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CONNECTICUT REPORTS

Vol. 335

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

ROGER SAUNDERS, TRUSTEE *v.* KDFBS, LLC, ET AL. (SC 20182)

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

Syllabus

The plaintiff, as trustee, sought to foreclose a mortgage on certain real property owned by the defendant L Co. In the first count of his complaint, the plaintiff sought foreclosure of his mortgage, alleging, inter alia, that there were encumbrances on the subject property that were subsequent and subordinate to his mortgage, including the mortgage of the defendants K and D. In the second count, the plaintiff sought a declaratory judgment that the mortgage of K and D, which was purportedly recorded before the plaintiff's mortgage, was subordinate to the plaintiff's mortgage on the ground that the plaintiff had no notice of K and D's mortgage because it had been incorrectly indexed by the town clerk's office. K and D denied the allegation in each count that their mortgage was subordinate to the plaintiff's mortgage and asserted a special defense that L Co. had mortgaged the subject property to them and that their mortgage was prior in right and title to the plaintiff's mortgage. The trial court rendered judgment for the plaintiff on both counts and ordered a foreclosure by sale. Prior to the sale date set by the court, K and D appealed from the judgment of foreclosure to the Appellate Court. The plaintiff moved to dismiss the appeal on the ground that the Appellate Court lacked subject matter jurisdiction because the priority of mortgages cannot be challenged until after the foreclosure sale has taken place, and that court dismissed the appeal for lack of a final judgment. On the granting of certification, K and D appealed to this court. *Held* that the Appellate Court improperly dismissed the appeal of K and D for lack of a final judgment, as the judgment of foreclosure by sale in the present case was a final judgment: the trial court rendered judgment for the plaintiff, and against K and D, on both counts of the complaint and ordered the full measure of relief sought therein, and the determination of priorities as between the plaintiff and K and D was an integral part of the judgment of foreclosure, as it was the joint status of K and D as a subsequent encumbrancer that permitted the foreclosure action to proceed against them because, if the mortgage of K and D had priority over the plaintiff's mortgage, K and D would not be proper parties to the foreclosure action and would retain their full property interest, rather than be left with only a claim to a portion of any proceeds from the sale after the plaintiff is paid in full; moreover, the plaintiff could not prevail on his claim that K and D were not appealing to the Appellate Court from the judgment of foreclosure by sale because their appeal

challenged the trial court's priority determination rather than the plaintiff's right to foreclose on his mortgage, as the priority issue was in dispute as to both counts of the complaint, and the mere fact that the trial court resolved this dispute by first disposing of the declaratory judgment count did not negate its legal effect on the foreclosure count; furthermore, there was no merit to the plaintiff's claim that an appeal of a priority determination before the trial court's approval of the sale and the rendering of a supplemental judgment is premature, as the priority of the foreclosing plaintiff is a proper and essential aspect of the judgment of foreclosure by sale, a supplemental judgment is intended to resolve disputes only as between parties holding interests subsequent in priority, the trial court's priority determination was ripe for adjudication before the sale was approved because K and D's loss of priority was neither hypothetical nor contingent on an event that could never transpire, and practical and pragmatic considerations, including the concern that the ability to calculate an appropriate bid on the property would be impaired by the uncertainty of whether the foreclosing plaintiff or a defendant encumbrancer has first priority, weighed strongly in favor of permitting an appeal before the foreclosure sale has been ratified.

Argued October 24, 2019—officially released May 18, 2020*

Procedural History

Action to foreclose a mortgage on certain of the named defendant's real property, and for other relief, brought to the Superior Court in the judicial district of Danbury and tried to the court, *Hon. William J. Lavery*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment of foreclosure by sale and determined the priority of the parties' mortgages as to the subject property, and the defendant Karen Davis et al. appealed to the Appellate Court, which granted the plaintiff's motion to dismiss the appeal, and the defendant Karen Davis et al., on the granting of certification, appealed to this court. *Reversed*; *further proceedings*.

Alexander Copp, with whom were *Neil R. Marcus* and, on the brief, *Barbara M. Schellenberg*, for the appellants (defendant Karen Davis et al.).

* May 18, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Jessica M. Signor, with whom were *Michael J. Jones* and *John J. Ribas*, for the appellee (plaintiff).

Opinion

McDONALD, J. The issue in this foreclosure action is whether a determination of the priority of mortgages can be challenged in an appeal from the judgment of foreclosure by sale, before the foreclosure sale has taken place, when the priority of the foreclosing plaintiff's mortgage is in dispute. The trial court rendered judgment in favor of the plaintiff, Roger Saunders, Trustee of Roger Saunders Money Purchase Plan, on his two count complaint seeking a judgment of foreclosure on certain real property and a declaratory judgment that his mortgage had priority over a purported mortgage on the property held by the defendants Karen Davis and Daniel Davis. The Appellate Court summarily dismissed the Davis defendants' appeal challenging the priority of the plaintiff's mortgage over their mortgage for want of a final judgment. We distinguish the present case from one in which there is a dispute among junior encumbrancers and reverse the Appellate Court's order summarily dismissing the appeal.

The following undisputed facts were found by the trial court or are otherwise reflected in the record. In March, 2008, the defendant KDFBS, LLC, purchased the subject property, a condominium in Ridgefield, by way of a deed that was recorded under its name in April, 2008. KDFBS is managed by its sole member, the defendant Brian Scanlon.[1]

In June, 2008, KDFBS executed a mortgage deed on the property in favor of the Davis defendants in the principal amount of $565,000. Although the signature line

[1] The United States of America and The Village at Ridgefield Condominium Association, Inc., who had encumbrances on the subject property that were subsequent and subordinate to the plaintiff's mortgage, were also named as defendants but are not participating in the present appeal.

and the acknowledgement clause of the deed reflected that Scanlon was executing the deed in his capacity as a member of KDFBS, his designation as a member was erroneously omitted in the grantor clause at the top of the mortgage deed. The Ridgefield town clerk's office indexed the deed under Scanlon's personal name as the grantor.

In October, 2009, KDFBS executed a second mortgage deed on the Ridgefield property in favor of the plaintiff as security for a joint loan in the amount of $110,000 to KDFBS and to Scanlon individually. Scanlon told the plaintiff that he would have a first mortgage on the property. To ensure his security for the loan, the plaintiff had a title search conducted. That search revealed no mortgages of record in KDFBS' chain of title. The plaintiff's mortgage deed was duly recorded in October, 2009.

In December, 2009, the Ridgefield town clerk's office changed the official index for the Davis mortgage after an unidentified person brought the indexing error to the town clerk's attention. A correction report was issued, and the Davis mortgage was changed from the grantor index for Scanlon to the index for KDFBS.[2]

KDFBS and Scanlon subsequently defaulted on their obligation to the plaintiff, which gave rise to the present action. In the first count of the complaint, the plaintiff

[2] The Davis defendants submitted a copy of the Ridgefield index for KDFBS, as it stood after the correction report was issued, as an exhibit. That index lists the Davis mortgage according to the date on which it was executed, such that it immediately follows the warranty deed by which KDFBS received the property and retains the same page and volume number as originally recorded. Although evidence was submitted to establish these facts, the plaintiff's complaint did not allege that the correction report had been issued or that the Davis mortgage had been reindexed. Neither the Davis defendants nor the trial court addressed the anomaly arising from the fact that the declaratory judgment count alleged that the Davis mortgage was outside KDFBS' chain of title but the foreclosure judgment count did not allege that the mortgage was brought back into that chain of title.

sought foreclosure of his mortgage. In addition to asserting allegations regarding the default, this count alleged that there were encumbrances on the subject property that were subsequent and subordinate to the plaintiff's mortgage, among which was the purported Davis mortgage, which was recorded in 2008. In the second count, the plaintiff sought a declaratory judgment that the 2008 Davis mortgage was subordinate to the plaintiff's 2009 mortgage because the plaintiff had no notice of it due to it having been indexed under Scanlon's name.[3]

The Davis defendants filed an answer denying the allegation in each count that their mortgage was subordinate to the plaintiff's mortgage. They also asserted a special defense that KDFBS, acting through its duly authorized member, Scanlon, had mortgaged the subject property to them and that this mortgage was prior in right and title to the plaintiff's mortgage.

KDFBS was defaulted for failure to appear and Scanlon was defaulted for failure to plead. The plaintiff then filed a motion for a judgment of foreclosure by sale. The motion was supported by an affidavit of debt totaling $176,467.50, an affidavit of attorney's fees in the amount of $18,345, and an appraisal assessing the property's fair market value at $310,000.

Following a contested trial between the plaintiff and the Davis defendants, the court rendered judgment in favor of the plaintiff on both counts and ordered a foreclosure by sale.

Prior to the sale date set by the court, the Davis defendants appealed from the judgment. The plaintiff moved

[3] The plaintiff alternatively sought a declaration that the Davis mortgage was invalid because it was granted by an entity other than the record owner. The trial court did not expressly acknowledge this alternative theory, but its findings that "a mortgage deed from KDFBS to the [Davis defendants] was executed and recorded" and that this deed was subordinate to the plaintiff's mortgage implicitly rejects that alternative theory.

to dismiss the appeal, contending that the Appellate Court lacked subject matter jurisdiction because its case law established that priority of mortgages cannot be challenged until after the foreclosure sale has taken place. See, e.g., *Moran* v. *Morneau*, 129 Conn. App. 349, 357, 19 A.3d 268 (2011). The Appellate Court thereafter issued an order summarily dismissing the appeal for lack of a final judgment. The Davis defendants' certified appeal to this court followed.

The certified question is framed as whether the Appellate Court properly dismissed the appeal "for lack of a final judgment in accordance with *State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983)." *Saunders* v. *KDFBS, LLC*, 330 Conn. 915, 193 A.3d 559 (2018). *Curcio* sets forth two circumstances in which an interlocutory ruling is deemed to have the attributes of a final judgment so as to permit an immediate appeal.[4] See *State* v. *Curcio*, supra, 31. The Davis defendants contend that *Curcio* is inapplicable to the present case, however, because they are, in fact, appealing from a final judgment. Alternatively, the Davis defendants rely on the fact that a declaratory judgment is designated by statute to "have the force of a final judgment." General Statutes § 52-29 (a).

The plaintiff makes two arguments premised on the fact that the trial court has not yet approved a sale of the property or rendered the supplemental judgment that determines the priority of encumbrancers in distributing proceeds from the sale. First, he contends that these facts demonstrate that the underlying decision was an interlocutory order that was not appealable under either circumstance set forth in *Curcio*. Second, he contends that Appellate Court precedent demon-

[4] Under *Curcio*, an interlocutory order or action is treated as a final judgment if either (1) "the order or action terminates a separate and distinct proceeding," or (2) "the order or action so concludes the rights of the parties that further proceedings cannot affect them." *State* v. *Curcio*, supra, 191 Conn. 31.

strates that the appeal is not ripe before these acts occur. We agree with the Davis defendants' principal argument and, therefore, do not separately consider the effect of the judgment rendered on the declaratory judgment count.

"It is axiomatic that, except insofar as the constitution bestows upon [an appellate court] jurisdiction to hear certain cases; see *Fonfara* v. *Reapportionment Commission*, 222 Conn. 166, 610 A.2d 153 (1992); the subject matter jurisdiction of the Appellate Court and of [the Supreme Court] is governed by statute. *Grieco* v. *Zoning Commission*, 226 Conn. 230, 231, 627 A.2d 432 (1993). It is equally axiomatic that, except insofar as the legislature has specifically provided for an interlocutory appeal or other form of interlocutory appellate review; see, e.g., General Statutes § 52-278*l* (prejudgment remedies); General Statutes § 54-63g (petition for review of bail); General Statutes § 51-164x (court closure orders); *State* v. *Ayala*, 222 Conn. 331, 340, 610 A.2d 1162 (1992); appellate jurisdiction is limited to final judgments of the trial court." (Internal quotation marks omitted.) *Conetta* v. *Stamford*, 246 Conn. 281, 289–90, 715 A.2d 756 (1998).

Both parties cite as controlling authority a line of Appellate Court cases holding that, in a foreclosure by sale, "there are typically three appealable determinations: the judgment ordering a foreclosure by sale, the approval of the sale by the court and the supplemental judgment [in which the proceeds from the sale are distributed]."[5] *Moran* v. *Morneau*, supra, 129 Conn.

[5] "By way of contrast, the strict foreclosure process typically presents only one judgment or ruling that is properly appealable, the judgment of strict foreclosure, because the effect of strict foreclosure is to vest title to the real property absolutely in the mortgagee, and to do so without any sale of the property. . . . Any motion for the determination of priorities in a strict foreclosure action must be filed prior to the rendering of judgment." (Citations omitted.) *Moran* v. *Morneau*, supra, 129 Conn. App. 355 n.6.

App. 355; see also *Glenfed Mortgage Corp.* v. *Crowley*, 61 Conn. App. 84, 88–89, 763 A.2d 19 (2000) (citing cases). The first determination is deemed final if the trial court has determined the method of foreclosure and the amount of the debt. *Moran* v. *Morneau*, supra, 356; *Danzig* v. *PDPA, Inc.*, 125 Conn. App. 254, 261, 11 A.3d 153 (2010), cert. denied, 300 Conn. 920, 14 A.3d 1005, cert. denied sub nom. *Dadi* v. *Danzig*, 564 U.S. 1044, 131 S. Ct. 3077, 180 L. Ed. 2d 899 (2011); see, e.g., *Benvenuto* v. *Mahajan*, 245 Conn. 495, 501, 715 A.2d 743 (1998) (judgment of strict foreclosure was appealable even though recoverability or amount of attorney's fees for litigation remains to be determined); *Willow Funding Co., L.P.* v. *Grencom Associates*, 63 Conn. App. 832, 836–38, 779 A.2d 174 (2001) (judgment of foreclosure by sale is final judgment even if trial court has not set sale date).

Although not cited as supporting authority in these Appellate Court cases, their conclusion that a judgment of foreclosure by sale is a final judgment is in accord with the rule set forth in Practice Book § 61-2. That rule recognizes that "[w]hen judgment has been rendered on an entire complaint . . . such judgment shall constitute a final judgment." Practice Book § 61-2. When this rule applies, there is no need to turn to the alternative, as set forth in *Curcio*, for establishing the finality of the judgment, even though some aspects of the case remain interlocutory. See *Speckner* v. *Riebold*, 86 N.M. 275, 277, 523 P.2d 10 (1974) (citing New York and New Mexico case law for proposition that judgment of foreclosure is "final in part and interlocutory in part" (internal quotation marks omitted)); see also *Willow Funding Co., L.P.* v. *Grencom Associates*, supra, 63 Conn. App. 837 ("foreclosure judgments are often appealable immediately"); 2 D. Caron & G. Milne, Connecticut Foreclosures (8th Ed. 2018) § 20-4:1, pp. 56–57 (noting that appeal from certain orders issued in connection with judgment of foreclosure by sale that will impact certain

parties' rights in subsequent proceedings, e.g., setting terms and conditions of sale, probably would be premature from judgment of foreclosure by sale).[6]

The judgment of foreclosure by sale in the present case manifestly meets the requirements of Practice Book § 61-2. The trial court rendered judgment in favor of the plaintiff, and thus against the Davis defendants, on both counts of the complaint and ordered the full measure of relief sought therein. See *Rockstone Capital, LLC* v. *Sanzo*, 332 Conn. 306, 313, 210 A.3d 554 (2019) ("the complaint sets the parameters for determining a final judgment"); *Morici* v. *Jarvie*, 137 Conn. 97, 103, 75 A.2d 47 (1950) ("[a final] judgment [in a foreclosure action] must either find the issues for the defendant or [find the issues for the plaintiff and] determine the amount of the debt, direct a foreclosure and fix the law days").

Our review of certain fundamental principles of Connecticut foreclosure law demonstrates that the determination of priorities as between the plaintiff and the Davis defendants was an integral part of the judgment of foreclosure. "A mortgage . . . is [a] conveyance of title to property that is given as security for the payment of a debt . . . ." (Internal quotation marks omitted.) *Ankerman* v. *Mancuso*, 271 Conn. 772, 778, 860 A.2d 244 (2004). "The purpose of the judicial sale in a foreclosure action is to convert the property into money and, following the sale, a determination of the rights of the parties in the funds is made, and the money received from the sale takes the place of the property." (Internal quotation marks omitted.) *Mortgage Electronic Registration Systems, Inc.* v. *White*, 278 Conn. 219, 229, 896 A.2d 797 (2006); see also General Statutes § 49-27. "[T]he rights of the mortgagor [or debtor] in the . . . property are

[6] Unless otherwise indicated, all citations in this opinion to this treatise on Connecticut foreclosures are to the 2018 edition.

terminated by confirmation of the foreclosure sale, and subsequent to such sale, any interest the mortgagor [or debtor] may claim is in the proceeds of the sale solely and not in the property." (Internal quotation marks omitted.) *Mortgage Electronic Registration Systems, Inc.* v. *White*, supra, 230.

The interests of the foreclosing plaintiff and the defendants holding *subsequent* encumbrances are similarly impacted. See *Farmers & Mechanics Savings Bank* v. *Sullivan*, 216 Conn. 341, 354, 579 A.2d 1054 (1990) ("[i]n a foreclosure proceeding the trial court must exercise its discretion and equitable powers with fairness not only to the foreclosing mortgagee, but also to *subsequent* encumbrancers and the owner" (emphasis added; internal quotation marks omitted)); 1 D. Caron & G. Milne, supra, § 4-2, p. 205 ("all encumbrancers *subsequent* in right to the interest being foreclosed must be made parties to the action" (emphasis added)); see also General Statutes § 49-30 (providing procedure when mortgage or lien on real estate has been foreclosed and party holding encumbrance subsequent or subordinate to such mortgage or lien has been omitted or has not been foreclosed of such interest or encumbrance).

Because "the foreclosure of a mortgage or lien can be binding only on subsequent encumbrancers, a first mortgagee cannot be affected by the foreclosure of a subsequent interest. Thus, any sale ordered by a judgment in such action must be subject to the prior encumbrance." 1 D. Caron & G. Milne, supra, § 7-17:2, p. 514; see *Voluntown* v. *Rytman*, 27 Conn. App. 549, 556, 607 A.2d 896 ("[a] foreclosure by sale furnishes conflicting claimants an ideal forum for litigating their differences without prejudicing prior encumbrancers" (internal quotation marks omitted)), cert. denied, 223 Conn. 913, 614 A.2d 831 (1992); see also *Mortgage Electronic Registration Systems, Inc.* v. *White*, supra, 278 Conn. 230 ("[T]he estate that passes by committee deed to a pur-

chaser at a foreclosure sale is no more nor less than the estate that had been held by the mortgagor or lien holder, minus the interests of parties to the foreclosure action that had been terminated during the sale. If that estate is encumbered by a valid mortgage that was not foreclosed, then the estate that passes to the purchaser is subject to that mortgage.").

These principles demonstrate that, if the Davis defendants' mortgage had priority over the plaintiff's mortgage, the Davis defendants would not be proper parties to the foreclosure action and would retain their full property interest, rather than be left with only a claim to a portion of any proceeds from the sale after the plaintiff is paid in full. It was their joint status as a subsequent encumbrancer that permitted the foreclosure action to proceed against them. Clearly, then, the priority determination at issue was essential to the judgment of foreclosure.

The plaintiff makes two principal arguments as to why this rule of finality should not apply to the priority dispute in the present case, neither of which we find persuasive. The plaintiff first contends that, because the Davis defendants' appeal challenges the trial court's priority determination, not the plaintiff's right to foreclose on his mortgage, the Davis defendants are not appealing from the judgment of foreclosure by sale.[7] The plaintiff's argument ignores the fact that the priority issue was in dispute at trial as to both counts of the complaint—the Davis defendants denied the allegation in the foreclosure count that their mortgage was subordinate to the plaintiff's mortgage and asserted a special defense to the declaratory judgment count. The mere fact that the trial court resolved this dispute by first

[7] The plaintiff frames this issue as the Davis defendants abandoned their right to appeal from the judgment of foreclosure by not raising that issue on appeal.

disposing of the declaratory judgment count does not negate its legal effect on the foreclosure count. If the Davis defendants are successful on appeal to the Appellate Court, they will be entitled to judgment in their favor, not only on the declaratory judgment count, but also on the foreclosure count. The fact that the judgment of foreclosure in favor of the plaintiff would stand as against the mortgagor and the remaining defendant encumbrancers, whose encumbrances are conceded to be subordinate to that of the plaintiff, is immaterial.

The plaintiff's second argument against allowing an immediate appeal from the judgment of foreclosure by sale, resting primarily on two Appellate Court cases, is that an appeal of a priority determination before the court's approval of the sale and the rendering of the supplemental judgment is premature. See *J & E Investment Co., LLC* v. *Athan*, 131 Conn. App. 471, 27 A.3d 415 (2011); *Moran* v. *Morneau*, supra, 129 Conn. App. 349. The plaintiff contends that, under *Moran* and *Athan*, even when the trial court properly makes a priority determination in connection with the judgment of foreclosure by sale, as in the present case, any appeal must await the approval of the sale and the rendering of the supplemental judgment. The plaintiff also points to the implausible possibility that the property could sell for an amount so far in excess of its fair market value that the sale could yield sufficient funds to satisfy the security interests of both the plaintiff and the Davis defendants.[8] We disagree.

We begin with an overview of the two Appellate Court cases on which the plaintiff relies. Like the present

[8] The amount of debt owed to the Davis defendants is not in the record. The face value of the Davis mortgage, executed less than eight years before the present action was commenced, is $565,000. The total debt owed to the plaintiff, including attorney's fees, was approximately $195,000. Assuming the full value of the Davis mortgage to roughly approximate the debt, the combined debt would be $760,000. The plaintiff's expert appraised the property's fair market value at $310,000.

case, both cases involved a priority determination as between the foreclosing plaintiff and a defendant encumbrancer. Unlike the present case, however, the issue of priorities was not put in dispute by way of a responsive pleading; the defendants were defaulted and raised the issue by way of a motion for a determination of priorities *after* the judgment of foreclosure was rendered. In each case, the appeal was dismissed for lack of a final judgment under *Curcio*.

In *Moran*, after the trial court rendered judgment of foreclosure by sale, the court granted the defaulting defendant encumbrancer's motion for a determination of priorities of the parties' interests in the subject property, ruling that the defendant held first priority. *Moran* v. *Morneau*, supra, 129 Conn. App. 351–52. The plaintiff then appealed from that ruling. Id., 352. In dismissing the appeal, the Appellate Court emphasized that the plaintiff had not filed a timely appeal from the judgment of foreclosure by sale, which was an appealable decision, and instead had appealed from a postjudgment order, which was an interlocutory decision.[9] Id., 356 and n.7. It noted that "[t]he fact that an appealable final judgment has occurred in a case does not, by itself, render a subsequent interlocutory order immediately appealable." Id., 356 n.7.

The court in *Moran* further observed that neither of the other two decisions recognized as amenable to immediate appeal—approval of the sale and the supplemental judgment—had yet occurred. Id., 356–57. The Appellate Court concluded that, although it was not per

[9] It is unclear whether the Appellate Court in *Moran* was suggesting that the plaintiff could have, and should have, appealed from the judgment of foreclosure by sale, and the Appellate Court does not indicate on what basis the plaintiff would have been aggrieved by such a judgment prior to the determination of priorities. It is also unclear whether the Appellate Court was suggesting that the plaintiff could have appealed if the determination of priorities had been made before the judgment of foreclosure was rendered.

se improper for the trial court to have made the determination of priorities before the sale; id., 358; it was well established that such rights should be determined in the supplemental judgment: "Pursuant to . . . § 49-27, entitlement to proceeds of the sale, and the amount of such entitlements, is to be determined by the court in a supplemental proceeding after the sale has been ratified by the court. *Voluntown* v. *Rytman*, [supra, 27 Conn. App. 556]. Our Supreme Court has long recognized that the decree of foreclosure by sale should not adjudicate the rights of the parties to the fund or funds realized; rather, such rights should be determined by way of a supplemental judgment. *Gault* v. *Bacon*, 142 Conn. 200, 203, 113 A.2d 145 (1955); *City National Bank* v. *Stoeckel*, 103 Conn. 732, 744, 132 A. 20 (1926). . . . Clearly, a resolution of such issues provides the very raison d'etre of supplemental judgment proceedings. D. Caron & G. Milne, [Connecticut Foreclosures (4th Ed. 2004) § 8.02B], p. 188." (Footnote omitted; internal quotation marks omitted.) *Moran* v. *Morneau*, supra, 129 Conn. App. 356–57. Relying on this authority, the Appellate Court concluded that the plaintiff's claim to first priority would be subject to vindication in an appeal following the supplemental judgment. Id., 358.

In *Athan*, the trial court had resolved the priority issue in favor of the defendant mortgagee, raised by way of motion, after the court had opened the judgment of strict foreclosure and ordered the certificate of foreclosure dissolved. See *J & E Investment Co., LLC* v. *Athan*, supra, 131 Conn. App. 478. The plaintiff filed its appeal before the trial court rendered judgment of foreclosure. Id., 478, 483. The Appellate Court dismissed the plaintiff's appeal for lack of a final judgment insofar as it challenged the trial court's determination of priority. See id., 482, 485. The court observed that "[a] judgment of foreclosure constitutes an appealable final judgment when the court has determined the method of foreclo-

sure and the amount of the debt"; id., 483; neither of which had been determined in that case. Id. Although that holding would be dispositive of the appeal, the Appellate Court went on to observe that, if the trial court were to order a judgment of foreclosure by sale, "[that] court recently ha[d] concluded that the adjudication of priorities is not a final judgment for the purposes of appeal until a sale is approved and the court renders a supplemental judgment." Id., 484, citing *Moran* v. *Morneau*, supra, 129 Conn. App. 357.

The Davis defendants suggest that *Moran* and *Athan* can be distinguished from the present case on procedural grounds. We agree with respect to *Athan*. The fact that an appeal was taken in *Athan* before a judgment of foreclosure was rendered clearly resulted in an impermissible interlocutory appeal under our final judgment jurisprudence. In the present case, no such defect exists because the appeal was taken after the judgment of foreclosure by sale was rendered.

The Davis defendants' view that *Moran* also can be distinguished on procedural grounds finds support in a treatise on Connecticut foreclosure law, which opines: "The dilemma that arose in *Moran* . . . comes about because the parties failed to address the priorities issue in the proper manner: within the context of the pleadings. Presumably, the *Moran* complaint alleged that the . . . mortgage [of the defendant Chase Home Finance, LLC] was subordinate to the plaintiff's claim. Chase's proper course of action should have been to answer that allegation by way of a simpl[e] denial. The issue then would have been closed, and the matter would have been determined at trial, or perhaps by summary judgment. In either event, no judgment, and hence no sale, would be ordered until the issue had been ruled upon, including a determination of any appeal from the judgment. *Under this scenario*, *the priorities ruling is not subject to the* Moran *defect that it is not a final*

and thus appealable judgment, since the ruling being appealed would be either a judgment of foreclosure in favor of the plaintiff, or a judgment in favor of the defendant." (Emphasis added.) 1 D. Caron & G. Milne, supra, § 9-2:2.1, pp. 542–43; see also 1 D. Caron & G. Milne, supra, § 6-1:7, p. 357 ("It is inappropriate for a defendant to challenge the priority of the foreclosing plaintiff's interest by means of a motion filed under Practice Book § 23-17 [allowing for a motion for determination of priorities in the context of assigning order of law days]. Such a challenge is properly accomplished by the filing of either an answer denying the allegation of the plaintiff's priority or, if warranted, a special defense. The issues are then closed, and the matter is heard upon a full trial . . . ."). This scenario is in accord with the Davis defendants' actions in the present case.

The treatise ignores, however, the essential substantive flaw in *Moran*, which *Athan* cited in dictum. Our disagreement with these Appellate Court cases lies in the fact that they do not recognize the important distinction between the nature of the interest held by a party claiming priority over the foreclosing plaintiff's mortgage and the interests held by encumbrancers holding interests admittedly subordinate to the plaintiff's interest, although in dispute as to that subordinate order.[10] As we previously explained, the priority of the foreclosing

[10] We suspect that overly general language in some of this court's opinions, in which we did not make clear that we were referring only to lien holders with subordinate interests, contributed to this misperception. See, e.g., *Citibank, N.A.* v. *Lindland*, 310 Conn. 147, 163–64, 75 A.3d 651 (2013) ("[T]he supplemental judgment performs a variety of functions. Not only does it ratify and confirm the sale, but it also determines the priorities of the encumbrancers and finds the debt due to each, as well as orders disbursement of the expenses of the sale and possession to the successful bidder. . . . This description of the purposes of the supplemental judgment procedure suggests that it is the mechanism to adjudicate all claims on the proceeds paid into the court and to determine their priorities. This would include the claims of the mortgager and the purchaser, in addition to those of lienors." (Citations omitted; internal quotation marks omitted.)).

plaintiff is a proper and, indeed, essential aspect of the judgment of foreclosure by sale. It determines whether the defendant encumbrancer claiming priority retains its property interest or merely holds a stake in any surplus proceeds of the sale, after the plaintiff is fully compensated for its debt. See General Statutes § 49-27.

The order of priority among subsequent encumbrancers, by contrast, does not alter the nature of their interest—an interest in the surplus proceeds, not the property—and thus is not a proper subject for the judgment of foreclosure. See *New Milford Savings Bank* v. *Lederer*, 112 Conn. 447, 450, 152 A. 709 (1930) ("[t]he enforcement of . . . [the mortgagee's] claim should not be delayed by any controversy among parties whose claims are subordinate to his" (internal quotation marks omitted)); 1 D. Caron & G. Milne, supra, § 9-2:2.1, p. 541 ("a determination of priorities between subsequent encumbrancers is properly deferred until after the sale, thus allowing the auction to proceed without delay pending resolution of the dispute between those parties at a later date"). It is for this reason and in this context that this court has recognized that " '[t]he decree of foreclosure by sale should not adjudicate the rights of the parties *to the funds realized*; those rights should be determined by way of a supplemental judgment. *City National Bank* v. *Stoeckel*, [supra, 103 Conn. 744].' *Gault* v. *Bacon*, [supra, 142 Conn. 203]." (Emphasis added.) *City National Bank* v. *Traffic Engineering Associates, Inc.*, 166 Conn. 195, 201–202, 348 A.2d 637 (1974); see also *Citibank, N.A.* v. *Lindland*, 310 Conn. 147, 163–64, 169, 172, 75 A.3d 651 (2013) (trial court had jurisdiction to open supplemental judgments "[b]ecause the relief [sought] relates to the proceeds from the sale, rather than to the property itself, and, therefore, would be addressed within the supplemental judgment process without regard to the status of the property"). Each of the cases in which we recited this principle—*Stoeckel*, *Gault*, and *Traffic*

Engineering Associates, Inc.—concerned a priority dispute among subsequent encumbrancers.[11]

The fact that the supplemental judgment is intended to resolve disputes only as between parties holding interests subsequent in priority to the plaintiff's mortgage is also plainly reflected in the statutory scheme. Section 49-27 provides in relevant part: "The proceeds of each such sale shall be brought into court, there to be applied if the sale is ratified, in accordance with the provisions of a supplemental judgment then to be rendered in the cause, specifying the parties who are entitled to the same and the amount to which each is entitled. If any part of the debt or obligation secured by the mortgage or lien foreclosed or by any *subsequent* mortgage or lien was not payable at the date of the judgment of foreclosure, it shall nevertheless be paid as far as may be out of the proceeds of the sale as if due and payable, with rebate of interest where the debt was payable without interest, provided, *if the plaintiff is the purchaser at any such sale, he shall be required to bring into court only so much of the proceeds as exceed the amount due upon his judgment debt, interest and costs*. . . ." (Emphasis added.) This statute plainly treats the plaintiff as having established priority and the priorities among subsequent encumbrancers as the proper subject of the supplemental judgment.

The plaintiff's argument that the appeal is premature until the sale has been approved has more support in

[11] A convoluted procedural posture in *City National Bank* v. *Traffic Engineering Associates, Inc.*, supra, 166 Conn. 195, makes this context less clear. In that case, after the judgment of foreclosure by sale was rendered, the foreclosing plaintiff became the successor to a defendant encumbrancer who claimed priority over another junior encumbrancer. A careful reading shows that both defendants held interests subordinate to the plaintiff's interest. See id., 196 ("[i]n this action, following a judgment ordering a foreclosure by sale, the Superior Court, pursuant to a motion made, determined priorities *among the defendants* with respect to the payment of any sums remaining from the sale *in excess of the amount due the plaintiff*" (emphasis added)).

the law but also, ultimately, is unpersuasive. See *Esposito* v. *Specyalski*, 268 Conn. 336, 345–46, 844 A.2d 211 (2004) ("We acknowledge that, because the trial court completely disposed of a counterclaim and a [third-party] action, at first blush, this case appears to be an appealable final judgment under [Practice Book] § 61-2. Our resolution of this appeal, however, rests with the question of whether the decision of the trial court is ripe for adjudication."). "[A] judicial sale becomes complete and creates a legal right to obligations among parties when it is confirmed and ratified by the court." (Internal quotation marks omitted.) *Mortgage Electronic Registration Systems, Inc.* v. *White*, supra, 278 Conn. 230. This means that the Davis defendants' property interest will not actually be terminated until the sale has been ratified. Nonetheless, their lack of priority right vis-à-vis the plaintiff has been conclusively established. A case is not ripe if it presents a hypothetical injury or a claim that is contingent on the happening of some event that has not yet and, indeed, may never transpire. See *Janulawicz* v. *Commissioner of Correction*, 310 Conn. 265, 271, 77 A.3d 113 (2013); *Esposito* v. *Specyalski*, supra, 346. The Davis defendants' loss of priority is neither hypothetical nor contingent on an event that may never transpire. If any outcome is purely hypothetical, it is the plaintiff's suggestion that the sale could yield sufficient proceeds to cover both the plaintiff's and the Davis defendants' mortgages, such that the Davis defendants would not actually be harmed by the priority determination. If that were a reasonable possibility, it would raise a question of aggrievement, not ripeness. The trial court's priority determination, however, plainly meets the standard for aggrievement. "Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." (Internal quotation marks omitted.) *Med-Trans of Connecticut*,

Inc. v. *Dept. of Public Health & Addiction Services*, 242 Conn. 152, 159, 699 A.2d 142 (1997); see also *Pomazi* v. *Conservation Commission*, 220 Conn. 476, 483, 600 A.2d 320 (1991).

Finally, to the extent that practical and pragmatic considerations may be taken into account to bolster our final judgment determination, they weigh strongly in favor of permitting an appeal before the sale has been ratified. As the authors of the foreclosure treatise observe, the ability to calculate an appropriate bid on the property is impaired by the uncertainty of whether the foreclosing plaintiff or a defendant encumbrancer has first priority. See 1 D. Caron & G. Milne, supra, § 9-2:2.1, p. 542.[12] This concern has been cited by another jurisdiction as a compelling reason "for requiring an appeal to be perfected in a foreclosure action from a judgment entry decreeing sale and determining the mortgage to be the first and best lien upon the land." *Queen City Savings & Loan Co.* v. *Foley*, 170 Ohio St. 383, 388, 165 N.E.2d 633 (1960). Although the plaintiff emphasizes the delay from allowing an immediate appeal, his position also could result in a delay. If a nonparty were to bid on the property without knowl-

[12] The authors of the foreclosure treatise posit the following hypothetical and its consequences in the absence of an appeal from the judgment of foreclosure by sale: "[T]he plaintiff is a mechanic's lienor with a debt of $200,000. The property is appraised at $250,000. In addition to the owner, the complaint names as a defendant a mortgagee with a debt of $150,000, and alleges that the mechanic's lien is prior in right to the mortgage. . . . The trial court [resolves a priority dispute] in favor of the mortgagee.

"[If no appeal is permitted before the sale] these circumstances place both the lienor and the mortgagee in a difficult position, since neither one can know whether it is bidding subject to, or free and clear of, the other's interest. If the lienor were to bid its debt (ignoring the costs of the sale) and were to be the high bidder, it would realize only $50,000 from the sale, since the balance of its bid ($150,000) would be paid to the mortgagee. Similarly, the mortgagee bidding its debt would find, if the lienor were later to be determined to be prior, that its entire bid would be paid to the lienor. In either case, either party would suffer a loss in the event [that the reviewing] court later ruled against it on the priority question." 1 D. Caron & G. Milne, supra, § 9-2:2.1, p. 542.

edge of the prior encumbrance and a reviewing court later were to restore that encumbrance, the nonparty may seek to set aside the sale on the ground of mistake.

The order of the Appellate Court dismissing the appeal is reversed and the case is remanded to that court for further proceedings.

In this opinion the other justices concurred.

LIME ROCK PARK, LLC *v.* PLANNING AND ZONING COMMISSION OF THE TOWN OF SALISBURY

(SC 20237)
(SC 20238)
(SC 20239)

Robinson, C. J., and Palmer, McDonald, Mullins, Kahn, Ecker and Vertefeuille, Js.

Syllabus

Pursuant to the statute (§ 14-164a (a)) governing motor vehicle racing, such racing "may be conducted at any reasonable hour of any week day or after twelve o'clock noon on any Sunday," and "[t]he legislative body of the . . . town in which the race or exhibition will be held may issue a permit allowing a start time prior to twelve o'clock noon on any Sunday, provided no such race or exhibition shall take place contrary to the provisions of any . . . town ordinances."

The plaintiff, which owns property in the town of Salisbury, brought an administrative appeal in the trial court, challenging the validity of certain amendments to the town's zoning regulations concerning the racing of motor vehicles that the defendant planning and zoning commission had adopted in 2015. Motor vehicle racing had taken place on a racetrack on the property since 1957, when the town had no zoning regulations. In 1958, a group of town residents and entities brought a nuisance action against the owners of the property at that time, alleging that the noise and traffic associated with the racing activities interfered with the enjoyment of their own properties. The trial court rendered judgment in 1959 for the plaintiffs and granted a permanent injunction prohibiting racing activities on the property on Sundays, limiting mufflered racing activities to certain times on weekdays, and prohibiting unmufflered racing except during certain hours on Tuesdays, ten Saturdays a year, and certain holidays. Shortly thereafter, the town adopted zoning regulations for

the first time, which allowed racing activities only during such hours as permitted by statute. In 1966 and 1968, the parties to the nuisance action entered into court approved stipulations that modified the court's original judgment with respect to, inter alia, certain aspects of unmuffled racing activity but maintained the ban on racing on Sundays. Sometime thereafter, the commission revised the zoning regulations to provide that racing activities on racetracks were specifically restricted to the hours permitted by the 1959 court order. The parties to the nuisance action entered into another stipulation in 1988, and the judgment was again modified accordingly. In 2013, the commission again revised the zoning regulations to provide that racing activities on racetracks were restricted to the hours permitted by the 1959 court order and the subsequent, related court orders. In 2015, the commission again amended the regulations and, in doing so, stated that those amendments were intended to maintain the status quo by codifying the restrictions that already were in place by virtue of the prior revisions of the regulations that incorporated by reference the previous court orders. The plaintiff challenged the commission's adoption of the 2015 amendments on numerous grounds, including the provision of the amendments prohibiting all racing activities on Sundays, which the plaintiff claimed was preempted by § 14-164a (a). The trial court permitted L Co., a group of entities and individuals who own property near the racetrack, to intervene in the appeal. L Co. contended that the plaintiff had waived its right to challenge the provision barring racing on Sunday because the plaintiff's predecessor in interest previously had stipulated to that limitation on the use of the property, and the 2015 amendments were intended to codify those stipulations. Following a trial, the court rejected L Co.'s waiver argument, sustained the portion of the plaintiff's appeal claiming that the regulation prohibiting racing on Sunday was preempted by § 14-164a (a), and denied the plaintiff's appeal in all other respects. Thereafter, the plaintiff, the commission, and L Co. filed separate appeals. *Held*:

1. The trial court correctly determined that the plaintiff did not waive its right to challenge the provision of the 2015 amendments prohibiting racing activities on the property on Sundays:

   a. Although a stipulated judgment has attributes of a private contract, which merely memorializes the bargained for position of the parties and generally may not be modified without the consent of the parties, a stipulated judgment also is a final judicial order, the prospective provisions of a court approved stipulated judgment are injunctive in nature, and the court, therefore, retains ongoing jurisdiction over the stipulated judgment during the duration of its existence and may modify it upon a showing of changed circumstances; accordingly, there was no merit to L Co.'s claims that the plaintiff's predecessor in interest, by entering into the stipulated judgments in 1966 and 1968 prohibiting racing on Sundays, had permanently waived the right of its successors

to seek a modification to the stipulations, and that, by waiving its right to modify the stipulations, the plaintiff's predecessor in interest also had waived its successor's right to challenge zoning regulations that codified the terms of the stipulations.

b. L Co.'s claim that, even if the stipulated judgments were injunctive in nature, the plaintiff and its predecessor in interest waived the right to challenge any modifications to the zoning regulations codifying the terms of the stipulations because they continuously abided by those terms for almost fifty years was unavailing, there having been no authority for the proposition that a party waives its right to seek a modification of an injunctive order, or to challenge the codification of such an order, merely by abiding by its terms.

c. This court declined to review L Co.'s claim that, even if the stipulated judgments were injunctive in nature and, therefore, subject to judicial modification, the plaintiff waived its right to challenge the prohibition on Sunday racing because the plaintiff and its predecessor in interest did not bring an administrative appeal to challenge the commission's prior amendments to the regulations incorporating by reference the court's orders prohibiting Sunday racing: L Co. provided no authority or analysis for the proposition that a party's failure to challenge a zoning amendment bars the party from challenging a subsequent amendment that was intended to recodify the original amendment in different language, and, therefore, the issue was inadequately briefed; moreover, even if this court assumed that a party cannot challenge an amendment to zoning regulations that merely recodifies a preexisting regulation using different language, in light of comments made by the commission's counsel and L. Co. itself during deliberations on the adoption of the 2015 amendments, it was not clear that the purpose of the 2015 amendments was merely to recodify the previous amendments, and L Co. provided no analysis with respect to that issue.

2. The trial court incorrectly concluded that § 14-164a (a) preempted the provision of the 2015 amendments prohibiting racing activities on Sundays: this court, having determined that the language of § 14-164a (a) was not clear and unambiguous, examined extratextual sources and the genealogy of the statute and concluded that § 14-164a (a) was prohibitory for preemption purposes in that it was intended only to bar municipalities from allowing racing activities that were statutorily prohibited, that is, racing during unreasonable hours on weekdays and before 12 p.m. on Sundays without a permit, and that it was not intended to confer the absolute right to engage in motor vehicle racing activities that were statutorily permitted; accordingly, § 14-164a (a) did not preempt the more restrictive provision of the 2015 amendments prohibiting all racing activities on Sundays; moreover, that interpretation of § 14-164a (a) as prohibitory did not render the statute meaningless because it still barred municipalities from allowing racing activities during unreasonable hours on weekdays and before 12 p.m. on Sundays without a permit, and it

was of no consequence that § 14-164a (a) allows towns to adopt ordinances that are more restrictive than the statute, whereas, in the present case, the restrictions on racing activities on Sundays were imposed by zoning regulation, because the words "ordinance" and "regulation" frequently are used interchangeably, and the plaintiff did not explain why the legislature would have intended to limit the application of § 14-164a (a) solely to enactments by a town's legislative body via ordinance and to exclude enactments by a town's zoning commission via zoning regulation.

3. The trial court incorrectly concluded that the word "weekday," as used in the 2015 amendments, did not include Saturday and, accordingly, that mufflered racing is prohibited on Saturdays under the 2015 amendments; notwithstanding L Co.'s claim that the modern usage of the word "weekday," which was not specifically defined by the zoning regulations, excludes both Saturday and Sunday, this court was persuaded, and both the plaintiff and the commission agreed, that "weekday," as used in the 2015 amendments, was intended to include Saturday, as numerous dictionaries define "weekday" to include Saturday, this court's older case law used the word "weekday" to refer to any day of the week other than Sunday, and the language used in the 1959 memorandum of decision in the nuisance action, as well as in the language of the 1988 stipulation and a certain provision of the 2015 amendments, all strongly suggested that the word "weekday" was meant to include Saturday.

