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

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

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

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

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

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

JENNIYAH GEORGES ET AL. *v.* OB-GYN SERVICES, P.C., ET AL.
(SC 20170)

Palmer, McDonald, D'Auria, Mullins, Kahn, Ecker, Js.*

Syllabus

The plaintiffs, L and L's minor daughter, G, sought damages for personal injuries that G had sustained allegedly as a result of the defendants' medical malpractice. Prior to trial, the plaintiffs filed an offer of compromise for $2 million, which the defendants did not accept. On October 28, 2016, the trial court accepted the jury verdict awarding the plaintiffs $4.2 million against both of the defendants. Subsequently, the plaintiffs filed a motion for statutory (§ 52-192a (c)) offer of compromise interest and for statutory (§ 37-3b) postjudgment interest. On November 28, 2016, evidently as a result of a clerical error, an entry was placed on the case docket, stating "judgment on verdict for plaintiff." On December 12, 2016, the court awarded the plaintiffs both offer of compromise and postjudgment interest. On December 16, 2016, the defendants filed an appeal with the Appellate Court, challenging both the jury verdict and the trial court's awards of offer of compromise and postjudgment interest. The plaintiffs filed a timely motion to dismiss the appeal, claiming that the defendants had failed to file the appeal within twenty days of the date that judgment was rendered, as required by the rule of practice (§ 63-1 (a)) governing the time to appeal. The defendants filed an objection to that motion, claiming that their appeal from the judgment rendered in accordance with the jury verdict was timely because they filed it within twenty days of the trial court's December 12, 2016 awards of offer of compromise and postjudgment interest. The defendants also filed a motion to suspend the rules of practice to permit the filing of a late appeal pursuant to the applicable rules of practice (§§ 60-2 (5) and 60-3), claiming, in the alternative, that there was good cause to permit the late appeal in light of the confusion in the trial court concerning the date the judgment was rendered. The Appellate Court dismissed as untimely that portion of the defendants' appeal challenging the jury verdict and, in doing so, denied the defendants' motion to suspend the rules of practice to permit a late appeal. The Appellate Court also upheld the trial court's awards of offer of compromise and postjudgment interest. On the granting of certification, the defendants appealed to this court. *Held*:

1. The Appellate Court properly dismissed as untimely the portion of the defendants' appeal challenging the jury verdict, there having been no merit to the defendants' claim that, although they did not file their appeal

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

within twenty days of the date on which the judgment was rendered in accordance with the jury verdict, and did not file a request for an extension of time or a postverdict motion, their appeal was nonetheless timely because the appeal period should have been measured from the date of the trial court's awards of offer of compromise and postjudgment interest, rather than the date the trial court accepted the jury verdict:

a. The defendants could not prevail on their claim that the judgment did not become final for purposes of appeal when the trial court accepted the jury verdict insofar as the court had yet to determine whether, or how much, offer of compromise interest should be awarded under § 52-192a, as a determination of the amount of offer of compromise interest is not an essential prerequisite to an appealable final judgment on the merits, because, although the presence of an unresolved claim for relief can delay the finality of a judgment on the merits, offer of compromise interest is not part of the plaintiffs' compensation for the alleged wrongdoing or unlawful conduct that gave rise to the underlying action, and, thus, a decision regarding offer of compromise interest does not require an assessment of the merits of the underlying case; moreover, under § 52-192a (c), trial courts have no discretion to determine if, or how much, offer of compromise interest should be awarded, as that statute requires that such interest be awarded when the amount of the verdict is equal to or exceeds the offer of compromise and prescribes the precise formula for calculating it.

b. The defendants could not prevail on their claim that, under Practice Book § 63-1 (c) (1), which provides for the tolling of the twenty day appeal period when a motion filed within the original twenty day appeal period seeks an alteration to the terms of the judgment, the plaintiffs' motion for offer of compromise and postjudgment interest created a new twenty day period within which the defendants could appeal from the judgment rendered in accordance with the jury verdict: the awards of offer of compromise and postjudgment interest, although increasing the plaintiffs' overall recovery, did not alter the amount of compensatory damages the jury previously had awarded, and, accordingly, the plaintiffs' motion for such interest did not seek an alteration of the judgment within the meaning of Practice Book § 63-1 (c) (1); moreover, federal precedent interpreting an analogous federal rule of appellate procedure (Fed. R. App. Proc. 4 (a) (4)) supported the view that postverdict motions for statutory interest do not seek an alteration to the underlying judgment.

2. The Appellate Court did not abuse its discretion in denying the defendants' motion to suspend the rules of practice to permit a late appeal, as the defendants failed to establish good cause: despite the defendants' claim that there was widespread confusion in the trial court about the date the judgment was rendered, there was no reasonable basis for any such confusion, as the rules of practice (§§ 17-2 and 63-1 (b)) directing trial courts to render judgments on jury verdicts and providing that the appeal

period begins to run when the verdict is accepted, plainly should have put the defendants' counsel on notice that, when the trial court accepted the verdict on October 28, 2016, and no subsequent motions were filed under the rules of practice (§§ 16-35 and 17-2A) governing certain post-verdict motions, a final judgment had been rendered and the twenty day appeal period had begun to run, and the erroneous entry placed on the case docket suggesting that the judgment had been rendered for the plaintiffs on November 28, 2016, was of no moment because the twenty day appeal period had expired eleven days before that entry appeared on the docket; moreover, the Appellate Court reasonably concluded that the defendants had failed to show good cause on the basis of their claimed good faith belief that there was no appealable final judgment until the trial court issued its decision awarding interest on December 12, 2016, as established final judgment principles should have put the defendants' counsel on notice that offer of compromise interest is not a type of relief that delays finality, and nothing in the text of Practice Book § 63-1 (c) (1), or Connecticut case law interpreting it, remotely suggested that a postjudgment motion for mandatory interest, such as the plaintiffs' motion in the present case, alters any aspect of the underlying judgment; furthermore, contrary to the defendants' claim, the size of the verdict did not render the Appellate Court's refusal to hear the appeal challenging the jury verdict an abuse of discretion, particularly in light of the wholly inadequate explanations proffered by the defendants for why they failed to appeal until approximately one month after the deadline, and, although the gravity of the consequences of a dismissal to the appealing party is not wholly irrelevant to a good cause analysis, under the circumstances of the present case, the size of the verdict, in and of itself, did not compel the conclusion that the Appellate Court abused its discretion.

(*Two justices concurring in part and dissenting in part in one opinion*)

Argued October 23, 2019—officially released June 3, 2020**

Procedural History

Action to recover damages for, inter alia, medical malpractice, and for other relief, brought to the Superior Court in the judicial district of New London, where the plaintiff Jean Georges withdrew from the action; thereafter, the case was tried to the jury before *Vacchelli*, *J.*; verdict and judgment for the named plaintiff and in part for the plaintiff Marie Leoma; subsequently, the court granted

** June 3, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

the motion of the named plaintiff et al. for offer of compromise and postjudgment interest, and the defendants appealed to the Appellate Court, which granted in part the motion of the named plaintiff et al. to dismiss the appeal and denied the defendants' motion to suspend the rules of practice to permit a late appeal; thereafter, this court dismissed the defendants' petition for certification to appeal; subsequently, the Appellate Court, *Keller*, *Prescott* and *Bright*, *Js.*, affirmed the judgment of the trial court as to offer of compromise and postjudgment interest, and the defendants, on the granting of certification, appealed to this court. *Affirmed.*

David J. Robertson, with whom, on the brief, was *Malaina J. Sylvestre*, for the appellants (defendants).

Alinor C. Sterling, with whom were *James D. Horwitz* and, on the brief, *Cynthia C. Bott*, for the appellees (named plaintiff et al.).

Jeffrey R. Babbin and *Christopher P. Kriesen* filed a brief for the Connecticut Defense Lawyers Association as amicus curiae.

Opinion

MULLINS, J. The defendants, OB-GYN Services, P.C., and Brenda Gilmore, appealed from the judgment of the trial court rendered following a jury verdict in favor of the plaintiff Marie Leoma and the named plaintiff, Jenniyah Georges, Leoma's minor daughter, on certain medical malpractice claims.[1] The Appellate Court, how-

[1] Although the complaint refers to Jenniyah Georges as the named plaintiff, it is clear that the only proper, remaining plaintiff is Leoma, who, together with Jean Georges, brought this action as the next friend of Jenniyah Georges. See *DiPietro* v. *Farmington Sports Arena, LLC*, 123 Conn. App. 583, 585 n.1, 2 A.3d 963 (2010), rev'd on other grounds, 306 Conn. 107, 49 A.3d 951 (2012); see also *Mendillo* v. *Board of Education*, 246 Conn. 456, 460 n.3, 717 A.2d 1177 (1998) (recognizing general rule that minor children may bring action only by way of parent or next friend), overruled in part on other grounds by *Campos* v. *Coleman*, 319 Conn. 36, 123 A.3d 854 (2015). Leoma also brought claims against the defendants in her individual capacity, seeking damages for emotional distress. The jury returned a verdict for the

ever, granted in part the plaintiffs' motion to dismiss the appeal as untimely and denied the defendants' motion to suspend the rules of practice to permit a late appeal. On appeal to this court, the defendants claim that the Appellate Court (1) improperly granted the plaintiffs' motion to dismiss the portion of the appeal challenging the jury's verdict as untimely, and (2) abused its discretion in denying their motion to suspend the rules of practice to permit a late appeal. We disagree and, accordingly, affirm the judgment of the Appellate Court.

The record reveals the following relevant facts and procedural history. The plaintiffs filed their original complaint on December 12, 2011. In that complaint, the plaintiffs alleged that the defendants committed malpractice during Leoma's pregnancy and labor, and during the delivery of Jenniyah Georges, causing Jenniyah Georges to sustain severe, permanent injuries. On May 16, 2013, the plaintiffs filed an offer of compromise directed to both defendants, offering to settle the claim for $2 million. The defendants did not accept the offer of compromise, which resulted in it being deemed rejected thirty days later by operation of law.[2] A jury trial ensued.

On October 28, 2016, the jury returned a verdict for the plaintiffs of $4.2 million as against both defendants. The trial court accepted the verdict that same day. The defendants did not file any postjudgment motions challenging the jury's verdict.

On November 8, 2016, the plaintiffs filed a motion seeking offer of compromise interest. The plaintiffs argued that they were entitled to such interest pursuant

defendants with respect to these claims, which are not at issue in this appeal. Jean Georges, Jenniyah Georges' father, also was originally named as a plaintiff in both his representative and individual capacities but subsequently withdrew from this action. We refer to Leoma and Jenniyah Georges individually by name and collectively as the plaintiffs.

[2] See General Statutes § 52-192a (a); Practice Book § 17-16.

to General Statutes § 52-192a (c)[3] and Practice Book § 17-18 because the defendants failed to accept the plaintiffs' offer of compromise for $2 million and the jury's verdict of $4.2 million exceeded that amount. The plaintiffs' motion also sought postjudgment interest under General Statutes § 37-3b.[4] The defendants filed an objection to the plaintiffs' motion. On November 28, 2016, evidently as a result of a clerical error, an entry was placed on the electronic docket, stating "judgment on verdict for plaintiff."

On December 12, 2016, the trial court issued a memorandum of decision, awarding the plaintiffs both offer of compromise and postjudgment interest. With respect to offer of compromise interest, the court concluded that the "end date" for calculating the interest was the date the judgment was rendered and clarified that the judgment was rendered on October 28, 2016—the date the verdict was accepted by the court—not November 28, 2016. The court clarified that the docket entry made on November 28, 2016, which referenced November 28, 2016, as the date of the judgment, had been made in error. The court awarded the plaintiffs $1,639,496.55 in offer of compromise interest. The trial court also

[3] General Statutes § 52-192a (c) provides in relevant part: "After trial the court shall examine the record to determine whether the plaintiff made an offer of compromise which the defendant failed to accept. If the court ascertains from the record that the plaintiff has recovered an amount equal to or greater than the sum certain specified in the plaintiff's offer of compromise, the court shall add to the amount so recovered eight per cent annual interest on said amount . . . . The interest shall be computed from the date the complaint in the civil action . . . was filed with the court if the offer of compromise was filed not later than eighteen months from the filing of such complaint . . . ." See Practice Book § 17-18 (providing for identical computation method).

[4] General Statutes § 37-3b provides in relevant part: "(a) For a cause of action arising on or after May 27, 1997, interest at the rate of ten per cent a year, and no more, shall be recovered and allowed in any action to recover damages for injury to the person, or to real or personal property, caused by negligence, computed from the date that is twenty days after the date of judgment or the date that is ninety days after the date of verdict, whichever is earlier, upon the amount of the judgment. . . ."

awarded the plaintiffs postjudgment interest under § 37-3b, to be calculated at 10 percent per year, commencing on November 17, 2016, twenty days from the date of the judgment, "subject to tolling as permitted by statute."

On December 16, 2016, the defendants filed an appeal with the Appellate Court, challenging both the jury's verdict and the trial court's awards of offer of compromise and postjudgment interest.[5] The plaintiffs filed a timely motion to dismiss the appeal or, in the alternative, to dismiss the portion of the appeal challenging the jury's verdict. They claimed that the defendants failed to file the appeal within twenty days of the date the judgment was rendered, as required by Practice Book § 63-1 (a). The defendants filed an objection to that motion, arguing that their appeal from the judgment rendered in accordance with the jury's verdict was timely because they filed it within twenty days of the trial court's December 12, 2016 memorandum of decision awarding the offer of compromise and postjudgment interest. The defendants also filed a motion to suspend the rules of practice to permit a late appeal pursuant to Practice Book §§ 60-2 (5)[6] and 60-3,[7] arguing,

[5] As to the jury verdict, the defendants claimed that the court had improperly admitted certain expert testimony and provided the jury with an incorrect instruction on damages.

[6] Practice Book § 60-2 provides in relevant part: "[The court] may . . . upon motion of any party . . . (5) order that a party for good cause shown may file a late appeal . . . unless the court lacks jurisdiction to allow the late filing . . . ." Although § 60-2 was amended in October, 2017, to take effect in January, 2018, that amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current version of § 60-2.

[7] Practice Book § 60-3 provides: "In the interest of expediting decision, or for other good cause shown, the court in which the appellate matter is pending may suspend the requirements or provisions of any of these rules on motion of a party or on its own motion and may order proceedings in accordance with its direction." Although § 60-3 was amended in October, 2017, to take effect in January, 2018, that amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current version of § 60-3.

in the alternative, that there was "good cause" to permit the late appeal in light of the "significant amount of confusion in the trial court" concerning the date the judgment was rendered. This motion largely focused on the erroneous docket entry of November 28, 2016, listing that date as the date of the judgment.

The Appellate Court granted in part the plaintiffs' motion to dismiss and denied the defendants' motion to suspend the rules of practice to permit a late appeal. This certified appeal followed.[8]

I

The defendants claim that the Appellate Court improperly granted the plaintiffs' motion to dismiss the portion of the defendants' appeal challenging the jury's verdict because the appeal was timely. We disagree.

We review the Appellate Court's decision to dismiss an untimely appeal for abuse of discretion; see, e.g., *Ramos* v. *Commissioner of Correction*, 248 Conn. 52, 53, 59, 61, 727 A.2d 213 (1999); cf. *Kelley* v. *Bonney*, 221 Conn. 549, 559 and n.4, 606 A.2d 693 (1992) (noting that Appellate Court has broad discretion to determine whether to hear late appeal); but questions concerning whether the judgment was final for purposes of appeal, or when the twenty day appeal period began to run, are questions of law over which our review is plenary. See, e.g., *Hylton* v. *Gunter*, 313 Conn. 472, 478, 97 A.3d 970 (2014); *In re Haley B.*, 262 Conn. 406, 410–11, 815 A.2d 113 (2003).

"Unless a different time period is provided by statute, an appeal must be filed within twenty days of the date

[8] We granted the defendants' petition for certification to appeal, limited to the following issues: (1) "Did the Appellate Court properly dismiss that portion of the defendants' appeal relating to the judgment rendered on October 28, 2016?" And (2) "[d]id the Appellate Court abuse its discretion when it denied the defendants' motion to [suspend the rules of practice to permit] a late appeal?" *Georges* v. *OB-GYN Services, P.C.*, 330 Conn. 905, 192 A.3d 426 (2018).

notice of the judgment or decision is given." Practice Book § 63-1 (a). "In civil jury cases, the appeal period shall begin when the verdict is accepted." Practice Book § 63-1 (b). Likewise, with respect to the date the judgment is deemed to have been rendered in such cases, Practice Book § 17-2 provides in relevant part: "If no motions under Sections 16-35 or [17-2A] are filed, upon the expiration of the time provided for the filing of such motions, judgment on the verdict shall be rendered in accordance with the verdict, and *the date of the judgment shall be the date the verdict was accepted. . . .*" (Emphasis added.)

In the present case, the trial court accepted the jury's verdict on October 28, 2016, which meant that, in the absence of an extension of time or the filing of a postverdict motion by the defendants, the defendants had until November 17, 2016, to appeal from the judgment rendered in accordance with that verdict. The defendants did not file any posttrial motions under Practice Book § 16-35 or Practice Book § 17-2A; nor did they request an extension of the appeal period. The defendants did not file their appeal until December 16, 2016, approximately one month after the deadline. The defendants contend, however, that their appeal was nonetheless timely because they filed it within twenty days of the court's December 12, 2016 decision awarding offer of compromise and postjudgment interest. The defendants argue that the appeal period should be measured from the date of this subsequent decision, rather than the date the verdict was accepted, because (1) there was no appealable final judgment until the court awarded offer of compromise and postjudgment interest, and (2) the plaintiffs' November 8, 2016 motion for interest created a new twenty day appeal period pursuant to Practice Book § 63-1 (c) (1).

We address these questions of law in turn.

A

The first question is whether the date of the final judgment for purposes of appeal is October 28, 2016, the date the trial court accepted the jury's verdict. It is well settled that "the acceptance of the jury verdict at the time it is [returned] is deemed to constitute a final judgment . . . unless a motion to set aside is later filed." (Citations omitted; internal quotation marks omitted.) *Kolich* v. *Shugrue*, 198 Conn. 322, 327, 502 A.2d 918 (1986); see also Practice Book § 17-2. The defendants argue, however, that, in the present case, the judgment did not become final for purposes of appeal when the verdict was accepted because the trial court had yet to determine whether, or how much, offer of compromise interest should be awarded under § 52-192a.

This court has held that the presence of an unresolved claim for relief can delay the finality of a judgment on the merits. This, however, is the exception to the usual rule and generally applies only if the form of relief being sought "seek[s] compensation for the alleged[ly] wrongful conduct of the defendants, which depend[s] upon an assessment of the underlying merits of the transaction between the parties." (Internal quotation marks omitted.) *Broadnax* v. *New Haven*, 294 Conn. 280, 297, 984 A.2d 658 (2009); see, e.g., *Balf Co.* v. *Spera Construction Co.*, 222 Conn. 211, 215, 608 A.2d 682 (1992) (claim for discretionary prejudgment interest postponed finality of judgment because "[t]he plaintiff's right to such a recovery is part of its claim to be made whole," and "[w]hether it succeeds will depend upon an assessment of the underlying merits");[9] see also *Stroiney* v. *Cres-*

[9] In concluding in *Balf Co.* that claims for discretionary prejudgment interest can postpone the rendering of an appealable final judgment, this court distinguished between claims for that type of relief and claims for attorney's fees, which this court had previously held in *Paranteau* v. *DeVita*, 208 Conn. 515, 522–23, 544 A.2d 634 (1988), do not affect finality. See *Balf Co.* v. *Spera Construction Co.*, supra, 222 Conn. 214–15; see also footnote 10 of this opinion. Adopting the United States Supreme Court's reasoning in *Osterneck* v. *Ernst & Whinney*, 489 U.S. 169, 175–77, 109 S. Ct. 987, 103

cent Lake Tax District, 197 Conn. 82, 84, 495 A.2d 1063 (1985) (judgment "rendered only [on] the issue of liability without an award of damages" is interlocutory).

Conversely, when the postverdict relief is not designed to compensate the plaintiffs for the underlying wrongdoing and does not require the trial court to examine the merits of the underlying case, it is collateral to the judgment and does not affect its finality for purposes of appeal. See, e.g., *Hylton* v. *Gunter*, supra, 313 Conn. 485 n.12 (noting that award of attorney's fees and litigation costs as part of common-law punitive damages claim would not affect finality of judgment because their "calculation . . . derives from evidence that is collateral to that considered in the main cause of action"); *Paranteau* v. *DeVita*, 208 Conn. 515, 522–23, 544 A.2d 634 (1988) (adopting "bright-line rule" that "a judgment on the merits is final for purposes of appeal even though the recoverability or amount of attorney's fees for the litigation remains to be determined").[10]

L. Ed. 2d 146 (1989), this court observed: "First, unlike attorney's fees, which at common law were regarded as an element of costs and therefore not part of the merits judgment . . . prejudgment interest traditionally has been considered part of the compensation due [the] plaintiff. Second, unlike a request for attorney's fees or a motion for costs, a motion for discretionary prejudgment interest does not rais[e] issues wholly collateral to the judgment in the main cause of action . . . nor does it require an inquiry wholly separate from the decision on the merits . . . . In deciding if and how much prejudgment interest should be granted, a [trial] court must examine—or in the case of a postjudgment motion, reexamine—matters encompassed within the merits of the underlying action. . . . Third, the conclusion that a postjudgment motion for discretionary prejudgment interest postpones the finality of a judgment on the merits helps further the important goal of avoiding piecemeal appellate review of judgments." (Citation omitted; internal quotation marks omitted.) *Balf Co.* v. *Spera Construction Co.*, supra, 214–15.

[10] Under the bright-line rule of *Paranteau*, requests for attorney's fees categorically "will be treated separately" from decisions on the merits regardless of whether the "particular . . . claim for attorney's fees was collateral to, or an integral part of, the judgment on the merits." *Paranteau* v. *DeVita*, supra, 208 Conn. 522–23; see also *Hylton* v. *Gunter*, supra, 313 Conn. 483–84; *Benvenuto* v. *Mahajan*, 245 Conn. 495, 498–500, 715 A.2d 743 (1998). But see *Hylton* v. *Gunter*, supra, 485 n.13 (noting that "attorney's

Offer of compromise interest plainly falls into the latter category because it does not entail any examination of matters encompassed within the merits of the underlying action. Although offer of compromise interest increases a plaintiff's overall recovery, offer of compromise interest is not part of the plaintiff's compensation *for the alleged wrongdoing or unlawful conduct that gave rise to the underlying action*. See *Paine Webber Jackson & Curtis, Inc.* v. *Winters*, 22 Conn. App. 640, 652–54, 579 A.2d 545 (explaining that, unlike discretionary prejudgment interest, which "constitutes an element of the damages awarded," offer of compromise interest is "unrelated to the underlying [damages claim]"), cert. denied, 216 Conn. 820, 581 A.2d 1055 (1990). Rather, "interest awarded under § 52-192a is *solely* related to a defendant's rejection of an advantageous offer to settle before trial and his subsequent waste of judicial resources." (Emphasis added; internal quotation marks omitted.) *Blakeslee Arpaia Chapman, Inc.* v. *El Constructors, Inc.*, 239 Conn. 708, 742, 687 A.2d 506 (1997). In other words, an award of offer of compromise interest is punitive, rather than compensatory, in nature. Id., 752; see also *Accettullo* v. *Worcester Ins. Co.*, 256 Conn. 667, 673, 775 A.2d 943 (2001).

