Berger, self-represented, in support of the petition.

Lloyd L. Langhammer, in opposition.

Decided October 13, 2020

STATE OF CONNECTICUT *v.* LAURA C. CRAFTER

The defendant's petition for certification to appeal from the Appellate Court, 198 Conn. App. 732 (AC 41302), is denied.

James B. Streeto, senior assistant public defender, in support of the petition.

Rocco A. Chiarenza, assistant state's attorney, in opposition.

Decided October 13, 2020

STATE OF CONNECTICUT *v.* SEAN JACKSON

The defendant's petition for certification to appeal from the Appellate Court, 198 Conn. App. 489 (AC 41916), is denied.

James B. Streeto, senior assistant public defender, in support of the petition.

Laurie N. Feldman, special deputy assistant state's attorney, in opposition.

Decided October 13, 2020

LEE WINAKOR *v.* VINCENT SAVALLE

The plaintiff's petition for certification to appeal from the Appellate Court, 198 Conn. App. 792 (AC 42306), is granted limited to the following issue:

"Did the Appellate Court correctly conclude that the Home Improvement Act, General Statutes § 20-418 et seq., did not apply to the defendant's work for the plaintiff?"

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

Paul M. Geraghty, in support of the petition.

Patrick J. Markey, in opposition.

Decided October 13, 2020

MIGUEL CASTRO *v.* KATRINA BAJANA

The plaintiff's petition for certification to appeal from the Appellate Court, 198 Conn. App. 901 (AC 43056), is denied.

Miguel Castro, self-represented, in support of the petition.

Decided October 13, 2020

VIRLEE KOVACHICH *v.* DEPARTMENT OF MENTAL HEALTH AND ADDICTION SERVICES

The plaintiff's petition for certification to appeal from the Appellate Court, 199 Conn. App. 332 (AC 41976), is granted, limited to the following issues:

"1. Did the Appellate Court correctly conclude that the trial court had erroneously admitted into evidence written communications between counsel, and between

the plaintiff's counsel and an investigator of the Commission on Human Rights and Opportunities, under § 4-8 of the Connecticut Code of Evidence, which provides that offers to compromise or to settle a disputed claim are inadmissible?

"2. If the answer to the first question is 'yes,' did the Appellate Court correctly conclude that the admission of that evidence caused substantial prejudice requiring reversal of the trial court's judgment?

"3. If the answer to either the first or the second question is 'no,' did any of the other evidentiary errors identified by the Appellate Court result in harmful error in the trial court?"

Jacques J. Parenteau, in support of the petition.

Clare Kindall, solicitor general, in opposition.

Decided October 13, 2020

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500 NORTH AVENUE, LLC *v.* PLANNING COMMISSION OF THE TOWN OF STRATFORD

The defendants' petition for certification to appeal from the Appellate Court, 199 Conn. App. 115 (AC 42235), is denied.

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

Alexander J. Florek and *Joseph A. Kubic*, in support of the petition.

Stephen R. Bellis, in opposition.

Decided October 13, 2020

BETHANY FLOOD *v.* ROBERT FLOOD

The defendant's petition for certification to appeal from the Appellate Court, 199 Conn. App. 67 (AC 42477), is denied.

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

Peter J. Zarella and *Gary I. Cohen*, in support of the petition.

Eric R. Posmantier and *Kimberly A. Stokes*, in opposition.

Decided October 13, 2020

CHELSEA GROTON BANK *v.* BELLTOWN SPORTS, LLC, ET AL.

The defendants' petition for certification to appeal from the Appellate Court, 199 Conn. App. 294 (AC 42709), is denied.

Patrick W. Boatman, in support of the petition.

Brian D. Rich, in opposition.

Decided October 13, 2020

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Habeas corpus; certification from Appellate Court; claim that habeas court improperly dismissed habeas petition as untimely filed; whether Appellate Court correctly concluded that petitioner lacked good cause for his untimely filing when he had relied on advice of his attorney to withdraw previous, validly filed petition and to file present petition in its place, even though it would be subject to statutory (§ 52-470 (d)) presumption of delay; certification improvidently granted.

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CONNECTICUT APPELLATE REPORTS

Vol. 201

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* DENNIS G. HAZARD (AC 43384)

DiPentima, C. J., and Moll and Harper, Js.*

Syllabus

Convicted of the crime of robbery in the first degree, the defendant appealed, claiming, inter alia, that the evidence was insufficient to establish his identity as the perpetrator and that he proved his affirmative defense of inoperability of the weapon used during the robbery. The perpetrator had pointed a gun at the employee on duty at a storage facility, took cash from her and then fled. Police officers searching the nearby area encountered a vehicle that came toward them but then reversed direction and left the area before crashing in a yard. The defendant fled from the crash scene before the police arrived and found cash, a gun and other items in the vehicle, which had been lent to the defendant by his girlfriend hours before the robbery. The storage facility employee described to the police what the defendant was wearing but was unable to identify him when the police brought her to a nearby store where he was arrested shortly after the robbery for a one-on-one identification. *Held*:

1. There was sufficient evidence from which the jury reasonably could have found that the defendant was the person who robbed the storage facility; the defendant owned and wore clothing and items similar to that worn by the perpetrator, some of which the police found in bushes near the crime scene and which contained the defendant's DNA, video surveillance showed an individual driving to a bush in a vehicle matching that which was owned by the defendant's girlfriend, exiting the vehicle and retreating behind the bush before returning to the vehicle wearing clothing that matched that of the defendant at the time of his arrest, and the police found in the vehicle, which belonged to the defendant's girlfriend, a gun and money that approximated the amount stolen from the storage facility.
2. The defendant could not prevail on his claim that his conviction of first degree robbery should be reversed because he proved the affirmative defense that the gun was inoperable at the time of the robbery; there was no evidence provided during the trial that addressed the operability of the gun at the time of the robbery, contrary to the defendant's claim that it was reasonable to infer that the gun was in the same condition at the time of the robbery as it was when the police tested it six months later and found it unable to discharge, the police officer who tested the gun was unable to testify about its operability prior to its recovery by the police or to state whether dirt found in the gun was the same type

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

of dirt that was found on the defendant's clothes at the time of his arrest or the type of dirt that surrounded the items found in the bushes, the jurors were free to infer that the gun was not in the same condition at the time of testing as it was during the robbery, and, accordingly, the jury reasonably could have found that the defendant failed to prove his affirmative defense of inoperability.

3. The trial court did not abuse its discretion when it denied the defendant's motion for a mistrial, which was based on his claim that a police officer's testimony constituted improper lay opinion under the applicable provision of the Connecticut Code of Evidence (§ 7-1) and an improper opinion on the ultimate issue of identity in violation of the applicable provision of the Connecticut Code of Evidence (§ 7-3):

a. The police officer's testimony that the defendant's clothing appeared to be the same as that worn by the perpetrator in the surveillance footage did not constitute an improper lay opinion, as nonexpert opinion testimony about the appearance of persons or things was admissible in the discretion of the court.

b. The police officer did not give an opinion on the ultimate issue of identity when she testified that the defendant was wearing pants similar to those of the perpetrator in the surveillance video and that the defendant was the individual seen at the storage facility in that surveillance video; the trial court ordered the identification testimony stricken from the record and instructed the jurors twice not to consider it in their deliberations, the defendant did not demonstrate that the stricken testimony was so prejudicial that the jury could not reasonably be presumed to have disregarded it, and, even if the identification testimony was improper, this court was not persuaded that it was harmful, as the jury was presented with significant other circumstantial evidence that connected the defendant to the robbery and provided a reasonable basis on which to conclude that he was the individual in the surveillance footage.

4. The defendant could not prevail on his claim that the trial court erred in failing to give the jury his requested instruction on identity, as the case did not involve issues of misidentification or lack of clarity and inconsistencies in identification, the jury instructions that were given were not incorrect, insufficient or misleading to the jury, and the defendant's reliance on the requirement that juries be given specific instructions with regard to eyewitness identifications was unavailing, as the sole potential eyewitness to the robbery was unable to identify the defendant.

Argued May 18—officially released October 27, 2020

Procedural History

Two part substitute information charging the defendant, in the first part, with the crimes of robbery in the first degree and robbery in the second degree, and, in

the second part, with being a persistent dangerous felony offender, brought to the Superior Court in the judicial district of Ansonia-Milford, where the first part of the information was tried to the jury before *Brown*, *J.*; thereafter, the court denied the defendant's motion for a mistrial; verdict of guilty; subsequently, the defendant was presented to the court on a plea of guilty to the second part of the information; thereafter, the court denied the defendant's motions for a judgment of acquittal and for a new trial, vacated the verdict of guilty of robbery in the second degree, and rendered judgment in accordance with the verdict and the plea, and the defendant appealed. *Affirmed*.

James B. Streeto, senior assistant public defender, with whom was *Susan Brown*, public defender, for the appellant (defendant).

Jonathan M. Sousa, deputy assistant state's attorney, with whom, on the brief, were *Margaret E. Kelley*, state's attorney, and *Cornelius P. Kelly*, supervisory assistant state's attorney, for the appellee (state).

Opinion

HARPER, J. The defendant, Dennis G. Hazard, appeals from the judgment of conviction, rendered after a jury trial, of robbery in the first degree in violation of General Statutes § 53a-134 (a) (4).[1] On appeal, the

[1] General Statutes § 53a-134 (a) provides in relevant part: "A person is guilty of robbery in the first degree when, in the course of the commission of the crime of robbery as defined in section 53a-133 or of immediate flight therefrom, he or another participant in the crime . . . (4) displays or threatens the use of what he represents by his words or conduct to be a pistol, revolver, rifle, shotgun, machine gun or other firearm, except that in any prosecution under this subdivision, it is an affirmative defense that such pistol, revolver, rifle, shotgun, machine gun or other firearm was not a weapon from which a shot could be discharged. . . ."

The jury also found the defendant guilty of robbery in the second degree in violation of General Statutes § 53a-135 (a) (1) (B). The court, however, vacated the defendant's conviction of robbery in the second degree because it concluded that a conviction of first and second degree robbery would violate the prohibition against double jeopardy.

defendant claims that (1) there was insufficient evidence to establish his identity as the person who committed the robbery, (2) he established the affirmative defense of inoperability of a gun that was found in the car he had been driving, (3) the trial court erred in denying his motion for a mistrial, and (4) the trial court erred in failing to give the jury his requested instruction on identification. We disagree with the defendant and, accordingly, affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to this appeal. On May 5, 2016, at or about 12:06 p.m., a robbery occurred at the Public Storage (storage facility) on Bull Hill Lane in West Haven. Renae Luginbuhl was the sole storage facility employee on duty at that time. The perpetrator was described as an African-American man wearing a dark hooded sweatshirt with a portion of a white undershirt hanging out, a baseball cap with a yellow brim and a light colored emblem, dark pants, and dark shoes with white soles. Upon entering the storage facility, the man mumbled something that Luginbuhl did not understand. Then the man pointed a gun at Luginbuhl and stated, "give me all your fucking money." Luginbuhl gave the man all of the money in the register and, additionally, the $50 and $100 bills she stored underneath the register. After receiving the money, the man warned Luginbuhl not to call anyone and then fled.

As soon as the man left the storage facility, Luginbuhl reported the robbery to the police. She described to the police what the man was wearing and informed them that the man had run across Bull Hill Lane. Luginbuhl, however, was unable to describe the man's facial features.

Detectives William Conlan and Craig Casman of the West Haven Police Department were among the first police officers to respond to the scene. They arrived

at or about 12:24 p.m., in an unmarked vehicle, and searched the immediate area surrounding the storage facility, including a nearby dirt access road behind the Orange Landing Condominiums complex (complex). Once behind the complex, Conlan and Casman encountered a white or tan Chevy Malibu (vehicle) with a partially open passenger side door driving toward them from the opposite direction. At or about 12:25 p.m., the driver of the vehicle reversed direction and exited the access road, only to head north on Bull Hill Lane. Suspicious of the driver's actions, Conlan directed other police officers to stop the vehicle. Officer Minh Pham spotted the vehicle and began pursuit. Pham observed that the driver of the vehicle was a black man with a distinctive haircut. Pham also observed the man driving erratically throughout Bull Hill Lane, Knight Lane, and then Valley Brook Road, where the vehicle hit stop signs, mailboxes, a utility pole, and ultimately crashed in a backyard on Valley Brook Road. By the time Pham arrived at the scene of the crash, the driver had exited the vehicle and escaped on foot.

Contemporaneous with Pham's pursuit of the vehicle, Detectives Sean Faughnan and Tammy Murray, along with Officer Justin Standish and his tracking dog, Cody, arrived at the storage facility to investigate. Standish directed Cody to the front door of the storage facility, where Cody picked up the scent of the perpetrator and, thereafter, led Standish across Bull Hill Lane and toward the complex. Once Standish and Cody reached the area of the complex, Cody lost the scent of the perpetrator. The police, however, found a black sweatshirt and baseball cap, similar to the one worn by the perpetrator, hidden in a bush by the complex. Thereafter, Faughnan, Murray, and Standish decided to continue their search at the crash site on Valley Brook Road, approximately two minutes away from the complex. They searched the vehicle and found approximately $479 scattered

loosely over the floor of the passenger seat, a black revolver style pellet gun, two cell phones, and a pair of white sneakers.

While at the scene of the crash, Standish prepared Cody to continue tracking by using the scent obtained from the front seat of the vehicle. Cody began leading the officers on a scent trail from the crash site to a nearby parking lot where several construction workers reported seeing a black male running. From there, Cody led the officers across Carlson Road, up a short access road, and then toward a Dollar Tree store (store) on Boston Post Road in Orange.

A black male, later identified as the defendant, entered the store at or about 12:33 p.m. and was observed not wearing shoes. The defendant asked Stacey Sorrells, a store employee, if shoes were sold in the store, and she directed him to the area where he could purchase flip-flops. The defendant picked out a pair of flip-flops and, while checking out with a cashier, kept looking out the window and tapping his fingers. Upon completing his transaction, the defendant went to leave; however, after observing several police officers approaching the store at or about 12:36 p.m., he turned around and walked further into the store. Once Cody had entered the store, at or about 12:37 p.m., he led Standish past the other officers, employees, and customers, and alerted Standish to the defendant. The defendant was arrested and escorted from the store at or about 12:44 p.m.

At the time of his arrest, the defendant was wearing a blue and white shirt, jeans, and socks covered in dirt or mulch. Shortly after his arrest, Luginbuhl was brought to the store by the police in order to make an identification; however, she was unable to identify the defendant as the person who robbed the storage facility.

Following his arrest, the defendant was charged with robbery in the first degree and robbery in the second

degree. The trial began on November 28, 2017, and concluded December 5, 2017. On November 30, 2017, the state called Detective Murray, who testified, among other things, that the perpetrator was wearing the same clothing as the defendant at the time of his arrest and that the defendant was the perpetrator on the surveillance footage at the storage facility. Immediately following Murray's statement, the defendant orally moved for a mistrial, arguing that Murray's testimony was irreparably prejudicial. That motion was denied. On December 4, 2017, the defendant filed a written motion for a mistrial, challenging the court's rulings regarding allegedly prejudicial statements made by Murray. That motion was denied. Following the jury trial, on December 6, 2017, the defendant was found guilty of robbery in the first degree and robbery in the second degree.

Two months later, on February 8, 2018, the defendant filed a motion for a judgment of acquittal, arguing that the evidence adduced at trial did not reasonably permit a finding of guilty beyond a reasonable doubt. He also filed, that same day, a motion for a new trial. Specifically, he argued that (1) the court erred when it allowed testimony by Murray that the pants the perpetrator had worn and the pants the defendant had worn at the time of his arrest were the same pants, (2) Murray had testified erroneously about an essential element of the crime charged, (3) the court improperly denied the defendant's request for a mistrial on the basis of that issue, and (4) the court refused to instruct the jury on the issue of making an identification based on clothing. The court denied both of the defendant's motions.

On February 16, 2018, the court sentenced the defendant to a total effective term of twenty-eight years of incarceration, execution suspended after fifteen years, followed by five years of probation. On March 21, 2018, the defendant filed another motion for a judgment of acquittal and a new trial, arguing that the verdict of

guilty of both robbery in the first degree and robbery in the second degree was legally inconsistent. More specifically, he argued that the difference between first and second degree robbery was the issue of the operability of the firearm and that a firearm cannot simultaneously be operable and inoperable. The defendant's motion was denied.[2] This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the evidence of identity was insufficient to sustain his conviction, and that the trial court erred in denying his motion for a judgment of acquittal. The state counters that the cumulative impact of all the evidence and the inferences the jury reasonably could have drawn therefrom support the jury's finding that the defendant was the perpetrator. We agree with the state.

We begin our analysis by setting forth the well settled standard of review applicable to a sufficiency of the evidence claim, wherein we apply a two part test. "First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict. . . .

"[T]he jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty

[2] Consistent with Connecticut case law, we conclude that the trial court should have dismissed rather than denied the defendant's March 21, 2018 motion for acquittal and a new trial due to lack of jurisdiction. See *State* v. *McCoy*, 331 Conn. 561, 586–87, 206 A.3d 725 (2019) ("a trial court loses jurisdiction once the defendant's sentence is executed, unless there is a constitutional or legislative grant of authority").

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

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

"[T]here is a fine line between the making of reasonable inferences and engaging in speculation—the jury is allowed only to do the former. . . . However, [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. When that point is reached is, frankly, a matter of judgment. . . .

"[P]roof of a material fact by inference from circumstantial evidence need not be so conclusive as to exclude every other hypothesis. It is sufficient if the evidence produces in the mind of the trier a reasonable belief in the probability of the existence of the material fact. . . . Thus, in determining whether the evidence supports a particular inference, we ask whether that inference is so unreasonable as to be unjustifiable. . . . In other words, an inference need not be compelled by the evidence; rather, the evidence need only be reasonably susceptible of such an inference. . . .

"Finally, 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." (Citations omitted; internal quotation marks omitted.) *State* v. *Richards*, 196 Conn. App. 387, 395–97, 229 A.3d 1157, cert. granted, 335 Conn. 931, A.3d (2020).

Additionally, "[r]eview of any claim of insufficiency of the evidence introduced to prove a violation of a criminal statute must necessarily begin with the skeletal requirements of what necessary elements the charged statute requires to be proved. . . . The state has the burden of proving beyond a reasonable doubt the defendant's identity as the perpetrator of the crime." (Citation omitted; internal quotation marks omitted.) *State* v. *Pugh*, 190 Conn. App. 794, 802–803, 212 A.3d 787, cert. denied, 333 Conn. 914, 217 A.3d 635 (2019). "[T]he issue of the identity of the defendant as [the] perpetrator of the robbery is one of fact for the jury." *State* v. *Morgan*, 274 Conn. 790, 798, 877 A.2d 739 (2005).

The defendant does not dispute that the storage facility was robbed. Rather, the defendant contends only

that the evidence of his identity as the perpetrator was insufficient to support the jury's inference linking him to the crime. He contends that the evidence of identity was insufficient because (1) there was no eyewitness who identified him as the perpetrator, (2) there was no physical evidence that tied him to the storage facility, (3) there was no confession, and (4) there was no testimony from an informant. The defendant further argues that the state relied, in large part, on the use of a montage of surveillance footage—from the storage facility, the complex, and the store—that contained gaps in time, was of poor quality, and purportedly showed the defendant approaching, robbing, and fleeing the storage facility. He further contends that, by concluding that the person in the video is the defendant, the jury engaged in speculation. We conclude that there was sufficient evidence presented at trial to satisfy the state's burden of proving identity and, ultimately, to support the defendant's conviction.

First, Luginbuhl testified that the perpetrator was an African-American man wearing a black hooded sweatshirt pulled over a baseball cap with a yellow brim and dark pants. The police investigating the robbery found a black hooded sweatshirt and a baseball cap with a yellow brim abandoned in a bush near the storage facility. Shanae Lucky, the defendant's girlfriend at the time, testified that the defendant owned a black hooded sweatshirt and a black hat with a yellow brim, and that both items of clothing looked similar to those found by the police near the storage facility. Furthermore, forensic analysis revealed that the defendant's "entire genetic profile" was detected and that he was "a potential contributor to the major DNA mixture profile" found on the sweatshirt and the cap that were found near the storage facility. Forensic analysis further revealed that the expected frequency of individuals who could be a contributor to the major DNA mixture profile from the hat is less than

1 in 7 billion in the African-American, Caucasian, and Hispanic populations, and that the expected frequency of individuals who could be a contributor to the major DNA mixture profile from the sweatshirt is less than approximately 1 in 6100 in the African-American population, approximately 1 in 5900 in the Caucasian population, and approximately 1 in 6500 in the Hispanic population.

Second, Lucky testified that, on the morning of May 5, 2016, a few hours prior to the robbery, she lent the defendant her tan 2002 Chevy Malibu so that he could get the front passenger door repaired, which, at that time, required tying a seat belt to the door in order to keep it closed. Conlan testified that, while both he and Casman were driving on a dirt access road close to the storage facility, they encountered a man driving a tan Chevy Malibu. According to Conlan, after the driver saw the officers, the driver began backing his car in the opposite direction. Conlan further testified that when the vehicle eventually turned around, he noticed that the passenger side door was partially open. Furthermore, he testified that the vehicle that crashed on Valley Brook Road was the same vehicle he and Casman encountered on the dirt access road.

Third, after the police commenced pursuit of the vehicle that subsequently crashed on Valley Brook Road, the vehicle was searched and the contents therein were inventoried. Murray testified that the contents of the car included, among other things, $479 that was loosely scattered over the floor of the passenger seat,[3] a black

[3] Luginbuhl did not recall the exact amount of money stolen from the storage facility. She testified that she began the day with $250 in a drawer and gave the robber what was in the drawer, plus the $50 and $100 bills that she kept underneath the drawer. During cross-examination, defense counsel showed Luginbuhl a report she had given to the police indicating the amount of money stolen. After reading the report, she testified that there was $347 underneath the register. She did not clearly state, however, the total amount of money inside the drawer, including the original $250. To the extent that there is a discrepancy with regard to the amount of

revolver style pellet gun, and white shoes. Additional forensic and DNA analysis revealed that the defendant could not be eliminated as a contributor to the DNA found on the trigger and handle grip of the gun that was found in the vehicle. Last, the defendant's fingerprints matched those found on the vehicle.

Fourth, Officer Standish testified about the results of the deployment of his K-9 tracking dog, Cody. Specifically, Standish testified that, after he led Cody to the entrance of the public storage and "casted" Cody,[4] Cody led Standish out of the storage facility and south across Bull Hill Lane toward the complex. When Cody and Standish reached the area surrounding the complex, however, a loud noise from an adjacent construction site interrupted Cody's tracking. At that point, Standish had received information via his radio that the pursuit of the vehicle resulted in a crash on Valley Brook Road; therefore, he and Cody left the scene of the robbery to begin a search at the scene of the crash. He further testified that he had directed Cody to the scent on the vehicle's driver seat and that Cody then began to track that scent. According to Standish, Cody led a team of police officers past several construction workers, through several streets, and into the store where he alerted Standish to the defendant, indicating that the defendant was the source of the scent obtained by Cody from the driver's seat of the vehicle. As a result of Cody's tracking efforts, the defendant was located.

Fifth, as noted, surveillance camera footage collected from the day of the robbery from three primary locations—the storage facility, the complex, and the store—

money found in the vehicle as compared to that having been taken from the storage facility, this court has held that "a possible discrepancy in the evidence does not necessarily outweigh the evidence tending to show guilt." *State* v. *Ingram*, 132 Conn. App. 385, 392, 31 A.3d 835 (2011), cert. denied, 303 Conn. 932, 36 A.3d 694 (2012).

[4] "Casting" is the process of bringing a trained tracking dog to an area where a suspect was last seen in order to have the dog pick up the suspect's scent.

was presented to the jury. That footage was compiled and showed the following: The perpetrator was wearing a dark hooded sweatshirt, an undershirt with white on the bottom, a dark cap with a yellow emblem, dark pants with rips on the front and back, and dark colored shoes when he robbed the storage facility; an individual wearing clothing similar to that which the perpetrator wore during the robbery exited a tan Chevy Malibu, ran to a bushy area where the sweatshirt and cap were found, and then returned to the vehicle no longer wearing the sweatshirt or cap; when that individual emerged from the bushes, he was wearing a "two-toned" shirt that was dark on top and white on bottom and dark, ripped jeans; the defendant entered the store with no shoes, wearing a "two-toned" shirt and pants similar in color and pattern to those worn by the perpetrator; when buying flip-flops in the store, the defendant kept tapping his hand and looking out the window of the store; and, after completing his purchase, the defendant went to exit the store but then turned around and went further into the store until several police officers entered the store and arrested him. The clothes the defendant was wearing in the surveillance footage at the store, after having been tracked down by Cody, were the same clothes he was wearing earlier that day when he left Lucky's home.[5]

[5] The defendant contends that the surveillance footage is unreliable. Specifically, he argues that the footage contained inaccurate time stamps and that to render any conclusions therefrom would require speculation. He further argues that, because the time stamps are inaccurate, "it cannot be said, without speculation, that they show events happening at or around the time of the robbery." We find the defendant's arguments unavailing.