4. The trial court correctly concluded that the provision of the 2015 amendments restricting unmufflered racing activities did not constitute a noise control ordinance for purposes of the Noise Pollution Control Act (§ 22a-73) and, therefore, did not require the approval of the Commissioner of Energy and Environmental Protection in order for it to be effective; the 2015 amendments contemplated two distinct uses of the property in question, namely, mufflered racing and unmufflered racing, those uses had two different noise levels, the regulations provided different operating days and times for those different activities, and a zoning regulation that differentiates between distinct land uses that produce different noise levels for purposes of determining whether a specific use is appropriate for a property does not by itself specify noise levels and, therefore, does not constitute a municipal noise control ordinance for purposes of § 22a-73.

5. The trial court incorrectly determined that the commission acted within its authority when it adopted, as part of the 2015 amendments, regulations requiring that the plaintiff obtain a special permit and site plan as a condition to filing a petition seeking an amendment to the 2015 amendments, and, because those regulations arbitrarily restricted the persons who could seek an amendment to the zoning regulations, they were invalid: the commission's claim that the plaintiff lacked standing to challenge the special permit requirement because it did not bar the plaintiff from filing a petition seeking an amendment to the regulations

was unavailing, as the plaintiff was adversely affected by such a requirement; furthermore, both the commission and L Co. conceded that, under the special permit requirement, persons other than the plaintiff who were affected by the racing activities on the property and the 2015 amendments regulating those activities, such as neighboring landowners, would not be able to seek an amendment to the 2015 amendments, and such a restriction on the classes of affected persons who could seek an amendment to the zoning regulations was therefore arbitrary.

Argued November 13, 2019—officially released May 22, 2020*

Procedural History

Appeal challenging the validity of certain amendments to the zoning regulations of the town of Salisbury pertaining to the operation of racetracks and uses accessory to racetracks, brought to the Superior Court in the judicial district of Litchfield, where Lime Rock Citizens Council, LLC, was permitted to intervene as a defendant; thereafter, the case was tried to the court, *J. Moore*, *J.*; judgment sustaining in part the appeal; subsequently, the court granted the parties' motions to reargue; thereafter, the court opened and amended its judgment, from which the parties filed separate appeals. *Reversed in part*; *judgment directed.*

Timothy S. Hollister, with whom were *Andrea L. Gomes* and, on the brief, *Joette Katz* and *Jessica Colin-Greene*, for the appellant in Docket No. SC 20237 and the appellee in Docket Nos. SC 20238 and SC 20239 (intervening defendant).

Charles R. Andres, for the appellant in Docket No. SC 20238 and the appellee in Docket Nos. SC 20237 and SC 20239 (named defendant).

Maureen Danehy Cox, with whom were *James K. Robertson, Jr.*, and *Jennifer Sills Yoxall*, for the appellant in Docket No. SC 20239 and the appellee in Docket Nos. SC 20237 and SC 20238 (plaintiff).

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

VERTEFEUILLE, J. These appeals arise from the adoption by the defendant, the Planning and Zoning Commission (commission) of the Town of Salisbury (town), of certain amendments to the town's zoning regulations restricting motor vehicle racing activities on property owned by the plaintiff, Lime Rock Park, LLC. The plaintiff appealed to the trial court from the adoption of the amendments. Thereafter, the intervening defendant, Lime Rock Citizens Council, LLC (council), filed a motion to intervene in the appeal, which the trial court granted. After a trial to the court, the court sustained the plaintiff's appeal in part and dismissed it in part. All three parties appealed from the decision, raising numerous claims.[1] We conclude that the trial court incorrectly (1) sustained the portion of the plaintiff's appeal claiming that the provision of the amended regulations prohibiting racing activities on Sundays was preempted by General Statutes § 14-164a (a),[2] (2) denied the portion of the appeal claiming that the commission lacked the authority to condition the filing of a petition to amend the regulations on obtaining a special permit, and (3) concluded that the amended regulations prohibited racing activities on Saturdays. We further conclude that the trial court correctly (1) determined that the plaintiff did not waive its right to challenge the regulation prohibiting Sunday racing, and (2) denied the portion of the plaintiff's appeal claiming that the amendments'

[1] Upon the granting of certification pursuant to General Statutes § 8-8 (o), the parties appealed to the Appellate Court, and we transferred the appeals to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[2] General Statutes § 14-164a (a) provides in relevant part: "No person shall operate a motor vehicle in any race, contest or demonstration of speed or skill with a motor vehicle as a public exhibition except in accordance with the provisions of this section. Such race or exhibition may be conducted at any reasonable hour of any week day or after twelve o'clock noon on any Sunday. The legislative body of the city, borough or town in which the race or exhibition will be held may issue a permit allowing a start time prior to twelve o'clock noon on any Sunday, provided no such race or exhibition shall take place contrary to the provisions of any city, borough or town ordinances. . . ."

restrictions on unmufflered racing are subject to the provision of General Statutes § 22a-73 (c), requiring the Commissioner of Energy and Environmental Protection to approve municipal noise control ordinances. Accordingly, we affirm in part and reverse in part the trial court's judgment.

The record reveals the following facts, which were found by the trial court or that are undisputed, and procedural history. It is appropriate to warn the reader at the outset that these facts reveal a long and complex history of disagreement between the owners of the property on which the racing activities take place and neighboring landowners regarding the use of the property. The plaintiff owns property located at 497 Lime Rock Road in the town (property). Since 1957, motor vehicle races and other contests and demonstrations of speed and skill have been conducted on a racetrack located on the property. In addition, the property has been the site of automobile shows and exhibitions, food concessions, camping, and television, movie and radio productions, with the associated use of lighting and sound equipment. At the time that these activities commenced in 1957, the town had no zoning regulations.

In 1958, a group of town residents and entities brought a nuisance action against the then owners of the property, in which they alleged that the racing activities on the property generated excessive noise, traffic and disruptive behavior that interfered with the plaintiffs' enjoyment of their property. See *Adams* v. *Vaill*, 158 Conn. 478, 480, 262 A.2d 169 (1969) (*Vaill III*) (discussing allegations of original nuisance action). After a hearing, the trial court in the nuisance action rendered judgment in favor of the plaintiffs and granted a permanent injunction prohibiting the property owners from conducting racing activities on Sundays. In addition, the injunction limited mufflered racing activities to weekdays between 9 a.m. and 10 p.m., and prohibited unmuf-

flered racing except during specified hours on Tuesdays, ten Saturdays per year, and certain holidays. See *Adams* v. *Vaill*, Superior Court, judicial district of Litchfield, Docket No. 15,459 (May 12, 1959) (*Vaill I*); see also *Vaill III*, supra, 480–81.

Shortly after the trial court rendered judgment in *Vaill I*, the town adopted zoning regulations for the first time. The regulations placed the property in a "Rural Enterprise" zoning district, in which a track for racing motor vehicles and accessory uses were permitted uses. Salisbury Zoning Regs. (1959) § 8.1.17. The regulations also allowed racing "during such hours as are permitted by [s]tatute." Id., § 8.1.17.1. At the time, the controlling statute provided that "any race, contest or demonstration of speed or skill with a motor vehicle as a public exhibition . . . may be conducted at any reasonable hour of any week day or after the hour of two o'clock in the afternoon of any Sunday, provided no such race or exhibition shall take place contrary to the provisions of any city, borough or town ordinances." General Statutes (1958 Rev.) § 29-143 (a).

In 1966, the parties to the *Vaill* case entered into a stipulation providing that the judgment in *Vaill I* would be modified to provide that the prohibition of Sunday racing applied to both mufflered and unmufflered racing, as well as several other changes. See *Adams* v. *Vaill*, Superior Court, judicial district of Litchfield, Docket No. 15,459 (March 2, 1966) (*Vaill II*) (stipulation between parties). The judgment was again modified in 1968 by a court order prohibiting unmufflered racing on the property. See *Adams* v. *Vaill*, Superior Court, judicial district of Litchfield, Docket No. 15,459 (August 26, 1968), aff'd, 158 Conn. 478, 262 A.2d 169 (1969). The impetus for this modification was the legislature's amendment of General Statutes (Cum. Supp. 1967) § 14-80 (c) to provide that the use of unmufflered motor vehicles was prohibited not only on public streets, but in

all locations. See *Vaill III*, supra, 158 Conn. 482–84; see also Public Acts 1967, No. 846 (deleting words "while such motor vehicle is being operated upon a street or highway" from statute prohibiting use of motor vehicles without mufflers).

In 1977 and 1978, a flurry of appeals were brought from certain decisions of the Salisbury Zoning Board of Appeals to the trial court regarding the activities that were permitted on the property (ZBA actions). The ZBA actions were resolved when the parties entered into a stipulation restricting the use of the property by campers and the hours that campers would be permitted to use the track entrance, as well as restricting the parking of nonofficial motor vehicles during certain hours of the day. Judgment was rendered accordingly in each of the ZBA actions (ZBA judgments).

At some point after March 11, 1974—the date on which the second revision to the Salisbury zoning regulations was adopted—and before February 23, 1981—the date on which the sixth revision was adopted—the commission amended the regulations applicable to racing activities on the property to provide that "[n]o races shall be conducted on any such track except during such hours as are permitted by [c]ourt [o]rder dated [May 12, 1959]," the date of the judgment in *Vaill I*.[3] Salisbury Zoning Regs. (1985) § 415.1. Before that amendment, the regulations continuously had provided that no races could be conducted "except during such hours as are permitted by [s]tatute." See Salisbury Zoning Regs.

[3] The trial court noted that the parties were unable to provide any documentation regarding the adoption of this regulation. On the basis of a copy of the 1974 revision of the zoning regulations that contained handwritten references to the third through sixth revisions of the Salisbury zoning regulations, as well as a handwritten notation containing the text of the amendment referring to the judgment in *Vaill I*, the court found that the amendment had been adopted at some point between the adoption of the second and sixth revisions.

(1959) § 8.1.17.1; Salisbury Zoning Regs. (1974) § 415.1. In 1975, the commission again amended the regulations to provide that the operation of a commercial racetrack was a special permit use.[4] See Salisbury Zoning Regs. (1985) § 412.

In 1988, the parties to the *Vaill* case[5] entered into a stipulation to prohibit motorcycle racing on the property and to allow some unmufflered racing in recognition of the legislature's amendment to General Statutes (Supp. 1969) § 14-80 (c) in 1969 to provide an exception to the prohibition on using a motor vehicle without a muffler when the vehicle is operated in a race. See *Adams* v. *Vaill*, Superior Court, judicial district of Litchfield, Docket No. 15,459 (March 21, 1988) (*Vaill IV*) (stipulation between parties); see also Public Acts 1969, No. 17, § 1. The judgment was modified accordingly.[6] In 2013, the commission amended the regulations to provide that "[n]o races shall be conducted on any such

[4] Neither the parties nor the trial court has explained how the court arrived at its conclusion that this amendment was adopted in 1975. The conclusion is undisputed, however.

[5] At the time of the 1988 modification, the Lime Rock Protection Committee, Inc., had been substituted as the plaintiff in the *Vaill* case and the then owner of the property, Lime Rock Associates, Inc., had been substituted as the defendant.

[6] On September 4, 2015, the plaintiff in the present case, which is a defendant in the *Vaill* case, again sought to modify the injunction in *Vaill*. Specifically, in its motion, the plaintiff sought to modify the present terms of the injunction by, among other things, (1) allowing it to conduct unmufflered racing activities on one Sunday per year after 12 p.m., (2) allowing mufflered racing activities on twenty Sundays per year; (3) allowing a start time of 9 a.m. for mufflered racing activities in the "[u]pper [a]rea" of the property on Sundays and after 12 p.m. on the racetrack, (3) changing the racing start time on Fridays from 10 a.m. to 9 a.m. and changing the finish time on Saturdays from 6 p.m. to 7 p.m., (4) allowing unmufflered racing activities on Fridays, and (5) reducing the number of Tuesdays that the plaintiff can conduct unmufflered racing activities from fifty-two per year to twenty per year, and allowing the plaintiff to conduct unmufflered racing activities on five Thursdays per year instead of on Tuesdays. The proceedings on the plaintiff's motion for modification have been stayed pending resolution of these appeals.

track except during such hours as permitted by [c]ourt [o]rder dated [May 12, 1959] and subsequent related [c]ourt [o]rders on file in the Planning and Zoning Office, or the Town Clerk's Office." Salisbury Zoning Regs. (2013) § 221.2 (a).

The amendments to the town's zoning regulations that are the subject of the present appeals were adopted on November 16, 2015 (2015 amendments).[7] In its ruling approving the amendments, the commission stated that

[7] The 2015 amendments to the regulations provide: "221.1 Track for Racing Motor Vehicles

"A track for racing motor vehicles, excluding motorcycles, as well as for automotive education and research in safety and for performance testing of a scientific nature, private auto and motorcycle club events, car shows, and certain other events identified in section 221.2 are permitted subject to the issuance of a special permit in compliance with the procedures and standards of these regulations and also subject to the following:

"a. No motor vehicle races shall be conducted on any such track except in accordance with the following parameters:

"(1) All activity of mufflered or unmufflered racing cars upon the asphalt track or in the paddock areas shall be prohibited on Sundays.

"(2) Activity with mufflered racing car engines shall be permitted as follows:

"A. On any weekday between [9 a.m.] and [10 p.m.] provided, however, that such activity may continue beyond the hour of [10 p.m.] without limitation on not more than six . . . occasions during any one calendar year.

"B. Permissible mufflers are those which meet the standards set forth in Section 14-80 (c) of the General Statutes of Connecticut, Revision of 1959, or as the same may be amended from time to time.

"(3) Activity with unmufflered racing car engines shall be permitted as follows:

"A. On Tuesday afternoon of each week between [12 p.m.] and [6 p.m.].

"B. On Saturdays, not more than ten . . . in number in each calendar year, between the hours of [9 a.m.] and [6 p.m.].

"C. On the ten . . . Fridays which precede the said ten . . . Saturdays between the hours of [10 a.m.] and [6 p.m.] for the purpose of testing, qualifying or performing such other activities as may be necessary or incidental to the direct preparation for races on the Saturdays specified, provided that no qualifying heats or races shall be permitted on such Fridays.

"D. In such event the scheduled activity for any of the said ten . . . Saturdays must be rescheduled for a 'rain date,' then the said 'rain date' and the Friday preceding it shall not be considered as one of the ten . . . days referred to in [p]aragraphs (b) and (c) above.

"E. On Memorial Day, Fourth of July and Labor Day between the hours of [9 a.m.] and [6 p.m.].

"(i) In the event any of said holidays falls on a Tuesday, Thursday or a Friday, there may be unmufflered activity on the day preceding the holiday between the hours of [12 p.m.] and [6 p.m.], but in the event the permissible

unmufflered activity of the Tuesday next preceding the holiday shall be forfeited.

"(ii) In the event any of said holidays falls on a Sunday, the next day (Monday) will be considered the holiday for these purposes.

"(iii) In no event shall any such holidays increase the number of Saturdays of permissible unmufflered activity beyond ten . . . as provided in [p]aragraph (b) above.

"(4) Prohibited activity upon the track property shall include the revving or testing of mufflered or unmufflered car engines on Saturdays and permitted holidays prior to [9 a.m.] and after [6 p.m.], excepting the transportation of said vehicles to and from the paddock areas on or off their respective trailers, which transporting, unloading or loading shall not commence before 7:30 a.m. or extend beyond 7:30 p.m.

"(5) The use of the track loudspeakers before [8 a.m.] and after [7 p.m.] is prohibited.

"(6) A 'racing car,' for purposes of this subsection, is defined as any car entered in an event on an asphalt track.

"(7) Racing of motorcycles is prohibited. Nevertheless, specifically permitted are nonracing motorcycle activities including but not limited to demonstrations, instruction, timing, testing, practice and photography.

"(8) The parameters set forth in this subsection may be amended by the [c]ommission upon filing and approval of (1) a special permit application in compliance with all requirements of these regulations, including a site plan identifying the location of all uses, accessory uses, buildings, structures, pavement, and all other improvements on the relevant property, and amendments to any of the parameters set forth above; and (2) a petition to amend the zoning regulations setting forth alternative parameters for this subsection.

"b. Where the land on which a race track is situated abuts or faces a residential zone district, there shall be a minimum of fifty foot buffer strips along each yard, or part thereof, so abutting or facing, which shall contain a screen of shrubbery not less than fifteen feet in width nor less than six feet in height within one year of the adoption of this amendment to the regulations. This screen shall thereafter be suitably and neatly maintained by the owner, tenant and/or their agent. Any such screen shall consist of at least fifty percent evergreens so as to maintain a dense screen at all seasons of the year.

"c. The lot shall have adequate frontage on or access to a principal traffic street or street capable of handling the volume of traffic to be generated thereon. The access and service roads connecting with the principal traffic street or streets shall be so located and designed as to avoid unsafe traffic conditions or congestion. Traffic control devices and lighting of access points at or across street or access intersections shall be provided at the expense of the owner when required and provision shall be made for safe pedestrian traffic to, from and within the lot. The design and location of access and intersections with public highways shall be subject to the approval of the [s]electmen for a town road or the Connecticut Department of Transportation for a state highway.

"d. Adequate off-street parking shall be provided to accommodate the vehicles of employees, proprietors, participants, customers, visitors and others.

"e. Not more than three signs, not more that [fifty] square feet each, advertising the use of the premises shall be permitted. Any sign not consistently visible from off the premises is permitted. Directional signs, not more than six square feet each, are permitted.

"f. No sign, with the exception of scoreboards, visible off the premises shall be illuminated by exposed tubes or other exposed light sources, nor shall any flashing sign be visible from off the premises. Spot or other lighting of any sign, building, structure, land track, parking space or any other part of the premises shall be so arranged that the light source is not visible from any point off the premises.

"221.2 Accessory [u]ses to a track for racing motor vehicles may include: retail stores, professional or business offices, fire or emergency services, ATMs, restaurants, and food stands. Accessory uses may also include the use of the premises for automobile shows, sale of motor vehicles during racing events, sale of automotive parts and accessories; car washes, auto service and repairs; filling stations; commercial parking; laundry; equipment storage; racing schools and clubs; indoor theaters; and other similar activities that are accessory to the operation of a recreational race track herein permitted. Other accessory uses may include the production, showing, or performance of television, motion picture or radio programs with their related lighting and sound equipment.

"221.3 Camping by spectators and participants is allowed as an accessory use to permissible automobile racing events subject to the following restrictions:

"a. All camping and camping vehicles shall be limited to locations within the infield of any asphalt race track existing as of the effective date of this regulation.

"b. No motor vehicles shall be parked in any [r]ace [t]rack outfield during the hours of [10 p.m.] to [6 a.m.] except those which are (1) on official track business; and (2) parked in the parking lot existing as of the effective date of this regulation.

"c. No traffic other than emergency or service vehicles shall be allowed between the hours of [11 p.m.] and [6 a.m.] on any accessway into any race track that abuts property located at 52 White Hollow Road.

"d. The standards set forth in this subsection may be amended by the [c]ommission upon filing and approval of (1) a special permit application in compliance with all requirements of these regulations, including a site plan identifying the location of all uses, accessory uses, buildings, structures, pavement, and all other improvements on the relevant property, and amendments to any of the restrictions set forth above; and (2) a petition to amend the zoning regulations setting forth alternative standards for this subsection.

"221.4 The following uses are deemed not to be accessory uses to a track for racing motor vehicles but are allowed subject to a special permit: Fireworks displays (with the exception of a single evening display during the annual Independence Day period in early July for charitable purposes), concerts, flea markets, craft fairs, food shows, non-automotive trade shows, and garden shows.

"221.5 If the holder of a special permit for a track for motor vehicle racing leases or otherwise authorizes a private organization to use all or part of

the amendments were intended to maintain the status quo by codifying the restrictions on racing activities that were already part of the town's zoning scheme by virtue of the previous regulations incorporating the terms of the stipulated judgment in *Vaill IV* and the ZBA judgments. The plaintiff appealed from the commission's adoption of the amendments pursuant to General Statutes §§ 8-8 and 8-9 on the ground that the commission had "acted illegally, arbitrarily, capriciously and in abuse of its discretion" when it adopted them. Specifically, the plaintiff contended that the amendments violated the requirement of General Statutes § 8-2[8] that zoning regulations be in conformity with the comprehensive plan; § 8-2 does not authorize the commission to engraft restrictions contained in judicial judgments into the zoning regulations; and the amendments did not serve any legitimate land use purpose. In addition, the plaintiff contended that the regulations limiting days and hours of racing activities were

its property to a third party, it shall require said party to comply with all provisions of these regulations, the special permit, and its conditions.

"221.6 If any portion of this section . . . shall be found by a court of competent jurisdiction to be illegal, it is the intent of this [c]ommission no part of [this] [s]ection . . . shall remain valid, including the amended table of uses adopted simultaneously herewith providing that a track for racing of motor vehicles shall be allowed by special permit in the [rural enterprise] [d]istrict; it being the intent of the [c]ommission that, if it is found that the [c]ommission lacks authority to regulate any aspect of [r]ace [t]rack use as set forth herein, then a track for [r]acing of [m]otor [v]ehicles shall be found to not be permitted in the [rural enterprise] [d]istrict, and any race track use in existence at the time of the adoption of these regulations shall have such rights as may exist as a nonconforming use under these regulations and Connecticut law." (Footnote omitted.) Salisbury Zoning Regs. (2015) §§ 221.1 through 221.6.

We note that paragraph (a) of § 221.1 includes the following footnote: "The parameters set forth [in paragraph (a)] are identical to those set forth in [the amended judgment in *Vaill IV*], which parameters were previously incorporated by reference in the zoning regulations." Salisbury Zoning Regs. (2015) § 221.1 (a) n.1.

Section 221.6 of the 2015 amendments was repealed on April 6, 2016.

[8] General Statutes § 8-2 (a) provides in relevant part: "The zoning commission of each city, town or borough is authorized to regulate, within the limits of such municipality . . . the location and use of buildings, structures and land for trade, industry, residence or other purposes . . . ."

preempted by § 14-164a (a); the regulations restricting unmufflered racing improperly regulated noise in violation of the requirement of § 22a-73 (c) that the Commissioner of Energy and Environmental Protection approve municipal noise control ordinances; the commission exceeded its authority under General Statutes § 8-3 (c) by requiring the plaintiff to file an application for a special permit, as well as a site plan, as a condition for seeking an amendment to the regulations; the regulations constituted illegal spot zoning; and the regulations did not conform to the town's plan of conservation and development. The commission and the council disputed these claims. In addition, the council contended that the plaintiff had waived its right to challenge the provision of the 2015 amendments prohibiting Sunday racing because its predecessor in interest had stipulated to that limitation on the use of the property in *Vaill II* and *Vaill IV*, which the amendments were intended to codify.

After a trial, the trial court concluded that the commission had not exceeded the authority conferred by § 8-2 when it adopted the 2015 amendments incorporating the terms of the stipulated judgments in *Vaill II* and *Vaill IV* and the ZBA judgments; § 14-164a (a) did not preempt the commission from regulating the hours of racing activities on weekdays but did preempt the commission from prohibiting racing on Sundays; the restrictions on unmufflered racing do not constitute a noise control ordinance subject to § 22a-73 (c); it was within the commission's authority to require the plaintiff to file an application for a special permit before it could seek an amendment to the regulations; the amendments did not constitute illegal spot zoning; and the amendments conformed to the town's plan of conservation and development.[9] In addition, the court determined that, because the amendments permitted

[9] The trial court issued its first memorandum of decision on January 31, 2018, sustaining the appeal in part and denying it in part, and it rendered

mufflered racing only on any "weekday," which the court concluded means Monday through Friday, they did not allow mufflered racing on Saturdays.[10] The court rejected the council's claim that the plaintiff, through its predecessor in interest, had waived any right to challenge the prohibition on Sunday racing when it entered into the stipulations that the amendments were intended to codify. Accordingly, the court sustained the portion of the plaintiff's appeal challenging § 221.1 (a) (1) of the 2015 amendments, which prohibits all racing activities on Sundays; see footnote 7 of this opinion; and denied the appeal in all other respects.

These appeals followed. See footnote 1 of this opinion. The council claims in its appeal that the trial court incorrectly determined that the plaintiff had not waived its right to challenge the 2015 amendments' prohibition on Sunday racing. In addition, both the council and the commission claim that the court incorrectly determined that § 14-164a (a) preempts the regulation prohibiting racing activities on Sundays. The plaintiff contends that the trial court incorrectly concluded that (1) the 2015 amendments allow mufflered racing only on any weekday, which does not include Saturdays,[11] (2) if the 2015

judgment accordingly. Thereafter, all three parties filed motions to reargue. The trial court granted the motions to reargue, opened the judgment and issued an amended memorandum of decision on July 17, 2018, which superseded the original memorandum of decision in all respects.

[10] The parties did not address in the proceedings before the trial court the issue of whether the word "weekday," as used in the amendments, includes Saturdays. The commission and the plaintiff appear to have assumed that "weekday" includes Saturdays, whereas the council appears to have assumed that it does not. The trial court reached its conclusion that mufflered racing is not allowed on Saturdays in the portion of its memorandum of decision summarizing the contents of the amendments.

[11] As we have explained, the plaintiff did not raise this claim in the proceedings before the trial court but appears to have assumed, sub silentio, that the word "weekday," as used in the 2015 amendments, includes Saturdays, whereas the council appears to have made the contrary assumption. See footnote 10 of this opinion. Because the record is adequate for review, the parties have briefed the issue, and neither the commission nor the council objects to our review, we review the claim.

amendments prohibit mufflered racing on Saturdays, that prohibition was not preempted by § 14-164a (a), (3) the 2015 amendments' restrictions on unmufflered racing are not subject to the provisions of § 22a-73 (c), and (4) the commission had the authority to adopt the regulations requiring the plaintiff to obtain a special permit as a precondition to seeking an amendment to the regulations.

I

Because it is potentially dispositive, we first address the council's claim that the plaintiff waived its right to challenge § 221.1 (a) (1) of the 2015 amendments, which prohibits racing activities on the property on Sundays, because its predecessor in interest stipulated in *Vaill II* and *Vaill IV* to that limitation on the use of the property, and the plaintiff and its predecessor have continuously abided by those stipulations.[12] The council contends that, unlike an injunctive order, a stipulated judgment is a contract between the parties and is not subject to later modification by the trial court in light of changed circumstances. In addition, the council claims that, even if the stipulated judgments were subject to modification, the plaintiff waived its right to challenge the prohibition on Sunday racing when it and its predecessor in interest failed to appeal from previous amendments to the zoning regulations that codified the terms of the stipulated judgments. The plaintiff contends that it did not waive its right to challenge the prohibition on Sunday racing because (1) the stipulated judgments were injunctive in nature, and courts always retain juris-

[12] After the plaintiff, which is a defendant in the *Vaill* case, filed a motion to modify the judgment in *Vaill*, the council filed a motion to intervene in that case, which the trial court granted. The commission states in its brief to this court that, "because the council's waiver argument relies on specific pleadings and stipulations in a matter [in which] the commission is not a party," it took no position on this claim in the trial court and takes no position on the council's claim on appeal.

diction to modify injunctions in light of changed circumstances, and (2) even if the plaintiff waived its right to seek later modifications of the stipulated judgments, that waiver does not apply to its right to challenge the amendments to the zoning regulations. We agree with the plaintiff that the stipulated judgments were injunctive in nature and, therefore, were subject to the ongoing jurisdiction of the trial court to modify them in light of changed circumstances. Accordingly, we reject the council's claim that the plaintiff waived its right to challenge the prohibition on Sunday racing.

We begin with the standard of review. Ordinarily, whether a person has waived a right is a question of fact subject to review for clear error. See *AFSCME, Council 4, Local 704* v. *Dept. of Public Health*, 272 Conn. 617, 622, 866 A.2d 582 (2005). "[W]hen a trial court makes a decision based on pleadings and other documents, [however] rather than on the live testimony of witnesses, wereview its conclusions as questions of law." *State* v. *Lewis*, 273 Conn. 509, 516–17, 871 A.2d 986 (2005). Because the trial court's determination in the present case was based solely on the pleadings and stipulated judgments, our review is plenary.

We next review the substantive law of waiver. "Waiver is the intentional relinquishment or abandonment of a known right or privilege." (Internal quotation marks omitted.) *AFSCME, Council 4, Local 704* v. *Dept. of Public Health*, supra, 272 Conn. 623. "Waiver is based upon a species of the principle of estoppel and where applicable it will be enforced as the estoppel would be enforced. . . . Estoppel has its roots in equity and stems from the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights [that] might perhaps have otherwise existed . . . . 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 reason-

able to do so." (Citations omitted; internal quotation marks omitted.) Id.

In support of its claim that the plaintiff waived its right to challenge the 2015 amendments' prohibition on Sunday racing, the council relies heavily on the principle that a stipulated judgment constitutes "a contract of the parties acknowledged in open court and ordered to be recorded by a court of competent jurisdiction." *Bryan* v. *Reynolds*, 143 Conn. 456, 460, 123 A.2d 192 (1956). "The essence of the [stipulated] judgment is that the parties to the litigation have voluntarily entered into an agreement setting their dispute or disputes at rest and that, upon this agreement, the court has entered judgment conforming to the terms of the agreement." Id. "It necessarily follows that if the judgment conforms to the stipulation it cannot be altered or set aside without the consent of all the parties, unless it is shown that the stipulation was obtained by fraud, accident or mistake." Id., 460–61.

Thus, the council contends that (1) unlike an ordinary judgment granting a permanent injunction in a private nuisance action, which can be modified if relevant circumstances change; see *Vaill III*, supra, 158 Conn. 482 ("[i]t cannot be doubted that courts have inherent power to change or modify their own injunctions where circumstances or pertinent law have so changed as to make it equitable to do so"); a stipulated judgment in a private nuisance action cannot be modified in the absence of a showing of fraud, accident or mistake, and (2) when a party has stipulated to a permanent, unmodifiable limitation on the use of a particular property in a private nuisance action, the party has implicitly waived the right to challenge any *zoning regulation* that is consistent with that limitation.[13] In other words,

[13] We note that the plaintiff makes no claim that the stipulations in *Vaill II* and *Vaill IV* are not binding on it or that, if its predecessor in interest waived the right to challenge amendments to the zoning regulations that were consistent with the terms of those stipulations, it would not be bound by that waiver. It claims only that there was no such waiver.

the council contends the plaintiff's predecessor in interest waived the right to challenge any zoning regulation codifying the terms of the stipulated judgments because the stipulations were *not* modifiable injunctions.

We are not persuaded. Although a stipulated judgment has attributes of a private contract that "merely memorializes the bargained for position of the parties"; *Williams* v. *Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983); "[t]he terms of [a stipulated judgment or consent] decree, unlike those of a simple contract, have unique properties. A consent decree has attributes of both a contract and of a judicial act." Id.; see also id. ("[a] consent decree . . . is also a final judicial order"). Accordingly, "[o]nce approved, the prospective provisions of the consent decree *operate as an injunction*. . . . The injunctive quality of consent decrees compels the court to: [1] retain jurisdiction over the decree during the term of its existence . . . [2] protect the integrity of the decree with its contempt powers . . . and [3] *modify the decree should changed circumstances subvert its intended purpose*." (Citations omitted; emphasis added; internal quotation marks omitted.) Id.

Similarly, the court in *Mendly* v. *Los Angeles*, 23 Cal. App. 4th 1193, 28 Cal. Rptr. 2d 822 (1994), observed that, "[i]n a stipulated judgment, or consent decree, litigants voluntarily terminate a lawsuit by assenting to specified terms, which the court agrees to enforce as a judgment. . . . As the [California Supreme Court] has recognized, stipulated judgments bear the earmarks both of judgments [rendered] after litigation and contracts derived through mutual agreement . . . . It is settled that where there has been a change in the controlling facts upon which a permanent injunction was granted, or the law has been changed, modified or extended, or where the ends of justice would be served by modification or dissolution, the court has the inherent power to vacate or modify an injunction where the

circumstances and situation of the parties have so changed as to render such action just and equitable. . . . This principle governs even though the judgment providing the injunctive relief is predicated upon stipulation of the parties." (Citations omitted; internal quotation marks omitted.) Id., 1206–1207; see also *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 84 n.9, 101 S. Ct. 993, 67 L. Ed. 2d 59 (1981) (characterizing prospective relief obtained in consent decree as injunctive); *Steele* v. *Guardianship & Conservatorship of Crist*, 251 Kan. 712, 719–20, 840 P.2d 1107 (1992) (quoting *Williams* v. *Vukovich*, supra, 720 F.2d 920, with approval); 46 Am. Jur. 2d 569, Judgments § 190 (2017) ("[P]rospective provisions of a consent decree operate as an injunction. This injunctive quality compels the court to: (1) retain jurisdiction over the decree during the terms of its existence; (2) protect the integrity of the decree with its contempt powers; and (3) modify the decree should changed circumstances subvert its intended purpose." (Footnote omitted.));[14] cf. *Housing Authority* v. *Lamothe*, 225 Conn. 757, 767, 627 A.2d 367 (1993) ("[a] stipulated judgment, although obtained by the consent of the parties is binding *to the same degree as a judgment obtained through litigation*" (emphasis added; internal quotation marks omitted)).

We agree with these authorities that the prospective provisions of a stipulated judgment are injunctive in nature and, therefore, may be modified by the court upon a showing of changed circumstances. We further

[14] Indeed, we note that, under Connecticut law, a restrictive covenant running with the land, which is a *purely private* agreement, may be modified in light of changed circumstances. See, e.g., *Bueno* v. *Firgeleski*, 180 Conn. App. 384, 396, 183 A.3d 1176 (2018). Accordingly, even if the plaintiff were correct that the stipulations in *Vaill II* and *Vaill IV* effectively constituted restrictive covenants that run with the land, that would not mean that the owners of the property would be bound by the terms of the stipulations *forever*, regardless of whether a change in circumstances subverted their purpose.

note that the council does not dispute that a stipulated judgment can always be modified by consent of all of the parties. See *Gillis* v. *Gillis*, 214 Conn. 336, 340, 572 A.2d 323 (1990). We therefore reject the council's claim that, by entering into the stipulated judgments, the plaintiff's predecessor in interest somehow permanently waived the right of its successors in interest to seek any modification of the stipulations. Accordingly, we reject the council's claim that, by waiving its right to modify the stipulations, the plaintiff's predecessor in interest waived its successors' right to challenge zoning regulations that codified the terms of the stipulations.

To the extent that the council claims that, even if the stipulated judgments were injunctive in nature, the plaintiff and its predecessor in interest waived the right to challenge any modifications to the zoning regulations that codified the stipulations by abiding by their terms for almost fifty years, we disagree. We are unaware of any authority for the proposition that a party waives the right to seek a modification of an injunctive order by abiding by its terms, much less that the party waives the right to challenge the codification of the various orders and stipulations in zoning regulations.[15]

The council finally claims that the plaintiff waived its right to challenge the 2015 amendments' prohibition on Sunday racing when it and its predecessor in interest failed to challenge previous regulations that prohibited Sunday racing, specifically, the 1975 amendment providing that "[n]o races shall be conducted on any such track except during such hours as are permitted by [c]ourt [o]rder dated [May 12, 1959, in *Vaill I*]"; Salis-

[15] We acknowledge that it is possible that the plaintiff's actions may have given rise to reliance interests the trial court could consider when determining whether the injunction should be modified. That question, however, is not before the court in the present case, and we express no opinion on it. We conclude only that the plaintiff is not *barred* from ever challenging the terms of the stipulations in any forum merely because it abided by their terms.

bury Zoning Regs. (1985) § 415.1; and the 2013 amendment, which provided that "[n]o races shall be conducted on any such track except during such hours as permitted by [c]ourt [o]rder dated [May 12, 1959, in *Vaill I*] and subsequent related [c]ourt [o]rders on file in the Planning and Zoning Office, or the Town Clerk's Office." Salisbury Zoning Regs. (2013) § 221.2 (a). The council contends that the plaintiff "forfeit[ed]" its right to appeal because the 2015 amendments merely recodified the previous prohibition on Sunday racing activities.

We decline to review this claim because it is inadequately briefed. First, the council has provided no authority or analysis to support its claim that a party's failure to challenge a zoning amendment bars the party from challenging a subsequent amendment that was intended to recodify the original amendment in different language.[16] Second, and perhaps more fundamental, it is far from clear that the purpose of the 2015 amendments was merely to recodify the previous amendments, and the council has provided no analysis on that issue.[17]

[16] The council cites authority for the proposition that, when an appeal from a zoning decision is available, a party cannot forgo the appeal and later bring a collateral attack on the decision. See *Cavallaro* v. *Durham*, 190 Conn. 746, 748, 462 A.2d 1042 (1983) ("[a]n independent action may not be used to test the very issue [that] an appeal is designed to test"). This begs the question, however, by assuming that an appeal from an amendment to the zoning regulations that purportedly recodifies a preexisting regulation in different language constitutes an impermissible collateral attack on the original regulation, which is the very claim that the council is making in the first instance.

[17] The council does contend that the trial court incorrectly found that the 2015 amendments did not merely recodify the 2013 amendment because the 2013 amendment restricted only the *hours* that racing activities were permitted on the property and did not prohibit racing on Sundays. We agree with the council and the commission that, by incorporating the order in *Vaill I*, as subsequently modified, the 2013 amendment prohibited racing activities on the property on Sundays because the order, as modified, permitted *zero* hours of racing activities on Sundays. Thus, the prohibition on Sunday racing in the 2015 amendments recodified that prohibition.

Specifically, although it is clear that, before the 2015 amendments were adopted, the substance of the regulations would be effectively modified whenever the judgment in the *Vaill* case was modified, it is not entirely clear whether that feature of the regulations survived the amendments. As the trial court noted, counsel for the commission, Charles R. Andres, acknowledged, during a November 16, 2015 meeting of the commission to deliberate on the 2015 amendments, that the 2013 amendment was ambiguous as to whether its reference to the "[c]ourt [o]rder . . . and subsequent related [c]ourt [o]rders" was intended to include modifications to the injunction in *Vaill I* that were made subsequent to the adoption of the amendment. Salisbury Zoning Regs., (2013) § 221.2 (a). Andres questioned whether an arrangement under which the town's zoning regulations would be effectively amended by modifying an injunction in a private nuisance action would be *legal*, but he acknowledged that the 2013 amendment could be interpreted in that manner and argued that the 2015 amendments were intended to remove that ambiguity.[18] Moreover, in the council's written presentation to the commission in support of the proposed amendments, which was presented to the town on October 19, 2015, the council contended that the use of the property was controlled by various orders and stipulations in the *Vaill* case, that "the burden of monitoring, enforcing, and reacting to proposed modifications to the injunctions and stipulations, and expansions or modifications

[18] We recognize that, at a September 8, 2015 public hearing on the proposed amendments, the chairman of the commission, Michael W. Klemens, indicated that he did not believe that the 2013 amendment was intended to incorporate modifications to the injunction in the *Vaill* case that occurred after the date that the amendment was adopted. We emphasize that we express no opinion as to whether this position was correct. Rather, we decline to review the council's claim that the plaintiff forfeited its right to challenge the 2015 amendment when it failed to appeal from the 2013 amendment because the council has provided no analysis on this issue in its brief to this court.

of operations, is placed on the private parties [to the *Vaill* case]"; (emphasis omitted); and that the amendments were necessary to bring the racing activities on the property "under the control of the town through its zoning regulations." The council also pointed out that the plaintiff was attempting to expand racing activities on the property in its September 4, 2015 motion to modify the injunction in the *Vaill* case; see footnote 6 of this opinion; thereby "underscor[ing]" the need for the zoning regulations.

Thus, the council implicitly acknowledged in the proceedings before the commission that the 2013 amendment left control of the hours that racing activities would be permitted on the property to the ongoing jurisdiction of the trial court in the *Vaill* nuisance action, that, if the trial court in *Vaill* were to modify the injunction to eliminate the prohibition on Sunday racing activities, the 2013 amendment would not operate independently to prohibit them, and that the 2015 amendments were intended to remedy that situation. Indeed, the commission stated expressly in its reasons for approving the 2015 amendments that one reason was to "eliminate the possibility that the zoning regulations could be deemed to be amended if there were to be an amendment to a court judgment in the *Vaill* [case]." If the 2015 amendments in fact had that effect, they would not merely have recodified the 2013 amendment, because, unlike that amendment, they froze in time the restrictions on the use of the property that were already in place in the *Vaill* case, subject only to the procedures for amending zoning regulations. Even if we were to assume that the council is correct that a party cannot challenge an amendment to zoning regulations that merely recodifies a preexisting regulation, the council provides no analysis explaining why that change would not be substantive or, if it was, why the plaintiff would be barred from challenging it because it failed to challenge the 2013 amend-

ment. Accordingly, for all of the foregoing reasons, we reject the council's claim that the trial court incorrectly determined that the plaintiff did not waive its right to challenge the 2015 amendments' prohibition on Sunday racing.

II

We next address the defendant's claim that the trial court incorrectly determined that § 14-164a (a) preempts § 221.1 (a) (1) of the 2015 amendments, prohibiting racing activities on the property on Sundays.[19] We conclude that § 14-164a (a) is a prohibitory statute[20] and does not preempt zoning regulations restricting the hours of racing activities on the property on any day of the week or hour of the day, or regulations prohibiting such activities altogether.

The issues raised by the parties require us to interpret § 14-164a (a). "Issues of statutory construction raise

[19] For its part, the plaintiff contends that the trial court incorrectly determined that the commission could regulate weekday racing activities in any manner under § 14-164a (a), except to ensure that the activities occurred at reasonable hours. Thus, the plaintiff appears to contend that the commission cannot prohibit racing activities during reasonable hours on weekdays. Because the plaintiff makes no claim that the 2015 amendments actually prohibit weekday racing during reasonable hours, this claim is hypothetical, and we ordinarily would not address it. See, e.g., *Esposito* v. *Specyalski*, 268 Conn. 336, 350, 844 A.2d 211 (2004) ("[w]e are not compelled to decide claims of right which are purely hypothetical or are not of consequence as guides to the present conduct of the parties" (internal quotation marks omitted)). We note, however, that it necessarily follows from our conclusion that § 14-164a (a) does not preempt towns from adopting zoning regulations that are more restrictive of Sunday racing activities than the statute because the statute is prohibitory in that the statute would not preempt the commission from prohibiting racing activities during any hours on any day of the week.

[20] As we explain more fully subsequently in this opinion, a prohibitory statute is a statute that *restricts* the subjects of the statute from engaging in certain activities, in contrast to a permissive statute, which confers permission to engage in certain activities. When a statute is prohibitory, towns cannot permit activities that the statute prohibits, whereas, if a statute is permissive, towns cannot prohibit activities that the statute permits.

questions of law, over which we exercise plenary review. . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and [common-law] principles governing the same general subject matter . . . .'' (Citation omitted; internal quotation marks omitted.) *State* v. *Moreno-Hernandez*, 317 Conn. 292, 299, 118 A.3d 26 (2015).

We next review the legal principles governing statutory preemption of local regulations. ''[A] local ordinance is preempted by a state statute whenever the legislature has demonstrated an intent to occupy the entire field of regulation on the matter . . . or . . . whenever the local ordinance irreconcilably conflicts with the statute. . . . Whether an ordinance conflicts with a statute or statutes can . . . be determined [only] by reviewing the policy and purposes behind the statute and measuring the degree to which the ordinance frustrates the achievement of the state's objectives.'' (Internal quotation marks omitted.) *Bauer* v. *Waste Management of Connecticut, Inc.*, 234 Conn. 221, 232, 662 A.2d 1179 (1995).

''A test frequently used to determine whether a conflict exists is whether the ordinance permits or licenses

that which the statute forbids, or prohibits that which the statute authorizes; if so, there is a conflict. If, however, both the statute and the ordinance are prohibitory and the only difference is that the ordinance goes further in its prohibition than the statute, but not counter to the prohibition in the statute, and the ordinance does not attempt to authorize that which the legislature has forbidden, or forbid that which the legislature has expressly authorized, there is no conflict." (Internal quotation marks omitted.) Id., 235.

As we noted, "[w]hether an ordinance conflicts with a statute or statutes can . . . be determined [only] by reviewing the policy and purposes behind the statute and measuring the degree to which the ordinance frustrates the achievement of the state's objectives. . . . Therefore, [t]hat a matter is of concurrent state and local concern is no impediment to the exercise of authority by a municipality through the enactment of an ordinance, so long as there is no conflict with the state legislation. . . . Where the state legislature has delegated to local government the right to deal with a particular field of regulation, the fact that a statute also regulates the same subject in less than full fashion does not, ipso facto, deprive the local government of the power to act in a more comprehensive, but not inconsistent, manner. . . .