Accordingly, a decision regarding offer of compromise interest does not require an assessment of the merits of the underlying case. Under § 52-192a (c), trial courts have no discretion to determine if, or how much, offer of compromise interest should be awarded. The statute *requires* the interest to be awarded if the amount of the verdict is equal to or exceeds the offer of compromise and prescribes the precise formula for calculating it. See footnote 3 of this opinion. "[A]n award of interest

fees that themselves form the basis of a plaintiff's claim for compensatory damages, such as those occasioned by an insurer's breach of its duty to defend, are conceptually different and must be established in order to have an appealable final judgment").

under § 52-192a is mandatory, and the application of § 52-192a does not depend on an analysis of the underlying circumstances of the case or a determination of the facts." (Emphasis omitted; internal quotation marks omitted.) *Blakeslee Arpaia Chapman, Inc.* v. *El Constructors, Inc.*, supra, 239 Conn. 752.

We therefore conclude that a determination of the amount of offer of compromise interest to be awarded is not an essential prerequisite to an appealable final judgment on the merits. See *Earlington* v. *Anastasi*, 293 Conn. 194, 196–97 n.3, 976 A.2d 689 (2009) (noting that judgment was final despite failure to award offer of compromise interest "[b]ecause a decision to award such interest pursuant to . . . § 52-192a is severable from the proceedings on the merits and does not require the exercise of discretion"). In the present case, the judgment became final on October 28, 2016, when the court accepted the jury verdict. See Practice Book § 17-2; Practice Book § 63-1 (b). The court's subsequent decision on December 12, 2016, awarding offer of compromise interest, "raise[d] a collateral and independent claim that is separately appealable as a final judgment." *Paranteau* v. *DeVita*, supra, 208 Conn. 523; see id. (determining whether supplemental postjudgment order regarding amount of attorney's fees may raise claim that is separately appealable as final judgment).

B

The defendants next argue that, under Practice Book § 63-1 (c) (1), the plaintiffs' November 8, 2016 motion for offer of compromise interest and for postjudgment interest under § 37-3b created a new twenty day period within which the defendants could appeal from the judgment rendered in accordance with the jury's verdict. They contend that this new appeal period began to run when the court decided that motion on December 12, 2016. We are not persuaded.

Under Practice Book § 63-1 (c) (1), "[i]f a motion is filed within the appeal period that, if granted, *would render the judgment, decision or acceptance of the verdict ineffective* . . . a new twenty day period . . . for filing the appeal shall begin on the day that notice of the ruling is given on the last such outstanding motion . . . ." (Emphasis added.) That subdivision explains that the motions that meet these criteria include, inter alia, "motions that seek . . . any alteration of the terms of the judgment."[11] In determining whether a motion seeks an "alteration" of the terms of the judgment, "we look to the substance of the relief sought by the motion rather than the form." *In re Haley B.*, supra, 262 Conn. 413.

The defendants contend that the plaintiffs' motion for offer of compromise and postjudgment interest altered the terms of the judgment under Practice Book § 63-1 (c) (1) because it "change[d] the judgment from the initial amount of the verdict [$4.2 million], to the amount of the verdict plus offer of compromise interest." We disagree.

The defendants rely on *In re Haley B.*, supra, 262 Conn. 406, which considered the application of Practice Book § 63-1 (c) (1) in a custody dispute. Id., 407, 412. In that case, the trial court denied the intervening respondent's motion for custody or guardianship over her grandchild but ordered weekly visitation with the

[11] Practice Book § 63-1 (c) (1) provides in relevant part: "Motions that, if granted, would render a judgment, decision or acceptance of the verdict ineffective include, but are not limited to, motions that seek: the opening or setting aside of the judgment; a new trial; the setting aside of the verdict; judgment notwithstanding the verdict; reargument of the judgment or decision; collateral source reduction; additur; remittitur; *or any alteration of the terms of the judgment*.

"Motions that do not give rise to a new appeal period include those that seek: clarification or articulation, as opposed to alteration, of the terms of the judgment or decision; a written or transcribed statement of the trial court's decision; or reargument of a motion listed in the previous paragraph. . . ." (Emphasis added.)

grandchild. Id., 407–409. Subsequently, in response to an oral motion raised by the Department of Children and Families (department), the court reduced the amount of visitation it had previously awarded to the intervening respondent to once per month. Id., 409–10. This court concluded that the department's motion had sought a modification or alteration of the trial court's original order, thereby triggering a new appeal period under § 63-1 (c) (1), because the motion resulted in the court's "chang[-ing]" its prior order of weekly visitation by reducing it to monthly visitation. Id., 414. Therefore, "a portion of the court's original decision, namely, that part requiring weekly visitation, was rendered *ineffective* by the subsequent order of the court reducing visitation to a monthly basis." (Emphasis in original.) Id.

In re Haley B. is not controlling here. That case involved the trial court's altering a substantive term of its prior judgment. In the present case, the awards of statutory interest—although increasing the plaintiffs' overall recovery—did not alter the amount of compensatory damages the jury previously had awarded. As to whether the addition of these interest awards to the existing judgment creates a new appeal period under Practice Book § 63-1 (c) (1), our research has not revealed any pertinent Connecticut appellate authority addressing the applicability of that rule in this particular context. We find persuasive, however, the reasoning of the United States Supreme Court in interpreting the analogous federal rule, set forth in rule 4 (a) (4) of the Federal Rules of Appellate Procedure. See *Balf Co.* v. *Spera Construction Co.*, supra, 222 Conn. 215 (adopting United States Supreme Court's reasoning in *Osterneck* v. *Ernst & Whinney*, 489 U.S. 169, 173–77, 109 S. Ct. 987, 103 L. Ed. 2d 146 (1989), to determine whether judgment was final, "even though the United States Supreme Court was applying [rule 59 (e) of] the Federal Rules of Civil Procedure" and rule 4 (a) (4) of Federal Rules

of Appellate Procedure); cf. *Paranteau* v. *DeVita*, supra, 208 Conn. 522–23 (adopting United States Supreme Court's reasoning in determining whether judgment on merits was final for purposes of appeal even though that court applied federal law).

Similar to Practice Book § 63-1 (c) (1), which creates a new appeal period for, inter alia, motions seeking "any alteration of the terms of the judgment," rule 4 (a) (4) (A) (iv) of the Federal Rules of Appellate Procedure creates a new appeal period for motions that, pursuant to rule 59 (e) of the Federal Rules of Civil Procedure, "alter or amend a judgment . . . ." "[F]ederal courts generally have invoked [r]ule 59 (e) [of the Federal Rules of Civil Procedure] only to support reconsideration of matters properly encompassed in a decision on the merits." (Internal quotation marks omitted.) *Buchanan* v. *Stanships, Inc.*, 485 U.S. 265, 267, 108 S. Ct. 1130, 99 L. Ed. 2d 289 (1988). Thus, a postjudgment motion for costs did not purport to alter any aspect of the judgment; rather, it "sought only what was due *because of* the judgment. . . . Assessment of such costs does not involve reconsideration of any aspect of the decision on the merits." (Emphasis in original.) Id., 268. The United States Supreme Court explained that, although the outcome may have been different "if expenses of this sort were provided as an aspect of the underlying action," a motion for costs "raises issues wholly collateral to the judgment in the main cause of action, issues to which [r]ule 59 (e) [of the Federal Rules of Civil Procedure] was not intended to apply." Id., 268–69.

Following the rationale of the United States Supreme Court, we conclude that the plaintiffs' motion for offer of compromise and postjudgment interest did not seek an "alteration" of the judgment within the meaning of Practice Book § 63-1 (c) (1). As we explained in part I A of this opinion, a decision to award offer of compromise

interest under § 52-192a is ministerial and does not require the trial court to reconsider any aspect of the decision on the merits.

The same is true of postjudgment interest under § 37-3b, which similarly leaves trial courts with no discretion in determining whether to award such interest. See, e.g., *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, 310 Conn. 38, 48, 74 A.3d 1212 (2013) (legislative history of § 37-3b "leaves no doubt that the legislature . . . convert[ed] § 37-3b from a statute that permitted an award of postjudgment interest in the discretion of the trial court into one that mandates such an award"); see also footnote 4 of this opinion. A claim for interest under § 37-3b also does not require, or permit, the trial court to reconsider the merits of the case because such interest is not an element of the plaintiff's damages in the underlying action. See *Hicks* v. *State*, 297 Conn. 798, 804, 1 A.3d 39 (2010) ("[I]nterest awarded pursuant to § 37-3b is in addition to and based upon the amount of damages as determined by the trier of fact. Postjudgment interest, therefore, cannot be an element of damages."). Indeed, because § 37-3b requires the interest to be calculated "upon the amount of the judgment," a claim for such interest cannot even be considered until after the plaintiff has recovered a judgment against the defendant. Accordingly, an award of interest under § 37-3b is collateral to, and does not alter for purposes of Practice Book § 63-1 (c) (1), the judgment on the merits. See *White* v. *New Hampshire Dept. of Employment Security*, 455 U.S. 445, 451–52, 102 S. Ct. 1162, 71 L. Ed. 2d 325 (1982) (motion for attorney's fees did not alter judgment under rule 59 (e) of Federal Rules of Civil Procedure because it "require[d] an inquiry . . . that cannot even commence until one party has 'prevailed' ").

We therefore conclude that the plaintiffs' postverdict motion for mandatory interest under §§ 52-192a and 37-

3b did not seek an "alteration" of the judgment within the meaning of Practice Book § 63-1 (c) (1) and certainly did not render the judgment ineffective. Rather, the motion "sought only what was due *because of* the judgment." (Emphasis in original.) *Buchanan* v. *Stanships, Inc.*, supra, 485 U.S. 268. The twenty day appeal period began to run on October 28, 2016, when the court accepted the jury verdict; see Practice Book § 63-1 (b); and expired on November 17, 2016, approximately one month before the defendants filed their appeal from the judgment rendered in accordance with that verdict on December 16, 2016. Accordingly, the Appellate Court correctly concluded that the appeal was untimely.

II

The defendants claim that the Appellate Court abused its discretion in denying their motion to suspend the rules of practice to permit a late appeal. We disagree.

We begin with the principles governing our review. "The rules of practice vest broad authority in the Appellate Court for the management of its docket." (Internal quotation marks omitted.) *Alliance Partners, Inc.* v. *Voltarc Technologies, Inc.*, 263 Conn. 204, 210, 820 A.2d 224 (2003). Practice Book § 60-2 provides in relevant part that "[t]he supervision and control of the proceedings shall be in the court having appellate jurisdiction from the time the appellate matter is filed . . . . [The court] may . . . on its own motion or upon motion of any party . . . (5) order that a party for good cause shown may file a late appeal . . . unless the court lacks jurisdiction to allow the late filing . . . ." Practice Book § 60-3 further provides that, "[i]n the interest of expediting decision, or for other good cause shown, the court in which the appellate matter is pending may suspend the requirements or provisions of any of these rules on motion of a party or on its own motion and may order proceedings in accordance with its direction."

"In the absence of jurisdictional barriers, appellate tribunals must exercise their discretion to determine whether a late appeal should be permitted to be heard. . . . Thus, we review the Appellate Court's decision [to deny a motion for permission to file a late appeal] under the abuse of discretion standard. 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. . . . Reversal is required only where an abuse of discretion is manifest or where injustice appears to have been done." (Citations omitted; internal quotation marks omitted.) *Alliance Partners, Inc.* v. *Voltarc Technologies, Inc.*, supra, 263 Conn. 210. In the absence of evidence that the Appellate Court "decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors," its decision must be upheld. (Internal quotation marks omitted.) *State* v. *Holley*, 327 Conn. 576, 628, 175 A.3d 514 (2018).

Consistent with this court's prior cases, we emphasize at the outset that our review of the Appellate Court's decision is especially deferential in the present case in light of the Appellate Court's "broad authority to manage its docket. . . . In the exercise of that authority, [the Appellate Court] legitimately has adopted a policy of docket control that, in other than exceptional cases, the need to address cases that were filed timely outweighs the need to permit appeals that are in fact late." (Citation omitted; internal quotation marks omitted.) *Alliance Partners, Inc.* v. *Voltarc Technologies, Inc.*, supra, 263 Conn. 212; see also *Ramos* v. *Commissioner of Correction*, supra, 248 Conn. 61.

The Appellate Court has explained that, under this policy, it may "exercise its discretion to consider late appeals, even when a party timely files a motion to dismiss an untimely appeal. . . . Given the large number of appeals . . . filed in [the Appellate Court], however, [the court has] adopted a policy that gives precedence

to those appeals that are timely filed . . . . Therefore, when a motion to dismiss that raises untimeliness is, itself, timely filed . . . it is ordinarily [the court's] practice to dismiss the appeal if it is in fact late, and if no reason readily appears on the record to warrant an exception to [the court's] general rule." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Blue Cross/Blue Shield of Connecticut, Inc.* v. *Gurski*, 47 Conn. App. 478, 481–82, 705 A.2d 566 (1998). The Appellate Court has numerous times "announced this policy, putting all litigants, including the [litigants in the present case], on fair notice thereof." *Alliance Partners, Inc.* v. *Voltarc Technologies, Inc.*, supra, 263 Conn. 212. This previously announced policy of dismissing untimely appeals in the absence of a readily apparent reason to hear the appeal generally weighs in favor of upholding the Appellate Court's decision to deny a request for permission to file a late appeal.[12] See id., 214.

In determining whether the Appellate Court abused its discretion in the present case, we examine the defen-

[12] The concurring and dissenting justice dilutes our deferential standard of review of the Appellate Court's ruling on a motion for permission to file a late appeal to the point of being virtually indistinguishable from plenary review. Specifically, according to the concurring and dissenting justice, if this court can discern on appeal an "objectively reasonable basis for confusion, uncertainty or mistake about when the appeal period has run or has been tolled," and "no other factors weigh against granting the motion," then the Appellate Court necessarily abused its discretion in failing to find good cause for the late appeal. Although objectively reasonable confusion about the operation of our appellate rules certainly is a factor to consider when reviewing the Appellate Court's decision to deny a motion for permission to file a late appeal, we disagree that this or any other factor is dispositive. Rather, abuse of discretion review mandates that we make "every reasonable presumption . . . in favor of the correctness of the [Appellate Court's] ruling." (Internal quotation marks omitted.) *Alliance Partners, Inc.* v. *Voltarc Technologies, Inc.*, supra, 263 Conn. 210. More to the point, as we explain subsequently in the body of this opinion, the Appellate Court was justified in concluding that the defendants' proffered explanations for their confusion about the date final judgment was rendered or when the appeal period began to run did not amount to good cause to excuse their untimely appeal.

dants' motion to suspend the rules of practice to permit a late appeal in order to assess whether the defendants established the requisite "good cause" under Practice Book §§ 60-2 (5) and 60-3. See id., 209 n.9 ("[i]n reviewing the Appellate Court's [decision to deny a motion for permission to file a late appeal], we take into account the [appellant's] representations" in that motion).

In their motion, the defendants asserted, first, that there was "widespread confusion" in the trial court as to the date the judgment was actually rendered, for which they should not be penalized. In particular, they noted the docket entry that erroneously listed the date of the judgment as November 28, 2016. Second, the defendants argued that they had a "good faith belief" that there was no appealable final judgment until the court issued its decision awarding offer of compromise and postjudgment interest on December 12, 2016. Finally, the defendants emphasized that the substantial size of the jury's verdict, $4.2 million, counseled in favor of permitting their untimely appeal to proceed.

We find these justifications unconvincing. Despite the defendants' claim that there was "widespread confusion" in the trial court about the date the judgment was rendered, we see no reasonable basis for any such confusion. Practice Book § 17-2 expressly provides that, if no motions under Practice Book § 16-35 or Practice Book § 17-2A are filed, "the date of the judgment shall be the date the verdict was accepted." Further, Practice Book § 63-1 (b) provides that, "[i]n civil jury cases, the appeal period shall begin when the verdict is accepted." These provisions plainly should have put the defendants' counsel on notice that, when the trial court accepted the verdict on October 28, 2016, and no subsequent motions under Practice Book § 16-35 or Practice Book § 17-2A were filed, a final judgment had been rendered and the twenty day appeal period had began to run.

In this regard, the erroneous entry placed on the docket suggesting that the judgment had been rendered in favor of the plaintiffs on November 28, 2016, is of no moment. The twenty day appeal period expired on November 17, 2016, eleven days *before* that erroneous entry appeared on the docket. We therefore fail to see how the erroneous entry could have been the cause of the defendants' failure to appeal on or before the November 17, 2016 deadline.

Nor did the Appellate Court act unreasonably when it concluded that the defendants had failed to show good cause on the basis of their claimed "good faith belief" that there was no appealable final judgment until the court issued its decision awarding interest on December 12, 2016. Again, Practice Book § 17-2 explicitly provides that "the date of the judgment shall be the date the verdict was accepted." Further, even if the defendants had harbored some uncertainty about the date final judgment was rendered, "[t]he filing requirements prescribed by [our rules of practice] cannot be abrogated . . . by a party's perception that appeal is unnecessary during the appropriate appeal period. The fact that the need for an appeal may not have been evident until after the mandated filing period passed is not a circumstance that impels us to bypass the requirements of our rules of practice." *Lucisano* v. *Lucisano*, 200 Conn. 202, 206, 510 A.2d 186 (1986). Moreover, the defendants have offered no reason why, if there was any doubt in their minds as to whether the judgment was final on October 28, 2016, they did not "take the obviously safer route"; *Alliance Partners, Inc.* v. *Voltarc Technologies, Inc.*, supra, 263 Conn. 212; and immediately appeal from the judgment rendered in accordance with the jury's verdict, which they later could have amended to include any claims challenging the court's subsequent interest awards.[13] See, e.g., *Ran-*

[13] Contrary to the concurring and dissenting justice's suggestion, we are not advocating for an " 'appeal early and often' approach" to appellate

dazzo v. *Sakon*, 181 Conn. App. 80, 87–88 n.7, 189 A.3d 616, cert. denied, 330 Conn. 909, 193 A.3d 560 (2018); see also Practice Book § 61-9.

The concurring and dissenting justice contends that the Appellate Court abused its discretion in denying the defendants' motion to suspend the rules of practice to permit a late appeal because "the barren state of the law" gave the defendants an objectively reasonable, good faith belief either (1) that the judgment was not yet final when the court accepted the verdict, or (2) that the plaintiffs' subsequent motion for interest triggered a new appeal period under Practice Book § 63-1 (c) (1). Although we agree that an objectively reasonable mistake of law may constitute good cause for filing a late appeal, we disagree that the Appellate Court was required to determine that the defendants' untimeliness was due to any such justifiable mistake of law in the present case.

With regard to the finality of the judgment, although there were no appellate cases definitively holding that unawarded offer of compromise interest does not delay the finality of a judgment on the merits, our decision today that it does not delay finality should come as no surprise to the defendants. As we explained in part I A of this opinion, this court's decisions have uniformly recognized that postverdict claims for relief delay finality only if they are related to compensation and require an assessment of the underlying merits of the case. See *Hylton* v. *Gunter*, supra, 313 Conn. 485 n.12; *Broadnax* v. *New Haven*, supra, 294 Conn. 297; footnote 9 of this

litigation. Footnote 14 of the concurring and dissenting opinion. Nor did this court endorse such an approach in *Alliance Partners, Inc.*, by making the observation that "it is difficult to see why, if the plaintiff was even somewhat confused about [the proper method for calculating the twenty day appeal period] . . . it nonetheless opted to wait for the potential twenty-first day to file [its appeal], rather than to take the obviously safer route and file on the potential twentieth day." *Alliance Partners, Inc.* v. *Voltarc Technologies, Inc.*, supra, 263 Conn. 212.

opinion and accompanying text. Offer of compromise interest meets neither of these requirements. See *Accettullo* v. *Worcester Ins. Co.*, supra, 256 Conn. 673; *Blakeslee Arpaia Chapman, Inc.* v. *El Constructors, Inc.*, supra, 239 Conn. 742, 752. Thus, established final judgment principles should have put the defendants' counsel on notice that offer of compromise interest is not a type of relief that delays finality.[14]

In fact, this court, in 2009, noted that undetermined offer of compromise interest does not affect the finality of the judgment. *Earlington* v. *Anastasi*, supra, 293 Conn. 196–97 n.3. Although that aspect of *Earlington* was dictum, it was cited in a leading treatise on appellate practice for the proposition that "the lack of a ruling on a claim for [offer of compromise interest under § 52-192a] does not deprive the court of appellate jurisdiction on an otherwise final judgment." W. Horton & K. Bartschi, Connecticut Practice Series: Connecticut Rules of Appellate Procedure (2019–2020 Ed.) § 61-1, p. 84, authors' comments. Thus, to the extent that the defendants claimed that they were confused about the operation of our final judgment rules in this context, the Appellate Court was well within its discretion to regard such confusion as unreasonable.[15] See *Alliance*

[14] Relying on *Nolan* v. *Milford*, 86 Conn. App. 817, 819, 862 A.2d 879 (2005), the concurring and dissenting justice contends that there was "at least a straight-faced argument" that final judgment was not rendered until the trial court resolved the parties' dispute as to the proper "end date" for calculating the offer of compromise interest. We disagree. *Nolan* addressed *discretionary* prejudgment interest under General Statutes § 37-3a; *Nolan* v. *Milford*, supra, 818–19; which this court has long recognized must be awarded before there can be an appealable final judgment. See *Balf Co.* v. *Spera Construction Co.*, supra, 222 Conn. 214–15; footnote 9 of this opinion and accompanying text. The plaintiffs' motion did not seek discretionary prejudgment interest under § 37-3a but, rather, mandatory interest under §§ 37-3b and 52-192a. *Nolan* does not suggest that claims for such awards delay the rendering of an otherwise appealable final judgment.

[15] The concurring and dissenting justice relies on additional aspects of the trial court proceedings that, in its view, provided the defendants with an objectively reasonable belief that the judgment was not final when the verdict was accepted on October 28, 2016. First, the concurring and dis-

Partners, Inc. v. *Voltarc Technologies, Inc.*, supra, 263 Conn. 212 (rejecting argument that mistake of law justified late appeal in part because correct rule was discussed in prior case law and cited in authoritative treatise on appellate practice).

Nor was the Appellate Court required to determine that the defendants' untimeliness was due to a reasonable, albeit mistaken, belief that Practice Book § 63-1 (c) (1) provided them with a new appeal period. Nothing in the text of § 63-1 (c) (1), or our case law interpreting it, remotely suggests that a postjudgment motion for mandatory interest, such as the one that the plaintiffs filed on November 8, 2016, alters any aspect of the underlying judgment. Although there was no prior appellate decision holding that § 63-1 (c) (1) *does not* apply to this type of motion, the absence of a case directly on point, although something that the Appellate Court could consider,[16] does not mean that there was "confu-

senting justice notes that the plaintiffs filed a motion to request the offer of compromise interest even though trial courts are required to impose such interest sua sponte without the need for a motion. We fail to see why this would have added to the defendants' confusion. If anything, we believe it is objectively *unreasonable* to suspect that a claim for relief that must automatically be awarded at the statutorily prescribed rate could affect the finality of the judgment.

Second, the concurring and dissenting justice contends that the plaintiffs' motion for interest suggested that the plaintiffs themselves believed that the judgment had not yet been rendered on October 28, 2016. He relies on the following statement from the plaintiffs' motion: "Section 52-192a (c) directs the court to add 8 percent annual interest to the amount recovered by the plaintiffs, running from the date the complaint in this action was filed . . . to ninety days following the rendering of the verdict, which occurs on January 26, 2017." This is a true statement: January 26, 2017, *is* approximately ninety days after the verdict was returned on October 28, 2016. The plaintiffs made the statement in the course of arguing for what they believed the correct "end date" was for calculating the offer of compromise interest when postjudgment interest under § 37-3b also is in play. Although this argument reflected the plaintiffs' understanding about how the competing interest statutes operate, it does not suggest any confusion on the plaintiffs' part about the date final judgment was rendered.