During trial, Detective Murray testified that the surveillance footage from 155 Bull Hill Lane—the footage covering the back service road area—"was approximately five hours and twenty minutes later than what the time is on the display. So, the time would say, like, 06:45 because it's in military time, but it's actually at five hours and twenty minutes [later] . . . ." Murray further testified that the "video from 157 Bull Hill Lane that—the actual time with respect to that video is actually three minutes later than the display time. So, if it says 12:07, [then] the video was actually 12:10." Murray's testimony, which the jury was free to accept, clarified the time stamps

Last, the defendant's actions immediately following the robbery are indicative of his consciousness of guilt. "[Consciousness of guilt] is relevant to show the conduct of an accused . . . subsequent to an alleged criminal act, which may be inferred to have been influenced by the criminal act. . . . The state of mind which is characterized as guilty consciousness or consciousness of guilt is strong evidence that the person is indeed guilty . . . ." (Internal quotation marks omitted.) *State* v. *Crafter*, 198 Conn. App. 732, 744, 233 A.3d 1227 (2020). "Flight, when unexplained, tends to prove a consciousness of guilt. . . . Flight is a form of circumstantial evidence. . . . 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.) *State* v. *Grajales*, 181 Conn. App. 440, 448–49, 186 A.3d 1189, cert. denied, 329 Conn. 910, 186 A.3d 707 (2018). In the present case, the driver of a vehicle, which was similar to that owned by the defendant's girlfriend and lent to the defendant, was captured on surveillance footage reversing direction after the appearance of an unmarked police vehicle; that same vehicle was pursued by other police officers until it ultimately crashed a few streets away from the crime scene; the driver fled on foot; Cody, the tracking dog, followed the scent of the driver and led the police officers to the defendant in the store; and, the defendant, who originally was attempting to exit the store, upon seeing the police approach the store, turned around and went further into the store where he was subsequently arrested.

In support of his claim, the defendant relies on this court's decision in *State* v. *Billie*, 123 Conn. App. 690, 696, 2 A.3d 1034 (2010), and the dissenting opinion in *State* v. *Osman*, 21 Conn. App. 299, 573 A.2d 743 (1990)

provided to the jury and, furthermore, established that the robbery of the storage facility, the pursuit of the Chevy Malibu, and the arrest of the defendant all took place between 12:05 and 12:45 p.m.

(*Berdon*, *J.*, dissenting in part and concurring in part), rev'd, 218 Conn. 432, 589 A.2d 1227 (1991), as well as our Supreme Court's decision in *State* v. *Osman*, 218 Conn. 432, 437, 589 A.2d 1227 (1991). The defendant's reliance on these cases is misplaced.

In *Billie*, an anonymous informant had notified the police of suspected criminal activity in an area known for drug trafficking. *State* v. *Billie*, supra, 123 Conn. App. 692. Specifically, "[t]he informant stated that he had witnessed a 'black male' placing narcotics underneath the rear porch of a certain house but did not provide any further information that could be used to identify the individual observed." Id. As a result, the police had removed all but one package of narcotics and setup surveillance over the area that the informant described. Id. Later that evening, the police noticed the defendant as he approached the porch and removed the hidden narcotics; shortly thereafter, he was arrested. Id., 693.

On appeal, the defendant in *Billie* argued that the state did not produce sufficient evidence to prove beyond a reasonable doubt that he possessed the narcotics that were removed previously by the police or that he had the requisite intent to sell; this court agreed. Id., 694–95. Because the remaining narcotics were not on the defendant's person and because the defendant was not in exclusive possession of the premises, in order to obtain a conviction, the state needed to "show incriminating statements or circumstances that support an inference that [the defendant] knew of the presence of the narcotics and had control of them . . . ." (Internal quotation marks omitted.) Id., 698. The state argued that it met its burden because knowledge and control of the remaining narcotics could have been inferred from the correlation between the informant's observations and the defendant's actions. Id. This court was not persuaded: "[T]he . . . informant's statement to the . . .

police was limited to his witnessing a 'black male' placing narcotics underneath the rear porch of a certain house. This general description alone, totally devoid of any additional identifying characteristics or traits, did not provide sufficient information for the jury reasonably to have concluded that the defendant was the individual observed by the informant. The individual observed very well may have been the defendant or just as readily a drug dealer or user hiding his stash of narcotics. The evidence simply does not make this clear. Thus, in the absence of additional identifying information, the jury could not have concluded that the defendant was the individual observed by the informant without resorting to speculation." (Footnote omitted.) Id., 698–99.

Similar to *Billie*, there was no eyewitness identification of the defendant in the present case; rather, a general description was provided to the police. Unlike in *Billie*, however, that description was not limited to the defendant's skin color or gender—it also included the clothing he was wearing at the time, the fact that he was armed with a gun, and an approximation of how much money was stolen from the storage facility. As previously noted, evidence was also presented to the jury that the defendant owned clothing similar to that of the perpetrator; the clothing worn by the perpetrator during the robbery was found near the crime scene and contained the defendant's "entire genetic profile"; a gun and an amount of money similar to that taken from the storage facility were found in the vehicle belonging to the defendant's girlfriend, who also testified that she had lent the defendant her vehicle earlier that day; and the police had pursued that vehicle from the area of the crime scene to where it eventually crashed, near the store where the defendant was arrested. Accordingly, unlike in *Billie*, there was additional identifying information, as set forth previously in this opinion, from

which the jury could have concluded that the defendant was the perpetrator.

Equally unpersuasive is the defendant's reliance on the dissent in *State* v. *Osman*, supra, 21 Conn. App. 314, as well as our Supreme Court's decision in *State* v. *Osman*, supra, 218 Conn. 437. In *Osman*, the defendant was convicted of robbery in the first degree and conspiracy to commit robbery in the first degree. *State* v. *Osman*, supra, 218 Conn. 433. The defendant appealed to this court, arguing that there was insufficient evidence to identify him as the perpetrator or as a conspirator in the robbery of a convenience store. A majority of this court disagreed with the defendant on his claim that the evidence was insufficient to find him guilty of robbery in the first degree, found that the evidence was nevertheless sufficient to find him guilty of robbery in the third degree in violation of General Statutes § 53a-133 and affirmed his conviction of conspiracy to commit robbery in the first degree. One judge dissented in part and concurred in part. *State* v. *Osman*, supra, 21 Conn. App. 314. Our Supreme Court, however, reversed the judgment of this court. *State* v. *Osman*, supra, 218 Conn. 437–38. The evidence presented at trial included the following: the defendant lived within two miles of the crime scene; the defendant possessed a pellet gun, a Halloween costume with red hair, and gray pants, all of which were similar to those described by the victims; the defendant tried to borrow money on the day of the robbery; the defendant and his accomplice were similar in height to the robbers; and, after the robbery had occurred, the defendant brought home an expensive stereo, leather jacket, and leather sneakers, despite having been unemployed. *State* v. *Osman*, supra, 21 Conn. App. 301–304.

In the present case, the defendant relies on the dissent in *Osman*, which opined that the conviction in *Osman* "was upheld on proof of identification based

solely upon circumstantial evidence of mere similarities not bolstered by similarities of a distinctive nature that connect the defendant to the crime." *State* v. *Osman*, supra, 21 Conn. App. 314 (*Berdon*, *J.*, dissenting in part and concurring in part). Without citing to the dissent, our Supreme Court concluded, in a per curiam opinion, that the "cumulative effect of the evidence elicited at . . . trial was insufficient to establish beyond a reasonable doubt the defendant's identity . . . . To have arrived at its decision that the defendant was one of the robbers, the jury would have had to resort to speculation and conjecture and to have drawn unwarranted inferences from the facts presented." *State* v. *Osman*, supra, 218 Conn. 437.

From our review of the evidence presented at trial in the present case, we are not persuaded that there were just "mere similarities" without a "distinctive nature" that connected the defendant to the crime. On the contrary, unlike in *Osman*, the evidence in this case showed not only that the defendant owned clothing similar to that worn by the perpetrator, but also that clothing similar to that worn by the perpetrator was found abandoned in the bushes near the scene of the crime and that clothing contained the defendant's DNA. Furthermore, video surveillance showed an individual driving up to the bush in a vehicle matching that which was owned by Lucky, exiting the vehicle and retreating behind the bush, and then returning to the vehicle wearing clothing matching that of the defendant at the time of his arrest. Additionally, as previously noted, a gun and an amount of money approximating the amount stolen from the storage facility were found near the scene of the crime, strewn in a vehicle belonging to Lucky, who had lent the defendant her vehicle several hours prior to the crime.

The defendant concludes his claim by making a series of arguments aimed at reviewing the evidence and

arguing that, together, it demonstrates his innocence. He further argues that evidence necessary to convict him was not provided by the state. We are mindful, however, of our scope of review: "[W]e give deference not to the hypothesis of innocence posed by the defendant, but to the evidence and the reasonable inferences drawable therefrom that support the jury's determination of guilt. 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. *Richards*, supra, 196 Conn. App. 407.

On the basis of the foregoing evidence presented at trial and mindful of our standard of review, we conclude that there was sufficient evidence from which the jury reasonably could have found beyond a reasonable doubt that the defendant was the person who robbed the storage facility.

II

Next, the defendant claims that this court must reverse his conviction of robbery in the first degree because he established the affirmative defense of inoperability. The state contends that the defendant failed to satisfy his burden of proving the affirmative defense of inoperability by a preponderance of the evidence. We agree with the state.

The following legal principles are relevant to our disposition of this claim. "The state meets its burden of proof regarding robbery in the first degree by proving beyond a reasonable doubt that, inter alia, the defendant displayed or threatened the use of what he represented to be a firearm. . . . If the defendant so chooses and the evidence permits, he may assert the affirmative defense of inoperability. . . . Because inoperability is

an affirmative defense, the defendant was required to raise and prove it by a preponderance of the evidence. . . . Proving the defense by a preponderance of the evidence results in a conviction of robbery in the second degree." (Citations omitted; internal quotation marks omitted.) *State* v. *Seay*, 128 Conn. App. 518, 523 n.4, 16 A.3d 1278, cert. dismissed, 302 Conn. 907, 23 A.3d 1246 (2011); see also General Statutes § 53a-134 (a) (4). On appeal, the standard for reviewing the defendant's affirmative defense claim is the same standard used for a sufficiency of the evidence claim. See *State* v. *D'Antuono*, 186 Conn. 414, 421, 441 A.2d 846 (1982); see also part I of this opinion.

In this case, the jury necessarily found that the state met its burden of proving the elements of robbery in the first degree and that the defendant did not prove the affirmative defense of inoperability by a preponderance of the evidence. Evidence was presented during trial that a gun was used by the perpetrator during the robbery and that a gun later was found in the vehicle that the defendant had borrowed from his girlfriend. Shortly after the defendant's arrest, the gun was recovered from the passenger side floor of the vehicle, inventoried, and placed in the police evidence room. During trial, Detective Murray testified about a test that was performed to determine if the gun had been operable. Despite the three attempts that were made, the gun was unable to discharge, even after the cylinder in the gun was replaced. Murray was unable to testify about the operability of the gun prior to its recovery or during the robbery. In fact, there was no evidence provided during the trial that addressed the operability of the gun at the time of the robbery.

According to the defendant, the gun was seized on May 5, 2016, and tested on November 17, 2016. He argues that because it is reasonable to infer that the

gun was stored in such a manner as to prevent deterioration, the only reasonable inference is that the gun was in the same condition on the day it was tested as it was during the robbery. We are not persuaded.

During trial, Murray testified that a close examination of the gun revealed that there was dirt inside of it. Murray, however, was unable to state whether the dirt found in the gun was the same type of dirt found on the defendant's clothes at the time of his arrest or if it was the same type of dirt that surrounded the sweatshirt and hat hidden in the bushes. Furthermore, evidence also was presented to the jury that the vehicle in which the gun was found crashed prior to the defendant's arrest. On the basis of the evidence presented at trial, the jurors were free to infer that the gun was not in the same condition at the time of testing as it was during the robbery. Regardless of the weight of that evidence, however, there was no evidence provided during the trial that addressed the operability of the gun at the time of the robbery. Accordingly, the jury reasonably could have found that the defendant failed to meet his burden of proving the affirmative defense of inoperability by a preponderance of the evidence.

In support of his claim, the defendant also cites to *State* v. *Ortiz*, 71 Conn. App. 865, 804 A.2d 937, cert. denied, 261 Conn. 942, 808 A.2d 1136 (2002), and discusses *State* v. *Seay*, supra, 128 Conn. App. 518. Neither case assists him in this appeal.

In *Ortiz*, unlike in the present case, evidence showed that the gun at issue was inoperable both *before and after* the robbery. *State* v. *Ortiz*, supra, 71 Conn. App. 876. As previously noted, in the present case there was no evidence proffered at trial that addressed the operability of the gun before or during the robbery; therefore, *Ortiz* is inapposite.

The defendant also seems to make the same argument that the *Seay* defendant attempted to make—that because there was no evidence that the gun was operable, the defendant met his burden.[6] See *State* v. *Seay*, supra, 128 Conn. App. 523. In *Seay*, the defendant was convicted of robbery in the first degree after he robbed a liquor store. Id., 520. During the robbery, he had held a duffel bag with "some kind of firearm" inside but never actually removed it from the bag. Id. After the robbery, the police searched the defendant's property and found broken pieces of what, when put together, was described to be a " 'facsimile firearm' . . . ." Id., 524. Additionally, "[d]uring closing argument, the prosecutor suggested that the facsimile firearm likely was used by the defendant during the robbery."[7] Id.

On appeal, the defendant in *Seay* argued that his conviction of robbery in the first degree should be replaced by the lesser included offense of robbery in the second degree because he had met his burden of proving the affirmative defense of inoperability. Id., 523. More specifically, he argued that there was no evidence that the facsimile firearm was operable and that there was no evidence that a gun other than that one was used during the robbery. Id. Despite the prosecutor's argument that the facsimile firearm was likely the one used during the robbery, this court held that "[a]lthough

[6] The defendant argues in his brief that *Seay* should be overruled. As we have often stated, however, "[i]t is axiomatic that one panel of this court cannot overrule the precedent established by a previous panel's holding. . . . The reversal may be accomplished only if the appeal is heard en banc." (Citation omitted; internal quotation marks omitted.) *State* v. *Carlos P.*, 171 Conn. App. 530, 545 n.12, 157 A.3d 723, cert. denied, 325 Conn. 912, 158 A.3d 321 (2017); see also Practice Book § 70-7.

[7] In *Seay*, the prosecutor argued that "[w]e've introduced a facsimile firearm into evidence. We can't prove beyond a reasonable doubt that that's the one that's in the bag, but it's a reasonable likelihood that that is the one that was in the bag. I think common sense would tell you that that probably was." (Internal quotation marks omitted.) *State* v. *Seay*, supra, 128 Conn. App. 524.

the jury reasonably could have found that the firearm found by the police was the same item used by the defendant during the robbery, the jury was not obligated so to find. It was within the province of the jury not to believe . . . that the facsimile firearm found by the police was used by the defendant during the robbery. . . . We note that [the victim] did not testify that the facsimile firearm found by the police was the same weapon used during the robbery. Operability is not an element of robbery in the first degree. It was the defendant's burden to prove inoperability and the jury reasonably could have determined that the defendant had not proven the affirmative defense of inoperability by a preponderance of the evidence." Id., 524.

As previously noted, in the present case, there was no evidence presented that the gun was operable, which the state was not required to prove. There also, however, was no evidence that the gun was inoperable at the time of the robbery, which the defendant was required to prove in order to meet his burden with respect to the affirmative defense of inoperability. The evidence presented to the jury was that the gun seized from the vehicle contained dirt, that it was found in the vehicle of the defendant's girlfriend after that vehicle was crashed by the defendant, and that the gun was inoperable several months after the robbery when it was tested by the police. Just as this court held in *Seay*, in the present case, it was within the province of the jury to disbelieve that the gun was inoperable during the robbery. Indeed, under *Seay*, the jury could have found that the gun recovered from the Chevy Malibu was not the same gun the defendant used during the robbery. The defendant offered no affirmative evidence that the firearm used during the robbery was inoperable. Accordingly, the jury reasonably could have determined that the defendant did not prove the affirmative

defense of inoperability by a preponderance of the evidence.

III

The defendant next claims that the trial court erred in denying his motion for a mistrial. Specifically, he contends that a mistrial should have been granted after Detective Murray testified that the defendant's clothing appeared to be the same as the perpetrator's and after she identified the defendant as the perpetrator in the surveillance footage. The defendant argues that such testimony constituted improper lay opinion under § 7-1 of the Connecticut Code of Evidence and an opinion on the ultimate issue of identity in violation of § 7-3 of the Connecticut Code of Evidence. The state argues that the trial court properly exercised its discretion and that, even if Murray's testimony was improper, it did not violate the defendant's right to a fair trial. We agree with the state.

We begin with our standard of review. "In our review of the denial of a motion for mistrial, we have recognized the broad discretion that is vested in the trial court to decide whether an occurrence at trial has so prejudiced a party that he or she can no longer receive a fair trial. The decision of the trial court is therefore reversible on appeal only if there has been an abuse of discretion." (Internal quotation marks omitted.) *State* v. *Montanez*, 185 Conn. App. 589, 602, 197 A.3d 959 (2018), cert. denied, 332 Conn. 907, 209 A.3d 643 (2019).

Additionally, "[t]o the extent [that] a trial court's admission of evidence is based on an interpretation of the Code of Evidence, our standard of review is plenary. . . . We review the trial court's decision to admit evidence, if premised on a correct view of the law, however, for an abuse of discretion. . . . It is axiomatic that [if premised on a correct view of the law, the] trial court's ruling on the admissibility of evidence is entitled

to great deference. . . . In this regard, the trial court is vested with wide discretion in determining the admissibility of evidence . . . . Accordingly, [t]he trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . [I]n determining whether there has been an abuse of discretion, every reasonable presumption should be made in favor of the correctness of the trial court's ruling, and we will upset that ruling only for a manifest abuse of discretion." (Internal quotation marks omitted.) *State* v. *Petersen*, 196 Conn. App. 646, 663–64, 230 A.3d 696, cert. denied, 335 Conn. 921, 232 A.3d 1104 (2020).

The following facts are relevant to this claim. Murray testified about many facets of the case, including the defendant's attire as compared to that of the perpetrator portrayed in sequenced video surveillance footage. More specifically, during her testimony, she stated that "[t]his . . . footage from [the store] . . . shows an individual entering the store wearing no footwear and appearing to be clad in the same clothing that the individual in the footage from [the complex] was wearing." Murray then testified that the individual in the store was arrested and also identified the person who was arrested as being the defendant. Shortly thereafter, the state questioned Murray about the locations from which she obtained the defendant's fingerprints, including at the counter of the storage facility, to which Murray stated: "I did not process the [storage facility] counter for fingerprints because, in the video, you could see [the defendant] actually doesn't touch . . . ." Before Murray could finish her statement, defense counsel objected and asked that the statement be stricken from the record. The court ordered the statement stricken and admonished the jurors not to consider it in their deliberations. Following the remainder of Murray's testimony, defense counsel orally moved for a mistrial,

arguing that Murray's statements were prejudicial, that they were induced by the state's witness, and that, because this is a case of identification, the incident was irreparable. The court, without explanation, denied the defendant's motion.

On December 5, 2017, defense counsel renewed his motion for a mistrial with respect to Murray's testimony that the perpetrator had worn the same clothing as that worn by the defendant. The court denied the defendant's motion. On February 9, 2018, prior to sentencing, defense counsel moved for a new trial, arguing, again, that Murray was unqualified to testify to the sameness or similarities of the perpetrator's clothing compared to that of the defendant's, and that she had testified to the ultimate issue of identity. The court denied the defendant's motion and provided the following reason: "[T]he defendant has not met the test under [§ 42-53] of the Practice Book, either . . . for an error by reason of which the defendant is constitutionally entitled to a new trial, or . . . for any other error which the defendant can establish was materially injurious to him or her. . . . [T]hose standards have not been met."[8]

In his challenge to the court's denial of his motion for a mistrial, the defendant posits that Murray's testimony constituted improper lay opinion and an opinion on the ultimate issue of identity. We disagree and address both in turn.

[8] Practice Book § 42-53 provides in relevant part: "(a) Upon motion of the defendant, the judicial authority may grant a new trial if it is required in the interests of justice. Unless the defendant's noncompliance with these rules or with other requirements of law bars his or her asserting the error, the judicial authority shall grant the motion:

"(1) For an error by reason of which the defendant is constitutionally entitled to a new trial; or

"(2) For any other error which the defendant can establish was materially injurious to him or her. . . ."

A

Section 7-1 of the Connecticut Code of Evidence provides: "If a witness is not testifying as an expert, the witness may not testify in the form of an opinion, unless the opinion is rationally based on the perception of the witness and is helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue." The defendant argues that Murray's testimony about the defendant's clothing represented layperson testimony and that Murray was not established as an expert in fashion or clothing.

Our Supreme Court analyzed § 7-1 extensively in *State* v. *Holley*, 327 Conn. 576, 175 A.3d 514 (2018). On appeal in that case, the defendant challenged the admission of testimony by the police that identified marks on the defendant's body as bite marks. Id., 604. The defendant claimed that this testimony violated § 7-1, arguing that the testifying officer was not an expert capable of making such an identification. Id., 607–608. In its analysis, the court recounted the language of § 7-1 and stated that "the commentary to the rule cites as illustrative matters upon which nonexpert opinion testimony has been held admissible include: the market value of property where the witness is the owner of the property . . . *the appearance of persons or things* . . . sound . . . the speed of an automobile . . . and physical or mental condition." (Emphasis in original; internal quotation marks omitted.) Id., 608–609. Our Supreme Court then proceeded to recount several cases in which it concluded that the challenged testimony constituted "the appearance of persons or things" and was, thus, admissible at the discretion of the trial court. Id., 609; see *State* v. *Schaffer*, 168 Conn. 309, 318–19, 362 A.2d 893 (1975) ("It is permissible to admit into evidence *the opinions of common observers in regard to common appearances*, facts and conditions . . . . [I]t is indispensable that the opinions be founded on

their own personal observation, and not [on] the testimony of others, or on any hypothetical . . . .'' (Citations omitted; emphasis added; internal quotation marks omitted.)).

Given our Supreme Court's conclusions in *Holley*, we are not persuaded that Murray's testimony, in the present case, as to the defendant's pants violated § 7-1.

B

We now address the defendant's claim that Murray's testimony constituted an opinion on the ultimate issue of identity and that it was harmful. Section 7-3 (a) of the Connecticut Code of Evidence provides: ''Testimony in the form of an opinion is inadmissible if it embraces an ultimate issue to be decided by the trier of fact, except that, other than as provided in subsection (b), an expert witness may give an opinion that embraces an ultimate issue where the trier of fact needs expert assistance in deciding the issue.'' The defendant argues that Murray's testimony that the defendant was wearing similar pants as the perpetrator and that the defendant was the individual at the storage facility counter on the surveillance footage went to the ultimate issue of identity. In support of his argument, he cites to *State* v. *Finan*, 275 Conn. 60, 881 A.2d 187 (2005). Specifically, he argues that our Supreme Court concluded in *Finan* that the identification of a perpetrator on the video surveillance was an ultimate issue for the jury and that the admission of testimony from four police officers as to that defendant's identity on the video was harmful error.

In *Finan*, our Supreme Court stated that an ultimate issue is characterized ''as one that cannot reasonably be separated from the essence of the matter to be decided [by the trier of fact].'' (Internal quotation marks omitted.) Id., 66. The court concluded that, on the facts of the case, ''the identification of the defendant as one

of the perpetrators shown on the videotape was an ultimate issue . . . .'' Id., 67. The court further concluded that ''[t]he identification of the defendant . . . on the videotape was fundamental to the jury's conclusion that the defendant was one of the perpetrators of the robbery. Accordingly . . . [it was] improperly determined that the lay witness testimony [of the four police officers] correctly was admitted.'' Id., 68–69.

Even if we assume that Murray's statement identifying the defendant was improper opinion testimony, we are not persuaded that it was harmful. ''In order to establish reversible error on an evidentiary impropriety . . . the defendant must prove both an abuse of discretion and a harm that resulted from such abuse. . . . When an [evidentiary impropriety] . . . is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [W]hether [the improper admission of a witness' testimony] is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict.'' (Citations omitted; internal quotation marks omitted.) *State* v. *Bermudez*, 195 Conn. App. 780, 797, 228 A.3d 96, cert. granted on other grounds, 335 Conn. 908, 227 A.3d 521 (2020).

It is noteworthy that, after Murray identified the person in the surveillance footage as the defendant, defense counsel objected immediately, and the court ordered the statement stricken from the record. Additionally, the court admonished the jurors and instructed

them, twice, to disregard Murray's statement and not to consider it in their deliberations. "If curative action can obviate the prejudice, the drastic remedy of a mistrial should be avoided. . . . [A]s a general matter, the jury is presumed to follow the court's curative instructions in the absence of some indication to the contrary. . . . [T]he burden is on the defendant to establish that, in the context of the proceedings as a whole, the stricken testimony was so prejudicial, notwithstanding the court's curative instructions, that the jury reasonably cannot be presumed to have disregarded it." (Citations omitted; internal quotation marks omitted.) *State* v. *Gonzalez*, 167 Conn. App. 298, 302–303, 142 A.3d 1227, cert. denied, 323 Conn. 929, 149 A.3d 500 (2016).

Furthermore, the jury in this case, unlike in *Finan*, was presented with significant other circumstantial evidence that connected the defendant to the robbery, separate and distinct from that of Murray's singular stricken statement. See part I of this opinion. That other evidence, taken together, provided the jury with a reasonable basis on which to conclude that the defendant was the individual in the surveillance footage. Additionally, the defendant has not demonstrated that the stricken testimony was so prejudicial that the jury reasonably cannot be presumed to have disregarded it.

Accordingly, we conclude that the trial court did not abuse its discretion in denying the defendant's motion for a mistrial.

IV

Last, the defendant claims that the court erred in failing to give the jury his requested instruction on identification. More specifically, the defendant argues that the requested instruction was crucial to his defense of misidentification and to the central issue of identification. We disagree.

The following additional facts are relevant to this claim. With regard to identity, the court gave the jury the following instruction: "The state has the burden of proving beyond a reasonable doubt that the defendant was the perpetrator of the crime. You, the jury, must be satisfied beyond a reasonable doubt that the defendant was the perpetrator of the crime or you must find the defendant not guilty. The defendant denies that he is the person who was involved in the commission of the alleged offense." The court's instruction is only a portion of what the defendant had requested; specifically, the defendant requested that the court include the following additional language as part of its identity instruction: "If you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty. . . . In this case, Renae Luginbuhl, the employee at the Public Storage, and the only person in the facility at the time of the incident . . . did not identify [the defendant] as the perpetrator of this offense. In a one-on-one identification procedure, she did not make an identification."