"Therefore, merely because a local ordinance, enacted pursuant to the municipality's police power, provides higher standards than a statute on the same subject does not render it necessarily inconsistent with the state law. Whether a conflict exists depends on whether the ordinance permits or licenses that which the statute forbids, or prohibits that which the statute authorizes. If, however, both the statute and the ordinance are prohibitory and the only difference is that the ordinance goes further in its prohibition than the statute, but not counter to the prohibition in the statute, and the ordinance does

not attempt to authorize that which the legislature has forbidden, or forbid that which the legislature has expressly authorized, there is no conflict. . . . Where a municipal ordinance merely enlarges on the provisions of a statute by requiring more than a statute, there is no conflict unless the legislature has limited the requirements for all cases." (Citations omitted; internal quotation marks omitted.) *Modern Cigarette, Inc.* v. *Orange*, 256 Conn. 105, 119–20, 774 A.2d 969 (2001).

Thus, the question that we must address is whether § 14-164a (a) was intended only to *prohibit* racing activities during unreasonable hours on weekdays and before noon on Sundays without a permit, as the council and the commission claim, in which case the commission would not be preempted from adopting more restrictive regulations, or, instead, the statute was intended to *confer the absolute right* to conduct racing activities during reasonable hours on weekdays and after noon on Sundays, as the plaintiff claims, in which case the statute would preempt more restrictive local regulations.

We begin our analysis with a review of the language of the statute. Section 14-164a (a) provides in relevant part: "No person shall operate a motor vehicle in any race, contest or demonstration of speed or skill with a motor vehicle as a public exhibition except in accordance with the provisions of this section. Such race or exhibition may be conducted at any reasonable hour of any week day or after twelve o'clock noon on any Sunday. The legislative body of the city, borough or town in which the race or exhibition will be held may issue a permit allowing a start time prior to twelve o'clock noon on any Sunday, provided no such race or exhibition shall take place contrary to the provisions of any city, borough or town ordinances. . . ."

We conclude that § 14-164a (a) is ambiguous as to whether it is prohibitory or, instead, confers a right to engage in motor vehicle racing activities that conform

to the conditions of the statute. The first sentence of § 14-164a (a) is clearly prohibitory, and it strongly suggests that the legislature believed that, left unregulated, motor vehicle racing activities would be likely to create a nuisance. Thus, for preemption purposes, it would be reasonable to expect that the subsequent provisions of the statute would specify the *only* conditions under which towns *have the authority* to allow racing activities, not the conditions under which towns *are required* to allow racing. Taken in isolation, however, the second sentence reasonably can be read as conferring a right to engage in racing activities during reasonable hours on weekdays and after noon on Sundays, which would preempt towns from imposing more restrictive regulations. We conclude, therefore, that there is a tension between these sentences that gives rise to ambiguity.

In reaching the conclusion that § 14-164a (a) is ambiguous, we acknowledge that the third sentence of the statute allowing towns to issue permits to race before noon on Sundays "provided no such race . . . shall take place contrary to the provisions of any city, borough or town ordinances" (proviso clause) arguably supports the plaintiff's position that the statute confers the absolute right to conduct racing activities during reasonable hours on weekdays and before noon on Sundays, because, if the statute were prohibitory, the clause would be superfluous. General Statutes § 14-164a (a). In other words, if the statute was intended only to specify the conditions under which towns cannot *allow* racing, the preemption doctrine would not prevent towns from imposing stricter regulations, and there would be no need for the legislature to expressly confer the authority to do so. We also acknowledge that, as the trial court concluded, the grammatical structure of the third sentence and the statute as a whole supports the interpretation that the proviso clause modifies only the first clause

of the third sentence and not the second sentence.[21] Finally, we acknowledge that, if the proviso clause is not superfluous, and if it applies only to the first clause of the third sentence of § 14-164a (a), it would be reasonable to conclude that the second sentence was intended to specify the racing activities that towns cannot prohibit, not the *only* racing activities that towns can allow. We conclude, however, that, although these considerations arguably support the plaintiff's position that § 14-164a (a) preempts towns from prohibiting racing activities that the statute permits, with the exception of racing activities before noon on Sundays, they do not overcome the inherent ambiguity of the statute. Accordingly, we may "look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and [common-law] principles governing the same general subject matter . . . ." (Internal quotation marks omitted.) *State* v. *Moreno-Hernandez*, supra, 317 Conn. 299.

In our search for guidance, we turn first to the genealogy of § 14-164a. As the trial court recognized, the legislation that is now codified at § 14-164a (a) was first enacted in 1935. See General Statutes (Cum. Supp. 1935) § 898c. Section 898c (a) provided that race contests that were open to the public were prohibited unless the Com-

[21] In its primary brief to this court, the commission expounds at length on its claim that the trial court's grammatical analysis was incorrect because the word "provided" can be interpreted as meaning "and," in which case the proviso clause would not be a dependent subordinate clause, but an independent clause. Even if that were the case, however, the structure and grammar of the statute would still support the conclusion that "such race," as used in the proviso clause, refers only to the races described in the first clause of the third sentence, i.e., races before 12 p.m. on Sunday. We also disagree with the commission's claim that the references to "such race" in the first and third sentences of § 14-164 (a) must be interpreted as having the same meaning, i.e., all races that the statute regulates. It is reasonable to conclude that the phrase "such race" has the same meaning in the sense that it refers to the immediately antecedent use of the word "race."

missioner of State Police issued a certificate approving the race, after determining that certain safety conditions were met. In 1939, the statute was amended to provide that the Commissioner of State Police was authorized to provide a racing permit "naming a definite date for such race or exhibition, which may be conducted at any reasonable hour on any week day or after the hour of two o'clock in the afternoon of any Sunday, provided no such race or exhibition shall take place contrary to the provisions of any city, borough or town ordinances." General Statutes (Supp. 1939) § 827e (a). Thus, the statute made clear for the first time that towns could prohibit racing activities on any day of the week or hour of the day.

In 1973, the statute was again amended to provide that the Commissioner of Motor Vehicles rather than the Commissioner of State Police could issue a permit for racing activities. See Public Acts 1973, No. 73-672, codified at General Statutes (Rev. to 1975) § 14-164a (a). The statute continued to provide that towns could prohibit such activities altogether. In 1975, the statute was amended to change the time that Sunday racing activities could start from 2 p.m. to 12 p.m. See Public Acts 1975, No. 75-404, § 1, codified at General Statutes (Rev. to 1977) § 14-164a (a).

After the legislature made additional changes to § 14-164a (a) in 1984 and 1985, the statute provided in relevant part: "The Commissioner of Motor Vehicles, upon receipt of such application and fee, shall cause an inquiry to be made concerning the condition of the race track or place of exhibition and all of the appurtenances thereto and, if he finds no unusual hazard to participants in such race or exhibition or to persons attending such race or exhibition, he may issue a permit naming a definite date for such race or exhibition, which may be conducted at any reasonable hour of any week day or after twelve o'clock noon on any Sunday, provided no such race or exhibition shall take place con-

trary to the provisions of any city, borough or town ordinances. . . .'' General Statutes (Rev. to 1987) § 14-164a (a). Thus, towns were still expressly authorized to prohibit any or all motor vehicle racing.

In 1998, § 14-164a (a) was again amended to provide in relevant part:[22] ''The Commissioner of Motor Vehicles, upon receipt of such application and fee, shall cause an inquiry to be made concerning the condition of the race track or place of exhibition and all of the appurtenances thereto and, if he finds no unusual hazard to participants in such race or exhibition or to persons attending such race or exhibition, he may issue a permit naming a definite date for such race or exhibition, which may be conducted at any reasonable hour of any week day or after twelve o'clock noon on any Sunday. [, provided] *The Commissioner, with the approval of the legislative body of the city, borough or town in which the race or exhibition will be held, may issue a permit allowing a start time prior to twelve o'clock noon on any Sunday, provided* no such race or exhibition shall take place contrary to the provisions of any city, borough or town ordinances. . . .'' Public Acts 1998, No. 98-182, § 3 (P.A. 98-182), codified at General Statutes (Rev. to 1999) § 14-164a (a).

The final amendment to § 14-164a (a) that is relevant to this appeal was made in 2004. See 2004 Public Acts, No. 04-199, § 11. The 2004 amendment made the following changes:[23] ''No person shall operate a motor vehicle in any race, contest or demonstration of speed or skill with a motor vehicle as a public exhibition [until a permit for such race or exhibition has been obtained from the Commissioner of Motor Vehicles] *except in accordance with the provisions of this section.* [Any person desiring to manage, operate or conduct such a motor

[22] The language that was deleted in 1998 is indicated by brackets, and the language that was added is indicated by italics.

[23] Again, the language that was deleted is indicated by brackets, and the language that was added is indicated by italics.

vehicle race or exhibition shall make application in writing to said commissioner at least ten days prior to the race or exhibition and such application shall set forth in detail the time of such proposed race or exhibition, together with a description of the kind and number of motor vehicles to be used and such further information as said commissioner may require. Such application shall be accompanied by a fee of seventy-five dollars. The Commissioner of Motor Vehicles, upon receipt of such application and fee, shall cause an inquiry to be made concerning the condition of the race track or place of exhibition and all of the appurtenances thereto and, if the commissioner finds no unusual hazard to participants in such race or exhibition or to persons attending such race or exhibition, the commissioner may issue a permit naming a definite date for such] *Such* race or exhibition [, which] may be conducted at any reasonable hour of any week day or after twelve o'clock noon on any Sunday. The [commissioner, with the approval of the] legislative body of the city, borough or town in which the race or exhibition will be held [,] may issue a permit allowing a start time prior to twelve o'clock noon on any Sunday, provided no such race or exhibition shall take place contrary to the provisions of any city, borough or town ordinances. . . ." Public Acts 2004, No. 04-199, § 11, codified at General Statutes (Rev. to 2005) § 14-164a (a).

The plaintiff contends that, when the legislature amended the statute in 1998 by splitting the second sentence of the statute into two sentences and leaving the proviso clause attached only to the third sentence governing Sunday racing activities before noon, it evinced an intent to confer the right to conduct racing activities during reasonable hours on weekdays and after noon on Sundays. For the following reasons, we disagree.

As the foregoing genealogy of § 14-164a shows, and the plaintiff does not dispute, from 1939 through 1998,

§ 14-164a (a) and its predecessor statutes expressly contemplated that towns would have the authority to restrict racing activities that were statutorily permitted or to prohibit them altogether. Thus, during that period, the statute was clearly prohibitory for preemption purposes, that is, it barred towns from allowing racing activities that were statutorily prohibited. It did not require towns to allow racing activities that were statutorily permitted. It is reasonable to conclude that the legislature enacted the statutory prohibition on racing during unreasonable hours and on Sundays because it believed that motor vehicle racing, with its attendant noise, fumes, crowds, traffic congestion, danger to participants and spectators, and other potential disruptions, was likely to create a *nuisance* if not *restricted* by statute. Indeed, § 14-164a (d) imposes criminal penalties for violations of the statute. We cannot perceive why, in 1998, the legislature would suddenly have spun 180 degrees and come to the conclusion that motor vehicle racing is so *socially valuable* that it must be *protected* from unduly burdensome regulation by towns.

Indeed, nothing in the legislative history of P.A. 98-182 suggests that the purpose of the amendment, which split what previously had been one sentence into two sentences and left the proviso clause attached to the language in the new third sentence authorizing the Commissioner of Motor Vehicles to issue a permit for racing activities before noon on Sunday *subject to town approval*,[24] was to *divest* towns of their preexisting authority to further restrict or prohibit altogether racing activities that the statute permitted. To the contrary, José O. Salinas, the Commissioner of the Department of Motor Vehicles, submitted written testimony on the proposed legislation in which he stated that its purpose was to "place the decision to extend the operating hours of

[24] As we explained, before the 1998 amendment, racing activities before 12 p.m. on Sunday were categorically prohibited.

[motocross] racing on Sundays at the municipal level . . . .'' Conn. Joint Standing Committee Hearings, Transportation, Pt. 2, 1998 Sess., p. 477; see also id., p. 374, remarks of Commissioner Salinas (purpose of proposed legislation was ''to allow municipalities to extend [motocross] racing [before] noon on Sundays''). Thus, Salinas' testimony shows that the purpose of the amendment was to *authorize* municipalities to *allow* racing before noon on Sundays, subject to the permit requirement, not to deprive them of their preexisting authority to *prohibit* racing activities after noon. If the legislature had intended such a radical departure from the policy underlying the original statute, it surely would have discussed that reason for the change during the debate on the proposed legislation and used clearer language to express its intent.[25] See, e.g., *Stafford* v. *Roadway*, 312 Conn. 184, 195, 93 A.3d 1058 (2014) (''It is axiomatic that a radical departure from an established policy cannot be implied. It must be expressed in unequivocal language.'' (Internal quotation marks omitted.)). Accordingly, it is reasonable to conclude that the legislature split the second sentence of § 14-164a (a) into two sentences in 1998 simply because the sentence had become unwieldy with the addition of the new language, and that it left the proviso clause in its previous location without realizing that the change in sentence structure reasonably could be interpreted as changing the function of the clause.

Moreover, under the plaintiff's interpretation, § 14-164a (a) would be simultaneously prohibitory *and* permissive. That is, it would both categorically prohibit racing activities that do not meet the statutory criteria—i.e., racing activities on weekdays during unreasonable

[25] The plaintiff concedes that nothing in the legislative history of P.A. 98-182 indicates that the legislature intended to confer an absolute right to conduct racing activities during reasonable hours on weekdays and after noon on Sundays.

hours or before noon on Sunday without a permit[26]—and confer an absolute right to conduct racing activities that meet the statutory criteria. The plaintiff has cited no other examples of statutes in which the legislature has evinced an intent both to place restrictions on an activity, presumably to mitigate its inherently dangerous and disruptive nature, and to confer an absolute right to engage in the same activity. While we recognize that such statutes may exist, it is reasonable to conclude that they ordinarily would involve uses with extraordinary social value, such as utilities or hospitals.[27] There is no indication that the legislature attached such value to motor vehicle racing activities.

Finally, we cannot perceive why the legislature would suddenly have concluded in 1998 that it was necessary to impose a uniform statewide rule allowing motor vehicle racing activities seven days a week, regardless of the character of the area in which the activities take place. As the commission points out, racing activities

[26] Notwithstanding its contention that § 14-164a (a) is a "permissive" statute, the plaintiff does not appear to claim that towns could enact zoning regulations that would, for example, permit racing activities twenty-four hours a day, seven days a week. Any such interpretation would ignore the first sentence of § 14-164a (a), providing that "[n]o person shall operate a motor vehicle in any race . . . except in accordance with the provisions of this section." It would also mean that there was no need for the legislature to adopt the 1998 amendment to § 14-164a (a) authorizing the issuance of a permit to conduct racing activities before noon on Sundays subject to the approval of the municipality.

[27] For similar reasons, we reject the plaintiff's suggestion that towns have the authority under § 8-2; see footnote 8 of this opinion; to prohibit racing activities altogether and to prohibit them in certain zones, but, once towns permit racing activities, they cannot regulate the days and hours on which the activities occur more strictly than § 14-164a (a). First, this contention seems to contradict claims made elsewhere by the plaintiff that § 14-164a (a) grants an absolute right to conduct racing at certain hours on certain days of the week and that the legislature "explicitly limit[ed] local control to Sunday prenoon activities . . . ." Second, we cannot perceive why the legislature would simultaneously conclude that racing activities are so potentially disruptive and dangerous that they may be prohibited altogether but are so socially valuable that, when they are allowed, they must be allowed seven days a week during certain hours.

on Sunday afternoons in an indoor arena in a nonresidential, urban area may be entirely appropriate, whereas the same activities on an outdoor track in a heavily populated suburban location could be extremely disruptive. We conclude, therefore, that § 14-164a (a) does not preempt the provision of the 2015 amendments prohibiting racing activities on Sundays.[28]

In support of its claim to the contrary, the plaintiff contends that, "under the [commission's] interpretation, *whether* someone could conduct racing activities would always be based on the zoning regulations. As such, the [statutory seven day] grant [of permission to conduct racing activities during reasonable hours on weekdays, after noon on Sundays and before noon on Sundays with a permit] would be of no effect—and thus meaningless—with respect to *whether* someone could conduct racing activities." (Emphasis in original.) The statute is not meaningless if it is prohibitory, however, because it bars towns from allowing motor vehicle racing during unreasonable hours on weekdays and before noon on Sundays without a permit, which they otherwse would have the authority to do.

The plaintiff also contends that the trial court correctly concluded that the first sentence of General Statutes § 8-13,[29] which allows zoning commissions to adopt

[28] Having concluded that § 14-164a (a) is prohibitory for preemption purposes, we need not address the plaintiff's claim that the trial court incorrectly determined that "week day," as used in § 14-164a (a), does not include Saturdays because, even if the plaintiff were correct, the statute would not preempt the commission from restricting Saturday racing activities more strictly than the statute. We address in part III of this opinion the plaintiff's claim that the trial court incorrectly concluded that the word "weekday," as used in the 2015 amendments, does not include Saturdays.

[29] General Statutes § 8-13 provides: "If the regulations made under authority of the provisions of this chapter require a greater width or size of yards, courts or other open spaces or a lower height of building or a fewer number of stories or a greater percentage of lot area to be left unoccupied or impose other and higher standards than are required in any other statute, bylaw, ordinance or regulation, the provisions of the regulations made under the provisions of this chapter shall govern. If the provisions of any other statute,

regulations that are more restrictive than restrictions imposed by statute, does not authorize towns to adopt stricter *temporal* limitations on particular land uses than those imposed by statute. The trial court concluded that, under this court's decision in *Mallory* v. *West Hartford*, 138 Conn. 497, 500, 86 A.2d 668 (1952), § 8-13 authorizes zoning commissions only to adopt stricter physical standards than those imposed by statute, such as the "size of yards, number of stories and the like." Even if that were the case, however, that would mean only that § 8-13 simply does not apply to the 2015 amendments, not that it renders the 2015 amendments unenforceable. In other words, if the trial court were correct that the first sentence of § 8-13 did not expressly authorize the commission to adopt the 2015 amendments because the statute applies only to physical standards, then the second sentence providing that, "[i]f the provisions of any other statute, bylaw, ordinance or regulation require a greater width or size of yards, courts or other open spaces or a lower height of building or a fewer number of stories or a greater percentage of lot area to be left unoccupied or impose other and higher standards than are required by the regulations made under authority of the provisions of this chapter, the provisions of such statute, bylaw, ordinance or regulation shall govern," would not render the amendments unenforceable. If § 8-13 does not apply to the temporal restrictions of the 2015 amendments, they would still be subject to common-law preemption principles, under which towns acting through their zoning commissions may adopt regulations that are more restrictive than prohibitory statutes governing the same subject matter. See, e.g., *Modern Cigarette, Inc.* v. *Orange*, supra, 256 Conn. 119–20.

bylaw, ordinance or regulation require a greater width or size of yards, courts or other open spaces or a lower height of building or a fewer number of stories or a greater percentage of lot area to be left unoccupied or impose other and higher standards than are required by the regulations made under authority of the provisions of this chapter, the provisions of such statute, bylaw, ordinance or regulation shall govern."

To the extent that the plaintiff contends that § 8-13 effectively preempts the common-law preemption doctrine as applied to statutes controlling land use, we disagree. The preemption doctrine embodies commonsense principles that are designed to ensure that the legislative will is not overridden by municipal ordinances and regulations. We can perceive no reason why the legislature would have wanted to force courts that are confronted with prohibitory land use statutes, like § 14-164a (a), to treat them as if they conferred the absolute right to engage in the conduct that is not prohibited, thereby *changing* the intended effect of the statutes.[30] Accordingly, we reject this claim.

Finally, the plaintiff contends that, even if § 14-164a (a), like its predecessor statutes, allows towns to adopt *ordinances* that are more restrictive than § 14-164a (a)

[30] In *Mallory* v. *West Hartford*, supra, 138 Conn. 497, this court construed a provision of a special act; see 19 Spec. Acts 939, No. 469, § 20 (1925) (Spec. Act No. 469); that contained language identical to the language of § 8-13 and authorized the town of West Hartford to create zoning districts. See *Mallory* v. *West Hartford*, supra, 499–500. The plaintiff contended that, because a statute setting forth procedures for approving a zone change contained higher standards than those followed by the zoning commission, which complied with certain special laws passed by the legislature, Spec. Act No. 469 rendered the procedures followed by the zoning commission unenforceable. Id. This court concluded that Spec. Act No. 469 was concerned only with statutes governing the "size of yards, number of stories and the like," and did not apply to statutes governing procedures. Id., 500. Thus, the court distinguished between *substantive* statutes and *procedural* statutes, not between statutes governing physical standards and statutes governing other substantive zoning standards, such as § 14-164a (a). We note that this court in *Mallory* did not address the question of whether or how general preemption principles would apply to the plaintiff's claim. We need not decide whether *Mallory* was correctly decided or, if it was, whether the trial court correctly applied it, because, even if the trial court correctly determined that § 8-13 applies only to physical standards, it does not render the 2015 amendments unenforceable. We note, however, that either § 8-13 applies only to statutes governing physical standards under *Mallory*, as the trial court concluded, in which case other substantive zoning statutes would be subject to common-law preemption principles, or § 8-13 applies to all statutes governing land use, which would lead to the same result because § 8-13 incorporates general preemption principles.

with respect to the hours during and days on which racing activities can occur, the town's zoning regulations are not ordinances within the meaning of the proviso clause of the third sentence of the statute.[31] See General Statutes § 14-164a (a) ("provided no such race . . . shall take place contrary to the provisions of any city, borough or town ordinances"). The plaintiff points out that the legislature has always distinguished between regulations and ordinances. See, e.g., General Statutes § 8-13 ("[i]f the regulations made under authority of the provisions of this chapter require a greater width or size of yards, courts or other open spaces or a lower height of building or a fewer number of stories or a greater percentage of lot area to be left unoccupied or impose other and higher standards than are required in any other statute, bylaw, ordinance or regulation, the provisions of the regulations made under the provisions of this chapter shall govern").[32] In addition, the plaintiff points out that "ordinance" is defined by General Statutes § 1-1 (n) as "an enactment under the provisions of [General Statutes §] 7-157," which, in turn, provides that "[o]rdinances may be enacted by the legislative body of any town . . . ." General Statutes § 7-157 (a). Because a zoning commission is not the legislative body of a town, the plaintiff contends, it cannot enact ordinances. The plaintiff further relies on this court's decision in *Bora* v. *Zoning Board of Appeals*, 161 Conn. 297, 288 A.2d 89 (1971), in which this court held that, because General Statutes § 30-91 authorized towns, "by

[31] The plaintiff does not indicate whether it raised this claim in the trial court. Because the council and the commission make no claim that the issue is unreviewable, the parties have briefed the issue, and the plaintiff cannot prevail, we review it. *See Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 157–58, 84 A.3d 840 (2014) ("[r]eview of an unpreserved claim may be appropriate . . . when the minimal requirements for review are met and . . . the party who raised the unpreserved claim cannot prevail" (citation omitted; emphasis omitted; footnote omitted))

[32] Section 8-13 originally was enacted in 1949. See General Statutes (1949 Rev.) § 847.

[a] vote of a town meeting or by ordinance, [to] reduce the number of hours during which [sales of liquor] shall be permissible," and because a board of zoning appeals did not have the power to enact an ordinance, the board exceeded its powers when it granted a variance reducing the number of hours that a café that served liquor could operate. (Internal quotation marks omitted.) Id., 302; see General Statutes § 30-91 (d).

The council claims that, to the contrary, when a town creates a zoning commission, it delegates the town's legislative authority to control land use to that commission. Accordingly, any regulations adopted by the commission are ordinances, just as they would be if enacted by the town's legislative body. See R. Fuller, 9 Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) § 1:2, p. 5 ("[a]ll of the land use statutes are based upon the police power, which allows regulation of use of property because uncontrolled use would be harmful to the public interest"); id., p. 6 ("[m]unicipal land use regulation must be carried out by ordinance, and the ordinance must be consistent with the enabling statute"). The council and the commission also point out that the words "ordinance" and "regulation" are frequently used interchangeably by the legislature and the courts. See, e.g., General Statutes § 8-2i (a) (referring to "any zoning regulation . . . imposed by ordinance, regulation or pursuant to any special permit, special exception or subdivision plan"); General Statutes § 15-91 (authorizing municipalities to adopt "airport zoning regulations"); General Statutes § 19a-438 (c) (6) (referring to "the zoning ordinances of the municipality"); General Statutes § 21a-62c (c) (referring to "municipal . . . zoning ordinances"); General Statutes § 25-109g (a) (authorizing zoning commission to "revise the zoning ordinances"); General Statutes § 30-44 (referring to "the zoning ordinance of any city or town"); see also, e.g., *NPC Offices, LLC* v. *Kowaleski*, 320 Conn. 519, 531 n.5, 131 A.3d 1144 (2016) (referring to "zoning ordi-

nances"); *Bauer* v. *Waste Management of Connecticut, Inc.*, supra, 234 Conn. 238 (referring to "the . . . zoning ordinance"); *Fairlawns Cemetery Assn., Inc.* v. *Zoning Commission*, 138 Conn. 434, 437, 86 A.2d 74 (1952) (observing that "the zoning commission adopted an ordinance"); *Berlin Batting Cages, Inc.* v. *Planning & Zoning Commission*, 76 Conn. App. 199, 219, 821 A.2d 269 (2003) ("the fact that [the statute at issue] refers to local *ordinances*, while the commission has labeled the enactment at issue . . . a zoning *regulation*, is of no consequence" (emphasis in original)).

We agree with the council and the commission. Although there may be circumstances under which the distinction between the words "ordinance" and "regulation" is significant, the words frequently are used interchangeably, and the plaintiff has not explained why the legislature would have wanted to limit the proviso clause of § 14-164a (a) and its predecessor statutes to enactments by the legislative body of a town and to exclude enactments by a zoning commission.[33] Accordingly, we reject this claim.

III

We next address the plaintiff's claim that the trial court incorrectly determined that the word "weekday," as used in the 2015 amendments to the zoning regulations, does not include Saturdays. We agree with the plaintiff.

This claim requires us to interpret article § 221.1 (a) (2) (A) of the 2015 amendments. See footnote 7 of this opinion. "Because the interpretation of the regulations presents a question of law, our review is plenary. . . . Additionally, zoning regulations are local legislative enactments . . . and, therefore, their interpretation is governed by the same principles that apply to the con-

[33] We further note that the plaintiff itself contends that the 2015 amendments to the zoning regulations constitute a municipal "ordinance," as that word is used § 22a-73. See part IV of this opinion.

struction of statutes. . . . Moreover, regulations must be interpreted in accordance with the principle that a reasonable and rational result was intended . . . . The process of statutory interpretation involves the determination of the meaning of the statutory language [or . . . the relevant zoning regulation] as applied to the facts of the case, including the question of whether the language does so apply." (Internal quotation marks omitted.) *Trumbull Falls, LLC* v. *Planning & Zoning Commission*, 97 Conn. App. 17, 21–22, 902 A.2d 706 (2006).

Section 221.1 (a) (2) (A) provides that "[a]ctivity with mufflered racing car engines shall be permitted . . . [o]n any weekday between [9 a.m.] and [10 p.m.] provided, however, that such activity may continue beyond the hour of [10 p.m.] without limitation on not more than six . . . occasions during any one calendar year." The town's zoning regulations do not define "weekday." Although the plaintiff acknowledges that the word *can* refer to any day of the week except Saturday and Sunday, as the trial court found, it points out that a number of dictionaries define "weekday" to include Saturdays. See American Heritage College Dictionary (2d Ed. 1991) p. 1371 (defining "weekday" as "1. [a]ny day of the week except Sunday," and "2. [a]ny day exclusive of the days of the weekend"); Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) p. 1418 (defining "weekday" as "a day of the week except Sunday or sometimes except Saturday and Sunday"); see also Webster's New International Dictionary (2d Ed. 1957) p. 2896 (defining "weekday" as "[a]ny day of the week except Sunday; a working day"). In addition, the plaintiff points out that a number of older Connecticut cases use the word "weekday" to refer to any day of the week except Sunday. See *Mason* v. *Board of Zoning Appeals*, 143 Conn. 634, 635, 124 A.2d 920 (1956) (referring to "Sundays as well as weekdays"); *Cadwell* v. *Connecticut Railway & Lighting Co.*, 84 Conn. 450, 456, 80 A. 285 (1911) (referring to "week days

and . . . Sundays"); *Frost* v. *Plumb*, 40 Conn. 111, 116 (1873) (referring to "a week day, or . . . the Sabbath"); *Scofield* v. *Eighth School District*, 27 Conn. 498, 499 (1858) (preliminary statement of facts and procedural history) (referring to "week days and . . . Sundays"). Accordingly, the plaintiff contends that "weekday" is ambiguous.

In support of its contention that, as used in § 221.1 (a) (2) (A) of the 2015 amendments, the word "weekday" includes Saturdays, the plaintiff relies on the memorandum of decision that the trial court issued in *Vaill I* before rendering judgment, in which the court noted that "residents of Lime Rock often invite visitors and friends to spend the weekend there and to enjoy the peaceful surroundings of the beautiful countryside," and that "operation of the [racetrack] on Sundays proves to be especially annoying and irritating to the plaintiffs." The court concluded that "the noise does not have the same effect on other days, and the track could be operated on every other day of the week . . . ." The plaintiff contends that this language shows that, as used in the *Vaill I* memorandum of decision, the word "weekend" meant Sunday, thereby implying that all other days were weekdays. The plaintiff also points out that both § 221.1 (a) (4) of the 2015 amendments and the stipulation in *Vaill IV* contain provisions prohibiting "the revving or testing of mufflered . . . car engines on Saturdays . . . prior to [9 a.m.] and after [6 p.m.]," strongly suggesting that the use of such engines was permitted during the remainder of the day.

The commission acknowledges that the 2015 amendments were intended to codify the terms of the 1988 stipulated judgment in *Vaill IV* and concedes that the plaintiff and its predecessor in interest have, pursuant to their understanding of the terms of that judgment, conducted mufflered racing activities on the property on Saturdays for decades, without complaint by the

Vaill plaintiffs or other affected landowners.[34] Accordingly, the commission concedes that, as used in § 221-1 (a) (2) (A) of the 2015 amendments, the word "weekday" includes Saturdays.

The council contends that, to the contrary, under ordinary modern usage, the word "weekday" means any day that does not occur on the "weekend," which means Saturday and Sunday. The council also points out that the 2015 amendments distinguish weekdays from Saturdays in some respects.

We are persuaded by the plaintiff's arguments, as well as the commission's concession, that the word "weekday," as used in § 221.1 (a) (2) (A) of the 2015 amendments, was intended to include Saturdays. The council's reliance on the fact that there are some differences between the restrictions imposed on racing activities from Monday through Friday and those imposed on Saturday racing is misplaced because there is no reason that the commission could not impose distinct regulations on Saturday racing even if Saturday is a weekday. Accordingly, we conclude that the trial court

[34] The council contends that there is no evidence in the record to support the conclusion that the plaintiff and its predecessor in interest have regularly conducted racing activities on Saturdays. As we indicated, however, the parties did not raise this issue in the trial court, presumably because they had simply made assumptions about the meaning of the word "weekday." See footnote 10 of this opinion. Thus, the parties had no reason to believe that they were required to submit evidence on the issue. Inasmuch as the council makes no claim that, if given the opportunity, it could present evidence that mufflered racing has not taken place on Saturdays since the stipulation in *Vaill IV*, we conclude that we may rely on the plaintiff's representation and the commission's concession that such racing has taken place. We also may take judicial notice of the plaintiff's public event calendar for 2020, which indicates that racing activities are scheduled to occur on certain Saturdays. See, e.g., Lime Rock Park, "IMSA Northeast GP" (indicating that sports car race will be held on plaintiff's property on Saturday, July 18, 2020), available at http://www.limerock.com/node/1429 (last visited May 18, 2020). See generally *Moore* v. *Moore*, 173 Conn. 120, 123 n.1, 376 A.2d 1085 (1977) (court may take judicial notice of facts that "are common knowledge and those which are capable of accurate and ready demonstration" (internal quotation marks omitted)).

incorrectly determined that mufflered racing is prohibited on Saturdays under the 2015 amendments to the zoning regulations.[35]

IV

We next address the plaintiff's claim that the trial court incorrectly determined that § 221.1 (a) (3) of the 2015 amendments restricting unmufflered racing activities is not a noise control ordinance within the meaning of § 22a-73 (b), which, to be effective, would require the approval of the Commissioner of Energy and Environmental Protection (commissioner) pursuant to § 22a-73 (c).[36] The plaintiff contends that § 221.1 (a) (3) is a

[35] As we already indicated, we need not address the plaintiff's claim that the trial court incorrectly, albeit implicitly, determined that the term "week day," as used in § 14-164a (a), does not include Saturdays because, regardless of whether it does, the commission would not be preempted from restricting Saturday racing activities more strictly than the statute or prohibiting them altogether. See footnote 28 of this opinion. We further note that the council has made no claim that, if we conclude that the 2015 amendments allow Saturday racing activities, that portion of the amendments is preempted by § 14-164a (a) because, by failing to include Saturday racing in permitted racing activities, the statute prohibits it. Accordingly, the question of whether § 14-164a (a) preempts the provisions of the 2015 amendments allowing Saturday racing activities is not before us. We are compelled to observe, however, that, as we indicated, Saturday was considered a weekday under ordinary usage at the time that the statute was adopted. We also find it unlikely that the legislature would have imposed a prohibition on Saturday racing by omitting any reference to that day in the statute or that it would have placed greater restrictions on Saturday racing than on Sunday racing.

[36] General Statutes § 22a-73 provides in relevant part: "(a) To carry out and effectuate the purposes and policies of this chapter it is the public policy of the state to encourage municipal participation by means of regulation of activities causing noise pollution within the territorial limits of the various municipalities. To that end, any municipality may develop and establish a comprehensive program of noise regulation. Such program may include a study of the noise problems resulting from uses and activities within its jurisdiction and its development and adoption of a noise control ordinance.

"(b) Any municipality may adopt, amend and enforce a noise control ordinance which may include the following: (1) Noise levels which will not be exceeded in specified zones or other designated areas; (2) designation of a noise control officer and the designation of an existing board or commission, or the establishment of a new board or commission to direct such program; (3) implementation procedures of such program and the relation

noise control ordinance subject to § 22a-73 (c) because it differentiates the treatment of unmufflered racing activities, which are loud, from mufflered activities, which are less loud. We disagree.

Whether the restrictions on unmufflered racing activities constitute a noise control ordinance for purposes of § 22a-73 is a question of statutory interpretation, over which our review is plenary. See, e.g., *State* v. *Moreno-Hernandez*, supra, 317 Conn. 299. The principles governing our interpretation of statutes are set forth in part II of this opinion. Because none of the parties contends that § 22a-73 is plain and unambiguous as to what constitutes a noise regulation subject to § 22a-73, we may "look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and [common-law] principles governing the same general subject matter . . . ." (Internal quotation marks omitted.) Id.

Section 22a-73 is part of the Noise Pollution Control Act (act), General Statutes § 22a-67 et seq. The legislative policy that the act was designed to implement is set forth in § 22a-67.[37] That statute expressly recognizes

of such program to other plans within the jurisdiction of the municipality; (4) procedures for assuring compliance with state and federal noise regulations; (5) noise level restrictions applicable to construction activities, including limitation on on-site hours of operation.

"(c) No ordinance shall be effective until such ordinance has been approved by the commissioner. No ordinance shall be approved unless it is in conformity with any state noise control plan, including ambient noise standards, adopted pursuant to section 22a-69 or any standards or regulations adopted by the administrator of the United States Environmental Protection Agency pursuant to the Noise Control Act of 1972 . . . or any amendment thereto. Notwithstanding the provisions of this subsection, any municipality may adopt more stringent noise standards than those adopted by the commissioner, provided such standards are approved by the commissioner."

[37] General Statutes § 22a-67 provides: "(a) The legislature finds and declares that: (1) Excessive noise is a serious hazard to the health, welfare and quality of life of the citizens of the state of Connecticut; (2) exposure

that land uses that create excessive noise constitute a potential nuisance and that it is the policy of the state to promote an environment that is "free from noise that jeopardizes the health and welfare of [Connecticut's] citizens . . . ." General Statutes § 22a-67 (b). Pursuant to that policy, the commissioner is authorized to "adopt . . . a comprehensive state-wide program of noise regulation . . . ." General Statutes § 22a-69 (a).

Pursuant to § 22a-73 (a), "it is the public policy of the state to encourage municipal participation by means of regulation of activities causing noise pollution . . . ." To that end, "[a]ny municipality may adopt . . . a noise control ordinance which may include the following: (1) Noise levels which will not be exceeded in specified zones or other designated areas; (2) designation of a noise control officer and the designation of an existing board or commission, or the establishment of a new board or commission to direct such program; (3) implementation procedures of such program and the relation of such program to other plans within the jurisdiction of the municipality; (4) procedures for assuring compliance with state and federal noise regulations; [and] (5) noise level restrictions applicable to construction activities, including limitation on on-site hours of operation." General Statutes § 22a-73 (b).

With these provisions in mind, we preliminarily observe that we see no evidence, and the plaintiff makes no

to certain levels of noise can result in physiological, psychological and economic damage; (3) a substantial body of science and technology exists by which excessive noise may be substantially abated; (4) the primary responsibility for control of noise rests with the state and the political subdivisions thereof; (5) each person has a right to an environment free from noise that may jeopardize his health, safety or welfare.

"(b) The policy of the state is to promote an environment free from noise that jeopardizes the health and welfare of the citizens of the state of Connecticut. To that end, the purpose of this chapter is to establish a means for effective coordination of research and activities in noise control, to authorize the establishment of state noise emission standards and the enforcement of such standards, and to provide information to the public respecting noise pollution."

claim, that the act was intended to *deprive* municipalities, acting through their zoning commissions, of their undisputed authority to consider noise as a factor when they regulate the uses that may be permitted on specific properties. It is well established that "[t]he central concern of zoning is the interaction of land uses, and an attempt to order those uses to minimize their adverse impacts on each other. The idea is to prevent nuisances before they occur . . . ." T. Tondro, Connecticut Land Use Regulation (2d Ed. 1992) p. 35. This court has repeatedly recognized that excessive noise is a type of nuisance that can be regulated pursuant to the zoning authority conferred on municipalities by § 8-2. See *Cambodian Buddhist Society of Connecticut, Inc.* v. *Planning & Zoning Commission*, 285 Conn. 381, 440, 941 A.2d 868 (2008) (planning and zoning commission's denial of special exception to build Buddhist temple was supported by substantial evidence when "the commission reasonably could have concluded that a parking lot for 148 cars would be a significant source of noise and disruption in the neighborhood"); *Husti* v. *Zuckerman Property Enterprises, Ltd.*, 199 Conn. 575, 582, 508 A.2d 735 ("[P]erformances at an outdoor amphitheater located in a residential area threatened the quality of life and the safety of the inhabitants of the neighborhood by causing noise, attracting crowds, and creating traffic congestion. These are precisely the kinds of dangers that zoning is meant to combat; see General Statutes § 8-2; and that justify content-neutral regulation of the time, place, and manner of expression." (Footnote omitted.)), appeal dismissed, 479 U.S. 802, 107 S. Ct. 43, 93 L. Ed. 2d 6 (1986). Indeed, the plaintiff concedes that the act does not prevent zoning commissions from considering noise "as a factor in deciding whether a proposed new use [is] appropriate for a particular location" pursuant to the zoning authority conferred by § 8-2.

The plaintiff contends, however, that, once a particular use of a property has been permitted, zoning com-

missions cannot continue to regulate the noise level that is produced by the use without obtaining the approval of the commissioner pursuant to § 22a-73 (c). In support of this claim, the plaintiff relies on *Berlin Batting Cages, Inc.* v. *Planning & Zoning Commission*, supra, 76 Conn. App. 199. In that case, the defendant planning and zoning commission of the town of Berlin appealed from the judgment of the trial court sustaining the plaintiff's appeal from the defendant's denial of an application seeking site plan approval to construct a go-cart track on its property. Id., 200. The defendant claimed, among other things, that the trial court improperly had concluded that § X (D) (3) of the Berlin Zoning Regulations[38] was ineffective because it conflicted with the act. Id., 215–16. The defendant contended that § X (D) (3) was not a noise control ordinance for purposes of the act because it "applie[d] only to site plan review while an ordinance adopted pursuant to [the act] would regulate noise emissions in all situations and not merely when a site plan is under review." (Internal quotation marks omitted.) Id., 218.

The Appellate Court in *Berlin Batting Cages, Inc.*, disagreed. The court concluded that, by adopting the act, "the legislature has undertaken to preempt that field of legislation [i.e., noise pollution control] and to require that local efforts aimed at noise pollution control comply with the requirements [that] it has enumerated by statute." Id., 217. The court further concluded that § 8-2 did not "confer authority [to] the zoning commission to promulgate regulations concerning noise pollution and, moreover, we certainly do not read that language to contradict the [act]." Id., 218. Because the

[38] The zoning regulation provided: "Noise—Any noise emitted outside the property from which it originates shall comply with the provisions of Sections 22a-69-1 to 22a-69-7.4 of the Regulations of the Connecticut Department of Environmental Protection (Control of Noise)." (Internal quotation marks omitted.) *Berlin Batting Cages, Inc.* v. *Planning & Zoning Commission*, supra, 76 Conn. App. 215, quoting Berlin Zoning Regs., § X (D) (3).

defendant had not complied with the requirement of § 22a-73 (c) that noise control ordinances be approved by the commissioner, the Appellate Court concluded that the zoning regulation was ineffective. Id., 217–19. Accordingly, the Appellate Court upheld the trial court's ruling that § X (d) (3) could not provide a basis for denying the site plan. Id., 219.

The plaintiff in the present case contends that *Berlin Batting Cages, Inc.*, supports its position for two reasons. First, it claims that, although the defendant in that case would have had the authority under § 8-2 to consider noise as a factor in deciding whether to allow the use sought by the plaintiff,[39] the decision establishes that zoning commissions cannot regulate noise after a use had been approved without obtaining the approval of the commissioner. Thus, the plaintiff appears to contend that, once the commission permitted racing activities on the property in the present case, any further attempt to regulate the noise level of those activities would constitute a noise control ordinance for purposes

[39] In this regard, we agree with the plaintiff that, when the Appellate Court stated in *Berlin Batting Cages, Inc.* v. *Planning & Zoning* Commission, supra, 76 Conn. App. 218, that § 8-2 did not "confer authority in the zoning commission to promulgate regulations concerning noise pollution," it did not mean that zoning commissions have no authority under § 8-2 to consider noise as a factor when determining whether a particular use of the land is appropriate. Rather, the Appellate Court concluded only that zoning commissions have no authority, other than that conferred by the act, to adopt regulations like § X (D) (3) of the Berlin zoning regulations, which incorporated §§ 22a-69-1 through 22a-69-7.4 of the Regulations of Connecticut State Agencies; see footnote 38 of this opinion; and, therefore, § X (D) (3) constituted a noise control ordinance subject to the requirements of the act. Because the state regulations that were incorporated in § X (D) (3) expressly set forth specific *noise levels* that may not be exceeded in specified *zones*, we agree with the Appellate Court's assessment. See General Statutes § 22a-73 (b) (1) (town may adopt noise control ordinances, including "[n]oise levels which will not be exceeded in specified zones"); see also Regs., Conn. State Agencies § 22a-69-2 (designating noise zones); Regs., Conn. State Agencies § 22a-69-3 (specifying allowable noise levels for designated noise zones).

of the act. Second, the plaintiff contends that, under *Berlin Batting Cages, Inc.* v. *Planning & Zoning Commission*, supra, 76 Conn. App. 199, zoning commissions that want to regulate noise must adopt a "*comprehensive program* of noise regulation"; (emphasis added; internal quotation marks omitted) id., 216; and they cannot adopt noise control ordinances that target specific properties.