[16] The concurring and dissenting justice asserts that, because the Appellate Court denied the defendants' motion to suspend the rules of practice to

sion" in the law to such an extent as to render the Appellate Court's refusal to hear a late appeal a manifest abuse of discretion.[17]

The present case is similar in many respects to *Alliance Partners, Inc.* In that case, this court concluded that the Appellate Court did not abuse its discretion in denying an appellant's motion for permission to file a

permit a late appeal in an order without any explanation, "we have no idea whether the Appellate Court considered the absence of on point case law or whether it simply enforced deadlines in an uncompromising fashion." Footnote 6 of the concurring and dissenting opinion. To the contrary, we must indulge "every reasonable presumption . . . in favor of the correctness of the [Appellate Court's] ruling." (Internal quotation marks omitted.) *Alliance Partners, Inc.* v. *Voltarc Technologies, Inc.*, supra, 263 Conn. 210. Therefore, to the extent that the defendants raised the lack of pertinent authority in their motion to suspend the rules of practice to permit a late appeal, we must presume that the Appellate Court considered it in the context of conducting a proper inquiry into whether there was good cause for the defendants' failure to file a timely appeal.

[17] The concurring and dissenting justice contends that, in fashioning postjudgment interest awards under § 37-3b, trial courts, at least arguably, have discretion to determine the appropriate interest rate because the statute does not mandate any particular rate but merely provides that interest shall be calculated "at the rate of ten per cent a year, and no more . . . ." General Statutes § 37-3b (a). Even if we assume, without deciding, that courts do have such discretion, this could not reasonably have suggested to the defendants that an award of § 37-3b interest "alter[s]" the judgment rendered in connection with the jury's award of compensatory damages so as to create a new appeal period under Practice Book § 63-1 (c) (1). Indeed, this court explained years before the defendants' appeal that § 37-3b interest is separate and distinct from compensatory damages awarded by a jury: "[I]nterest pursuant to § 37-3b is computed only after and upon the amount of judgment. It is calculated *after* the trier of fact has calculated the amount of damages . . . . If, within twenty days, the defendant pays the damages awarded, then no interest is due. . . . Interest accrues only if the damages are not paid. An award of interest, therefore, first necessitates a factual finding of a debt now due—a specific liquidated sum due. *Thus, interest awarded pursuant to § 37-3b is in addition to and based upon the amount of damages as determined by the trier of fact. Postjudgment interest, therefore, cannot be an element of damages.*" (Citation omitted; emphasis altered; internal quotation marks omitted.) *Hicks* v. *State*, supra, 297 Conn. 804. A review of *Hicks* should have suggested to the defendants that the plaintiffs' motion for § 37-3b interest did not alter the underlying judgment for purposes of Practice Book § 63-1 (c) (1).

late appeal when the appeal was filed one day after the deadline and the justifications proffered by the appellant in its motion—that the rules of practice governing how to calculate the twenty day appeal period were confusing—were unpersuasive. Id., 211–12. This court explained that there was "no reasonable basis" for the appellant's confusion in light of prior case law and Practice Book § 63-2, which "clearly indicate[d]" the way to calculate the twenty day period. Id.

We disagree with the concurring and dissenting justice's attempts to distinguish *Alliance Partners, Inc.* As in that case, we see no reasonable basis, in light of our prior discussion in this opinion, for the defendants' claimed belief that there was no appealable final judgment when the trial court accepted the verdict on October 28, 2016, or that the plaintiffs' subsequent motion for offer of compromise and postjudgment interest triggered a new appeal period. Additionally, by disallowing an appeal filed just one day after the deadline, even though there is a statutory right to appeal and the twenty day period is not jurisdictional, an inescapable lesson from *Alliance Partners, Inc.*, is that adhering to the Appellate Court's policy of denying untimely appeals in the absence of exceptional circumstances is one that this court takes seriously.

Finally, we disagree with the defendants that the size of the verdict, $4.2 million, renders the Appellate Court's refusal to hear the appeal an abuse of discretion, particularly in light of the wholly inadequate explanations proffered by the defendants for why they failed to appeal until approximately one month after the deadline. To be sure, this court has recognized that an "unyielding policy requiring strict adherence to an appellate limitation period—no matter how severe or unfair the consequences—does not serve the interests

of justice." *Banks* v. *Thomas*, 241 Conn. 569, 586, 698 A.2d 268 (1997). Nonetheless, the principal question is whether the defendants have met their burden of "establish[ing] good cause for [their] failure to file a timely appeal." *Alliance Partners, Inc.* v. *Voltarc Technologies, Inc.*, supra, 263 Conn. 211. They plainly have not done so. Although the gravity of the consequences of a dismissal to the appealing party is not wholly irrelevant to the good cause analysis, we are not persuaded that, under the circumstances of the present case, the size of the verdict, in and of itself, compels the conclusion that the Appellate Court abused its discretion.[18]

In summary, in light of our limited scope of review, the Appellate Court's well known policy of managing its own crowded docket, and the lack of any persuasive justification for the late filing, we cannot conclude that the Appellate Court manifestly abused its broad discretion or worked injustice by determining that the defendants had failed to establish good cause under Practice Book §§ 60-2 (5) and 60-3. See id., 210 ("[r]eversal is required only where an abuse of discretion is manifest or where injustice appears to have been done" (internal quotation marks omitted)). Whether we might have exercised our discretion differently is not the question before us. We reiterate, however, our observation in *Alliance Partners, Inc.*, that our decision in the present case "does not mean . . . that any exercise of discretion by the Appellate Court in denying [a motion for

[18] We note that the concurring and dissenting justice also contends that "the plaintiff[s] did not argue that [they] would have suffered any prejudice or undue delay from the granting of permission to file a late appeal beyond the delay normally associated with a timely filed appeal." We read the plaintiffs' opposition to the defendants' motion to suspend the rules of practice to permit a late appeal, however, as arguing that allowing the late appeal would cause undue delay and that they would be prejudiced because the late appeal would further delay their access to the damages and interest awards, which, given Jenniyah Georges' debilitating injuries, "Jenniyah [Georges] needs now."

permission to file] a late appeal will find a welcoming eye in this court. . . . Our decision in the present case means only that each case must stand or fall on its own merits; and the merits in this case do not persuade us that the Appellate Court abused its discretion." (Citations omitted.) Id., 214–15.

The judgment of the Appellate Court is affirmed.

In this opinion McDONALD, KAHN and ECKER, Js., concurred.

D'AURIA, J., with whom PALMER, J., joins, concurring in part and dissenting in part. I agree with part I A and B of the majority opinion but dissent from part II. Although the court's holdings today in both part I A and B establish or clarify the law in a confusing area of the law, I ultimately agree that the majority properly applies our law and that the defendants' appeal from the judgment on the jury's verdict was untimely. The Appellate Court therefore properly granted the motion filed by the plaintiff Marie Leoma[1] to dismiss that part of the appeal that "relates to the October 28, 2016 judgment . . . ." I disagree with part II of the majority opinion, however, which holds that the Appellate Court properly denied the motion for permission to file a late appeal, which was filed by the defendants, OB-GYN Services, P.C., and Brenda Gilmore. Instead, I believe that the defendants' appeal should be heard on its merits.

The majority holds in part I A and B of its opinion that, after a favorable jury verdict, a plaintiff's motion for interest pursuant to both General Statutes §§ 52-192a (c) (prejudgment offer of compromise interest) and 37-3b (postjudgment interest) neither delays entry of a final judgment for purposes of appeal nor tolls the appeal period pursuant to Practice Book § 63-1 (c) (1)

[1] Although Jenniyah Georges also is a plaintiff, in the interest of simplicity, we refer to Maria Leoma as the plaintiff throughout this opinion.

(motion that, "if granted, would render a judgment, decision or acceptance of the verdict ineffective," creates a new appeal period). Given the circumstances of this case and the confusion that preceded today's decision in this area of appellate practice, I believe that the Appellate Court incorrectly determined that the defendants lacked good cause to justify filing a late appeal. I reach this conclusion fully aware of the deferential standard of review we apply to such rulings of the Appellate Court. Our case law commands that, to call this ruling an error, we must conclude that the Appellate Court abused its discretion. In my view, we should make clear—to ourselves and to the Appellate Court—that, when exercising discretion to accept a late appeal, an appellate court must consider whether there exists an objectively reasonable basis for confusion, uncertainty or mistake about when the appeal period has run or has been tolled. If so, this factor should weigh heavily —if not dispositively—in the balance in determining whether to accept the late appeal. If objectively reasonable good faith confusion exists, and no other factors weigh against granting the motion to file a late appeal—such as prejudice or undue delay beyond the delay normally associated with a timely filed appeal—in my view, an appellate court abuses its discretion by denying a party permission to file a late appeal. For example, if reasonable good faith confusion exists and the only factor weighing against granting permission is docket control, I do not believe an appellate court properly exercises its discretion by denying permission to file a late appeal. Punishing a party by disallowing its appeal from being heard is a drastic sanction when—as in a case like the present one—there was not clear guidance for determining an appeal deadline. Applying a proper standard, I believe that, under the circumstances of this case, it was an abuse of discretion not to grant a motion to file a late appeal.

I

The majority and I do not disagree on the material facts and procedural history that the record discloses. On May 16, 2013, the plaintiff filed an offer of compromise to settle her medical malpractice claim against the defendants for $2 million. The defendants did not accept. On October 28, 2016, the jury returned a $4.2 million verdict in favor of the plaintiff. The trial court accepted the verdict that same day.

On November 8, 2016, during the twenty day appeal period, the plaintiff filed a motion with the trial court seeking offer of compromise interest pursuant to § 52-192a (c) and postjudgment interest pursuant to § 37-3b. No other entries appear on the electronic docket for the next fifteen days: no party filed a pleading, and the court undertook no action. In the plaintiff's view, the defendants would have had to file any appeal by November 17, 2016.

On November 23, 2016—the day before Thanksgiving—the trial court issued an order directing the parties to appear on December 8, 2016, for argument on the plaintiff's motion. The following Monday, November 28, 2016, an entry appeared on the docket, stating, "judgment on verdict for plaintiff."

According to the plaintiff's counsel, the issue the court was to address at the December 8, 2016 hearing was: "[O]n what date does offer of compromise interest stop and does postjudgment interest begin?" Each statute establishes a different interest rate and provides alternate dates for when each type of interest *begins*. However, § 52-192a (c) does not provide for when prejudgment offer of compromise interest *ends*, including in cases in which both types of interest are awarded.[2]

[2] General Statutes § 52-192a (c) provides in relevant part: "After trial the court shall examine the record to determine whether the plaintiff made an offer of compromise which the defendant failed to accept. If the court ascertains from the record that the plaintiff has recovered an amount equal

On December 12, 2016, the trial court issued a decision concluding that the "end date" for calculating offer of compromise interest was the date judgment entered, which it clarified was October 28, 2016, the date the verdict was accepted.[3] This meant that *no* interest would accrue for twenty days after the verdict. Postjudgment interest under § 37-3b would then begin to accrue if the defendants did not satisfy the judgment.[4]

On December 16, 2016, four days after the trial court's ruling on interest, the defendants appealed to the Appellate Court, challenging both that ruling and the jury's ver-

to or greater than the sum certain specified in the plaintiff's offer of compromise, the court shall add to the amount so recovered eight per cent annual interest on said amount . . . . The interest shall be computed from the date the complaint in the civil action or application under section 8-132 was filed with the court if the offer of compromise was filed not later than eighteen months from the filing of such complaint or application. If such offer was filed later than eighteen months from the date of filing of the complaint or application, the interest shall be computed from the date the offer of compromise was filed. . . ."

General Statutes § 37-3b (a) provides in relevant part: "[I]nterest at the rate of ten per cent a year, and no more, shall be recovered and allowed in any action to recover damages for injury to the person, or to real or personal property, caused by negligence, computed from the date that is twenty days after the date of judgment or the date that is ninety days after the date of verdict, whichever is earlier, upon the amount of the judgment."

[3] The trial court indicated that the docket "entry of 'judgment on verdict for plaintiff' entered by the courthouse clerk on November 28, 2016," did not "intend to indicate that the date of judgment was November 28, 2016 . . . ." This was a "misimpression [that] shall be corrected." Under the plaintiff's theory—confirmed by this court's decision today—the defendants' appeal was already twenty-five days late at this belated point of clarity.

[4] The trial court awarded the plaintiff $1,639,496.55 in offer of compromise interest (8 percent), which it determined ran from the date the complaint was filed to the date judgment entered. It also awarded postjudgment interest, to be calculated at 10 percent per year, beginning twenty days from the date of judgment. Thus, under the trial court's order, interest did not run under either theory during the twenty day appeal period. The plaintiff had argued that offer of compromise interest should run from the date the complaint was filed to ninety days following the return of the jury verdict and that postjudgment interest should run from the ninety days following the date of the verdict so that there was no break in the interest.

dict.[5] On December 22, 2016, the plaintiff moved to dismiss the defendants' appeal from the October 28, 2016 judgment on the jury verdict. On December 30, 2016, the defendants opposed the motion and, at the same time, moved the Appellate Court for permission to file a late appeal, pursuant to Practice Book § 60-2 (5).

On February 8, 2017, the Appellate Court granted the plaintiff's motion to dismiss the defendants' appeal, "as it relates to the October 28, 2016 judgment," and denied the defendants' motion for permission to file a late appeal. The defendants filed a petition for certification to appeal with this court, which we dismissed because their appeal to the Appellate Court had not been finally determined. See General Statutes § 51-197f.

The defendants' appeal concerning the trial court's December 16, 2016 interest determinations proceeded, and the Appellate Court affirmed the judgment of the trial court. *Georges* v. *OB-GYN Services, P.C.*, 182 Conn. App. 901, 184 A.3d 840 (2018). The defendants then filed another petition for certification to appeal from the Appellate Court's dismissal of their previous appeal, which we granted. *Georges* v. *OB-GYN Services, P.C.*, 330 Conn. 905, 192 A.3d 426 (2018).

II

The Appellate Court is indisputably the "workhorse" of our appellate system, administering and adjudicating more than 450 appeals annually. See W. Horton & K. Bartschi, "2016 Appellate Review," 90 Conn. B.J. 221, 231 (2017). Without sacrificing fairness, our Appellate Court colleagues handle hundreds more appeals annually than this court, with a dispatch we aspire to emulate. "[A]ppellate tribunals must exercise their discretion to determine

[5] The defendants' preliminary statement of issues indicated that the defendants intended to raise on appeal a claim that the trial court had improperly admitted certain expert testimony and provided the jury with an incorrect instruction on damages.

whether a late appeal should be permitted," and "we review the Appellate Court's decision under the abuse of discretion standard." (Internal quotation marks omitted.) *Alliance Partners, Inc.* v. *Voltarc Technologies, Inc.*, 263 Conn. 204, 210, 820 A.2d 224 (2003). I take seriously both the size of the Appellate Court's caseload and this deferential standard of review. Thus, I would ordinarily be reluctant to conclude that a coordinate appellate tribunal has abused its discretion in enforcing rules regarding the timeliness for taking appeals. Several observations about this standard of review are in order, however, as I undertake to apply it.

First, although we have acknowledged that the Appellate Court has "broad authority to manage its docket"; id., 212; we have provided very little guidance on how that court should go about exercising that discretion, including when it applies the very same rules we apply in determining whether to permit a late filing. We have indicated that an appellate court appropriately considers a "variety of factors," including, but not limited to, the reason for the late filing, the nature of the underlying case, whether the application for permission is opposed, and the interests of judicial economy. See *Janulawicz* v. *Commissioner of Correction*, 310 Conn. 265, 274, 77 A.3d 113 (2013) (application for permission to file late petition for certification to appeal); see also *Ramos* v. *Commissioner of Correction*, 248 Conn. 52, 61–62, 727 A.2d 213 (1999) (petitioner's late appeal fell within Appellate Court's policy of permitting such appeals only in exceptional circumstances). Consistent with these factors, it is also appropriate to consider the extent of any prejudice to the objecting party. See *Meribear Productions, Inc.* v. *Frank*, 193 Conn. App. 598, 606, 219 A.3d 973 (2019) ("allowing the defendants to file a late appeal will not prejudice the plaintiff"); see also *Janulawicz* v. *Commissioner of Correction*, supra, 274–75 ("because there frequently is no material prejudice arising from the

late filing, as we have indicated, we often agree to consider the merits of untimely petitions otherwise in compliance with our rules of practice''). Beyond that, we have provided almost no direction, including in situations in which the timeliness of the filing of an appeal is subject to legitimate question.

It is true that we have stated that the Appellate Court "legitimately has adopted a policy of docket control 'that, in other than exceptional cases, the need to address cases that were filed timely outweighs the need to permit appeals that are in fact late.' " *Alliance Partners, Inc.* v. *Voltarc Technologies, Inc.*, supra, 263 Conn. 212, quoting *Ramos* v. *Commissioner of Correction*, supra, 248 Conn. 61. We have also recognized, however, that "[j]udicial discretion . . . is always a legal discretion, exercised according to the recognized principles of equity." (Internal quotation marks omitted.) *Burton* v. *Browd*, 258 Conn. 566, 569–70, 783 A.2d 457 (2001). This discretion "should be exercised in conformity with the spirit of the law and should not impede or defeat the ends of substantial justice." (Internal quotation marks omitted.) Id., 570. A ruling denying permission to file a late appeal forecloses entirely a party's statutory right to appellate review. We have therefore been careful to note that deference to the Appellate Court "does not mean . . . that any exercise of discretion by the Appellate Court in denying a late appeal will find a welcoming eye in this court." *Alliance Partners, Inc.* v. *Voltarc Technologies, Inc.*, supra, 214. I interpret this to mean that we can and should construe and apply our rules—including rules concerning late appeals—to provide the Appellate Court with appropriate guidance on how to exercise its discretion.

Second, unlike the situation in most instances of a *trial court's* exercise of discretion, we have very little in the record explaining the basis of the Appellate Court's ruling. Other than the cryptic orders granting the plain-

tiff's motion to dismiss (in part) and denying the defendants' motion to permit a late appeal, we do not know precisely how the Appellate Court exercised its discretion, including which of the previous listed factors it considered, how close it found the question or whether it would have permitted a late appeal if any factors were different, such as if the defendants had recognized their mistake earlier and appealed more promptly. I intend no criticism by this observation. Both this court and the Appellate Court routinely and appropriately issue such orders without explanation. Cf. *Meribear Productions, Inc.* v. *Frank*, supra, 193 Conn. App. 599, 602 (published opinion in which Appellate Court exercised discretion to grant, nunc pro tunc, defendants' motion to file late appeal and denying plaintiff's motion to dismiss where defendants improperly filed appeal too early when judgment was not final, which became apparent only after Supreme Court review). However, given that appellate courts must consider a "variety of factors" when ruling on motions to accept late appeals; *Janulawicz* v. *Commissioner of Correction*, supra, 310 Conn. 274; the absence of any explanation for the ruling, in my view, makes entirely deferential review problematic. Said another way, I am reluctant to defer reflexively to discretion exercised in a fashion that is not manifest.[6] Cf. *State* v. *Fernando V.*, 331 Conn. 201, 213, 202

[6] For example, the majority states: "Although there was no prior appellate decision holding that [Practice Book] § 63-1 (c) (1) *does not* apply to this type of motion, the absence of a case directly on point, although something that the Appellate Court could consider, does not mean that there was 'confusion' in the law to such an extent as to render the Appellate Court's refusal to hear a late appeal a manifest abuse of discretion." (Emphasis in original; footnote omitted.) Text accompanying footnotes 16 and 17 of the majority opinion. I will address whether it is appropriate to conclude that the Appellate Court abused its discretion. It is enough for now to point out that we have no idea whether the Appellate Court considered the absence of on point case law or whether it simply enforced deadlines in an uncompromising fashion. Either way, I would conclude that the Appellate Court abused its discretion. Either it did not consider this issue, which should have factored into its decision, or it incorrectly determined that there was not objectively reasonable, good faith confusion.

A.3d 350 (2019) (declining to rule on claim advanced, for first time, on appeal seeking to sustain evidentiary objection at trial because "[w]e cannot determine whether the trial court abused an exercise of discretion that it neither made nor was asked to make").

Finally, and relatedly, unlike when we review a discretionary *trial court* ruling,[7] our review of this discretionary *Appellate Court* ruling does not involve an exercise of discretion entirely unique to the Appellate Court. By that I mean that the deference we afford to the Appellate Court when ruling on a motion to permit a late appeal is not a function of our being ill-equipped to rule on such motions. In fact, this court also rules on motions to dismiss appeals and motions for permission to file late appeals. See, e.g., *Francis* v. *Fonfara*, 303 Conn. 292, 295 n.6, 33 A.3d 185 (2012) (motion for permission to file late writ of error granted after adverse trial court ruling). Rather, the deference we afford our fellow tribunal in the appellate system is rooted in the fact that it handles a greater volume of appeals than this court. Most—but not all—appeals are filed first in the Appellate Court. See General Statutes §§ 51-197a and 51-199. Therefore, it is one thing when reviewing a *trial court's* discretionary ruling to recite the familiar

[7] To cite just two examples, we have explained the need to defer to a trial court's rulings on evidence and awards of attorney's fees because the trial court is in the unique position of having conducted the trial. See, e.g., *State* v. *Collins*, 299 Conn. 567, 593 n.24, 10 A.3d 1005 ("the abuse of discretion standard reflects the context specific nature of evidentiary rulings, which are made in the heat of battle by the trial judge, who is in a unique position to [observe] the context in which particular evidentiary issues arise and who is therefore in the best position to weigh the potential benefits and harms accompanying the admission of particular evidence" (internal quotation marks omitted)), cert. denied, 565 U.S. 908, 132 S. Ct. 314, 181 L. Ed. 2d 193 (2011); *Bobinski* v. *Kalinowski*, 107 Conn. App. 622, 628–29, 946 A.2d 283 ("'we may not alter an award of attorney's fees unless the trial court has clearly abused its discretion, for the trial court is in the best position to evaluate the circumstances of each case' "), cert. denied, 289 Conn. 919, 958 A.2d 150 (2008). Thus, I find distinguishable the cases the majority cites, such as *State* v. *Holley*, 327 Conn. 576, 628, 175 A.3d 514 (2018), which reviewed trial court rulings for abuse of discretion.

refrain that, on appeal, "the question is not whether any one of us, *had we been sitting as the trial judge*, would have exercised our discretion differently." (Emphasis added; internal quotation marks omitted.) *State* v. *Cancel*, 275 Conn. 1, 18, 878 A.2d 1103 (2005). However, I find it harder to disclaim any obligation to scrutinize with some rigor the denial of a motion to permit a late appeal because this court is called on to make similar rulings (albeit not as often). Under these circumstances, one appellate court applying different criteria than another in assessing a late filed appeal borders on the arbitrary.

Our rules require that a party seeking permission to file a late appeal must show good cause for the late filing. See Practice Book § 60-2 (5). An appellate court will customarily allow a late filing if "unusual circumstances" or "exceptional cases" justify granting such permission. (Internal quotation marks omitted.) *Alliance Partners, Inc.* v. *Voltarc Technologies, Inc.*, supra, 263 Conn. 212, 213. Consistent with our case law and our rules of practice, I would hold that an objectively reasonable basis for confusion, uncertainty or mistake about when the appeal period has run, or whether the appeal period has been tolled, must weigh heavily in an appellate court's determination of whether "good cause" justifies permitting a late appeal. Cf. *Morici* v. *Jarvie*, 136 Conn. 370, 371, 71 A.2d 556 (1950) ("[w]here counsel mistakenly but in good faith proceed on the assumption that a finding is necessary, file a request for a finding and draft finding and, under the second provision in [former Practice Book] § 341, do not file assignments of error with the appeal, it certainly would not ordinarily be just to preclude them from filing assignments when they discover that a finding is not necessary, and thus prevent them from prosecuting an appeal"). Although I agree that a delinquent appellant should not "obtain the benefit of the appellate process after contributing to its delay, to the detriment of others with appeals pending who have complied with the rules and

have a right to have their appeals determined expeditiously''; (internal quotation marks omitted) *Alliance Partners*, *Inc.* v. *Voltarc Technologies*, *Inc.*, supra, 213; I do not agree that an objectively reasonable, good faith mistake of law does not constitute good cause in the absence of countervailing factors. If objectively reasonable confusion exists, and no other factor weighs against granting permission to file a late appeal, such as prejudice or undue delay beyond the delay normally associated with a timely filed appeal—in my view, docket control alone does not outweigh this good cause. See footnote 14 of this opinion.