We turn now to the relevant legal principles that guide our review of this claim. "It is a well established principle that a defendant is entitled to have the jury correctly and adequately instructed on the pertinent principles of substantive law. . . . The primary purpose of the charge to the jury is to assist [it] in applying the law correctly to the facts which [it] find[s] to be established." (Citations omitted; internal quotation marks omitted.) *State* v. *Ortiz*, 252 Conn. 533, 560–61, 747 A.2d 487 (2000). "[T]he test of a court's charge is not whether it is as accurate upon legal principles as the opinions of a court of last resort but whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient

for the guidance of the jury . . . we will not view the instructions as improper." (Internal quotation marks omitted.) *State* v. *Leroy*, 232 Conn. 1, 8, 653 A.2d 161 (1995).

"Our Supreme Court has held that identification instructions are not constitutionally required and [e]ven if [a] court's instructions were less informative on the risks of misidentification . . . the issue is at most one of instructional error rather than constitutional error. A new trial would only be warranted, therefore, if the defendant could establish that it was reasonably probable that the jury was misled. . . . The ultimate test of a court's instructions is whether, taken as a whole, they fairly and adequately present the case to a jury in such a way that injustice is not done to either party under the established rules of law. . . .

"We review nonconstitutional claims of instructional error under the following standard. While a request to charge that is relevant to the issues in a case and that accurately states the applicable law must be honored, a [trial] court need not tailor its charge to the precise letter of such a request. . . . If a requested charge is in substance given, the [trial] court's failure to give a charge in exact conformance with the words of the request will not constitute a ground for reversal. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper." (Citation omitted; internal quotation marks omitted.) *State* v. *Crosby*, 182 Conn. App. 373, 410–11, 190 A.3d 1, cert. denied, 330 Conn. 911, 193 A.3d 559 (2018). "A challenge to the validity of jury instructions presents a question of law over which this court has plenary review." (Internal quotation marks omitted.) Id., 411. "Significantly, our Supreme Court [has] . . . emphasized that a trial court retains the discretion to decide whether, under the specific facts and circumstances presented, focused and informative jury instructions

on eyewitness testimony are warranted. . . . In reviewing the discretionary determinations of a trial court, every reasonable presumption should be given in favor of the correctness of the court's ruling." (Internal quotation marks omitted.) Id., 416.

The defendant cites two cases in support of his claim. First, he relies on our Supreme Court's holding in *State* v. *Cerilli*, 222 Conn. 556, 567, 610 A.2d 1130 (1992), that a "specific instruction on identification was warranted because [the defendant's] theory of defense was misidentification and because there were sufficient instances of lack of clarity and sufficient inconsistencies in the identification testimony of the victim and [a witness]." Because the present case did not involve issues of misidentification or a lack of clarity and sufficient inconsistencies in identification, we conclude that the defendant's reliance on *Cerilli* is misplaced.[9]

[9] In *Cerilli*, our Supreme Court concluded that a specific identification instruction was necessary because the defendant's theory of defense was misidentification and, as noted, there were inconsistencies and a lack of clarity in the identification testimony. *State* v. *Cerilli*, supra, 222 Conn. 567. Specifically, the victim "[i]n a forty-two page typewritten statement given to the police on October 26, 1987 . . . described her assailant as a white man between 5'10" and 6' tall, a little flabby or pouchy, thirty-five to forty years old or older. She described his skin as having 'little holes and cratering in his face,' and she stated that the blemishes on his face 'looked like somebody had acne.' In response to the question by the police whether it was '[h]eavy acne or just light acne?' she responded, 'Yeah, and they was red.' In response to the question, 'Red in complexion?' she responded, 'Mm hmm, real pale.' In this statement, the victim described the assailant's hair as 'long, dark . . . brown . . . feathered up . . . and it came down to about his shoulders [and] neck and he had it curled . . . .' She also described it as 'real dark brown, almost . . . black' with 'light brown, brown/blond . . . streaks . . . mixed in . . . .' She described his nose as 'funny shape[d],' 'real round . . . skinny and . . . round, real curved . . . pointed at the end . . . .' " Id., 564 n.6. Further, "[s]he described his car as dark brown, square, with a light tan interior, and with nothing unusual about the rearview mirror." Id. During trial, however, the victim described the defendant as follows: "[T]he assailant [had], inter alia, acne and a pock-marked face, and a prominent, hawk-like nose." Id. Additionally, "[s]he . . . recalled describing the assailant's car as dark brown with a tan interior and a vinyl roof." Id. Another witness, however, prior to trial, described the

Second, the defendant relies on our Supreme Court's analysis in *State* v. *Guilbert*, 306 Conn. 218, 246, 49 A.3d 705 (2012). Specifically, he emphasizes the court's focus on the scientific developments as to eyewitness identification instructions and that instructions reflecting the substance of those scientific findings were important to assuring a fair trial. He also relies on the court's conclusion in *Guilbert* that "a trial court retains the discretion to decide whether, under the specific facts and circumstances presented, focused and informative jury instructions on the fallibility of eyewitness identification evidence . . . would alone be adequate to aid the jury in evaluating the eyewitness identification at issue. . . . [A]ny such instructions should reflect the findings and conclusions of the relevant scientific literature pertaining to the particular variable or variables at issue in the case; *broad, generalized instructions on eyewitness identifications . . . do not suffice*." (Citations omitted; emphasis added; footnote omitted.) Id., 257–58.

This court, however, already has concluded that "*Guilbert* concerned the admissibility of expert testimony, *not a challenge to jury instructions*. Although the court in *Guilbert* did acknowledge the widespread judicial recognition that eyewitness identifications are potentially unreliable in a variety of ways unknown to the average juror . . . it did not mandate that such factors

defendant as "having light brown or blond curly hair that reached down to about his neckline and was combed back. She described his face as having 'little holes' in it that looked 'like craters,' and his nose as 'funny shaped.' " Id.

Unlike *Cerilli*, in the present case, there was a single and consistent description by Luginbuhl as to what the perpetrator was wearing during the commission of the crime. Additionally, Luginbuhl was unable to describe the facial features or other physical characteristics of the perpetrator; rather, she provided only a description of his clothing. Accordingly, we conclude that the factual scenario underlying our Supreme Court's decision to require a more specific jury instruction on identification in *Cerilli* is inapplicable in the present case.

be included in jury instructions." (Citation omitted; emphasis added; internal quotation marks omitted.) *State* v. *Crosby*, supra, 182 Conn. App. 411–12. Additionally, to the extent that *Guilbert* requires more specific jury instructions with regard to eyewitness identifications, we find the defendant's reliance thereon unavailing because, in the present case, *there were no eyewitness identifications*. As previously noted, the sole potential eyewitness was unable to identify the defendant.

After our careful review of the evidence and the jury instructions, we cannot conclude that those instructions were incorrect, insufficient, or misleading to the jury.

The judgment is affirmed.

In this opinion the other judges concurred.

IN RE XAVIER H.*

(AC 43770)
(AC 43774)

Bright, C. J., and Prescott and Alexander, Js.

Syllabus

The respondent parents filed separate appeals to this court from the judgment of the trial court terminating their parental rights with respect to their minor child, who had previously been adjudicated neglected. The respondents claimed, inter alia, that the trial court improperly concluded that they had failed to achieve the requisite degree of personal rehabilitation as would encourage the belief that within a reasonable time they could assume responsible positions in the child's life as required by the applicable statute (§ 17a-112). *Held*:

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

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018); we decline to identify any party protected or sought to be protected under a protective order or a restraining order that was issued or applied for, or others through whom that party's identity may be ascertained.

1. The respondent father's claim that the trial court made clearly erroneous subordinate factual findings and applied those findings in reaching its decision that there was sufficient evidence to terminate the father's parental rights was unavailing; contrary to the father's claim that the evidence demonstrated that he complied with each of the specific steps ordered by the court, there was ample evidence in the record that the Department of Children and Families was unsuccessful in offering therapy service providers to the father because the father rejected those providers and, instead, chose his own providers and lied to his chosen providers, which made his therapy unsuccessful, the father admittedly did not participate in mediation or couples counseling and was untruthful about his continuing relationship with the respondent mother, and, although the court's factual finding that the father was in the courtroom and had seen a video that showed him entering the mother's apartment at 1:55 a.m. prior to his testimony that he had arrived at the apartment at 5:15 a.m., was in error, such error was harmless because it did not undermine the court's principal finding that the father lied to the court about his time of arrival at the apartment.
2. The respondents could not prevail on their claims that the trial court failed to employ the proper standard in assessing whether, pursuant to § 17a-112 (j) (3), the respondents had each failed to achieve a sufficient degree of personal rehabilitation as would encourage the belief that within a reasonable time they could assume a responsible position in the child's life: although the court did not employ the precise statutory language, it correctly set forth the legal standard at the beginning of its analysis and found by clear and convincing evidence that the department provided reasonable efforts for reunification of the child with the respondents but that the respondents did not achieve the required level of rehabilitation, the court having found that the father had made no progress on the key issue on which the court relied for termination, domestic violence in the relationship between the father and the mother, and concluded that he failed to understand and to address this issue, and lied to the department, his therapist and the court about the status of his relationship with the mother; moreover, the trial court found that the mother had consistently shown resistance to participating in any domestic violence counseling program, and, despite the violence in the relationship, continued a relationship with the father and continued to lie about it, she had not gained an understanding of the deleterious effects of such violence and lacked the ability to care for the needs of the child as those needs relate to the issues surrounding domestic violence, she repeatedly undermined the child's relationship with the foster mother, she abused medications and she self-discharged from an intensive inpatient care program.
3. The respondent father could not prevail on his claim that the trial court failed to apply in a proper manner the factors set forth in § 17a-112 (k) when conducting its analysis of whether termination was in the child's

best interest: the court listed and made written findings on each of the seven factors set forth in § 17a-112 (k) and found that the father had not fulfilled his obligation under the terms of the court-ordered specific steps; moreover, any lack of clarity on the specific statutory factor directing the court to consider the child's emotional ties was harmless because, when the court's memorandum of decision was read as a whole, this court concluded that, although the court did not explicitly address the child's emotional ties to the father, it discussed their relationship, as well as the child's bond with his foster family, and found that the child, only three years, ten months old, had been out of his parents' care for more than thirty-four months, and, even if the child had strong emotional ties to the father, the court's determination that termination of the father's parental rights was in the child's best interest was factually supported and legally sound.

4. The respondent mother could not prevail on her claim that the trial court failed to employ the proper standard in assessing whether she had failed to rehabilitate; although the court did not employ precise statutory language, it correctly set forth the legal standard at the beginning of its analysis and found by clear and convincing evidence that the department provided reasonable efforts for reunification of the child with the mother and set forth sufficient factual and legal findings to meet the statutory standard for the adjudicatory requirements of § 17a-112 (j) (3) (B) (i).

5. The trial court's written findings and conclusions that the minor child's best interest would be served by granting the petition to terminate the respondent mother's parental rights sufficiently complied with § 17a-112 (k) and, accordingly, the court's ultimate conclusion that it was in the child's best interest to terminate the mother's parental rights was factually supported and legally sound: the court listed and made written findings on each of the seven factors set forth in § 17a-112 (k) and found that the mother had not fulfilled her obligation under the terms of the court-ordered specific steps; moreover, any ambiguity in the court's findings concerning the child's emotional ties with the mother did not undermine the court's determination that termination of the mother's parental rights was in the child's best interest, as there was evidence that the court considered the mother's relationship with the child and the dangers presented by it, and that the child had developed significant emotional ties with his foster family; furthermore, the court made sufficient findings addressing the mother's efforts to adjust her circumstances, as the court considered evidence that the mother resisted participation in domestic violence counseling, repeatedly undermined the child's relationship with his foster mother, repeatedly sought modifications of protective orders for herself issued against the father on the father's behalf, lied about her ongoing relationship with the father and failed to make meaningful changes in her life.

Argued September 8—officially released October 22, 2020**

** October 22, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of New London, Juvenile Matters at Waterford, and tried to the court, *Hon. Michael A. Mack*, judge trial referee; judgment terminating the respondents' parental rights, from which the respondents filed separate appeals to this court. *Affirmed.*

Joseph Jaumann, assigned counsel, for the appellant in Docket No. AC 43770 (respondent father).

Mildred Doody, assistant public defender, for the appellant in Docket No. AC 43774 (respondent mother).

Sara Nadim, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Benjamin Zivyon*, assistant attorney general, for the appellee in Docket Nos. AC 43770 and AC 43774 (petitioner).

Don M. Hodgdon, for the minor child in Docket Nos. AC 43770 and AC 43774.

Opinion

BRIGHT, C. J. In Docket No. AC 43770, the respondent father appeals from the judgment of the trial court terminating his parental rights as to his son, Xavier H. He claims that the trial court (1) made clearly erroneous factual findings, (2) failed to employ the proper standard in assessing whether, pursuant to General Statutes § 17a-112 (j) (3), he failed to rehabilitate to such a degree as to reasonably encourage a belief that he could assume a responsible position in Xavier's life, and (3) failed to apply in a proper manner the statutory factors set forth in § 17a-112 (k) when conducting its analysis of whether termination was in Xavier's best interest.

In Docket No. AC 43774, the respondent mother appeals from the judgment of the trial court terminating her parental rights as to her son, Xavier H. The respondent mother claims that the trial court (1) failed to employ the proper standard in assessing whether, pursuant to § 17a-112 (j) (3), she failed to rehabilitate to such a degree as to reasonably encourage a belief that she could assume a responsible position in Xavier's life, (2) erred in finding that she had failed to rehabilitate, and (3) failed to make complete written findings concerning the statutory factors set forth in § 17a-112 (k) when considering whether termination was in Xavier's best interest. We disagree with the claims in each appeal and, accordingly, affirm the judgment of the trial court.[1]

Initially, we briefly set forth some of the facts found by the trial court and the procedural history that are relevant to both appeals. Both parents have significant issues that led to the petitioner, the Commissioner of Children and Families, taking Xavier into her custody. Those issues have been present from Xavier's birth through the date of the court's judgment in this matter. The Department of Children and Families (department) has had involvement with the respondent mother dating back to 2005, when issues involving domestic violence, substance abuse, and criminal activities were addressed. Ultimately, on March 28, 2008, the respondent mother's parental rights as to another child were terminated after the petitioner filed a petition, and guardianship of that child was transferred to the child's maternal grandparents. Those same issues exist with respect to Xavier, but, this time, they include the respondent father of Xavier, as well. Those issues include unresolved substance abuse, mental health concerns, domestic violence, lack of housing, and criminal involvement.

[1] In both appeals, the attorney for Xavier has adopted the brief of the petitioner, the Commissioner of Children and Families.

On January 10, 2017, the department invoked a ninety-six hour hold on Xavier, and, on January 11, 2017, the petitioner filed with the court a motion for an order of temporary custody and a neglect petition with respect to Xavier. The court granted the order of temporary custody, and it found that the department had made reasonable efforts to prevent or to eliminate the need for removal. On April 18, 2017, the court adjudicated Xavier neglected and committed him to the care and custody of the petitioner until further order of the court. The court ordered specific steps for each respondent to take. On December 12, 2017, the court approved a concurrent permanency plan of termination of parental rights and adoption or reunification with the respondents.

Via a petition filed on June 8, 2018, the petitioner sought the termination of the parental rights of the respondent father and the respondent mother as to Xavier. In the petition, the petitioner alleged that Xavier had been adjudicated neglected in a prior proceeding and that neither the respondent father nor the respondent mother had achieved a degree of personal rehabilitation that would encourage the belief that, within a reasonable time, considering the age and needs of Xavier, either of them could assume a responsible position in Xavier's life. The court, pursuant to § 17a-112 (j) (3) (B) (i),[2] granted that petition in a November 25, 2019 memorandum of decision. This appeal followed.

[2] General Statutes § 17a-112 (j) (3) (B) (i) provides in relevant part: "The Superior Court, upon notice and hearing . . . may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that . . . the child . . . has been found by the Superior Court . . . to have been neglected, abused or uncared for in a prior proceeding . . . and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent pursuant to section 46b-129 and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . ."

"We begin with the applicable standard of review and general governing principles. Although the trial court's subordinate factual findings are reviewable only for clear error, the court's ultimate conclusion that a ground for termination of parental rights has been proven presents a question of evidentiary sufficiency. . . . That conclusion is drawn from both the court's factual findings and its weighing of the facts in considering whether the statutory ground has been satisfied. . . . On review, we must determine whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court. . . . To the extent we are required to construe the terms of [§ 17a-112 (j) (3)] or its applicability to the facts of this case, however, our review is plenary. . . .

"Proceedings to terminate parental rights are governed by § 17a-112. . . . Under [that provision], a hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more of the . . . grounds for termination of parental rights set forth in § 17a-112 [(j) (3) (B) (i)] exists by clear and convincing evidence. The [petitioner] . . . in petitioning to terminate those rights, must allege and prove one or more of the statutory grounds. . . . Subdivision (3) of § 17a-112 (j) carefully sets out . . . [the] situations that, in the judgment of the legislature, constitute countervailing interests sufficiently powerful to justify the termination of parental rights in the absence of consent. . . . Because a respondent's fundamental right to parent his or her child is at stake, [t]he statutory criteria must be strictly complied with before termination can be

accomplished and adoption proceedings begun." (Internal quotation marks omitted.) *In re Tresin J.*, 334 Conn. 314, 322–23, 222 A.3d 83 (2019).

"[I]n order to prevail on a petition for the termination of parental rights pursuant to § 17a-112 (j) (3) (B) (i), the petitioner must prove by clear and convincing evidence the department's reasonable efforts or the parent's inability or unwillingness to benefit therefrom, and that termination is in the best interest of the child. In addition, under . . . § 17a-112 (j) (3) (B) (i), the petitioner must prove by clear and convincing evidence that 'the child . . . has been found by the Superior Court or the Probate Court to have been neglected, abused or uncared for in a prior proceeding . . . and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent pursuant to section 46b-129 and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . .' " *In re Jayce O.*, 323 Conn. 690, 711–12, 150 A.3d 640 (2016).

I

AC 43770

The respondent father claims that the trial court (1) made clearly erroneous subordinate factual findings, (2) failed to employ the proper standard in assessing whether, pursuant to § 17a-112 (j) (3), he failed to rehabilitate to such a degree as to reasonably encourage a belief that he could assume a responsible position in Xavier's life, and (3) failed to apply in a proper manner the statutory factors set forth in § 17a-112 (k) when conducting its analysis of whether termination was in Xavier's best interest. After setting forth the relevant

facts as found by the trial court concerning the respondent father, we will consider each of these claims in turn.

The respondent father has a criminal history that includes, but is not limited to, assault in the third degree, violation of a protective order, violation of a restraining order, carrying a dangerous weapon, failure to appear, breach of the peace, and battery; he alsowas found in violation of the conditions of his probation. He has been incarcerated. The department attempted to engage him in services but had little success. Attempts to engage him in substance abuse evaluations and screenings failed at least ten times before he finally engaged, after which it finally was discovered that he did not meet the criteria for substance abuse disorder, and that treatment was not recommended. Nancy Randall, a psychologist who is an expert in clinical and forensic psychology, diagnosed the respondent father with adjustment disorder and personality disorder (not otherwise specified) with antisocial and narcissistic features. He is in need of therapy to work toward accepting personal responsibility, anger control, relationship issues, and to get a better understanding of Xavier's needs, including the impact on Xavier of being exposed to conflict, violence, and/or substance abuse.

The court further found that the respondent father had denied to Randall that there had been any physical violence between the respondent mother and him, but he could not explain the existence of nine protective or restraining orders placed against him to protect the respondent mother. Although he persisted in his contention that there had been no violence, the respondent mother acknowledged that domestic violence started six months after their relationship began more than ten years ago, as of the date of the trial in this case. The court found that the respondent father was neither honest with the department nor with Randall when he

maintained that he and the respondent mother were no longer in a relationship. It took the persistence of a department employee to observe the respondent father going to the respondent mother's home late at night and staying for long hours on multiple occasions to establish the falsity of the respondent father's claim. The court concluded that honesty was not a strong point in the respondent father's management of his situation with the department. The court further noted that, although the father is still in a relationship with the respondent mother, he has not participated in any couples therapy with the respondent mother or in mediation, and Randall thought it likely that continued contact between them would result in further violence and conflict.

The court further found that the respondent father intentionally did not reveal to his therapists that he still was involved with the respondent mother. The respondent father completed an intake at United Community and Family Services (family services) for individual therapy and attended regularly with Joseph LaBrecque, a licensed professional counselor. He was working on improving and/or fostering healthy relationships with others. Although the respondent father was supposed to be receiving dialectical behavior therapy, as had been recommended and encouraged by Randall, LaBrecque is not a trained dialectical behavior therapy clinician.[3] The respondent father, however, also received therapy services from Joyce LeCara. The court specifically pointed out that LeCara testified, in response to questions by counsel for the petitioner, that, if the respondent father was having contact with the respondent mother, he would be putting himself at risk.

[3] The court explained that "[d]ialectical [b]ehavior [t]herapy is an evidence-based psychotherapy to treat borderline personality disorder and is useful in treating patients seeking change in behavioral patterns such as substance abuse and domestic or non-domestic violence against others. It is a process in which the therapist helps the patient find and employ strategies and ultimately synthesize them to accomplish consistently the defined ultimate goal and is used to treat borderline personality disorders and

Additionally, the court also discussed a video that had been introduced into evidence by the petitioner, showing the respondent father arriving at the home of the respondent mother on April 27, 2019 at 1:55 a.m. The court noted that the respondent father "was in the courtroom when [the video] exhibit . . . was introduced with much discussion as to where it came from and what it showed. Knowing that, [the respondent] father still took the stand to testify under oath and included in that testimony that he did indeed go to [the respondent] mother's apartment on April 27, 2019, arriving at 5:15 a.m. [The video, however] is the security monitor . . . video which shows [the respondent] father arriving at [the respondent] mother's apartment at 1:55 a.m. that morning and the two of them departing after 6:00 a.m. that morning." The court then found: "If [the respondent] father cannot be honest with the court while under oath knowing that the court has access to the [video] exhibit which shows the actual time he arrived, the court must conclude and does conclude that [the respondent father] has terrible difficulty with managing the truth in any aspect of his interactions with others in every other aspect of his life, including with clinicians who are trying to help him improve his mental disposition. Clinicians depend on the honesty of their patients while trying to improve their patient's mental health. Without honesty, they can do nothing. Veracity cannot be noted as a strong point of [the respondent] father's character in any aspect of this case. The evidence established that [the respondent] mother and [the respondent] father were together five consecutive days in April, 2019 (23rd through and including the 27th) after they had disengaged from coparenting training because the relationship was too toxic."

After making these subordinate factual findings, the court found, by clear and convincing evidence, that the

addictive personality disorders. To be successful, it demands honesty both from the patient and the clinician."

department had provided reasonable efforts for and on behalf of the respondent father to reunite him with his child but that the respondent father was "unwilling to engage with the resources offered by the [department] and chose to make his own way with providers of his choice and then attempted to deceive each of them by failing to be truthful with them. The result was that he failed to benefit from their efforts." The court then found that the respondent father had not "achieved any level of rehabilitation [that] might encourage the belief that within a reasonable time [he] might reach a point where reunification with Xavier was in Xavier's best interest." In the dispositional portion of its decision, the court examined the seven factors set forth in § 17a-112 (k), and concluded that it was in Xavier's best interest for the respondent father's parental rights to be terminated. Additional facts relevant to the respondent father's appeal will be set forth as necessary.

A

First, the respondent father claims that the trial court made clearly erroneous subordinate factual findings. He argues that the court made "several clearly erroneous subordinate factual findings and then applied said findings" in reaching its decision that "there was sufficient evidence to terminate [the respondent] father's parental rights."

"A finding is clearly erroneous when either there is no evidence in the record to support it, or [if] the reviewing court is left with the definite and firm conviction that a mistake has been made." (Internal quotation marks omitted.) *In re Sarah O.*, 128 Conn. App. 323, 336, 16 A.3d 1250, cert. denied, 301 Conn. 928, 22 A.3d 1275 (2011).

The respondent father first argues that the court's factual finding that the department had "attempted to engage him . . . in services, but [had] little success"

was unsupported by the evidence, which, he argues, demonstrated that he had "substantially if not completely complied with every specific step listed on the January, 2017 specific steps ordered by the court." He argues that the evidence demonstrates that he complied with Randall's recommendations, engaged in domestic violence services, individual therapy with LaBrecque, dialectical behavior therapy with LeCara, and coparenting therapy. He contends that he provided drug testing samples, a substance abuse evaluation, consistent visitation with Xavier, and that all of the clinicians indicated that he had made progress and the department admitted that he was compliant with all specific steps and services.

We conclude that the court's factual finding that the department had "attempted to engage him . . . in services, but [had] little success" was not clearly erroneous. There is ample evidence in the record that the department was unsuccessful in offering service providers to the respondent father because he rejected those providers and, instead, chose to find his own providers. Additionally, the court heard extensive evidence that the respondent father repeatedly lied to his chosen providers, which made his therapy unsuccessful.

The respondent next argues that the court's factual finding that the respondent father "has not participated in mediation or couple counseling" was clearly erroneous. The respondent father then argues that he was not in a relationship with the respondent mother so such services were not required and the department never asked him to engage in such services. We conclude that the court's finding was not clearly erroneous. Regardless of whether these services specifically were required by the department, the respondent father admits that he did not participate in such services, which was the finding of the court. The respondent father continually told the department and his service providers that he

and the respondent mother were not in a relationship. The evidence, however, tends to demonstrate otherwise. There also is evidence that if the respondent father had been honest with the department and his providers, additional therapy would have been required.