The flaw in the plaintiff's first argument is that, even if the plaintiff were correct that the commission cannot regulate the noise level of a land use that it has permitted without obtaining the approval of the commissioner, the plaintiff incorrectly assumes that the use that the 2015 amendments permit is "racing activities." In fact, the amendments contemplate *two distinct uses* of the property—mufflered racing activities and unmufflered racing activities—with two different noise levels. We can perceive no reason why, if the commission has the authority under § 8-2 to consider noise as a factor when determining whether a particular land use is appropriate—which the plaintiff concedes—it would not have the authority to allow mufflered racing while prohibiting or placing greater restrictions on unmufflered racing on the basis of their different noise levels. It would make little sense, for example, to conclude that, if a zoning commission were to permit racing activities by noiseless electric vehicles as an appropriate use of a property under the authority conferred by § 8-2, it could not thereafter prohibit or restrict unmufflered monster truck racing on the property without running afoul of the act, even though the act would not have affected the commission's authority to prohibit unmufflered racing as a "new use" if it had not previously allowed electric vehicle racing. We conclude, therefore, that a zoning regulation that differentiates between distinct *land uses* that produce different noise levels for purposes of determining whether a specific use is appro-

priate for a property does not, ipso facto, specify "[*n*]*oise levels* which will not be exceeded in specified zones or other designated areas"; (emphasis added) General Statutes § 22a-73 (b) (1); and, therefore, does not constitute a municipal noise control ordinance for purposes of the act.

This conclusion disposes of the plaintiff's second argument.[40] Even if we were to assume that a town that wishes to establish a noise control program pursuant to the act must adopt a comprehensive program, we have concluded that the 2015 amendments did not constitute a noise control ordinance within the meaning of the act. We conclude, therefore, that the trial court correctly determined that the commission was not required to obtain the commissioner's approval of § 221.1 (a) (3) of the 2015 amendments, pursuant to § 22a-73 (c), before the regulation could be effective.[41]

V

Finally, we address the plaintiff's contention that the trial court incorrectly determined that the commission had the authority under §§ 8-2 and 8-3 (c)[42] to adopt §§ 221.1 (a) (8) and 221.3 (d) of the 2015 amendments (special permit provisions), which provide that the respective subsections of the amendments "may be amended by the [c]ommission upon filing and approval of . . . a special permit application in compliance with

[40] We note that the trial court rejected the plaintiff's broader claim that the 2015 amendments constitute illegal spot zoning, and the plaintiff has not challenged that ruling on appeal.

[41] Accordingly, we need not address the commission's claim that the trial court's ruling may be affirmed on the alternative ground that the restrictions on unmufflered racing set forth in § 211.1 (a) (3) of the 2015 amendments were not based solely on noise impacts, but also on other impacts, such as traffic and property values.

[42] General Statutes § 8-3 (c) provides in relevant part: "All petitions requesting a change in the regulations or the boundaries of zoning districts shall be submitted in writing and in a form prescribed by the commission and shall be considered at a public hearing within the period of time permitted under section 8-7d. . . ."

all requirements of these regulations . . . .'' We agree with the plaintiff.

The following additional procedural history is relevant to our consideration of this claim. In support of its determination that the commission had the authority to adopt the special permit provisions, the trial court relied on the Appellate Court's decision in *Taylor* v. *Zoning Board of Appeals*, 65 Conn. App. 687, 783 A.2d 526 (2001). In that case, the plaintiffs operated a nonconforming sand and gravel quarry on their property. Id., 690. The plaintiffs and their predecessors in title had operated the quarry for several decades, but, in 1990, the town of Wallingford amended its zoning regulation to allow quarry operations if the owner obtained a special permit. Id. The plaintiffs obtained a permit and renewed it twice but ultimately let the permit expire. Id. Thereafter, the town's zoning enforcement officer issued a cease and desist order to the plaintiffs. Id., 690–91. The plaintiffs appealed from the order to the zoning board of appeals (board), claiming that, because their quarry operation was a preexisting nonconforming use, they were not required to obtain a special permit. Id., 691. The board denied the appeal on the ground that the plaintiffs had waived their right to continue to use their property as a nonconforming use when they applied for a special permit. Id.

The plaintiffs then appealed to the trial court. Id. The trial court dismissed the appeal on the ground that the town's zoning regulations permitted the conversion of a nonconforming use into a permitted use. Id. The court further concluded that, even if the plaintiffs' use continued to be nonconforming, the town had the authority to regulate the use in the interest of public health, safety and welfare. Id., 691–92.

The plaintiffs appealed from the judgment of dismissal to the Appellate Court, which concluded that

the trial court had incorrectly determined that the town had the authority to convert the plaintiffs' nonconforming use into a permitted use because, "[o]nce a nonconforming use is established, the only way it can be lost is through abandonment." Id., 695. The Appellate Court also concluded, however, that the town had the authority to regulate the nonconforming use to protect the public health, safety and welfare, "provided it is done reasonably"; (emphasis omitted; internal quotation marks omitted) id., 697; and that the special permit requirement was a reasonable regulation. Id., 698. Accordingly, the Appellate Court affirmed the judgment of the trial court. Id.

In the present case, the trial court found that "the regulation of racing, camping and parking at the track [had] been ambiguous, jumbled, sloppy and confusing prior to the 2015 . . . amendments." In addition, the court found that, "even though [racing activities have] been a specially permitted use since 1975, the [plaintiff] has never applied for or received a special permit." The court concluded that, consistent with *Taylor*, "[i]t would provide a necessary benefit to the public to have a site plan of the [property] on file in the zoning office, detailing important aspects of its operation like sanitation and parking." The trial court further concluded that, under this court's decision in *Zimnoch* v. *Planning & Zoning Commission*, 302 Conn. 535, 29 A.2d 898 (2011), the commission was not precluded by § 8-3 (c) from "combining a zone change application with a special permit application." See id., 552 ("although the considerations and actions taken by the commission in reviewing the zone change application are slightly different in operation when compared to the special exception permit application, we have uncovered no requirement, statutory, regulatory or otherwise, that precludes the town from combining these applications into one process" (footnote omitted)). Accordingly, the trial court

concluded that, under *Taylor*, the special permit provisions were a reasonable regulation of the plaintiff's nonconforming use.

The plaintiff now contends that, regardless of whether the commission could order the plaintiff to discontinue its racing activities until it obtained a special permit, as was done in *Taylor*,[43] the trial court's reliance on *Zimnoch* v. *Planning & Zoning Commission*, supra, 302 Conn. 535, to support its conclusion that the commission had the authority to require it to apply for a special permit as a condition for seeking an amendment to the zoning regulations was misplaced because that case is distinguishable from the present case. The plaintiff also contends that the special permit provisions are arbitrary and unreasonable because they effectively bar any person except the plaintiff from seeking an amendment. The council and the commission dispute these claims. The commissioner also contends that the plaintiff lacks standing to raise them because the special permit provisions do not bar it from filing a petition to amend the regulations.

"It is, of course, fundamental that no zoning regulations are valid unless they are within the police power. They must bear a reasonable relation to the public welfare and that relation must be within at least one of the

[43] The plaintiff strongly suggests that, contrary to the trial court's determination, it could not be required to obtain a special permit in order to continue its present operations on the property because there was no requirement for a special permit when it began the operations. The plaintiff does not address the Appellate Court's decision in *Taylor* v. *Zoning Board of Appeals*, supra, 65 Conn. App. 687, holding that preexisting as of right uses may be subject to a special permit requirement. We need not address the thorny issue of whether *Taylor* was correctly decided and whether the commission could, therefore, order the plaintiff to cease its racing activities until it obtained a special permit, however, because we conclude that, even if the commission could do so under *Taylor*, it could not require the filing of a special permit application as a general condition for filing a petition to amend the regulations.

particulars specified in the enabling statute. . . . It must be borne in mind that the courts will not substitute their judgment for that of the legislative body if the question whether a zoning ordinance is consistent with the public welfare in any of the particulars specified in the statute is fairly debatable. . . . A zoning ordinance will be held invalid only if it is palpably unjust, unrea sonable or arbitrary." (Citations omitted.) *Fairlawns Cemetery Assn., Inc.* v. *Zoning Commission*, supra, 138 Conn. 440; see also *Schwartz* v. *Town Planning & Zoning Commission*, 168 Conn. 285, 294, 362 A.2d 1378 (1975) (zoning regulations were valid when plaintiffs presented no evidence that they were "unreasonable, arbitrary or confiscatory"). The validity of a zoning regulation is a question of law over which our review is plenary. See, e.g., *Jackson, Inc.* v. *Planning & Zoning Commission*, 118 Conn. App. 202, 206, 982 A.2d 1099 (2009), cert. denied, 294 Conn. 931, 986 A.2d 1056 (2010).

Because it implicates the trial court's subject matter jurisdiction, we first address the commission's claim that the plaintiff lacks standing to challenge the special permit provisions on the ground that they bar other persons from seeking to amend the regulations. In support of this claim, the commission cites *Lauer* v. *Zoning Commission*, 220 Conn. 455, 465, 600 A.2d 310 (1991). In *Lauer*, the defendant, John Angeloni, applied for and obtained a special permit to operate a horse riding academy on his property. Id., 456–58. The plaintiff, who owned land within 100 feet of Angeloni's property; id., 458 n.6; claimed that the failure of the zoning commission to give notice of the special permit proceedings to an adjoining town, as required by General Statutes (Rev. to 1989) § 8-3h, deprived the commission of subject matter jurisdiction over the special permit application. Id., 459. This court concluded that the failure to give notice pursuant to § 8-3h did not implicate the commission's subject matter jurisdiction but merely pro-

vided for "personal notice." Id., 464–65. This court further concluded that the plaintiff had no standing to raise the claim on appeal that the commission had failed to give personal notice to the adjoining town. Id., 465.

We conclude that *Lauer* is distinguishable from the present case. Unlike the plaintiff in *Lauer*, who was in no way affected by the zoning commission's failure to notify an adjoining town of the special permit proceedings, the plaintiff in the present case is adversely affected by the requirement that it obtain a special permit before it may seek an amendment to the zoning regulations.[44] We conclude, therefore, that the plaintiff has standing to raise the claim that the special permit provisions are arbitrary because they restrict the persons who can seek an amendment to the zoning regulations. A conclusion to the contrary would mean that the plaintiff would be burdened by a facially invalid regulation. In this regard, we note that this court in *Lauer* implicitly recognized that, if § 8-3h had been subject matter jurisdictional, the plaintiff would have had standing to raise the claim that the commission had failed to comply with it. See id.

We now turn to the merits of the plaintiff's claim that the trial court's reliance on *Zimnoch* was misplaced and that the special permit provisions are arbitrary. We agree with the plaintiff. In *Zimnoch*, the defendant, Pond View, LLC (Pond View), owned land in the town of Monroe, part of which fell within a DB-2 business and commercial zone and part of which fell within a residential zone. *Zimnoch* v. *Planning & Zoning Commission*, supra, 302 Conn. 537, 539. Pursuant to town zoning regulations that required a landowner that wanted

[44] As we discuss subsequently in this opinion, we recognize that the plaintiff cannot expand the racing activities on the property without obtaining a special permit. In the absence of the special permit provisions, however, there would be nothing to prevent the plaintiff from seeking an amendment to the zoning regulations to permit expanded activities without actually seeking a special permit to do so. We will not presume that the plaintiff could have no good reason to pursue this course.

to change the zone in which its land was located to a design district to file simultaneously a petition to establish the design district and an application for a special exception permit, Pond View filed a combined application for a design district zone change and a special exception permit. See id., 539.[45] The application was denied, and a series of appeals followed; id., 540–56; the substance of which has no bearing on the present case. In the course of explaining the applicable regulatory scheme, this court stated in *Zimnoch* that it had "uncovered no requirement, statutory, regulatory or otherwise, that precludes the town [of Monroe] from combining these applications [for a zone change and for a special permit] into one process." Id., 552. Indeed, we noted that "combining zone and permit applications helps expedite the process and ensures that a commission makes the most informed decision possible." Id., 553.

In the present case, the trial court appears to have concluded that *Zimnoch* stands for the general proposition that a petition to amend zoning regulations may

[45] The relevant portions of the Monroe zoning regulations that then were in effect are as follows: "Section 117-900 of the Monroe zoning regulations . . . provide[d] in relevant part: 'The owner or owners of a tract of land may petition for the establishment of a design district (D) only, coincidentally with an application for special exception permit and development proposal which shall be proposed and developed in conformance with these regulations. . . . In [d]esign [d]istricts, the existing use of land shall not be changed . . . until a site plan of development shall have been prepared by the owner of such land, and approved by the [c]ommission, and a [s]pecial [e]xception shall have been granted . . . .' " (Emphasis omitted.) *Zimnoch* v. *Planning & Zoning Commission*, supra, 302 Conn. 549 n.11.

"Section 117-905 (A) of the Monroe zoning regulations . . . provide[d] in relevant part: 'An application for a change of zoning classification to a design district shall be submitted in complete form . . . . The [c]ommission shall hold a public hearing on the proposed change of zone and special exception application, as required by the General Statutes.'

"Section 117-907 (A) of the Monroe zoning regulations . . . provide[d] in relevant part: 'A change of zone to a design district shall not become effective until the required special exception shall have been approved by the [c]ommission . . . .' " (Emphasis omitted.) *Zimnoch* v. *Planning & Zoning Commission*, supra, 302 Conn. 549 n.12.

be conditioned on the simultaneous filing of a special permit application. In *Zimnoch*, however, the regulation that governed petitions to change the zone in which a particular property was located to a design district was specifically directed to the *owners of the property*. See id., 549 n.11 (quoting Monroe Zoning Regs., § 117-900, providing that " '[t]he owner or owners of a tract of land may petition for the establishment of a design district' "). Presumably, this was because only the owners would have standing to seek to designate their property as a design district. Any person who would be affected by the proposed change, however, would be able to protect his or her interests by participating in the public hearings on the petition. See id., 549 n.12 (citing Monroe Zoning Regs., § 117-905 (A)); see also footnote 45 of this opinion. In contrast, in the present case, many persons other than the plaintiff have interests that are affected by the racing activities on the plaintiff's property and the 2015 amendments, whose interests could be protected by filing a petition to amend the regulations. For example, neighboring landowners might want to seek an amendment changing or reducing the number of hours that racing activities are permitted. Under the special permit provisions, they have no ability to do so. The council and the commission—which concede this point—have cited no authority for the proposition that the commission is empowered to arbitrarily restrict the classes of affected persons who can seek to amend particular zoning regulations.[46] We conclude, therefore, that the special permit provisions are invalid.[47]

[46] Although the commission concedes that only the plaintiff may seek an amendment to the zoning regulations, it claims that this restriction is not arbitrary because only the plaintiff has standing to do so. The commission does not explain why a neighboring landowner who is adversely affected by racing activities on the property would not have standing to seek an amendment to the zoning regulations to change the activities that are permitted.

[47] It is possible that, under *Zimnoch*, a regulation requiring *the owner of any property* who conducts racing activities that are subject to the 2015 amendments to file a special permit application as a condition for filing a

We further note that, to the extent that the commission adopted the special permit provisions in order to force the plaintiff to file an application for a special permit before it could expand racing activities on the property, the provisions would appear to be unnecessary. The sole justification for the plaintiff's position that it is not required to apply for a special permit to continue its present activities on the property is that those activities predated the adoption of the regulation requiring a special permit to conduct racing activities in 1975. Thus, the plaintiff contends that, contrary to the holding of the Appellate Court in *Taylor* v. *Zoning Board of Appeals*, supra, 65 Conn. App. 687, conducting the current level of racing activities *without the need to obtain a special permit* is, in effect, a preexisting nonconforming use that the commission cannot abrogate by regulation.[48] The plaintiff makes no claim, however, that it could *expand* its racing activities on the property without first seeking an amendment to the zoning regulations and obtaining the required special permit.[49] Cf. R. Fuller, 9B Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) § 52:2, p. 226 ("[t]he zoning regulations . . . may allow [for] expansion of a nonconforming use by special permit" (footnote omitted)).

petition to amend the regulations to expand the permitted use would be valid. The special permit provisions provide, however, that the commission cannot grant *any* petition to amend the zoning regulations unless it first approves a special permit application.

[48] The commission takes no position on this issue.

[49] The plaintiff contended in the regulatory proceedings before the commission that, notwithstanding the series of injunctive orders in the *Vaill* case restricting its use of the property since May 12, 1959, *unlimited* racing and camping activities on the property are a protected nonconforming use because those activities predated the adoption of the town's zoning regulations in 1959. Accordingly, it contended that the proposed amendments codifying the restrictions contained in the *Vaill* orders and the ZBA judgments would be invalid because they would deprive the plaintiff of its vested property rights without compensation. It does not renew that claim on appeal to this court.

VI

In summary, we conclude that the trial court correctly determined that (1) the plaintiff did not waive its right to challenge the 2015 amendments' prohibition on Sunday racing, and (2) the 2015 amendments' restrictions on unmufflered racing are not subject to the provisions of § 22a-73. We further conclude that the trial court incorrectly determined that (1) § 14-164a (a) preempted the regulation prohibiting racing activities on the plaintiff's property on Sundays, (2) the 2015 amendments prohibit mufflered racing activities on Saturdays, and (3) the commission acted within its authority when it adopted the regulations requiring the plaintiff to obtain a special permit as a condition for filing a petition to amend the 2015 amendments.

The judgment is reversed insofar as the trial court determined that § 14-164a (a) preempted the regulation prohibiting racing activities on Sundays and the case is remanded with direction to render judgment dismissing the plaintiff's appeal with respect to that claim; the judgment is reversed insofar as the trial court ruled that the 2015 amendments prohibited mufflered racing activities on Saturdays and the case is remanded with direction to vacate that ruling; the judgment is reversed insofar as the trial court determined that the commission had the authority to adopt the regulations requiring the plaintiff to obtain a special permit as a condition for filing a petition to amend the 2015 amendments and the case is remanded with direction to render judgment sustaining the plaintiff's appeal with respect to that claim; the judgment is affirmed in all other respects.

In this opinion the other justices concurred.

ORDERS

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

The plaintiffs' petition for certification to appeal from the Appellate Court, 199 Conn. App. 265 (AC 42581), is denied.

Keith Yagaloff, in support of the petition.

Michael G. Rigg, *R. Cornelius Danaher, Jr.*, *Laura E. Waltman*, and *Cristin E. Sheehan*, in opposition.

Decided November 3, 2020

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

The cross petition by the defendant Sound Physicians of Connecticut, LLC, for certification to appeal from the Appellate Court, 199 Conn. App. 265 (AC 42581), is denied.

R. Cornelius Danaher, Jr., and *Laura E. Waltman*, in support of the petition.

Decided November 3, 2020

JERRY LEWIS WHISTNANT *v.* COMMISSIONER OF CORRECTION

The petitioner Jerry Lewis Whistnant's petition for certification to appeal from the Appellate Court, 199 Conn. App. 406 (AC 42894), is denied.

Deborah G. Stevenson, assigned counsel, in support of the petition.

Zenobia Graham-Days, assistant attorney general, in opposition.

Decided November 3, 2020

CHAD E. COHEN ET AL. *v.* POSTAL HOLDINGS, LLC

The plaintiffs' petition for certification to appeal from the Appellate Court, 199 Conn. App. 312 (AC 42912), is denied.

Beverley Rogers, in support of the petition.

Matthew G. Conway and *Raymond M. Gauvreau*, in opposition.

Decided November 3, 2020

STATE OF CONNECTICUT *v.* SHAILA M. CURET

The state's petition for certification to appeal from the Appellate Court, 200 Conn. App. 13 (AC 41372), is granted, limited to the following issue:

"Did the Appellate Court correctly conclude that the warrantless entry by the police into the defendant's apartment was not justified under the exigent circumstances doctrine or the emergency doctrine?"

Michele C. Lukban, senior assistant state's attorney, in support of the petition.

Emily H. Wagner, assistant public defender, in opposition.

Decided November 3, 2020

PAUL JOHN FERRI *v.* NANCY POWELL-FERRI ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 200 Conn. App. 63 (AC 42068), is denied.

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

Jeffrey J. Mirman, in support of the petition.

Decided November 3, 2020

NANCY GIORDANO *v.* RAY GIORDANO

The defendant's petition for certification to appeal from the Appellate Court, 200 Conn. App. 130 (AC 42497), is denied.

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

Peter J. Zarella, in support of the petition.

Samuel V. Schoonmaker IV, in opposition.

Decided November 3, 2020

MARLON SYMS *v.* COMMISSIONER OF CORRECTION

The petitioner Marlon Syms' petition for certification to appeal from the Appellate Court, 200 Conn. App. 905 (AC 42784), is denied.

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

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

Brett R. Aiello, deputy assistant state's attorney, in opposition.

Decided November 3, 2020

BAC HOME LOANS SERVICING, L.P. *v.* RICHARD M. FARINA ET AL.

The named defendant's petition for certification to appeal from the Appellate Court (AC 43800) is denied.

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

Richard M. Farina, self-represented, in support of the petition.

Adam L. Avallone, in opposition.

Decided November 3, 2020

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CONNECTICUT APPELLATE REPORTS

Vol. 201

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

ALINA LEONOVA *v.* STANISLAV LEONOV
(AC 42539)

Keller, Prescott and Devlin, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court dissolving his marriage to the plaintiff and from the trial court's granting of the plaintiff's motions for attorney's fees. *Held*:

1. The plaintiff could not prevail on his claim that the trial court abused its discretion by improperly basing the supplemental alimony awarded to the plaintiff on the defendant's gross, rather than net, bonus income, as the court had ample evidence at its disposal to adequately inform it as to the defendant's financial status with respect to his net bonus income; the trial court did not state that it relied on the party's gross earnings to form the basis of its order, the record demonstrated both parties' net available income, including the defendant's base pay, and it was apparent that the court intended its supplemental alimony order to be a function of the gross bonus income, which was a convenient and economical method of calculation, and was distinguishable from the court basing its order on the bonus gross income, especially as the court did not use gross income to calculate the periodic alimony order or the monthly and supplemental child support orders.
2. Contrary to the defendant's claim, the trial court did not act in excess of its statutory (§ 46b-81) authority applicable to dissolution proceedings by ordering the parties to establish and to contribute to educational savings plans, as the court properly exercised its authority pursuant to the applicable statute (§ 46b-56) to secure contemplated future educational support orders by requiring each party to restore one half of the gift money that had been donated to the parties' two children from their grandmother and to protect it for their future use; the court's order to establish the plans was eminently fair, as both parties were ordered to contribute equally to their creation after they had used the children's gift money to renovate a home that the children will never occupy, although the defendant claimed that § 46b-81 was limited to orders regarding property division and did not permit the court to order future investment decisions for the parties, the trial court did not exceed its authority, as § 46b-81 was inapplicable, and that under the applicable statutes (§§ 46b-56 and 46b-84), the court was authorized to provide security for the enforcement of a future educational support order when it retained jurisdiction to make an order providing the children with an educational expectancy and, by ordering the establishment of two new savings plans, the court was not distributing marital property from one spouse to the other, but securing funds for the children's future educational needs.

3. The trial court erred in finding the defendant in contempt for violating the automatic orders in effect, pursuant to the relevant rule of practice (§ 25-5), by renting a seasonal ski lodge, as it was undisputed that the plaintiff failed to file a written motion for contempt regarding the rental of the ski lodge: the defendant had no notice that he was facing a contempt finding with respect to the rental of the ski lodge, as the plaintiff's motion for contempt alleged only that the defendant violated the automatic orders in purchasing cryptocurrency; furthermore, the trial court did not abuse its discretion in ordering the defendant to reimburse the plaintiff for one half of the cost the defendant incurred in renting the ski lodge and to reimburse the plaintiff for one half of the loss that he incurred as a result of a cryptocurrency investment he made after the imposition of the automatic orders, as the record sufficiently demonstrated that, contrary to the defendant's claims, the rental of the ski lodge and the investment in the cryptocurrency were not made in the usual course of business as provided in the exception to Practice Book § 25-5 for the transfer or disposal of marital property; the defendant admitted that he did not request permission from the plaintiff prior to purchasing the cryptocurrency, that he did not have accounts to make that type of investment prior to the commencement of the dissolution action, he did not discuss the rental of the seasonal ski lodge with the plaintiff, and, although the parties took vacations together during their marriage, the plaintiff did not ski, the parties never rented a ski lodge during their marriage, and the defendant shared the seasonal ski lodge with others; moreover, even in the absence of a contempt finding, a trial court has the authority to compensate a spouse for losses caused by a violation of the automatic orders by adjusting the distribution of marital assets in the injured spouse's favor.

4. The trial court did not abuse its discretion by failing to attribute an earning capacity to the plaintiff in determining alimony and child support, the record having sufficiently supported the court's determination to base its awards of child support and alimony on the plaintiff's actual income at the time of the dissolution, which it found to be zero, as such determination was not contrary to law; the court expressly stated that it had considered all of the relevant statutes before rendering its judgment, and the trial court has broad discretion in varying the weight placed on each statutory criterion under the circumstances of each case.

5. The trial court did not err in awarding the plaintiff attorney's fees for representation during the marital dissolution proceedings, postjudgment matters, and this appeal, as the trial court properly exercised its broad discretion in granting the plaintiff's motions for attorney's fees; this court, in affording the trial court every reasonable presumption in favor of the correctness of its decision, found that the trial court could have relied on evidence relevant to each statutory (§ 46b-82) criterion as it applied to both parties, and that not awarding the plaintiff attorney's fees would have had the effect of undermining its other financial orders.

Argued June 15—officially released November 17, 2020

Procedural History

Action for the dissolution of marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford and tried to the court, *Hon. Michael E. Shay*, judge trial referee; judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to this court; thereafter, the court, *Hartley Moore*, *J.*, granted the plaintiff's motions for attorney's fees and granted certain other relief, and the defendant filed an amended appeal. *Reversed in part*; *further proceedings.*

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

Charles D. Ray, with whom, on the brief, was *Angela M. Healey*, for the appellee (plaintiff).

Opinion

KELLER, J. The defendant, Stanislav Leonov, appeals from the judgment of the trial court, dissolving his marriage to the plaintiff, Alina Leonova, which included a finding of contempt against the defendant, and from two postjudgment orders awarding the plaintiff attorney's fees incurred in connection with postdissolution proceedings and her defense of this appeal. On appeal, the defendant claims that the trial court (1) abused its discretion by improperly basing supplemental alimony awarded to the plaintiff on the defendant's gross, rather than net, bonus income, (2) acted in excess of its statutory authority when it ordered the parties to establish and to contribute to education savings plans established pursuant to 26 U.S.C. § 529 (§ 529 plans) for the benefit of each of the two minor children, (3) acted in excess of its statutory authority when it found the defendant in contempt for an alleged violation of the automatic orders set forth in Practice Book § 25-5, despite the fact

that there was no contempt motion pending, (4) abused its discretion when it found the defendant in contempt for two violations of the automatic orders where the defendant's financial expenditures fell within the "usual course of business" exception to the rule, (5) abused its discretion by failing to attribute an earning capacity to the plaintiff in determining alimony and child support, and (6) in violation of the directive of General Statutes § 46b-62 (a) and relevant decisional law, improperly awarded the plaintiff attorney's fees for representation during the marital dissolution proceedings, postjudgment matters and this appeal.[1] We agree with the defendant's third claim only. Accordingly, we reverse the judgment of dissolution only with respect to one of the contempt findings, and remand the case to the trial court with direction to vacate its finding that the defendant was in contempt with respect to one of the violations of the automatic orders alleged by the plaintiff. We affirm the judgment and postjudgment orders of the court in all other respects.

The plaintiff brought the underlying dissolution action against the defendant in 2017. A contested trial took place in December, 2019, during which both parties were represented by counsel. The following undisputed facts, or facts as found by the trial court, and additional procedural history are relevant to this appeal. The plaintiff and the defendant were married in New York, New York on March 10, 2006. Both parties emigrated as children from regions of the former Soviet Union, the defendant from Ukraine and the plaintiff from Azerbaijan. Each is a naturalized citizen and is fluent in English. There are two minor children issue of the marriage who, at

[1] As will be discussed in greater detail later in this opinion, the attorney's fees awarded for representation during the dissolution were ordered by the Honorable Michael E. Shay, judge trial referee. The fees awarded for representation during postjudgment proceedings and to defend this appeal were ordered by Judge Margarita Hartley Moore.

the time of the judgment of dissolution, were ages four and three. From the time that the parties separated in March, 2017, until the time of the dissolution, the plaintiff resided in a condominium owned by the parties at 25 West Elm Street in Greenwich (Greenwich condominium). The children resided primarily with the plaintiff.[2] The defendant resided in an apartment in White Plains, New York.

The defendant, at the time of the dissolution, was thirty-nine years old and in good health. He has a degree in computer science and has worked steadily throughout the marriage. For the six years of marriage preceding the divorce, he had been employed by Viking Global Investors in Greenwich as a team leader in quantitative development. He earned an annual base salary of $400,000 and also regularly received an additional annual discretionary bonus. In 2017, he received a gross bonus of $508,500 and was expecting to receive a gross bonus of $550,000 for 2018.[3]

The plaintiff, at the time of the dissolution, was thirty-five years old and in general good health, but has vision problems and a serious hearing deficit, which would require further surgery to partially restore her hearing. She had earned a master's degree in business administration from Fordham University while working full-time earlier in the marriage, but had not been fully

[2] Prior to the dissolution, pursuant to a pendente lite order based on a stipulation of the parties dated August 7, 2018, the defendant had access to the children every Wednesday night and every other weekend. The court annexed to its decision a "Regular Parenting Plan" or "Schedule A," to which the parties never agreed, and made this Schedule A part of its parenting orders. The court granted the defendant access to the children on alternating weekends and Wednesday nights from 6 p.m. to Thursday morning, as well as additional access on designated holidays, birthdays, school breaks and two nonconsecutive weeks during the summer. The orders pertaining to the parties' joint legal custody, parental access and other parenting responsibilities are not challenged on appeal.

[3] During a hearing on the plaintiff's postjudgment motions for attorney's fees on April 1, 2019, the defendant testified that he recently had received his 2018 bonus of $550,000.

employed outside of the home since 2012. She considered herself a full-time homemaker, although she sporadically earned money during the marriage. In one instance she performed some part-time bookkeeping, earning between $4000 and $5000, and in another instance she earned several hundred dollars related to her photography hobby.

The principal assets of the parties included two properties in Connecticut and a cooperative apartment in Brooklyn, New York (Brooklyn co-op). The parties stipulated that one of the Connecticut properties, the jointly owned Greenwich condominium occupied by the plaintiff, had a fair market value of $580,000. There was a mortgage on that property in the amount of approximately $416,000. The parties also owned a larger home at 215 Riverside Avenue in Greenwich (Riverside house), which they had purchased during the marriage and renovated. On each of their financial affidavits, the parties indicated that the Riverside house had a fair market value of $2.5 million with an outstanding mortgage of approximately $1,467,000. At trial, the defendant complained that the plaintiff spent far too much money on the renovations.[4] The plaintiff testified that if she had known that the family was not going to occupy the Riverside house when the renovations were complete, she never would have spent so much.[5] To complete the renovations, the plaintiff had borrowed $50,000 from her mother, and both parties acknowledged that the

[4] The plaintiff testified that the parties paid $2.5 million for the Riverside house and spent $500,000 on the renovations. At the time of the dissolution, it had been listed at $2,495,000 after being on the market for more than a year. On March 1, 2019, the defendant filed a motion to terminate the appellate stay regarding the orders for the sale of the Riverside house. In his motion, he alleged that the plaintiff was refusing to consider offers of purchase and that the mortgage on the property, which he was obligated to pay, was $24,000 in arrears. After a hearing, the court granted the motion to allow for the listing and sale of the property with the net proceeds of any sale to be held in escrow pending the outcome of this appeal.

[5] Both parties testified that the plaintiff supervised the renovation project as if she were the general contractor.

$60,000 that the plaintiff's mother had gifted to the parties' children, $30,000 to each child at the time of the child's birth, also was spent for that purpose. The parties also jointly owned the Brooklyn co-op, which was under a contract for sale for $290,000. There was approximately $195,000 of equity in that property.

Other marital assets included several retirement accounts, three belonging to the defendant and one belonging to the plaintiff. The unspent balance of the defendant's 2017 net bonus, approximately $63,000, was being held in escrow in one of the checking accounts pursuant to a court order.[6]

The plaintiff also held an interest in an apartment and an apple orchard in Azerbaijan, which she estimated had a combined value of $50,200. The defendant claimed no interest in either. Both parties, as of the time of the dissolution, had accumulated a substantial amount of credit card debt, as well as debts to family and friends.

The court, in its factual conclusions, was more critical of the defendant than of the plaintiff, noting, as follows: "During the pendency of the case, [the defendant] received an annual bonus for 2017, most of which he spent, much of it on credit card debt. As a result, the court entered pendente lite orders, among other things,

[6] On December 12, 2017, the plaintiff filed a motion to enjoin, pendente lite, seeking to prevent the defendant from reducing in "any way, shape or form" the net bonus he had received from his employer for the calendar year 2017.

In an oral decision, the court, *Colin*, *J.*, granted the motion after making the following finding: "The evidence showed that the defendant received a substantial bonus. He unilaterally decided to pay off a substantial amount of debt notwithstanding any difficulties that may exist in communication between the parties.

"The common sense, right thing to do would have been to discuss with [the plaintiff] how you were going to spend $145,000 approximately before you did it. . . . The moving party has established enough probable cause that without some further relief there's some risk that the remaining portion of the bonus will be spent without the moving party having any input or say into it."

freezing the unspent balance as well as other orders. Moreover, since the separation, his spending has been uncharacteristically lavish for, among other things, meals and travel. . . . The [plaintiff] told the court that the pattern throughout the marriage was to 'save and invest,' adding that 'this is not my husband.' The [defendant] did not dispute the marital saving and spending patterns. By way of contrast, in 2018 he only paid the [plaintiff] $12,500 for support for the first half of the year and nothing since. However, since the filing of the complaint, among other things, without consulting the [plaintiff] or seeking her permission, he made a large, and losing, investment in some alternative currencies (so-called 'cryptocurrencies'), like Bitcoin. In January, 2018, he invested $39,000 in these currencies and later sold them for a $22,000 loss. While the [defendant] has maintained an investment account, it was clear from his testimony that he had never made such an investment before. More recently, again without permission, he removed $10,000 from [a] checking account to rent a ski lodge for the upcoming season. . . .

"[The defendant] testified that the parties had 'grown apart' and that for a year there had been 'no emotional or physical relationship or intimacy.' The [defendant] struck the court as somewhat insincere, the evidence supporting a finding that for years he has been carrying on a long time extramarital affair with a person he met on a ski trip. The [plaintiff] told the court that she was surprised to first find out about the [defendant's] affair when he posted a picture of the girlfriend on social media and it was brought to her attention by a friend. [The plaintiff] believed that the marriage could be saved. Adding to [the plaintiff's] consternation was the fact that in April, 2016, [the defendant gave the plaintiff] a gift of an expensive diamond ring, which he claimed cost $50,000. She values the ring at $25,000."

In making its findings, the court noted that it had considered all relevant statutory provisions affecting its financial orders.[7] It found that both parties had contributed to the breakdown of the marriage "in some fashion," but that the defendant's actions were the primary cause.

With respect to its January 10, 2019 orders, which were incident to the judgment of dissolution and are the subject of this appeal, the court indicated that it had reviewed the affidavit of attorney's fees submitted by the plaintiff's attorney dated December 20, 2018, and that the fees incurred by the plaintiff were fair and reasonable, and that "to require the [plaintiff], who has at present a minimal earning capacity and the responsibility for the two minor children, to pay these fees from her portion of the martial assets awarded to her . . . would undermine the purposes of the same and that it would be fair and equitable for the [defendant] to pay a portion of the same." (Citation omitted.) The court ordered the defendant to pay $40,000 to the plaintiff's attorney for legal fees incurred by the plaintiff within thirty days of the date of the judgment. The plaintiff was to pay the balance of her legal fees, and the defendant was responsible for his own.

The court ordered that, commencing February 1, 2019, the defendant was to pay to the plaintiff the monthly sum of $6200 for periodic alimony until the death of either party, the remarriage of the plaintiff, her cohabitation or living together as defined by General Statutes § 46b-86 (b), or until June 30, 2029, whichever shall sooner occur. In addition to the foregoing, commencing with the bonus that the defendant was to receive for the year 2019 and succeeding years, until termination

[7] The court cited to nine separate sections of the General Statutes, specifically General Statutes §§ 46b-56, 46b-56a, 46b-56c, 46b-62, 46b-81, 46b-82, 46b-84, 46b-87 and 46b-215a. It also stated that it had considered the Child Support and Arrearage Guidelines Regulations, effective July 1, 2015.

of alimony for whatever reason, the court ordered the defendant to pay to the plaintiff, as additional periodic alimony, a sum equal to 20 percent of his gross bonus award up to and including $250,000, and, thereafter, a sum equal to 10 percent of his gross bonus award up to and including a ceiling of $750,000 (supplemental alimony award). The defendant was required to make the supplemental alimony award payment within one week of receipt of the bonus and to include with the payment a copy of the pay slip outlining the gross amount and any deductions therefrom. Except for the circumstances warranting termination of alimony stated in the order, the court made the term of the periodic alimony otherwise nonmodifiable, and further ordered that the amount of periodic alimony would be nonmodifiable by the defendant where the sole basis for modification is annual gross earnings of the plaintiff of $35,000 or less.[8]

In light of testimony that gifts of $30,000 to each of the children from the plaintiff's mother had been used to pay for some of the costs of renovating the Riverside house, each of the parties was ordered to jointly contribute $30,000 to a separate § 529 plan for each minor child, to be established by the plaintiff for their benefit. Specifically, the court ordered these funds to be deducted from each party's share of the net proceeds from the defendant's 2018 bonus. To the extent that the court's order also suggests that these funds be set aside from the proceeds of the sale of the Riverside house, we infer that the court intended to derive the $30,000 contributions into the new § 529 plans by either of these two means. To wit, either from the Riverside house net sale proceeds or from the defendant's 2018 net bonus proceeds. Neither party claims that the amount of the contribution that the court required from each of

[8] This type of alimony order in family cases is often referred to as an income "safe harbor" provision. See, e.g., *Hornung* v. *Hornung*, 323 Conn. 144, 186, 146 A.3d 912 (2016) (*Zarella*, *J.*, dissenting).

them was more than $30,000. The plaintiff was ordered to serve as the fiduciary for both accounts. Until said accounts are established, the sum of $60,000 from the net proceeds of the 2018 bonus was to be paid to and held in escrow in the plaintiff's attorney's trustee account. Any § 529 plans previously established by the defendant were ordered to remain in full force and effect.

The court also addressed a claim made by the plaintiff during the trial that she be reimbursed for losses resulting from the defendant's breach of the automatic orders based on his cryptocurrency investment and his rental of the ski lodge. The plaintiff previously had filed a motion for contempt against the defendant for his violation of the automatic orders based on his cryptocurrency investment, but she did not file a motion for contempt alleging that his rental of the ski lodge was also such a violation. The court ordered the defendant to pay to the plaintiff $16,000 from his share of the net proceeds of his 2018 bonus to offset his violation of these two automatic orders.

Although, in the present appeal, the defendant does not challenge the court's distribution of marital assets, we will review the court's orders in this regard because they are relevant to our analysis of whether certain other financial orders that are the subject of this appeal constitute an abuse of the court's discretion.

The plaintiff was allowed to retain her interest in the assets located in Azerbaijan.

The net proceeds of the sale of the Brooklyn co-op after payment of any mortgage, taxes and liens, as well as closing costs, were ordered to be divided equally by the parties.

The Greenwich condominium, in which the plaintiff and the children reside, was awarded to her, subject to any existing indebtedness after the defendant brought the mortgage, the real estate taxes and the homeowners insurance current from his share of the division of his

2018 bonus. The defendant was ordered to quitclaim his interest in this property to the plaintiff within thirty days of the date of the dissolution and to make these payments current within one month of the date of the dissolution. After the defendant quitclaimed his interest in the condominium to the plaintiff, she was ordered to be solely responsible for the payment of the balance of the mortgage, the insurance and the real estate taxes and to indemnify and to hold the defendant harmless therefrom. She further was ordered to use her best efforts to remove the defendant's name from the existing mortgage within five years.

The court ordered the Riverside house to be listed for sale, with the net proceeds of the sale to be divided equally between the parties. The plaintiff was ordered to reimburse the defendant from her share of the proceeds for carrying costs on the home that he was ordered to pay from January 1, 2019, until it is sold. The defendant also was ordered to immediately bring the mortgage, the real estate taxes and the homeowners insurance current from his share of the division of his 2018 bonus as of the date of the judgment.

The balances in three checking accounts were ordered to be divided equally. These accounts included a Citibank account containing the $63,000 escrowed balance of the defendant's 2017 bonus income, a Chase Bank account containing $11,000 and an HSBC checking account.[9]

The parties were allowed to retain the balances in their individual 401 (k) plans and retirement accounts, except that one Fidelity 401 (k) plan, held by the defendant and worth $423,184, was ordered be divided, 60 percent to the plaintiff and 40 percent to the defendant by means of a qualified domestic relations order (QDRO). The plaintiff's Fidelity 401 (k) plan was worth $210,000. The defendant was allowed to retain in its entirety a

[9] The amount in the HSBC checking account is not ascertainable from the record.

Viking 401 (k) plan worth $167,139 and a Fidelity individual retirement account, worth $5779.

The parties each were ordered responsible for the cost of their leased automobiles and for any debt on their respective financial affidavits not addressed in the court's memorandum of decision.[10] Household furnishings, except for the children's furniture, which was to remain in the plaintiff's possession, were ordered to be divided equally. Each party was allowed to retain his or her clothing, personal effects, E-Trade accounts,[11] and jewelry, which permitted the plaintiff to keep the diamond ring she claimed was appraised at $25,000. The defendant was allowed to retain his Viking Hedge Fund account, worth approximately $7200.

After the judgment was rendered, the defendant filed this appeal on January 30, 2019. On February 1, 2019, the plaintiff filed two motions for counsel fees, in which she sought legal fees for representation relevant to certain postdissolution motions and to defend this appeal. On April 8, 2019, after an evidentiary hearing, the court, *Hartley Moore*, *J.*, granted both motions after finding that the defendant "was able to obtain significant funds for a retainer for new counsel to represent him postjudgment," and that he had "rented an expensive ski house for the season and [had] started paying the alimony and child support order in February, 2019. The plaintiff has nominal income from part-time employment and has the primary responsibility of caring for two very young children. Moreover, the plaintiff was awarded counsel

[10] On her financial affidavit, the plaintiff claimed $232,300 in liabilities. The defendant claimed $262,852. These amounts included significant balances on a number of credit cards held by each of them and loans from friends and family members. The defendant also was in arrears on the mortgage payments for all three properties owned by the parties.

[11] The plaintiff claimed that her E-Trade account was worth $1300 and the defendant claimed that his E-Trade account was worth $1033.

fees in the underlying dissolution of marriage."[12] On April 24, 2019, the defendant amended his appeal to seek reversal of these April 8, 2019 orders. Additional facts and procedural history will be set forth as necessary.

I

SUPPLEMENTAL ALIMONY AWARD

The defendant's first claim is that the court abused its discretion by improperly basing the supplemental alimony awarded to the plaintiff on the defendant's gross, rather than net, bonus income. We disagree.

The applicable standard of review of this financial order is abuse of discretion. "In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action." (Internal quotation marks omitted.) *Medvey* v. *Medvey*, 98 Conn. App. 278, 281, 908 A.2d 1119 (2006); see id. (abuse of discretion standard applied to claim court improperly relied on gross, rather than net, income of husband in modifying alimony).

As indicated previously in this opinion, the court entered the following order of supplemental alimony: "[C]ommencing with the bonus [the defendant] receives for the year 2019 and succeeding years, until termination of alimony for whatever reason, he shall pay to the [plaintiff, as additional] periodic alimony, a sum equal to 20 percent of his gross bonus award up to and including $250,000; and thereafter a sum equal to 10 percent of his gross bonus award up to and including a ceiling of

[12] On June 25, 2019, the defendant filed motions for articulation of the court's January 10, 2019 and April 8, 2019 orders. Both motions were denied, and the defendant moved this court for review on July 15, 2019. On September 19, 2019, this court granted the defendant's motions for review but denied the relief requested.

$750,000.[13] Said payment shall be made within one week of receipt of the bonus and shall be accompanied by a copy of the pay slip outlining the gross amount and any deductions therefrom." (Footnote added.)