In the present case, in which no prejudice or allegation of undue delay has been raised, beyond the delay normally associated with a timely filed appeal while postjudgment interest is running, and the granting of the appeal would not have caused an undue delay, the Appellate Court either did not consider the defendants' objectively reasonable good faith confusion or determined that the defendants' confusion was either unreasonable or outweighed by the need for docket control. Either way, I conclude on this record that the Appellate Court abused its discretion by denying the defendants permission to file a late appeal.

III

The benchmark against which the majority measures the Appellate Court's denial of the defendants' late appeal is this court's unforgiving decision in *Alliance Partners*, *Inc.*, a case I find entirely distinguishable. The plaintiff filed its appeal in *Alliance Partners*, *Inc.*, a single day late. *Alliance Partners*, *Inc.* v. *Voltarc Technologies*, *Inc.*, supra, 263 Conn. 207. Upon the defendant's motion, the Appellate Court dismissed the appeal and denied the plaintiff permission to file a late appeal. Id. The plaintiff argued that its one day delay in filing the appeal arose from a misunderstanding of law, namely, the plaintiff's

counsel "[mis]read [Practice Book § 63-2] . . . to not include the first and last days of filing for purposes of counting the [twenty day] appeal period. Consequently, [the plaintiff] filed [its] appeal on the [twenty-first] day and not the twentieth day." (Internal quotation marks omitted.) Id., 208.

Central to the court's reasoning rejecting the plaintiff's argument in *Alliance Partners, Inc.*, was that it could "perceive no reasonable basis" for any "assertion of confusion" about the last day for filing an appeal, given that Practice Book 63-2 provides in relevant part: "[I]n determining the last day for filing any [documents] . . . [the] last day shall, and the first day shall not, be counted." (Internal quotation marks omitted.) Id., 211. If there were any doubt, the court noted, consulting "an authoritative treatise on our appellate practice" would havedispelled any confusion, as it "made the same point in clear language. 'In determining the last day for filing papers, the last day is included and the first day is not.' " Id., 212, quoting C. Tait & E. Prescott, Connecticut Appellate Practice and Procedure (3d Ed. 2000) § 4.11, p. 153.

In contrast to the situation in *Alliance Partners, Inc.*, the events that transpired in the present case after the jury's verdict were, in my view, susceptible to reasonable confusion sufficient to constitute "good cause" and to justify the defendants' late appeal. Specifically, as the plaintiff's counsel acknowledged at oral argument before this court, a motion for offer of compromise interest need not be filed during the appeal period and is most often filed after the appeal period. In fact, it is unclear that any motion needs to be filed at all; instead, the court adds offer of compromise interest as a ministerial matter.[8] An arguably unnecessary motion, filed dur-

[8] Section 52-192a (c) contains no mention of either the need for a motion or a time period for a motion for offer of compromise interest to be filed. Instead, it directs the trial court to "examine the record to determine whether the plaintiff made an offer of compromise which the defendant failed to

ing the appeal period and raising new issues concerning calculation of interest, can be viewed objectively as adding confusion to whether the judgment was final. As for postjudgment interest, no appellate court has definitively determined whether the 1997 amendment to § 37-3b[9] makes 10 percent interest in all ways mandatory or whether the trial court retains some discretion over the extent of an award of interest.

In the present case, the plaintiff—the prevailing party—filed a motion seeking awards of *both* types of interest, did so within the twenty day appeal period, and the trial court set the motion down for a hearing. The question posed by the defendants' appeal is whether that motion either (1) delayed the entry of a final judgment, or (2) tolled the appeal period under Practice Book § 63-1 (c).

A

Ultimately, I agree with the majority's well reasoned opinion that a motion for offer of compromise interest neither delays entry of a final judgment nor tolls the appeal period. Specifically, I agree with the majority that offer of compromise interest "does not entail any examination of matters encompassed within the merits of the underlying action" and that interest under § 52-192a (c) is "collateral to the judgment and does not affect its finality for purposes of appeal." We have, at least in dictum, said as much in *Earlington* v. *Anastasi*, 293 Conn. 194, 196 n.3, 976 A.2d 689 (2009). I also agree that a motion for offer of compromise interest is not one that, "if granted, would render the judgment, decision

accept." General Statutes § 52-192a (c). If the plaintiff "has recovered an amount equal to or greater than the sum certain specified in the plaintiff's offer of compromise, the court shall add to the amount so recovered eight per cent annual interest on said amount . . . ." General Statutes § 52-192a (c). Conventionally, counsel often file a motion to assist the trial court with the math.

[9] See footnote 11 of this opinion.

or acceptance of the verdict ineffective"; Practice Book § 63-1 (c) (1); and a trial court's ruling on such a motion therefore does not create a new appeal period. However, as it concerns the defendants' motion for permission to file a late appeal in the present case, two things are true.

First, on the issue of whether a motion for offer of compromise interest tolls the appeal period under Practice Book 63-1 (c), the majority candidly admits that "our research has not revealed any pertinent Connecticut appellate authority . . . ." In fact, to conclude that the plaintiff's motion did not toll the appeal period requires rejecting the application of one of our cases, *In re Haley B.*, 262 Conn. 406, 815 A.2d 113 (2003), and relying solely on the "persuasive" reasoning of a United States Supreme Court case, *Buchanan* v. *Stanships, Inc.*, 485 U.S. 265, 108 S. Ct. 1130, 99 L. Ed. 2d 289 (1988).[10] Moreover, unlike the situation in *Alliance Partners, Inc.*, resort to the rules of practice or a pertinent treatise would not have authoritatively resolved the question. As one prominent treatise states, "[t]his area of the law is like threading a needle." W. Horton & K. Bartschi, Connecticut Practice Series: Connecticut Rules of Appellate Procedure (2019–2020 Ed.) § 61-1, p. 84, authors' comments.

Second, the plaintiff's motion sought *more* than just offer of compromise interest. It also sought postjudgment interest pursuant to § 37-3b. There is also no binding authority on whether a motion for postjudgment interest remains in any way discretionary (at least as

[10] It is true that Practice Book § 17-2 provides that, if no motions pursuant to Practice Book §§ 16-35 and 17-2A are filed, the date of the judgment "shall be the date the verdict was accepted." Section 63-1 (b) provides similarly, pertaining to how notice of a judgment or decision is given. These provisions beg the question, as they do not purport to countermand Practice Book § 63-1 (c), concerning how the filing of certain motions creates a new appeal period.

to the rate of interest) or delays entry of a final judgment.[11] Cf. *Nolan* v. *Milford*, 86 Conn. App. 817, 819, 862 A.2d 879 (2005) (judgment was not final for purpose of appeal until rate of prejudgment interest was determined when General Statutes § 37-3a provided for interest rate of "ten per cent a year, and no more," because trial court retained discretion to determine interest rate). Although I agree with the majority that a motion for postjudgment interest does not alter the judgment under Practice Book § 63-1 (c) (1), I do not believe that this was clear at the time of the plaintiff's postverdict motion in the present case.

But even more particularly—and this is the real final judgment brainteaser—the plaintiff's motion asked the trial court to determine on what date offer of compromise interest at 8 percent (under § 52-192a (c)) ended and postjudgment interest at 10 percent (under § 37-3b) began. At the hearing on this motion, the plaintiff's counsel explained that, because the plaintiff sought awards of both types of interest, "the debate . . . is, on what date does offer of compromise interest stop and does postjudgment interest begin." The trial court decided the question adversely to the plaintiff's posi-

[11] Before 1997, interest pursuant to § 37-3b was discretionary, not mandatory. The statute was amended by Public Acts 1997, No. 97-58, § 2. Although the amended version of § 37-3b was not at issue in *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, 310 Conn. 38, 54, 74 A.3d 1212 (2013), we indicated in that case that this amendment made awards of interest under § 37-3b mandatory on the basis of the legislature's replacement of the term "may" with the term "shall." Id., 42 n.5. Although this court has interpreted this amendment to require an award of interest; id., 48; we have not addressed whether the rate of interest awarded must be 10 percent. The Appellate Court has previously interpreted a similar rate of interest provision to provide the trial court with discretion in setting the interest rate and then determined that this discretion meant that the judgment was not final until the trial court set the interest rate. See *Nolan* v. *Milford*, 86 Conn. App. 817, 819, 862 A.2d 879 (2005) (trial court retained discretion to determine prejudgment interest rate under General Statutes § 37-3a, as long as rate was 10 percent or lower, where statutory interest rate was set at "ten per cent a year, and no more").

tion. See footnote 4 of this opinion. There is at least a straight-faced argument that, until the trial court resolved this issue, which would affect what interest rate applied, a final judgment had not been rendered, especially as it was unclear whether the court retained any discretion in determining the postjudgment rate of interest. Cf. *Nolan* v. *Milford*, supra, 86 Conn. App. 819 (judgment is not final until rate of prejudgment interest under § 37-3a is determined);[12] see also footnote 11 of this opinion.

In fact, the plaintiff's motion itself suggests that the plaintiff might have believed (mistakenly, the majority now makes clear) that judgment had not yet been rendered. Specifically, the plaintiff argued that § 52-192a (c) directs the court to add 8 percent annual interest from the date the complaint was filed "to ninety days following the rendering of the verdict, *which occurs on January 26, 2017*." (Emphasis added.) The quoted language concerning "ninety days following" the verdict appears not in § 52-192a, but in § 37-3b, which provides for the recovery of 10 percent annual interest "computed from the date that is twenty days after the date of judgment or the date that is *ninety days after the date of verdict, whichever is earlier* . . . ." (Emphasis added.) General Statutes § 37-3b (a). The only way for January 26, 2017, to have been the "earlier" date, of course, would be if judgment had not yet been rendered at the time of the plaintiff's motion, as the plaintiff's pleading suggests. If judgment had been rendered on the day of the verdict (October 28, 2016), as the trial court ultimately ruled, November 17, 2016, would have been the "earlier" date (twenty days after the judgment). The plaintiff's own confusion over when judgment was ren-

[12] "Threading the needle" under *Nolan*, the defendants might even have had the better argument on this score. In light of the majority's opinion on this final judgment question, which I join, *Nolan* now seems to be of doubtful precedential value or, at least, should be confined precisely to the facts of that case.

dered for purposes of calculating interest certainly is consistent with the defendants' confusion in determining the correct appeal period.

B

Because there is a need for bright lines in applying our rules, I agree with the majority that the defendants filed their appeal past the appeal deadline, as the majority determines it to be. But the record reflects more than a modicum of confusion (including on the plaintiff's part) about when the judgment became final or whether the appeal period was tolled, which I find reasonable in light of the state of the law at the time the verdict was returned. The plaintiff's motion triggered ongoing proceedings in the trial court, and the parties had been in court together just eight days before the defendants filed their appeal. After the trial court ruled on the plaintiff's motion regarding the proper application of the two interest statutes in play, the defendants appealed promptly (within four days). Neither the plaintiff, the Appellate Court nor the majority suggests that the defendants' arguments that they filed timely are frivolous or that they filed the late appeal in bad faith. Moreover, the plaintiff did not argue that she would have suffered any prejudice or undue delay from the granting of permission to file a late appeal beyond the delay normally associated with a timely filed appeal. See footnote 15 of this opinion. I would hold that it must weigh heavily in an appellate court's determination of whether "good cause" justifies permitting a late appeal when a party has delayed filing an appeal when there is an objectively reasonable basis for confusion, uncertainty or mistake about when the appeal period has run or whether the appeal period has been tolled. In the present case, such good cause existed, and it was an abuse of discretion by the Appellate Court to fail either to consider this good cause or to weigh it properly in light of the absence of any other factors justifying the

court's denial of the defendants' motion for permission to file a late appeal.

In contrast, the majority holds that, although "good cause" may arise from an objectively reasonable mistake of law, the defendants' confusion in the present case was not reasonable. Unlike the situation in *Alliance Partners, Inc.*, in which the appellant could easily have looked at a treatise to determine the last day for filing an appeal, in the present case, this court had to clarify the law to determine when the appeal period began and whether it was tolled. Moreover, *Lucisano* v. *Lucisano*, 200 Conn. 202, 206, 510 A.2d 186 (1986), on which the majority relies for the proposition that a mistake of law regarding the date of judgment does not compel the granting of permission to file a late appeal, is plainly distinguishable from the present case. *Lucisano* did not involve an arguable mistake of law regarding the date of judgment or a tolling of that judgment for appeal purposes. Rather, the plaintiff in *Lucisano*, not recognizing that the trial court had not incorporated a provision of the parties' separation agreement into the judgment of legal separation, attempted to include in his appeal of a ruling more than two years later a challenge to the trial court's error, claiming that the issue was not apparent to him at the time. Id., 205–206. This court held that "[t]he fact that the need for an appeal may not have been evident until after the mandated filing period passed is not a circumstance that impels us to bypass the requirements of our rules of practice." Id., 206. We did not have reason to address whether a reasonable mistake of law regarding the date of judgment compels the court to grant a motion to file a late appeal when no other factors weigh against granting the motion.

The majority suggests that, "[a]lthough there was no prior appellate decision holding that [Practice Book] § 63-1 (c) (1) *does not* apply to this type of motion, the absence of a case directly on point, although something

that the Appellate Court could consider, does not mean that there was 'confusion' in the law to such an extent as to render the Appellate Court's refusal to hear a late appeal a manifest abuse of discretion." (Emphasis in original; footnote omitted.) Text accompanying footnotes 16 and 17 of the majority opinion. We do not know, of course, whether, in exercising its discretion, the Appellate Court in fact considered that there was an absence of a case on point. Nor, in my view, is the question of whether, objectively speaking, there was uncertainty in the law at the time a matter on which we should appropriately defer to the Appellate Court. Rather, given the barren state of the law in light of the record before us, I would conclude that there was objectively reasonable, good faith confusion sufficient to constitute good cause and that the Appellate Court abused its discretion by denying the defendants permission to file a late appeal.

IV

If my position appears lenient to the objective observer, this does not derive from my own charitable spirit. Rather, I take my cues from several legal and policy declarations, including from our case law and rules of practice.

First, the legislature has provided litigants with a statutory right to appeal. See General Statutes §§ 51-197a and 52-263. Although time deadlines in our rules of practice are important, they are not statutory and therefore not a jurisdictional condition of this right. See *Meadowbrook Center, Inc.* v. *Buchman*, 328 Conn. 586, 604, 181 A.3d 550 (2018); *LaReau* v. *Reincke*, 158 Conn. 486, 493–94, 264 A.2d 576 (1969). The twenty day time period in Practice Book § 63-1 (a) for filing an appeal is not mandatory. See, e.g., *Connecticut Light & Power Co.* v. *Lighthouse Landings, Inc.*, 279 Conn. 90, 103, 900 A.2d 1242 (2006). It is directory: Intended to encourage "dispatch in the proceedings . . . ." (Internal quotation

marks omitted.) *Meadowbrook Center, Inc.* v. *Buchman*, supra, 598.[13] Also, although a condition of the right to appeal is that the judgment is "final," it has been left to the courts (and, principally, this court) to flesh out what "final" means. In certain contexts, we have done that with only a modicum of success. See, e.g., *U.S. Bank National Assn.* v. *Crawford*, 333 Conn. 731, 738, 219 A.3d 744 (2019) (discussing "doctrinal confusion" over final judgment rule in application); see also id., 760 (*McDonald, J.*, dissenting) (discussing "murky state of our final judgment jurisprudence").

Clearly, our appellate courts have discretion to permit the late filing of any documents, including appeals. See Practice Book §§ 60-1 and 60-2 (5). This discretion, as in all appellate rules of practice, is to be applied consistent with the very first provision in our appellate rules of practice, which directs: "The design of these rules [of appellate procedure] being to facilitate business and advance justice, they will be interpreted liberally in any appellate matter where it shall be manifest that a strict adherence to them will work surprise or injustice." Practice Book § 60-1. Finally, we have articulated a considered preference for having cases decided on their merits, rather than by the enforcement of nonjurisdictional rules. See, e.g., *Coppola* v. *Coppola*, 243 Conn. 657, 665, 707 A.2d 281 (1998) ("[o]ur practice does not favor the termination of proceedings without a determination of the merits of the controversy where

[13] The plaintiff benefited from similar maxims in this very case. The defendants claimed that the plaintiff's offer of compromise was defective because it cited to the wrong section of our rules of practice. They argued that the trial court should strictly construe the applicable provision of the rules of practice and not award the plaintiff any interest under § 52-192a (c). The plaintiff responded that there was no mandatory rule requiring citation to the rules of practice but, rather, that the rule was directory and that the failure to comply with this directory rule was not fatal, as long as the pleading provided the defendants with sufficient notice. The defendants' argument did not persuade the trial court, and the Appellate Court rejected it in a memorandum decision. See *Georges* v. *OB-GYN Services, P.C.*, supra, 182 Conn. App. 901.

that can be brought about with due regard to necessary rules of procedure'' (internal quotation marks omitted)). I do not agree that, when a litigant presents a nonfrivolous reason for confusion over when it must file an appeal, our justice system does not afford that litigant the grace to file a late appeal when that litigant's judgment turns out to be wrong and no other factors except for docket control justify the denial of permission to file a late appeal. Although we do indeed afford a good deal of discretion to the Appellate Court in managing its docket, a policy of docket control that does not account for good faith, but mistaken, interpretations of the rules does not in my view constitute an appropriate exercise of that discretion. Instead, a policy of docket control in the absence of such countervailing factors, such as prejudice and undue delay, merely constitutes another way of enforcing a de facto jurisdictional appeal period where the legislature has prescribed none.[14]

The holding in the present case means that these defendants accidentally forfeited their statutory right to appeal a $4.2 million judgment against them for mal-

[14] Both the plaintiff and the majority point out that the defendants could have avoided this predicament in a number of ways. Of course, they could have recognized the final judgment and filed a timely appeal, notwithstanding the plaintiff's motion for interest, within the appeal period. They also could have moved to extend the time within which to file an appeal. Or, if there were any doubt, they could have appealed multiple times, as some commentators suggest, and ''let the appellate court judges sort [it] out . . . .'' W. Horton & K. Bartschi, supra, § 61-1, p. 84, authors' comments; see also E. Prescott, Connecticut Appellate Practice and Procedure (5th Ed. 2016) § 4-2:6.2e, p. 245. Putting aside that hedging your bets and following the ''appeal early and often'' approach burdens both our clerks' offices and the opposing party, the defendants obviously wish they *had* taken one of these actions. But that these options would have been more prudent is simply a truism. If all litigants managed to navigate our final judgment case law and our rules of practice successfully, and always filed their appeals timely, there would be no need for a provision permitting the filing of late documents, including appeals, and no need for an appellate court to exercise its discretion to permit late filings. See Practice Book §§ 60-2 and 60-3. The question is whether good cause exists to permit a late appeal when an appeal is *not* timely filed.

practice. The size of this verdict has absolutely nothing to do with my view, just as I am confident it has nothing to do with the majority's or the Appellate Court's considered views. When an objectively reasonable but mistaken understanding of the rules or the case law leads to a late filed appeal, this result would have to be the same whether the appellant were plaintiff or defendant, or a juvenile, criminal or family litigant. I find this inflexibility inconsistent with our rules of practice, which are designed to advance justice. In my view, the complete forfeiture of a party's legislatively provided right to appeal under these circumstances is wildly out of proportion to any procedural violation in the case. Cf. *Ridgaway* v. *Mount Vernon Fire Ins. Co.*, 328 Conn. 60, 71, 176 A.3d 1167 (2018) (sanction of nonsuit must be proportionate to violation); *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, 257 Conn. 1, 17–18, 776 A.2d 1115 (2001) (same).[15]

If the answer to my point of view is that, only by enforcing the rules strictly—or, in this case, allowing the Appellate Court to do so—do we have any hope of securing compliance with those rules, count me as doubtful. Mistakes happen. Misjudgments, too. I do not recognize a system of justice that does not tolerate the potential for imperfection. Rather, this court "eschew[s] a mechanistic interpretation of our appellate rules in recognition of the fact that an unyielding policy requiring strict adherence to an appellate time limitation—no

[15] I am not indifferent to delay in appellate filings. It is possible that, in some cases, a three week delay in filing an appeal might in fact constitute prejudice. In the life of an appeal, that would be a very unusual case, where preargument conferences are scheduled and rescheduled and litigants are (appropriately) afforded extensions of time to file—or correct the filing of—every other document that our rules require. When measured against the forfeiture of a statutory right to appeal, and in consideration of the uncertainty in our final judgment law and the lack of expressed prejudice to the plaintiff, who took no steps in reliance on there *not* having been an appeal, three weeks delay is not significant.

matter how severe or unfair the consequences—does not serve the interests of justice." (Internal quotation marks omitted.) *Alliance Partners, Inc.* v. *Voltarc Technologies, Inc.*, supra, 263 Conn. 213–14. "It is the courts, the legal profession and the public generally, not just the plaintiffs, who are the losers when serious cases like this one fail to be resolved on their merits because of some procedural deficiency." *Hughes* v. *Bemer*, 200 Conn. 400, 405, 510 A.2d 992 (1986) (*Shea, J.*, dissenting).[16]

Nor do I believe that, when there is objectively reasonable confusion over an appeal deadline, parties—counseled or otherwise—will be less careful if my view were to prevail because they can rely on an appellate court to entertain and grant a motion to file a late appeal. That is a dangerous game. Litigants have a great incentive to interpret rules correctly in the first instance. I see no floodgates of late appeals bursting open if appellate courts were to take account of such confusion when considering whether to permit late appeals.

Finally, I do not believe a malpractice action is the answer if an attorney were responsible for the mistake in the present case or in an analogous case. Demonstrating causation or prejudice under such circumstances (i.e., the appeal would have succeeded) is practically impossible. See *Bozelko* v. *Papastavros*, 323 Conn. 275, 284, 147 A.3d 1023 (2016) ("the plaintiff must prove that, in the absence of the alleged breach of duty by her attorney, the plaintiff would have prevailed [in] the underlying cause of action and would have been entitled to judgment" (internal quotation marks omitted)). More-

[16] This court has come a long way since the days of *Hughes* v. *Bemer*, supra, 200 Conn. 400, *Simko* v. *Zoning Board of Appeals*, 206 Conn. 374, 538 A.2d 202 (1988), and *Burton* v. *Planning Commission*, 209 Conn. 609, 553 A.2d 161 (1989). Both this court and the legislature have since acknowledged that "an overly strict adherence" to procedural requirements "would result in unnecessary unfairness." (Internal quotation marks omitted.) *Fedus* v. *Planning & Zoning Commission*, 278 Conn. 751, 768, 900 A.2d 1 (2006).

over, I do not believe that creating the need for another case in our court system "advances justice."

Accordingly, I respectfully concur in part and dissent in part.

ORDERS

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STATE OF CONNECTICUT *v.* GEORGE MICHAEL LENIART

The defendant's petition for certification to appeal from the Appellate Court, 198 Conn. App. 591 (AC 36358), is denied.

Lauren M. Weisfeld, chief of legal services, in support of the petition.

Stephen M. Carney, senior assistant state's attorney, in opposition.