Next, the respondent challenges the court's factual finding that the respondent father was in the courtroom when the video of his stay at the respondent mother's home was played and that he had lied to the court about not getting to the home until 5:15 a.m. He contends that the video showing his arrival at the respondent mother's home at 1:55 a.m. and leaving her home at 6 a.m. was not played before his testimony but that it was introduced during the petitioner's rebuttal, which occurred after his testimony. He argues: "The court's findings . . . lead the court to conclude erroneous[ly] that the respondent [father] is untruthful because he testified after being aware and seeing video about when he arrived [and departed] the [respondent] mother's residence." Although part of the court's factual finding may have been in error, it appears that the respondent father misses the import of the whole of the court's finding, which was that the respondent father lied to the court during his testimony. We conclude that the court's finding that the respondent father had seen the video before he lied during testimony was in error, but the error was harmless because it did not undermine the court's principal, and undisputed, finding that the respondent father had been untruthful to the court about the time of his arrival at the respondent mother's home.

The respondent father makes several additional arguments concerning alleged clearly erroneous factual findings. We have reviewed and considered each of them, but find them to be meritless, and we conclude that they do not warrant discussion. Accordingly, we conclude that the court's subordinate factual findings were not clearly erroneous.

B

The respondent father next claims that the trial court failed to employ the proper standard in assessing whether, pursuant to § 17a-112 (j) (3), he failed to rehabilitate to such a degree as to reasonably encourage a belief that he could assume a responsible position in Xavier's life. He contends that this failure requires reversal of the court's judgment. We are not persuaded.

The consideration of whether the court applied an incorrect legal test presents a question of law, which requires our plenary review. See *In re Jacob W.*, 330 Conn. 744, 754, 200 A.3d 1091 (2019). "The interpretation of a trial court's judgment presents a question of law over which our review is plenary. . . . As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole. . . . If there is ambiguity in a court's memorandum of decision, we look to the articulations [if any] that the court provides." (Internal quotation marks omitted.) *In re James O.*, 322 Conn. 636, 649, 142 A.3d 1147 (2016). "[W]e are mindful that an opinion must be read as a whole, without particular portions read in isolation, to discern the parameters of its holding. . . . Furthermore, [w]e read an ambiguous trial court record so as to support, rather than contradict, its judgment." (Citation omitted; internal quotation marks omitted.) *In re Jason R.*, 306 Conn. 438, 453, 51 A.3d 334 (2012).

In the present case, the court, in its memorandum of decision, specifically stated that it found "by clear and convincing evidence that the [department] provided reasonable efforts for and on behalf of each parent to reunite them or either of them with their child, but [the

respondent] mother was either unwilling or unable to derive from those efforts the benefits necessary to be able to do so and [the respondent] father was unwilling to engage with the resources offered by the [department] and chose to make his own way with providers of his choice and then attempted to deceive each of them by failing to be truthful with them. The result was that he failed to benefit from their efforts.

"Neither [the respondent] mother nor [the respondent] father achieved any level of rehabilitation which might encourage the belief that within a reasonable time each or either of them might reach a point where reunification with Xavier was in Xavier's best interest."

The respondent father argues that the court improperly failed to apply its subordinate factual findings to the statutory requirement that he had not rehabilitated *to such a degree as would encourage a belief that he could assume a responsible position in Xavier's life in the future*. See General Statutes § 17a-112 (j) (3) (B) (i). Rather, he argues, the court found that it was not encouraged to believe that the respondent father had or *could reach a point where reunification with Xavier would be in Xavier's best interest*, and he argues that this does not meet the required legal finding necessary in the adjudicatory phase of a termination of parental rights proceeding under § 17a-112 (j) (3) (B) (i).

The petitioner responds that the respondent father's "claim fails, as the record in this case makes clear that [although] the court did not use the exact words of the statute, its analysis, factual findings, and JD-JM-31 form[4] conform with the statutory requirements." (Footnote added.) She further argues that the court's factual

[4] Form JD-JM-31 is a Judicial Branch form entitled "ORDER, TERMINATION OF PARENTAL RIGHTS AND APPOINTMENT OF STATUTORY PARENT/GUARDIAN." In this case, the form contains the required statutory language. However, it was signed by the deputy chief clerk on behalf of the trial judge and not by the trial judge.

findings demonstrate, when viewed in their entirety, that it made the statutory legal finding that the respondent father had failed to rehabilitate to such a degree as to reasonably encourage a belief that he could assume a responsible position in Xavier's life. The petitioner points to the court's findings that there was nothing to indicate that the respondent father had benefited from any services or that anything had changed, and that the respondent father still could not place Xavier's needs "before his own anger and need to have things the way he believes is right." The petitioner contends that, read as a whole, the court's decision demonstrates that it found that the respondent father had failed to rehabilitate to such a degree as to reasonably encourage a belief that he could assume a responsible position in Xavier's life.[5] We agree with the petitioner.

We conclude that, although the court did not use the talismanic phrasing of the statute, its framing of the legal question before it, and its findings, taken as a whole, nonetheless, satisfy the statute. The court began its decision by properly explaining: "This matter comes to the court by way of a petition dated June 7, 2018, filed by the [d]epartment . . . seeking the termination of the parental rights of [the respondent mother and the respondent father] . . . . The petition alleges that the child had been adjudicated in a prior proceeding to have been neglected and that mother and father each individually have failed to achieve the degree of personal rehabilitation that would encourage the belief that within a reasonable time, considering the age and needs of the child, each or either could assume a responsible position in the life of the child."

[5] The petitioner also argues that if there is ambiguity in the court's judgment, this court should read the decision to support the judgment, especially in light of the respondent father's failure to file a motion for articulation. See Practice Book § 66-5.

The court then proceeded to provide its analysis for granting the petition. It specifically found that the department had little success in engaging the respondent father in services, that the respondent father found his own therapists rather than engage with the ones recommended by the department, that he then lied to those therapists, that he refused to admit that he had engaged in physical violence against the respondent mother, despite nine protective or restraining orders placed against him to protect her from his violent episodes, that he repeatedly lied about his ongoing relationship with the respondent mother, that both Randall and LeCara thought it likely that continued contact between the respondent mother and the respondent father would result in more violence and that it was risky, that the respondent father minimized the significance of the many protective and restraining orders issued against him, that, according to Randall, the respondent father continued to show a pattern of angry, controlling, and intimidating behaviors when he was not being monitored closely, that the respondent father is unlikely to be able to control his anger or place Xavier's needs above his own, that nothing had changed as a result of therapy, that the respondent father lied to the court while under oath, that the respondent father had made no progress toward any reform related to domestic violence, and that the respondent father's persistent dishonesty left the court with little hope that he would change.

Although the court did not recite the precise language of the statute in the concluding sentence of the adjudicatory section of its memorandum of decision, we conclude, on the basis of the court's full decision, that it found that the department had proven, by clear and convincing evidence, the allegations specifically alleged in its petition, namely, that the respondent mother and the respondent father each individually have failed to

achieve the degree of personal rehabilitation that would encourage the belief that within a reasonable time, considering the age and needs of the child, each or either could assume a responsible position in the life of the child. See *In re James O.*, supra, 322 Conn. 653–55 (considering challenged portion of trial court's "memorandum of decision within the context of the trial court's overall analysis").

In *In re Shane M.*, the only case relied on by the respondent father to support his claim, our Supreme Court explained that "[t]he trial court is required, pursuant to § 17a-112, to analyze the [parent's] rehabilitative status as it relates to the needs of the particular child, and further . . . *such rehabilitation must be foreseeable within a reasonable time*. . . . The statute does not require [a parent] to prove precisely when [he] will be able to assume a responsible position in [his] child's life. Nor does it require [him] to prove that [he] will be able to assume full responsibility for [his] child, unaided by available support systems. It requires the court to find, by clear and convincing evidence, that the level of rehabilitation [he] has achieved, if any, falls short of that which would reasonably encourage a belief that at some future date [he] can assume a responsible position in [his] child's life. . . . In addition, [i]n determining whether a parent has achieved sufficient personal rehabilitation, *a court may consider whether the parent has corrected the factors that led to the initial commitment*, regardless of whether those factors were included in specific expectations ordered by the court or imposed by the department." (Citations omitted; emphasis added; internal quotation marks omitted.) *In re Shane M.*, 318 Conn. 569, 585–86, 122 A.3d 1247 (2015). The standard we employ on appeal, as set forth previously in this opinion, is the following: "As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative

factor is the intention of the court as gathered from all parts of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed." (Internal quotation marks omitted.) *In re James O.*, supra, 322 Conn. 649.

Although it would have been preferable for the trial court to conclude the adjudicatory section of its decision with a legal finding that specifically employed the precise statutory language, we conclude that the court's decision in this case, when read as a whole, sets forth sufficient factual and legal findings to meet the statutory standard for the requirements of the adjudicatory phase of the proceedings, as set forth in § 17a-112 (j) (3) (B) (i). See id., 655; *In re Shane M.*, supra, 318 Conn. 585–86. Significantly, this is not a case in which the question was the degree of progress the respondent father was making. The court found that the respondent father had made no progress on the key issue on which the court relied for termination—domestic violence in the relationship between the respondent father and the respondent mother. Furthermore, the court concluded that the respondent father not only had made no progress to understand and to address this issue, he also lied to the department, his therapist and the court about the status of his relationship with the respondent mother. Given these factual findings and the fact that the court correctly set forth the legal standard at the beginning of its analysis, we are not persuaded that the court's imprecision in its conclusory statement reflects the application of an incorrect legal standard.

C

The respondent father finally claims that the trial court failed to apply in a proper manner the statutory factors set forth in § 17a-112 (k) when conducting its analysis of whether termination was in Xavier's best interest. Specifically, he argues that the court "fail[ed]

to consider and articulate the proper findings necessary under . . . § 17a-112 (k) (3) and (4).[6] In failing to do so, the court's findings are clearly erroneous." (Footnote added.) The petitioner argues that the respondent father's "claim is based on a misunderstanding of the trial court's obligation to consider those statutory factors, as they serve simply as guidelines for the trial court to consider when deciding the best interest of the child and are not mandatory." We conclude that the trial court properly considered the required statutory factors and that its finding as to Xavier's best interest is factually supported and legally sound.

To the extent that the respondent father's claim requires us to interpret the requirements of § 17a-112 (k), our review is plenary. See *In re Nevaeh W.*, 317 Conn. 723, 729, 120 A.3d 1177 (2015). Additionally, "[t]he best interest determination . . . must be supported by clear and convincing evidence. . . . [O]ur function is to determine whether the trial court's conclusion was factually supported and legally correct. . . . In doing so, however, [g]reat weight is given to the judgment of the trial court because of [the court's] opportunity to observe the parties and the evidence. . . . We do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. . . . [Rather] every reasonable presumption is made in favor of the trial court's ruling." (Citations omitted; internal quotation marks omitted.) *In re Davonta V.*, 285 Conn. 483, 487–88, 940 A.2d 733 (2008).

[6] General Statutes § 17a-112 (k) provides in relevant part: "Except in the case where termination of parental rights is based on consent, in determining whether to terminate parental rights under this section, the court shall consider and shall make written findings regarding . . . (3) the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order; [and] (4) the feelings and emotional ties of the child with respect to the child's parents, any guardian of such child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties . . . ."

"[T]he balancing of interests in a case involving termination of parental rights is a delicate task and, when supporting evidence is not lacking, the trial court's ultimate determination as to a child's best interest is entitled to the utmost deference. . . . Although a judge [charged with determining whether termination of parental rights is in a child's best interest] is guided by legal principles, the ultimate decision [whether termination is justified] is intensely human. It is the judge in the courtroom who looks the witnesses in the eye, interprets their body language, listens to the inflections in their voices and otherwise assesses the subtleties that are not conveyed in the cold transcript. . . . [A]lthough a trial court shall consider and make written findings regarding the factors enumerated in § 17a-112 (k), a trial court's determination of the best interests of a child will not be overturned on the basis of one factor if that determination is otherwise factually supported and legally sound." (Citation omitted; internal quotation marks omitted.) *In re Nevaeh W.*, supra, 317 Conn. 740.

1

In the present case, the court listed each of the seven factors set forth in § 17a-112 (k) and included its written findings under each. Specifically, on the factor set forth in § 17a-112 (k) (3), which directs the trial court to consider "the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order," the court stated: "The court finds that [the department] made reasonable efforts to reunite the child with [the respondent mother and/or the respondent father] as extensively discussed in the adjudication portion of the memorandum of decision but neither parent was either willing to nor capable of accomplishing the necessary

results of those offers of help, assistance, care, guidance and instruction."

The respondent father argues that the court improperly failed to "indicate whether [he had] fulfilled . . . his obligation under the terms of the court-ordered specific steps. In fact, the court does not . . . indicate at any time in its memorandum of decision that [the respondent father] has substantially complied with the steps that were ordered by the court." We are not persuaded.

The court ordered the respondent father to adhere to the following specific steps: (1) keep all appointments set by or with the department, and cooperate with home visits, (2) take part in counseling and make progress toward the identified treatment goals, (3) submit to a substance abuse evaluation and follow the recommendations about treatment, (4) submit to random drug testing, (5) do not use illegal drugs or abuse alcohol, (6) cooperate with service providers recommended for parenting/individual/family counseling, (7) participate in a substance abuse evaluation and urine screen, (8) follow any and all recommendations, (9) cooperate with court-ordered evaluations or testing, (10) sign necessary releases, (11) get or maintain adequate housing, (12) notify the department about changes in living conditions, (13) cooperate with restraining and/or protective orders to avoid more domestic violence incidents, (14) attend and complete an appropriate domestic violence program, (15) do not get involved further with the criminal justice system and cooperate with probation or parole officers, (16) visit your child as often as the department permits, (17) provide information to the department about possible placement resources for your child, if any, and (18) provide to the department information about the child's grandparents.

In its memorandum of decision, the court specifically found that the respondent father failed to engage in services, that it took ten attempts by the petitioner to engage him in substance abuse evaluations and screenings, that he minimized the significance of the many protective and restraining orders issued against him, that he repeatedly lied to his therapists and that he lied to the court while under oath, that he missed nine of his scheduled appointments with Randall, that nothing had changed despite his participation in services, and that he had failed to achieve any benefit whatsoever from those services. Reading the court's decision as a whole; see *In re Nevaeh W.*, supra, 317 Conn. 733; we conclude that the court clearly found that the respondent father had not fulfilled his obligation under the terms of the court-ordered specific steps.

2

Section 17a-112 (k) (4) "directs the trial court to consider the [child's] emotional ties with a long list of people in determining whether the termination of the respondent's parental rights is in [his] best interest." Id., 731; see footnote 6 of this opinion. In the present case, the court specifically found: "Xavier has developed significant emotional ties to his current caregivers. He is truly part of the family which has been his family for all of his life less approximately ten months." The respondent father argues that the court's finding "does not even attempt to consider the require[d] statutory language . . . ." We are not persuaded.

As explained in *In re Nevaeh W.*, "[n]othing in [§ 17a-112 (k) (4)] . . . require[s] the trial court to consider only the [child's] emotional ties with the respondent [father]. To the contrary . . . it [is] appropriate for the trial court to consider the [child's] emotional ties to the preadoptive foster family in considering whether termination of the [respondent father's] parental rights

[is] in the [child's] best interest. . . . Furthermore, in considering the trial court's findings pursuant to § 17a-112 (k) (4), we are mindful that an opinion must be read as a whole, without particular portions read in isolation, to discern the parameters of its holding." (Citations omitted; internal quotation marks omitted.) *In re Nevaeh W.*, supra, 317 Conn. 731–33.

Reading the trial court's memorandum of decision as a whole; see id., 733; we conclude that, although the court did not explicitly address Xavier's emotional ties to the respondent father, it did discuss their relationship, as well as Xavier's bond with his foster family. Specifically, the court found that "Xavier has been out of his parents' care for over thirty-four months. He is only three years ten months old. Dr. Randall stated in testimony in this case her recommendation that Xavier be placed permanently with someone other than [the respondent] mother and/or [the respondent] father. He has been placed in a legal risk foster home where he is making excellent strides and has developed an attachment to his caregivers, a couple who also have a three year old son who has formed a bond with Xavier as Xavier has with him and with his parents. He is healthy and all of his medical, dental, psychological and educational needs are being met. This couple wishes to adopt Xavier. This clearly is in Xavier's best interest."

The court found that "[the respondent] father grabbed [the respondent] mother's arm with such strength that it left marks on her arm noticeable to the police when they arrived and [the respondent] mother was holding Xavier in her arms when this event happened." It also found that the respondent father's therapist believed that the respondent father was unable to place the needs of Xavier before his own anger and his need to have things done his way. The court also found that the respondent father "is in need of therapy to work toward accepting personal responsibility, anger

control, relationship issues, and a better understanding of his son's needs including the impact on his son of being exposed to conflict, violence, and/or substance abuse." We find our Supreme Court's decision in *In re Nevaeh W.* to be instructive. In that case, the trial court's entire finding regarding the "emotional ties" requirement of § 17a-112 (k) (4) was: "Both children have been placed together with a preadoptive resource who has expressed a willingness to adopt both girls. They are comfortable, secure and safe." (Internal quotation marks omitted.) *In re Nevaeh W.*, supra, 317 Conn. 731. This court reversed the judgment of the trial court because the trial court's finding pursuant to § 17a-112 (k) (4) was " 'utterly unresponsive to the mandatory statutory requirement . . . .' " Id. Our Supreme Court reversed the decision of this court, opining that a discussion of the respondent's relationship with the children, found earlier in the trial court's memorandum of decision, was sufficient to meet the "emotional ties" requirement of § 17a-112 (k) (4). Id., 733. Specifically, the court stated: "Reading the trial court's memorandum of decision in the present case as a whole, we conclude that the trial court did consider the factor set forth in § 17a-112 (k) (4), including the children's emotional ties to the respondent. Specifically, the trial court explained at the beginning of the memorandum that 'Nevaeh . . . has been in [the petitioner's] care on three separate occasions. On September 4, 2008, Nevaeh . . . was placed [on a ninety-six hour hold because the respondent] was homeless and had no way to care for the child. She was committed to [the petitioner] in October, 2008 and reunified to the [respondent's] care in January, 2009. In April, 2009, the child was placed in another [ninety-six] hour hold and again committed to [the petitioner] after [the respondent] was discharged from a drug treatment program for noncompliance. The child was reunified with [the respondent] in December, 2010.

On July 2, 2012, Nevaeh was removed from [the respondent] for a third time.' The trial court continued: '[Janiyah] resided with [the respondent] until [Janiyah was] removed with Nevaeh . . . on July 2, 2012. On November 30, 2012, both children were placed in a preadoptive foster home. Nevaeh . . . has previously been placed with this family for [more than one] year.' These findings by the trial court demonstrate that the trial court did consider the children's relationship with the respondent." Id., 733–34.

After concluding that the trial court had satisfied § 17a-112 (k) (4) through the findings in its memorandum of decision, our Supreme Court, in an effort to clarify any perceived ambiguity in the trial court's reasoning, then went on to review the trial court's articulations, in which it more directly addressed the emotional ties of the respondent and the children. Id., 734–38. The Supreme Court, though, in no way suggested that any ambiguity in the trial court's judgment would require reversal in the absence of an articulation. To the contrary, the Supreme Court relied on the well settled law that "we read an ambiguous trial court record so as to support, rather than contradict, its judgment." (Internal quotation marks omitted.) Id., 733.

Finally, the court in *In re Nevaeh W.* addressed the petitioner's claim that the trial court was not required to make explicit findings as to each aspect of the seven factors enumerated in § 17a-112 (k). In doing so, the court reaffirmed its holding in *In re Eden F.*, 250 Conn. 674, 741 A.2d 873 (1999), that the factors in § 17a-112 (k) serve as a guide to the trial court when making its decision whether to grant a petition to terminate parental rights: "As we explained in *In re Eden F.*, 'the fact that the legislature [had interpolated] objective guidelines into the open-ended fact-oriented statutes which govern [parental termination] disputes . . . should not be construed as a predetermined weighing

of evidence . . . by the legislature. Where . . . the record reveals that the trial court's ultimate conclusions [regarding termination of parental rights] are supported by clear and convincing evidence, we will not reach an opposite conclusion on the basis of any one segment of the many factors considered in a termination proceeding . . . .' " *In re Nevaeh W.*, supra, 317 Conn. 739–40. The court further stated that, "although a trial court shall consider and make written findings regarding the factors enumerated in § 17a-112 (k), a trial court's determination of the best interests of a child will not be overturned on the basis of one factor if that determination is otherwise factually supported and legally sound." Id., 740.

In the present case, as did the trial court in *In re Nevaeh W.*, the court specifically addressed the respondent father's relationship with Xavier although it did not address explicitly the "emotional ties" between the two. See id., 733. Although we do not have an articulation to further clarify any perceived ambiguity, we conclude that any lack of clarity on this specific factor was harmless because the record reveals that, even if Xavier had strong emotional ties to the respondent father, the court's determination that termination of the respondent father's parental rights was in Xavier's best interest is factually supported and legally sound.

II

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On appeal,[7] the respondent mother claims that the trial court (1) failed to employ the proper standard in assessing whether, pursuant to § 17a-112 (j) (3), she failed to rehabilitate to such a degree as to reasonably

[7] The initial facts and relevant procedural history, as well as our standard of review and general governing principles regarding a challenge to the trial court's decision on a termination of parental rights petition, were set forth previously in this opinion.

encourage a belief that she could assume a responsible position in Xavier's life, (2) erred in finding that she had failed to rehabilitate, and (3) failed to make complete written findings concerning the statutory factors set forth in § 17a-112 (k) when considering whether termination was in Xavier's best interest.

After setting forth the trial court's relevant factual findings related to the respondent mother, we will consider each of her claims in turn. Xavier was born in early 2016, and, in August, 2016, the Norwich Police contacted the department because the respondent father had grabbed the respondent mother's arm, while she was holding Xavier, with such strength that it left marks on her arm noticeable to the police. The department, thereafter, referred her to various appropriate services in an attempt to engage her in rehabilitative and guidance services that she needed so that she could be reunited with Xavier. The respondent mother engaged in services and obtained medication, which she admitted to abusing. She also admitted to abusing another medication that was not prescribed to her. She continued to test positive for unprescribed medications in 2017. The respondent mother was criminally charged with risk of injury to a child and operation of a motor vehicle while under the influence of alcohol and/or drugs.[8]

On February 14, 2017, the respondent mother completed a substance abuse evaluation at Care Plus, where she was recommended for intensive outpatient care for

[8] The record reveals that in January, 2017, the respondent mother was living with Xavier at the Covenant Shelter (shelter). A worker at the shelter notified the department that the respondent mother was intoxicated while caring for Xavier. The respondent father also telephoned the department to say that he had been with the respondent mother and that she may have been intoxicated when she returned to the shelter. The respondent mother was arrested for risk of injury to a child, and the department removed Xavier from her care. Then, on June 7, 2017, the respondent mother was arrested for driving while under the influence. Both of those charges were pending at the time of the termination proceedings.

opioid dependence. She discharged herself from the program, however, after having a conflict with the providing physician. The respondent mother consistently has shown resistance to participating in any domestic violence counseling program. The counselors to whom she went for treatment could not ascertain whether she understood the cycle of domestic violence. The court found that the respondent mother wants nothing to do with domestic violence counseling, although domestic violence has been an ongoing issue for her. Such violence played a large part in the removal of her other child, which led to the termination of her parental rights as to that child in 2008. The court concluded that the respondent mother clearly is unwilling to engage in such counseling even though that was an issue leading to the prior termination and is again an issue in this case. The department, nevertheless, continued to offer her necessary services, despite her unwillingness.

The respondent mother was diagnosed by Randall with post-traumatic stress disorder, generalized anxiety disorder and alcohol use disorder in remission. She noted that the respondent mother was in need of continued therapy to work on her mood and anxiety, decision making, conflict resolution skills, emotional controls, and to get a better understanding of Xavier's needs. The respondent mother had shared with Randall that the respondent father had been physically abusive to her beginning just six months into their relationship, which had lasted more than ten years at the time of trial.

The court credited Randall's opinion that the respondent mother's interactions were indicative of a continued inability to place Xavier's needs first. The court quoted Randall as opining that the respondent mother "was angry and argumentative with the foster mother, in the presence of Xavier, and she repeatedly undermined Xavier's relationship with his foster mother. She demonstrated no understanding of Xavier's need to

view his foster parents in a parental role, and she did not acknowledge that her own clear anger and disagreement with the foster mother could cause emotional disruption for her son." (Internal quotation marks omitted.)

Additionally, the court found that during the time of the respondent mother's relationship with the respondent father, nine restraining or protective orders had been issued to protect her. The court also found that despite all the violence, the respondent mother and the respondent father continued to maintain a relationship, as demonstrated by the respondent father's overnight visits to the respondent mother's home, which lasted until the morning, but that neither would admit to it. The court also found that the respondent mother lied to the department about her relationship with the respondent father. One of the respondent mother's service providers, Child and Family Services, recommended that she engage in individual therapy with a provider who specialized in domestic violence intervention as part of her treatment, but she refused to consider it. The court found that "she has not gained an understanding of the deleterious effects of domestic violence nor the lack of ability to care for the needs of Xavier as those needs relate to the issues surrounding domestic violence and she has no intention to address the issues at any time."

The court then concluded the adjudicatory section of its memorandum of decision by finding "by clear and convincing evidence that the [department had] provided reasonable efforts for and on behalf of each parent to reunite them or either of them with their child, but [that the respondent] mother was either unwilling or unable to derive from those efforts the benefits necessary to be able to do so . . . . Neither [the respondent] mother nor [the respondent] father achieved any level of rehabilitation which might encourage the belief that within

a reasonable time each or either of them might reach a point where reunification with Xavier was in Xavier's best interest." In the dispositional portion of its decision, the court examined the seven factors set forth in § 17a-112 (k), and concluded that it was in Xavier's best interest for the respondent mother's parental rights to be terminated. Additional facts relevant to the respondent mother's appeal will be set forth as necessary to address her claims.

A

The respondent mother claims that the trial court failed to employ the proper standard in assessing whether, pursuant to § 17a-112 (j) (3), she failed to rehabilitate to such a degree as to reasonably encourage a belief that she could assume a responsible position in Xavier's life. We are not persuaded.