The court had before it the financial affidavits and worksheets of both parties filed pursuant to the Child Support and Arrearage Guidelines (child support guidelines), which had been filed immediately prior to trial as required by Practice Book § 25-30 (e). The defendant, however, did not disclose his bonus income, gross or net, in either this financial affidavit or in his child support guidelines worksheet. He only indicated his weekly income from his base salary. He did, however, testify that, before the trial concluded, he was anticipating receiving from his employer a gross bonus of $550,000 for the year 2018. He acknowledged that his income from salary and bonus for the year 2016, the last year he had filed a tax return, was $813,644. The defendant further stated that he had been on a trajectory where his bonus income exceeded his annual base salary.

The court had as evidence the parties' joint tax returns for the years 2014 through 2016 and a list of the expenditures the defendant had made from the net proceeds of his 2017 bonus. There was a balance of $63,000 remaining from the 2017 bonus. Also in evidence was the defendant's 2017 bonus payroll statement, including deductions, which showed a gross bonus of $508,500, or

[13] In contrast, after ordering the defendant to pay to the plaintiff $3400 per month for child support, the presumptive maximum amount under the child support guidelines, the court ordered supplemental child support to be paid from the defendant's bonus in a sum "equal to 10 percent of the husband's net bonus after taking into account the normal 'allowable deductions' for the first $250,000 and 5 percent of the excess thereof, up to and including a ceiling of $750,000." The court indicated that a supplemental award of child support based on the defendant's bonus income should be expressed as a percentage not to exceed 17.71 percent. See Regs., Conn. State Agencies § 46b-215a-2c (e); see also *Maturo* v. *Maturo*, 296 Conn. 80, 96, 995 A.2d 1 (2010).

$9778.85 weekly, as well as financial affidavits, previously filed by the defendant on January 25 and April 6, 2018, which indicated a net weekly income, including bonus payments, of nearly $10,000 a week after his stated deductions, some of which are not legally mandated, such as his contributions into his retirement accounts.

Although our case law consistently affirms the basic tenet that support and alimony orders must be based on net income, "the proper application of this principle is context specific. . . . [W]e differentiate between an order that is a function of gross income and one that is based on gross income. . . . [T]he term based as used in this context connotes an order that only takes into consideration the parties' gross income and not the parties' net income. Consequently, an order that takes cognizance of the parties' disposable incomes may be proper even if it is expressed as a function of the parties' gross earnings." (Citation omitted; internal quotation marks omitted.) *Procaccini* v. *Procaccini*, 157 Conn. App. 804, 808, 118 A.3d 112 (2015).

This court previously has overlooked the failure of the trial court to make a finding as to a party's net income, as in the present case, with respect to the defendant's net bonus income. We have concluded that such an omission does not compel the conclusion that the court's order was improperly based on gross income if the record indicates that the court considered evidence from which it could determine a party's net income, and it did not state that it had relied on the party's gross earnings to form the basis of its order. See *Hughes* v. *Hughes*, 95 Conn. App. 200, 207, 895 A.2d 274, cert. denied, 280 Conn. 902, 907 A.2d 90 (2006).

In *Kelman* v. *Kelman*, 86 Conn. App. 120, 123, 860 A.2d 292 (2004), cert. denied, 273 Conn. 911, 870 A.2d 1079 (2005), this court rejected a similar claim on the ground that, although the trial court, in its decision,

made reference to the parties' gross incomes, it did not expressly state that it was relying solely on gross earnings in framing its order. The trial court in the present case, like the trial court in *Kelman*, stated that it took into account all of the relevant statutes, the testimony of the parties, and the evidence presented, which included evidence of the defendant's actual net bonus income, including a payroll statement from 2017 reflecting his most recent annual net bonus payment. The court found that based on the parties' financial affidavits, the defendant's net available income from his *base* pay was $4462 per week, or $19,187 per month, and the plaintiff's net available income was $0 per week. The court relied on these net findings as the basis for its monthly child support and alimony awards. The court also based its supplemental child support order on a percentage of the defendant's net annual bonus, after allowing for the mandatory deductions listed in the child support guidelines regulations. It further indicated that it was aware that "alimony and child support orders must be based upon the net income of the parties," and did not distinguish between periodic and supplemental orders in making this statement.

It is apparent that the court intended its supplemental alimony order to be a function of the gross bonus income, which is a convenient and economical method of calculation.[14] This order is distinguishable from the court basing its order on the bonus gross income, especially in light of the fact that the court did not use gross income to calculate the periodic alimony order or the monthly and supplemental child support orders.[15]

[14] See *Maturo* v. *Maturo*, 296 Conn. 80, 120, 995 A.2d 1 (2010) (court may fashion financial order by utilizing capped percentage of gross bonus as supplemental alimony, eliminating practical difficulties inherent in order).

[15] For the first time on appeal, the defendant also raises a claim in his principal and reply briefs that the 2017 passage of the Tax Cuts and Jobs Act (TCJA), Pub. L. No. 115-97, 131 Stat. 2054 (2017), and its changes to the tax treatment for alimony payments by a spouse in the Internal Revenue Code, 26 U.S.C. § 71, made it "impossible" for the court to determine what

Because the court had ample evidence at its disposal to adequately inform it as to the defendant's financial status with respect to his net bonus income, we conclude that the court did not abuse its discretion in making its supplemental alimony order a function of the defendant's future gross bonus income.

II

ORDER TO ESTABLISH § 529 PLANS

The defendant's second claim is that the court acted in excess of its statutory authority by ordering the parties to establish and to contribute to an education savings plan established pursuant to 26 U.S.C. § 529, for the benefit of each of the two minor children.[16] The

the defendant's net bonus income would be when he begins paying alimony. The TCJA changed the law to eliminate the deduction for alimony, effective January 1, 2019. This is an issue the defendant did not distinctly raise in the trial court and we decline to review it as it is unpreserved. The defendant at trial presented no argument to the court on this purported impossibility with respect to his particular financial situation. In fact, in his proposed orders to the court, the defendant proposed an order of "additional alimony" equal to "20 percent of the *gross* amount of any bonus(es) up to $500,000, which [the defendant] may receive from his employment if the case proceeds to judgment before January 1, 2019, or 15 percent of the net amount of any bonus(es) up to $500,000 if the case goes to judgment thereafter." (Emphasis added.) This proposal certainly does not suggest to the court that an order calculated after January 1, 2019, had been rendered impossible by the TCJA.

Although the defendant filed a motion for articulation, he did not seek further articulation from the court regarding its rationale for the supplemental alimony order and whether it took into account the changes in the tax code ending deductions for alimony payments. Counsel for the defendant acknowledged in his closing argument that an alimony award might not be tax deductible to the defendant and that such an award should be reduced if it was no longer going to be deductible. As we presume the court knows the law, and allow every reasonable presumption in favor of the correctness of its action, even if we were to review this claim, we would have no basis to conclude that the court, in ordering the payable percentages from the defendant's gross annual bonus as supplemental alimony after January 1, 2019, failed to consider the impact of the change in the tax code.

[16] Title 26 of the United States Code, § 529, provides for the creation of an account specifically designed for higher education related qualified expenses. Earnings on contributions invested are tax deferred and withdrawals are tax free when used for qualified educational expenses.

defendant argues that the court had no authority to issue such an order because General Statutes § 46b-81, which pertains to property divisions, does not afford the court the right to make future investment decisions for the parties; rather, its authority is limited to the ability to distribute the marital property from one spouse to the other or to order its sale.

As we explained previously in this opinion, prior to the court-ordered equal distribution of the net proceeds of the defendant's 2018 bonus, each party was ordered to contribute the sum of $30,000 to a separate § 529 plan for each child, to be established by the plaintiff. We disagree with this claim and conclude that the court imposed this order to secure future educational support to the children, which is within its authority in a dissolution proceeding, pursuant to General Statutes § 46b-56.

The following additional facts apply to this claim. During the trial, the court heard testimony from both the plaintiff and the defendant as to their expenditure of $30,000 in gifts that the plaintiff's mother had donated to each of the minor children at the time of their births. The plaintiff testified that, in addition to loans that she had received from her mother, she had used the $60,000 gift amount to pay for part of the renovation work to the Riverside house. She claimed that she and the defendant had agreed that this amount would eventually be repaid to the children. In closing argument, her counsel requested that the court restore this money to the children. The defendant testified that the plaintiff told him that these gifts from his mother-in-law were intended for the children and had been used instead for the renovations, although he claimed to have no proof of the gifts or the fact that they were used for the renovations. The court credited the plaintiff's testimony and, in its financial orders, ordered each of the parties to place $30,000, to be deducted from each party's share of one

of two distributed marital assets, into two § 529 plans,[17] one for each of the children, with the plaintiff to serve as trustee of those plans.

The parties disagree on the applicable standard of review. The plaintiff argues that the standard of review should be abuse of discretion, but the defendant correctly argues that "the court's authority to transfer property appurtenant to a dissolution proceeding requires an interpretation of the relevant statutes. Statutory construction, in turn, presents a question of law over which our review is plenary." (Internal quotation marks omitted.) *Rosato* v. *Rosato*, 77 Conn. App. 9, 18, 822 A.2d 974 (2003).

We further note that, "[a]lthough created by statute, a dissolution action is essentially equitable in nature. . . . The power to act equitably is the keystone to the court's ability to fashion relief in the infinite variety of circumstances [that] arise out of the dissolution of a marriage." (Internal quotation marks omitted.) *O'Brien* v. *O'Brien*, 326 Conn. 81, 103, 161 A.3d 1236 (2017).

Section 46b-81 (a) provides in relevant part: "At the time of entering a decree annulling or dissolving a marriage . . . the Superior Court may assign to either spouse all or any part of the estate of the other spouse. The court may pass title to real property to either party or to a third person or may order the sale of such real property, without any act by either spouse, when in the judgment of the court it is the proper mode to carry the decree into effect. . . ." We have held that "[i]t is plain from [this] statute that while the court has the authority to pass title of real property from one spouse to another or to a third party at the time of marital dissolution, the court's authority to transfer any part

[17] There was testimony from the defendant and an itemization on his financial affidavit that each of the children already had a § 529 plan with $10,000 invested into it, for which the defendant served as trustee.

of each spouse's estate is limited to transfers between spouses." *Rosato* v. *Rosato*, supra, 77 Conn. App. 19.

The defendant also argues that, to the extent that the court intended its order to constitute a form of post-secondary educational support, the court's order violates General Statutes § 46b-56c (c)[18] because the court expressly stated that it was reserving jurisdiction to enter an educational support order at a later date for the benefit of the two children and, therefore, never undertook an analysis of the statutory factors in § 46b-56c (c). Finally, the defendant claims that, to the extent that the court intended its order to constitute postmajority child support, its award did not comply with General Statutes § 46b-66.[19]

The plaintiff counters that the defendant's arguments ignore the totality of the factual circumstances surrounding the order creating the two new § 529 plans and that, given its broad discretionary authority, the court prop-

[18] General Statutes § 46b-56c (c) provides: "The court may not enter an educational support order pursuant to this section unless the court finds as a matter of fact that it is more likely than not that the parents would have provided support to the child for higher education or private occupational school if the family were intact. After making such finding, the court, in determining whether to enter an educational support order, shall consider all relevant circumstances, including: (1) the parents' income, assets and other obligations, including obligations to other dependents; (2) the child's need for support to attend an institution of higher education or private occupational school considering the child's assets and the child's ability to earn income; (3) the availability of financial aid from other sources, including grants and loans; (4) the reasonableness of the higher education to be funded considering the child's academic record and the financial resources available; (5) the child's preparation for, aptitude for and commitment to higher education; and (6) evidence, if any, of the institution of higher education or private occupational school the child would attend."

[19] General Statutes § 46b-66 (a) provides in relevant part: "If [an] agreement is in writing and provides for the care, education, maintenance or support of a child beyond the age of eighteen, it may also be incorporated or otherwise made a part of any such order and shall be enforceable to the same extent as any other provision of such order or decree . . . ." The parties in the present case entered into no such agreement.

erly restored and preserved money donated to the children that had been appropriated by the parties for another purpose during the marriage.[20] In doing so, the court was aware from the evidence that the parties previously had created several § 529 plans for the benefit of their children. We agree with the plaintiff that the court did not exceed its authority under § 46b-81. We conclude that § 46b-81 is inapplicable, and that pursuant to General Statutes §§ 46b-56 and 46b-84, the court is authorized to provide security for the enforcement of a future educational support order when it retains jurisdiction to make such an order providing the children with an educational expectancy.[21]

We do not agree with the defendant that the court's order that each of the parties deposit $30,000 into two new § 529 plans was an improper order under § 46b-81 because it required the parties to distribute joint marital funds to someone other than the other spouse. Rather, allowing every reasonable presumption in favor of the correctness of the court's action, we find that the court, in ordering the creation of two new § 529 plans, although

[20] As the Riverside house has been ordered sold, the children are not going to have the benefit of residing in a home in which the costs of renovations were funded, in part, with their assets.

[21] General Statutes § 46b-56 (a) provides in in relevant part: "In any controversy before the Superior Court as to the custody or care of minor children . . . the court may make . . . any proper order regarding . . . support of the children . . . ."

General Statutes § 46b-84 provides in relevant part: "(a) Upon or subsequent to the . . . dissolution of any marriage or the entry of a decree of . . . divorce, the parents of a minor child of the marriage, shall maintain the child according to their respective abilities, if the child is in need of maintenance. . . . (d) In determining whether a child is in need of maintenance and, if in need, the respective abilities of the parents to provide such maintenance and the amount thereof, the court shall consider the age, health, station, occupation, earning capacity, amount and sources of income, estate, vocational skills and employability of each of the parents, and the age, health, station, occupation, educational status and expectation, amount and sources of income, vocational skills, employability, estate and needs of the child."

it did not explicitly state its intention, was doing so in order to secure a potential postmajority educational support order.[22]

Although the court did not enter any postmajority educational order, it did reserve jurisdiction to enter one in the future. See General Statutes § 46b-56c (c). When a court retains jurisdiction over educational support, as the court did here, it has the discretion to issue a financial order that would secure any educational support order that might be entered in the future.[23] See *Lederle* v. *Spivey*, 113 Conn. App. 177, 194, 965 A.2d 621 (court that retained jurisdiction over educational support order did not exceed its jurisdiction by ordering maintenance of life insurance to protect minor child if either parent died prior to child completing his postsecondary education), cert. denied, 291 Conn. 916, 970 A.2d 728 (2009).

In this case, the court found that "it is more likely than not that the parents would have provided support to each of the children for higher education or private occupational school if the family were intact," and "in their proposed orders, each parent has requested that the court retain jurisdiction to enter educational support orders in the future." The court further indicated

[22] The court endeavored to ensure future educational support in other ways as well. It ordered the defendant to maintain health insurance for each child and to maintain group term life insurance naming the plaintiff and the children as beneficiaries for as long as he has an obligation to pay child support or postmajority educational support. In addition, it ordered that any § 529 plans previously established by the defendant "shall remain in full force and effect."

[23] We infer that the court chose the plaintiff as the trustee for the § 529 plans because the money restored in the plans for the benefit of the children had come from her mother, and because it described the defendant's postseparation spending as "uncharacteristically lavish," and found that the defendant had violated the automatic orders. On the basis of the foregoing, it reasonably may have concluded that the plaintiff, who now assumes a fiduciary duty, would be the party best capable of handling the funds responsibly.

that its findings brought the issue within the ambit of § 46b-56c. Because the statutory scheme anticipates that a dissolution may occur in advance of the time postsecondary educational decisions appropriately can be made, it provides a mechanism for the court to retain jurisdiction for the purpose of ordering educational support for adult children. In its orders, the court reserved jurisdiction to enter an educational support order pursuant to § 46b-56c at an appropriate time.[24] We note, too, that the order in the court's memorandum of decision that establishes the two § 529 plans follows immediately after the order in which the court reserves jurisdiction to enter an educational support order in the future.

Our analysis is guided by this court's decision in *Sander* v. *Sander*, 96 Conn. App. 102, 899 A.2d 670 (2006). The trial court in *Sander* ordered the sale of the parties' Vermont vacation home and that $75,000 of the proceeds of the sale be held in trust for the education of the parties' daughter pursuant to § 46b-56c. Id., 113. On appeal, the plaintiff challenged the propriety of that order. Id., 115. In upholding the challenged order, this court, in *Sander*, relied on the educational support statute, § 46b-56c (h), for the expressed proposition that "an educational support order may be . . . enforced in the same manner as is provided by law for any support order." Id., 120. Thus, it is appropriate to turn to the statutes governing other support orders for the means of enforcing an educational support order. Section 46b-84 (f) concerns a

[24] We reject the defendant's claim that the court entered an improper educational support order pursuant to § 46b-56c (c). The court's order merely reserving jurisdiction to enter an educational support order in the future is clear and unambiguous. In *Greenan* v. *Greenan*, 150 Conn. App. 289, 91 A.3d 909, cert. denied, 314 Conn. 902, 99 A.3d 1167 (2014), this court held that, "[a]lthough [§] 529 accounts pertain to education expenses . . . [§] 529 accounts were not educational support orders pursuant to § 46b-56c." Id., 310. As in *Greenan*, the court's order in the present case with respect to the § 529 plans did not require the defendant or the plaintiff to provide support in the future should the children attend a postsecondary educational program.

parent's obligation to provide maintenance for a minor child. It provides in relevant part that "[t]he court shall make and enforce the decree for the maintenance of the child as it considers just, and may direct security to be given therefor . . . ." General Statutes § 46b-84 (f). The court in *Sander* explained that, "[as] a court may enforce these support orders by requiring that security be given, a court similarly may enforce an educational support order by requiring that security be given." *Sander* v. *Sander*, supra, 120.

"In making its [financial] orders . . . a trial court is afforded a wide latitude of discretion." *Pacchiana* v. *McAree*, 94 Conn. App. 61, 69, 891 A.2d 86, cert. denied, 278 Conn. 922, 901 A.2d 1221 (2006). The creation of a § 529 plan to fund an educational support order fits well within that latitude of discretion. In *Louney* v. *Louney*, 13 Conn. App. 270, 274–75, 535 A.2d 1318 (1988), this court upheld an order in a dissolution action requiring that funds held in joint accounts be used for the designated purpose of the education of the parties' minor children. Here, the court similarly established § 529 plans to hold the parties' money for the express purpose of their children's postsecondary educations pursuant to § 46b-56c. We therefore conclude that the court in this case properly exercised its authority by requiring the parties to establish two § 529 plans to secure any future educational support order that may be entered for the benefit of their children.

We also do not agree with the defendant that the court entered an illegal, postmajority support order. The court did not order any further payments into the plans or that investments into the plans continue beyond the date the children turned eighteen. We do not read into the order language that which is not there and that which would contravene statutory and case law. See *Gallo* v. *Gallo*, 184 Conn. 36, 46, 440 A.2d 782 (1981) (educational fund order which contained no language continuing payments beyond age eighteen

would not be read as contravening statutory and case law). Nonetheless, the court did not abuse its discretion by issuing a financial order that would secure any educational support order that might be entered in the future, at about the time the children become eighteen and are making decisions about their educational futures. As a matter of judicial economy, it would not be practical to require the parties to maintain § 529 plans for the benefit of the minor children, terminate them when the children become eighteen and reinstitute them some months later when the adult children matriculate at a postsecondary educational institution as the beneficiaries of educational support orders. See *Crews* v. *Crews*, 107 Conn. App. 279, 304, 945 A.2d 502 (2008), aff'd on other grounds, 295 Conn. 153, 989 A.2d 1060 (2010).

We also do not agree with the defendant's argument that the order is squarely in conflict with this court's decision in *Weinstein* v. *Weinstein*, 87 Conn. App. 699, 867 A.2d 111 (2005), rev'd on other grounds, 280 Conn. 764, 911 A.2d 1077 (2007). In *Weinstein*, this court found error with respect to a trial court's "decision to impute a higher level of passive income on the defendant's investments simply because another investment vehicle may have provided a higher yield." Id., 706–707. This court stated, "[r]ather, we hold that for a court to impute additional investment income capacity to a party in formulating its support orders, the court must find that the party has unreasonably depressed investment income in order to evade a support obligation or that the party's investment strategy is economically unreasonable." Id., 707. The issue in *Weinstein* concerned assessing proper passive earning capacity, and the case did not involve a claim that the court improperly ordered the defendant to make any particular investment.

The applicability of *Weinstein* to the circumstances of this case is not apparent. The basis for the court's order in the present case was not any disagreement

with the manner in which the parties had chosen to invest the children's gifts—they both acknowledged that they had spent the $60,000 rather than investing it in a manner that would have directly benefitted the children, such as by placing the money in the § 529 plans already in existence. Both parties also acknowledged that they owed a debt to their children because they had spent their grandmother's gifts for expensive renovations to the Riverside house.[25] The money gifted to the children was not property acquired by either of the parties during the course of the marriage as a result of their individual efforts, and the plaintiff requested an order from the court restoring the $60,000 to the children if the Greenwich house was sold. Although § 529 plans established and funded by the parties themselves might qualify as marital property under the broad definition given to that term by our legislature in § 46b-81, in that such accounts are existing property at the time of the divorce proceedings; see *Greenan* v. *Greenan*, supra, 150 Conn. App. 311; by ordering the establishment of two new § 529 plans, the court was not distributing marital property from one spouse to the other, but securing funds for the children's future educational needs.

The court's order to establish the two § 529 plans to secure any future educational support order was eminently fair, as both parties were ordered to contribute equally to their creation after they had used the children's gift moneys to renovate a home that the children will never occupy. We conclude that the court properly exercised its authority to secure contemplated future educational support orders by requiring each party to restore one half of the children's gift money and to protect it for their future use.

[25] The plaintiff testified that her mother "gave $30,000 [to] each child that we spent. It was not to us. We have nothing. We are not allowed to touch that money. She was very clear about that. It's presents to the kids."

III

VIOLATIONS OF PRACTICE BOOK § 25-5 AUTOMATIC ORDERS

We address the defendant's third and fourth claims jointly in this part of the opinion, as both claims pertain to alleged violations of the automatic order provisions set forth in Practice Book § 25-5 (b).[26] In the defendant's third claim, he contends that the court improperly found the defendant in contempt for one of the alleged violations of the automatic orders set forth in Practice Book § 25-5, his expenditure of $10,000 to rent a ski lodge, because there was no contempt motion pending alleging such a violation; and, in his fourth claim, the defendant contends that the court abused its discretion by finding the defendant in contempt for two violations of the automatic orders, by renting the ski lodge and by investing $39,000 in cryptocurrency, despite the fact that both of these financial expenditures were within the "usual course of business" exception in the rule. See Practice Book § 25-5 (b) (1). For the reasons that follow, we agree with the defendant's third claim.

The following additional facts and procedural history are relevant to these claims. At trial, it was undisputed that, after the divorce action had commenced, the defendant used two new accounts to buy cryptocurrency. The defendant testified that he lost $22,000 as a result of this investment. On May 4, 2018, the plaintiff

[26] Practice Book § 25-5 provides in relevant part: "The following automatic orders shall apply to both parties, with service of the automatic orders to be made with service of process of a complaint for dissolution of marriage . . . . (b) In all cases involving a marriage . . . whether or not there are children: (1) Neither party shall sell, transfer, exchange, assign, remove, or in any way dispose of, without the consent of the other party in writing, or an order of a judicial authority, any property, except in the usual course of business or for customary and usual household expenses or for reasonable attorney's fees in connection with this action." In the present case, the service of process included the service of the automatic orders.

filed a motion for contempt, alleging that the defendant had wilfully violated the automatic orders by purchasing $39,004 in cryptocurrency[27] without the permission of the court or the consent of the plaintiff in writing. She further alleged that the purchase of the cryptocurrency was not a customary or ordinary investment made by either party prior to the filing of the divorce action. This pendente lite motion, like many other pendente lite motions filed in this case, was never heard,[28] but, during the dissolution trial, the plaintiff pursued it, and both parties offered evidence as to the timing, purpose and nature of this cryptocurrency purchase. During her closing argument, counsel for the plaintiff indicated that she wished to have this motion for contempt considered and granted.

The plaintiff never filed a motion for contempt that pertained to the defendant's rental of the ski lodge in September, 2018, but the plaintiff did question the defendant about his $10,000 expenditure for the lodge, which he admitted he used not only for his children, but for other family members, his girlfriend, and her children. This expenditure, made with funds from one of the defendant's checking accounts, occurred just after the parties had entered into a stipulation that the court had accepted and had made an order of the court. That stipulation provided that the defendant could use a portion of the escrowed net proceeds of his 2017 bonus to pay the mortgage on the Riverside house and the costs of the children's preschool and extended day program for 2018 and 2019. He indicated that it would not have been "customary" to discuss the rental of the ski lodge with the plaintiff prior to the expenditure.

[27] We are using the term employed by the court, "cryptocurrency," although there are references in the record to "virtual currency" and "Bitcoin."

[28] There were representations made to the court by the plaintiff and her counsel that the parties appeared in court numerous times to argue pretrial motions and the court was never able to accommodate them for a hearing due to time constraints and for other reasons.

The court stated in its memorandum of decision that the plaintiff also had requested reimbursement for this expenditure as a violation of the automatic orders.

In addressing the plaintiff's two claimed violations of the automatic orders, the court held the defendant in contempt for both the ski lodge rental and the cryptocurrency purchase. After stating that there must be clear and convincing evidence of a wilful failure to comply with a clear and unequivocal order of the court in order to find a party in contempt, the court found that the automatic orders set forth in Practice Book § 25-5 are clear and unambiguous, that the evidence supported a finding that the defendant violated the automatic orders in one or more instances, to wit, the cryptocurrency investment of $39,000 and the rental of the ski lodge for $10,000, and that these expenditures were not in the ordinary course and were made without the written permission of the plaintiff. The court found the defendant's violation of the automatic orders to be "wilful and without good cause," found him in contempt, and ruled that it was "equitable and appropriate to make [the plaintiff] whole in some manner for said breaches." The court ordered that the net proceeds of the defendant's 2018 bonus, which was to be received at or about the time of trial, was to be divided, with 50 percent given to the defendant and 50 percent given to the plaintiff, but that a deduction of $16,000 from the defendant's 50 percent share was to be paid to the plaintiff to offset his violation of the automatic orders.

We first address the plaintiff's argument that the issue of whether the court erred in finding the defendant in contempt for the ski lodge expenditure is moot because the defendant has not challenged the other independent ground for the court's contempt ruling, i.e., his cryptocurrency investments. We disagree.

First, although precedent establishes that an appeal or claim of error can be rendered moot if the appellant

neglects to challenge every independent ground on which the challenged ruling may be sustained, the defendant here has challenged both findings on which the finding of contempt was predicated. Moreover, in *Keller* v. *Keller*, 158 Conn. App. 538, 541–44, 119 A.3d 1213 (2015), appeal dismissed, 323 Conn. 398, 147 A.3d 146 (2016), this court counseled that the defendant's claim that the trial court erred in finding him in contempt would not be moot even if the defendant had not challenged both of the findings of contumacious conduct. In *Keller*, the plaintiff, in an ongoing dissolution action, appealed from a judgment holding her in contempt on two grounds. Id., 542. On appeal, the plaintiff challenged only one of the grounds for the contempt finding, and the defendant argued that the Appellate Court could not afford the plaintiff any practical relief because she had neglected to challenge the other ground. Id., 541. This court rejected the defendant's mootness argument, concluding that we make every presumption favoring our exercise of jurisdiction and ruling that the appeal was not moot because practical relief could be afforded to the plaintiff by reversing the single finding of contempt, even though there was no sanction, monetary or otherwise, imposed as a result of the contempt judgment. Id., 543–44. This court noted that, if the single finding of contempt was left undisturbed, such a finding of contumacious conduct could hurt the contemnor in the future because "a finding of contempt may well affect a later court's determination of the penalty to be imposed after a future finding of contempt." (Internal quotation marks omitted.) Id., 543.

The present case and *Keller* stand on the exact same procedural footing—in both cases, the trial court made two separate findings of contempt. Id., 543 and n.7. Even a bare finding of contempt unaccompanied by any sanction can have adverse future collateral consequences for the contemnor. Accordingly, we reject the mootness argument.

We next address the merits of the defendant's claim that the court erred in finding him in contempt for violating the automatic orders by renting the ski lodge because there was no motion for contempt pending on that issue. Although we agree with the defendant that the court improperly held him in contempt with respect to the seasonal ski lodge rental because there was no motion for contempt pending on that issue, we conclude, nevertheless, that the court properly determined that the rental was not in the usual course of business and that, therefore, it had the authority to fashion a remedial order to offset the defendant's violation of the automatic orders by leasing the ski lodge, despite the improper contempt finding.

"Contempts of court may . . . be classified as either direct or indirect, the test being whether the contempt is offered within or outside the presence of the court." *Brody* v. *Brody*, 315 Conn. 300, 317, 105 A.3d 887 (2015). This is a case of civil contempt. A refusal to comply with an automatic order in Practice Book § 25-5 is an indirect contempt of court because it occurs outside the presence of the trial court. In determining whether a contempt of court is civil or criminal, we look to the nature of the relief ordered. "A contempt fine is civil if it either coerce[s] the defendant into compliance with the court's order, [or] . . . compensate[s] the complainant for losses sustained." (Internal quotation marks omitted.) *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 489, 499, 970 A.2d 570 (2009).

There are constitutional safeguards that must be satisfied in indirect contempt cases. "It is a fundamental premise of due process that a court cannot adjudicate a matter until the persons directly concerned have been notified of its pendency and have been given a reasonable opportunity to be heard in sufficient time to prepare their positions on the issues involved." (Internal

quotation marks omitted.) *Leftridge* v. *Wiggins*, 136 Conn. App. 238, 244, 44 A.3d 217 (2012). It is axiomatic that due process of law requires that one charged with contempt of court be advised of the charges against him, i.e., that he is notified that he is being accused of being in contempt of court, is given a reasonable opportunity to defend the contempt charge by way of defense or explanation, be represented by counsel and be given a chance to testify and to call witnesses in his behalf. It is not disputed that the plaintiff failed to file a written motion with the court seeking to have the defendant found in contempt for violation of the automatic orders due to his rental of the ski lodge. Practice Book § 25-23 incorporates Practice Book § 11-1, which requires motions to be in writing, and Practice Book § 25-27 specifies what specifically should be alleged in a motion for contempt. "The purpose of requiring written motions is not only the orderly administration of justice . . . but the fundamental requirement of due process of law." (Citation omitted.) *Connolly* v. *Connolly*, 191 Conn. 468, 475, 464 A.2d 837 (1983). Accordingly, as there was no notice to the defendant that he was facing a finding of contempt with respect to the ski lodge rental, the court erred when it held the defendant in contempt for spending $10,000 on the rental of the ski lodge after the automatic orders went in effect.

Our consideration of the validity of the court's finding that the ski lodge expenditure violated the automatic orders, however, does not end here. In *O'Brien* v. *O'Brien*, supra, 326 Conn. 81, our Supreme Court held that, even in the absence of a contempt finding, a trial court has the authority to compensate a spouse for losses caused by a violation of the automatic orders by adjusting the distribution of marital assets in the injured spouse's favor. Id., 96; see also *Clement* v. *Clement*, 34 Conn. App. 641, 647, 643 A.2d 874 (1994) ("[i]n a contempt proceeding, *even in the absence of a finding of*

contempt, a trial court has broad discretion to make whole a party who has suffered as a result of another party's failure to comply with the court order" (emphasis added; internal quotation marks omitted)). Thus, if the lease of the ski lodge was a violation of a court order, the court was free to craft a remedial order. In the present case, the court's order that the defendant reimburse the plaintiff for one half of the $10,000 cost of the ski lodge rent was remedial in nature.[29]

Next, we address the defendant's challenge to the court's finding of contempt based on his investment in cryptocurrency and the consequential sanction of reimbursement, and the court's remedial order regarding the rental of the ski lodge, on the basis of both being violations of the automatic orders. As to both the expenditure for the rental of the ski lodge and the investment in cryptocurrency, the defendant argues that they both met the exception in Practice Book § 25-5 for the transfer or disposal of marital property "in the usual course of business." We are not persuaded.

Whether a particular transaction has been conducted in the usual course of business presents a question of fact, to be determined by looking to the circumstances of each case. See *Quasius* v. *Quasius*, 87 Conn. App. 206, 208, 866 A.2d 606 (reviewing trial court's finding concerning usual course of business exception for abuse of discretion because trial court is "in the best position to assess all of the circumstances surrounding a dissolution action" (internal quotation marks omitted)), cert. denied, 274 Conn. 901, 876 A.2d 12 (2005). "Whether a transaction is conducted in the usual course of business does not turn solely on the type of asset or transaction but on whether the transaction at issue

[29] Although we have concluded that the contempt finding related to the ski lodge rental must be set aside, for the reasons that follow, we conclude that the court's remedial order related to the ski lodge rental nonetheless was appropriate and is left undisturbed.

was '*a continuation of prior activities*' carried out by the parties before the dissolution action was commenced." (Emphasis in original.) *O'Brien* v. *O'Brien*, supra, 326 Conn. 115.

In *O'Brien*, our Supreme Court addressed the plaintiff's claim that his stock and option transactions did not violate the automatic orders established under Practice Book § 25-5 because they fell within the exception for transactions made "in the usual course of business." Id., 112. The court began by adopting an expansive definition of business: "We do not suggest . . . that the usual course of business exception is reserved only for transactions made in connection with a party's business or profession; rather, because the automatic orders are intended to maintain the status quo between the parties, the exception would appear to extend to personal transactions, but only if any such transactions are conducted in the normal course of the parties' ordinary activities, such that both parties would fully expect the transactions to be undertaken without prior permission or approval." Id., 115 n.12. Thus, personal transactions, such as the rental of the ski lodge and the cryptocurrency investment in the present case, will meet the exception only if they previously were conducted in the normal course of the parties' ordinary activities, such that both parties would fully expect the activity to be undertaken without the actor obtaining prior consent. See id.

We conclude that the court did not abuse its discretion in finding that the exception did not apply in the present case to the rental of the ski lodge or the investment in cryptocurrency. The defendant admitted that he did not request permission from the plaintiff before he purchased the cryptocurrency, that he purchased it for the first time between November, 2017 and January, 2018, and that he did not have accounts to purchase the cryptocurrency prior to the commencement of the

dissolution action. During closing argument, the court alerted the defendant to the *O'Brien* case, likened the defendant's conduct to that of the husband in *O'Brien*, and then asked counsel who should bear the burden for the cryptocurrency loss. In response, the defendant's counsel admitted, "[l]isten, he's got some exposure in that regard . . . in terms of offset and loss."

Similarly, in September, 2018, while the divorce action was pending, the defendant withdrew $10,000 from a checking account for the ski house rental without the plaintiff's permission. He claims that this was in the usual course of business because the parties, during the course of their marriage, took vacations with the children. There is a distinction, however, between a vacation rental that one or both of the parties customarily had agreed to undertake while the marriage was still intact, and an unprecedented rental of a ski lodge that the defendant used on weekends with not only the parties' minor children, but with friends, his girlfriend, and his girlfriend's children. While they were still living together, the parties had never rented a ski lodge. The defendant admitted that he did not discuss the rental of the ski lodge with the plaintiff in September, 2018. He indicated that he took weekend ski trips with the children, but never went skiing with the plaintiff without the children because she does not ski. There is no evidence that a seasonal rental of a ski lodge, with or without the plaintiff, was customary during the marriage. Accordingly, the court was justified in concluding that this expenditure also was not in the usual course of business.

In light of the foregoing, we conclude that the court properly found the defendant in contempt for the cryptocurrency investment as a violation of the automatic orders and for concluding, despite its improper finding of contempt, that the defendant further violated those orders by virtue of his having rented the ski lodge. It

was not an abuse of discretion for the court to order the defendant to reimburse the plaintiff for one half of the $10,000 cost for rental of the ski lodge as a remedial order and for one half of the $22,000 loss that he incurred as a result of the cryptocurrency investment as a sanction for his contempt of court.

IV

FAILURE TO ATTRIBUTE AN EARNING CAPACITY TO THE PLAINTIFF

The defendant's next claim is that the court abused its discretion by failing to attribute an earning capacity to the plaintiff in determining alimony and child support. The defendant argues that, under the circumstances of the present case, the court should have based its financial orders on the plaintiff's earning capacity, rather than on her actual earned income. Moreover, the defendant argues that, in light of the evidence of the plaintiff's prior earnings, her age, and her qualifications, the court improperly awarded child support and alimony based on a finding of no actual net income. We disagree.

The court determined that the basic child support obligation and alimony orders "must be based upon the net income of the parties." It then found that the plaintiff's net income was $0 per week and relied on that finding in crafting its financial orders. The defendant argues that the court erred in not attributing an earning capacity to the plaintiff based on her earnings earlier in the marriage, which, over a two year period in 2010 and 2011, had been in the range of $45,000 to $65,000.

"An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . It is within the province of the trial court

to find facts and draw proper inferences from the evidence presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . [T]o conclude that the trial court abused its discretion, we must find that the court either incorrectly applied the law or could not reasonably conclude as it did. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.§ (Citations omitted; internal quotation marks omitted.) *Tracey* v. *Tracey*, 97 Conn. App. 122, 124–25, 902 A.2d 729 (2006).

First, we address the argument that the court's analysis was flawed as a matter of law because the court relied on the plaintiff's actual earnings, rather than on her earning capacity. "[O]ur case law is clear that a party's earning capacity is the amount that he or she realistically can be expected to earn. . . . It is not the amount the party previously has earned or currently may be earning." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Steller* v. *Steller*, 181 Conn. App. 581, 592, 187 A.3d 1184 (2018). "In marital dissolution proceedings, *under appropriate circumstances*, the trial court *may* base financial awards on the earning capacity rather than the actual earned income of the parties . . . when . . . there is specific evidence of the [party's] previous earnings. . . . It is particularly appropriate to base a financial award on earning capacity where there is evidence that the [party] has voluntarily quit or avoided obtaining employment in [the party's] field." (Emphasis in original; internal

quotation marks omitted.) *Brown* v. *Brown*, 148 Conn. App. 13, 21–22, 84 A.3d 905, cert. denied, 311 Conn. 933, 88 A.3d 549 (2014). "Earning capacity, in this context, is not an amount which a person can theoretically earn, nor is it confined to actual income, but rather it is an amount which a person can realistically be expected to earn considering such things as his vocational skills, employability, age and health." (Internal quotation marks omitted.) *Elia* v. *Elia*, 99 Conn. App. 829, 833, 916 A.2d 845 (2007).

The defendant claims that the court should have attributed an earning capacity to the plaintiff of between $65,000 and $85,000, based on her testimony as to what she had earned in 2012, the last time she was employed. The court found that the plaintiff considered herself a full-time homemaker although, while at home, she once had performed a part-time bookkeeping project for a friend, earning approximately $4000 to $5000, and had overseen the renovations to the Riverside house. Some acquaintances also had paid her to take photographs as photography was a hobby of hers. The most she had been paid for her photographs was $495 in one year. The court further found that the plaintiff had not worked full-time since 2012, which coincided with the birth of the parties' first child. The plaintiff testified that she and the defendant planned that she would stay home and care for the children as it did not make economic sense for her to incur child care expenses that would be necessary as a result of her employment. She testified that if she were to work, the quality of her children's lives would suffer, as they had suffered while she was busy with the renovations of the Riverside house. She also testified that she had no family living in the United States to assist her with the two children.

During closing arguments, the court expressed its appreciation for the hard work required of both working mothers and homemakers. The court entered parenting

orders that established the plaintiff's home as the primary residence of the children.

With respect to the plaintiff's health, the court found that she has vision problems and a serious hearing deficit. The plaintiff testified that the hearing impairment substantially worsen in the last five years and that she cannot hear "half of what's going on." She indicated she has 65 percent hearing loss in her right ear and that she planned to have surgery, which might not fully restore her hearing to 100 percent. The two minor children at the time of the dissolution were still preschool age and, with the exception of the photography projects and the bookkeeping project, the plaintiff was unemployed, while the defendant's annual gross income was in excess of $900,000.

Acknowledging the importance of a mother's role, the court reasonably could have determined that the plaintiff's desire to stay home and to raise her children for the foreseeable future was not an act of indolent work avoidance. There was evidence that the parties had decided that after their first child was born the plaintiff would no longer work, the birth of their second child occurred soon after the birth of their first child, their children were very young in age, the plaintiff had a hearing disability, and, with the defendant's approval, the plaintiff had been primarily a full-time homemaker for five years prior to the filing of the dissolution action because her working did not make economic sense given transportation, day care and other expenses. In light of these undisputed circumstances, the court reasonably could have determined that the plaintiff did not voluntarily quit or avoid employment in her field. Thus, the court's determination to base its awards of child support and alimony on the plaintiff's actual income at the time of the dissolution, which it found to be zero, was not contrary to law.[30]

[30] We also observe that this is not a case in which the court *based* its alimony and child support awards on a minimal earning capacity that it had

We further observe that, in considering all relevant statutory criteria, no single criterion is preferred over others, and the trial court, in entering its financial orders, has broad discretion in varying the weight placed on each criterion under the circumstances of each case. See *Jungnelius* v. *Jungnelius*, 133 Conn. App. 250, 262, 35 A.3d 359 (2012). The court expressly stated that it had considered all of the relevant statutes before rendering its judgment. It awarded the plaintiff time limited alimony, taking into consideration the factors set forth in General Statutes § 46b-82, including the age, education, earnings and work experience of the wife, as well as her current primary parenting responsibilities, and found that, in light of the facts and circumstances of the case, a time limited award of alimony, which will end in 2029, before either child attains the age of majority, was appropriate. Thus, the court impliedly found that the plaintiff would have the capacity in the future to earn a salary sufficient to support herself. The court reasonably could have concluded that the plaintiff's childcare responsibilities and health concerns would not permit an immediate, cost beneficial return to the workforce but that, eventually, there would need to be a gradual return to gainful employment on the plaintiff's part. The court also determined that the amount of alimony awarded to the plaintiff would be nonmodifiable by the defendant if the sole basis for the modification were to be the annual gross earnings of the plaintiff of $35,000 or less, which is one way to encourage a nonworking spouse to eventually return to the workforce.

attributed to the plaintiff, although the court, after considering the amounts the plaintiff had been paid for bookkeeping and photography by her friends, did mention that her earning capacity as of the date of the dissolution was, in fact, "minimal." The defendant's reliance on *Tanzman* v. *Meurer*, 309 Conn. 105, 70 A.3d 13 (2013), is therefore misplaced. In *Tanzman*, our Supreme Court held that when a trial court has based alimony or child support awards on a party's earning capacity, the court must determine the specific dollar amount of the party's earning capacity. Id., 107–108.

To the extent that the defendant, apart from arguing that the court improperly relied on the plaintiff's actual net income, incorrectly found that her actual net income was $0 at the time of the dissolution, we readily conclude that this finding was consistent with the evidence, including the plaintiff's financial affidavit dated November 16, 2018, on which the court expressly relied. Accordingly, the court's finding in this regard was not clearly erroneous.

V

AWARDS OF ATTORNEY'S FEES TO THE PLAINTIFF

The defendant's final claim is that, in violation of the directive of § 46b-62 (a)[31] and relevant decisional law, the court erred in awarding the plaintiff attorney's fees for representation during the marital dissolution proceedings, postjudgment matters and this appeal. We are not persuaded.

Before we consider the orders at issue in this claim—one related to attorney's fees incurred during the dissolution proceedings and one related to attorney's fees incurred during postjudgment matters and in connection with the present appeal—we set forth the relevant legal principles. In dissolution and other family court proceedings, pursuant to § 46b-62 (a), the court may order either parent to pay the reasonable attorney's fees of the other in accordance with their respective financial abilities and the equitable criteria set forth in § 46b-82, the alimony statute. That statute provides that the court may consider "the length of the marriage, the causes for the . . . dissolution of the marriage . . .