Decided November 10, 2020

DANIEL DIAZ *v.* COMMISSIONER OF CORRECTION

The petitioner Daniel Diaz' petition for certification to appeal from the Appellate Court, 200 Conn. App. 524 (AC 41159), is granted, limited to the following issue:

"Did the Appellate Court properly reject the petitioner's claim that the habeas court had abused its discretion by denying his petition for certification to appeal with respect to the claim that defense counsel at his

second criminal trial rendered ineffective assistance by failing to disclose his role as an active police officer in the state of Connecticut?"

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.

Mitchell S. Brody, senior assistant state's attorney, in opposition.

Decided November 10, 2020

JOHN LEPESKA *v.* COMMISSIONER OF CORRECTION

The petitioner John Lepeska's petition for certification to appeal from the Appellate Court, 200 Conn. App. 903 (AC 42447), is denied.

Peter G. Billings, in support of the petition.

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

Decided November 10, 2020

PHYLLIS LARMEL *v.* METRO NORTH COMMUTER RAILROAD COMPANY

The plaintiff's petition for certification to appeal from the Appellate Court, 200 Conn. App. 660 (AC 42647), is granted, limited to the following issues:

"1. Did the Appellate Court correctly conclude that a judgment rendered after mandatory arbitration pursuant to General Statutes § 52-549u is a 'trial on the merits' that bars a plaintiff from subsequently utilizing the accidental failure of suit statute, General Statutes § 52-592?

"2. Was the plaintiff's failure to request a trial de novo pursuant to General Statutes § 52-549z, following entry of the arbitrator's decision under § 52-549u, a 'matter of form,' as contemplated by § 52-592?"

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

James P. Brennan, in support of the petition.

Beck S. Fineman, in opposition.

Decided November 10, 2020

ROBERT V. PENTLAND III *v.* COMMISSIONER OF CORRECTION

The petitioner Robert V. Pentland III's petition for certification to appeal from the Appellate Court, 200 Conn. App. 296 (AC 42761), is denied.

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

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

James A. Killen, senior assistant state's attorney, in opposition.

Decided November 10, 2020

AMY SILVER *v.* TREVOR SILVER

The defendant's petition for certification to appeal from the Appellate Court, 200 Conn. App. 505 (AC 42777), is denied.

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

Charles D. Ray, in support of the petition.

Yakov Pyetranker, in opposition.

Decided November 10, 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.

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

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

Decided November 10, 2020

STATE OF CONNECTICUT *v.* RICARDO K. WILLIAMS

The defendant's petition for certification to appeal from the Appellate Court, 200 Conn. App. 427 (AC 43226), is denied.

Alice Osedach, assistant public defender, in support of the petition.

Samantha L. Oden, deputy assistant state's attorney, in opposition.

Decided November 10, 2020

DEUTSCHE BANK NATIONAL TRUST COMPANY, TRUSTEE *v.* THOMAS J. SHIVERS, JR., ET AL.

The named defendant's petition for certification to appeal from the Appellate Court, 200 Conn. App. 903 (AC 43336), is denied.

Thomas J. Shivers, Jr., self-represented, in support of the petition.

Adam L. Avallone, in opposition.

Decided November 10, 2020

STATE OF CONNECTICUT *v.* XAVIER RIVERA

The defendant's petition for certification to appeal from the Appellate Court, 200 Conn. App. 487 (AC 43411), is granted, limited to the following issues:

"1. Did the Appellate Court correctly conclude that the trial court did not abuse its discretion in admitting into evidence a compact disc containing an audio recording of a conversation between Alexis Vilar and the defendant?

"2. Did the Appellate Court correctly conclude that the trial court did not abuse its discretion when it directed the jury to disregard the portion of defense counsel's closing argument indicating that the state never had asked an eyewitness, Jesus Rodriguez, to make an in-court identification of the defendant?"

Lisa J. Steele, assigned counsel, in support of the petition.

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

Decided November 10, 2020

CITIBANK, N.A., TRUSTEE *v.* LAURA A. STEIN ET AL.

The named defendant's petition for certification to appeal from the Appellate Court (AC 43230) is denied.

McDONALD, J., would grant the petition.

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

Laura A. Stein, self-represented, in support of the petition.

Christopher J. Picard, in opposition.

Decided November 10, 2020

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CONNECTICUT APPELLATE REPORTS

Vol. 201

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

IN RE D'ANDRE T. ET AL.*
(AC 43883)

Prescott, Suarez and DiPentima, Js.

Syllabus

The respondent mother appealed to this court from the judgments of the trial court terminating her parental rights as to her two minor children and denying her motion to transfer guardianship of them to her sister, B. The trial court determined that, pursuant to statute (§ 17a-112 (j) (3) (B) (i)), the respondent had failed to achieve such a degree of personal

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

rehabilitation as would encourage the belief that within a reasonable time she could assume a responsible position in the children's lives. The court also found that it was not in the children's best interests to transfer guardianship of them to B, as B was not a suitable guardian in light of her having allowed one of the children to be in the respondent's care in contravention of directives by the Department of Children and Families. On appeal, the mother claimed that the trial court denied her a fundamentally fair proceeding by treating her motion to transfer guardianship with less regard than the petitions to terminate her parental rights. She further claimed that this court should exercise its supervisory authority over the administration of justice to require the Superior Court to make certain written findings in all cases in which a court is considering a transfer of guardianship motion and a petition to terminate parental rights concurrently. *Held*:

1. This court had jurisdiction over the respondent mother's appeal, which presented an actual, justiciable controversy, notwithstanding the assertion by the petitioner, the Commissioner of Children and Families, that the appeal should be dismissed because the mother's request for a new procedural rule was not tethered to any actual controversy and she did not claim that the trial court erred in its decisions on the termination petitions or the motion to transfer guardianship; in light of the mother's contention that the trial court's failure to rule on her motion to transfer guardianship prior to ruling on the termination of parental rights petitions created an appearance that the court's default preference was to terminate her parental rights, the requirements of justiciability were satisfied, as there was an actual live controversy as to whether the court properly handled the motion to transfer guardianship, the parties' interests were adverse, and this court was capable of adjudicating whether the trial court properly considered the mother's motion, which could result in practical relief to her.

2. This court declined to exercise its supervisory authority over the administration of justice to adopt the respondent mother's proposed procedural rule, which implicated a policy consideration best addressed by the legislature, as the mother's proposed rule would not create a new procedural rule but would ask this court to rewrite the statutory (§ 46b-129 (j) (3)) scheme controlling transfer of guardianship motions when the legislature is better suited to gather and to assess the facts necessary to make that policy determination; the failure to adopt the mother's proposed rule did not implicate the fairness of the proceeding and would not enhance public confidence in the integrity of the judicial system, as there was no evidence of pervasive, significant problems or conduct that threatened the sound administration of justice, and, under the existing statutory (§ 17a-112 (k) (4)) scheme, the trial court, having been obligated to make certain written findings concerning guardians when considering a petition for the termination of parental rights, made such

written findings on the motion to transfer guardianship and explained why it did not believe that B was a suitable guardian.

Argued October 5—officially released November 17, 2020**

Procedural History

Petitions by the Commissioner of Children and Families to terminate the parental rights of the respondents as to certain of their minor children, brought to the Superior Court in the judicial district of Hartford and transferred to the judicial district of Middlesex, Child Protection Session at Middletown, where the matter was tried to the court, *Hon. Barbara M. Quinn*, judge trial referee; thereafter, the court denied the respondent mother's motion to transfer guardianship; judgments terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Affirmed.*

Albert J. Oneto IV, assigned counsel, for the appellant (respondent mother).

Evan O'Roark, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (petitioner).

Opinion

DiPENTIMA, J. The respondent mother, Debralee B.,[1] appeals from the judgments of the trial court terminating her parental rights as to her two minor children on the ground that she failed to achieve a sufficient degree of personal rehabilitation pursuant to General Statutes § 17a-112 (j) (3) (B) (i). On appeal, the respondent does not challenge the underlying factual findings of the trial

** November 17, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] Because only the respondent mother has appealed from the judgments terminating her parental rights; see footnote 3 of this opinion; our references in this opinion to the respondent are to the mother.

court but claims that the court denied her a fundamentally fair proceeding by treating her motion to transfer guardianship to her sister, Carmen B., with less regard than the petitions to terminate her parental rights. The respondent urges us to use our supervisory authority over the administration of justice to reverse the judgments terminating her parental rights and denying her motion to transfer guardianship, to award her a new trial, and to obligate the trial court to apply a new procedural rule that would require the Superior Court to make certain written findings in all cases in which a court is considering a transfer of guardianship motion and a petition to terminate parental rights concurrently. We decline to exercise our supervisory authority, and, accordingly, affirm the judgments of the trial court.

The following facts, as found by the trial court, and procedural history are relevant to this appeal. The respondent has two minor children, D'Andre T. and D'Ziah D. The Department of Children and Families (department) first became involved with the respondent in October, 2015, after receiving a report that she was fighting with D'Andre's father on the street and that D'Andre had been left at home alone. The department substantiated the report and referred the respondent for ongoing services. Following additional incidents in April, 2016, the petitioner, the Commissioner of Children and Families, initiated neglect proceedings. D'Andre was removed from the respondent's care pursuant to an order of temporary custody on June 24, 2016, and was placed with his maternal aunt, Carmen B., on June 26, 2016. D'Andre continued to reside with Carmen B., and, on September, 27, 2016, he was adjudicated neglected and committed to the care and custody of the petitioner.

While the case involving D'Andre was pending, the respondent gave birth to D'Ziah. When D'Ziah was born,

both the respondent and D'Ziah tested positive for phencyclidine (PCP). The petitioner filed a petition of neglect and a motion for an order of temporary custody on October 21, 2016. D'Ziah was removed from the respondent's care at the hospital, and she was placed in the care of a family friend. She was adjudicated neglected on July 31, 2017, and committed to the care and custody of the petitioner. D'Andre later was placed with his sister in the same household after Carmen B. violated the department's requirements for his care by allowing the respondent to have two unsupervised visits with D'Andre. At one of those visits, the police became involved.

The court ordered specific steps with which the respondent was required to comply for reunification with D'Andre and D'Ziah. The respondent complied with these specific steps only sporadically and repeatedly failed to use the services the department offered to her. She also continued to use PCP. Although she participated in visits with her children supervised by the department, the visits did not go well. The respondent often behaved inappropriately, and D'Ziah had to be taken to a hospital after the respondent handled her too roughly during one visit.

On February 8, 2018, the petitioner filed petitions to terminate the respondent's parental rights with respect to both children on the ground that the respondent had failed to achieve a sufficient degree of personal rehabilitation that would encourage the belief that, within a reasonable time, she could assume a responsible position in the lives of her children. The court consolidated the petitions with a motion to transfer guardianship to Carmen B., which the respondent filed on November 30, 2017, prior to the filing of the petitions to terminate her parental rights.[2]

[2] The respondent's motion to transfer guardianship to Carmen B. was the last of three motions to transfer guardianship that she had filed prior to the filing of the petitions to terminate her parental rights. It appears that the respondent filed her first motion to transfer guardianship on June 5, 2017,

A trial was held on four nonconsecutive days in April, May, and November, 2019. On December 3, 2019, the court, in a thorough memorandum of decision, granted the termination petitions as to the respondent.[3] The court found, by clear and convincing evidence, that the respondent had "not made sufficient progress for a long enough period of time to assume that she is stable, had adequately addressed her mental health difficulties, including through the use of medication and is free of PCP permanently. There is no evidence of such changes in her behavior and outlook to support the claim that she could reasonably safely care for her children, now or in the future." Accordingly, the court found that the petitioner had proven that the respondent had failed to achieve a sufficient degree of personal rehabilitation pursuant to § 17a-112 (j) (3) (B) (i).

In the dispositional phase of the proceedings, the court made detailed findings on the seven criteria set out in § 17a-112 (k) as to the best interests of the children.[4] On the basis of these findings, the court concluded that terminating the respondent's parental rights

but it is unclear from the record to whom she was seeking to transfer guardianship and if the court ever ruled on her motion. The respondent filed her second motion to transfer guardianship on August 22, 2017, in which she sought to transfer guardianship to a family friend, Quetcy R. On October 26, 2017, the court, *Dyer*, *J.*, denied the motion on the ground that it was not in the children's best interests to transfer guardianship to Quetcy R. Thereafter, the respondent filed the motion to transfer guardianship to Carmen B. on November 30, 2017.

[3] The court also granted the petitions as to the fathers of D'Andre and D'Ziah. The court granted the petition as to D'Ziah's father on the basis of his consent to the termination of his parental rights. The court granted the petition as to D'Andre's father on the grounds of abandonment and failure to have an ongoing parent-child relationship with D'Andre. Neither father has appealed.

[4] General Statutes § 17a-112 (k) sets out the following factors: "Except in the case where termination of parental rights is based on consent, in determining whether to terminate parental rights under this section, the court shall consider and shall make written findings regarding: (1) The timeliness, nature and extent of services offered, provided and made available to the parent and the child by an agency to facilitate the reunion of

with respect to D'Andre and D'Ziah was in their best interests. The court also addressed the respondent's motion to transfer guardianship. The court determined that Carmen B. was not a suitable guardian for the respondent's children, citing her past conduct in allowing D'Andre to be in the respondent's care in contravention of the department's directives. The court also found that it was not in the best interests of the children to transfer guardianship to Carmen B. and, therefore, denied the respondent's motion to transfer guardianship. This appeal followed.

On appeal, the respondent does not argue that the court's factual findings were erroneous, nor does she claim that the court failed to comply with its statutory obligations to make findings on the seven criteria enumerated in § 17a-112 (k). Instead, the respondent contends that the court should have ruled on her motion to transfer guardianship prior to ruling on the petitions to terminate her parental rights and that the court

the child with the parent; (2) whether the [department] has made reasonable efforts to reunite the family pursuant to the federal Adoption and Safe Families Act of 1997, as amended from time to time; (3) the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order; (4) the feelings and emotional ties of the child with respect to the child's parents, any guardian of such child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties; (5) the age of the child; (6) the efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest of the child to return such child home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions, and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child; and (7) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent."

treated her motion with inadequate consideration. The respondent urges us to use our supervisory authority to reverse the judgments terminating her parental rights and to adopt a new procedural rule, to be applied on remand, requiring the Superior Court to make certain written findings in all cases in which the court is considering a transfer of guardianship motion and a petition to terminate parental rights concurrently. Specifically, pursuant to the respondent's proposed procedural rule, a trial court, when considering whether a guardian is " 'suitable and worthy,' " would be required to articulate written findings as to whether the guardian has the ability "[1] to show love and affection for the child, [2] to protect the child's health, education, and welfare, [3] to provide the child with food, clothing, medical care, and a domicile, and [4] to oversee the child's social and religious guidance." The court would then need to make detailed written findings addressing whether the transfer of guardianship is in the child's best interest. For this determination, the respondent proposes that the court should consider whether "[1] the placement will foster the child's sustained growth, development, well-being, and stability of environment, [2] the child would benefit from ongoing contact with a parent or the parent's extended family, to include the family's history, tradition, and culture, [3] there is any potential detriment to the child by terminating parental rights, and [4] the placement is outweighed by the benefit to the child of being placed in a stable adoptive home if the termination petition is granted."[5] The respondent claims that adopting such a procedural rule would guide

[5] The respondent derived her proposed "suitable and worthy" factors from *In re Isaiah J.*, 52 Conn. Supp. 485, 72 A.3d 446 (2011), aff'd, 141 Conn. App. 474, 62 A.3d 635, cert. denied, 308 Conn. 936, 66 A.3d 498, cert. denied sub nom. *Katherine D.* v. *Katz*, 571 U.S. 937, 134 S. Ct. 359, 187 L. Ed. 2d 249 (2013), and her proposed best interest of the child factors from *In re Dependency of A.C.*, 123 Wn. App. 244, 98 P.3d 89 (2004).

the trial court "in deciding matters that involve conflicting permanency options for children in foster care,[6] one by transfer of guardianship to a relative, and the other by termination of parental rights and adoption, where the court would be required to demonstrate through written findings that it has considered all relevant probative criteria bearing upon the transfer of guardianship as a less restrictive means of permanency . . . ." (Footnote added.) According to the respondent, such a rule is desirable because it would "assure the litigants and the public that the judiciary's default preference is not to terminate parental rights but to promote legislative policies favoring the placement of children in foster care with relatives."

In response, the petitioner argues that we should dismiss the respondent's appeal because her request for a new procedural rule is not connected to any actual controversy in that she is not challenging the termination of her parental rights. The petitioner further contends that, to the extent that we decide to review the respondent's claim, we should decline to exercise our supervisory authority because there are no exceptional circumstances in the present case warranting the use of such powers. We disagree with the petitioner's claim that the appeal should be dismissed but agree that we should not exercise our supervisory authority.

I

We first turn to the issue of whether we have jurisdiction over the respondent's appeal. The petitioner contends that we should dismiss her appeal because the

[6] Pursuant to General Statutes § 45a-604 (8), "permanent guardianship" is defined as "a guardianship . . . that is intended to endure until the minor reaches the age of majority without termination of the parental rights of the minor child's parents . . . ." It thus appears that guardianship can be a permanency option for children in foster care. We note that the respondent, however, did not move to have Carmen B. named as the permanent guardian of her children in her motion for transfer of guardianship. Instead, it appears that the respondent was seeking to transfer guardianship to Carmen B. on a temporary basis.

respondent's request for a new procedural rule is not tethered to any actual controversy. In the petitioner's view, the respondent does not claim that the trial court erred in making its decision either on the termination of parental rights petitions or on the motion to transfer guardianship. Consequently, the petitioner claims that the respondent is asking this court to issue an advisory opinion. We do not agree.

We begin by setting forth our standard of review. "Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable. . . . Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant. . . . A case is considered moot if [the trial] court cannot grant the appellant any practical relief through its disposition of the merits . . . ." (Internal quotation marks omitted.) *In re Egypt E.*, 322 Conn. 231, 241, 140 A.3d 210 (2016). "Under such circumstances, the court would merely be rendering an advisory opinion, instead of adjudicating an actual, justiciable controversy." (Internal quotation marks omitted.) *St. Juste* v. *Commissioner of Correction*, 328 Conn. 198, 208, 177 A.3d 1144 (2018).

The respondent's claims on appeal demonstrate that there is an actual, justiciable controversy. Here, the respondent contends that the court erred in its handling of her motion to transfer guardianship to Carmen B. Specifically, she argues that the court should have ruled on her motion prior to ruling on the termination of parental rights petitions. She contends that the court's failure to do so denied her a fundamentally fair proceeding by creating an appearance that its default preference

was to terminate her parental rights. She further claims that the court's memorandum of decision, which disposed of her motion to transfer guardianship in eleven sentences, reflects that it treated her motion with less consideration than the termination of parental rights petitions. Moreover, due to these perceived errors, the respondent asks this court to reverse the judgments of the trial court, to award her a new trial, and to obligate the trial court to apply her proposed procedural rule.

In light of the respondent's claims of error and request for relief, we conclude that the respondent's appeal presents an actual, justiciable controversy. We conclude that the justiciability requirements have been satisfied because (1) there is an actual live controversy between the respondent and the petitioner as to whether the trial court properly handled the respondent's motion to transfer guardianship, (2) the parties' interests are adverse, with the respondent asserting that the court should have ruled on her motion to transfer guardianship first and the petitioner asserting that the court's consideration of her motion was proper, (3) this court is capable of adjudicating whether the court properly considered the respondent's motion, and (4) our determination of whether the court properly handled her motion could result in practical relief to the respondent if we were to conclude that the court erred and we adopt her proposed procedural rule. See *In re Egypt E.*, supra, 322 Conn. 241.

We are unpersuaded by the petitioner's argument to the contrary. Although our Supreme Court declined to exercise its supervisory authority in the cases that the petitioner cites, the court declined to do so, not because it concluded that it did not have jurisdiction over the appeal, but because it determined that the exercise of its supervisory authority was unnecessary. See, e.g., *State* v. *Weatherspoon*, 332 Conn. 531, 553, 212 A.3d 208 (2019) (declining to establish rule when no such

injustice occurred in case); *State* v. *Castillo*, 329 Conn. 311, 337, 186 A.3d 672 (2018) (declining to exercise supervisory authority when facts of defendant's case did not give rise to purported issue and defendant failed to demonstrate that issue was pervasive problem). Accordingly, we have jurisdiction over the respondent's appeal.

II

We now turn to the issue of whether we should exercise our supervisory authority to adopt the new procedural rule proposed by the respondent. Because we conclude that the proposed procedural rule implicates policy considerations better considered by the legislature, we decline to do so.

"Supervisory authority is an extraordinary remedy that should be used sparingly . . . . Although [a]ppellate courts possess an inherent supervisory authority over the administration of justice . . . [that] authority . . . is not a form of free-floating justice, untethered to legal principle . . . . Our supervisory powers are not a last bastion of hope for every untenable appeal. They are an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole . . . . Constitutional, statutory and procedural limitations are generally adequate to protect the rights of the [litigant] and the integrity of the judicial system. Our supervisory powers are invoked only in the rare circumstance [in which] these traditional protections are inadequate to ensure the fair and just administration of the courts. . . . Overall, the integrity of the judicial system serves as a unifying principle behind the seemingly disparate use of our supervisory powers. . . . Thus, we are more

likely to invoke our supervisory powers when there is a pervasive and significant problem . . . or when the conduct or violation at issue is offensive to the sound administration of justice . . . ." (Internal quotation marks omitted.) *DeChellis* v. *DeChellis*, 190 Conn. App. 853, 870–71, 213 A.3d 1, cert. denied, 333 Conn. 913, 215 A.3d 1210 (2019).

We decline the respondent's invitation to exercise our supervisory authority in the present case. Matters pertaining to child protection, including the termination of parental rights, are heavily regulated by statute, and our legislature has crafted specific requirements that courts must comply with when determining, for example, whether to terminate parental rights. Pursuant to § 17a-112 (k), a court hearing a petition for the termination of parental rights is required to make specific written findings on seven criteria. The legislature, however, has not enacted a similar requirement for courts deciding a motion for transfer of guardianship. Transfer of guardianship motions are adjudicated pursuant to subsection (j) of General Statutes § 46b-129. *In re Avirex R.*, 151 Conn. App. 820, 833, 96 A.3d 662 (2014). Section § 46b-129 (j) (3) provides in relevant part that, "[i]f the court determines that the commitment should be revoked and the child's or youth's legal guardianship or permanent legal guardianship should vest in someone other than the respondent parent, parents or former guardian, or if parental rights are terminated at any time, there shall be a rebuttable presumption that an award of legal guardianship or permanent legal guardianship . . . shall be in the best interests of the child or youth and that such caregiver is a suitable and worthy person to assume legal guardianship or permanent legal guardianship . . . ."

As indicated by the clear language of § 46b-129 (j) (3), the court is not required to make specific findings on certain enumerated criteria when ruling on a motion

for transfer of guardianship. The rule that the respondent is asking us to adopt, which specifies eight criteria on which trial courts would be required to make written findings, would not be creating a new procedural rule, but, rather, would be asking us to rewrite the statutory scheme controlling transfer of guardianship motions. "It is not a proper function of this [court] to rewrite statutes." *State* v. *Lee*, 30 Conn. App. 470, 484, 620 A.2d 1303 (1993), aff'd, 229 Conn. 60, 640 A.2d 553 (1994). The legislature is better suited to gather and to assess the facts necessary to make this policy determination, and we defer to that branch of our government. See *State* v. *Moore*, 334 Conn. 275, 278–79, 221 A.3d 40 (2019) (noting reluctance to exercise supervisory authority when legislature already had acted in area of respondent's proposed procedural rule); *State* v. *Lockhart*, 298 Conn. 537, 577, 4 A.3d 1176 (2010) (deferring to legislature and declining to exercise supervisory power).