As we explained in part I B of this opinion, the consideration of whether the court applied an incorrect legal test presents a question of law, which requires our plenary review. See *In re Jacob W.*, supra, 330 Conn. 754. "[A]n opinion must be read as a whole, without particular portions read in isolation, to discern the parameters of its holding. . . . Furthermore, [w]e read an ambiguous trial court record so as to support, rather than contradict, its judgment." (Citation omitted; internal quotation marks omitted.) *In re Jason R.*, supra, 306 Conn. 453.

The trial court found "by clear and convincing evidence that the [department] provided reasonable efforts for and on behalf of each parent to reunite them or either of them with their child, but [the respondent] mother was either unwilling or unable to derive from those efforts the benefits necessary to be able to do so . . . . Neither [the respondent] mother nor [the respondent] father achieved any level of rehabilitation which might encourage the belief that within a reasonable

time each or either of them might reach a point where reunification with Xavier was in Xavier's best interest."

The respondent mother argues that the court used an "improper standard for rehabilitation." She contends that the court's finding employed a higher, more stringent standard for the respondent mother to meet than is mandated under § 17a-112 (j) (3) (B) (i). She contends that the court failed to find that she had not rehabilitated to such a degree as would encourage a belief that she could assume a responsible position in Xavier's life in the future. As with the respondent father's appeal setting forth essentially the same claim, we conclude that the court, although using less than precise language in its concluding sentence of the adjudicatory section of its decision, employed the proper standard under § 17a-112 (j) (3) (B) (i). See *In re James O.*, supra, 322 Conn. 655; *In re Shane M.*, supra, 318 Conn. 585–86; see also part I B of this opinion.

The court began its decision by properly explaining: "This matter comes to the court by way of a petition dated June 7, 2018, filed by the [petitioner] . . . seeking the termination of the parental rights of [the respondent mother and the respondent father] . . . . The petition alleges that the child had been adjudicated in a prior proceeding to have been neglected and that mother and father each individually have failed to achieve the degree of personal rehabilitation that would encourage the belief that within a reasonable time, considering the age and needs of the child, *each or either could assume a responsible position in the life of the child*." (Emphasis added.) The court then proceeded to set forth factual findings and to provide its analysis for granting the petition.

The court found that the respondent mother engaged in services and obtained medication, which she then admitted to abusing, in addition to another medication

that she was not prescribed, and she continued to test positive for unprescribed medications in 2017. The court found that the respondent mother completed a substance abuse evaluation at Care Plus, where she was recommended for intensive outpatient care for opioid dependence, and, although she attended the intensive program, she discharged herself after having a conflict with the providing physician. The court additionally found that the respondent mother consistently has shown resistance to participating in any domestic violence counseling program and that she wants nothing to do with domestic violence counseling, although such violence has been an issue for her since at least 2006. The court found that Randall had opined that the respondent mother's interactions were indicative of a continued inability to place Xavier's needs first. The court quoted Randall as opining that the respondent mother " 'was angry and argumentative with the foster mother, in the presence of Xavier, and she repeatedly undermined Xavier's relationship with his foster mother. She demonstrated no understanding of Xavier's need to view his foster parents in a parental role, and she did not acknowledge that her own clear anger and disagreement with the foster mother could cause emotional disruption for her son.' " The court further found that, despite all the violence, the respondent mother continued to maintain a relationship with the respondent father and that she had lied about it. The court found that "she has not gained an understanding of the deleterious effects of domestic violence nor the lack of ability to care for the needs of Xavier as those needs relate to the issues surrounding domestic violence and she has no intention to address the issues at any time."

Although the court did not follow the language of the statute in the concluding sentence of the adjudicatory section of its memorandum of it decision, on the basis of our review of the court's full decision, it is apparent

that the court found that the petitioner had proven, by clear and convincing evidence, the allegations of its petition, namely, that Xavier had been adjudicated in a prior proceeding to have been neglected and that the respondent mother and the respondent father "each individually have failed to achieve the degree of personal rehabilitation that would encourage the belief that within a reasonable time, considering the age and needs of the child, each or either could assume a responsible position in the life of the child." See *In re James O.*, supra, 322 Conn. 653–55 (considering challenged portion of trial court's "memorandum of decision within the context of the trial court's overall analysis"). As with the respondent father, the court's findings as to the respondent mother were that the respondent mother had essentially ignored the domestic violence issue that was the basis of the court's conclusion that she failed to rehabilitate and that she has no intention to address the issue. We conclude that the court's decision in this case, when read as a whole, sets forth sufficient factual and legal findings to meet the statutory standard for the adjudicatory requirements of § 17a-112 (j) (3) (B) (i). See id., 655; *In re Shane M.*, supra, 318 Conn. 585–86.

B

The respondent mother next claims that the trial court erred in finding that she had failed to rehabilitate. She contends that the court's error, at least in part, was due to its clearly erroneous subordinate factual finding that she had refused or was unwilling to address the issue of domestic violence. We are not persuaded.

"We review the trial court's subordinate factual findings for clear error, and review its finding that the respondent [mother] failed to rehabilitate for evidentiary sufficiency. . . . In reviewing that ultimate finding for evidentiary sufficiency, we inquire whether the trial court could have reasonably concluded, upon the

facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . We emphasize that [i]t is not the function of this court to sit as the [fact finder] when we review the sufficiency of the evidence . . . rather, we must determine, in the light most favorable to sustaining the [judgment], whether the totality of the evidence, including reasonable inferences therefrom, supports the [judgment of the trial court] . . . . In making this determination, [t]he evidence must be given the most favorable construction in support of the [judgment] of which it is reasonably capable. . . . In other words, [i]f the [trial court] could reasonably have reached its conclusion, the [judgment] must stand, even if this court disagrees with it." (Citations omitted; internal quotation marks omitted.) *In re Jayce O.*, supra, 323 Conn. 715–16.

1

We first consider the respondent mother's claim that the court's subordinate factual finding, that she had refused or was unwilling to address the issue of domestic violence, was clearly erroneous. She argues that she had attended domestic violence programs, including the Survivor Project and Safe Futures, and that the department had acknowledged that she successfully had completed the domestic violence work that had been recommended by the department. The petitioner argues that the evidence clearly demonstrates that the respondent mother "failed to rectify the most significant deficiency present in her life both before and after Xavier's birth, specifically, her domestic violence history with [the respondent] father . . . and her inability to resolve their toxic and conflictual relationship, which impaired her ability to care for Xavier." We agree with the petitioner.

The record reveals that Randall testified that the respondent mother "had a history of relationships with

domestic violence in them, including the relationship with [the respondent] father." She testified that the respondent mother told her that she and the respondent father were no longer together and that she, therefore, "did not see a need . . . to participate in domestic violence treatment . . . [but that] she was willing to do so because it was required by [the department]." Randall further testified that, in her professional opinion, the continued relationship between the respondent mother and the respondent father "puts Xavier at risk for being exposed to continued conflict and violence in the home."

Carolyn Ryan, a social worker with the department, testified that, "given the evidence . . . that [the respondent mother and the respondent father] are in a relationship [that] means that they haven't addressed the core issue in their relationship, which was . . . intimate partner violence." She also agreed that, although the respondents had attended therapy, it did not mean that they actually had derived any benefit from the services rendered, in part, because they were not honest with respect to their relationship. Ryan explained: "There was a—the bigger issue is dealing with the domestic violence and being fully forthcoming and honest with your providers, and that's something that neither [of the respondents] have done throughout the time that they've been involved with the department. So in terms of—our assessment is that . . . [the respondent mother] has not made the progress needed based on the fact that during this time, while she made progress, she went to services, but she wasn't honest with the people that are working with her, her therapeutic providers. That included her individual therapist. That included the clinician that [was] doing coparenting."

Ryan also explained: "The main concern [of the department] is the [respondents'] complete lack of honesty throughout this entire case, and that is because of their extremely long history, documented history of intimate

partner violence [to] which their child, Xavier, was exposed . . . . And that while they—presumably in services . . . did make some progress . . . there wasn't—the progress wasn't made. They didn't work on the very issue that is the issue, [namely] . . . the intimate partner violence . . . . [T]hey're not working on the issue that is of the main—of the most concern, [namely] . . . the violence and the [presumption that if] the child's placed back in their care that Xavier could be exposed to once again."

Lorraine Thomas, a social work supervisor with the department, testified that "the department believes that the [respondent] parents remain engaged in a relationship and that there has been significant domestic violence in that relationship. The department believes that [the respondent mother] is a victim of domestic violence and that [she] does not clearly understand the risk of being a victim, and so she would do [what] the abuser is telling her to do, which is lie to the department so that their child can be reunified and then put in a—possibly put in a situation that's going to retraumatize this child." Thomas also testified: "The issue is, is that we removed the child because of domestic violence, because of substance abuse, and the domestic violence piece, even though [the respondents have] engaged in services, they weren't truthful to the providers in order to work on the appropriate services for them. They have not been truthful to the department . . . . But as a supervisor of the case with a young child under the age of five, significantly concerned that we would do nothing. The parents have not engaged in appropriate services because they have not been truthful, so the providers could not treat them accordingly in order to reunify their child with them." She agreed that "there is every indication from the department's perspective that the pattern of domestic violence, the pattern of

volatile interaction and engagement and then disengagement, is continuing . . . .''

On the basis of the clear, foregoing testimony, we conclude that the court's finding that the respondent mother refused or was unwilling to address the issue of domestic violence was not clearly erroneous.

2

We next address the respondent mother's claim that the evidence at trial was not sufficient to support the trial court's conclusion that the petitioner met its burden of proof, by clear and convincing evidence, that the respondent mother failed to achieve rehabilitation. She argues that ''[t]he trial court's findings that [the respondent] mother was unwilling to benefit from the department's efforts and that she refused to address the issue of domestic violence are belied by [her] participation in the numerous programs to which she was referred, including parenting services and domestic violence treatment, by her progress in achieving sobriety and stability, and by her positive relationship with Xavier.'' We disagree.

The trial court found that the respondent mother consistently has shown resistance to participating in any domestic violence counseling program, and that she wants nothing to do with domestic violence counseling, although domestic violence has been an issue for her over the course of many years. The court also relied on Randall's assessments that the respondent mother's interactions were indicative of a continued inability to place Xavier's needs first, and that the respondent mother '' 'was angry and argumentative with the foster mother, in the presence of Xavier, and she repeatedly undermined Xavier's relationship with his foster mother. She demonstrated no understanding of Xavier's need to view his foster parents in a parental role, and she did not acknowledge that her own clear

anger and disagreement with the foster mother could cause emotional disruption for her son.' " The court found that, despite all the violence, the respondent mother continued to maintain a relationship with the respondent father and that she continued to lie about it. The court also made the explicit finding that the respondent mother had not "gained an understanding of the deleterious effects of domestic violence nor the lack of ability to care for the needs of Xavier as those needs relate to the issues surrounding domestic violence and she has no intention to address the issues at any time." Additionally, the court made findings about the respondent mother's abuse of medications, finding that she continued to test positive for unprescribed medications in 2017, and that she self-discharged from an intensive outpatient care program because she was having a conflict with the providing physician. Although the court certainly noted some positive things about the respondent mother, those do not minimize the findings that led the court to conclude that she had failed to rehabilitate. Our law is quite clear; on appeal, we can neither weigh the evidence nor substitute our judgment for that of the trial court. See *In re Shane M.*, supra, 318 Conn. 593 and n.20; see also *In re Jayce O.*, supra, 323 Conn. 716.

After reviewing the evidentiary sufficiency of the court's ultimate finding that the respondent mother failed to rehabilitate, we conclude, on the basis of the subordinate facts found and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence is sufficient to support the court's ultimate conclusion.

C

The respondent mother's final claim is that the trial court erred in concluding that termination of her parental rights was in Xavier's best interest because the court

failed to make complete written findings concerning the statutory factors set forth in § 17a-112 (k). She argues that the court failed to make sufficient findings under three of the statutory factors, namely, "the extent to which [the respondent] mother fulfilled her obligations under the specific steps, the child's emotional ties with [her], and [her] efforts to adjust her circumstances."[9] We conclude that the court's findings complied with § 17-112 (k).

To the extent that the respondent mother's claim requires us to interpret the requirements of § 17a-112 (k), our review is plenary. See *In re Nevaeh W.*, supra, 317 Conn. 729. Additionally, as we explained in part I C of this opinion: "[T]he balancing of interests in a case involving termination of parental rights is a delicate task and, when supporting evidence is not lacking, the trial court's ultimate determination as to a child's best interest is entitled to the utmost deference. . . . Although a judge [charged with determining whether termination of parental rights is in a child's best interest] is guided by legal principles, the ultimate decision [whether termination is justified] is intensely human. It is the judge in the courtroom who looks the witnesses in the eye, interprets their body language, listens to the inflections in their voices and otherwise assesses the subtleties that are not conveyed in the cold transcript. . . . [A]lthough a trial court shall consider and make written findings regarding the factors enumerated in § 17a-112 (k), a trial court's determination of the best interests of a child will not be overturned on the basis of one factor if that determination is otherwise factually supported and legally sound." (Citation omitted; internal quotation marks omitted.) Id., 740.

[9] The respondent mother concedes in her brief that "[t]he seven factors serve simply as guidelines for the court and are not statutory prerequisites. There is no requirement that each factor be proven by clear and convincing evidence."

1

The respondent mother first argues that the court failed to make sufficient findings under § 17-112 (k) (3), which requires the court to address "the extent to which [the respondent] mother fulfilled her obligations under the specific steps . . . ."

In the present case, in its memorandum of decision, the court listed each of the seven factors set forth in § 17a-112 (k) and included its written findings under each. Specifically, on the factor set forth in § 17a-112 (k) (3), which directs the trial court to consider "the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order," the court stated: "The court finds that [the department] made reasonable efforts to reunite the child with [the respondent mother and/or the respondent father] as extensively discussed in the adjudication portion of this memorandum of decision but neither parent was either willing to nor capable of accomplishing the necessary results of those offers of help, assistance, care, guidance and instruction."

The respondent mother now argues that the court "failed to consider whether all parties had fulfilled their obligations, as it did not make any written finding regarding whether, and to what extent, [the respondent] mother had actually fulfilled her obligations under the relevant court orders, i.e., the specific steps." We disagree.

The court ordered the following specific steps for the respondent mother: (1) keep all appointments set by or with the department, and cooperate with home visits, (2) take part in counseling and make progress toward the identified treatment goals, (3) submit to a substance abuse evaluation and follow the recommendations about treatment, (4) submit to random drug testing, (5) do not

use illegal drugs or abuse alcohol or medication, (6) cooperate with service providers recommended for counseling, in-home support services and substance abuse assessment and treatment, following any and all recommendations and participate in a substance abuse evaluation and urine screen, (8) cooperate with court-ordered evaluations or testing, (9) sign necessary releases, (10) get or maintain adequate housing, (11) notify the department about changes in living conditions, (12) obtain and/or cooperate with restraining and/or protective orders to avoid more domestic violence incidents, (13) attend and complete an appropriate domestic violence program, (14) do not get involved further with the criminal justice system and cooperate with probation or parole officers, (15) visit your child as often as the department permits, (16) provide information to the department about possible placement resources for your child, if any, and (17) provide to the department information about the child's grandparents.

In its memorandum of decision, the court specifically found that the respondent mother had engaged in services and obtained medication, which she then admitted to abusing, in addition to another medication that she had not been prescribed, and she continued to test positive for unprescribed medications in 2017. The court found that the respondent mother discharged herself from an extensive outpatient treatment program that had been recommended, that she has demonstrated a resistance to participating in domestic violence counseling programs, and that she wants nothing to do with domestic violence counseling, although she has been in violent relationships, including during her ten year relationship with the respondent father. In its memorandum of decision, the court also relied on Randall's opinion that the respondent mother's continued interactions with the respondent father were indicative of an ongoing inability to place Xavier's needs first, and that the

respondent mother " 'was angry and argumentative with the foster mother, in the presence of Xavier, and she repeatedly undermined Xavier's relationship with his foster mother. She demonstrated no understanding of Xavier's need to view his foster parents in a parental role, and she did not acknowledge that her own clear anger and disagreement with the foster mother could cause emotional disruption for her son.' " The court further found that, despite all the violence, the respondent mother continued to maintain a relationship with the respondent father and that she lied about it. The court also specifically found that "she has not gained an understanding of the deleterious effects of domestic violence nor the lack of ability to care for the needs of Xavier as those needs relate to the issues surrounding domestic violence and she has no intention to address the issues at any time." Reading the court's decision as a whole, as we must; see *In re Nevaeh W.*, supra, 317 Conn. 733; we conclude that the court did consider and make findings as to the respondent mother's efforts to fulfill her obligation under the terms of the court-ordered specific steps.

2

The respondent mother next argues that the court failed to make sufficient findings concerning Xavier's emotional ties with her. We conclude that the court sufficiently addressed § 17a-112 (k) (4), but, even if the court's decision could be considered ambiguous as to this finding, its ultimate conclusion is sufficiently supported by the evidence and is legally sound.

Section 17a-112 (k) (4) "directs the trial court to consider the [child's] emotional ties with a long list of people in determining whether the termination of the respondent's parental rights is in [his] best interest." *In re Nevaeh W.*, supra, 317 Conn. 731; see footnote 6 of this opinion. Here, the court specifically found:

"Xavier has developed significant emotional ties to his current caregivers. He is truly part of the family which has been his family for all of his life less approximately ten months."[10]

In *In re Nevaeh W.*, our Supreme Court stated that "[n]othing in [§ 17a-112 (k) (4)] . . . required the trial court to consider only the [child's] emotional ties with the respondent [mother]. To the contrary . . . it was appropriate for the trial court to consider the [child's] emotional ties to the preadoptive foster family in considering whether termination of the [respondent mother's] parental rights was in the [child's] best interest." *In re Nevaeh W.*, supra, 317 Conn. 731. "Furthermore, in considering the trial court's findings pursuant to § 17a-112 (k) (4), we are mindful that an opinion must be read as a whole, without particular portions read in isolation, to discern the parameters of its holding." (Internal quotation marks omitted.) Id., 733.

Reading the trial court's memorandum of decision as a whole, as we must; see id.; we conclude that the court's findings were sufficient to comply with § 17a-112 (k) (4). The court found that "Xavier has been out of his parents' care for over thirty-four months. He is only three years ten months old. Dr. Randall stated in testimony in this case her recommendation that Xavier be placed permanently with someone other than [the respondent] mother and/or [the respondent] father. He has been placed in a legal risk foster home where he is making excellent strides and has developed an attachment to his caregivers, a couple who also have a three year old son who has formed a bond with Xavier as Xavier has with him and with his parents. He is healthy and all of his medical, dental, psychological and educational needs are being met. This couple wishes to adopt

[10] The respondent mother states that Xavier was not placed with this foster family until December, 2017. We conclude that this misstatement is not relevant to the court's decision.

Xavier. This clearly is in Xavier's best interest." The court also found that the respondent mother was unable to put Xavier's needs first, and that "she has not gained an understanding of the deleterious effects of domestic violence nor the lack of [her] ability to care for the needs of Xavier as those needs relate to the issues surrounding domestic violence." Guided by our Supreme Court's decision in *In re Nevaeh W.*, supra, 317 Conn. 733–34, we conclude that these subordinate factual findings by the trial court, although not explicitly addressing Xavier's emotional ties to the respondent mother, demonstrate that the court considered the respondent mother's relationship with Xavier and the possible dangers presented by it, as well as his relationship and bond and emotional ties to his foster family. See our further discussion of *In re Nevaeh W.* in part I C 2 of this opinion. Furthermore, to the extent that the court's findings under § 17a-112 (k) (4) could be considered ambiguous as to Xavier's emotional ties with the respondent mother, we conclude that the court's overall decision supports its ultimate conclusion that termination of the respondent mother's parental rights was in Xavier's best interest. See *In re Nevaeh W.*, supra, 740 ("although a trial court shall consider and make written findings regarding the factors enumerated in § 17a-112 (k), a trial court's determination of the best interests of a child will not be overturned on the basis of one factor if that determination is otherwise factually supported and legally sound"); see also *In re Eden F.*, supra, 250 Conn. 691.

3

The respondent mother also argues that the court failed to make sufficient findings about her efforts to adjust her circumstances, as required under § 17a-112 (k) (6).[11] She argues that the court "did not make any

[11] General Statutes § 17a-112 (k) (6) provides: "Except in the case where termination of parental rights is based on consent, in determining whether to terminate parental rights under this section, the court shall consider and

findings at all with respect to [her] *efforts* in its response to this factor. Rather, the court [spoke only] to [her] making 'minimal progress' . . . and that it would be inappropriate to consider reunification since [she] has not made any meaningful changes to her life . . . ." (Emphasis in original.) We conclude that the court's findings sufficiently address this factor.

In its decision, the court specifically found that the respondent mother "*resisted* participating in any domestic violence counseling program . . . [and] that she clearly is *unwilling to engage* in such counseling . . . ." (Emphasis added.) The court also found that "she repeatedly undermined Xavier's relationship with his foster mother." (Internal quotation marks omitted.) Additionally, the court found that, "[d]uring the time of their relationship, nine restraining or protective orders ha[d] been issued by various judicial authorities trying to protect [her] from [the respondent] father . . . [and] [i]t was [she] who repeatedly sought the courts to modify those orders on behalf of [the respondent] father. Although both [respondents] now maintain that the relationship is over and they no longer see each other, that seems not to be the truth and raises a question as to the honesty of each [respondent] on a critical issue of the case—domestic violence. . . . Recognizing that domestic violence was a prominent factor causing this case to arise and recognizing that [the respondent] mother *has refused* to address in any way this serious issue which was present at the beginning of this case causes the court to have *grave concern about the sincerity of* [*the respondent*] *mother's intentions* as she

shall make written findings regarding . . . the efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest of the child to return such child home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions, and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child . . . ."

goes through the motions to address the various issues noted by [the department]." (Emphasis added.) Furthermore, the court found that "it would be inappropriate to consider reunification . . . since [the respondent] mother *has not made any meaningful changes* to her life . . . ." (Emphasis added.) We conclude that all of these facts address the respondent mother's efforts or the lack thereof. Reviewing the court's findings as a whole; see *In re Nevaeh W.*, supra, 317 Conn. 733; we conclude that the court's factual findings were more than sufficient to address § 17a-112 (k) (6).

On the basis of the foregoing analysis, we conclude that the court's ultimate conclusion that it was in Xavier's best interest to terminate the respondent mother's parental rights is factually supported and legally sound.

The judgment is affirmed.

In this opinion the other judges concurred.

NORTHWEST HILLS CHRYSLER JEEP, LLC, ET AL. *v.* DEPARTMENT OF MOTOR VEHICLES ET AL. (AC 42899)

Lavine, Alvord and Cradle, Js.

Syllabus

The plaintiffs, four automobile dealerships, sought to preclude the defendant franchisor from establishing a certain new automobile dealership in the relevant market area of each plaintiff. The defendant Department of Motor Vehicles, after a hearing, found that good cause existed, pursuant to statute (§ 42-133dd (c)), to establish the proposed dealership. The plaintiffs appealed to the trial court, claiming, inter alia, that the department's decision was inconsistent and not supported by substantial evidence. The trial court dismissed the plaintiffs' appeal. On the plaintiffs' appeal to this court, *held* that the trial court properly dismissed the appeal and rendered judgment for the defendants; because the claims raised by the plaintiffs in this court essentially reiterated the claims they raised in the trial court, this court adopted the trial court's thorough and well reasoned memorandum of decision as a proper statement of the facts and applicable law on the issues.

Argued September 8—officially released October 27, 2020

Procedural History

Appeal from the decision of the named defendant finding that good cause existed to allow the defendant FCA US, LLC, to establish a certain automobile dealership, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Huddleston*, *J.*; judgment dismissing the appeal, from which the plaintiffs appealed to this court. *Affirmed.*

Jason T. Allen, pro hac vice, with whom were *James J. Healy* and, on the brief, *Richard N. Sox*, pro hac vice, for the appellants (plaintiffs).

Eileen Meskill, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellees (named defendant et al.).

George W. Mykulak, pro hac vice, with whom were *Charles D. Ray* and, on the brief, *Shawn S. Smith*, for the appellee (defendant FCA US, LLC).

Opinion

PER CURIAM. In this administrative appeal, the plaintiffs, Northwest Hills Chrysler Jeep, LLC, Gengras Chrysler Dodge Jeep, LLC, Crowley Chrysler Plymouth, Inc., doing business as Crowley Chrysler Jeep Dodge Ram, and Papa's Dodge, Inc., challenge the judgment of the trial court dismissing their appeal. The plaintiffs had appealed from the decision of a hearing officer for the defendants Commissioner of Motor Vehicles and the Department of Motor Vehicles (collectively, department), which found that good cause existed to allow the defendant FCA US, LLC (FCA), to establish a new Jeep dealership at the defendant Mitchell Dodge, Inc. (Mitchell), in Canton. We affirm the judgment of the trial court.

The record reveals that the four plaintiffs operate Chrysler, Dodge, Jeep and Ram dealerships in Connecticut, where they engage in the sale of new motor vehicles

and hold valid franchises from FCA for such activities. Mitchell operates a Chrysler, Dodge and Ram dealership. FCA manufactures, assembles, imports and/or distributes new motor vehicles to each of the plaintiffs and to Mitchell.

In May, 2016, FCA provided notice to the department and to the plaintiffs, pursuant to General Statutes § 42-133dd (a),[1] that it intended to establish a new Jeep dealership at Mitchell, which would be located within the relevant market area[2] of each plaintiff. The plaintiffs timely protested FCA's proposal to establish the new Jeep dealership, and a hearing was held by the department to determine whether good cause existed to establish the proposed dealership pursuant to § 42-133dd (*c*).[3]

[1] General Statutes § 42-133dd (a) provides in relevant part: "In the event that a manufacturer or distributor seeks to enter into a franchise establishing a new dealer or relocating an existing dealer within or into a relevant market area where the same line make is then represented, the manufacturer or distributor shall in writing, by certified mail, first notify the commissioner and each dealer in such line make in the relevant market area of its intention to establish a new dealer or to relocate an existing dealer within or into that market area. . . ."