[31] General Statutes § 46b-62 (a) provides in relevant part: "In any proceedings seeking relief under the provisions of this chapter . . . the court may order either spouse or, if such proceedings concerns the custody, care, education, visitation or support of a minor child, either parent to pay the reasonable attorney's fees of the other in accordance with their respective financial abilities and the criteria set forth in section 46b-82."

the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81" for the assignment of property. General Statutes § 46b-82. Section 46b-62 (a) applies to postdissolution proceedings because the jurisdiction of the court to enforce or to modify its decree is a continuing one and the court has the power, whether inherent or statutory, to make allowance for fees. See *Krasnow* v. *Krasnow*, 140 Conn. 254, 262, 99 A.2d 104 (1953). "Whether to allow counsel fees, [under § 46b-62 (a)], and if so in what amount, calls for the exercise of judicial discretion. . . . An abuse of discretion in granting counsel fees will be found only if [an appellate court] determines that the trial court could not reasonably have concluded as it did." (Citation omitted; internal quotation marks omitted.) *Misthopoulos* v. *Misthopoulos*, 297 Conn. 358, 386, 999 A.2d 721 (2010); see also *Pena* v. *Gladstone*, 168 Conn. App. 175, 186, 146 A.3d 51 (2016).

A trial court is not limited to awarding fees for proceedings at the trial level. Connecticut courts have permitted postjudgment awards of attorney's fees to defend an appeal. See *Friedlander* v. *Friedlander*, 191 Conn. 81, 87–88, 463 A.2d 587 (1983) (affirming award of attorney's fees to defend appeal); see also *Olson* v. *Mohammadu*, 169 Conn. App. 243, 264 n.11, 149 A.3d 198, cert. denied, 324 Conn. 903, 151 A.3d 1289 (2016).

A

We first consider the validity of the order issued by the court, the Honorable *Michael E. Shay*, judge trial referee, at the time he rendered the judgment of dissolution, awarding attorney's fees of $40,000 to the plaintiff.[32] On December 10, 2018, the plaintiff filed a motion

[32] The defendant does not contest the reasonableness of the attorney's fees incurred by the plaintiff.

for counsel fees pendente lite and an affidavit of attorney's fees was filed by the plaintiff's counsel, Attorney Catherine P. Whelan, on December 21, 2018. The plaintiff sought $70,132.34 in fees that had accrued as of December 20, 2018.[33] In its memorandum of decision, the court indicated that it had reviewed Attorney Whelan's affidavit and found the attorney's fees incurred by the plaintiff to be fair and reasonable under all of the circumstances. It further indicated that "to require the [plaintiff], who [had] a minimal earning capacity and the [primary] responsibility for the two minor children, to pay [all of] these fees from her portion of the marital assets awarded to her by virtue of [the court's decision] would undermine the purposes of the same; and that it would be fair and equitable for the defendant to pay a portion of [the plaintiff's fees]." The court ordered the defendant to pay Attorney Whelan the sum of $40,000 as a portion of the legal fees and the costs of suit incurred by the plaintiff in connection with this case, and the plaintiff was ordered responsible for any balance due thereafter. The court ruled that the defendant shall be responsible for any fees and costs incurred by him.

The defendant claims that the plaintiff received ample liquid funds from the trial court's judgment with which to pay the attorney's fees awarded to her and that the

[33] On January 8, 2019, the defendant filed a motion for counsel fees pendente lite, but the court ordered that he would be responsible for his own fees and costs in its memorandum of decision. In an updated affidavit of services, the defendant's counsel, Attorney Paul H. McConnell, of the McConnell Family Law Group, LLC, averred that from November 1, 2017 to January 8, 2019, his law firm, and the law firm of Schoonmaker, George, Colin & Blamberg, P.C., had rendered $213,191.88 in services and expense advances on behalf of the defendant. At a hearing concerning the plaintiff's motion for postjudgment counsel fees and appellate fees, the defendant testified that he had advanced the law firm of Pullman & Comley, LLC, a $35,000 retainer to represent him on appeal and had also paid that firm $15,000 in fees for continuing postdissolution matters.

court, in awarding her these fees, unreasonably concluded that it would undermine the financial package awarded to her at the time of the dissolution if the plaintiff had to pay her own fees. He also asserts that the plaintiff was awarded substantial alimony and child support as well as a higher percentage of the parties' assets. The plaintiff contends that the trial court properly exercised its discretion in awarding her attorney's fees and reasonably concluded that not doing so would have undermined her other financial awards.

Although the basic focus of § 46b-62 (a) is compensatory and supports an award only if the prospective recipient of a fee award lacks ample liquid assets to cover the cost of his or her own legal expenses, our Supreme Court, in *Eslami* v. *Eslami*, 218 Conn. 801, 820, 591 A.2d 411 (1991), held that in addition to the situation in which one party does not have ample liquid assets to pay attorney's fees, a court also may award fees even if the movant has ample liquid assets when the failure to award them will undermine the court's other financial orders. Judge Shay expressly relied on the latter justification in awarding the plaintiff attorney's fees. See, e.g., *Maguire* v. *Maguire*, 222 Conn. 32, 44, 608 A.2d 79 (1992). He made no finding as to whether or not the plaintiff had ample liquid assets, nor was he required to do so. Our Supreme Court has recognized that "[t]he availability of sufficient cash to pay one's attorney's fees is not an absolute litmus test. . . . [A] trial court's discretion should be guided so that its decision regarding attorney's fees does not undermine its purpose in making any other financial award." (Internal quotation marks omitted.) *Hornung* v. *Hornung*, 323 Conn. 144, 170, 146 A.3d 912 (2016). An award of counsel fees to a spouse who had sufficient liquid assets may be justified if the failure to do so would substantially undermine the other financial awards. See *Eslami* v. *Eslami*, supra, 820.

On her financial affidavit filed at the time of the dissolution, the plaintiff claimed no weekly net income, a total of $957,500 in assets, $9183.68 in weekly expenses and $232,300 in liabilities. The defendant's financial affidavit reflected a net weekly income from his base salary of $4462. Also in evidence was a paystub reflecting his 2017 bonus income with deductions. His claimed weekly expenses were $13,313, his assets were $1,523,242, and his liabilities were $262,852, including an unspecified amount owed for his own attorney's fees.

The court ordered the parties to split equally their bank accounts, including the previously escrowed sum from what was left of the defendant's 2017 bonus, $63,000, and to split equally the net proceeds from the defendant's 2018 bonus, which the defendant testified would be $550,000 gross. Additionally, the plaintiff received $16,000 on account of the defendant's violation of the automatic orders, the Greenwich condominium with $150,000 in equity, one half of the net proceeds after the sale of the Riverside house, listed for sale at the time of dissolution at $2.45 million with $1.03 million in equity and one half of the net proceeds after the sale of the Brooklyn co-op, with equity of approximately $190,000. The plaintiff also was awarded the properties in Azerbaijan—an apartment and an apple orchard, valued at approximately $50,000—which were both being used by her mother. The plaintiff was additionally awarded a $483,910 share of the parties' retirement assets. The defendant was awarded $303,839 as his share of the retirement assets.

What the defendant fails to acknowledge is the obvious fact that, for the foreseeable future, the plaintiff will be in a far less favorable position than he is to earn a significant salary and, thus, to be able to further enhance the marital assets that she has acquired as the result of the dissolution or to acquire additional assets.

In addition to Judge Shay's indication that not awarding the plaintiff $40,000 in attorney's fees would undermine the other financial orders pursuant to *Maguire* v. *Maguire*, supra, 222 Conn. 44, Judge Shay's decision expressly stated that he considered the statutory criteria set forth in § 46b-82, as required by § 46b-62. That general reference by the court to those criteria is all that is required. See *Jewett* v. *Jewett*, 265 Conn. 669, 693, 830 A.2d 193 (2003) (court is not obligated to make express findings on each of statutory criteria in making award of attorney's fees under § 46b-62). The court is "free to weigh the relevant statutory criteria without having to detail what importance it has assigned to the various statutory factors." (Internal quotation marks omitted.) *Greco* v. *Greco*, 70 Conn. App. 735, 740, 799 A.2d 331 (2002).

There was evidence reflective of these criteria that the court might reasonably have considered when it determined to award the plaintiff a portion of her attorney's fees. She had no income while the defendant's income is in the high six figures. At the time of the dissolution, she had significant debt to pay—almost $200,000—a good portion of which had developed because she borrowed money to renovate the Riverside house. She further testified that due to the defendant's failure to voluntarily provide her and the children with support throughout 2018, she had to borrow money from friends and her mother, and could only meet even basic expenses for her and the children by maxing out her credit cards.[34]

Once the defendant quitclaims the Greenwich condominium to the plaintiff, she will be responsible for the mortgage, taxes, insurance, condominium fees and all

[34] The court was aware of the prior decision by Judge Colin, determining that the defendant had unilaterally spent a disproportionate amount of his 2017 net bonus without first consulting with the plaintiff. See footnote 6 of this opinion.

other carrying expenses. The mortgage payment alone is $2700 per month. She will be responsible for maintaining the lease on her vehicle. She received no health insurance benefits as part of the dissolution orders, and will have to incur expenses to purchase them. Should she attempt to return to work on a full-time or part-time basis, there is no clear provision in the divorce decree for any reimbursement by the defendant to her for day care costs.[35] She also may continue to incur costs for herself and the children to visit her mother and other relatives in Azerbaijan once a year, as she had during the marriage. The court also still held her responsible for nearly one half of her attorney's fees.

Pursuant to the § 46b-82 criteria, in awarding counsel fees, the court also may consider the causes for the dissolution and, in this case, the court had concluded that the defendant was primarily at fault, finding that the evidence supported a finding that "for years he has been carrying on a long time extramarital affair with a person he met on a ski trip." It also may consider the plaintiff's earning capacity, which it determined was minimal, the great disparity between the parties' earning capacities; see *Emanuelson* v. *Emanuelson*, 26 Conn. App. 527, 533–34, 602 A.2d 609 (1992) (attorney's fees award amounting to approximately 3 percent of wife's liquid assets was not abuse of discretion in light of, inter alia, fact that husband caused breakdown of marriage and great disparity between parties' earning capacities); the amount of her income, which it found

[35] The regular parenting plan attached as Schedule A to the court's memorandum of decision, mentions that a parent who is "not current . . . on their . . . share of qualified, work related child care . . . expenses . . . shall forfeit their right to claim the minor children as a dependent that year. . . . ." However, nowhere does the memorandum of decision designate any shared obligation of the parents for qualified, work related child care. The court ordered that the parties share equally the cost of extracurricular and school related activities but, in that provision, does not refer to qualified work related child care.

to be zero, her employability, and in the case of a parent to whom the custody of minor children has been awarded, the desirability and feasibility of such parent securing employment.

Moreover, several of the assets awarded to the plaintiff also were not necessarily easily or quickly liquidated. It was not clear when either of the two properties ordered sold would actually be sold. The Brooklyn co-op sales contract had a mortgage contingency clause, and the Riverside house had been on the market for more than one year.[36] Given the amount of her credit card debt, it might not be easy for the plaintiff to sell the Greenwich condominium and buy something less expensive to maintain, and she and the children need a place in which to live. The court reasonably could have determined that it did not want the plaintiff to have to reach into her awarded retirement funds and incur possible tax penalties. The division of the defendant's Fidelity IRA was going to require the drafting of a QDRO. The only assets she was awarded that were capable of being immediately liquidated were her share of the bank accounts and the equal division of the defendant's 2018 bonus. The plaintiff owed a total of $70,132.34 in attorney's fees, which, contrary to the defendant's contention, does not represent a small fraction of the liquid assets awarded to her. See *Misthopoulos* v. *Misthopoulos*, supra, 297 Conn. 383–87 ($64,000 attorney's fees award was proper when "the overwhelming majority of the assets awarded to the [wife] were not liquid assets," given that "$2.6 million of the approximately $3.2 million in assets awarded to the [wife] consisted of the family home in which the [wife] and the parties' three minor children resided" and "also included her interest in a trust . . . certain retirement accounts, vested stock and vested stock options").

[36] See footnote 4 of this opinion.

The court reasonably could have concluded that, in spite of its generous child support and alimony awards, there was a need to protect the financial package it had established for the plaintiff to allow her, prior to her alimony being terminated in ten years or earlier, to achieve a more financially stable, less dependent position in her life, which it acknowledged would be complicated by the raising of two children and her hearing deficit. Having rejected the plaintiff's request for lifetime alimony, the court reasonably could have endeavored to assure that the plaintiff had a strong financial base on which to build before the expiration of the alimony and child support orders, which was not going to occur that far into the future. This is illustrated by the fact that the court also allowed the plaintiff to earn $35,000 before the defendant could use any potential earnings on her part as a basis for a modification. See *Weiman* v. *Weiman*, 188 Conn. 232, 235, 237, 449 A.2d 151 (1982) ($10,000 attorney's fees award to wife was proper when trial court "could reasonably have concluded that [her] financial resources . . . were necessary to meet her future needs" and alimony awarded to her "was not substantial in amount nor was it for a long period of time"). In this case, the plaintiff would receive a monthly alimony award of only $6200 and would not receive her 50 percent share of the defendant's gross bonus income until the end of 2019.

Affording the court every reasonable presumption in favor of the correctness of its decision, we assume that Judge Shay, in determining his award of pendente lite attorney's fees to the plaintiff, relied on evidence relevant to each statutory criterion as it applied to both parties. We therefore conclude that Judge Shay properly exercised his discretion in granting the plaintiff's motion for attorney's fees.

B

We next address the claim raised in the defendant's amended appeal, which is that the court, *Hartley Moore*,

J., abused its discretion in awarding the plaintiff postjudgment counsel fees—$10,000 for postjudgment litigation and $20,000 to defend this appeal.

On February 1, 2019, the plaintiff filed two motions for counsel fees to cover postjudgment fees incurred as a result of postjudgment litigation that she alleged had become necessary to protect her interests and assets at the trial level, and one motion seeking fees to defend this appeal. The first motion sought attorney's fees that were necessary to prosecute and defend a number of postdissolution motions filed by both parties between January 4 and April 1, 2019.

An evidentiary hearing was held before the court, *Hartley Moore*, *J.*, on April 1, 2019. Judge Hartley Moore heard testimony from both parties. The defendant testified that he had moved to an apartment in Greenwich with his girlfriend and was not only paying partial rent for his former apartment in White Plains, New York, but also paying a higher rent, $4800, in Greenwich, with assistance from his girlfriend. During his testimony, he admitted that, on March 12, 2019, he had e-mailed the plaintiff and demanded that she pay one half of the $22,922 that he had paid for the children to be able to ski that winter, which included the cost of renting the ski lodge, as her 50 percent share of an extracurricular activity pursuant to the dissolution orders. He further testified that he had paid a new law firm, Pullman & Comley, LLC, a $50,000 retainer—$15,000 for postjudgment litigation and $35,000 to represent him in this appeal. He also indicated that he had paid most of the fees owed to the attorneys that represented him during his divorce and that he owed only $37,000 out of a total of more than $220,000.

The plaintiff indicated that she was now paying the mortgages for the Greenwich condominium and the Brooklyn co-op, even though the latter was ordered to

be paid by the defendant until it sold, and that she had started working part-time. She could not afford health insurance for herself. She still owed more than $90,000 in credit card debt, and was behind on her car payments. She no longer had the ability to borrow from her mother after borrowing another $10,000 in February, 2019, to partially pay her legal fees.

Judge Hartley Moore, in issuing her orders, indicated that she had considered the parties' respective financial abilities and the criteria set forth in §§ 46b-62 and 46b-82, which, as noted previously, was all that she needed to do. She did not need to mention each and every criterion specifically. See *Greco* v. *Greco*, supra, 70 Conn. App. 730–40. She then granted both motions after finding that the defendant "was able to obtain significant funds for a retainer for new counsel to represent him postjudgment," and that he had "rented an expensive ski house for the season and [had] started paying the alimony and child support order in February, 2019. The plaintiff has nominal income from part-time employment and has the primary responsibility of caring for two very young children. Moreover, the plaintiff was awarded counsel fees in the underlying dissolution of marriage action.

The defendant claims that, because Judge Hartley Moore mentioned his seasonal rental of the ski lodge and his lack of any child support or alimony payments to the plaintiff until February, 2019, her orders were therefore punitive, intended to punish him for his pendente lite failings. The defendant further claims that the court improperly considered the retainer that he had paid to his appellate attorney, the ski lodge rental, and the plaintiff's primary responsibility for the care of the children as consideration for awarding fees because the plaintiff already was adequately compensated for childcare with her child support award and for the ski lodge rental, which had been determined to be a violation of the automatic orders, by Judge Shay's

$16,000 remedial order. Finally, he claims that the defendant's ability to pay a retainer to his own attorney should have had no bearing on Judge Hartley Moore's decision. We disagree.

Granting Judge Hartley Moore every reasonable presumption in favor of the correctness of her decision, we believe her commenting on the expensive ski lodge rental was because it became an issue during the April 1 hearing as the result of the defendant's demand of the plaintiff in an e-mail that she reimburse him for 50 percent of the cost of extracurricular skiing expenses for the children, including the cost for renting the ski lodge. Judge Hartley Moore may have referenced the ski lodge rental in order to find that the plaintiff did not owe the defendant any compensation for that rental based on Judge Shay's decision. Obviously, any money the defendant claimed the plaintiff was not paying him pursuant to the orders of the court might have had an effect on her request for counsel fees.

Judge Hartley Moore's mention of the fees the defendant paid to his appellate attorney, the fact that the defendant did not begin to pay alimony and child support until after the divorce and the plaintiff's primary childcare responsibilities were fair and legitimate comment on certain of the criteria she is permitted to consider under §§ 46b-62 (a) and 46b-82 when determining whether attorney's fees should be awarded. She was allowed to consider the parties' financial abilities, noting the plaintiff's nominal earnings, the needs of the parties, their station, and in the case of a parent to whom custody of minor children has been awarded, the desirability and feasibility of such parent's securing employment. See General Statutes § 46b-82.

In addition, the court appropriately referred to the judgment of dissolution wherein, only a few months earlier, Judge Shay had awarded the plaintiff attorney's

fees incurred by her in connection with the underlying dissolution action, and stated that the intent of his award was to preserve for the plaintiff the financial benefits the dissolution court had created for her with its financial orders. See *Maguire* v. *Maguire*, supra, 222 Conn. 43–44. Given the few months in time that had elapsed since the judgment of dissolution had been rendered, Judge Hartley Moore was entitled to take Judge Shay's recent decision into account, especially because the plaintiff had yet to receive the full benefit of the property distribution awards. Judge Hartley Moore was not required to "make an express finding with respect to whether the fee award is necessary to avoid undermining the other financial orders, so long as the record supports that conclusion." *Grimm* v. *Grimm*, 276 Conn. 377, 397, 886 A.2d 391 (2005), cert. denied, 547 U.S. 448, 126 S. Ct. 2296, 164 L. Ed. 2d 815 (2006). By stating that she had considered Judge Shay's finding in awarding attorney's fees, we can reasonably infer that Judge Hartley Moore agreed with his finding.

Affording the court every reasonable presumption in favor of the correctness of its decision, we conclude that Judge Hartley Moore reasonably could have relied on evidence relevant to each statutory criterion as it applied to both parties, and conclude that she properly exercised her broad discretion in granting the plaintiff's motions for attorney's fees.

The judgment is reversed only with respect to the finding of contempt against the defendant for the violation of the Practice Book § 25-5 automatic orders related to the rental of the ski lodge and the case is remanded with direction to vacate that finding; the judgment and the postjudgment orders awarding attorney's fees are affirmed in all other respects.

In this opinion the other judges concurred.

IAN WRIGHT *v.* COMMISSIONER OF CORRECTION (AC 43170)

Moll, Suarez and DiPentima, Js.

Syllabus

The petitioner, a Jamaican national who previously had been convicted of various crimes, including murder, sought a writ of habeas corpus, claiming that his federal and state constitutional rights to due process were violated when he was denied a deportation parole eligibility hearing pursuant to statute (§ 54-125d (c)) after serving 50 percent of his sentence. The habeas court rendered judgment dismissing the habeas petition, concluding that it lacked subject matter jurisdiction because the petitioner had no liberty interest in a deportation parole eligibility hearing. The habeas court denied the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court did not abuse its discretion in denying the petition for certification to appeal, that court having properly determined that the petitioner lacked a liberty interest in a deportation parole eligibility hearing pursuant to § 54-125d; the due process clause does not provide the petitioner with a constitutionally protected liberty interest in a deportation parole hearing, as there is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence; furthermore, § 54-125d did not create a liberty interest in parole eligibility or a parole eligibility hearing as the mandatory language "shall," used in § 54-125d (c), was inapplicable to the petitioner and is limited to those persons whose eligibility for parole is restricted pursuant to a different statute (§ 54-125a (b) (2)), which does not include the crime for which the petitioner was convicted, namely, murder; moreover, § 54-125d (b) vests the Department of Correction with discretion over deportation parole eligibility determinations and, thus, did not create an "expectancy of release," but only a possibility of parole; additionally, although a sentencing court may refer a convicted person who is an alien to the Board of Pardons and Paroles for deportation, it cannot do so for a person convicted of a capital felony or a class A felony, and, as murder is a class A felony, the sentencing court did not have the discretion to refer the petitioner to the Board of Pardons and Paroles.

Argued September 10—officially released November 17, 2020

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland,

where the court, *Newson, J.*, rendered judgment dismissing the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Ian Wright, self-represented, the appellant (petitioner).

Zenobia G. Graham-Days, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Clare E. Kindall*, solicitor general, for the appellee (respondent).

Opinion

DiPENTIMA, J. The self-represented petitioner, Ian Wright, appeals following the habeas court's denial of his petition for certification to appeal from that court's dismissal of his petition for a writ of habeas corpus due to lack of subject matter jurisdiction. On appeal, the petitioner claims that the court (1) abused its discretion in denying his petition for certification to appeal and (2) improperly concluded that it lacked subject matter jurisdiction over his petition when it reasoned that the petitioner did not have a liberty interest in a deportation parole eligibility hearing pursuant to General Statutes § 54-125d.[1] We dismiss the appeal.

[1] The petitioner also claims that, in failing to grant him a deportation parole eligibility hearing, the respondent, the Commissioner of Correction, failed to adhere to the Uniform Administrative Procedures Act for rule making. See General Statutes § 4-183 et seq. Because we determine that the habeas court properly concluded that the petitioner did not have a liberty interest in deportation parole eligibility, we decline to address this claim. For the petitioner's claim to be cognizable in a habeas action, the petitioner would have to have at least some type of constitutional or statutorily created liberty interest in deportation parole eligibility. See *Vincenzo* v. *Warden*, 26 Conn. App. 132, 138, 599 A.2d 31 (1991). Because the petitioner does not have such a liberty interest, the habeas court lacked subject matter jurisdiction over this claim. See id., 143–44. "Unless a liberty interest in parole exists, the procedures followed in the parole determination are not required to comport with standards of fundamental fairness." Id., 144. "[A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . ." (Internal quotation marks omitted.) *Green* v. *Commis-*

The petitioner's claim on appeal centers on subsection (c) of § 54-125d, which concerns deportation parole. Section 54-125d provides in relevant part: "(a) The Board of Pardons and Paroles shall enter into an agreement with the United States Immigration and Naturalization Service for the deportation of parolees who are aliens as described in 8 USC 1252a (b) (2) and for whom an order of deportation has been issued pursuant to 8 USC 1252 (b) or 8 USC 1252a (b).

"(b) The Department of Correction shall determine those inmates who shall be referred to the Board of Pardons and Paroles based on intake interviews by the department and standards set forth by the United States Immigration and Naturalization Service for establishing immigrant status.

"(c) Notwithstanding the provisions of subdivision (2) of subsection (b) of section 54-125a, any person whose eligibility for parole is restricted under said subdivision shall be eligible for deportation parole under this section after having served fifty per cent of the definite sentence imposed by the court. . . ."[2]

sioner of Correction, 184 Conn. App. 76, 85, 194 A.3d 857, cert. denied, 330 Conn. 933, 195 A.3d 383 (2018).

[2] General Statutes § 54-125a (b) provides: "(1) No person convicted of any of the following offenses, which was committed on or after July 1, 1981, shall be eligible for parole under subsection (a) of this section: (A) Capital felony, as provided under the provisions of section 53a-54b in effect prior to April 25, 2012, (B) murder with special circumstances, as provided under the provisions of section 53a-54b in effect on or after April 25, 2012, (C) felony murder, as provided in section 53a-54c, (D) arson murder, as provided in section 53a-54d, (E) murder, as provided in section 53a-54a, or (F) aggravated sexual assault in the first degree, as provided in section 53a-70a. (2) A person convicted of (A) a violation of section 53a-100aa or 53a-102, or (B) an offense, other than an offense specified in subdivision (1) of this subsection, where the underlying facts and circumstances of the offense involve the use, attempted use or threatened use of physical force against another person shall be ineligible for parole under subsection (a) of this section until such person has served not less than eighty-five per cent of the definite sentence imposed."

The petitioner is a Jamaican national who was convicted in 2002, following a jury trial, of murder in violation of General Statutes § 53a-54a and carrying a pistol or revolver without a permit in violation of General Statutes § 29-35. The petitioner was sentenced to a total effective term of thirty-five years of incarceration, including a sentence enhancement pursuant to General Statutes § 53-202k. His conviction was affirmed on direct appeal. *State* v. *Wright*, 77 Conn. App. 80, 822 A.2d 940, cert. denied, 266 Conn. 913, 833 A.2d 466 (2003). In 2013, the United States Immigration Court ruled that the petitioner be removed from the United States to Jamaica.

The self-represented petitioner filed an amended petition for a writ of habeas corpus in May, 2018. He alleged that he has made several attempts to contact the Board of Pardons and Paroles (board) for the purpose of obtaining a deportation parole eligibility hearing. He claimed that his due process rights were violated because he was denied a deportation parole eligibility hearing pursuant to § 54-125d (c) after having served 50 percent of his sentence. In a separate action filed in March, 2018, the plaintiff initiated a civil rights action pursuant to 42 U.S.C. § 1983, in which he similarly argued that his federal and state constitutional rights to due process were violated when he was not given a deportation parole eligibility hearing. See *Wright* v. *Giles*, 201 Conn. App. 353, A.3d (2020).

On September 19, 2018, pursuant to Practice Book § 23-29, the habeas court provided notice of a hearing to determine whether, inter alia, the court lacked subject matter jurisdiction over the petition.[3] The respondent, the Commissioner of Correction, thereafter filed

[3] Practice Book § 23-29 provides in relevant part: "The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that: (1) the court lacks jurisdiction . . . ."

a motion to dismiss and, in a memorandum of law in support thereof, argued that the court lacked subject matter jurisdiction over the petition because the petitioner failed to raise a liberty interest. Following oral argument on November 9, 2018, the court issued an order allowing the petitioner additional time to submit written responses to the issues raised by the court's notice and the respondent's motion to dismiss. The petitioner filed a "Memorandum of Law In Support of Objection to Respondent's Motion to Dismiss," which included exhibits in support of his arguments, and later filed a "Supplemental Memorandum of Law In Support of Objection to Respondent's Motion to Dismiss." A second hearing was held on February 22, 2019.

In a memorandum of decision filed May 10, 2019, the court dismissed the petition for lack of subject matter jurisdiction. The court rejected the petitioner's interpretation of § 54-125d (c) that parole eligibility was mandatory once 50 percent of a sentence is served and concluded that, in light of § 54-125d (b), the statute did not convey a liberty interest. The court reasoned that deportation parole eligibility does not "simply rest on the amount of a sentence that has been served, as argued by the petitioner, but requires an interview process, and vests discretion with [the United States Immigration and Naturalization Service] to determine the standards a particular inmate must meet in that process." The court further reasoned, citing *Baker* v. *Commissioner of Correction*, 281 Conn. 241, 914 A.2d 1034 (2007), that permissive language in parole statutes does not give rise to a liberty interest and, because "the operative language of this statute clearly contemplates an eligibility determination process, the petitioner has no inherent recognized liberty interest, nor any state created liberty interest, in a deportation parole eligibility hearing." (Internal quotation marks omitted.) The

petitioner filed a petition for certification to appeal, which the court denied. This appeal followed.

I

The petitioner first claims that the court erred in denying his petition for certification to appeal from the court's dismissal of his petition for lack of subject matter jurisdiction.

"Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, he must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling . . . [and] [r]eversal is required only where an abuse of discretion is manifest or where injustice appears to have been done." (Citations omitted; internal quotation marks omitted.) *Perry* v. *Commissioner of Correction*, 131 Conn. App. 792, 795–96, 28 A.3d 1015, cert. denied, 303 Conn. 913, 32 A.3d 966 (2011).

"In determining whether the habeas court abused its discretion in denying the petitioner's request for

certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by this court for determining the propriety of the habeas court's denial of the petition for certification. Absent such a showing by the petitioner, the judgment of the habeas court must be affirmed." (Internal quotation marks omitted.) *Mourning* v. *Commissioner of Correction*, 169 Conn. App. 444, 448, 150 A.3d 1166 (2016), cert. denied, 324 Conn. 908, 152 A.3d 1246 (2017). We conclude, on the basis of our review of the petitioner's substantive claim, that he cannot prevail under the two-pronged test in *Simms* because he has not demonstrated that the court abused its discretion in denying certification to appeal.

II

The petitioner claims that the court improperly dismissed his petition for lack of subject matter jurisdiction. He contends that the court has subject matter jurisdiction over his petition because he has a cognizable liberty interest in a deportation parole hearing and/or eligibility on the basis of the mandatory language "shall" used in § 54-125d (c) concerning deportation parole eligibility. He argues that, because he has served 50 percent of his sentence, he "shall be eligible for deportation parole" according to § 54-125d (c). We disagree.

"The standard of review of a motion to dismiss is . . . well established. In ruling upon whether a complaint survives a motion to dismiss, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the

pleader. . . . The conclusions reached by the trial court in its decision to dismiss [a] habeas petition are matters of law, subject to plenary review. . . . [When] the legal conclusions of the court are challenged, [the reviewing court] must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record." (Citation omitted; internal quotation marks omitted.) *Woods* v. *Commissioner of Correction*, 197 Conn. App. 597, 606–607, 232 A.3d 63 (2020).

"In order to state a claim for a denial of procedural due process . . . a prisoner must allege that he possessed a protected liberty interest, and was not afforded the requisite process before being deprived of that liberty interest. . . . A petitioner has no right to due process . . . unless a liberty interest has been deprived . . . . Our first inquiry, therefore, is whether the petitioner has alleged a protected liberty interest. That question implicates the subject matter jurisdiction of the habeas court." (Citation omitted; internal quotation marks omitted.) *Anthony A.* v. *Commissioner of Correction*, 326 Conn. 668, 674–75, 166 A.3d 614 (2017).

"[T]he scope of relief available through a petition for habeas corpus is limited. In order to invoke the trial court's subject matter jurisdiction in a habeas action, a petitioner must allege that he is illegally confined or has been deprived of his liberty. . . . In other words, a petitioner must allege an interest sufficient to give rise to habeas relief. . . . In order to . . . qualify as a constitutionally protected liberty [interest] . . . the interest must be one that is assured either by statute, judicial decree, or regulation.§ (Citations omitted; internal quotation marks omitted.) *Green* v. *Commissioner of Correction*, 184 Conn. App. 76, 85, 194 A.3d 857, cert. denied, 330 Conn. 933, 195 A.3d 383 (2018).

"Liberty interests protected by the [f]ourteenth [a]mendment may arise from two sources—the [d]ue [p]rocess

[c]lause itself and the laws of the [s]tates." (Internal quotation marks omitted.) *State* v. *Matos*, 240 Conn. 743, 749, 694 A.2d 775 (1997). "A liberty interest may arise from the [c]onstitution itself, by reason of guarantees implicit in the word 'liberty,' see, e.g., *Vitek* v. *Jones*, 445 U.S. 480, [493–94], 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980) (liberty interest in avoiding involuntary psychiatric treatment and transfer to mental institution), or it may arise from an expectation or interest created by state laws or policies, see, e.g., *Wolff* v. *McDonnell*, 418 U.S. 539, [556–58], 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974) (liberty interest in avoiding withdrawal of state-created system of good-time credits)." *Wilkinson* v. *Austin*, 545 U.S. 209, 221, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005). It is clear that the first of those two sources does not provide the petitioner in this case with a liberty interest in a deportation parole hearing. The United States Supreme Court has held that "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. . . . A state may . . . establish a parole system, but it has no duty to do so." (Citations omitted.) *Greenholtz* v. *Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, 7, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979); see also *Swarthout* v. *Cooke*, 562 U.S. 216, 220, 131 S. Ct. 859, 178 L. Ed. 2d 732 (2011).

The second source, state law, does not provide the petitioner in this case with a cognizable liberty interest. In *Greenholtz* v. *Inmates of Nebraska Penal & Correctional Complex*, supra, 442 U.S. 7, which specifically concerned whether inmates had been unconstitutionally denied parole pursuant to a state parole statute, the United States Supreme Court determined that the existence of a state-created liberty interest was to be determined on a "case-by-case" basis and, that under the circumstances present in *Greenholtz*, the court

accepted the inmates' argument that the use of the mandatory language "shall" in a state parole statute created a legitimate "expectancy of release" that was entitled to constitutional protection. Id., 12. In *Board of Pardons* v. *Allen*, 482 U.S. 369, 107 S. Ct. 2415, 96 L. Ed. 2d 303 (1987), which also specifically concerned a state's parole regulations, the United States Supreme Court determined that the state statute created a due process liberty interest in parole because the statute "uses mandatory language ('shall') to creat[e] a presumption that parole release will be granted when the designated findings are made."[4] (Footnote omitted;

[4] In *Sandin* v. *Conner*, 515 U.S. 472, 479–84, 115 S. Ct. 2293,132 L. Ed. 2d 418 (1995), which concerned internal prison regulations concerning disciplinary segregation, the United States Supreme Court criticized the methodology that had been used in a long line of cases, including *Greenholtz*, of searching for mandatory language in order to determine whether a state-created liberty interest existed. The court instead favored an analysis for determining state-created liberty interests that focused on the nature of the deprivation, namely whether an "atypical and significant hardship" has been placed "on the inmate in relation to the ordinary incidents of prison life." *Sandin* v. *Conner*, supra, 515 U.S. 484. In *Anthony A.* v. *Commissioner of Correction*, supra, 326 Conn. 675–79, our Supreme Court noted *Sandin*'s criticism of such mandatory versus discretionary methodology in the context of an inmate's claim that he was incorrectly classified as a sex offender, to which claim our Supreme Court applied the stigma plus test. Id., 675–81 (in applying stigma plus test, court asked "whether the allegations of the petition demonstrate that the classification was wrongful and stigmatized the petitioner, and that the consequences suffered by the petitioner were 'qualitatively different' from the punishments usually suffered by prisoners, so that they constituted a major change in the conditions of confinement amounting to a grievous loss").

The approach of applying the methodology in *Greenholtz* to claims regarding alleged liberty interests in parole eligibility and interpreting *Sandin* as not applying to such claims has been adopted by other courts. The United States Court of Appeals for the District of Columbia Circuit aptly describes the reasoning involved in such an interpretation in *Ellis* v. *District of Columbia*, 84 F.3d 1413 (D.C. Cir. 1996): "The *Sandin* test relates to claims dealing with the day-to-day management of prisons. It seems ill-fitted to parole eligibility determinations. Parole is, in the words of *Sandin*, surely a freedom from restraint but the restraint itself will always be an ordinary incident of prison life. . . . In other words, if a prisoner is denied parole—if, in terms of *Sandin*, the prisoner is restrained—the prisoner will never suffer an atypical or significant hardship as compared to other prisoners. He will

internal quotation marks omitted.) Id., 377–78. In the recent decision of *Dinham* v. *Commissioner of Correction*, 191 Conn. App. 84, 97–98, 213 A.3d 507, cert. denied, 333 Conn. 927, 217 A.3d 995 (2019), this court stated: "Our appellate courts have concluded, consistently, that an inmate does not have a constitutionally protected liberty interest in certain benefits—such as good time credits, risk reduction credits, and early parole consideration—if the statutory scheme pursuant to which the [respondent] is authorized to award those benefits is discretionary in nature." (Internal quotation marks omitted.)

In *Boyd* v. *Commissioner of Correction*, 199 Conn. App. 575, 581–90, A.3d , cert. granted, 335 Conn.

continue to serve his sentence under the same conditions as his fellow inmates. There is no room for an argument that the denial of parole always imposes extraordinary hardship by extending the length of incarceration, and therefore gives rise to a liberty interest protected by the [d]ue [p]rocess [c]lause. That is simply a recasting of the argument—rejected in *Greenholtz* . . . and unaffected by *Sandin*—that a liberty interest in parole stems directly from the [c]onstitution without regard to state law. And yet given *Greenholtz* and *Allen*, an inferior court could not accept an argument that, no matter what state law provides, a prisoner's interest in parole can never amount to a liberty interest protected by the [d]ue [p]rocess [c]lause. Where does this leave us? *Sandin* did not overrule *Greenholtz* or *Allen* or any other Supreme Court decision. . . . To be sure, it abandoned the reasoning embodied in those opinions, at least insofar as applied to prisoners challenging the conditions of their confinement or the administration of the prison. In this situation, we think the only course open to us is to comply with the rule expressed in *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989): 'If a precedent of this [c]ourt has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this [c]ourt the prerogative of overruling its own decisions.' [Id., 484] . . . . Until the [c]ourt instructs us otherwise, we must follow *Greenholtz* and *Allen* because, unlike *Sandin*, they are directly on point. Both cases deal with a prisoner's liberty interest in parole; *Sandin* does not." (Citation omitted; internal quotation marks omitted.) *Ellis* v. *District of Columbia*, supra, 1418.

In the present case, we apply the mandatory versus discretionary analysis used in *Greenholtz* and *Allen*. It remains good law that an inmate does not have a constitutionally protected liberty interest in early parole consider-

962, A.3d (2020), this court examined a state parole statute for mandatory or discretionary language to determine whether the legislature vested the petitioner with a liberty interest in parole eligibility sufficient to invoke the subject matter jurisdiction of the habeas court. This court held that the language of the statute for determining parole eligibility of juvenile offenders, General Statutes " 54-125a (f), vested the petitioner with a cognizable liberty interest in parole eligibility status because, according to the language of the statute, the board was "required to hold a hearing [w]henever a person becomes eligible for parole release, and the petitioner . . . will become eligible for parole release after serving 60 percent of his fifty year sentence . . . ." (Internal quotation marks omitted.) Id., 587. But see *Perez* v. *Commissioner of Correction*, 326 Conn. 357, 371, 163 A.3d 597 (2017) (parole eligibility pursuant to § 54-125a does not constitute cognizable liberty interest sufficient to invoke habeas jurisdiction because decision to grant parole entirely is within discretion of board); *Rivera* v. *Commissioner of Correction*, 186 Conn. App. 506, 515, 200 A.3d 701 (2018) (petitioner did not have constitutionally protected liberty interest because applicable risk reduction credit statute provided that credit be awarded at respondent's discretion), cert. denied, 331 Conn. 901, 201 A.3d 402 (2019); *Boria* v. *Commissioner of Correction*, 186 Conn. App. 332, 344, 199 A.3d 1127 (2018) (risk reduction credits provided to inmates at discretion of respondent pursuant to General Statutes § 18-98e (a)), cert. granted on other grounds, 335 Conn. 901, 225 A.3d 685 (2020); *Green* v. *Commissioner of Correction*, 184 Conn. App. 76, 86–87, 194 A.3d 857 (no liberty interest in risk reduction credits where award credits discretionary pursuant to § 18-98e), cert. denied, 330 Conn. 933,

ation. See, e.g., *Rivera* v. *Commissioner of Correction*, 186 Conn. App. 506, 514, 200 A.3d 701 (2018), cert. denied, 331 Conn. 901, 201 A.3d 402 (2019).

195 A.3d 383 (2018); *Byrd* v. *Commissioner of Correction*, 177 Conn. App. 71, 82, 171 A.3d 1103 (2017) (to constitute constitutionally protected liberty interest, interest must be *assured* by state statute, judicial decree or regulation).

In the present case, the deportation parole statute, § 54-125d, does not create a liberty interest in parole eligibility or a parole eligibility hearing.[5] First, the petitioner's argument that the parole deportation statute creates a liberty interest rests on the use of the mandatory language "shall" in § 54-125d (c). That subsection, however, does not apply to the petitioner. Section 54-125d (c) provides that, "[n]otwithstanding the provisions of subdivision (2) of subsection (b) of section 54-125a, *any person whose eligibility for parole is restricted under said subdivision* shall be eligible for deportation parole under this section after having served fifty per cent of the definite sentence imposed by the court." (Emphasis added.) By its plain terms, the applicability of § 54-125d (c) is limited to persons whose eligibility for parole is restricted pursuant to § 54-125a (b) (2). Section 54-125a (b) (2) provides that "[a] person convicted of (A) a violation of section 53a-100aa or 53a-102, or (B) an offense, other than an offense specified in subdivision (1) of this subsection, where the underlying facts and circumstances of the offense involve the use, attempted use or threatened use of physical force against another person shall be ineligible for parole under subsection (a) of this section

[5] The respondent argues that the petitioner does not have a liberty interest in deportation parole eligibility pursuant to " 54-125d for the additional reason that the petitioner was convicted of murder in violation of § 53a-54a, and § 54-125a (b) (1) (E) provides that "[n]o person convicted of any of the following offenses, which was committed on or after July 1, 1981, *shall be eligible for parole under subsection (a) of this section* . . . murder, as provided in section 53a-54a . . . ." (Emphasis added.) By its terms, however, § 54-125a (b) (1) (E) applies only to the ineligibility for parole under § 54-125a (a).

until such person has served not less than eighty-five per cent of the definite sentence imposed." Thus, § 54-125a (b) (2) does not include the crime for which the petitioner had been convicted, murder in violation of § 53a-54a, which crime is specified in § 54-125a (b) (1) (E). Accordingly, because the word "shall" as used in § 54-125d (c) does not apply to the petitioner, that language cannot form the basis for the petitioner's claimed liberty interest.

Second, subsection (b) of § 54-125d vests the Department of Correction (department) with discretion over deportation parole eligibility determinations. Subsection (b) provides that "[t]he Department of Correction shall determine those inmates who shall be referred to the Board of Pardons and Paroles based on intake interviews by the department and standards set forth by the United States Immigration and Naturalization Service for establishing immigrant status." General Statutes § 54-125d (b). As a result, whether a particular inmate is referred to the board depends on the result of intake interviews conducted by the department. Accordingly, because of the discretion that the plain language of § 54-125d (b) confers on the department in the interview process, the deportation parole statute does not create an "expectancy of release"; *Greenholtz* v. *Inmates of Nebraska Penal & Correctional Complex*, supra, 442 U.S. 12. The deportation parole statute only creates the possibility of parole, provided multiple factors are satisfied, including a discretionary determination by the department following an interview process. "That the state holds out the possibility of parole provides no more than a mere hope that the benefit will be obtained . . . a hope which is not protected by due process." (Citation omitted; emphasis omitted.) Id., 11.

Additionally, according to § 54-125d (d), "a sentencing court may refer any person convicted of an offense other than a capital felony or a class A felony who

is an alien to the Board of Pardons and Paroles for deportation under this section." According to the plain language of this subsection, the referral process is discretionary. Moreover, because murder is a class A felony; see General Statutes § 53a-35a (2); *State* v. *Adams*, 308 Conn. 263, 272–73, 63 A.3d 934 (2013); the sentencing court is not given discretion to refer the petitioner to the board.

For the foregoing reasons, the petitioner has not alleged a constitutionally protected liberty interest that invokes the jurisdiction of the habeas court. The petitioner has failed to sustain his burden that the denial of his petition for certification to appeal was a clear abuse of discretion or that an injustice has been done. See *Simms* v. *Warden*, supra, 230 Conn. 612; see also *Lozada* v. *Deeds*, 498 U.S. 430, 431–32, 111 S. Ct. 860, 112 L. Ed. 2d 956 (1991). Therefore, we conclude that the habeas court did not abuse its discretion in denying the petitioner's petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

IAN WRIGHT *v.* CARLETON GILES ET AL.
(AC 42686)

Moll, Suarez and DiPentima, Js.