The procedural rule that the court adopted in *In re Yasiel R.*, 317 Conn. 773, 120 A.3d 1188 (2015), the main case on which the respondent relies in arguing that we should exercise our supervisory authority, is distinguishable from the rule that the respondent asks us to adopt here. In *In re Yasiel R.*, our Supreme Court invoked its supervisory authority to adopt a procedural rule requiring a brief canvass of all parents immediately before a parental rights termination trial. Id., 794. During the canvass, respondents would be advised, in part, of the nature and legal effect of a termination of parental rights proceeding, their ability to confront and to cross-examine witnesses, their right to representation by counsel, and their right to present evidence opposing the allegations. Id., 795. In adopting this procedural rule, our Supreme Court noted that the lack of such a canvass may give the appearance of unfairness "insofar as it may indicate a lack of concern over a parent's rights and understanding of the consequences of the

proceeding." Id., 794. Our Supreme Court concluded that "public confidence in the integrity of the judicial system would be enhanced by a rule requiring a brief canvass of all parents immediately before a parental rights termination trial so as to ensure that the parents understand the trial process, their rights during the trial and the potential consequences." Id. The court also stated that courts frequently canvass parties in other circumstances, such as when a criminal defendant waives his or her right to a jury trial and when a criminal defendant wishes to represent himself or herself, and that a canvass would neither materially delay the termination proceeding nor unduly burden the state. Id., 795–96. Accordingly, our Supreme Court concluded that imposing the canvass rule was an appropriate exercise of its supervisory authority. Id., 796.

The considerations that led the court in *In re Yasiel R.* to invoke its supervisory authority are not present here. Unlike the proposed rule presently before us, the procedural rule from *In re Yasiel R.* did not require the court, in effect, to rewrite a statutory scheme. The procedural rule that the court adopted there "merely constitute[d] an advisement to [respondents] of [their] rights regarding the trial" and did not effect a change in the substantive law of child protection. Id., 795. In the present case, the failure to adopt the respondent's proposed procedural rule also does not risk creating the appearance of unfairness. The proposed rule does not implicate the fairness of the proceeding itself, and would not enhance public confidence in the integrity of the judicial system by ensuring that parties to a termination and guardianship proceeding understand the trial process, their rights during trial, and the potential consequences. Moreover, under the existing statutory scheme, the trial court is obligated to make certain written findings concerning guardians when considering a petition for the termination of parental rights.

Specifically, the court is required to make written findings on the feelings and emotional ties of the child with respect to his or her parents and guardians. See General Statutes § 17a-112 (k) (4). It thus cannot be said that the respondent's proposed rule is necessary to ensure that courts properly and fairly consider transfer of guardianship motions raised concurrently with a petition for the termination of parental rights. Indeed, the trial court here made written findings on the respondent's motion and explained why it did not believe that Carmen B. was a suitable guardian. In light of these considerations, *In re Yasiel R.* is distinguishable. This simply is not the occasion to invoke the extraordinary remedy of our supervisory authority where the proposed procedural rule implicates a policy consideration best addressed by the legislature and there is no evidence of pervasive, significant problems[7] or conduct that threatens the sound administration of justice. Accordingly, we decline to exercise our supervisory authority to adopt the respondent's proposed procedural rule.

The judgments are affirmed.

In this opinion the other judges concurred.

JOHN DOE *v.* STEPHEN FLANIGAN ET AL.
(AC 42567)

Elgo, Bright and Moll, Js.*

Syllabus

The plaintiff sought to recover damages from, inter alia, the defendant city of Waterbury for injuries that he suffered when F, a former police officer employed by the city, allegedly pushed the plaintiff to the ground and

[7] The respondent has conceded that the number of cases to which the rule would apply is likely to be " 'extremely small.' "

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

handcuffed him, and a third party, C, assaulted the plaintiff by placing a sex toy against his buttocks. The plaintiff's operative complaint alleged, inter alia, that the city was liable pursuant to statute (§ 52-557n) for the damages he sustained as a result of F's negligence. The court rendered partial summary judgment in favor of the city, concluding that there were no genuine issues of material fact as to whether F had engaged in wilful, rather than negligent misconduct, and that the identifiable victim subject to imminent harm exception to governmental immunity did not apply to the plaintiff's allegation that F failed to protect him from C's sexual assault. Subsequently, the plaintiff withdrew his remaining claims and appealed to this court. *Held*:

1. The trial court erred in granting the city's motion for summary judgment as to the plaintiff's claim that F negligently pushed him to the ground and handcuffed him: the plaintiff proffered sufficient evidence to demonstrate the existence of genuine issues of material fact with respect to whether F's conduct was wilful or negligent, as a reasonable jury could have concluded that the plaintiff was willingly handcuffed by F and was not, as the court concluded, an unwilling participant, there was an issue as to whether F was demonstrating the professional use of handcuffs on the plaintiff, and there was evidence in the record that F had shown a pattern of poor judgment while acting in his duties as a police officer, and the fact that F's use of handcuffs was in violation of the city's policy did not make his conduct per se wilful; moreover, the city's claim that this court should affirm the trial court's judgment on the alternative ground that F was not acting within the scope of his employment when he pushed the plaintiff to the ground and handcuffed him was unavailing, as there was evidence in the record that F was acting within his period of employment, the location of the assault was within F's normal jurisdiction, F frequently visited this location both while on and off duty and, at the time of the assault, F was on his way to an activity related to his role as a police officer in which he often demonstrated the use of handcuffs and he was dressed in full police uniform issued by the city, including his duty belt with his handcuffs and weapons.
2. The trial court erred in rendering summary judgment in favor of the city on the basis that there was no genuine issue of material fact as to whether it was apparent to F that the plaintiff was an identifiable victim subject to imminent harm, as the city never raised this defense in its motion; the city argued only that F's conduct was wilful and outside the scope of his employment and, thus, the plaintiff never had the opportunity or reason to make the argument that this exception to discretionary act immunity applied.

Argued June 19—officially released November 24, 2020

Procedural History

Action to recover damages for, inter alia, the named defendant's alleged negligence, and for other relief,

brought to the Superior Court in the judicial district of Waterbury, where the plaintiff filed an amended complaint; thereafter, the plaintiff filed a second amended complaint; subsequently, the court, *Shah*, *J.*, granted in part the motion for summary judgment filed by the defendant city of Waterbury and rendered judgment thereon; thereafter, the plaintiff withdrew his remaining claims and appealed to this court. *Reversed; further proceedings*.

Christopher DeMarco, for the appellant (plaintiff).

Daniel J. Foster, corporation counsel, for the appellee (defendant city of Waterbury).

Opinion

BRIGHT, J. This appeal arises out of an incident in which a third party, Charles Fullenwiley, assaulted the plaintiff, John Doe,[1] by placing a sex toy against his buttocks after the named defendant, Stephen Flanigan, at the time a police officer employed by the defendant city of Waterbury, allegedly pushed the plaintiff to the ground and handcuffed him.[2] The plaintiff appeals from the summary judgment rendered by the trial court in favor of the defendant on the fourth count of the plaintiff's second amended complaint, which alleged that, pursuant to General Statutes § 52-557n, the defendant was liable to the plaintiff for the injuries he sustained arising out of Flanigan's negligent conduct.[3] The fourth

[1] We note that the present action was commenced on behalf of John Doe, a minor child, by and through his parent, Jane Doe, as next friend. Thereafter, when John Doe reached the age of majority, he amended the complaint to delete the allegation that the claims were brought by his parent in a representative capacity. All references herein to the plaintiff are to John Doe.

[2] Flanigan is not a party to this appeal. Therefore, we refer to the city of Waterbury as the defendant throughout this opinion.

[3] In his four count second amended complaint, the plaintiff brought three counts against Flanigan, alleging that Flanigan (1) falsely arrested the plaintiff, (2) participated in the sexual assault of the plaintiff, and (3) was negligent in his interaction with the plaintiff. The plaintiff subsequently settled all of his claims against Flanigan.

count of the plaintiff's complaint incorporated the allegations of the third count, which alleged that Flanigan acted negligently when he (1) pushed the plaintiff to the ground and handcuffed him, (2) failed to protect the plaintiff from Fullenwiley's assault, and (3) failed to report Fullenwiley's assault. On appeal, the plaintiff claims that the court erred in concluding that there were no genuine issues of material fact as to whether (1) Flanigan engaged in wilful, rather than negligent, misconduct when he pushed the plaintiff to the ground and handcuffed him, and (2) the identifiable victim subject to imminent harm exception to governmental immunity did not apply to the plaintiff's allegation that Flanigan failed to protect the plaintiff from being sexually assaulted by Fullenwiley.[4] Additionally, the defendant argues that we can affirm the judgment of the trial court on the alternative ground that Flanigan was not acting within the scope of his employment, and, therefore, the defendant could not be liable.

As to the first issue raised by the plaintiff, we conclude that there are genuine issues of material fact as to whether Flanigan's conduct was wilful or negligent. We also reject the defendant's claimed alternative ground for affirmance because there are genuine issues of material fact as to whether Flanigan, in fact, was acting within the scope of his employment when he pushed the plaintiff to the ground and handcuffed him. As to the second issue raised by the plaintiff, we conclude that the court improperly rendered summary judgment on a ground not argued before it. Consequently, we reverse the judgment of the trial court.

The following facts, viewed in the light most favorable to the plaintiff, and procedural history are relevant

[4] The trial court denied the defendant's motion for summary judgment as to the plaintiff's failure to report allegation. Subsequently, the plaintiff withdrew that part of his negligence claim against the defendant.

to our resolution of the plaintiff's claims. At all times relevant to this appeal, the plaintiff was a minor under sixteen years of age, and Flanigan was employed by the defendant as a police officer. Flanigan took part in the Police Explorers, a program run by the Waterbury Police Department in which young people between the ages of fourteen and twenty-one would meet at the Waterbury Police Department on a monthly basis in order to learn more about becoming police officers. As part of the program, Flanigan frequently handcuffed juveniles as a way to demonstrate the use of handcuffs.

Beginning in July, 2005, the plaintiff worked with Fullenwiley at his place of business, an electronics store in Waterbury called World Technology. Flanigan, who had been friends with Fullenwiley since 2003, frequently visited the store to "hang out," often doing so while on duty. While at the store, Flanigan would "horse around" with the young people there, among whom were Fullenwiley's son and the plaintiff. In addition to horseplay, Flanigan, on more than one occasion, would handcuff young people at the store "because they wanted to see what it was like."

In the spring of 2006, Flanigan stopped at World Technology on his way to the Police Explorers. The plaintiff, while at World Technology, asked Flanigan to demonstrate the use of his handcuffs. Flanigan pushed the plaintiff to the ground and handcuffed him. While the plaintiff was restrained on the ground, Fullenwiley kneeled on his back and pushed a sex toy against his buttocks. Flanigan watched this incident unfold and took photographs of Fullenwiley and the plaintiff. In October, 2009, the plaintiff commenced the underlying action against Flanigan and the defendant for the injuries that he sustained arising out of this incident.

On January 22, 2015, the plaintiff filed the operative four count complaint (second amended complaint)

against Flanigan and the defendant. In the first and second counts, the plaintiff alleged that Flanigan falsely arrested the plaintiff and participated in a sexual assault against him. In the third count, the plaintiff alleged that Flanigan was negligent in pushing the plaintiff to the ground and handcuffing him, failing to protect the plaintiff from a sexual assault, and failing to report the sexual assault. Counts one through three subsequently were settled as against Flanigan himself, leaving only the fourth count of the complaint, which was brought against the defendant. In the fourth count, which incorporated by reference paragraphs 1 through 13 of the third count, the plaintiff alleged that, pursuant to § 52-557n, the defendant was liable to the plaintiff for the carelessness and negligence of Flanigan. The specific allegations of negligence in the third count at issue are as follows:

"6. . . . Flanigan would occasionally engage in 'horseplay' with minors at World Technology and would demonstrate the use of handcuffs to the minors present at World Technology.

"7. In the spring of 2006, while the plaintiff was at World Technology . . . Flanigan, in an attempt to demonstrate the use of handcuffs, pushed the plaintiff to the ground and put his handcuffs on the plaintiff.

"8. While the plaintiff lay on his stomach, and without . . . Flanigan knowing what was about to happen . . . Fullenwiley kneeled on the plaintiff's back and placed a [sex toy] against the plaintiff's buttocks.

"9. . . . Fullenwiley was ultimately arrested and convicted for various criminal offenses, among them the above-described incident.

"10. When . . . Flanigan observed Fullenwiley place a [sex toy] against the plaintiff's buttocks, he knew or should have known that . . . Fullenwiley's conduct

was illegal and that as a police officer, he had a duty to protect the minor plaintiff from such conduct, yet he failed to take any law enforcement action whatsoever.

"11. As a police officer . . . Flanigan was mandated to report incidents of child sexual abuse to the Department of Children and Families, thus making such a report nondiscretionary, yet he failed to make such a report.

"12. . . . Flanigan was negligent in that he failed to act in accordance with the scope of his duties as a police officer so as to protect the minor plaintiff from such conduct and to prevent such conduct from occurring.

"13. As a direct and proximate result of . . . Flanigan's negligence the plaintiff sustained physical injury, extreme emotional distress, fear and apprehension. From all of the aforesaid injuries the plaintiff has suffered and will suffer psychological pain and mental anguish, all of which are, or are likely to be, permanent in nature."[5]

On May 19, 2015, the defendant responded with an answer and nine special defenses. On November 22, 2016, the defendant filed a motion for summary judgment.[6] In addressing the motion for summary judgment,

[5] In the third count, the plaintiff also incorporated paragraphs 1 through 5 of the first count, which stated as follows:

"1. At all times relevant hereto the plaintiff was a child under the age of [sixteen] years of age.

"2. At all relevant times . . . Flanigan was employed by the defendant . . . as a police officer.

"3. At all relevant times the plaintiff was on probation from Juvenile Court.

"4. Beginning in the winter of 2006 the plaintiff would assist . . . Fullenwiley at his place of business known as World Technology located at 81 Bank Street, in the city of Waterbury, Connecticut.

"5. . . . Flanigan was a frequent visitor at . . . Fullenwiley's place of business, both while on and off duty as a Waterbury police officer."

[6] The motion filed on November 22, 2016 was subsequently sealed by the court, and the defendant filed a redacted motion for summary judgment with an accompanying memorandum on July 6, 2017.

the court treated the allegation of negligence against the defendant as setting forth three distinct claims. The court summarized the allegations as follows: "The plaintiff alleges that the [defendant] is liable for (A) Flanigan's affirmative acts of pushing the plaintiff to the ground and handcuffing him; (B) Flanigan's failure to protect the plaintiff from an assault by Fullenwiley; and (C) Flanigan's failure to make a mandatory report of child abuse."

In its memorandum in support of its motion for summary judgment, the defendant set forth the same argument as to all three bases for liability, namely, that Flanigan engaged in misconduct that was both wilful and outside of the scope of his official duties as a police officer. In support of its argument, the defendant stated: "The pleadings together with the sworn statements and testimony of the plaintiff clearly establish undisputed facts which can only lead to the conclusion that . . . Flanigan was not acting within the scope of his employment or official duties and that he had committed acts or omissions constituting wilful misconduct." The defendant argued that "[u]nder no scenario set forth by the plaintiff in an attempt to replead his case, can the plaintiff avoid the undisputed facts which the plaintiff himself asserts, that Flanigan pushed him to the ground, handcuffed him, participated in and photographed the incident where Fullenwiley placed a [sex toy] against the [plaintiff's] buttocks. There is no circumstance under which these activities of . . . Flanigan could be found to be within the scope of his employment or official duties. Additionally there can be no dispute that Flanigan's actions as testified to by the plaintiff were acts which constituted wilful misconduct." To the extent that Flanigan's actions constituted wilful misconduct beyond the scope of his employment, the defendant maintained that it could not be vicariously liable for such conduct under § 52-557n.

On February 27, 2017, the plaintiff filed a memorandum in opposition to the defendant's motion for summary judgment. In his memorandum, the plaintiff argued that the defendant failed to establish the absence of any genuine issue of material fact as to whether Flanigan had acted negligently, stressing that a reasonable fact finder could find that Flanigan had acted negligently, not wilfully. Specifically, the plaintiff stated: "It appears, based on statements he made, that Flanigan was not aware of the [defendant's] prohibition on the use of handcuffs for such purposes. Thus, a genuine issue exists as to whether Flanigan was negligent when he demonstrated the use of handcuffs on juveniles at World Technolog[y]. . . . The jury may determine that Flanigan had no idea what Fullenwiley was about to do after the plaintiff was placed on the ground and handcuffed. Flanigan may have negligently believed that he was simply demonstrating a restraint procedure, as he stated in his deposition and in police reports. After Fullenwiley held the [sex toy] to the plaintiff's buttocks, Flanigan had an absolute duty to arrest Fullenwiley, report the incident to his superiors, and alert [the Department of Children and Families]. It is for the trier of fact to determine whether his failure to do so was negligent or not." The plaintiff argued further that there exists a genuine issue of material fact as to whether Flanigan's actions—in demonstrating the use of handcuffs on the plaintiff—could be considered within the scope of his official duties as a police officer. The plaintiff argued that "[t]he plaintiff does not allege in the fourth count that Flanigan restrained the plaintiff so that Fullenwiley could sexually assault him; the allegation is that Flanigan negligently engaged in conduct without knowing what Fullenwiley was about to do. Thus, Flanigan's actions may still be considered within the scope of his employment if he thought, even mistakenly, that he was demonstrating the use of handcuffs."

On July 18, 2017, the court issued its memorandum of decision granting in part and denying in part the defendant's motion for summary judgment. The court addressed each of the three allegations of negligence in turn. As to the first allegation of negligence, that Flanigan was negligent in pushing the plaintiff to the ground and handcuffing him, the court found that the plaintiff had made a "colorable argument that a genuine issue of material fact exists as to whether Flanigan was acting in the scope of his employment or official duties at the time he pushed the plaintiff to the ground and placed him in handcuffs";[7] however, the court ultimately declined to reach that issue, finding instead that "[t]he only conclusion that can be reached . . . is that Flanigan's acts of pushing the plaintiff to the ground and unlawfully restraining him constitute[d] wilful misconduct. . . . Indeed, the plaintiff's allegation that Flanigan was demonstrating the use of handcuffs coupled with the evidence indicating that the plaintiff was not a willing participant in the demonstration buttress this determination. Moreover, the [defendant] submitted evidence that Flanigan's use of handcuffs in the manner alleged was in violation of the [defendant's] policies. . . . Accordingly, summary judgment is granted in favor of the [defendant] as to liability for Flanigan's acts of pushing the plaintiff to the ground and placing him in handcuffs."

With respect to the second allegation of negligence, that Flanigan had a duty as a police officer to protect the plaintiff from Fullenwiley's actions, the court did not consider whether Flanigan was acting in the scope of his employment or whether his actions were wilful, instead disposing of the claim on governmental immunity grounds, an argument that was not advanced by

[7] The court noted that "[t]he evidence submitted indicates that Flanigan was wearing his city issued police uniform and duty belt, which included his handcuffs (and presumably his weapon), and that he stopped into World Technology on his way to volunteer for the Police Explorers program."

the defendant. The court noted: "A police officer's actions in carrying out [his or her typical duties] are discretionary and typically afforded governmental immunity. See *Smart* v. *Corbitt*, 126 Conn. App. 788, 800, 14 A.3d 368, cert. denied, 301 Conn. 907, 19 A.3d 177 (2011). . . . However, governmental immunity does not apply when 'the circumstances make it apparent to [a] public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm. . . . ' *Merritt* v. *Bethel Police Dept.*, 120 Conn. App. 806, 812, 993 A.2d 1006 (2010)." (Citation omitted.) Applying these principles, the court determined that this exception to governmental immunity did not apply. In reaching that determination, the court stated that, "[b]ased on the evidence submitted, there is no genuine issue of material fact that Flanigan knew that the plaintiff was at risk of imminent harm or that Flanigan's nonresponse to the imminent danger would likely subject the plaintiff to that harm. The plaintiff's complaint alleges that Fullenwiley acted 'without . . . Flanigan knowing what was about to happen' . . . and there is no evidence in the record from which a reasonable jury could determine that it was apparent to Flanigan that Fullenwiley would place a [sex toy] against the plaintiff's buttocks. . . . Thus, summary judgment is granted in favor of the [defendant] as to liability for Flanigan's failure to act to protect the plaintiff." (Citations omitted.)

As to the third allegation of negligence, whether Flanigan had a mandatory duty to report Fullenwiley's sexual assault of the plaintiff to the Department of Children and Families, the court determined that the defendant failed to satisfy its burden of proving that no genuine issue of material fact existed. Consequently, the court denied the defendant's motion for summary judgment as to its liability for Flanigan's failure to report. As we stated in footnote 4 of this opinion, however, the plain-

tiff subsequently withdrew his claim against the defendant as to its liability arising out of Flanigan's failure to report.[8] Accordingly, we do not consider this claim, but we do note for the purposes of this appeal that in addressing this issue the court found that "the [defendant] has failed to show that no genuine issue of material fact remains as to whether Flanigan was acting in the scope of his employment at the time he witnessed the plaintiff's abuse." The court specifically noted that "the evidence submitted indicates that Flanigan stopped at World Technology while on his way to volunteer with the Police Explorers; World Technology was within Flanigan's normal jurisdiction; Flanigan often stopped at World Technology, while both on and off duty; and, at the time of the abuse, Flanigan was dressed in full police uniform with his duty belt, which included his handcuffs (and presumably his weapon)—all of which were issued by the [defendant]." This appeal followed. Additional facts will be set forth as necessary.

Initially, we set forth our standard of review. "The standard of review of a trial court's decision granting summary judgment is well established. Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The courts are in entire agreement that the

[8] At oral argument before this court, both parties acknowledged that they had previously agreed that, after settling with Flanigan, the plaintiff also would withdraw his remaining claim against the city alleging a failure to report, and, instead, proceed solely on the two claims alleging negligence in handcuffing the plaintiff and a failure to protect the plaintiff from the assault. Accordingly, the parties agree that the subject of this appeal was not rendered moot by the plaintiff's withdrawal of part of the fourth count.

moving party . . . has the burden of showing the absence of any genuine issue as to all the material facts . . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the [nonmoving] party must present evidence that demonstrates the existence of some disputed factual issue. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Citations omitted; internal quotation marks omitted.) *Lucenti* v. *Laviero*, 327 Conn. 764, 772–73, 176 A.3d 1 (2018).

I

A

On appeal, the plaintiff first claims that the court erred in rendering summary judgment in favor of the defendant as to his claim that Flanigan negligently pushed the plaintiff to the ground and handcuffed him because there is a genuine issue of material fact as to whether Flanigan engaged in negligent or wilful misconduct. We agree with the plaintiff.

The following additional facts are relevant to our resolution of the plaintiff's claim. In support of his memorandum in opposition to the defendant's motion for summary judgment, the plaintiff submitted the transcript of Flanigan's March 5, 2013 deposition. At his deposition, Flanigan testified about his participation in the Police Explorers. Flanigan testified that he had handcuffed juveniles who were not under arrest

"numerous times with the Police Explorers" as a way to demonstrate the use of handcuffs. When asked if he had ever handcuffed a juvenile who was not under arrest outside of the Police Explorers program, Flanigan testified that he could recall two instances: one time with Fullenwiley's son and another time with the plaintiff. With respect to the plaintiff, Flanigan testified that he handcuffed him for a period of "about ten seconds" because "he asked me to."

Flanigan, in a statement given to the police on July 13, 2009, signed under penalty of perjury, stated that the incident with the plaintiff occurred when he was on his way to a Police Explorers meeting.[9] Flanigan averred further that, while at the store, "[t]he kids began to look at my duty belt and wanted to play with my handcuffs. I remember that . . . [the plaintiff was] among the kids that were there. I asked [Fullenwiley] if I could handcuff the boys as part of a demonstration. I handcuffed . . . [the plaintiff] and then uncuffed [him] right away after putting the cuffs on. I did not think it was a big deal because that was what I was going to teach the Explorers that night."