[2] General Statutes § 42-133r (14) defines " '[r]elevant market area' " as "the area within a radius of fourteen miles around an existing dealer or the area of responsibility defined in a franchise, whichever is greater."

[3] General Statutes § 42-133dd (c) provides: "In determining whether good cause has been established for not entering into a franchise establishing a new dealer or relocating an existing dealer for the same line make, the commissioner shall take into consideration the existing circumstances, including, but not limited to: (1) The permanency and size of investment made and the reasonable obligations incurred by the existing new motor vehicle dealers in the relevant market area; (2) growth or decline in population and new car registrations in the relevant market area; (3) effect on the consuming public in the relevant market area; (4) whether it is injurious or beneficial to the public welfare for a new dealer to be established; (5) whether the dealers of the same line make in that relevant market area are providing adequate competition and convenient customer care for the motor vehicles of the line make in the market area including the adequacy of motor vehicle sales and service facilities, equipment, supply of motor vehicle parts, and qualified service personnel; (6) whether the establishment of a new dealer would increase or decrease competition; (7) the effect on the relocating dealer of a denial of its relocation into the relevant market area; (8) whether the establishment or relocation of the proposed dealership appears

Following an evidentiary hearing and the submission of posthearing briefs, the department issued its decision, dated January 19, 2018, concluding that, "[b]ased upon the evidence presented, and taking into consideration [the] criteria set forth in . . . § 42-133dd, good cause exists for permitting the establishment of a new Jeep dealer . . . in Canton . . . ."

The plaintiffs appealed from the department's decision to the trial court, alleging that the department (1) failed to comply with its statutory mandate to consider the existing circumstances of two of the dealers, (2) made findings that are not supported by substantial evidence with respect to three statutory factors, and (3) made irreconcilable findings with respect to two of the statutory factors. The court rejected the plaintiffs' arguments, concluding that the department's decision "is neither incomplete nor inconsistent and is supported by substantial evidence," and, accordingly, dismissed the plaintiffs' appeal.

The plaintiffs now challenge the trial court's dismissal of their appeal from the department's decision, essentially reiterating the claims that they raised during trial. We carefully have examined the record of the proceedings before the trial court, in addition to the parties'

to be warranted and justified based on economic and marketing conditions pertinent to dealers competing in the community or territory, including anticipated future changes; (9) the reasonably expected market penetration of the line-maker motor vehicle for the community or territory involved, after consideration of all factors which may affect said penetration, including, but not limited to, demographic factors such as age, income, education, size class preference, product popularity, retail lease transactions, or other factors affecting sales to consumers of the community or territory; (10) the economic impact of an additional franchise or relocated motor vehicle dealership upon the existing motor vehicle dealers of the same line make in the relevant market area to be served by the additional franchisee or relocated motor vehicle dealership; and (11) the retail sales and service business transacted by the existing dealers of the same line make in the market area to be served by the proposed new or relocated dealer as compared to the business available to them during the three-year period immediately preceding notice."

appellate briefs and oral arguments. Applying the well established principles that govern our review of a court's decision to dismiss an administrative appeal; see, e.g., *Meriden* v. *Freedom of Information Commission*, 191 Conn. App. 648, 654, 216 A.3d 847, cert. granted on other grounds, 333 Conn. 926, 217 A.3d 994 (2019); we conclude that the judgment of the trial court should be affirmed. We adopt the court's thorough and well reasoned decision as a proper statement of the facts and the applicable law on the issues. See *Northwest Hills Chrysler Jeep, LLC* v. *Dept. of Motor Vehicles*, Superior Court, judicial district of New Britain, Docket No. CV-18-6042924-S (April 15, 2019) (reprinted at 201 Conn. App. 132, A.3d). It would serve no useful purpose for us to repeat the discussion contained therein. See, e.g., *Tzovolos* v. *Wiseman*, 300 Conn. 247, 253–54, 12 A.3d 563 (2011); *Freeman* v. *A Better Way Wholesale Autos, Inc.*, 191 Conn. App. 110, 112, 213 A.3d 542 (2019).

The judgment is affirmed.

APPENDIX

NORTHWEST HILLS CHRYSLER JEEP, LLC, ET AL. *v.* DEPARTMENT OF MOTOR VEHICLES ET AL.*

Superior Court, Judicial District of New Britain
File No. CV-18-6042924-S

Memorandum filed April 15, 2019

Proceedings

Memorandum of decision on plaintiffs' appeal from decision by named defendant. *Appeal dismissed.*

James J. Healy, *Jason T. Allen*, pro hac vice, and *Richard N. Sox*, pro hac vice, for the plaintiffs.

* Affirmed. *Northwest Hills Chrysler Jeep, LLC* v. *Dept. of Motor Vehicles*, 201 Conn. App. 128, A.3d (2020).

Eileen Meskill, assistant attorney general, and *George Jepsen*, former attorney general, for the named defendant et al.

Charles D. Ray, *Shawn S. Smith*, *George W. Mykulak*, pro hac vice, and *Caitlin W. Monahan*, pro hac vice, for the defendant FCA US, LLC.

Jay B. Weintraub, *John L. Bonee* and *Eric H. Rothauser*, for the defendant Mitchell Dodge, Inc.

Opinion

HUDDLESTON, J. In this administrative appeal, four automobile dealers assert that the defendants Department of Motor Vehicles and its commissioner, Michael R. Bzdyra (collectively, department), improperly denied their protest to the decision of the defendant FCA US, LLC (FCA), to establish a new Jeep dealership in Canton. They assert that the department (1) failed to comply with its statutory mandate to consider the existing circumstances of two of the dealers, (2) made findings that are not supported by substantial evidence with respect to three statutory factors, and (3) made irreconcilable findings with respect to two of the factors. FCA and the department, in separate briefs, disagree. After considering all the arguments of the parties, and reviewing the entire administrative record, the court concludes that the department's decision is neither incomplete nor inconsistent and is supported by substantial evidence. Accordingly, for the reasons stated below, the appeal is dismissed.

LEGAL FRAMEWORK

In Connecticut, the relationships between manufacturers and dealers of motor vehicles are governed by General Statutes §§ 42-133r through 42-133ee. These provisions recognize the "need for intra-brand competition." *McLaughlin Ford, Inc.* v. *Ford Motor Co.*, 192

Conn. 558, 569 n.14, 473 A.2d 1185 (1984). Section 42-133r (14) defines " '[r]elevant market area' " as "the area within a radius of fourteen miles around an existing dealer or the area of responsibility defined in a franchise, whichever is greater." The law "does not guarantee an exclusive right to operate a dealership within a fourteen mile radius, but rather requires the [C]ommissioner of [M]otor [V]ehicles to demonstrate good cause, as defined in the statute, for denying the addition or relocation of a dealer in the objecting dealer's relevant market area." (Internal quotation marks omitted.) *McLaughlin Ford, Inc.* v. *Ford Motor Co.*, supra, 569 n.14.

If a manufacturer wants to add a new dealer or to relocate an existing dealer within the relevant market area of an existing dealer, General Statutes § 42-133dd (a)[1] requires the manufacturer to notify the Commissioner of Motor Vehicles and each existing dealer of its intention. If an existing dealer files a protest with the commissioner, the manufacturer cannot proceed until the commissioner has held a hearing and has determined whether there is good cause for denying the manufacturer's plan. The manufacturer bears the burden of proving that good cause exists for permitting the

[1] General Statutes § 42-133dd (a) provides in relevant part: "In the event that a manufacturer or distributor seeks to enter into a franchise establishing a new dealer or relocating an existing dealer within or into a relevant market area where the same line make is then represented, the manufacturer or distributor shall in writing, by certified mail, first notify the commissioner and each dealer in such line make in the relevant market area of its intention to establish a new dealer or to relocate an existing dealer within or into that market area. Within twenty days of receiving such notice or within twenty days after the end of any appeal procedure provided by the manufacturer or distributor, any such dealer may file with the commissioner a protest concerning the proposed establishment or relocation of such new or existing dealer. When such a protest is filed, the commissioner shall inform the manufacturer or distributor that a timely protest has been filed, and that the manufacturer or distributor shall not establish or relocate the proposed dealer until the commissioner has held a hearing, nor thereafter, if the commissioner determines that there is good cause for denying the establishment or relocation of such dealer. In any hearing held pursuant to this section, the manufacturer or distributor has the burden of proving that good cause exists for permitting the proposed establishment or relocation. . . ."

proposed establishment or relocation. Section 42-133dd (c) sets out eleven nonexclusive "circumstances" or factors to be considered in determining whether good cause exists.[2]

DEPARTMENT'S FINDING OF FACTS AND CONCLUSIONS OF LAWS[3]

Mitchell Dodge, Inc., doing business as Mitchell Chrysler Dodge (Mitchell), operates a Chrysler, Dodge,

[2] General Statutes § 42-133dd (c) provides: "In determining whether good cause has been established for not entering into a franchise establishing a new dealer or relocating an existing dealer for the same line make, the commissioner shall take into consideration the existing circumstances, including, but not limited to: (1) The permanency and size of investment made and the reasonable obligations incurred by the existing new motor vehicle dealers in the relevant market area; (2) growth or decline in population and new car registrations in the relevant market area; (3) effect on the consuming public in the relevant market area; (4) whether it is injurious or beneficial to the public welfare for a new dealer to be established; (5) whether the dealers of the same line make in that relevant market area are providing adequate competition and convenient customer care for the motor vehicles of the line make in the market area including the adequacy of motor vehicle sales and service facilities, equipment, supply of motor vehicle parts, and qualified service personnel; (6) whether the establishment of a new dealer would increase or decrease competition; (7) the effect on the relocating dealer of a denial of its relocation into the relevant market area; (8) whether the establishment or relocation of the proposed dealership appears to be warranted and justified based on economic and marketing conditions pertinent to dealers competing in the community or territory, including anticipated future changes; (9) the reasonably expected market penetration of the line-maker motor vehicle for the community or territory involved, after consideration of all factors which may affect said penetration, including, but not limited to, demographic factors such as age, income, education, size class preference, product popularity, retail lease transactions, or other factors affecting sales to consumers of the community or territory; (10) the economic impact of an additional franchise or relocated motor vehicle dealership upon the existing motor vehicle dealers of the same line make in the relevant market area to be served by the additional franchisee or relocated motor vehicle dealership; and (11) the retail sales and service business transacted by the existing dealers of the same line make in the market area to be served by the proposed new or relocated dealer as compared to the business available to them during the three-year period immediately preceding notice."

[3] Over seven days in May, 2017, a department hearing officer conducted the required hearing. He heard testimony from four FCA managers, a representative of each of the protesting dealers, the president of Mitchell [Dodge, Inc.], two expert witnesses for FCA, and two expert witnesses for the protesting dealers. FCA and the protesting dealers introduced some 190 exhibits and submitted posthearing briefs. The hearing officer subsequently

Ram (CDR) dealership presently located at 416 Hopmeadow Street in Simsbury. There are thirty CDR dealerships in Connecticut; all but four of them also sell the Jeep line. Mitchell is one of the four dealers currently without the Jeep line.

The four plaintiffs operate Chrysler, Dodge, Jeep, Ram (CDJR) dealerships in Connecticut. Northwest Hills Chrysler Jeep, LLC (Northwest), operates a CDJR dealership in Torrington. Gengras Chrysler Dodge Jeep, LLC (Gengras), operates a CDJR dealership in East Hartford. Crowley Chrysler Plymouth, Inc., doing business as Crowley Chrysler Jeep Dodge Ram (Crowley), operates a CDJR dealership in Bristol. Papa's Dodge, Inc. (Papa's), operates a CDJR dealership in New Britain. Each of their dealerships is within fourteen miles of Mitchell's present location.

In 2007, FCA's predecessor, DaimlerChrysler Motors Company, LLC, looked to add the Jeep line to Mitchell's franchise at its present location. It gave the statutorily required notice to the dealers in the relevant market area. Northwest, Gengras, Crowley, and Papa's filed a protest pursuant to § 42-133dd (a), and the proposal to establish the Jeep line at Mitchell's present location was withdrawn on March 5, 2007.

On May 5, 2016, FCA gave notice to the department and to affected existing Jeep dealers that Mitchell intended to construct a facility at 71 Albany Turnpike in Canton, where it would relocate its existing CDR dealership, and requested to add the Jeep line. On May 23, 2016, Northwest, Gengras, Crowley, and Papa's protested the establishment of the Jeep line. They did not protest the relocation of Mitchell's CDR dealership.[4]

issued a final decision on January 19, 2018, from which these facts are drawn. (The decision is misdated January 19, 2017, on the first page, but correctly dated on page 11.)

[4] Pursuant to § 42-133dd (b) (1), the protest provisions of § 42-133dd (a) do not apply to "the relocation of an existing dealer within that dealer's area of responsibility under its franchise, provided that the relocation shall

In FCA's dealer agreements, a "sales locality" is a geographic area of responsibility defined by specific census tracts. These are nonexclusive areas. Mitchell and the protesting dealers are located within three sales localities. Mitchell's present location, Gengras, and Papa's are located within the FCA's Hartford sales locality. Mitchell's proposed location is also within the Hartford sales locality. Crowley is within the FCA's Bristol sales locality, and Northwest is within the FCA's Torrington sales locality.

FCA further divides sales localities into "trade zones," also defined by census tracts. The Hartford sales locality is divided into five trade zones: Enfield, East Hartford, New Britain, Rockville, and Simsbury. Of the five trade zones, two—Enfield and Simsbury—do not presently have Jeep dealerships, and are known in the trade as "open points."

Section 42-133dd (c) requires the commissioner or his designee to "take into consideration the existing circumstances," which "includ[e], but [are] not limited to," eleven circumstances. The final decision addressed each of the eleven specified circumstances.

Section 42-133dd (c) (1) requires consideration of the "permanency and size of investment made and the reasonable obligations incurred by the existing new motor vehicle dealers in the relevant market area . . . ." As to this consideration, the department found that the existing motor vehicle dealers "have made significant and permanent investments, and have incurred financial obligations in their dealership facilities, located in the respective relevant market area." The department acknowledged FCA's argument that the

not be at a site within six miles of a licensed dealer for the same line make of motor vehicle . . . ."

Mitchell's proposed relocation was within its area of responsibility and was more than six miles from the protesting CDJR dealers.

dealers' investments had been made over a period of years, that the protesting dealers "are strong dealers who have successfully completed and succeeded against other dealers," including Mitchell in its present location, and that the dealers' agreements with FCA are expressly " 'non-exclusive' . . . ."

Section 42-133dd (c) (2) requires consideration of the "growth or decline in population and new car registrations in the relevant market area . . . ." As to this consideration, the department found that between 2000 and 2015, the population in the Hartford sales locality grew by over 40,000, or 4.9 percent. In the Simsbury trade zone, where the proposed Jeep location would be established, the population grew by 9.1 percent, which the department found to be the highest percentage of growth of all trade zones in the Hartford sales locality and higher than the growth in the Torrington and Bristol sales localities. The department found that both population and household growth is projected to be less than 1 percent between 2015 and 2020, rising slightly but remaining stable. Vehicle registrations in Connecticut rose by a significant percentage from 2010 through 2015, with Jeep registrations increasing by 172.5 percent. The department noted, however, that sales "peaked and plateaued in 2016," a nationwide trend that may continue. The department observed that the protesting dealers saw this slowing growth as support for their position that another Jeep dealership is not needed.

Section 42-133dd (c) (3) requires consideration of the "effect on the consuming public in the relevant market area . . . ." The department found that the consuming public would benefit from the addition of the Jeep line at the proposed location. Route 44 (Albany Turnpike) in Canton has evolved into an "auto row"—an area where numerous vehicle brands have established dealership locations and compete within the vicinity of each

other. Presently located near the proposed location are competitors of Jeep, including Chevrolet, Acura, Subaru, Volkswagen, Nissan, Toyota, Land Rover, and Honda dealers. The department found that "[a]uto rows are now common, and provide a convenience to consumers in having the ability to shop and compare competing brands at dealerships in close proximity." The department also found that drive time is significant to consumers. Although the parties disagreed as to the amount of time consumers would save if a new Jeep line were added at the proposed location, the department found that distances and drive times from the proposed location to the protesting dealers' locations are not insignificant, and that location on such an auto row would increase interbrand and intrabrand competition, to the consumer's benefit.

Section 42-133dd (c) (4) requires consideration of "whether it is injurious or beneficial to the public welfare for a new dealer to be established . . . ." The department found that the addition of construction and dealership based jobs, payroll and property taxes, and sales and use tax revenue would be beneficial to the public welfare in the Simsbury trade zone and particularly in Canton, the site of the proposed location. The department acknowledged the protesting dealers' argument that the benefit in construction jobs was only speculative, as there were only projections by Mitchell and one of the FCA experts as to what expenditures Mitchell would make if it were granted the Jeep dealership. The department observed that Mitchell could not be expected to have a detailed proposal in place, since it did not know if or when it would be allowed to add the Jeep line, and its ability to obtain the necessary approvals and financing for the project required the approval of the Jeep line at the proposed location. The department concluded that approval of the Jeep vehicle line "is not injurious to the public welfare."

Section 42-133dd (c) (5) requires consideration of "whether the dealers of the same line make in that relevant market area are providing adequate competition and convenient customer care for the motor vehicles of the line make in the market area including the adequacy of motor vehicle sales and service facilities, equipment, supply of motor vehicle parts, and qualified service personnel . . . ." As to this consideration, the department found that the protesting dealers have adequate service facilities, equipment, supply of motor vehicle parts, and qualified service personnel. The protesting dealers already compete successfully with Mitchell in a number of segments and franchises, including new CDR vehicles, the sale of used, certified preowned vehicles, including CDR and Jeep, warranty and out of warranty service on CDR and Jeep vehicles, and sales of parts for CDR and Jeep vehicles. As the department observed, however, the Simsbury trade zone has never had a Jeep dealership, and sales of new Jeeps in that trade zone have to be handled by in-selling. The only option for consumers in that area is to search for and purchase a new Jeep from a dealership outside the area, which, with Internet advertising, could be a dealer other than the protesting dealers. Television and Internet advertising by the protesting dealers reaches far beyond their relevant market areas, into adjoining states.

In considering § 42-133dd (c) (5), the department discussed registration effectiveness, a measure used by the automotive industry to assess brand performance. Registration effectiveness compares brand registrations within a territory to the expected number of registrations. It is distinct from dealer performance, which is calculated on "[m]inimum [s]ales [r]esponsibility," or MSR. As the department observed, "[d]ealer performance measures whether a dealer has captured the opportunity for sales assigned to it." FCA's dealers in the Hartford sales locality meet their MSRs, but the

Hartford sales locality is only 84 percent registration effective. This indicates lost sales for the brand and supports the need for another Jeep dealer.

Section 42-133dd (c) (6) considers "whether the establishment of a new dealer would increase or decrease competition . . . ." FCA argued that a new Jeep dealer would result in better prices, better choices, and better service as a result of the visibility of the proposed location, additional expected advertising by Mitchell, and increased interbrand competition. FCA also argued that existing dealers were not selling enough Jeeps to meet their expected market share. On the other hand, the protesting dealers argued that Jeep parts and service are already available in the Simsbury trade zone at Mitchell's existing location, and the addition of the Jeep line for sales would result in only "[minimally improved] convenience." The department found that, on balance, the addition of the Jeep line at the proposed location would increase competition.

Section 42-133dd (c) (7) requires consideration of "the effect on the relocating dealer of a denial of its relocation into the relevant market area . . . ." The department observed that, although this case involves the establishment of a new Jeep dealer rather than the relocation of an existing Jeep dealer, consideration of the eleven circumstances set out in § 42-133dd (c) are not exclusive. Considering the effect of a denial of the Jeep line on Mitchell, the department found that Mitchell had been losing money for years in its present location, and the possibility that it would have to relinquish its CDR dealership was relevant in terms of Mitchell's overall financial health. Loss of Mitchell's CDR dealership would adversely affect the customers who currently use Mitchell's services at its present location.

Section 42-133dd (c) (8) requires consideration of "whether the establishment or relocation of the proposed dealership appears to be warranted and justified

based on economic and marketing conditions pertinent to dealers competing in the community or territory, including anticipated future changes . . . .'' The department made extensive findings with respect to this issue. It found that the annual number of new vehicle sales for all manufacturers increased significantly from 2009–2010, when it was approximately twelve million units, to 2016, when sales were in excess of seventeen million units. In Connecticut, the Jeep line, measured by registrations, increased from 3945 in 2010 to 10,751 in 2015.

The department further found that when Chrysler emerged from bankruptcy in 2009 and FCA acquired certain of its assets, one of FCA's goals was to establish Chrysler, Dodge, Jeep, and Ram as a unified franchise under one roof. This consolidation plan was presented to the Bankruptcy Court both as a plan of survival for the brand and a plan that would benefit dealers and consumers. Approximately 60 to 70 percent of FCA's sales in the United States come from Jeep. In light of the greatly increased consumer preference for sport utility vehicles (SUVs), FCA is increasing production of Jeeps and introducing new models, with the expectation of selling 24 percent more Jeeps by 2020 than are currently sold. Existing dealers have benefited from this trend and will continue to benefit from planned new products and increased production volume.

The department found that the protesting dealers do sell Jeeps into the Simsbury trade zone, but most of their sales are made near their dealerships. It is a priority of FCA to establish dealerships, including the Jeep line, in auto rows such as the one in Canton to encourage cross-shopping and to be competitive with non-FCA brands.

The department found that Northwest's auto group includes a Chevrolet, Buick, GMC, Cadillac dealership

in Torrington that competes with Davidson Chevy, which is less than a mile from Mitchell's proposed location in Canton. In addition, the family that owns Northwest also owns O'Neill Chevrolet Buick in Avon, approximately three and a half miles from Davidson Chevy, and also owns a Honda dealership in Torrington that competes with Hoffman Honda in West Simsbury.

The department found that Crowley's dealership group includes Nissan Crowley in Bristol, which competes with Hoffman Nissan in Canton. Hoffman Nissan is located near Mitchell's proposed location. Crowley also owns a Volkswagen dealership in Plainville that competes with Mitchell Volkswagen in Canton, less than a mile from Mitchell's proposed location for adding the Jeep line.

The department found that Mitchell owns both 71 and 91 Albany Turnpike in Canton. Mitchell currently operates a Subaru dealership at 71 Albany Turnpike. If granted a Jeep dealership, Mitchell plans to build a new facility for Subaru at 91 Albany Turnpike and to renovate the proposed location at 71 Albany Turnpike for the CDJR dealership. The proposed location is already zoned for an auto dealership. The expert for the protesting dealers admitted that it is very difficult to find dealership locations in the Northeast that are not severely constrained by space or zoning.

The department acknowledged that a June, 2014 Hartford Market Study by FCA listed Simsbury as one of FCA's lowest market priorities in the greater Hartford market. After Mitchell advised FCA of its plan for the proposed location, however, FCA changed its priorities. The department found that such a change was to be expected.

The department concluded that the increased popularity of SUVs; intense marketing on television, the Internet, and in print media; and heightened interbrand

competition justify allowing the Jeep line at the proposed location. The department found that it is necessary to balance the interests of consumers, the local community, the establishing dealer, the vehicle manufacturer, and the existing dealers.

Section 42-133dd (c) (9) requires consideration of "the reasonably expected market penetration of the line-maker motor vehicle for the community or territory involved, after consideration of all factors which may affect said penetration, including, but not limited to, demographic factors such as age, income, education, size class preference, product popularity, retail lease transactions, or other factors affecting sales to consumers of the community or territory . . . ." As to this consideration, the department explained that "[m]arket penetration is the share a particular brand gets of a competitive set. Market penetration is the same as market share: how much business is transacted relative to the business available. Registration effectiveness is how well a brand does relative to what is expected from the brand." The department found that in the Hartford sales locality, Jeep's existing market share is less than its expected market share, using 2015 numbers. In that year, Jeep's expected market share in the Hartford sales locality was 9.85 percent, but its actual market share was 8.24 percent. If Jeep had achieved its expected market share in 2015, it would have sold 2086 vehicles in the Hartford sales locality, but in fact it sold only 1744 vehicles.

Section 42-133dd (c) (10) requires consideration of "the economic impact of an additional franchise or relocated motor vehicle dealership upon the existing motor vehicle dealers of the same line make in the relevant market area to be served by the additional franchisee or relocated motor vehicle dealership . . . ." The department found that the addition of a Jeep dealership

at the proposed location would result in some financial loss to the existing dealers. Although FCA's expert contended that there is sufficient lost opportunity from interbrand competition to have the new dealership established and not take any sales from the existing dealers, the protesting dealers testified that the proposed location would cause a financial loss to them and might result in a reduction of employees, with a corresponding loss in customer service. The department found that the protesting dealers all have well established Jeep dealerships with well regarded sales and service departments. It found that "[o]ne cannot say that the consumer will abandon the [protesting dealers'] dealerships and patronize a new dealership such as the [p]roposed [l]ocation based solely on convenience for the purchasing of a new Jeep." The department observed that both FCA and the protesting dealers acknowledge the significance of Jeep sales to a CDJR dealership. It found that although motor vehicle sales have leveled off, Jeep sales are expected to remain strong, providing continued opportunity for both the protesting dealers and Mitchell.

Section 42-133dd (c) (11) requires consideration of "the retail sales and service business transacted by the existing dealers of the same line make in the market area to be served by the proposed new or relocated dealer as compared to the business available to them during the three-year period immediately preceding notice." As to this consideration, the department found that Jeep registration effectiveness in the Hartford sales locality indicated lost Jeep sales in the years preceding the notice. In 2015, the Hartford sales locality had the third lowest registration effectiveness in the state, at 83.6 percent, and the Bristol RMA was at 85.7 percent. The department found that the protesting dealers have been in-selling into the Simsbury trade zone, where there is no new Jeep dealership. It further found that

the establishment of a new Jeep dealership in the Simsbury trade zone would not prevent the protesting dealers from continuing to in-sell into the Simsbury trade zone.