Syllabus

The self-represented, incarcerated plaintiff brought this action against the defendants pursuant to federal law (42 U.S.C. § 1983), claiming violations of his federal and state constitutional rights. The plaintiff claimed that he was entitled to deportation parole or a deportation parole eligibility hearing pursuant to statute (§ 54-125d (c)) and, that under 42 U.S.C. § 1983, the defendants had violated his rights to due process by failing to implement policies, procedures, and/or regulations that provided him with a deportation parole hearing and/or with eligibility. The trial court dismissed the plaintiff's complaint on the ground that the defendants were protected by sovereign immunity and rendered judgment thereon,

from which the plaintiff appealed to this court. *Held* that the judgment of the trial court was affirmed on the alternative ground that the plaintiff lacked standing; the plaintiff failed to demonstrate that he had a specific, personal, or legal interest in deportation parole eligibility as the possibility of deportation parole created by § 54-125d does not create a legal interest in parole eligibility, and the failure to exercise discretion to grant a deportation parole eligibility hearing is not within the zone of interests protected by 42 U.S.C. § 1983.

Argued September 10—officially released November 17, 2020

Procedural History

Action to recover damages for, inter alia, the alleged deprivation of the plaintiff's federal constitutional rights, and for other relief, brought to the Superior Court in the judicial district of New London, where the court, *Hon. Joseph Q. Koletsky*, judge trial referee, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Ian Wright, self-represented, the appellant (plaintiff).

Janelle R. Medeiros, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Clare E. Kindall*, solicitor general, for the appellees (defendants).

Opinion

DiPENTIMA, J. The plaintiff, Ian Wright, appeals from the judgment of the trial court granting the motion of the defendants, Carlton Giles, Richard Sparraco, Scott Semple, and George Jepsen, to dismiss the action for lack of subject matter jurisdiction. On appeal, the plaintiff claims that the court improperly granted the defendants' motion to dismiss.[1] We disagree and, accordingly, affirm the judgment of the trial court.

[1] The plaintiff also raises an additional related claim regarding the Uniform Administrative Procedures Act, General Statutes § 4-183 et seq., which he did not raise in the trial court. This claim is unreviewable for a number of reasons, but we simply state that, because the plaintiff lacks standing, we decline to address this claim.

The record reveals the following facts and procedural history. As we stated in *Wright* v. *Commissioner of Correction*, 201 Conn. App. 339, 342, A.3d (2020): "The [plaintiff] is a Jamaican national who was convicted in 2002, following a jury trial, of murder in violation of General Statutes § 53a-54a and carrying a pistol or revolver without a permit in violation of General Statutes § 29-35. The [plaintiff] was sentenced to a total effective term of thirty-five years of incarceration, including a sentence enhancement pursuant to General Statutes § 53-202k. His conviction was affirmed on direct appeal. *State* v. *Wright*, 77 Conn. App. 80, 822 A.2d 940, cert. denied, 266 Conn. 913, 833 A.2d 466 (2003). In 2013, the United States Immigration Court ruled that the [plaintiff] be removed from the United States to Jamaica."

In March, 2018, the self-represented plaintiff initiated an action pursuant to 42 U.S.C. § 1983, in which he alleged that he sent an application to the Board of Pardons and Paroles requesting a deportation parole eligibility hearing, but to date has not received such a hearing. The plaintiff claimed that the defendants violated his federal and state constitutional rights to due process by failing to implement policies, procedures and/or regulations providing him with a deportation parole hearing and/or providing him with eligibility. He specifically alleged that the mandatory language "shall" used in General Statutes § 54-125d (c) creates a legitimate expectation in parole to aliens who have served at least 50 percent of their sentence. On April 16, 2018, the defendants filed a motion to dismiss for lack of subject matter jurisdiction due to the plaintiff's lack of standing and sovereign immunity. In a memorandum of law in support of their motion to dismiss, the defendants argued that the plaintiff lacked standing because no mandatory, statutory right to parole exists.

The plaintiff filed an opposition to the motion to dismiss. On January 23, 2019, the court issued an order that read: "The defendant's motion to dismiss is granted." In response to a motion for articulation filed by the plaintiff, on May 22, 2019, the trial court explained its dismissal as follows: "The state enjoys sovereign immunity in this case. Calling this case a 'civil rights action' does not make that the case. [The plaintiff's] allegations that he was being denied a 'deportation parole hearing and/or eligibility' does not rise to that level."

The plaintiff's principal argument on appeal is that his claim that due process entitled him to a deportation parole eligibility hearing pursuant to § 54-125d (c)[2] demonstrates a liberty interest in deportation parole eligibility sufficient to invoke the court's subject matter jurisdiction. The defendants contend that the plaintiff has no such liberty interest and argue that the court's decision should be affirmed on the alternative ground of lack of standing.[3]

"Where the trial court reaches a correct decision but on [alternative] grounds, this court has repeatedly sustained the trial court's action if proper grounds exist to support it. . . . [W]e . . . may affirm the court's judgment on a dispositive [alternative] ground for which there is support in the trial court record." (Internal quotation marks omitted.) *Heisinger* v. *Cleary*, 323 Conn. 765, 776 n.12, 150 A.3d 1136 (2016).

"A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . When a . . . court decides a jurisdictional

[2] General Statutes § 54-125d (c) provides: "Notwithstanding the provisions of subdivision (2) of subsection (b) of section 54-125a, any person whose eligibility for parole is restricted under said subdivision shall be eligible for deportation parole under this section after having served fifty per cent of the definite sentence imposed by the court."

[3] All parties also presented us with opposing arguments addressing the trial court's stated ground for dismissal, namely, that the action is barred by sovereign immunity.

question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone. . . . A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . The issue of standing implicates [the] court's subject matter jurisdiction. . . . If a party is found to lack standing, the court is without subject matter jurisdiction to hear the cause. . . . Because standing implicates the court's subject matter jurisdiction, the plaintiff ultimately bears the burden of establishing standing." (Citations omitted; internal quotation marks omitted.) *Manning* v. *Feltman*, 149 Conn. App. 224, 230–31, 91 A.3d 466 (2014).

"When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue and not whether the controversy is otherwise justiciable, or whether, on the merits, the plaintiff has a legally protected interest that the defendant's action has invaded. . . . Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved. . . . The fundamental test for determining aggrievement encompasses a [well settled] twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the

party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]." (Citations omitted; internal quotation marks omitted.) *Steeneck* v. *University of Bridgeport*, 235 Conn. 572, 579, 668 A.2d 688 (1995).

"Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected. . . . With respect to whether the [plaintiff has] demonstrated some legally protected interest, we often have stated: Standing concerns the question [of] whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. . . . [I]n considering whether a plaintiff's interest has been injuriously affected . . . we have looked to whether the injury he complains of [his aggrievement, or the adverse effect upon him] falls within the zone of interests sought to be protected . . . ." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Broadnax* v. *New Haven*, 270 Conn. 133, 154–55, 851 A.2d 1113 (2004).

"An allegation of injury is both fundamental and essential to a demonstration of standing. Under Connecticut law, standing requires no more than a colorable claim of injury; a plaintiff ordinarily establishes his standing by *allegations* of injury. . . . As long as there is some direct injury for which the plaintiff seeks redress, the injury that is alleged need not be great. . . . Furthermore, an allegation of injury is a prerequisite under federal law to the maintenance of an action under [42 U.S.C.] § 1983." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *Johnson* v. *Rell*, 119 Conn. App. 730, 737, 990 A.2d 354 (2010).

The plaintiff has not established that he has standing because he has not demonstrated that he has a specific, personal, or legal interest in deportation parole eligibility. In his complaint, the plaintiff alleged a violation of procedural due process as the basis for his § 1983 action, and claimed that he was deprived of a liberty interest in deportation parole eligibility pursuant to § 54-125d. The possibility of deportation parole created by § 54-125d does not create a legal interest in parole eligibility. The plaintiff's due process claims in the present case mirror those that he made in *Wright* v. *Commissioner of Correction*, supra, 201 Conn. App. 345. In that case, we determined that the plaintiff did not have a liberty interest in deportation parole eligibility and/or a deportation parole hearing pursuant to the deportation parole statute, § 54-125d. Id. We are mindful of the limited scope of relief available through a petition for a writ of habeas corpus; see *Green* v. *Commissioner of Correction*, 184 Conn. App. 76, 85, 194 A.3d 857 (petitioner must allege either illegal confinement or deprivation of liberty interest to invoke jurisdiction of habeas court), cert. denied, 330 Conn. 933, 195 A.3d 383 (2018); and of the broader jurisdictional basis implicated in this action. In this civil action, the plaintiff is not required to demonstrate the existence of a liberty interest in order to invoke jurisdiction. See *Vincenzo* v. *Chairman, Board of Parole*, 64 Conn. App. 258, 263, 779 A.2d 843 (2001) (lack of liberty interest does not prevent plaintiff's pursuit of declaratory judgment action as long as statutory requirements for bringing declaratory judgment are satisfied). The plaintiff, however, must satisfy the requirements of establishing standing to bring his civil action. See, e.g., *Steeneck* v. *University of Bridgeport*, supra, 235 Conn. 579–80.

The plaintiff has failed to allege a direct or imminent injury to a legal interest. He does not have a legally protected interest in deportation parole eligibility. See

Wright v. *Commissioner of Correction*, supra, 201 Conn. App. 351. Furthermore, as the trial court alluded, although the plaintiff wrapped his claim in the garb of a civil rights action, his action concerns the fact that he was not given a parole eligibility hearing. The failure to exercise discretion to grant a deportation parole eligibility hearing is not within the zone of interests protected by 42 U.S.C. § 1983. See, e.g., *Hinesburg Sand & Gravel Co.* v. *State*, 166 Vt. 337, 342, 693 A.2d 1045 (1997) (dispute dressed up as civil rights action not within zone of interests of 42 U.S.C. § 1983). Accordingly, we conclude that the plaintiff lacks standing.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ROBERT LEMANSKI (AC 41785)

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

Syllabus

Convicted, after a jury trial, of the crime of operating a motor vehicle while under the influence of intoxicating liquor, the defendant appealed to this court. *Held*:

1. The defendant could not prevail on his unpreserved claim that his constitutional right to confrontation was violated when the trial court allowed C, the state trooper who arrested him, to testify that the defendant's son, L, told him that the defendant had consumed two drinks on the night that he was arrested; even if this court assumed that C's testimony was inadmissible hearsay that violated the defendant's right to confrontation, the defendant's claim failed under the fourth prong of *State* v. *Golding* (213 Conn. 233) because C's testimony was harmless beyond a reasonable doubt, as the state's case against the defendant was strong and L's statement to C was cumulative and unlikely to have influenced the jury's verdict.
2. The defendant could not prevail on his unpreserved claim that the trial court improperly instructed the jury regarding his alleged refusal to submit to a breath test at the time of his arrest:
   a. Contrary to the defendant's claim, the trial court did not commit plain error in instructing the jury that it could "make any reasonable inference

that follows" from the defendant's alleged refusal to submit to a breath test, as the court's instruction substantially complied with the applicable statute (§ 14-227a (e)) and did not, when read in the context of the court's entire instructions, mislead the jury; moreover, the defendant implicitly waived his claim that the court's instruction diluted the state's burden of proof and violated his constitutional right to due process, as the court provided the defendant with a copy of its instructions thirteen days before the preliminary charge conference, the defendant had ample time to review the instructions, the court reviewed the instructions with counsel on the record, soliciting comments and proposed modifications, and both counsel affirmatively, and repeatedly, expressed their satisfaction with the court's instructions.

b. The defendant's claim that the trial court committed plain error when it instructed the jury that his alleged refusal to submit to a breath test could be construed as consciousness of guilt because such an instruction was not factually supported by the evidence in view of the fact that he agreed to a blood test was unavailing: that court did not err in instructing the jury on consciousness of guilt, as C testified, without objection, that the defendant agreed to submit to a breath test, then changed his mind, vacillating several times before he requested a blood test, and, therefore, the court's instruction advising the jury of its obligation to determine whether the defendant refused the breath test was not only proper but was necessary; accordingly, the court's instructions to the jury pertaining to the consciousness of guilt evidence did not rise to the level of egregiousness and harm that would warrant reversal under the plain error doctrine.

Argued September 16—officially released November 17, 2020

Procedural History

Substitute information charging the defendant with the crime of operating a motor vehicle while under the influence of intoxicating liquor, brought to the Superior Court in the judicial district of Litchfield at Torrington and tried to the jury before *Noble, J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Laila M. G. Haswell, senior assistant public defender, for the appellant (defendant).

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, were *Dawn Gallo*, state's attorney, and *Jonathan Knight*, supervisory assistant state's attorney, for the appellee (state).

Opinion

CRADLE, J. The defendant, Robert Lemanski, appeals from the judgment of conviction, rendered after a jury trial, of operating a motor vehicle while under the influence of intoxicating liquor in violation of General Statutes § 14-227a (a) (1). On appeal, the defendant claims that (1) his constitutional right to confrontation under the sixth amendment to the United States constitution was violated when the trial court improperly admitted testimonial hearsay into evidence, and (2) the trial court improperly instructed the jury regarding his alleged refusal to submit to a breath test at the time of his arrest. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On the night of December 30, 2016, Connecticut State Trooper Matthew Costella was on general patrol in the areas of Harwinton and Burlington. At approximately 9 p.m., he was sitting in his police cruiser in a church parking lot at the intersection of Routes 4 and 118, when he observed a passing motor vehicle that did not have its rear registration plate illuminated. Costella pulled out behind the vehicle, onto Route 4 heading eastbound toward Burlington, and followed it for approximately one mile, when he observed the vehicle cross over the white fog line. On the basis of his observations, the registration plate light infraction and the manner of operation of the vehicle, Costella turned on the emergency lights of his cruiser and pulled the vehicle over to the right side of the road. Another vehicle also pulled over ahead of the vehicle that Costella was stopping.

Costella approached the vehicle and asked the operator, the defendant, for his license, registration and insurance, to which the defendant responded, "That's a lot of questions." Costella then asked the defendant where he was coming from and the defendant stated

that he was coming from Harwinton. When Costella asked where in Harwinton, the defendant responded that he was coming from the New Milford area, but then stated that he was coming from Torrington where he had played golf with his son, Steven Lemanski. During the foregoing exchange, the defendant searched for the documents that Costella had requested. Costella requested them a second time and referred the defendant to his wallet, which was located in plain sight on the passenger seat.

Costella asked the defendant if he had had anything to drink, and the defendant responded, "no, nothing." Costella noticed that the defendant's speech was slurred and his eyes were glassy. He advised the defendant that he could smell alcohol on his breath. When Costella asked the defendant if he had any medical conditions, the defendant responded that he did not. Costella conducted a test that he referred to as a "brief" or "modified" horizontal gaze nystagmus test, looking for an involuntary jerking of the eyes, to determine if the defendant had been drinking. Costella told the defendant that he could see his eyes bouncing.

Costella asked the defendant if he knew who was in the vehicle that had pulled over ahead of them, and the defendant told Costella that it was Steven Lemanski. At Costella's request, the defendant used his cell phone to call Steven Lemanski and asked him to back his vehicle up to them. Once Steven Lemanski had backed up, Costella approached his vehicle and asked him if the defendant had any medical conditions, and he told Costella that the defendant did not. Steven Lemanski confirmed that they had been playing golf in Torrington and, when Costella asked if the defendant had consumed any alcohol that night, Steven Lemanski told him that the defendant had two drinks while he was with him.

After speaking with Steven Lemanski, Costella returned to his cruiser and called for backup so that he could conduct the standard field sobriety tests to determine if the defendant was intoxicated. After two additional troopers arrived, Costella performed three field sobriety tests—the horizontal gaze nystagmus test, the walk and turn test and the one leg stand test. When the defendant emerged from his vehicle, Costella observed that he was having trouble maintaining his balance. The defendant failed to perform any of the three tests to standard. On the basis of his observation of the defendant's operation of his vehicle, his observations of the defendant after he stopped the vehicle, and the results of the field sobriety tests, Costella determined that the defendant was under the influence of alcohol. Costella arrested him and transported him to the state police barracks for processing.

Upon arriving at the barracks, Costella advised the defendant of his rights and informed him that he would be requested to submit to a blood, breath or urine test, which must be administered within two hours of the time of his operation of the motor vehicle.[1] The defendant asked that he be allowed to contact an attorney, and he was permitted to call his wife to ask her for a telephone number of an attorney. Costella also looked up an attorney on the Internet at the defendant's request and provided him with telephone books so he could look up other attorneys. The defendant was unable to contact an attorney, and Costella asked him to submit to a breath test. The defendant first indicated that he did not want to take a breath test, then changed his mind and agreed to take a breath test, then changed his mind again and stated that he did not want to take a breath test. The defendant eventually told Costella that he wanted to take a blood test. Because the administration of a blood test must be done at a hospital,

[1] See General Statutes § 14-227b (c).

blood tests generally are not offered due to the two hour window during which the test must be conducted. Costella thus continued to offer the defendant a breath test, while the defendant continued to request a blood test. Eventually another officer, Trooper Matthew Cashman, also offered the defendant a breath test, and the defendant refused.

The defendant was charged with and tried for operating a motor vehicle while under the influence of intoxicating liquor in violation of § 14-227a (a) (1). Following trial, the jury found him guilty, and the court sentenced him to six months of incarceration, execution suspended after ten days, and eighteen months of probation. This appeal followed.

I

The defendant first claims that his sixth amendment right to confrontation was violated when the court allowed Costella to testify that Steven Lemanski told him that the defendant had consumed two drinks on the night that he was arrested.[2] We disagree.

The defendant claims that Costella's testimony regarding Steven Lemanski's statement constituted testimonial hearsay, the admission of which violated his constitutional right to confrontation and deprived him of a fair trial. The defendant did not object to Costella's testimony regarding Steven Lemanski's statement at trial. Because the defendant's claim is unpreserved, we review it pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015),[3] as the

[2] Neither the state nor the defendant called Steven Lemanski as a witness at trial.

[3] Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the

defendant requests in his appellate brief. Even if we assume, arguendo, that Costella's testimony regarding Steven Lemanski's statement was inadmissible testimonial hearsay that violated the defendant's right to confrontation, we conclude that his claim fails under the fourth prong of *Golding* because any alleged violation was harmless.

"Whether a constitutional violation is harmless in a particular case depends upon the totality of the evidence presented at trial. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless. . . . Whether such error is harmless in a particular case depends upon a number of factors, such as the importance of the [evidence] in the prosecution's case, whether the [evidence] was cumulative, the presence or absence of evidence corroborating or contradicting the [evidence] . . . and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the evidence on the trier of fact and the result of the trial. . . . The state bears the burden of proving that the error is harmless beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Smith*, 156 Conn. App. 537, 561–62, 113 A.3d 103, cert. denied, 317 Conn. 910, 115 A.3d 1106 (2015).

Here, the state's case against the defendant was strong. Costella testified that, when he initially approached the defendant's vehicle, he noted a strong and distinct odor of alcohol emanating from the defendant, the defendant's eyes were glassy and his speech was slurred. The defendant had difficulty recounting where he was driving from and locating the documents that Costella requested, even though his wallet was in plain sight on

state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40.

the passenger seat. The defendant also failed all three of the field sobriety tests administered by Costella. The state presented expert testimony that, when an individual fails those three field sobriety tests, the likelihood of the impairment of that individual is between 91 percent and 95 percent. The video recording from the dashboard camera of Costella's cruiser was admitted into evidence, so the jury was able to observe the defendant when Costella stopped him, when he exited his vehicle and while he performed the field sobriety tests. Furthermore, Costella testified only that Steven Lemanski told him that the defendant had two drinks. He did not say that the defendant was intoxicated, what he drank, or when he consumed such drinks. Consequently, Steven Lemanski's statement was less probative than the evidence the jury heard and saw about the defendant's appearance, condition and conduct at the time his vehicle was pulled over by Costella. Because there was ample other evidence on which the jury could have based its guilty verdict, Steven Lemanski's statement to Costella, at most, was cumulative and was unlikely to have influenced the jury's verdict. We thus conclude that the admission of Costella's testimony regarding Steven Lemanski's statement that the defendant had consumed two drinks on the night of his arrest was harmless beyond a reasonable doubt. The defendant's claim thus fails under the fourth prong of *Golding*.

II

The defendant also claims that the court improperly instructed the jury regarding his alleged refusal to submit to a breath test. The defendant's challenge to the court's instruction to the jury regarding his alleged refusal to submit to a breath test is twofold. First, he argues that the court improperly instructed the jury that it could " 'make any reasonable inference that follows' " from his refusal to take a breath test. Second, he contends that the court erred in instructing the jury on

consciousness of guilt based on his alleged refusal to submit to a breath test. We are not persuaded.

On February 1, 2018, the court e-mailed counsel a copy of the instructions that it intended to give to the jury. On February 14, 2018, the court held a preliminary charge conference on the record, during which it indicated its intention to instruct the jury on consciousness of guilt. The court held a final charge conference, also on the record, the following day. Both parties expressly indicated that they were satisfied with the court's instructions; neither sought any changes, nor voiced any objection.

Later that same day, the court instructed the jury. The court explained, inter alia: "You may draw reasonable inferences from the facts you find established in the case, the inferences that you draw, however, must not be from a guess upon the evidence, but they must be from a fact or facts which the evidence has established. In drawing inferences from the established facts, you should use your reason and common sense. The inferences that you draw must be logical and reasonable and not the result of speculation or conjecture."

As to consciousness of guilt, the court instructed the jury as follows: "This is a limiting instruction. In any criminal trial, it is permissible for the state to show that conduct or statements made by a defendant after the time of the alleged offense may have been influenced by the criminal act; that is, the conduct or statements show a consciousness of guilt. For example, acts or statements made in an attempt to avoid detection of a crime or responsibility for a crime or [were] influence[d] by the commission of the criminal act. Such acts or statements do not, however, raise a presumption of guilt. If you find the evidence proved and also find that the acts or his statements were influenced by the criminal act and not by any other reason, you may, but

are not required to infer from this evidence that the defendant was acting from a guilty conscience. The state claims that the defendant was acting from a guilty conscience.

"The state claims that the following conduct is evidence of consciousness of guilt . . . the defendant's refusal to submit to the Breathalyzer test while at the police station. It is up to you as judges of the facts to decide whether the defendant's acts or statements, if proved, reflect the consciousness of guilt and to consider such in your deliberations and conformity with these instructions."

The court instructed the jury in detail on the elements of operating a motor vehicle while under the influence of intoxicating liquor and then summarized that "the state must prove beyond a reasonable doubt that [1] the defendant was operating a motor vehicle at the time and place alleged, and [2] he was under the influence of intoxicating liquor." The court also explained: "Evidence of the defendant's refusal to submit to a breath test has been introduced. If you find that the defendant did refuse to submit to such a test, you may make any reasonable inference that follows from that fact." After instructing the jury, the court asked counsel if they had any exceptions or issues with the final charge, and both expressly confirmed that they did not.

Because the defendant did not challenge the court's instructions at trial, he seeks relief for portions of his claim under *Golding* on the ground that a constitutional violation deprived him of a fair trial. See footnote 3 of this opinion. For other portions of his claim, he seeks relief under the plain error doctrine. "The plain error doctrine is . . . reserved for truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . That is, it

is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . . [Thus, an appellant] cannot prevail under [the plain error doctrine] . . . unless he [or she] demonstrates that the claimed error is both so clear and so harmful that a failure to reverse the judgment would result in manifest injustice. . . . Furthermore, even if the error is so apparent and review is afforded, the defendant cannot prevail on the basis of an error that lacks constitutional dimension unless he [or she] demonstrates that it likely affected the result of the trial." (Citations omitted; internal quotation marks omitted.) *State* v. *Harris*, 198 Conn. App. 530, 540, 233 A.3d 1197 (2020). With these principles in mind, we address the defendant's specific instructional claims in turn.

A

The defendant first claims that the trial court erred in instructing the jury that it could "make any reasonable inference that follows" from his alleged refusal to take a breath test. As to this instruction, the defendant claims that (1) the court committed plain error in so instructing the jury because it was "contrary to [§ 14-227a (e)] because it failed to explain precisely what the jury may infer and what it may not infer from such refusal," and (2) the court's instruction diluted the state's burden to prove every element of its case beyond a reasonable doubt and, thus, violated his constitutional right to due process because it "allowed the jury to infer solely from the refusal evidence that the defendant was under the influence." We are not persuaded.

1

The defendant claims that the trial court's instruction that the jury could draw any inference from the

defendant's alleged refusal to submit to a breath test was plain error because it was inconsistent with the language of § 14-227a (e), which provides in relevant part: "In any criminal prosecution for a violation of subsection (a) of this section, evidence that the defendant refused to submit to a blood, breath or urine test requested in accordance with section 14-227b shall be admissible . . . . If a case involving a violation of subsection (a) of this section is tried to a jury, the court shall instruct the jury as to *any inference that may or may not be drawn* from the defendant's refusal to submit to a blood, breath or urine test." (Emphasis added.) The defendant argues that the "plain meaning [of the statute] is to direct trial courts to explain precisely what the jury may or may not infer. The court must make clear that the jury may infer only that the defendant had a guilty conscience, not that he is in fact guilty based solely on the refusal."

This court addressed this issue in *State* v. *Gordon*, 84 Conn. App. 519, 854 A.2d 74, cert. denied, 271 Conn. 941, 861 A.2d 516 (2004). In *Gordon*, the trial court instructed the jury, inter alia, as follows: "Evidence of the defendant's refusal to submit to a test, to a breath test, has been introduced. If you find that the defendant did refuse to submit to such a test, you may make any reasonable inference that follows from that fact." Id., 530. The defendant argued that "the instruction permitted the jury to draw the conclusion that he refused to submit to the test and to consider that fact alone when determining guilt" and "failed to impress on the jury the requirement that even when making permissible inferences, to find the defendant guilty, it must have found that the state proved guilt beyond a reasonable doubt." Id. In rejecting the defendant's claim, this court explained: "We have held that [General Statutes (Rev. to 1999)] § 14-227a (f), now (e), permits the jury to draw reasonable inferences regarding a defendant's refusal

to submit to a Breathalyzer test. See *State* v. *McCarthy*, 63 Conn. App. 433, 437, 775 A.2d 1013, cert. denied, 258 Conn. 904, 782 A.2d 139 (2001). In *McCarthy*, we also recognized that as long as the court in its instruction properly identified as permissible the inference the jury could draw and clearly instructed as to the state's ultimate burden of proof, it was unimportant that the court's language in the instruction did not mirror the statutory language. Here, the court instructed the jury that you may make any reasonable inference, even though the statutory language states that the court shall instruct the jury as to any inference that may or *may not* be drawn . . . . We conclude that it was not possible for the jury to be misled into believing the presumption was mandatory from the language used by the court." (Citation omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Gordon*, supra, 531.

As this court held in *Gordon*, and, earlier in *McCarthy*, we conclude that the court's instruction to the jury that it could "make any reasonable inference that follows" from the defendant's alleged refusal to submit to a breath test substantially complied with § 14-227a (e), and, when read in the context of the entirety of the court's instructions, which explained the elements that the state was required to prove beyond a reasonable doubt, did not mislead the jury. We thus conclude that the court did not err in so instructing the jury or that such an alleged error "was of such monumental proportion that it threatened to erode our system of justice . . . or that it resulted in harm so grievous that fundamental fairness requires a new trial." (Internal quotation marks omitted.) *State* v. *Juan V.*, 191 Conn. App. 553, 574, 215 A.3d 1232, cert. denied, 333 Conn. 925, 217 A.3d 993 (2019).[4] Accordingly, the defendant's claim of plain error is unavailing.

[4] We note that the instruction given by the trial court in this case and in *Gordon* is identical to that prescribed by the Judicial Branch's model criminal jury instructions. See *Snell* v. *Norwalk Yellow Cab, Inc.*, 332 Conn. 720, 763,

The defendant also claims that the court's instruction permitting the jury to "make any reference that follows" from his alleged refusal to submit to a breath test diluted the state's burden of proof and, consequently, violated his right to due process. The state contends that the defendant implicitly waived this claim at trial. We agree with the state.

In *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011), our Supreme Court held: "[W]hen the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal. Such a determination by the reviewing court must be based on a close examination of the record and the particular facts and circumstances of each case." Id., 482–83.

In this case, the parties were given the court's proposed instructions on February 1, 2018, thirteen days prior to the preliminary charge conference on February 14, 2018. During that conference, which was held on the record, the court reviewed the instructions with counsel, proceeding page by page, and soliciting from counsel any questions or concerns about them. Both counsel voiced their satisfaction with each portion of the instructions as the court and counsel reviewed them together. The next day, the court provided counsel with a final copy of its intended instructions to the jury and

212 A.3d 646 (2019) ("language used in model jury instructions, although instructive in considering the adequacy of a jury instruction . . . is not binding on this court (citation omitted)).

held a final charge conference on the record. After the court noted on the record the minor edits that were made to the instructions, it asked if either counsel had any questions regarding those changes; both counsel indicated that they did not. The court then asked, once again, whether either counsel had "any additional request to charge any issues, changes, objections, exceptions, corrections to the final jury instructions." Both counsel indicated that they did not. After instructing the jury, the court asked counsel if they had any exceptions or issues with the final charge, and both confirmed that they did not.

Because the court provided the defendant with a copy of its instructions thirteen days before the preliminary charge conference, he had ample time to review them. The court reviewed the instructions with counsel on the record, soliciting comments and proposed modifications, and both counsel affirmatively, and repeatedly, expressed their satisfaction with the court's instructions. We therefore conclude that the defendant implicitly waived his claim that the court's instruction diluted the state's burden of proof and violated his constitutional right to due process.[5] His claim therefore fails under *Golding*.

[5] Although we do not reach the substance of this claim, we note that it too was rejected in *State* v. *Gordon*, supra, 84 Conn. App. 519. The court reasoned: "When determining whether a charge diluted the state's burden of proof, we do not look at the charge in isolation, but examine it within the context of the entire charge. . . . The court clearly and repeatedly instructed the jury that the state had the burden of proving each and every element beyond a reasonable doubt. The language directly following the challenged instruction specifically reminded the jury that to find the defendant guilty, it needed to find that the state proved each element beyond a reasonable doubt. In light of the instructions as a whole, we conclude that it was not reasonably possible that the jury was misled as to the state's burden of proof." (Citation omitted.) Id., 532–33. The court concluded: "We disagree with the defendant's contention that the challenged language, coupled with the court's instruction on the permissible inference the jury could draw under [General Statutes (Rev. to 1999)] § 14-227a (f), now (e), diluted the state's burden to prove the defendant's guilt on each element of the offense beyond a reasonable doubt." Id., 532.

B

The defendant also contends that the court committed plain error when it instructed the jury that his alleged refusal to submit to a breath test could be construed as consciousness of guilt because such an instruction was not factually supported by the evidence in view of the fact that he agreed to a blood test. We disagree.

Faced with the same issue in *State* v. *Barlow*, 30 Conn. App. 36, 618 A.2d 579 (1993), this court reasoned: "[W]e cannot conclude that the trial court abused its discretion by allowing the jury to consider testimony on the issue of whether the defendant refused to take the breath test. As [General Statutes (Rev. to 1991)] § 14-227a (f) [now (e)] makes abundantly clear, evidence that the defendant refused to submit to a . . . breath . . . test . . . shall be admissible provided that the requirements of subsection (b) of [General Statutes § 14-227b] have been satisfied. Whether the defendant refused to take the breath test was an issue of fact for the jury. . . . Accordingly, the trial court did not abuse its discretion by submitting this factual issue to the jury.

"Furthermore, the trial court prudently instructed the jury on interpreting the evidence surrounding the attempted breath test. [General Statutes (Rev. to 1991)] § 14-227a (f) [now (e)] provides that [i]f a case involving a violation of subsection (a) of this section is tried to a jury, the court shall instruct the jury as to any inference that may or may not be drawn from the defendant's refusal to submit to a . . . breath . . . test. In instructing the jury, the trial court explained that the jury was free to draw any reasonable inferences in the event that it found refusal. The court proceeded to caution the jury that evidence of refusal *by itself* cannot support a guilty verdict. In short, on these facts, we are unable to discern an abuse of discretion by the trial

court." (Citation omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) Id., 43–44.

As in *Barlow*, we cannot conclude that the trial court erred in instructing the jury on consciousness of guilt. Costella testified that the defendant agreed to submit to a breath test, then changed his mind, vacillating several times before he requested a blood test. That evidence was admitted without objection from the defendant and, accordingly, the jury was entitled to consider it. The court's instruction advising the jury of its obligation to determine whether the defendant refused the breath test, therefore, was not only proper, but it was necessary. See *State* v. *Rodriguez*, 192 Conn. App. 115, 123, 217 A.3d 21 (2019). Accordingly, we conclude that the court did not err in so instructing the jury. We further conclude that the instructions pertaining to the consciousness of guilt evidence do not rise to the level of egregiousness and harm that would warrant reversal under the plain error doctrine.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* PETER SEBBEN (AC 42763)

Alvord, Cradle and Alexander, Js.

Syllabus

The plaintiff, the state of Connecticut, sought reimbursement from the defendant, pursuant to statute (§18-85a) and the applicable regulation (§ 18-85a-2), for the cost of his incarceration after he had served a sentence for his conviction of certain crimes. The trial court granted the state's application for a prejudgment remedy to attach certain of the defendant's assets and thereafter granted the state's motion for summary judgment. The court rejected the defendant's claims that, inter alia, the assessed cost of his incarceration was based on an unreliable calculation and that his right to equal protection was violated because the state had not sought reimbursement for incarceration costs from other inmates.

The trial court thereafter rendered judgment for the state, and the defendant appealed to this court, raising many of the same arguments that he raised in the trial court. *Held* that, after applying the well established principles that govern the review of a trial court's decision to grant a motion for summary judgment, this court affirmed the judgment of the trial court and adopted its well reasoned decision as a proper statement of the facts and the applicable law on the issues.

Argued October 20—officially released November 17, 2020

Procedural History

Action for reimbursement of the alleged costs of the defendant's incarceration, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Wiese*, *J.*, granted the plaintiff's application for a prejudgment remedy; thereafter, the court, *Noble*, *J.*, granted in part and denied in part the plaintiff's motion for summary judgment and rendered judgment thereon; subsequently, the court, *Noble*, *J.*, denied the defendant's motion for reargument, and the defendant appealed to this court. *Affirmed.*

Peter Sebben, self-represented, the appellant (defendant).

Joan M. Andrews, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, *Sean Kehoe*, assistant attorney general, and *Judith A. Brown*, former assistant attorney general, for the appellee (plaintiff).

Opinion

PER CURIAM. The plaintiff, the state of Connecticut, instituted this action pursuant to General Statutes § 18-85a[1] and § 18-85a-2 of the Regulations of Connecticut

[1] General Statutes § 18-85a (b) provides in relevant part: "The state shall have a claim against each inmate for the costs of such inmate's incarceration under this section, and regulations adopted in accordance with this section, for which the state has not been reimbursed. . . . In addition to other remedies available at law, the Attorney General, on request of the Commissioner of Correction, may bring an action in the superior court for the judicial district of Hartford to enforce such claim . . . ."

State Agencies,[2] to recover $22,330, the assessed cost for 154 days of incarceration, from the self-represented defendant, Peter Sebben. See generally *State* v. *Ham*, 253 Conn. 566, 566–67, 755 A.2d 176 (2000); *Alexander* v. *Commissioner of Administrative Services*, 86 Conn. App. 677, 678, 862 A.2d 851 (2004). The trial court rendered summary judgment in favor of the state. On appeal, the defendant claims that (1) the court improperly granted the state's motion for summary judgment because genuine issues of material fact existed regarding the assessed cost of his incarceration, (2) his right to equal protection was violated, (3) application of § 18-85a constituted an excessive fine in violation of the eighth amendment to the United States constitution, (4) the court improperly denied his motion to reargue and (5) the court improperly denied his request for an extension of time for additional discovery. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to the resolution of this appeal. The defendant was convicted of violating General Statutes §§ 53a-58 and 53a-155. The court sentenced the defendant to six months of incarceration in the custody of the Commissioner of Correction, beginning on January 2, 2015. On April 23, 2015, the state filed an application for a prejudgment remedy to attach certain of the defendant's assets. On July 23, 2015, the court, *Wiese*, *J.*, granted the state's application in the amount of $22,330.

The state then filed a complaint to recover the costs of the defendant's incarceration. The state alleged that the defendant had been incarcerated from January 2 to June 2, 2015, at an assessed cost of $22,330. The defendant filed a motion to dismiss, which the court, *Hon.*

[2] Section 18-85a-2 of the Regulations of Connecticut State Agencies provides: "On or after October 1, 1997, inmates shall be charged for and shall be responsible to pay the assessed cost of incarceration, as defined in 18-85a-1 (a)."

Constance L. Epstein, judge trial referee, denied on July 5, 2016, and a motion to strike, which the court, *Robaina*, *J.*, denied on August 18, 2017. Thereafter, the defendant filed an answer in which he raised various special defenses. Following the state's motion to strike, the court, *Robaina*, *J.*, struck the majority of the defendant's special defenses.

On June 29, 2018, the state moved for summary judgment. On August 14, 2018, the defendant filed his opposition. On November 19, 2018, the court, *Noble*, *J.*, heard oral argument on the motion for summary judgment.

On March 15, 2019, the court issued its memorandum of decision on the summary judgment motion. At the outset of its analysis, the court noted that the law of the case doctrine applied and that Judge Robaina previously had addressed some of the arguments presented in the defendant's opposition to summary judgment. The court concluded that the state had met its burden of establishing entitlement to judgment as a matter of law. The court then considered and rejected the defendant's arguments that (1) he was entitled to additional discovery, (2) the assessed cost of incarceration claimed by the state was based on an unreliable calculation, and (3) he unfairly was targeted by the state, which had not sought reimbursement for incarceration costs from other inmates, thereby evidencing an equal protection violation.

On April 3, 2019, the defendant filed a motion for reargument and/or reconsideration of the granting of the state's motion for summary judgment. On May 9, 2019, the court denied the defendant's motion, noting that it was not "well-founded."

On appeal, the defendant challenges the trial court's rendering of summary judgment in favor of the state

and the denial of his motion to reargue. He essentially iterates arguments that he raised in the trial court.[3]

We carefully have examined the record of the proceedings before the trial court, in addition to the parties' appellate briefs and oral arguments. Applying the well established principles that govern our review of a court's decision to grant a motion for summary judgment; see, e.g., *Capasso* v. *Christmann*, 163 Conn. App. 248, 257–60, 135 A.3d 733 (2016); we conclude that the judgment of the trial court should be affirmed. We adopt the trial court's thorough and well reasoned decision as a proper statement of the facts and the applicable law on the issues. See *State* v. *Sebben*, Superior Court, judicial district of Hartford, Docket No. CV-15-5039364-S (March 15, 2019) (reprinted at 201 Conn. App. 381, 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); *Maselli* v. *Regional School District No. 10*, 198 Conn. 643, 648, 235 A.3d 599, cert. denied, 335 Conn.

[3] The defendant also claims that the total amount charged by the state in this case violated the eighth amendment, which prohibits excessive fines. See *Timbs* v. *Indiana*, U.S. , 139 S. Ct. 682, 686–87, 203 L. Ed. 2d 11 (2019) (eighth amendment's excessive fines clause is incorporated by due process clause of fourteenth amendment and applicable to states). The defendant's opposition to the state's motion for summary judgment indirectly referenced the excessive fines clause of the eighth amendment. The defendant, however, failed to explain or analyze how the cost calculated for his incarceration constituted an excessive fine or violated the eighth amendment. We further note that the defendant did not raise this issue in his motion for reargument or reconsideration.

The trial court did not expressly address the eighth amendment claim that the defendant now attempts to raise on appeal. We conclude, after a close examination of the filings before the court, that the defendant has raised his eighth amendment claim of an excessive fine for the first time on appeal. He did not address his failure to raise this claim properly before the trial court in his principal brief, nor has he requested review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). We therefore decline to consider his eighth amendment claim.

947, A.3d (2020); *Freeman* v. *A Better Way Wholesale Autos, Inc.*, 191 Conn. App. 110, 112, 213 A.3d 542 (2019).

The judgment is affirmed.

APPENDIX

STATE OF CONNECTICUT *v.* PETER SEBBEN*

Superior Court, Judicial District of Hartford
File No. CV-15-5039364-S

Memorandum filed March 15, 2019

Proceedings

Memorandum of decision on plaintiff's motion for summary judgment. *Motion granted.*

Peter Sebben, self-represented, the defendant.

Judith Brown, assistant attorney general, for the plaintiff.

Opinion

NOBLE, J.

FACTS

The plaintiff, the state of Connecticut, acting by Scott Semple, Commissioner of Correction, commenced the present case against the defendant, Peter Sebben, to recover $22,330: the alleged cost of the defendant's incarceration. Prior to commencing the present case, the plaintiff filed an application for a prejudgment remedy on April 23, 2015. A hearing was held on July 22, 2015, after which the court, *Wiese, J.*, granted the plaintiff's application in the amount of $22,330.

In its complaint, the plaintiff alleges that the defendant was convicted of certain crimes and that a judge

* Affirmed. *State* v. *Sebben*, 201 Conn. App. 376, A.3d (2020).

of the Superior Court committed the defendant to the custody of the Commissioner of Correction to be incarcerated. The plaintiff further alleges that the defendant was incarcerated from January 2, 2015, to June 5, 2015; between January 2, 2015, and April 17, 2015, the plaintiff alleges it incurred costs of $15,225 with nothing received from the defendant, and from April 18, 2015, until June 5, 2015, the plaintiff alleges it incurred costs of $7105.

On October 13, 2016, the defendant filed a motion to strike (# 128) the plaintiff's complaint. That motion was denied by the court, *Robaina*, *J.*, on August 18, 2017; the court articulated its decision in a memorandum of decision (# 142). On September 18, 2017, the defendant filed an answer and special defenses (# 144). The plaintiff filed a motion to strike each of the defendant's special defenses (# 145) on November 14, 2017. On April 19, 2018, in a detailed order (# 145.86), the court, *Robaina*, *J.*, addressed the plaintiff's motion, granting it in part and denying it part.

On June 29, 2018, the plaintiff filed a motion for summary judgment (# 152), which was accompanied by a memorandum of law as well as several exhibits (# 153). On August 14, 2018, the defendant filed a memorandum of law in opposition to the motion for summary judgment (# 156), which was accompanied by several exhibits. The motion was heard on November 19, 2018.

DISCUSSION

"Summary judgment is a method of resolving litigation when pleadings, affidavits, and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . The motion for summary judgment is designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried. . . . However, since litigants ordinarily have a constitutional right to have issues of fact decided

by a jury . . . the moving party for summary judgment is held to a strict standard . . . of demonstrating his entitlement to summary judgment." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 534–35, 51 A.3d 367 (2012). "A motion for summary judgment shall be supported by appropriate documents, including but not limited to affidavits, certified transcripts of testimony under oath, disclosures, written admissions and other supporting documents." Practice Book § 17-45 (a).

"Once the moving party has met its burden . . . the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book [§ 17-45] . . . ." (Internal quotation marks omitted.) *State Farm Fire & Casualty Co.* v. *Tully*, 322 Conn. 566, 573, 142 A.3d 1079 (2016). "The existence of the genuine issue of material fact must be demonstrated by counteraffidavits and concrete evidence. . . . If the affidavits and the other supporting documents are inadequate, then the court is justified in granting the summary judgment, assuming that the movant has met his burden of proof." (Internal quotation marks omitted.) *Rivera* v. *CR Summer Hill, Ltd. Partnership*, 170 Conn. App. 70, 74, 154 A.3d 55 (2017).

In support of its motion for summary judgment, the plaintiff argues that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Specifically, the plaintiff contends that the defendant is liable for the costs of his incarceration, notwithstanding his denial of liability and his assertion that the plaintiff has failed to state a claim upon which relief can

be granted. The plaintiff reasons that it is not only statutorily entitled to seek reimbursement as to the cost of the defendant's incarceration, but also that regulations and case law confirm that this action for reimbursement is available to it. In anticipation of some of the defendant's arguments in opposition, and in view of what the plaintiff perceived as ambiguities in the order of the court, *Robaina*, *J.*, with regard to its earlier motion to strike the defendant's special defenses, the plaintiff also notes that the defendant's fifth, sixth, ninth, and tenth special defenses should not preclude summary judgment,[1] and, specifically, that the circumstances surrounding the defendant's plea bargain do not create a genuine issue of material fact.