In addition to Flanigan's deposition testimony and police statement, the plaintiff also relied on Fullenwiley's written statement to the Waterbury Police Department, dated March 31, 2010. In his statement, Fullenwiley averred that Flanigan would horse around with the young people at his store, "but it was always in fun. No one was trying to hurt anyone." Fullenwiley averred further that the plaintiff "was always misbehaving. One day I was playing around with [the plaintiff] wrestling with him. [The plaintiff] is a big kid, like 230–240 pounds so when he was down on the floor, I kneeled down on

[9] This statement is at odds with Flanigan's testimony at his deposition that he resigned from the Police Explorers in 2005 due to scheduling conflicts. This would have been before the incident with the plaintiff. Such conflicts in recollection are for the finder of fact to resolve.

him. . . . There was a bunch of other people there too that day that saw what was going on. . . . While [the plaintiff] was on the ground, [he] got handcuffed. I think it was [Flanigan] that handcuffed [the plaintiff] with his handcuffs because he was on duty. He didn't do it to be malicious, we were all just playing around. Someone, I think it was [V] took my digital camera out and started taking pictures of us horsing around. I remember that three pictures were taken. I put them on my computer . . . for us all to look at. Two of the pictures had [Flanigan] in the background, standing by the doorway. [Flanigan] saw those pictures and told me to delete them because it looked bad and he could get in trouble. The third picture was of [the plaintiff] on the ground and you could see the handcuffs. I saved that picture and joked with [the plaintiff] that we were going to show all the girls at [school] how we got him on the floor. I've only seen [Flanigan] use his metal handcuffs that one time on [the plaintiff]. . . . The only other thing that I could remember [Flanigan] doing in my store while he was working was that sometimes he took out his Taser. . . . A few times when . . . [the plaintiff] misbehaved, [Flanigan] took his Taser out and took the cartridge off the end of it. Then he turned it on so you could see the electricity flash. [Flanigan] went near the boys with it to scare them, but he never touched anyone with it or used it on the boys. It probably wasn't appropriate for [Flanigan] to do that, but he was only doing it in fun."

Additionally, the plaintiff attached to his memorandum a copy of Flanigan's performance appraisal from the Waterbury department of human resources, dated November 29, 2004, and a copy of an interdepartmental memorandum, dated November 6, 2005, critiquing certain aspects of Flanigan's performance. In his performance appraisal, Flanigan's supervisor indicated that Flanigan has "on occasion exercise[d] poor judgment."

Similarly, in Captain A. Gallo's interdepartmental memorandum regarding Flanigan's performance, Gallo averred that Flanigan "has shown a pattern of being insensitive to citizens that he interacts with and at times has used poor judgment when his discretion is needed."

The following legal principles are relevant to our resolution of the plaintiff's claim. "The general rule is that governments and their agents are immune from liability for acts conducted in performance of their official duties. The common-law doctrine of governmental immunity has been statutorily enacted and is now largely codified in . . . § 52-557n. . . . Section 52-557n provides in relevant part: (a) (1) Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties . . . (2) Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by: (A) Acts or omissions of any employee, officer or agent which constitute criminal conduct, fraud, actual malice or wilful misconduct . . . ." (Citation omitted; internal quotation marks omitted.) *Martin* v. *Westport*, 108 Conn. App. 710, 729, 950 A.2d 19 (2008).

"Whether a party's conduct is wilful is a question of fact. See *Bauer* v. *Waste Management of Connecticut, Inc.*, 239 Conn. 515, 527, 686 A.2d 481 (1996) ([w]hat constitutes wilfulness is a question of fact). The term has many and varied definitions, with the applicable definition often turn[ing] on the specific facts of the case and the context in which it is used. *Doe* v. *Marselle*, 236 Conn. 845, 851, 675 A.2d 835 (1996); *Screws* v. *United States*, 325 U.S. 91, 101, 65 S. Ct. 1031, 89 L. Ed. 1495 (1945). As we previously have observed, Black's Law Dictionary (6th Ed. 1990) demonstrates the varied

ways that wilful has been defined ranging from voluntary; knowingly; deliberate . . . [i]ntending the result which actually comes to pass; designed; intentional; purposeful; not accidental or involuntary to [p]remeditated; malicious; done with evil intent, or with a bad motive or purpose, or with indifference to the natural consequences.

"Additionally, we have defined the term differently depending on the context. See, e.g., *Dubay* v. *Irish*, 207 Conn. 518, 533, 542 A.2d 711 (1988) (wilful misconduct requires design to injure); *DeMilo* v. *West Haven*, 189 Conn. 671, 678–79, 458 A.2d 362 (1983) (wilful destruction of bridge means intentional destruction of bridge and intent to cause injury); *State* v. *Gotsch*, 23 Conn. Supp. 395, 398–99, 184 A.2d 56 (1962) (wilful commonly means intentional, as opposed to accidental, but in penal statute it means with evil intent); *Guest* v. *Administrator*, 22 Conn. Supp. 458, 459, 174 A.2d 545 (1961) (wilful breach of rule means deliberate violation done purposely with knowledge as opposed to result of thoughtlessness or inadvertence). *Doe* v. *Marselle*, supra, 236 Conn. 851–52 n.8. The term wilful also has been described as including not only the mere exercise of the will in failing to comply with the statute [in question], but also an intention to do an act that he knows, or ought to know, is wrongful or forbidden by law . . . . Ballentine's Law Dictionary (3d Ed. 1969).

"Correspondingly, the term wilful has been used to describe conduct deemed highly unreasonable or indicative of bad faith. See *CFM of Connecticut, Inc.* v. *Chowdhury*, 239 Conn. 375, 395, 685 A.2d 1108 (1996) ([t]o determine whether the bad faith exception applies, the court must assess whether there has been substantive bad faith as exhibited by, for example, a party's . . . wilful violations of court orders . . .), overruled in part on other grounds by *State* v. *Salmon*, 250 Conn. 147, 154–55, 735 A.2d 333 (1999); *ACMAT Corp.* v.

Greater New York Mutual Ins. Co., 282 Conn. 576, 591–92 n.13, 923 A.2d 697 (2007) (same); *Matthiessen* v. *Vanech*, 266 Conn. 822, 833, 836 A.2d 394 (2003) (While we have attempted to draw definitional distinctions between the terms wilful, wanton or reckless, in practice the three terms have been treated as meaning the same thing. The result is that [wilful], wanton, or reckless conduct tends to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent." (Internal quotation marks omitted.) *Saunders* v. *Firtel*, 293 Conn. 515, 530–32, 978 A.2d 487 (2009); see *Dubay* v. *Irish*, supra, 207 Conn. 533 n.8 ("[w]ilful misconduct is intentional misconduct, and wanton misconduct is reckless misconduct, which is the equivalent of wilful misconduct" (internal quotation marks omitted)).

In reaching its conclusion that Flanigan's conduct of pushing the plaintiff to the ground and handcuffing him was wilful, the court stated that "Flanigan acted with a deliberate or reckless disregard for the plaintiff's safety and the consequences of his action." With respect to the parties' evidence, submitted in support of, or in opposition to the defendant's motion for summary judgment, the court reasoned that the plaintiff's unwillingness to participate in Flanigan's handcuffing demonstration buttressed its determination that Flanigan engaged in wilful misconduct.

Similarly, the defendant relies on the fact that Flanigan pushed the plaintiff to the ground just prior to handcuffing him as conclusive evidence that Flanigan's conduct exceeded mere negligence. The defendant states that "[a]ny such argument [that Flanigan's act of pushing the plaintiff to the ground constituted mere negligence] would defy common sense, because any reasonable person in Flanigan's position would have

known that the plaintiff was not a willing participant in what the plaintiff now calls a mere demonstration."[10]

The court and the defendant both ignored the import of the evidence proffered by the plaintiff in his opposition to the defendant's motion for summary judgment. Flanigan testified at his deposition that the plaintiff asked to be handcuffed. Similarly, Flanigan averred in his sworn police statement that, on the date in question, the plaintiff looked at his duty belt and "wanted to play with my handcuffs." On the basis of this evidence, a jury reasonably could conclude that the plaintiff was a willing participant in Flanigan's handcuffing demonstration.

Moreover, the plaintiff produced additional evidence that raises a genuine issue of material fact as to whether Flanigan's conduct was negligent or wilful. Specifically, in his statement to the police, Flanigan averred that he "did not think it was a big deal" to demonstrate the use of handcuffs on the plaintiff "because that was what I was going to teach the Explorers that night." To the extent that Flanigan, in fact, was demonstrating the professional use of handcuffs on the plaintiff, a jury reasonably could infer from Flanigan's conduct that he was not acting wilfully, as that term has been used throughout our case law. See *Saunders* v. *Firtel*, supra,

[10] We note that, on appeal, the defendant has not argued, as it did before the trial court, that the plaintiff's allegation that Flanigan photographed him operates as an admission to support its special defense that Flanigan engaged in wilful misconduct. Moreover, although the plaintiff in his principal appellate brief alludes to evidence that Flanigan "may" have taken a picture of a handcuffed juvenile, and similarly alleged, in his opposition to summary judgment before the trial court, that Flanigan photographed him, the plaintiff also relied on statements made by both Fullenwiley and Flanigan to demonstrate that the question of whether Flanigan photographed him remained a disputed issue of fact. Thus, even if we agreed that purported evidence of Flanigan photographing the plaintiff would support the defendant's claim of wilful misconduct, the issue is not properly before us, and, as a disputed fact, remains one for the trier of fact to resolve.

293 Conn. 530–32; see also *Daley* v. *Kashmanian*, 193 Conn. App. 171, 179, 219 A.3d 499 (2019) ("The state of mind amounting to recklessness may be inferred from conduct. But, in order to infer it, there must be something more than a failure to exercise a reasonable degree of watchfulness to avoid danger to others or to take reasonable precautions to avoid injury to them." (Internal quotation marks omitted.)), cert. granted, 335 Conn. 939, 237 A.3d 1 (2020), and cert. denied, 335 Conn. 940, 237 A.3d 1 (2020). Indeed, such an inference is supported by Fullenwiley's statement that, when Flanigan handcuffed the plaintiff, "[h]e didn't do it to be malicious, we were all just playing around."

Furthermore, Flanigan's supervisor indicated that Flanigan "has shown a pattern of being insensitive to citizens that he interacts with and at times has used poor judgment when his discretion is needed." Indeed, Flanigan's poor judgment had been on display in other instances, namely, his use of his Taser to scare the plaintiff and others. On the basis of this evidence, *viewed in the light most favorable to the plaintiff*, a jury reasonably could conclude that Flanigan's conduct, although inappropriate, was merely a lapse in judgment that was more akin to negligent horseplay than wilful misconduct, particularly in light of the evidence that comparable physical contact at World Technology "was always in fun."

Finally, the court's reliance on Flanigan's violation of the defendant's departmental policy as evidence that he engaged in wilful misconduct is misplaced. The mere fact that Flanigan's use of handcuffs "was in violation of the [defendant's] policies" does not make his conduct per se wilful. Whether a party engaged in wilful, wanton or reckless conduct cannot be determined simply by ascertaining whether an actor violated a policy, but, rather, it requires a determination of the actor's state of mind when violating the policy. See *Begley* v. *Kohl &*

Madden Printing Ink Co., 157 Conn. 445, 450–51, 254 A.2d 907 (1969) ("Recklessness is a state of consciousness with reference to the consequences of one's acts. . . . It requires a conscious choice of a course of action either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man, and the actor must recognize that his conduct involves a risk substantially greater . . . than that which is necessary to make his conduct negligent." (Citation omitted; internal quotation marks omitted.)). As noted, Flanigan "has shown a pattern of being insensitive to citizens that he interacts with and at times has used poor judgment when his discretion is needed." This evidence raises a genuine issue as to whether Flanigan's conduct was negligent or wilful.

B

The defendant argues in the alternative that we should affirm the judgment of the trial court on the ground that Flanigan was not acting within the scope of his employment when he pushed the plaintiff to the ground and handcuffed him. We are not persuaded.

Section 52-557n (a) provides that a local government will not be liable for the negligent acts or omissions of an employee unless the employee was "acting within the scope of his employment or official duties." In determining whether an employee has acted within the scope of employment, "courts look to whether the employee's conduct: (1) occurs primarily within the employer's authorized time and space limits; (2) is of the type that the employee is employed to perform; and (3) is motivated, at least in part, by a purpose to serve the employer. . . . Ordinarily, it is a question of fact as to whether a wilful tort of the servant has occurred within the scope of the servant's employment . . . [b]ut there are occasional cases [in which] a servant's digression

from [or adherence to] duty is so clear-cut that the disposition of the case becomes a matter of law." (Citation omitted; internal quotation marks omitted.) *Harp* v. *King*, 266 Conn. 747, 782–83, 835 A.2d 953 (2003). More specifically, we have held that a police officer's actions "occurred in the course of duties if [the actions] took place (1) within the period of employment, (2) at a place where the employee could reasonably be, and (3) while the employee is reasonably fulfilling the duties of employment or doing something incidental to it." *Crotty* v. *Naugatuck*, 25 Conn. App. 599, 603–604, 595 A.2d 928 (1991).

The trial court, in determining that there was a genuine issue of material fact as to whether Flanigan was acting within the scope of his employment at the time he witnessed the plaintiff being sexually assaulted, relied on the following facts: "In the present case, the evidence submitted indicates that Flanigan stopped at World Technology while on his way to volunteer with the Police Explorers; World Technology was within Flanigan's normal jurisdiction; Flanigan often stopped at World Technology, while both on and off duty; and, at the time of the abuse Flanigan was dressed in full police uniform with his duty belt, which included his handcuffs (and presumably his weapon)—all of which were issued by the city." These factors similarly lead us to conclude that there is a genuine issue of material fact as to whether Flanigan was acting within the scope of his employment when he pushed the plaintiff to the ground and handcuffed him. Flanigan was acting "within [his] period of employment," "at a place where [he] could reasonably be," and a jury reasonably could find that he was "fulfilling the duties of employment or doing something incidental to it" when he demonstrated the use of handcuffs on his way to a program where he often demonstrated the use of handcuffs. See *Crotty* v. *Naugatuck*, supra, 25 Conn. App. 603–604.

Accordingly, we conclude that the court erred in granting the defendant's motion for summary judgment as to the first allegation of negligence because the plaintiff proffered sufficient evidence to demonstrate the existence of a genuine issue of material fact with respect to whether Flanigan engaged in wilful misconduct or negligent misconduct when he pushed the plaintiff to the ground and handcuffed him, as well as whether Flanigan was acting within the scope of his employment at that time.

II

We turn next to the plaintiff's duty to protect claim and the court's conclusion that there was no genuine issue of material fact as to whether it was apparent to Flanigan that the plaintiff was an identifiable victim subject to imminent harm. Notably, in reaching its conclusion that the identifiable victim subject to imminent harm exception to governmental immunity did not apply, the court considered, and answered, a dispositive question of law that the defendant did not raise in its motion for summary judgment. Consequently, we conclude that the court erred in rendering summary judgment in favor of the defendant on the basis of a defense that was never raised in the defendant's motion.

"[T]he court's function is generally limited to adjudicating the issues *raised by the parties* on the proof they have presented and applying appropriate procedural sanctions on motion of a party. . . . The parties may, under our rules of practice, challenge the legal sufficiency of a claim at two points prior to the commencement of trial. First, a party may challenge the legal sufficiency of an adverse party's claim by filing a motion to strike. . . . Second, a party may move for summary judgment and request the trial court to render judgment in its favor if there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law.

. . . In both instances, the rules of practice require a party to file a written motion to trigger the trial court's determination of a dispositive question of law. *The rules of practice do not provide the trial court with authority to determine dispositive questions of law in the absence of such a motion*." (Citations omitted; emphasis altered; internal quotation marks omitted.) *Greene* v. *Keating*, 156 Conn. App. 854, 860–61, 115 A.3d 512 (2015). "[A] trial court lacks authority to render summary judgment on grounds not raised or briefed by the parties that do not involve the court's subject matter jurisdiction." *Bombero* v. *Bombero*, 160 Conn. App. 118, 131, 125 A.3d 229 (2015).

In response to the plaintiff's allegation that the defendant was liable for Flanigan's failure to protect him from Fullenwiley's unlawful conduct, the defendant, in its motion for summary judgment, argued only that Flanigan's conduct was wilful and outside of the scope of his employment.[11] Specifically, the defendant stated: "The pleadings together with the sworn statements and testimony of the plaintiff clearly establish undisputed facts which can only lead to the conclusion that . . . Flanigan was not acting within the scope of his employment or official duties and that he had committed acts or omissions constituting wilful misconduct. As a result, no liability exists on the part of the defendant . . . pursuant to § 52-557n for Flanigan's actions."

The trial court did not address these arguments, or the plaintiff's responses to them, as they related to the plaintiff's claim that Flanigan negligently failed to protect the plaintiff from Fullenwiley's assault. Instead, the court considered only whether the plaintiff had established an exception to discretionary act immunity under § 52-557n, noting that "[a] police officer's actions

[11] Although the defendant raised in its seventh special defense its alternative claim that it was entitled to immunity for the discretionary acts of Flanigan, it failed to raise and argue this claim in its motion for summary judgment.

in carrying out [his duty to protect] are discretionary and typically afforded governmental immunity." The court then correctly stated that "governmental immunity does not apply when the circumstances make it apparent to [a] public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm," before concluding that "there is no evidence in the record from which a reasonable jury could determine that it was apparent to Flanigan that Fullenwiley would place a [sex toy] against the plaintiff's buttocks." (Internal quotation marks omitted.) The plaintiff hardly can be faulted for failing to present evidence to address an argument that the defendant never made. Again, in its motion for summary judgment, the defendant argued only that it was insulated from liability for Flanigan's conduct under § 52-557n because the conduct at issue was wilful and outside of the scope of his official duties. The defendant never argued that it was shielded from liability because Flanigan's conduct was discretionary. Consequently, the plaintiff never had the opportunity or reason to make the counterargument that the exception to discretionary act immunity applies to the circumstances here. The court, thus, improperly rendered summary judgment in favor of the defendant on a ground that neither party raised.

The judgment is reversed and the case is remanded with direction to deny the defendant's motion for summary judgment and for further proceedings.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JOSHUA PARKER
(AC 43344)

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

Syllabus

The defendant appealed from the judgment of the trial court revoking his probation for his failure to pay restitution. The defendant had previously

pleaded guilty to various offenses, including burglary and larceny, and was sentenced to probation. As a condition of his probation, the court ordered the defendant to make restitution in the amount of more than $18,000. Thereafter, he was charged with additional offenses and for violating certain terms of his probation, not involving the payment of restitution, to which he pleaded guilty. The trial court continued the defendant's probation. In the months that followed, the defendant paid a total of $850 in restitution. The state thereafter charged the defendant with violation of probation for failure to pay restitution. The trial court revoked the defendant's probation, having determined, on the basis of the defendant's prior statements made to the court at his first probation revocation hearing, that the defendant had the ability and the willingness to pay, and would make sufficient efforts to pay, but had failed to do so. On appeal, the defendant claimed, inter alia, that the trial court erred in revoking his probation without first finding that his failure to pay the restitution was wilful. *Held* that the trial court erred in revoking the defendant's probation for failure to make restitution payments, as that court did not apply the correct legal standard and erred in making an implicit finding of wilfulness: as a prerequisite to incarceration for the failure to pay restitution, the trial court was required to make explicit findings on the record that a defendant had the ability to pay and, if so, whether the failure to pay was wilful, and, if not, whether the defendant made sufficient bona fide efforts legally to acquire the resources to pay; even if the trial court interpreted the defendant's statements made one and one-half years earlier at the first probation revocation hearing as an admission that he had the ability to pay, the court was still required to inquire into the reasons for the defendant's failure to pay and whether he failed to make good faith efforts to acquire legally the resources to pay, the evidence did not logically support the conclusion that the defendant had the ability to pay restitution during his probationary period because there was no evidence that he had any source of income or other assets that could be applied toward restitution, the court did not take into consideration the actual efforts the defendant made to acquire the resources to pay during the probation period, instead, improperly basing its conclusion that the defendant violated probation on the mere fact that he expressed an intention to make sufficient efforts, and, accordingly, the court failed to make the necessary finding that the defendant's failure to pay was wilful.

Argued September 8—officially released November 24, 2020

Procedural History

Substitute information charging the defendant with two counts of violation of probation, brought to the Superior Court in the judicial district of Windham, geographical area number eleven, and tried to the court,

Chaplin, *J.*; judgment revoking the defendant's probation, from which the defendant appealed to this court. *Reversed*; *further proceedings*.

John L. Cordani, assigned counsel, with whom, on the brief, was *Jenna M. Scoville*, for the appellant (defendant).

Laurie N. Feldman, deputy assistant state's attorney, with whom, on the brief, were *Anne F. Mahoney*, state's attorney, and *Andrew J. Slitt*, assistant state's attorney, for the appellee (state).

Opinion

PRESCOTT, J. The defendant, Joshua Parker, appeals from the judgment of the trial court revoking his probation pursuant to General Statutes § 53a-32 and sentencing him to thirty months of incarceration. On appeal, the defendant claims that (1) the court improperly revoked his probation for failure to pay restitution without first making a finding that such failure to pay was wilful, as constitutionally required pursuant to *Bearden* v. *Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983), and (2) the state introduced insufficient evidence to prove that the defendant wilfully refused to pay restitution. We agree that the court did not make the constitutionally requisite finding that the defendant's failure to pay restitution was wilful and, accordingly, we reverse the judgment of the trial court and remand the case for a new probation revocation hearing.

The following facts and procedural history are relevant to our resolution of this appeal. On November 25, 2015, the defendant, pursuant to a plea agreement, pleaded guilty under the *Alford* doctrine[1] to burglary in the third degree in violation of General Statutes § 53a-103, larceny in the third degree in violation of General

[1] See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

Statutes § 53a-124, attempt to commit burglary in the third degree in violation of General Statutes §§ 53a-103 and 53a-49, and failure to appear in the first degree in violation of General Statutes § 53a-172. The trial court, *J. Fischer*, *J.*, canvassed the defendant and found that there was a factual basis for the guilty pleas and that they were knowingly and voluntarily made with the assistance of competent counsel. The trial court later sentenced the defendant, consistent with the plea agreement, to three years of incarceration on each docket[2], execution suspended, with two years of probation, to run concurrently. As a condition of probation, the court ordered the defendant to make restitution for verifiable out of pocket losses in both dockets. The amount of restitution was determined by the Office of Adult Probation to be $18,734.43.

In October, 2017, the defendant was charged with violation of probation pursuant to § 53a-32 after he was arrested for additional offenses. At the defendant's probation revocation hearing on January 18, 2018, he admitted to violating the terms of his probation and pleaded guilty to forgery in the second degree in violation of General Statutes § 53a-139 and to reckless driving in violation of General Statutes § 14-222.[3] As of the date of the hearing, the defendant had not made any payments toward the $18,734.43 in restitution that he owed. The basis for the violation of probation, however, was the new arrest and the new convictions. The defendant was represented by a public defender at this hearing and at every prior court proceeding related to this appeal.

[2] There were two separate dockets in this case, both in the judicial district of Windham. The first docket, Docket No. CR-14-0152726-S, included the charges of burglary in the third degree and larceny in the third degree. The second docket, Docket No. CR-14-0152727-S, included the charges of attempt to commit burglary in the third degree and failure to appear in the first degree.

[3] The guilty plea to forgery in the second degree was made pursuant to the *Alford* doctrine.