The department concluded that, "[b]ased upon the evidence presented, and taking into consideration criteria set forth in . . . § 42-133dd, good cause exists for permitting the establishment of a new Jeep dealer at 71 Albany Turnpike in Canton . . . ." It accordingly dismissed the protests of the protesting dealers and ordered that FCA may establish a new Jeep dealer at 71 Albany Turnpike in Canton. This appeal followed.

SCOPE OF REVIEW

The plaintiffs appeal pursuant to General Statutes § 4-183.[5] "[J]udicial review of the commissioner's action is governed by the Uniform Administrative Procedure Act . . . General Statutes §§ 4-166 through 4-189 . . . and the scope of that review is very restricted . . . ." [R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable." (Citation

[5] General Statutes § 4-183 (j) sets out the statutory scope of review for administrative appeals. It provides: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. If the court finds such prejudice, it shall sustain the appeal and, if appropriate, may render a judgment under subsection (k) of this section or remand the case for further proceedings. For purposes of this section, a remand is a final judgment."

omitted; internal quotation marks omitted.) *Murphy* v. *Commissioner of Motor Vehicles*, 254 Conn. 333, 343, 757 A.2d 561 (2000). "Substantial evidence exists if the administrative record affords a substantial basis of fact from which the fact in issue can be reasonably inferred." (Internal quotation marks omitted.) *Schallenkamp* v. *DelPonte*, 229 Conn. 31, 40, 639 A.2d 1018 (1994). "The substantial evidence rule imposes an important limitation on the power of the courts to overturn a decision of an administrative agency . . . and to provide a more restrictive standard of review than standards embodying review of weight of the evidence or clearly erroneous action." (Internal quotation marks omitted.) *Cadlerock Properties Joint Venture, L.P.* v. *Commissioner of Environmental Protection*, 253 Conn. 661, 676, 757 A.2d 1 (2000), cert. denied, 531 U.S. 1148, 121 S. Ct. 1089, 148 L. Ed. 2d 963 (2001). "In determining whether an administrative finding is supported by substantial evidence, the reviewing court must defer to the agency's assessment of the credibility of witnesses. . . . The reviewing court must take into account contradictory evidence in the record . . . but the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence . . . ." (Internal quotation marks omitted.) *Frank* v. *Dept. of Children & Families*, 312 Conn. 393, 411–12, 94 A.3d 588 (2014).

Our Supreme Court has repeatedly stated that "administrative tribunals are not strictly bound by the rules of evidence and . . . may consider exhibits [that] would normally be incompetent in a judicial proceeding, [as] long as the evidence is reliable and probative." *Lawrence* v. *Kozlowski*, 171 Conn. 705, 710, 372 A.2d 110 (1976), cert. denied, 431 U.S. 969, 97 S. Ct. 2930, 53 L. Ed. 2d 1066 (1977). "It is axiomatic, moreover, that it is within the province of the administrative hearing

officer to determine whether evidence is reliable . . . and, on appeal, the plaintiff bears the burden of proving that the commissioner, on the facts before him, acted contrary to law and in abuse of his discretion . . . . Neither this court nor the [Appellate Court] may retry the case or substitute its own judgment for that of the [hearing officer with respect to] the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Citations omitted; internal quotation marks omitted.) *Do* v. *Commissioner of Motor Vehicles*, 330 Conn. 651, 667–68, 200 A.3d 681 (2019).

Section 4-183 (j) requires affirmance of an agency's decision unless the court finds that substantial rights of the person appealing have been prejudiced by the claimed error. "The complaining party has the burden of demonstrating that its substantial rights were prejudiced by the error." (Internal quotation marks omitted.) *Miller* v. *Dept. of Agriculture*, 168 Conn. App. 255, 266, 145 A.3d 393, cert. denied, 323 Conn. 936, 151 A.3d 386 (2016). "It is fundamental that a plaintiff has the burden of proving that the [agency], on the facts before [it], acted contrary to law and in abuse of [its] discretion . . . ." (Internal quotation marks omitted.) *Murphy* v. *Commissioner of Motor Vehicles*, supra, 254 Conn. 343–44.

DISCUSSION

The plaintiffs advance three arguments in support of their appeal. First, they assert that the department committed legal error by failing to make specific findings as to each of the eleven statutory considerations for each protesting dealer. Second, they assert that certain factual findings are not supported by substantial evidence and that two of the findings are inconsistent with

each other. Third, they argue that the department's legal conclusion does not follow legally and logically from certain undisputed facts. More generally, they argue that the protesting dealers were successful Jeep dealers and consistently exceeded FCA's goals; that FCA's decision to add a Jeep dealer in Canton was based on the personal preference of a single manager who had formerly worked for Toyota and wanted Jeep to be located near Toyota; and that the evidence showed a contracting automobile market, a stagnant population, "extreme" Jeep competition, and an insufficient supply of Jeeps for current dealers.

In response, FCA argues that the plaintiffs' arguments are waived, contradict the arguments they made before the department, misconstrue the dealer statute, and are legally immaterial. FCA also argues that substantial evidence supports the department's decision. The department argues that the hearing officer properly considered all the statutory factors as to all of the plaintiffs, that the findings are not inconsistent and are supported by substantial evidence, and that the department is afforded considerable discretion in weighing the statutory factors.

The court has reviewed the entire administrative record, including the transcripts, the exhibits, the post-hearing briefs, and the final decision. Based on its review, it concludes that the plaintiffs have not met their burden of showing any prejudicial error.

A

The plaintiffs' first argument is that the hearing officer failed to make specific findings as to each dealer on each statutory point, thereby depriving certain of the plaintiffs of their right to a decision based on their own circumstances. Similar arguments have been rejected at least twice in the past. See *A-1 Auto Service, Inc.* v.

Dept. of Motor Vehicles, Superior Court, judicial district of Hartford-New Britain, Docket No. CV-96-0558549 (July 18, 1996) (*Maloney, J.*) (basis of hearing officer's decision was clear despite failure to state subordinate conclusions as to some factors); *Mario D'Addario Buick, Inc.* v. *Dept. of Motor Vehicles*, Superior Court, judicial district of New Britain, Docket No. CV-01-0505960-S (October 12, 2001) (*Schuman, J.*) (hearing officer not required to make specific findings on each factor but merely to consider them all). Courts have considered whether the basis for the ultimate conclusion is clear and reflects consideration of the statutory factors. In *A-1 Auto Service, Inc.*, the court observed that the hearing officer's ultimate conclusion was simply that " 'existing circumstances'. . . do not establish good cause for denying the new franchise. As noted, the findings of fact are explicit and thorough; they completely cover the circumstances as required by the statute; and they provide an understandable and reasonable basis for the ultimate decision. If the hearing officer failed to label some subordinate conclusions as such or failed to state some subordinate conclusions explicitly, the plaintiff has not demonstrated any material prejudice as a result."

The plaintiffs here claim that the department failed to make findings about Northwest and Crowley as to the fifth, ninth, and eleventh statutory factors. The fifth factor directs the department to consider "whether the dealers of the same line make in that relevant market area are providing adequate competition and convenient customer care for the motor vehicles of the line make in the market area including the adequacy of motor vehicle sales and service facilities, equipment, supply of motor vehicle parts, and qualified service personnel . . . ." General Statutes § 42-133dd (c) (5). Contrary to the plaintiffs' claim, the department expressly found that all of the protesting dealers have

adequate service facilities, equipment, supply of motor vehicle parts, and qualified service personnel. Final Decision, ¶ 25. Turning from service to sales, the department observed that the Simsbury trade zone has never had a new Jeep dealership, with the result that consumers in that trade zone had to search for and purchase new Jeeps outside the area. It further observed that while the dealers in the Hartford sales locality met their minimum sales requirements, registration effectiveness (a measure of market share) was only 84 percent. In sum, the department found that dealers of the same line make were providing adequate competition in service but not adequate or convenient competition in sales of new Jeeps in the proposed location. This conclusion was supported by substantial evidence in the record.

The plaintiffs also claim that the department failed to make necessary findings about the ninth factor, which directs the department to consider "the reasonably expected market penetration of the line-maker motor vehicle for the community or territory involved, after consideration of all factors which may affect said penetration, including, but not limited to, demographic factors such as age, income, education, size class preference, product popularity, retail lease transactions, or other factors affecting sales to consumers of the community or territory . . . ." General Statutes § 42-133dd (c) (9). The plaintiffs claim that the department erred in failing to focus on Canton, the proposed location, as "the community or territory involved." The court disagrees. The statute employs undefined alternatives—"community or territory involved"—rather than the statutorily defined "relevant market area." By using broad, undefined alternative terms, the statute clearly affords the department substantial discretion to determine the most relevant "community or territory involved." The department did not abuse its discretion in focusing on the Hartford sales locality in which the proposed

location was located. Substantial evidence supports the department's finding that Jeep's market share in the Hartford sales locality was 8.24 percent, lower than its expected market share of 9.85 percent, with sales of only 1744 vehicles as compared to expected sales of 2086 vehicles.

The plaintiffs also claim that the department erred by failing to make specific findings concerning the retail sales of Jeeps in Canton and in Northwest's relevant market area, as they claim is required by the eleventh factor. That factor requires the department to consider "the retail sales and service business transacted by the existing dealers of the same line make in the market area to be served by the proposed new or relocated dealer as compared to the business available to them during the three-year period immediately preceding notice." General Statutes § 42-133dd (c) (11). The plaintiffs claim that the department was required to make specific findings as to market penetration in the "Canton/Simsbury market" as well as the Bristol and Northwest sales localities. The department and FCA disagree. They argue that the hearing officer correctly discussed the Hartford sales locality as "the market area to be served by the proposed new or relocated dealer." The court agrees with the defendants. Subsection (c) (11) requires consideration of the market area to be served by the proposed new Jeep dealer. The department reasonably focused on the Hartford sales locality in which the new dealership would be established. It observed that registration effectiveness, an industry measure of market share, indicated lost sales in the Hartford sales locality and in the Bristol relevant market area as well. It further noted that the protesting dealers had been in-selling into the Simsbury trade zone for years and could continue to do so after a new Jeep dealership was established.

As FCA argues, many of the statutory factors overlap with each other. By focusing on alleged failures with respect to specific factors, the plaintiffs ignore the fact that many of the findings relate to more than one factor. Review of the decision as a whole demonstrates that the department considered each protesting dealer's sales and service activities in its relevant market area. It identified each of the protesting dealers and their relevant market areas. Final Decision, ¶¶ 1, 12 and 13. It acknowledged their significant and permanent investments in their dealerships. Id., ¶ 15. It found that all the protesting dealers provided adequate competition in the service of vehicles and met their minimum sales responsibility under their agreements with FCA. Id., ¶¶ 25 and 28. It found, however, that registration effectiveness in the Hartford sales locality was only 84 percent, despite the fact that all protesting dealers advertised in, and made sales into, that sales locality. Id., ¶¶ 26 through 28 and 37.

The department construed § 42-133dd (c) as requiring the department to balance "the interests of consumers, the local community, the establishing dealer, the vehicle manufacturer, and the existing dealers . . . ." Id., ¶ 43. This was clearly correct. Section 42-133dd (c) evidences concern for existing dealers in subdivisions (1), (5), (8), (10) and (11). Concern for the consuming public, and for competition generally, is explicitly addressed in subdivisions (3), (4) and (5) and implicit in several other subdivisions. Concern for fairness to the manufacturer is explicit or implicit in subdivisions (2), (3), (5) and (9). Concern for relocating dealers is expressly addressed in subdivision (7). Section 42-133dd (c) does not exist solely to protect the interests of existing dealers, but to assure healthy competition in the market. Healthy competition, the statute assumes, is good for the consuming public and ultimately benefits manufacturers and dealers as well. The final decision as a whole

reflects the department's consideration of the factors set out in the statute.

B

The plaintiffs next argue that the department's findings as to subdivisions (6), (7) and (8) are not supported by substantial evidence, and that the findings as to subdivisions (3) and (10) are irreconcilable. "In determining whether an administrative finding is supported by substantial evidence, a court must defer . . . to the agency's right to believe or disbelieve the evidence presented by any witness, even an expert, in whole or in part." (Internal quotation marks omitted.) *Bancroft* v. *Commissioner of Motor Vehicles*, 48 Conn. App. 391, 400, 710 A.2d 807, cert. denied, 245 Conn. 917, 717 A.2d 234 (1998).

Under subdivision (6), the department found that on balance, allowing the addition of a Jeep dealership at the proposed location would increase competition. Final Decision, ¶ 31. The plaintiffs dispute this finding, arguing that the evidence demonstrated that vehicle pricing is at historically low levels in the relevant market areas. They also argue that there were not enough Jeep vehicles to meet demand. Finally, they argue that competition for Jeep service cannot be enhanced because Mitchell already performs Jeep service at its present location.

The plaintiffs' arguments are not well founded. There was substantial evidence that locating a dealership in an auto row near dealerships of competing brands increases interbrand competition. Such evidence came not only in the testimony of FCA's dealer placement managers and its expert witness, but also in the admissions of some of the protesting dealers on cross-examination. Jonathan Gengras, for instance, admitted that being in an auto row "stimulates competition to be among a number of dealerships where consumers can

cross-shop." Transcript, May 22, 2017, p. 155. He further admitted that the proposed location was part of an auto row and was a "great location to shop for a vehicle." Id., pp. 155–56. Domenic Papa admitted that competition provides consumers with better prices, better choices, and better attention from the dealers. Transcript, May 19, 2017, pp. 14–15.

The plaintiffs' claim that there were not enough Jeeps to meet demand was countered by evidence that FCA was building a second plant for Jeep Wranglers, one of the most popular models, and expected to increase production enough to increase sales by 24 percent within a couple of years. The hearing officer credited this evidence. See Final Decision, ¶ 36.

The plaintiffs' claim that competition for Jeep service would not be enhanced because Mitchell already services Jeeps is not persuasive. There was evidence that Mitchell was at a disadvantage in getting Jeep service work because many customers choose to service their vehicles at the dealership where they purchased it. Indeed, there was evidence that dealers use the point of sale to try to sell service contracts to enhance the likelihood that purchasers will return to that dealership for service.

The plaintiffs also claim that the department's findings with regard to subdivision (7) are not relevant to the analysis and not supported by substantial evidence. Subdivision (7) directs the department to consider the effect of a denial of a relocation request on a relocating dealer. The department acknowledged, in the final decision, that it was not required to address subdivision (7) because the protests before it involved the establishment of a new Jeep dealer rather than the relocation of an existing one. It noted, however, that the list of factors in § 42-133dd (c) is nonexclusive and deemed it appropriate to consider the effect of denying the Jeep

line to Mitchell. It found that the negative financial impact on Mitchell was well documented; Mitchell had been losing money at its present location for years. It also considered the possibility that Mitchell would be forced to relinquish its CDR franchise if not granted Jeep. It considered that termination of Mitchell's CDR franchise would adversely affect consumers who are presently using Mitchell's services at its present location.

The plaintiffs assert that the department's finding was not supported by substantial evidence because Mitchell's president admitted that Mitchell had remained in business throughout the recession and that, if he decided to stop operating the existing CDR franchise, he could sell it. But, as before, the plaintiffs discuss only the evidence that was favorable to their position and ignore the substantial evidence that supports the department's findings. The plaintiffs do not dispute that Jeep sales constitute 60 to 70 percent of the new vehicle sales at their dealerships. As demand for SUVs has increased, there has been a corresponding decrease in the demand for sedans. FCA managers testified that Jeep and light truck sales have driven the success of the business in recent years. Without the ability to sell new Jeeps, Mitchell is at a substantial disadvantage in relation to the dealers who sell all the CDJR lines. Mitchell testified that his CDR dealership had been losing money for at least six years and that if he was not allowed to add Jeep he would have to think "long and hard" about whether to continue to operate it. William Doucette, the dealer placement manager for FCA's Northeast region, testified that Mitchell was at a substantial disadvantage without Jeep. He testified that Mitchell had been unable to make needed upgrades to its Simsbury facility because it lacked the revenue from Jeep sales to support such an investment. Doucette thought it likely that Mitchell would voluntarily termi-

nate his CDR franchise if he could not add Jeep. The department did not err in considering that denying the Jeep line to Mitchell would adversely affect its business.

The plaintiffs also argue that the department's findings as to subdivision (8) are not supported by substantial evidence. Section 42-133dd (c) (8) requires the department to consider "whether the establishment or relocation of the proposed dealership appears to be warranted and justified based on economic and marketing conditions pertinent to dealers competing in the community or territory, including anticipated future changes . . . ." The plaintiffs first argue that the department improperly focused on historical conditions and failed to give adequate attention to "anticipated future changes . . . ." More specifically, they claim that the automotive industry is expected to contract, that there are no "growth projects" in Canton, and school enrollment is decreasing. They next argue that the department failed to reconcile FCA's evolving "justifications" for the new Jeep dealership. They point to a June, 2014 market study which showed that FCA did not believe there was a market justification for adding Jeep in Canton at that time, and then assert that FCA reversed course in August, 2014, when Mitchell first proposed to relocate to Canton and add the Jeep brand there. The plaintiffs claim that the only thing that changed was the availability of the Canton property and an FCA manager's desire to be near Toyota.

The claim that the department failed to consider existing economic and marketing factors and anticipated future changes is refuted by the decision. Although some of the findings are addressed under headings other than the heading specifically discussing subdivision (8), it is clear that the hearing officer considered the slowing population growth (¶ 18), the peak and plateau of vehicle sales in 2016 (¶ 19), the plaintiffs' argument that the slowing

of population and household growth supported denial of the Jeep addition (¶ 20), the marketing advantages of locating a dealership on an auto row (¶ 21), the increase in new vehicle sales between 2009 and 2016, with a 172.5 percent increase in the sale of Jeeps (¶ 34), the importance of the Jeep line to FCA dealers, contributing 60 to 70 percent of all FCA's sales in the United States (¶ 36), FCA's intention to increase production of Jeeps and to introduce new Jeep models, with its expectation of increasing Jeep sales by 24 percent by 2020 (¶ 36), and the recognition that while existing dealers sell into the Simsbury trade zone, most of their sales are made near their dealerships (¶ 37). The department further observed that the existing dealers who had dealerships for brands other than FCA brands were already competing with dealers in Canton—for instance, Northwest's auto group includes a Chevrolet dealership in Torrington that competes with a Chevy dealership less than a mile from the proposed location for Mitchell's Jeep dealership, and Crowley's Nissan dealership in Bristol competes with Hoffman Nissan in Canton. The department cited to specific testimony and exhibits that supported its findings. The department did not fail to conduct a proper analysis of economic and marketing conditions, including anticipated future changes; it simply disagreed with the plaintiffs' view of the evidence. That it chose to credit FCA's witnesses and expert more often than the plaintiffs' was its prerogative as the finder of fact. As our Supreme Court and Appellate Court have observed, " 'weighing the accuracy and credibility of the evidence' is the province of the administrative agency. *Connecticut Natural Gas Corp.* v. *Public Utilities Control Authority*, 183 Conn. 128, 136, 439 A.2d 282 (1981). Reviewing courts thus 'must defer to the agency's assessment of the credibility of the witnesses and to the agency's right to believe or disbelieve the evidence presented by any

witness, even an expert, in whole or in part.' *Briggs* v. *State Employees Retirement Commission*, 210 Conn. 214, 217, 554 A.2d 292 (1989); see also *Standard Oil of Connecticut, Inc.* v. *Administrator, Unemployment Compensation Act*, 320 Conn. 611, 623, 134 A.3d 581 (2016) (reviewing court cannot 'substitute its own judgment for that of the administrative agency on the weight of the evidence' . . .); *Tarasovic* v. *Zoning Commission*, 147 Conn. 65, 69, 157 A.2d 103 (1959) ('[i]t is not the function of the court to pass upon the credibility of the evidence heard' by administrative agency)." *Fagan* v. *Stamford*, 179 Conn. App. 440, 458, 180 A.3d 1 (2018).

The plaintiffs' emphasis on FCA's June, 2014 market study is equally unavailing. The hearing officer acknowledged that in a June, 2014 study, FCA ranked four communities as higher priorities for improved performance than Canton/Simsbury, but a follow-up study in August of 2014 recommended relocating Mitchell to the proposed location and adding the Jeep line.[6] Final Decision, ¶ 39. The hearing officer concluded that it was reasonable for FCA to adjust its priorities, in light of the popularity of the Jeep line, when Mitchell offered it the opportunity to locate a CDJR dealership at a highly visible location, on a busy thoroughfare, in close proximity to competing dealerships, that was already zoned for an auto dealership. Id., ¶¶ 21, 36, 38, 42 and 44. As the plaintiffs' own expert admitted, in the Northeast it

[6] FCA's national head of market representation, Bashar Cholagh, testified that the June, 2014 analysis was a preliminary study, based primarily on data from 2013, and the August, 2014 study was updated to reflect data through April and May of 2014, as well as insights gained from driving the market area in July, 2014. Notably, the June, 2014 study identified lost sales opportunities in the Hartford market area and recommended putting a CDJR dealership in the Simsbury trade zone. See Exhibit R2, Bates Stamp 9656. The June, 2014 study also included a trade zone map that indicated the importance of locating CDJR dealerships in auto rows near their main competitors. Id., Bates Stamp 9686.

is very difficult to find dealership locations with good frontage and good buildings that are not severely constrained by space or zoning. Id., ¶ 42. The plaintiffs disagree with the department's judgment, but it is one that was well supported by the evidence and well within the discretion afforded the department.

The plaintiffs repeatedly argue that the sole reason for FCA's change in priorities was that its market representative, Dan Cantrell, had previously been employed by Toyota and personally desired to locate Jeep dealerships near Toyota dealerships. Plaintiffs' Brief, pp. 3, 4, 15, 16, 20, 22 and 23. This argument ignores the testimony of FCA national and regional dealer placement managers, who testified about the importance of locating dealerships near their competitors, a fact acknowledged by the plaintiffs' witnesses as well. It also ignores the analysis in FCA's expert report, which the hearing officer cited frequently throughout the final decision. The hearing officer was entitled to reject the plaintiffs' argument and to credit the substantial evidence presented by FCA as to the competitive importance of locating dealerships near their main competitors.

The plaintiffs also argue that two of the department's subordinate findings are "incompatible." Under § 42-133dd (c) (3), which considers the effect on the consuming public, the department found that the consuming public would benefit from the addition of the Jeep line at the proposed location because it is convenient to shop and compare competing brands in an auto row and because it would reduce drive times to a dealership. Final Decision, ¶¶ 21 and 22. Under § 42-133dd (c) (10), which considers the economic impact of a new dealership on existing dealers, the department found that consumers would not abandon existing dealers solely based on convenience. Id., ¶ 50. These findings are not inconsistent. As the department found, both

FCA and the protesting dealers presented evidence that there would be some financial loss to existing dealers as the result of the addition of a Jeep dealership at the proposed location, but the probable amount of the loss was vigorously disputed. Id., ¶ 47. FCA presented evidence that there was sufficient lost opportunity to have the proposed location come into business and not take any sales from the existing dealers, while the protesting plaintiffs presented evidence that the proposed location would affect them economically and possibly require them to reduce the number of their employees. Considering the conflicting evidence, the department found that the protesting dealers "all have well established Jeep dealerships, with [well regarded] sales and services departments. One cannot say that the consumer will abandon the [protesting dealers'] dealerships and patronize a new dealership such as the [p]roposed [l]ocation based solely on convenience for the purchasing of a new Jeep." Id., ¶ 50. The department concluded that because Jeep sales are expected to remain strong, there would be "ample opportunity" for both the protesting dealers and Mitchell. Id., ¶ 51.

Under subdivision (3), the department found that addition of a Jeep dealership at the proposed location would be convenient for the consuming public and would reduce drive times to Jeep dealerships. Under subdivision (10), however, it found that convenience would not be the sole factor considered by consumers. It found that the protesting dealers had well established and well regarded dealerships. It is not unreasonable to infer that some consumers may prefer to continue to do business with dealers they know and trust even if a new dealer is more convenient. Moreover, a principal reason for locating a dealership in an auto row is to increase interbrand competition. There was substantial evidence to support the finding that Jeep sales were expected to remain strong and that there was "ample

opportunity" for both the protesting dealers and for Mitchell, including improving Jeep's market share in comparison to other brands. The department's findings are not inconsistent. It is not unreasonable to find that consumer behavior is affected by many factors, including convenience, loyalty, and proximity to competing choices.

C

The plaintiffs' final argument is that the department's ultimate conclusion—that there is good cause to add a Jeep dealership at the proposed location—cannot follow legally and logically from the undisputed facts. The plaintiffs present a list of purported "undisputed" facts, some of which are undisputed, some of which are not material, and some of which were disputed or countered by other evidence. It is undisputed, for instance, that the protesting dealers are located within fourteen miles of the proposed location; that is what gave them the right to file a protest. Several of the purported facts deal with Jeep sales in Canton. Even if undisputed, those facts would not be dispositive because the relevant market areas were larger than Canton. The plaintiffs assert that there is no FCA policy to place Jeep near Toyota; even if true, this assertion certainly ignores abundant evidence that FCA preferred to locate dealerships in auto rows, in close proximity to competing brands, to enhance interbrand competition. The plaintiffs assert that they all met their minimum sales requirements and had not been told they needed to improve their sales in their assigned markets or in Canton. But, as the department found, the manufacturer had wanted to establish a Jeep dealership in the Simsbury trade zone since 2007, when it first proposed to add Jeep to the Mitchell franchise in Simsbury. Its previous effort to add Jeep in the Simsbury trade zone provided notice that it believed that the Jeep brand was not adequately represented there.