In opposition to the plaintiff's motion for summary judgment, the defendant raises several arguments. First, the defendant argues that he has yet to receive certain requested documents pursuant to a Freedom of Information Act (FOIA) request; see General Statutes § 1-200 et seq.; and that, without this additional discovery, he is unable to mount a complete objection. Next, the defendant disputes the reliability of the amount that the plaintiff seeks to recover from him, contending that the calculation of the cost of his incarceration is neither accurate nor sufficiently authenticated. The defendant also contends that the Department of Correction's documented noncompliance with the statute at issue should preclude the plaintiff's claim. The defendant then argues that the intent of the statute that forms the basis of the present case indicates that the present case is

[1] The plaintiff indicates that the defendant's fifth and sixth special defenses alleged that the plaintiff could not bring the present case because the defendant's criminal plea agreement did not address or provide for costs of incarceration. The plaintiff further notes that the defendant's ninth special defense alleges that the collection of the costs of incarceration constitutes a bill of attainder and that the defendant's tenth special defense contends that the statute authorizing the plaintiff to seek reimbursement for the costs of incarceration is an ex post facto law.

unjust. In that vein, the defendant further argues that he is being unfairly targeted, noting that the plaintiff has not sought reimbursement for the cost of incarceration from other inmates. The defendant also argues that he had no notice that the plaintiff would seek to recover these costs prior to the application for a prejudgment remedy in April, 2015, and, relatedly, that he had a right in the expectation of finality in his plea. Finally, in opposition to the motion for summary judgment, the defendant also seeks to renew his previously stricken special defenses.

As a threshold matter, pursuant to the law of the case doctrine, the court need not consider every argument raised by the defendant. "The law of the case doctrine expresses the practice of judges generally to refuse to reopen what [already] has been decided . . . . New pleadings intended to raise again a question of law which has been already presented on the record and determined adversely to the pleader are not to be favored. . . . [When] a matter has previously been ruled [on] interlocutorily, the court . . . may treat that [prior] decision as the law of the case, if it is of the opinion that the issue was correctly decided, in the absence of some new or overriding circumstance. . . . A judge should hesitate to change his own rulings in a case and should be even more reluctant to overrule those of another judge. . . . Nevertheless, if . . . [a judge] becomes convinced that the view of the law previously applied by his coordinate predecessor was clearly erroneous and would work a manifest injustice if followed, he may apply his own judgment." (Citations omitted; internal quotation marks omitted.) *Total Recycling Services of Connecticut, Inc.* v. *Connecticut Oil Recycling Services, LLC*, 308 Conn. 312, 322, 63 A.3d 896 (2013).

In the present case, the court, *Robaina, J.*, has already issued decisions addressing some of the arguments currently raised by the defendant. A review of the court's

earlier decisions indicates that both are thorough and well supported. Accordingly, pursuant to the law of the case doctrine, any argument previously disposed of need not be considered, provided there are no new or overriding circumstances. The defendant's bald assertion that he is reviving previously stricken special defenses is not accompanied by any representation of changed circumstances; the reclaiming of these defenses is, therefore, of no moment. Furthermore, to the extent that the plaintiff notes a potential ambiguity as to the sufficiency of the defendant's ninth and tenth special defenses—those special defenses assert that the statute authorizing the present case is a bill of attainder or an ex post facto law, respectively—it should be noted that those arguments were considered and rejected by the court, *Robaina*, *J.*, in the decision denying the defendant's motion to strike the plaintiff's complaint. That decision also rejected the defendant's argument that the small number of inmates who have been sued for reimbursement satisfactorily evidences a violation of equal protection. Although this court is entitled to review each of the defendant's arguments, in light of the earlier, persuasive determinations made in the course of litigation, it is not obligated to do so.

Next, "[p]ursuant to General Statutes § 18-85a . . . the state of Connecticut is authorized to assess inmates for the costs of their incarceration." (Footnote omitted.) *Alexander* v. *Commissioner of Administrative Services*, 86 Conn. App. 677, 678–79, 862 A.2d 851 (2004). Section 18-85a provides in relevant part: "(a) The Commissioner of Correction shall adopt regulations . . . concerning the assessment of inmates of correctional institutions or facilities for the costs of their incarceration. (b) The state shall have a claim against each inmate for the costs of such inmate's incarceration under this section, and regulations adopted in accordance with

this section, for which the state has not been reimbursed . . . . In addition to other remedies available at law, the Attorney General, on request of the Commissioner of Correction, may bring an action in the superior court for the judicial district of Hartford to enforce such claim, provided no such action shall be brought but within two years from the date the inmate is released from incarceration . . . .'' Section 18-85a-1 (a) of the Regulations of Connecticut State Agencies provides that '' 'Assessed Cost of Incarceration' means the average per capita cost, per diem, of all component facilities within the Department of Correction as determined by employing the same accounting procedures as are used by the Office of the Comptroller in determining per capita per diem costs in state humane institutions in accordance with the provisions of Section 17b-223 of the general statutes. . . .''

In the present case, the plaintiff has carried its burden of demonstrating that it is entitled to judgment as a matter of law. First, through the defendant's mittimus as well as the affidavit of Jay Tkacz, a fiscal administrative manager with the Department of Correction, the plaintiff has established the fact of the defendant's conviction as well as the duration of his incarceration. Next, Tkacz attests that the per diem rate for the incarceration of any inmate in the fiscal year July 1, 2014 through June 30, 2015, was $145 per day and that the total assessed cost of the defendant's incarceration is therefore $22,330. Finally, § 18-85a clearly authorizes the plaintiff to bring an action seeking reimbursement for the cost of the defendant's incarceration, and the present case, which was brought within two years of the defendant's release from incarceration on June 5, 2015, is timely. Contrary to the defendant's argument that the plaintiff has failed to state a claim upon which [relief] can be granted, the plaintiff has therefore established that it is entitled to judgment as a matter of law. To

demonstrate otherwise, the defendant must establish that there is a genuine issue of material fact.

As an initial matter, with regard to the defendant's argument concerning his outstanding FOIA request, it is noted that, "[s]hould it appear from the affidavits of a party opposing the motion that such party cannot, for reasons stated, present facts essential to justify opposition, the judicial authority may deny the motion for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just." Practice Book § 17-47. "A party opposing a summary judgment motion . . . on the ground that more time is needed to conduct discovery bears the burden of establishing a valid reason why the motion should be denied or its resolution postponed, including some indication as to what steps that party has taken to secure facts necessary to defeat the motion. Furthermore, under Practice Book § 17-47, the opposing party must show by affidavit precisely what facts are within the exclusive knowledge of the moving party and what steps he has taken to attempt to acquire these facts." (Internal quotation marks omitted.) *Bank of America, N.A., Trustee* v. *Briarwood Connecticut, LLC*, 135 Conn. App. 670, 675, 43 A.3d 215 (2012). "[A] party contending that it needs to conduct discovery to respond to a motion for summary judgment must do more than merely claim the information needed is within the possession of the opposing party." Id., 677.

In the present case, the defendant has neither appropriately nor persuasively supported his argument concerning the need for additional discovery. First, the defendant has not submitted an affidavit in support of this argument. Even if the court were to consider the defendant's assertions,[2] however, there is nothing in

[2] "[I]t is the established policy of the Connecticut courts to be solicitous of pro se litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the pro se party." (Internal quotation marks omitted.) *Vanguard Engineering, Inc.* v. *Anderson*, 83 Conn. App. 62, 65, 848 A.2d 545 (2004).

the defendant's brief or his supporting documents that specifically indicates what facts are within the plaintiff's exclusive knowledge. The defendant contends that he is awaiting a response regarding a FOIA request regarding e-mails and submits a document indicating that he has requested e-mails and other records from various employees of the Department of Correction that reference him by name or by his inmate number. The defendant has not carried his burden of establishing a valid reason that the plaintiff's motion should be denied or postponed by broadly claiming that the information he needs is possessed by the plaintiff. This argument is therefore unavailing.

The defendant next argues that the amount claimed by the plaintiff in the present case is based upon an unreliable calculation. Specifically, the defendant contends that there are offsets, such as the defendant's payment of taxes and for phone services while incarcerated, that have not been accounted for; that the expenditure of the Department of Correction that was used in the calculation is greater than the expenditure represented in a 2013 report; that he is being overcharged based upon the security level of the facility he was incarcerated in and based upon the services he actually used while incarcerated; that some avenues of income for the state are not accounted for; and that he should not be liable to reimburse the state for the time he spent incarcerated after the Department of Correction declined to release him under transitional supervision. "Section 18-85a directs the commissioner to adopt regulations for the assessment of inmates for the costs of their incarceration. Implicit in this directive is the requirement that any assessment accurately reflect such costs, with the understanding, of course, that absolute precision may be impossible and only a rational basis is required." *State* v. *Strickland*, Superior Court,

judicial district of Hartford, Docket No. CV-00-0803071-S (November 19, 2002) (*Beach*, *J.*) [33 Conn. L. Rptr. 638, 644]. Indeed, as previously noted, the relevant regulation, § 18-85a-1 (a), provides that the assessed cost is an average per capita cost. The defendant cites to no authority, and the court knows of none, mandating that the calculation of incarceration costs take into account each individual inmate's particular circumstances when determining the daily rate. In the absence of evidence that raises a genuine issue of material fact as to the rational basis upon which the calculation rests, the defendant's argument concerning the reliability of the per diem rate must fail.

The defendant also argues that the plaintiff has failed to properly authenticate the amount claimed because Tkacz is unable to attest to the accuracy of the per diem rate; essentially, the plaintiff argues that Tkacz' invocation of the daily rate, which is determined by the Office of the State Comptroller, is hearsay. Hearsay evidence is inadmissible for the purpose of supporting or defeating a motion for summary judgment. See, e.g., *Cogswell* v. *American Transit Ins. Co.*, 282 Conn. 505, 534, 923 A.2d 638 (2007). There are, however, exceptions to the hearsay rule, including the business record exception. "To be admissible under the business record exception to the hearsay rule, a trial court judge must find that the record satisfies each of the three conditions set forth in . . . [General Statutes] § 52-180. . . . The court must determine, before concluding that it is admissible, that the record was made in the regular course of business, that it was the regular course of such business to make such a record, and that it was made at the time of the act described in the report, or within a reasonable time thereafter." (Footnote omitted; internal quotation marks omitted.) *State* v. *Polanco*, 69 Conn. App. 169, 181–82, 797 A.2d 523 (2002). Furthermore, "[t]he witness whose testimony provides the

foundation for the admission of a business record must testify to the three statutory requirements, but it is not necessary that the record sought to be admitted was made by that witness . . . .'' (Internal quotation marks omitted.) Id., 184.

In the present case, to the extent Tkacz' reference to the daily rate could be considered hearsay, it would nevertheless be admissible pursuant to the business records exception. In his affidavit, Tkacz attests that he ''has access to the business records of the [Department of Correction] as they pertain to the placement of persons committed to the custody of the Commissioner of Correction . . . and the assessed cost of each such person's incarceration. Said business records of inmates' incarceration and charges are made in the regular course of business of the Department of Correction, and it is in the regular course of business of the Department of Correction to make such records contemporaneously or within a reasonable time thereafter.'' Tkacz goes on to state that he has examined the business records of the Department of Correction as they relate to the defendant before determining the defendant's assessed costs of incarceration. Within the subparagraphs addressing Tkacz' examination of the pertinent records and the ultimate determination of the amount owed by the defendant, Tkacz attests that ''the per diem rate established by the Office of the State Comptroller for the cost of incarceration for the fiscal year [July 1, 2014] through [June 30, 2015] was $145.00 per day.'' The affidavit establishes, and the plaintiff does not provide evidence to dispute, that, to the extent that the per diem rate is hearsay, it is admissible under the business record exception. Accordingly, the defendant's argument as to the admissibility of the per diem rate fails.

Next, the defendant contends that the Department of Correction's documented noncompliance with the

statute at issue, § 18-85a, should preclude the plaintiff's claim. To support this argument, the defendant offers a report from the Auditors of Public Accounts for the fiscal years ending in June 30, 2012, and 2013. This report indicates, inter alia, that the Department of Correction "[had] not complied with statutory requirements dictating 10 [percent] be deducted from deposits made to inmates' accounts to fund a discharge savings account program or to recover the costs of incarceration." The defendant argues that "[t]he Audit Report is documentation the plaintiff . . . is not enforcing claims against each inmate. . . . This is the specific instance where persons similarly situated in all relevant aspects were treated differently." Putting aside the fact that this report concerns years prior to the defendant's incarceration, the Department of Correction's noncompliance with this statutory provision does not impact the present case. The defendant makes no assertions and presents no evidence that money was or was not deducted from an account kept during his incarceration. Although the Department of Correction's past noncompliance with a provision concerning the recovery of funds for the costs of incarceration may appear superficially relevant to the present case, this report has no application to the specific circumstances of the present case. Accordingly, the defendant's reliance on this report is misplaced.[3]

In that vein, the defendant further argues that he is being unfairly targeted and that the plaintiff has not sought reimbursement for the cost of incarceration from other inmates. He contends that he is being targeted because, inter alia, the defendant has a home

[3] Rejecting this argument also disposes of the defendant's contention that the auditors' report invalidates *Alexander* v. *Commissioner of Administrative Services*, Superior Court, judicial district of New Haven, Docket No. CV-02-0468821-S (February 11, 2003) (*Blue*, *J.*) [34 Conn. L. Rptr. 165], aff'd, 86 Conn. App. 677, 862 A.2d 851 (2004), as valid precedent.

and a pension; was a state employee and a "minority inmate"; does not use "entitlement services"; is of retirement age; and was involved in an infamous crime. In support of his argument, the defendant provides a table entitled "Collected Incarceration Costs" from 2011 to 2015 and a printout of Assistant Attorney General Judith Brown's case list from the Judicial Branch website, as of March 26, 2017. The defendant has supplemented both of these documents with his own handwritten calculations. The table of costs includes the defendant's assertion of how many inmates were released per year and the average amount collected per inmate. The case list purports to indicate, again through the defendant's handwritten calculations, how many individuals the state sought to recover incarceration costs from and whether those inmates had trust funds or state or municipal pensions. The defendant further relies upon responses submitted by the plaintiff to various interrogatories establishing, inter alia, the number of reimbursement suits commenced at various times.[4]

Notwithstanding that the defendant's handwritten additions might well be considered unsupported factual assertions, even if the court were to consider the defendant's notes, the records submitted do not establish a genuine issue of material fact. To the extent that the defendant attempts to use these records to emphasize the infrequency with which actions to recover costs

[4] "[A] response [to an interrogatory] can be considered by the court in ruling on a motion for summary judgment because Practice Book § 17-45 specifically states that disclosures are the type of evidence that may be considered as evidence to support a summary judgment motion, and that interrogatories and requests for production fall under the term disclosures." (Internal quotation marks omitted.) *Cavalier* v. *Bank One, N.A.*, Superior Court, judicial district of New Haven, Docket No. CV-03-0480474-S (November 5, 2004) (*Skolnick, J.*). Nevertheless, "[a]n answer . . . to an interrogatory has the same effect as a judicial admission made in a pleading . . . but it is not conclusive . . . ." *Bochicchio* v. *Petrocelli*, 126 Conn. 336, 339–40, 11 A.2d 356 (1940).

of incarceration occur, the argument that infrequency evidences an equal protection violation has been persuasively rejected by the court, *Robaina*, *J.*, in the course of this litigation already. Moreover, to the extent that the defendant's notes appear to assert that actions have been instituted to recover incarceration costs against other individuals with assets such as trust funds or pensions, that evidence does not indicate that the defendant has been unjustly targeted; rather, it tends to prove the opposite, that reimbursement actions are commenced when it is determined that an inmate or former inmate has adequate assets. Accordingly, the defendant's arguments on this point are unavailing.

As a final note to the defendant's unequal treatment arguments, the defendant also argues that he was discriminated against because § 18-85a is not income-dependent; the plaintiff, the defendant contends, unfairly targeted the defendant's gross income but did not seek to recover money from other inmates who lacked a state pension. In his brief, the defendant refers to the plaintiff's interrogatories to support this contention. The responses, however, merely indicate that the Department of Correction initiates an action when it learns that an inmate has nonexempt assets of $5000 or more or a government pension, in accordance with General Statutes § 52-321a (b).[5] The defendant's opinions as to the propriety of considering certain assets

[5] General Statutes § 52-321a (b) provides in relevant part: "Nothing in this section or in subsection (m) of section 52-352b shall impair the rights of the state to proceed under section 52-361a to recover the costs of incarceration under section 18-85a and regulations adopted in accordance with section 18-85a from any federal, state or municipal pension, annuity or insurance contract or similar arrangement described in subdivision (5) of subsection (a) of this section, provided the rights of an alternate payee under a qualified domestic relations order, as defined in Section 414 (p) of the Internal Revenue Code of 1986, or any subsequent corresponding internal revenue code of the United States, as from time to time amended, shall take precedence over any such recovery. . . ."

but not others when commencing an action for the reimbursement of incarceration costs does not create a genuine issue of material fact in the present case.

The defendant then argues that the intent of § 18-85a indicates that the plaintiff's claim against the defendant is unjust. Looking to the legislative history, which is attached as an exhibit to the defendant's opposition, the defendant contends that the intent of the law is to recover the cost of incarceration from inmates with significant financial resources; the defendant argues, however, that he does not have significant resources, and rather, that he is in debt. Even assuming that the defendant has accurately represented his finances, the defendant's assertions are irrelevant to the determination of whether the plaintiff is entitled to judgment as a matter of law in the present case. The intent of the statute is to recover the cost of incarceration from inmates deemed capable of paying, where that capability is statutorily defined: nonexempt assets of $5000 or more or a government pension. In his opposition, the defendant has neither asserted nor demonstrated that he does not meet the statutory criteria. Accordingly, notwithstanding the defendant's characterization of his finances and in view of the statute's overarching purpose, the defendant's argument on this point does not establish a genuine issue of material fact.

Finally, the defendant argues that he had no notice that the plaintiff would seek to recover these costs prior to the application for a prejudgment remedy in April, 2015, and that he had a right in the expectation of finality in his plea. This argument is slightly different from the defendant's earlier contention that his plea bargain constituted a contract—an argument already rejected in the course of this litigation. The defendant cites to no authority, and the court can find none, indicating that a plea bargain must address the costs of

incarceration or that notice is required prior to instituting an action to recover the costs of incarceration. Rather, as the statute authorizing the state to recover the costs of incarceration contains no mention of notice as a requirement, it appears that an action for reimbursement may proceed without notice being given. Accord *Dept. of Administrative Services* v. *Sullo*, Superior Court, judicial district of Hartford, Docket No. CV-05-4017863-S (June 30, 2011) (*Hon. Robert F. Stengel*, judge trial referee) (52 Conn. L. Rptr. 191, 193) (plain language of statutes authorizing state to seek reimbursement for care in state humane institution did not require notice and, therefore, claim was not barred due to lack of notice). The lack of notice to the defendant is therefore not a ground on which to deny the plaintiff summary judgment.

As the plaintiff has demonstrated that it is entitled to judgment as a matter of law and the defendant has not demonstrated that there is any genuine issue of material fact, the plaintiff's motion for summary judgment is granted.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 201

STATE OF CONNECTICUT *v.* ROBERT S. BUIE
(AC 42626)

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

Argued November 9—officially released November 17, 2020

Defendant's appeal from the Superior Court in the judicial district of Waterbury, *Alander*, *J.*

Per Curiam. The judgment is affirmed.

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SUPREME COURT PENDING CASES

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

STATE *v.* JOSEPH SILVA, SC 20266
Judicial District of Hartford

Criminal; Whether Trial Court's Jury Instructions on "Single Transaction" Element of Murder With Special Circumstances Were Proper; Whether Trial Court Was Required to Give Special Credibility Instruction Regarding Witness Allegedly Implicated in Murders; Whether Trial Court Improperly Prevented Defense Counsel From Commenting About Failure to Hear From Key State Witness. The defendant was involved in romantic relationships with two women, Coraima Velez and Kailei Opalacz. Velez was best friends with Alysha Ocasio, who was dating Joshua Cortez. On the evening of May 16, 2016, Opalacz visited Grant Street in Hartford, and she allegedly showed other individuals there the gun she had purchased. Subsequently, Opalacz and another individual, Josue Rodriguez, left Grant Street with the defendant in his vehicle. Later that evening, both Cortez and Ocasio were shot and killed on Cowles Street in Hartford. In connection with the shootings, the defendant was charged with, inter alia, one count of murder with special circumstances in violation of General Statutes § 53a-54b (7), which provides that "[a] person is guilty of murder with special circumstances who is convicted of . . . murder of two or more persons at the same time or in the course of a single transaction." In its long form information, the state alleged that the murders of the victims occurred "in the course of a single transaction." At trial, both Opalacz and Rodriguez testified that they saw the defendant shoot the victims. The defendant was convicted, and he now appeals. He claims that the trial court's instruction on the element of murder with special circumstances that the murders must take place in the course of a single transaction misled the jurors to believe that the state had to prove only that the murders had a temporal connection. The challenged instruction provided as to the "single transaction" element of § 53a-54b (7) that the jury must find "either that there was a temporal nexus between the murders . . . that is, a continuity between them based on time, or that he had a plan, motive or intent common to both murders." The defendant argues that, contrary to the "temporal connection" criteria seemingly articulated by the instruction, the element requires a "logical nexus" between the murders and proof that the defendant possessed a plan, motive or intent common to the murders. The defendant also claims that the trial court was required to give sua sponte a special credibility instruction as to

Opalacz in light of evidence implicating her in the murders. He contends that the principle that "animates" the special credibility instruction for accomplices and complaining witnesses, i.e., that they have a strong incentive to testify falsely, applies to a witness who commits the crime but then testifies for the state and blames the crime on the defendant. Finally, the defendant claims that the trial court improperly prevented defense counsel during his summation from commenting about not hearing from a key state witness, Velez, during trial. He argues that the comment was a proper argument on the jury's ability to find reasonable doubt based on lack of evidence and that the trial court's action violated his constitutional rights to counsel and to present a defense.

RASPBERRY JUNCTION HOLDING, LLC *v.* SOUTHEASTERN CONNECTICUT WATER AUTHORITY, SC 20454

Judicial District of New London

Torts; Economic Loss Doctrine; Whether the Defendant Water Company Owed Plaintiff a Duty of Care in Delivering Water Supply. The plaintiff, Raspberry Junction Holding, LLC, operates a hotel in North Stonington that relies on the defendant, Southeastern Connecticut Water Authority, for its water supply. The defendant was created in 1967 by a special act of the General Assembly and was granted rulemaking authority, pursuant to which it promulgated a rule that it was not liable for damages due to an interruption in the water supply. In June, 2015, one of the defendant's pump stations was damaged when a pneumatic tank exploded and, as a result, the water supply to the plaintiff's hotel was interrupted for several days. Due to the lack of water, the plaintiff was forced to stop conducting its business. It commenced this negligence action seeking to recover for purely economic damages as a result of its lost revenue. The defendant moved for summary judgment on the ground that it was immune from liability under its rules and because, under the economic loss doctrine, the defendant did not owe the plaintiff a duty of care with respect to its purely economic loss. The trial court granted the motion for summary judgment on the first ground, but that judgment was reversed on appeal by the Supreme Court (331 Conn. 364), and the case was remanded to the trial court with direction to consider the defendant's claim regarding the economic loss doctrine. On remand, the trial court rendered summary judgment in favor of the defendant after finding that it did not owe a duty of care to the plaintiff. The trial court concluded that, although the harm that the plaintiff suffered was foreseeable, it did not comport with public policy to hold the defendant liable for the

plaintiff's purely economic damages. In its public policy analysis, which is guided by four factors, the trial court reasoned that imposing a duty of care on the defendant would expose it to increased litigation and that a majority of other jurisdictions bar a plaintiff from recovering in tort for purely economic damages. Those factors, the court held, weighed heavily against imposing a duty on the defendant. The trial court also rejected the plaintiff's arguments that the economic loss doctrine should not apply here because the defendant is in a better position to insure against the loss and because the plaintiff was forced to accept the defendant's services without negotiating over any contractual terms, which the plaintiff claimed would provide an opportunity for the parties to allocate the risk between them. The trial court therefore rendered summary judgment for the defendant, and, after the plaintiff appealed to the Appellate Court, the Supreme Court transferred the appeal to itself. The Supreme Court will decide whether the trial court correctly rendered judgment in favor of the defendant because it did not owe a duty of care to the plaintiff.

STATE *v.* NOEL BERMUDEZ, SC 20461
Judicial District of Waterbury

Criminal; Whether Evidence That Defendant Was a Gang Member and That State's Chief Witness Was Relocated Out of State Was Properly Admitted; Whether Trial Court's Erroneous Preclusion of Sexually Explicit Letters Written by State's Chief Witness to Defendant Was Harmless; Whether Trial Court's Rulings Limiting Defendant's Cross-Examination of State's Chief Witness on Topics Regarding Her Credibility Were Proper. On April 11, 1998, the victim was robbed and shot to death near his home. Twelve years later, Damaris Algarin-Santiago (Algarin), the estranged wife of the defendant's brother, Victor Santiago, gave the police a written statement that implicated the defendant and Santiago in the victim's murder. The defendant was subsequently charged with felony murder. At trial, Algarin testified, inter alia, that, while the defendant was incarcerated on an unrelated criminal matter, he instructed her to write three intimate and salacious letters to him so that he could discredit her in the event that she were to testify against him. The defendant was convicted, and he appealed, claiming that the trial court improperly admitted into evidence Algarin's testimony that he and Santiago were affiliated with gangs and that she and her children were relocated out of state multiple times after she gave her statement to the police. The Appellate Court (195 Conn. App. 780) disagreed, concluding that the challenged testimony was admissible because it was

highly probative and relevant to explain that Algarin waited twelve years before informing the police about the victim's murder because she believed that she and her family were not safe due to the defendant's and Santiago's gang affiliations. Next, the defendant claimed that the trial court improperly excluded from evidence the three sexually explicit letters Algarin wrote to him and contended that the letters would have undercut Algarin's contention that she feared him. The court determined that, although the trial court erred in refusing to admit the letters into evidence, the defendant failed to show that the error was harmful. Finally, the defendant claimed that the trial court improperly (1) precluded defense counsel from cross-examining Algarin about the termination of her employment at a hospital following Santiago's admittance to the psychiatric unit of that hospital and (2) restricted defense counsel's inquiry into Algarin's birth control practices while she was married to Santiago. He contended that the purpose of both lines of inquiry was to undermine Algarin's supposed fear of Santiago. The court rejected both claims. Specifically, it concluded (1) that the evidence relating to the termination of Algarin's employment would have injected a collateral issue into the trial and (2) that any further inquiry into Algarin's birth control regimen would have inappropriately focused on a matter far too attenuated from the material issues in the case. Accordingly, the court affirmed the defendant's conviction. The defendant was granted certification to appeal, and the Supreme Court will determine whether the Appellate Court properly (1) upheld the trial court's admission of evidence that the defendant was a gang member and that Algarin, the state's chief witness, was relocated out of state after providing her statement to the police inculpating the defendant, (2) concluded that the trial court's erroneous preclusion of sexually explicit letters Algarin wrote to the defendant was harmless and that the trial court's limitation on the defendant's cross-examination of her was proper, and (3) upheld the trial court's rulings limiting the defendant's cross-examination of Algarin on topics regarding her credibility.

KRISTINE CASEY et al. *v.* GOVERNOR NED LAMONT, SC 20494

Judicial District of Waterbury, Complex Litigation Docket

Separation of Powers; General Statutes § 28-9; Civil Preparedness Emergency; Whether COVID-19 Pandemic Is a "Serious Disaster"; Whether Governor Has Authority to Issue Executive Orders Limiting Alcohol Service in Response to Pandemic.

General Statutes § 28-9 authorizes the governor to proclaim a civil preparedness emergency "[i]n the event of a serious disaster." Once the governor has proclaimed a civil preparedness emergency, he has the authority under § 28-9 to "modify or suspend in whole or in part . . . any statute, regulation or requirement or part thereof" if it conflicts with "the efficient and expeditious execution of civil preparedness functions or the protection of the public health." In response to the COVID-19 pandemic, the defendant, Governor Ned Lamont, declared a civil preparedness emergency in March, 2020, and subsequently issued a series of executive orders aimed at stopping the spread of the disease. Those executive orders, among other things, prohibited bars from serving food or alcohol on the premises. They were subsequently modified to allow for alcohol to be served during outdoor dining, and later, during indoor dining. The plaintiffs, Kristine Casey and Black Sheep Enterprise, LLC, own and operate a bar in Milford known as Casey's Irish Pub (pub). The plaintiffs, whose business consists of 10 percent food and 90 percent alcohol, closed the pub since the governor issued the first executive orders, and it has remained closed. The plaintiffs assert that the pub cannot reopen as a result of the executive orders, as neither indoor nor outdoor dining is economically or physically feasible and their customers have no interest in purchasing prepared takeout meals or sealed alcoholic beverages for off premises consumption. The plaintiffs brought this action seeking an injunction to prohibit the governor from enforcing those or similar executive orders as well as a declaration that those or similar executive orders are unconstitutional under the state constitution. The trial court concluded that the governor has the statutory authority to issue the challenged executive orders and, furthermore, that § 28-9 is not unconstitutional. The trial court rendered judgment in favor of the governor, and the plaintiffs appealed to the Supreme Court upon the granting of certification by the Chief Justice pursuant to General Statutes § 52-265a. The plaintiffs claim on appeal that the trial court erred in finding that the COVID-19 pandemic is a "serious disaster" within the meaning of § 28-9 (a) and erred in concluding that the governor has the statutory authority to issue the executive orders in question. They argue on appeal that § 28-9 is unconstitutional in that it violates the separation of powers enshrined in article second of the state constitution. They specifically assert that the statute improperly delegates to the governor the legislative power that the state constitution vests solely in the General Assembly, as § 28-9 allows the governor to unilaterally suspend, in whole or in part, any statute, regulation or requirement.

ANTHONY A. *v.* COMMISSIONER OF CORRECTION, SC 20499
Judicial District of Tolland at G.A. 19

Habeas Corpus; Due Process; Whether Petitioner's Right to Due Process was Violated by the Department of Correction Classifying Him as an Inmate with Sexual Treatment Needs When He Was Not Convicted of a Sex Offense; Whether Petitioner's State Constitutional Right Not to Be Punished Except in Cases Warranted by Law Was Violated. The petitioner was convicted pursuant to a guilty plea of unlawful restraint in the first degree and failure to appear in connection with a domestic dispute between the petitioner and the victim, his wife. The state initially charged the petitioner with sexual assault in a spousal relationship based on the victim's statement to police claiming that he had sexually assaulted her, but the state entered a nolle prosequi as to that charge after the victim recanted her statement. After he was sentenced, the Department of Correction (department) notified the petitioner that a hearing would be held to determine whether he would be assigned a sexual treatment needs score greater than one based on the victim's statement in the police report that the petitioner sexually assaulted her. The petitioner was not allowed to have his attorney present or to call witnesses at the hearing, but he was allowed to submit documentary evidence and to present arguments at the hearing. After the hearing, the hearing officer recommended that the petitioner be assigned a sexual treatment needs score of three based on the victim's allegations in the police report. The department referred him to a sex offender treatment program, advising him that his failure to comply with the program would affect his eligibility for good time credit, parole and supervised community release. The petitioner refused to participate in the program and subsequently requested that he be reclassified on the basis of a psychiatric report stating that sex offender treatment would be inappropriate for the petitioner. The department reviewed the report but denied the request, and the petitioner brought this habeas action, alleging that the department violated his right to due process and his state constitutional right not to be punished except in cases clearly warranted by law by wrongfully classifying him as having sexual treatment needs. He claimed that the department violated his right to procedural due process by denying his request to present witnesses at the hearing, by failing to provide adequate notice of the evidence to be used against him, by failing to ensure the final decision was made by a disinterested person, and by rendering a decision that was not supported by sufficient, reliable evidence. He further claimed that his substantive due process rights were violated because he was classified as having sexual treat-

ment needs, despite the fact that he had no history of sexual misconduct. The habeas court rejected the petitioner's claims, concluding that the department's classification procedure satisfied due process requirements and that the petitioner is not being punished by being classified as having sexual treatment needs. After the habeas court granted certification to appeal, the petitioner filed this appeal in the Appellate Court, and it was subsequently transferred to the Supreme Court. The Supreme Court will decide whether the habeas court properly denied the petitioner's claims that the department violated his right to due process and his state constitutional right not to be punished except in cases warranted by law.

DEBRA NORMANDY *v.* AMERICAN MEDICAL SYSTEMS, INC., SC 20500

Judicial District of Waterbury, Complex Litigation Docket

Product Liability; Statute of Limitations; Whether Trial Court Properly Determined that Defendant Hospital was Not "Product Seller" of Medical Device for Purposes of Product Liability Claim; Whether Trial Court Properly Determined that CUTPA and Common-Law Claims Were Barred under Statutes of Limitation. On December 1, 2009, Debra Normandy underwent a procedure at Bristol Hospital that involved the implantation of pelvic mesh products manufactured by American Medical Systems, Inc. (AMS). She suffered injuries, and she and her husband, Mark Normandy, commenced this action against AMS and Bristol Hospital in 2015. The claims against AMS were withdrawn, leaving claims against Bristol Hospital sounding in (1) violation of the Connecticut Product Liability Act (CPLA), (2) violation of the Connecticut Unfair Trade Practices Act (CUTPA), and (3) various common-law claims. The plaintiffs alleged in relevant part that the hospital had engaged in the business of placing the pelvic mesh products into the stream of commerce by purchasing them from AMS and further marketing and selling them to patients and medical professionals. The hospital filed a motion for summary judgment and argued that it was entitled to a judgment as a matter of law on the product liability claim because it was a provider of medical services and not a "product seller" under the CPLA. The hospital further argued that the plaintiffs' CUTPA and common-law claims were barred by the applicable statutes of limitation. The trial court granted the motion for summary judgment. It observed that there is no binding Connecticut precedent as to whether a hospital is a product seller under the CPLA when it engages in the business

of selling products used in medical procedures. It further observed, however, that other trial courts and courts in other jurisdictions have held that, for product liability purposes, hospitals are providers of medical services and not sellers of medical devices used in connection with such services. It accordingly concluded that there was no genuine issue of material fact that the hospital was not a product seller and noted in support thereof that the pelvic mesh products were incidental to the provision of the implantation procedure, which the trial court characterized as the "essence" of the parties' relationship. The trial court also determined that the plaintiffs' remaining claims were barred under the applicable statutes of limitation, which had run in 2012. It rejected the plaintiffs' argument that the statutes of limitation had been tolled under the continuing course of conduct and fraudulent concealment doctrines where they failed to provide evidence or legal authority for their positions that the hospital engaged in continuous marketing and advertising of the products, had an ongoing duty to warn about the dangers of the products, and had intentionally concealed information regarding the products. The plaintiffs filed this appeal from the trial court's judgment in the Appellate Court, and it was thereafter transferred to the Supreme Court. The Supreme Court will decide whether the trial court properly concluded that hospitals cannot be product sellers of medical devices for purposes of CPLA claims. It will also decide whether the trial court properly concluded that the plaintiffs' CUTPA and common-law claims were barred by the applicable statutes of limitation and that equitable tolling doctrines did not apply.

RAINBOW HOUSING CORPORATION et al. *v.*
TOWN OF CROMWELL, SC 20506
Judicial District of New Britain

Property Taxes; Whether Trial Court Properly Determined That Plaintiffs were Entitled to General Statutes § 12-81 (7) Charitable-Use Tax Exemption for Property Used as Supervised Apartment Program for Men with Mental Illness Because Plaintiffs Provided "Temporary" Housing not "Subdizied" by State Government. Rainbow Housing Corporation (Rainbow) owns property in the town of Cromwell, which it leases to its affiliate, Gilead Community Services, Incorporated (Gilead). On the property, Gilead conducts a "Supervised Apartment Program," a transitional, community based support program for men who suffer from severe mental illness. By contract, Gilead receives approximately 75 percent of its

funding from the State Department of Mental Health and Addiction Services (DMHAS). Rainbow and Gilead appealed to the Superior Court from the decision of the town's Board of Assessment Appeals affirming the town assessor's denial of their claim for a charitable property tax exemption under General Statutes § 12-81 (7). Subsection (A) of § 12-81 (7) provides in relevant part: "[T]he real property of, or held in trust for, a corporation organized exclusively for . . . charitable purposes . . . shall be eligible for the exemption." Subsection (B) of § 12-81 (7) provides an exception to the charitable-use exemption for "housing subsidized, in whole or in part, by federal, state or local government." Subsection (B) also provides, however, that the "subsidized housing" exception is not applicable to a property that is being used to "temporary" house "persons with a mental health disorder." The parties filed cross motions for summary judgment. The trial court granted the plaintiffs' motion for summary judgment and denied the defendant's motion for summary judgment. The defendant argued that the plaintiffs were not entitled to a charitable property tax exemption under § 12-81 (7) (A) because the property fell within the "subsidized housing" exception to the exemption under § 12-81 (7) (B) in that the living arrangement provided by Gilead to the residents under the program was "housing" that was "subsidized" by the funds from DMHAS to Gilead. The defendant further argued that the plaintiffs could not avoid the application of the "subsidized housing" exception of § 12-81 (7) (B) because the residency at the property was not "temporary." The court found that the contractual payments from DMHAS to Gilead could not be considered a subsidy where the purpose of those payments was to assist Gilead in its goal to provide various rehabilitative services in a residential setting for men with mental health disabilities. The court also concluded that, even if Gilead was providing subsidized housing, the "subsidized housing" exception was not applicable because the housing was "temporary" in nature, The court stated that Gilead's charitable purpose of moving men with mental health disabilities into the program with the expectation of preparing them to live independently in the community was a temporary, not long term, process. On appeal, the defendant claims that the trial court erred in granting summary judgment in favor of the plaintiffs because they are not entitled to a charitable property tax exemption under § 12-81 (7) (A) where their property falls within the "subsidized housing" exception to the exemption under § 12-81 (7) (B).

JOHN DOE *v.* TOWN OF MADISON, SC 20508
JOHN DOE *v.* TOWN OF MADISON et al., SC 20509
JOHN DOE *v.* TOWN OF MADISON et al., SC 20510
Judicial District of New Haven

Negligence; Governmental Immunity; Whether Trial Court Properly Found that Defendants Were Entitled to Governmental Immunity and that Identifiable Person-Imminent Harm Exception Did Not Apply. These three actions all revolve around allegations that a high school teacher in the town of Madison engaged in inappropriate relationships of a sexual nature with the plaintiffs, three students at the school. The crux of each of the minor plaintiff's claims is that the defendants, the board of education and the school's principal, were negligent in supervising the teacher in question and in failing to train school employees to identify and report this type of inappropriate interaction. They also allege that the defendants and their employees were aware of the teacher's inappropriate conduct, but those individuals failed to enforce the board's policies or report the teacher's conduct to either the Department of Children and Families or law enforcement, as mandated by General Statutes § 17a-101 et seq. The plaintiffs assert that the defendants' negligence allowed the teacher to call the plaintiffs out of class as well as contact them through social media for purposes of subjecting them to unwanted and inappropriate sexual acts, photographs, and comments. After the three cases were consolidated, the defendants moved to dismiss each action based on General Statutes § 52-557n, which provides governmental immunity for damages caused by negligent acts that require the exercise of discretion. The trial court agreed with the defendants that many of the acts or omissions complained of, including supervising or disciplining the teacher at issue and denying one plaintiff's request to be removed from a class taught by the teacher's husband after the allegations came to light, involved the exercise of discretion, and, therefore, the defendants were immune from liability as to those claims. The plaintiffs argued, however, that the defendants and school employees had a ministerial duty to report the teacher's abuse under both General Statutes § 17a-101 et seq. and school policy, as there was reasonable cause to suspect that the plaintiffs were being abused or were at risk of imminent harm. The trial court found that there was no genuine issue of material fact that the school employees did not witness any conduct that would cause them to reasonably suspect that the plaintiffs were being abused or were at risk of imminent harm from the teacher. Furthermore, the court rejected the plaintiffs' claims that they fit the identifiable person-imminent harm exception to discretionary act governmental immunity,

finding that, although the plaintiffs may have met the identifiable person prong of the exception when they were on school grounds during school hours, there was no reasonably ascertainable threat that would have put the defendants on notice that the plaintiffs were subject to imminent harm. As a result, the trial court rendered summary judgment for the defendants in each action, and the plaintiffs filed separate appeals in the Appellate Court. The plaintiffs generally argue on appeal that the trial court improperly rejected their claim that the defendants violated a ministerial duty to report suspected abuse and, also, that the court erred in concluding that the identifiable person-imminent harm exception did not apply. The Supreme Court subsequently transferred the appeal to itself and will decide whether the trial court properly rendered summary judgments for the defendants.

STATE OF CONNECTICUT JUDICIAL BRANCH *v.*
GERMAINE GILBERT, SC 20514
Judicial District of New Britain

Employment Discrimination; Whether Commission on Human Rights and Opportunities Had Authority to Issue Award of Emotional Distress Damages and Attorney's Fees; Whether Commission Properly Ordered Injunctive Relief. The defendant, Germaine Gilbert, is employed as a judicial marshal by the plaintiff, the State of Connecticut Judicial Branch. She complained to the plaintiff that another marshal who worked at the same courthouse, Gordon Marco, made inappropriate sexual comments and sexually assaulted her. The defendant suffered from anxiety and sleep related problems due to the harassment. The plaintiff investigated the defendant's claims, issued a written warning to Marco, and reassigned the defendant to a different courthouse. The defendant filed a complaint with the Commission on Human Rights and Opportunities (commission) alleging that the plaintiff had engaged in gender discrimination and subjected her to a hostile work environment. After a hearing, the referee found that the plaintiff had violated General Statutes § 46a-58 by depriving the defendant of her civil rights under the federal constitution and had violated General Statutes § 46a-60 by discriminating on the basis of sex and fostering a hostile work environment. The referee awarded the defendant $47,637 in attorney's fees and $50,000 in emotional distress damages pursuant to § 46a-58, as well as prejudgment and postjudgment interest. He also enjoined the plaintiff from assigning Marco to the same courthouse as the defendant and ordered that she have the option of returning to her original courthouse. The plaintiff appealed from the referee's decision to the Superior Court, claiming

that the award exceeded the commission's statutory authority. The trial court disagreed, reasoning that, although Supreme Court precedent holds that § 46a-60 does not authorize the commission to award emotional distress damages and attorney's fees, it may do so under § 46a-58. Furthermore, it found that, while sexual discrimination in violation of § 46a-60 cannot serve as the predicate for a claim under § 46a-58, sexual discrimination in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq., can serve as such a predicate. It also rejected the plaintiff's claim that the commission lacked jurisdiction over the defendant's civil rights claim under Title VII, finding that the commission had adjudicated a § 46a-58 claim predicated on a Title VII violation. The trial court, however, vacated the award of emotional distress damages as a result of the defendant's discovery noncompliance. It also vacated the portion of the award allowing her to return to her original assignment as an abuse of discretion and in excess of the commission's authority. The trial court affirmed the remainder of the award. The plaintiff appealed and the commission cross appealed to the Appellate Court, and the Supreme Court transferred the appeal to itself. The plaintiff claims on appeal that the trial court erred in affirming the award of emotional distress damages and attorney's fees under § 46a-58. It also claims that the commission did not have subject matter jurisdiction to adjudicate the defendant's civil rights claim under Title VII and that the award of prejudgment and postjudgment interest is barred by sovereign immunity. The commission claims on cross appeal that the trial court erred by vacating the emotional distress damages award and the order that the defendant be allowed to return to her original courthouse.

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

Jessie Opinion
Deputy Chief Staff Attorney

NOTICES

CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar by Uniform Bar Examination score transfer in October 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

Atkinson, Cameron L. of North Haven, CT
Batista, Moira S. of Stamford, CT
Caputo, Ariana Rae of Worcester, MA
Liu, Bokang of Fairfield, CT
Slutsky, Amanda Brooke of Long Beach, NY
White, Peter Kenneth of Newton, MA

CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar without examination in October 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

Alger, Ryan Anthony of Wethersfield, CT
Cousins, David Arthur of New Haven, CT
Doherty, John T. of Katonah, NY
Landau, Scott R. of New York, NY
Masso-Flores, Ramon of Waterford, CT
Shannon, James A. of Schenectady, NY
Sovak, Christopher John of Norwalk, CT
Stanton, Michael Joseph of Central Islip, NY
Ulisse, Rebecca Lynn of Stamford, CT