In sum, the department did its job: it considered the evidence presented by the plaintiffs, it considered the evidence presented by FCA and Mitchell, and it decided which evidence to credit. It cited frequently to the testimony and report of FCA's expert, indicating that it found that evidence to be credible. It weighed the interests of the existing dealers, the consuming public, the community affected, the manufacturer, and the dealer to be most affected by its decision, Mitchell. Despite the plaintiffs' efforts to recast these matters as legal issues, the issues identified by the plaintiffs are factual in character, and the ultimate conclusion is one in which the department is afforded considerable discretion. It is not the role of this court to second-guess the factual findings and discretionary decisions of an administrative agency. See *Frank* v. *Dept. of Children & Families*, supra, 312 Conn. 411–12 ("[t]he reviewing court must take into account contradictory evidence in the record . . . but the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence" (internal quotation marks omitted)).

CONCLUSION

The department's decision adequately addressed the statutory circumstances it was directed to consider. Its factual findings are supported by substantial evidence and are not inconsistent or incomplete. Accordingly, the department's decision must stand, and the plaintiffs' appeal is dismissed. Judgment shall enter for the defendants.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 201

MEMORANDUM DECISIONS

STATE OF CONNECTICUT *v.* JERMAINE JONES (AC 42996)

Bright, C. J., and Cradle and Bear, Js.

Argued October 14—officially released October 27, 2020

Defendant's appeal from the Superior Court in the judicial district of Waterbury, *Hon. Roland D. Fasano*, judge trial referee.

Per Curiam. The judgment is affirmed.

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NOTICES OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF SOCIAL SERVICES
DEPARTMENT OF DEVELOPMENTAL SERVICES

NOTICE OF INTENT TO RENEW THE EMPLOYMENT AND DAY SUPPORTS MEDICAID WAIVER

In accordance with the provisions of section 17b-8(c) of the Connecticut General Statutes, notice is hereby given that the Commissioner of Social Services intends to renew the Employment and Day Supports Medicaid waiver to be effective April 1, 2021. This waiver is operated by the Department of Developmental Services and is designed to support individuals with intellectual disability who live with family or in their own homes and require career development, supported employment or community-based day supports, respite, and/or behavioral supports to remain in the community.

As part of the renewal application, the Department of Social Services and the Department of Developmental Services are proposing the following changes to the Employment and Day Supports Medicaid waiver:

(1) Differentiating Transitional Employment Services from Prevocational Services in the waiver and modifying their definitions to match those used in the Individual and Family Supports and Comprehensive waivers. Prior to this renewal, Prevocational Services was incorrectly listed as an alternate service title to Transitional Employment Services, rather than as a separate service.

(2) Modifying and aligning performance measures to ensure consistency across all Connecticut Medicaid waivers, including those revisions requested by the Centers for Medicare & Medicaid Services (''CMS''); and

(3) Technical and administrative clarifications, including those revisions requested by CMS.

No current enrollees will be negatively impacted by the changes proposed in the application.

Copies of the complete text of the waiver application are available upon request from: Tammy Venenga, Director of Specialized Service Development, DDS Central Office, 460 Capitol Avenue, Hartford, CT, 06106, or via email at Tammy.Venenga@ct.gov. It is also available on the Department of Social Services' website, www.ct.gov/dss, under ''News and Press,'' as well as the following direct link: http://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-Waiver-Applications/Medicaid-Waiver-Applications, and the Department of Developmental Services' website, https://portal.ct.gov/dds, under ''Latest News.''

All written comments regarding these applications must be submitted by Friday, November 27, 2020 to: Tammy Venenga, 460 Capitol Avenue Hartford, Connecticut, 06106, or via email at Tammy.Venenga@ct.gov.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA) SPA 20-AB: Home Health Aide Rate Increase

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Effective on or after November 1, 2020, SPA 20-AB will amend Attachment 4.19-B of the Medicaid State Plan to update the home health services fee schedule by increasing the rates by 2.3% for the following services: Health Care Procedural Coding System (HCPCS) codes T1004 (Services of a qualified nursing aide, up to 15 minutes) and T1021 (Home Health aide or certified nurse assistant, per visit) provided by licensed home health agencies. The purpose of this SPA is reflect that home health agencies have increased costs in paying higher wages to home health aides in order to comply with the recent increase in the state's minimum wage.

Fee schedules are published at this link: http://www.ctdssmap.com, then select ''Provider'', then select ''Provider Fee Schedule Download.''

Fiscal Impact

DSS estimates that this SPA will increase annual aggregate expenditures by approximately $436,000 in State Fiscal Year (SFY) 2021 and $766,000 in SFY 2022.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: http://portal.ct.gov/dss. Scroll down to the bottom of the webpage and click on ''Publications'' and then click on ''Updates.'' Then click on ''Medicaid State Plan Amendments''. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference ''SPA 20-AB: Home Health Aide Rate Increase''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than November 11, 2020.

NOTICE

CONNECTICUT BAR EXAMINING COMMITTEE

The following 400 persons have applied for admission to the Connecticut bar by examination. The examination was held on October 5 & 6, 2020. Written objections or comments regarding any candidate should be addressed to the Connecticut Bar Examining Committee, 100 Washington Street, 1st Floor, Hartford, CT 06106 as soon as possible.

Jessica F. Kallipolites
Administrative Director

Abbas, Majda Mohammad of Watertown, MA
Abdellatif, Amelia of Forest Hills, NY
Abner, Adrienne Randolph of Wilmington, DE
Abovyan, Lusine Rafiki of Trumbull, CT
Abrafi, Dorinda of Quincy, MA
Agyapong, Nimako K. of Springfield, MA
Ahern, Hannah Elizabeth of Woodbridge, CT
Ahern, Justin Milton of Shelton, CT
Aksterowicz, Alexandra Nicole of East Lyme, CT
Alexander, Jacob J. of New Canaan, CT
Aliberti, Gabriella Lisa of Houston, TX
Allums, Kenneshea Brenay of Bridgeport, CT
Amico, Alexander Francis of Alexandria, VA
Amin, Dawud W. of New Haven, CT
Ampadu, Elvis of Manchester, CT
Andaya, Alexa Maud of Brooklyn, NY
Anderson, Andrea Shernett Marshalee of Waterbury, CT
Anderson, Lutherene A. of Miramar, FL
Anderson, Robert J. of Cheshire, CT
Appell, Jacqueline Higgins of Westport, CT
Arcuri, Kathleen Ann of Manchester, CT
Arias, Aaron Adonis of Stratford, CT
Aydogan, Zeynep Ecem of Hartford, CT
Ayer, Oliver Kramer of Hamden, CT
Bains, Herdesh Kaur of Old Westbury, NY
Bardoo, Sean Lincoln of Lowell, MA
Barreto, Elyssa Nicole of Northford, CT
Beale, Anthony James of Farmington, CT
Bengtson, Justin R. of West Haven, CT
Benjamin, Alundai Joan of East Hartford, CT
Bertolino, Matthew Vincent of Trumbull, CT
Bessarabova, Daniella A. of Agawam, MA
Bethi, Snehitha of Norwalk, CT
Bitar, Maryam M.K. of West Hartford, CT
Bixby, David Walter of Middletown, CT
Blanchard, Anne Elizabeth of Andover, CT
Blanchard, Nicholas Bruce of Portland, CT
Blasnik, Jessica Rose of Wethersfield, CT
Bonito, Angela Marie of North Branford, CT
Bosworth, William Wyatt of New Britain, CT
Botchkina, Ekaterina of Stony Brook, NY
Bova, Samantha Rose of West Hartford, CT
Boy, Christopher Ryan of Cheshire, CT
Boyer, Christopher Knight Collier of West Hartford, CT
Brantly, Alexandra Min-Sook of Waterbury, CT
Brewer, Simon Christopher of Montgomery, AL
Brocklehurst, Adam C. of Woodbridge, CT
Brown, Kathleen Rose of Hamden, CT
Brown, Matthew Weldon of Wheaton, MD
Buchanan, Elizabeth Holbrook of Deep River, CT
Buchholz, Brenton Joseph of Enfield, CT
Burgs, Brett Lambert of Allston, MA
Burlingham, Corinne Anna of Rocky Hill, CT
Byrd, Daniel Allen of Cheshire, CT
Byrne, John Joseph of West Hartford, CT
Byrnes, Emily Helen of Southington, CT
Caine, IV, Martin Leonard of Woodbury, CT
Callaghan, Brenton S. of Ansonia, CT
Callis, Katherine Alexandra of Farmington, CT
Canty, Shane Patrick of West Hartford, CT
Carbray, Ashley Patrice of Bloomfield, CT
Carlow, Sarah Elizabeth of Boston, MA
Carlson, Daniel Arthur of Farmington, CT
Carone, Nicholas Salvatore of East Berlin, CT
Carpenter Woods, Martina of Bowie, MD
Carroll, Tyler J. of Middletown, CT
Carroll, Wilson Theodore of Hamden, CT
Cassidy, Brendan Thomas of West Haven, CT
Chadha, Amrita of New York, NY
Chan, Justin Michael of Danbury, CT
Chapple, Daniel Charles of Granby, CT
Chida, Zohaib Hasan of Scarsdale, NY
Chiles, Alexandra Nicole of Stamford, CT
Choephel, Eleni Tenzin of New Haven, CT
Clesca, Princelee Adler of Lake Mary, FL
Colonia-Hughes, Bryce D. of Killingworth, CT
Combs, Danielle Elizabeth of Uxbridge, MA
Condon, Michael Thomas of Boston, MA
Conley, Allison Rose of West Hartford, CT
Constanzo, Lisia M. of New York, NY
Cooley, Louanne Reich of Storrs Mansfield, CT
Cooper, Cole Stephen of Cos Cob, CT
Cossuto, Joshua A. of Brooklyn, NY
Cote, William Pohlman of East Haven, CT
Coudert, Alexis Cummings of Hartford, CT
Crabtree, Morgan Elizabeth of Greenwich, CT

Crooks, Alyssa Lynn of East Hartford, CT
Cruz, Andrew Raymond of Hartford, CT
Culver, Julie A. of Wallingford, CT
Cunningham, Caitlan B. of Middletown, CT
Cunningham, Kirsten Elizabeth of Wallingford, CT
Czapiga, Kyle Edward of Fairfield, CT
Czarnowski, Jennifer E. of Southington, CT
Dacey, Cathleen Ann of Hamden, CT
Daley, Ashley Victoria of Hartford, CT
Daly, Joseph Edward of Beverly Hills, FL
D'Antonio, Gabriel of Terryville, CT
DeBiase, Rebecca Lea of Stratford, CT
DeBot, W Brandon of New Haven, CT
DeDomenico, Linsey Ann of Northford, CT
DeJesus, Joseph A. of Methuen, MA
DeLeon, Troy Steven of East Hampton, CT
DeMartino, Jenna Rose of West Hartford, CT
Demirjian, Freeman Jay of Orange, CT
Deneen, Mary Catherine of Windsor, CT
Denno, Amber Marie of Orange, CT
DeNove, Brian Edward of New Fairfield, CT
dePalma, Andrea Gabrielle of Naugautuck, CT
DeSimone, Aniello of Cheshire, CT
Devaney, Brendan M. of Trumbull, CT
deVaux, Charles Story of Farmington, CT
DiCristofaro, Deborah Ann of East Haddam, CT
DiGiorgio, Stephanie Rita of Utica, NY
Ding, Yumin of West Hartford, CT
DiPietro, Frank Amerigo of Pleasantville, NY
Dubrosky, Allison M. of Bristol, CT
Dubuc, Danielle Rejeanne of Longmeadow, MA
Dudding, Alexandra Listfield of New York, NY
Eddy, Christopher Youngers of West Hartford, CT
Edwards van Muijen, Christian Alexander of Newtown, CT
Egeberg, Morgan Giovanna of Henderson, NY
Entenman, Colleen Raftrey of Farmington, CT
Erazo, Makayla Carol of Fairfield, CT
Esmail, Ramy of Houston, TX
Espinoza, Jessica of Hartford, CT
Estes, Krystle Lynne of West Hempstead, NY
Eze, Paulette Nneka of West Hartford, CT
Fabian Maramarosy, Sarah of Stamford, CT
Fadairo, Tinuke Amajuoreise of Springfield, MA
Faith, Kimberly Karen of Litchfield Park, AZ
Fazekas, Christopher Andrew of Stratford, CT
Fazzino, Jonathan William of Kensington, CT
Ferrantelli, Joseph Michael of Shelton, CT
Ferreone, Alyssa Rose of Derby, CT
Fey, Maxfield Jackson of Farmington, CT
Field, Lydia of Allston, MA
Fishkind, Matthew Allessandro of New Haven, CT
Fletcher, Katrina Jeanette of East Windsor, CT
Foley, Kevin Patrick of Philadelphia, PA
Fontaine, Alexander Robert of Jersey City, NJ
Fontaine, Jacob A. of South Glastonbury, CT
Fontanella, Mario Jae of Amston, CT
Force, Amir Farid of Portland, CT
Forcier, Paige Elizabeth of West Hartford, CT
Ford, Hayley Katelyn of Haddam, CT
Ford, Tyrese Matthew of Hamden, CT
Francini, Anthony of East Hartford, CT
Frank, Daniel Paul of Alexandra, VA
Frank, Jeffrey Fredrick of New York, NY
Fray, Timothy R. of Hamden, CT
Frey, Robert Carter-Lee of Weatogue, CT
Friedlander, David Allan of Stamford, CT
Gallina, Lawrence Peter of Meriden, CT
Garfinkel, Hannah Shephard of Glastonbury, CT
Gazlay, Courtney Cameron of Southbury, CT
Geisler, James D. of West Hartford, CT
Gelozin, Gabrielle Lynn of Norwalk, CT
Gerosa, Nicole Marie of Branford, CT
Gerte, Thomas Robert of Clinton, CT
Ghalmi, Adam of Old Lyme, CT
Ghanbari, Maryam of Fairport, NY
Giancarlo, Taylor Leigh of Meriden, CT
Gifford, Daniel Lee of Newton, MA
Gillette, Virginia Marie of Marlborough, CT
Golicz, James H. of Southington, CT
Gonzalez, Joshua of Medford, MA
Graefe, Johann Julius of East Longmeadow, MA
Grasso, John Anthony of Wales, MA
Gullotta, Lorena Breanne of Naugatuck, CT
Guo, Hanni of Hartford, CT
Hague, Alyssa Emily of Hamden, CT
Hall, Emily Melissa of Topsfield, MA
Hamill, Lauren Nancy Ross of Boston, MA
Hamilton, Laura Marie of West Hartford, CT
Happi, Maxcelline of Lexington, MA
Harrison, Alexis J. of Hartford, CT
Hartman, Jessica Amber of Bridgeport, CT
Harty, Lisa Nicole of West Springfield, MA
Haseltine, Rosemond Mary of Buzzards Bay, MA
Hashaum, S. Ali of Naugatuck, CT
Healey, John F. of West Hartford, CT
Henderson, Christopher R. of Old Saybrook, CT
Heroy, Nicole Katherine of East Haven, CT
Higgins, Christina Renae of Washington, DC
Hindin, Gabrielle Shoshannah of Seymour, CT
Hoffman, Eric Peter of Nanuet, NY
Holahan, Makenzie R. of Hollywood, FL
Holler, Michael Patrick of Wethersfield, CT
Holmes, Glenn Lawrence of New London, CT
Hottin, Danielle Marie of North Branford, CT
Housel, Kirsten Anderson of Los Angeles, CA
Hruszko, Sergio Brandon of West Haven, CT
Huben, Christopher William of Stamford, CT
Hulin, Patrick Arthur of New Haven, CT
Humphrey, Ryan Dean of Sturbridge, MA
Hunt, Leslie Warner of Cleveland, OH
Hurtt, James Matthew of New Haven, CT
Hyde, Christopher Alan of Alexandria, VA
Hyder, Alexander Henry of Hartford, CT
Ignace, Brittany of Seymour, CT
Inglis, Audra Jayne of West Hartford, CT
Jacaruso, Robert Andrew of Rockville, MD
Jani, Rishita Kalpesh of Wethersfield, CT
Javarauckas, Stephanie Marie of Suffield, CT
Jean-Baptiste, Serge Carmin Emmanuel of Norwalk, CT
Kahn, David H. of Tunbridge, VT
Kalichman, Hannah Fay of Ellington, CT
Kapur, Rohan Sandip of East Hampton, CT
Karpinski, Emily Marie of Greenville, RI
Kassim, Emmanuel Enioluwa of Burke, VA
Keating, Michael Joseph of Wethersfield, CT
Keefer, William David of West Hartford, CT
Kelley, Michael James of Hartford, CT
Kemph, Madison Hoelscher of Greenwich, CT
Kim, Yewon of Leonia, NJ
Kittler, Megan Ann of Pittsfield, MA

Kittredge, Nikolas David of Charlton, MA
Klapper, Stephen of New Haven, CT
Kobak, Steve of Guilford, CT
Koch, Danielle of Berlin, CT
Konoval, Shana B. of Oxford, CT
Korwek, Alissa Marie of East Haven, CT
Kranc, Albert of Colchester, CT
Kraner, Nathan E. of Hartford, CT
Kraus, Andrew James of Branford, CT
Kuegler, Adam Joseph of Watertown, CT
Kumar, Shriya of Basking Ridge, NJ
Lampert, Brian Walter of Shelton, CT
Lanciani, Aidan Mishell of Belchertown, MA
Lavache, Caminer of West Haven, CT
Lee, Youngdo of New Britain, CT
Lefevre, Arthur Christian of New Hartford, CT
Lerch, Andrew Robert of Niantic, CT
Levin, Dana Franci of New York, NY
Leys, Nathan Daniel of New Haven, CT
Lin, Steven of Meriden, CT
Lindner Jr., Henry Joseph of Fall River, MA
Lisitano, Michael Gino of Middlefield, CT
Lloyd, Uriel Junior of Hartford, CT
Lockwood, Mark William of North Granby, CT
Lofquist, Eric Stanley of North Haven, CT
Lojo, Stephen Anthony of Wallingford, CT
Longfellow, Madalyne Ruth of Old Lyme, CT
Lopes, Christina M. of Seymour, CT
Lopez, Delmarina of Chicopee, MA
Lopol, Ashley Lynn of Burlington, CT
Loveland, Nicholas Anthony of Cromwell, CT
Lowe, Katherine Maxwell of Hamden, CT
Macias Flores, Miriam Araceli of Stratford, CT
Maduabueke, Samuel Chimdi of Waterbury, CT
Maille, Nicholle Linda of Somers, CT
Malyala, Pranathi Eesha of Dublin, CA
Mamillapalli, Snigdha of Cheshire, CT
Mangiardi, Jesse A. of Hartford, CT
Manning, Katelyn Elizabeth of Milford, CT
Marczeski, Katarina of West Hartford, CT
Martin, Katherine Meny of West Hartford, CT
Martocchio III, Louis Joseph of Southington, CT
McCarthy, Justin R. of New Haven, CT
McCloud, Melissa Shawniece of Bloomfield, CT
McDade, Jessica Erin of Hamden, CT
McEwan, Brittany Ann of Norwalk, CT
McKirryher, Colleen Susan of Middlebury, CT
McKitterick, Maryellen of Cheshire, CT
McLaughlin, Karen of Meriden, CT
McLean Batts, Arlene Ramona of Coral Springs, FL
McPherson, Brendan of West Kingston, RI
Merin, Anna Rothfus of Guilford, CT
Michelman, Glenn Perry of Springfield, MA
Mileski III, Ben Paul of Milford, CT
Miller, Victoria L. of Milford, CT
Minacci-Morey, Ciarra Joan of Hartford, CT
Minicucci, Gabriella Marie of Watertown, CT
Molodetz, Emma C. of Rochester, NY
Moloney, Shaun of West Hartford, CT
Moore, Kelly McConney of St. Petersburg, FL
Moran, Austin Kelly of Hartford, CT
Morro, Rachel Elizabeth of Guilford, CT
Mosley, Sean Maurice of Waterbury, CT
Movahed, Kimia Olivia of Greenville, NC
Murillo Garcia, Julio Cesar of Willimantic, CT
Murphy, Caitlin Erin of Hamden, CT
Naclerio, Eric Radcliffe of Milford, CT
Napper, Tyrone of West Hartford, CT
Nassau, Kileigh Lynn of Rocky Hill, CT
Nassetta, Samuel Michael of New London, CT
Nichols, Kyla Marie of Bristol, CT
Nielsen, David Craig of Middletown, CT
Niemiroski, Sarah Nicole of Old Saybrook, CT
Oladetimi, Shola Diana of Bridgeport, CT
Olumide, Kunle M. of Windsor, CT
Onukogu, Osinachi Chidimma of Newark, NJ
O'Sullivan, Andrew William of West Hartford, CT
Oyunbazar, Odonchimeg of Ridgefield, CT
Palo, Grace Elizabeth of Leesburg, VA
Pandher, Jasmine of Springfield, MA
Parafati, Christian Francis of Wolcott, CT
Parenti, Matthew Joseph of Watertown, CT
Parry, Brandy Michelle of Cheshire, CT
Paulino, Krystal M. of New York, NY
Perez, Ana Gloria of Newark, NJ
Pershing, Abigail D. of New Haven, CT
Pervez, Sahar of Brookfield, CT
Pesch, Olivia Quinn of Fairfield, CT
Petit, Kelly Elaine of Wallingford, CT
Petrides, Nikitas Savvas of Cromwell, CT
Phanngavong, Samantha of Stratford, CT
Pisani, Kimberly Ann of Wallingford, CT
Pizzonia, Simone Marguerite of New Milford, CT
Posada, Jessica of Norwalk, CT
Price, Nikko Brooks of New Haven, CT
Provencher, Stacie L. of Enfield, CT
Pulaski, Michael Francis of Stratford, CT
Rafus, Courtney Wynn of Westfield, MA
Reckmeyer, William Christopher of West Hartford, CT
Reeves, Heather J. of Oakdale, CT
Reinish, Libby Hathaway of Easthampton, MA
Renfrew, Mitchell Barin of Barkhamsted, CT
Rhi, Rachael H. of Fairfax, VA
Riccio, JoAnn Lynn of Bristol, CT
Rioux, Corey R. of Glastonbury, CT
Rivera, Kellie Jo of Manchester, CT
Roach, Ally Grace of West Hartford, CT
Robb, Zoe Olivia Alexandra of Lebanon, CT
Rodriguez, Kimberley of Ridgefield, CT
Rodrguez, Chiedza A. of Hartford, CT
Romero, Oscar Francisco of New Britain, CT
Root, Delia Nicole of Worcester, MA
Rotondo, James Nicholas of Shelton, CT
Ruffin Salkey, Giovannii Tasia of New Haven, CT
Ruhling, Jennifer Leonard of Lyme, CT
Russell-Donegal, Tashika Tashani of Bridgeport, CT
Russo, Bethany Gabrielle of Terryville, CT
Rutherford II, John Henry of Lauderhill, FL
Ryff, Tyler Michael of Seymour, CT
Rzewuski, Allison J. of Colchester, CT
Sahani, Jasjeet Kaur of Avon, CT
SaintPaul, Jamie Olivia of Naugatuck, CT
Salve, Pooja Ramesh of Wilmington, MA
Sandillo, IV, Francesco P. of Hamden, CT
Santovasi, Nicholas Joseph of Goshen, CT
Sarwar, Noreene Sanam of Allendale, NJ
Savit, Aaron Zvi of Avon, CT
Scherpa, Chloe L. of Feeding Hills, MA
Schlosser, Brian Grant of Wallingford, CT
Seyal, Amina Aziz of Fairfield, CT
Sherwood, Nicole Katherine of Easton, CT

Silva, Edward Alexander of Deep River, CT
Siso, Andrea Valentina of Houston, TX
Sisti, Samantha of Farmington, CT
Small, Kim R. of Danbury, CT
Small, Paul J. of Southington, CT
Smith, Annecca Henderson of Northampton, MA
Smith, Nicholas Francis of Woodbury, CT
Spence, Trisana N. of Hartford, CT
Spicer, Megan Lee of Meriden, CT
Spina, Rachael Elizabeth of Wallingford, CT
Stack, Erin Elizabeth of Waterbury, CT
Stephen, Kayla Renee of Hamden, CT
Stevens, Dylan Sheptock of Greenlawn, NY
Stith, Alexandria of Richmond, VA
Tadros Potter, Lauren Caroline of New Haven, CT
Teich, Adam Michael of Windsor Locks, CT
Tenore, Kayla Alesha of Vernon, CT
Terra, Cileena Y. of Webster, MA
Thakur, Vinay V. of New Haven, CT
Thenor, Wilnick of Fall River, MA
Tierney, Daniel of Vernon, CT
Tinnerello, Brooke Andrea of Glastonbury, CT
Tola-Adelani, Feyintoluwa Oluwakoseounti of West Hartford, CT
Torrenti, John Thomas of Norwalk, CT
Tournas, Potoula P. of West Hartford, CT
Troiano-Webb, Cassaundra G. of Lowell, MA
Truong, Quyen T. of Hartford, CT
Vahlsing, Conrad Alric of Princeton, NJ
Valenzano, Anthony Vito of Fairfield, CT
Vandzhura, Emilia of Berlin, CT
Vartelas, Oana Roxana of Shelton, CT
Vilas Boas, Alyssa M. of Rye Brook, NY
Viscomi, Lindsey Ann of South Windsor, CT
Viscuso, Christopher L. of New Haven, CT
Voyer, Jordan A. of West Hartford, CT
Walker, Katharine Louise of Johnson City, TN
Wallace, Kathryn Leaf of Waltham, MA
Walls Smith, Natasha L. of Washington, DC
Wang, Ding of New Haven, CT
Ward, Johanna Mei Ping of Cheshire, CT
Watson, Mary Elizabeth of Knoxville, TN
Weinberg, Michael Ross of Dartmouth, MA
West, Kayla Nicole of Chesterfield, MO
Weyman, Jeremy Aaron of Wethersfield, CT
Wilcox, Taylor Jade of Higganum, CT
Willner, Jaclyn Michelle of Philadelphia, PA
Wivell, Daniel Benjamin of Weatogue, CT
Wolfer, Nicole Alexandra of Woodbury, NY
Xia, Feifei of Stamford, CT
Yoon, Chanwon of Farmington, CT
Zgarni, Monia of Falls Church, VA
Zhang, Hao of New Haven, CT
Ziegler, Morgan Lee of New Britain, CT