Pursuant to a plea agreement, the court, *Newson*, *J.*, continued the defendant on probation, accepted his guilty pleas on the new offenses, and sentenced him to an additional five years of incarceration, execution suspended, with three years of probation for the forgery charge. The court ordered two special conditions of probation: (1) the defendant was not to operate any motor vehicle unless and until his operating privileges are validly reinstated by the Department of Motor Vehicles; and (2) the defendant must be either employed or making reasonable efforts to find full-time employment during the period of probation, unless he was involved in some sort of full-time educational or treatment program.[4] Additionally, the court stated that, "as to the probations that were continued, all of those conditions remain in full force and effect."

Between February 15 and May 18, 2018, the defendant paid a total of $850 in restitution, leaving a remaining balance of $17,884.43. On January 2, 2019, the state charged the defendant with two counts of violation of probation for failure to pay restitution.[5] The defendant denied the charges. A second probation revocation hearing was held on May 30, 2019. During the evidentiary phase of the hearing, the state called one witness, Probation Officer Amy Gile.

Officer Gile testified that she had been supervising the defendant's probation since approximately January or February, 2018. For the entirety of this time, the defendant was not employed. In addition to restitution, the defendant's other financial obligations included court-ordered child support for his daughter. The defendant spoke to Officer Gile many times about seeking employment. He told Officer Gile about a few positions

[4] The court did not order restitution with respect to the forgery or to the reckless driving conviction.

[5] Specifically, the state alleged that the defendant violated his probation in that he "has not made a restitution payment since May 18, 2018."

that he was considering applying for, but she was unaware if he ever did so. Officer Gile never asked the defendant to show her any completed job applications. The defendant told Officer Gile that he was unable to find employment, and that he had to provide childcare for his daughter, which prevented him from working.

Officer Gile also testified that the defendant was placed in, and later "discharged . . . successfully" from, an alternative in the community program (AIC program) that assists people with a criminal record in finding a job. Specifically, the program helps participants build a resume, provides them with a list of employers that will hire people with a criminal record, and offers various online curricula. Officer Gile received monthly reports from the AIC program that indicated that the defendant's participation in the program was satisfactory.

Officer Gile further testified that she did not believe the defendant made bona fide efforts to acquire the resources to pay restitution. When asked, however, how she would make a determination as to whether someone she was supervising had attempted to find employment, she responded, "[w]e'd put 'em in the AIC program for employment services." The defendant did not call any witnesses. The court, *Chaplin*, *J.*, found that the defendant had violated a condition of his probation by not making sufficient payments toward his restitution obligation, revoked the defendant's probation, and sentenced him to serve thirty months of incarceration.

In the court's oral ruling, which later was signed as its memorandum of decision, the court explained that the basis for its finding of a violation of probation was a colloquy between the court and the defendant at the defendant's first probation revocation hearing on January 18, 2018.[6] Specifically, the court stated that "as a

[6] The relevant portion of that exchange is as follows:

"The Court: . . . [A]nything you want to say before the court imposes sentence?

point, the court is now just reiterating the basis for the court's understanding in making its decision rather than allowing . . . another opportunity for additional closing arguments. Noting that upon reviewing the exhibits provided to the court of the transcripts specifically, the court does find on the January 18th date of 2018, there was a violation of probation admission entered by [the defendant]. On that date, a new probation period began which is the probation for which we're before the court today. Considering that probationary period beginning that date, there's a conversation between the court at that time and [the defendant] . . . . Specifically . . . [the defendant] makes comments about the ability to extend the probation and that would afford him the opportunity to pay the $18,000, noting his difficulty paying that over a period of one year, and he indicated that he could actually pay that now that he had two years. . . .

"[The Defendant]: Yeah. That I just appreciate the opportunity to, you know, extend my probation; it will help me pay the eighteen thousand 'cuz it was a pretty penny to pay over one year, two years and it was impossible. So now I can actually pay it, so—

"The Court: He didn't pay anything?

"[The Prosecutor]: Not as of October of—not as of the first eleven months of his probation.

"The Court: Okay. Well . . . I'll put it to you this way: I don't get involved and I don't know the facts and circumstances of the case and I imagine there was something worthwhile by . . . the state's bothering to put you back on probation. But, there's a difference between it being difficult to pay back your obligation and doing nothing. Nothing's what you did. People get sent to prison for doing nothing when it comes to paying back their restitution obligations. So [it] appears you need to take this entire thing a little more seriously and start making some dent in your obligation because you need to understand that if you come back again, regardless of what the lawyers do, the court does not have to take their deal, if it doesn't want to. Do you understand that?

"[The Defendant]: Oh, I understand, yes.

"The Court: My two cents would be [for] you [to] go to prison today for not paying anything and picking up new charges like this. So take the opportunity. I don't—take you at your word you take it seriously; but you know the old saying, actions speak a lot louder than words."

"Judge Newson . . . then made comments to [the defendant] indicating that the difference between an impossibility to pay and difficulty paying are two different issues and that the result of not paying on the new period of probation after [the defendant] indicated he would be able to pay and he would be making sufficient efforts to pay. Indicating that he had the ability to pay and . . . had the willingness to pay demonstrates to . . . this court, that there was an understanding, based on [the defendant's] comments, that he had the ability to pay and would make sufficient efforts to achieve that and make those payments as required by the conditions of the probation that were discussed with him at that time, and he was thankful for having more time from that . . . probation to pay . . . the amount owed. Based upon that, the court finds . . . by the fair preponderance of the evidence that [the defendant] was, one, aware of the condition of probation of paying the restitution, at that time aware of the amount of probation required to be paid, and at this point, he has engaged in conduct that does not satisfy that condition and, in fact, he has violated that condition of probation in not making payments and that he has . . . made payments that total $850; however, that is not sufficient. The court finds that he is in violation of the probation as to each file."

Judge Chaplin later granted the defendant's application for waiver of appellate fees and appointment of appellate counsel based on a finding that the defendant was indigent. This appeal followed.

In *Bearden* v. *Georgia*, supra, 461 U.S. 662, the United States Supreme Court recognized that it is impermissible to imprison a defendant who is on probation, solely because of his lack of financial resources. To do so "would deprive the probationer of his conditional freedom simply because, through no fault of his own, he

cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the [f]ourteenth [a]mendment [to the United States constitution]." Id., 672–73. This case asks us to decide whether the trial court improperly revoked the defendant's probation for failure to pay restitution without first making a finding that such failure to pay was wilful, as is constitutionally required pursuant to *Bearden*.[7] Specifically, the defendant argues that the court did not make a finding that he wilfully refused to pay restitution because the court (1) stated that "the state need only establish that . . . the probationer knew the condition and engaged in conduct that violated the condition," (2) based its finding that the defendant violated his probation on statements made by the defendant at his January 18, 2018 probation revocation hearing, which statements are immaterial to the issue of whether he violated his probation during the new probation period that began after that hearing, (3) never mentioned wilfulness in the context of discussing the defendant's January 18, 2018 statements, nor made any connection between those statements and its finding that the defendant wilfully refused to pay restitution in May, 2019, and (4) subsequently found the defendant indigent in connection with this appeal.

The state concedes that the trial court did not make an explicit finding of wilfulness, but contends that the court made an implicit finding, which is constitutionally sufficient. In support of that contention, the state points

[7] The defendant asserts that his claims are preserved because, during the revocation hearing, defense counsel brought to the trial court's attention the fact that it must find that the defendant wilfully refused to pay restitution before revoking his probation. Alternatively, the defendant argues that because his claims are constitutional in nature, they are reviewable under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). We conclude that the claims are preserved and the state does not argue otherwise.

to the fact that (1) the parties told the court that wilfulness was the contested issue, (2) the court expressed understanding that the defendant was claiming that his failure to pay was not wilful, and (3) the defendant did not file a motion for articulation in the absence of which this court must presume that the trial court acted properly. In reply, the defendant maintains that the trial court did not make an implicit finding of wilfulness and, even if it did, an express finding is required to satisfy the defendant's fourteenth amendment rights to due process and equal protection.[8] We agree with the defendant that the court did not make a finding of wilfulness and, therefore, the judgment is set aside and the case is remanded for further proceedings. In addition, we hold that an explicit finding of wilfulness is required.

As a preliminary matter, we set forth principles of law pertaining to the revocation of probation for failure to pay restitution. "[R]evocation of probation hearings, pursuant to § 53a-32, are comprised of two distinct phases, each with a distinct purpose. . . . In the evidentiary phase, [a] factual determination by a trial court as to whether a probationer has violated a condition of probation must first be made." (Citations omitted; internal quotation marks omitted.) *State* v. *Preston*, 286

[8] As the court acknowledged in *Bearden*, "due process and equal protection principles converge in the [c]ourt's analysis" in cases involving indigents in the criminal justice system. *Bearden* v. *Georgia*, supra, 461 U.S. 665. Specifically, in the context of a defendant whose probation has been revoked for failure to pay restitution, the court explained "[t]here is no doubt that the [s]tate has treated the petitioner differently from a person who did not fail to pay the imposed fine and therefore did not violate probation. To determine whether this differential treatment violates the [e]qual [p]rotection [c]lause, one must determine whether, and under what circumstances, a defendant's indigent status may be considered in the decision whether to revoke probation. This is substantially similar to asking directly the due process question of whether and when it is fundamentally unfair or arbitrary for the [s]tate to revoke probation when an indigent is unable to pay the fine." Id., 665–66.

Conn. 367, 375–76, 944 A.2d 276 (2008). "The state must establish a violation of probation by a fair preponderance of the evidence. . . . That is to say, the evidence must induce a reasonable belief that it is more probable than not that the defendant has violated a condition of his or her probation." (Internal quotation marks omitted.) *State* v. *Durant*, 94 Conn. App. 219, 224, 892 A.2d 302 (2006), aff'd, 281 Conn. 548, 916 A.2d 2 (2007).

"In the dispositional phase, [i]f a violation is found, a court must next determine whether probation should be revoked because the beneficial aspects of probation are no longer being served. . . . [The two phases] are governed by two different standards of review. . . . In making its factual determination [during the evidentiary phase], the trial court is entitled to draw reasonable and logical inferences from the evidence. . . . Our review is limited to whether such a finding was clearly erroneous. . . . The standard of review of the trial court's decision at the [dispositional] phase . . . is whether the trial court exercised its discretion properly by reinstating the original sentence and ordering incarceration." (Citations omitted; internal quotation marks omitted.) *State* v. *Preston*, supra, 286 Conn. 375–77.

In *Bearden* v. *Georgia*, supra, 461 U.S. 672, the United States Supreme Court held that the fourteenth amendment to the United States constitution requires that "in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer [wilfully] refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment . . . . If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment. Only if alternate measures are not adequate to meet the

[s]tate's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay." In other words, "absent *evidence and findings* that the defendant was somehow responsible for the failure [to pay]" it is unconstitutional to revoke probation. (Emphasis added.) Id., 665.

As our Supreme Court has recognized in a related context, "[t]he impact of indigency on a criminal defendant's liability to pay a fine is codified" in our rules of practice. (Internal quotation marks omitted.) *Molinas* v. *Commissioner of Correction*, 231 Conn. 514, 520, 652 A.2d 481 (1994). Specifically, Practice Book § 43-17 provides that "[n]o person shall be incarcerated as a result of failure to pay a fine unless the judicial authority first inquires as to the person's ability to pay the fine." In addition, Practice Book § 43-18 provides that "[t]he judicial authority may, upon a finding that the defendant is able to pay the fine and that the nonpayment is wilful, order the defendant incarcerated for nonpayment of the fine." Thus, in Connecticut, it has been acknowledged judicially, both in cases and through our adopted rules of practice, that a finding that a defendant had the ability to pay and wilfully failed to do so is a prerequisite to incarceration for the failure to pay a fine.

I

The defendant first claims that the trial court failed to make the requisite finding, pursuant to *Bearden*, that the defendant's failure to pay restitution was wilful. The state argues that the trial court made this finding implicitly, and that on appeal this court must presume that the trial court applied the correct legal standard. This issue presents a question of law and, therefore, it is subject to plenary review. See *Sosin* v. *Sosin*, 300 Conn. 205, 217, 14 A.3d 307 (2011) ("The interpretation of a trial court's judgment presents a question of law over which our review is plenary. . . . Effect must be

given to that which is clearly implied as well as to that which is expressed." (Citations omitted; internal quotation marks omitted.)); see also *Jones* v. *State*, 328 Conn. 84, 106–107, 177 A.3d 534 (2018) (whether trial court correctly applied legal standard raises question of law subject to plenary review). Accordingly, we must decide whether the trial court's "conclusions are legally and logically correct and find support in the facts that appear in the record." *Missionary Society of Connecticut* v. *Board of Pardons & Paroles*, 278 Conn. 197, 201, 896 A.2d 809 (2006). "[I]t is well settled that, in the absence of a contrary indication, we must presume that the court applied the correct legal standard." *State* v. *Petersen*, 196 Conn. App. 646, 668, 230 A.3d 696, cert. denied, 335 Conn. 921, 230 A.3d 696 (2020); see also *State* v. *Cecil J.*, 291 Conn. 813, 827 n.12, 970 A.2d 710 (2009) ("in [the] absence of contrary evidence, we presume that the trial court . . . undertook the proper analysis of the law and the facts" (internal quotation marks omitted)).

In the present case, the trial court explicitly stated that the basis for its determination that the defendant had violated a condition of probation by failing to pay restitution was the defendant's statement on January 18, 2018, that the continuation of extension of his probation "will help me pay the [restitution] . . . . So now I can actually pay it." See footnote 6 of this opinion. The trial court explained that this amounted to an "[indication] that he could actually pay." The court then reiterated that the defendant had indicated that he "would be able to pay and he would be making sufficient efforts to pay" and, further, such indication that "he had the ability to pay and . . . had the willingness to pay *demonstrates* to the court . . . that he had the ability to pay and would make sufficient efforts to achieve that and make those payments . . . ." (Emphasis added.)

The court's reasoning in this regard implies that it did not correctly apply the legal standard. Specifically, the trial court cannot make the constitutionally requisite finding that the defendant was at fault for the failure to pay restitution unless it determines that the defendant, *at the time he failed to make the required payments*, either had the ability to pay and wilfully chose not to, or, that the defendant did not have the ability to pay and "failed to make sufficient bona fide efforts legally to acquire the resources to pay." *Bearden* v. *Georgia*, supra, 461 U.S. 672; see *State* v. *Pieger*, 240 Conn. 639, 653 n.7, 692 A.2d 1273 (1997) ("it is well settled that the defendant's probation could not be revoked based upon his nonpayment . . . unless the trial court first determined that he was able to pay the money *and* that his nonpayment was wilful" (emphasis added)).

Here, the trial court concluded that the defendant had the ability to pay based on the defendant's statement on the first day of his probationary period, which, in context, is best understood as an expression of an intention to pay going forward, rather than an admission that he had the actual ability to pay. In fact, it can reasonably be inferred that the defendant's January 18, 2018 statement that he had the ability to pay $18,000 in restitution at that time was aspirational because, at that hearing, he was still represented by a public defender, reflecting his indigent status. See *Moscone* v. *Manson*, 185 Conn. 124, 131 n.3, 440 A.2d 848 (1981) ("[a]lthough the record does not expressly indicate the petitioner's indigency, we can infer that fact from his continued legal representation by public defenders").

Nevertheless, even if the defendant's statement could be taken as an admission that, on January 18, 2018, he had sufficient financial resources to make restitution payments, the court was still required to "inquire into the reasons for the [defendant's] failure to pay" more than the $850 that he paid in the months that fol-

lowed. *Bearden* v. *Georgia*, supra, 461 U.S. 672. Whether the defendant had the actual ability to pay or had failed to make good faith efforts to acquire legally the resources to pay throughout the duration of the probation period is an indispensable aspect of this inquiry. There could have been many intervening events that impacted the defendant's ability to pay or his efforts to acquire legally the resources to pay, and *Bearden* mandates that the court take into consideration any such events. Moreover, the fact that, when "reiterating the basis for the court's understanding in making its decision," the court pointed only to the defendant's stated ability to pay, which was made nearly one and one-half years prior, indicates that the trial court did not apply the requisite legal standard. Relying on the defendant's earlier statement at the beginning of his probationary period that he can actually pay cannot substitute for an inquiry at the time the state seeks to revoke his probation into whether he had the means to pay or had failed to make sufficient bona fide efforts legally to acquire the resources to pay.

Here, the evidence does not logically support the conclusion that the defendant had the ability to pay restitution during his probationary period because there is no evidence that he had any source of income. He was not employed since at least January or February, 2018. There was no evidence that he had other assets that could be applied toward restitution. In addition, his expenses included court-ordered child support for his daughter and his own basic needs.[9]

[9] We note that the state generally bears the burden of establishing a violation of probation by a fair preponderance of the evidence. See *State* v. *Davis*, 229 Conn. 285, 295, 641 A.2d 370 (1994). When the alleged probation violation is the failure to pay restitution, however, there is no clear Connecticut authority with regard to whether the state bears the burden of proving that the defendant wilfully failed to pay, or whether the defendant has the burden of raising and proving inability to pay as a defense. *Bearden*, itself, simply states that in revocation proceedings, the court "must inquire into the reasons for the failure to pay." *Bearden* v. *Georgia*, supra, 461 U.S. 672.

Furthermore, to the extent that the court's memorandum of decision can be read as finding that the defendant "failed to make sufficient bona fide efforts legally to acquire the resources to pay"; *Bearden* v. *Georgia*, supra, 461 U.S. 472; the evidence did not logically support such a conclusion.[10] Because the court's references to "sufficient efforts" in its decision are framed in terms of future conduct (i.e., "[the defendant] indicated . . . he would be making sufficient efforts to pay" and "that he . . . would make sufficient efforts to achieve that and make those payments as required by the conditions of probation"), the court's logic suffered from the same defect as it did with regard to the defendant's ability to pay. That is, the court did not take into consideration the actual efforts the defendant made to acquire legally the resources to pay during the probation period. Rather, it based its conclusion that the defendant violated probation on the mere fact that he expressed an intention to make sufficient efforts and erroneously inferred that, because he ultimately did not pay more than $850, he must not have honored that intention. That is not the constitutionally requisite inquiry under *Bearden*.

Furthermore, the evidence in the record of what the defendant actually did during the probationary period

We conclude that the burden is properly on the state to demonstrate that the defendant had the ability to pay and wilfully refused to do so or failed to make sufficient bona fide efforts legally to acquire the resources to pay, for several reasons. First, the state has the ultimate burden of proving a violation. The term violation denotes unlawful conduct, and if the defendant's failure to pay restitution is not wilful, it cannot be considered unlawful conduct because the state cannot punish a person solely on the basis of his poverty. See id.. Additionally, the state should bear the burden of proving wilfulness because probation revocation proceedings, although civil in nature, implicate the defendant's liberty interest.

[10] We note, however, that even if the defendant had the ability to pay restitution, a determination would still need to be made regarding whether his failure to pay was wilful. In other words, ability to pay is a necessary prerequisite to a finding of wilfulness, but it is not, in itself, sufficient to conclude that the failure to pay was wilful.

indicates that he made efforts to acquire legally the resources to pay. Specifically, he was placed in the AIC program to help him find employment, his participation was reported to be satisfactory, and he was ultimately "discharged successfully" from the program. He also told Officer Gile about a few positions for which he was considering applying. Whether those efforts could be deemed "sufficient" and "bona fide" is a factual determination for the trial court to make. We are not persuaded, however, based on our interpretation of the trial court's memorandum of decision, that the court actually made that determination. Accordingly, it did not apply the correct legal standard.

Our conclusion is further supported by the court's statement that, "in fact, [the defendant] has violated that condition of probation *in not making payments* and that he has made one payment or has made payments that total $850; however, that is not sufficient." (Emphasis added.) This suggests that the court's focus was on the fact that the defendant did not pay, not on whether he had the ability to pay and wilfully refused to do so, or did not have the ability to pay and failed to make sufficient bona fide efforts legally to acquire the resources to pay. See *Bearden* v. *Georgia*, supra, 461 U.S. 672.

Our decision in *State* v. *Martinik*, 1 Conn. App. 70, 467 A.2d 1247 (1983), likewise supports a conclusion that the court did not make the necessary finding that the defendant's failure to pay was wilful. In that case, just as here, the trial court revoked the defendant's probation for failure to make restitution payments. See id., 71. Specifically, the trial court stated that revocation was appropriate "because of the defendant's complete lack of cooperation with his probation officer in making the restitution payments." (Internal quotation marks omitted.) Id. This court, applying *Bearden*, held that the trial court did not make an appropriate finding

regarding wilfulness or review alternative punishments and, accordingly, set aside the judgment and remanded the case for further proceedings. Id., 72. As the defendant points out, despite the fact that the trial court in *Martinik* was silent on the issue of wilfulness, this court did not presume that the court applied the correct legal standard and made an implicit finding of wilfulness. It concluded, as we do here, that the court did not make the requisite finding.

Because we conclude that the trial court's judgment should be set aside for failure to make a finding of wilfulness, it is not necessary to reach the defendant's second claim that the state introduced insufficient evidence to prove that the defendant wilfully refused to pay restitution.[11]

II

Even if we were to conclude that the court made an implicit finding that the defendant's failure to pay restitution was wilful, we next consider whether a trial court in Connecticut is required to make an *explicit* finding on the record that a defendant's failure to pay restitution is wilful, before revoking probation. Neither the United States Supreme Court nor our Supreme Court explicitly has addressed this issue. The principles

[11] Unlike in the criminal context, where we would ordinarily address a claim of insufficiency of the evidence as a preliminary matter because double jeopardy principles dictate that "if we were to rule that the evidence was insufficient, the defendant would be entitled to an acquittal rather than a new trial" (internal quotation marks omitted); *State* v. *Gray*, 200 Conn. 523, 535–56, 512 A.2d 217, cert. denied, 497 U.S. 940, 107 S. Ct. 423, 93 L. Ed. 2d 373 (1986); it is unnecessary to do so here because those same concerns do not apply in the probation revocation proceeding context. See *State* v. *Davis*, 229 Conn. 285, 295, 641 A.2d 370 (1994) ("Although a [probation] revocation proceeding must comport with the requirements of due process, it is not a criminal proceeding. . . . It therefore does not require all of the procedural components associated with an adversary criminal proceeding." (Citations omitted; internal quotation marks omitted.)).

articulated in these cases, however, lead us to the conclusion that an explicit finding is required to satisfy the defendant's fourteenth amendment rights.[12]

As our Supreme Court acknowledged in *State* v. *Hill*, 256 Conn. 412, 421, 773 A.2d 931 (2001), the holding in *Bearden* "was grounded on the court's sensitivity to the treatment of indigents in the criminal justice system and its recognition of the due process and equal protection concerns that the indigence of a defendant raises." Moreover, probation itself, "once granted, is a constitutionally protected interest. The due process clause of the fourteenth amendment to the United States constitution requires that certain minimum procedural safeguards be observed in the process of revoking the conditional liberty created by probation. . . . This is so because the loss of liberty entailed is a serious deprivation requiring that the [probationer] be accorded due process." (Citations omitted; internal quotation marks omitted.) *State* v. *Davis*, 229 Conn. 285, 294, 641 A.2d 370 (1994).

The United States Supreme Court has recognized that, among the minimum procedural safeguards that must be observed in a proceeding to revoke probation, is the requirement of "a written statement by the [fact finders] as to the evidence relied on and the reasons for revoking [probation or] parole." (Internal quotation marks omitted.) *Gagnon* v. *Scarpelli*, 411 U.S. 778, 786, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973), citing *Morrissey* v. *Brewer*, 408 U.S. 471, 489, 92 S. Ct. 2593, 33 L. Ed.

[12] We reach this issue because it is germane to the controversy and provides an independently sufficient basis to reverse the trial court's decision. See *Cruz* v. *Montanez*, 294 Conn. 357, 377, 984 A.2d 705 (2009) ("[I]t is not dictum . . . when a court . . . intentionally takes up, discusses and decides a question germane to, though not necessarily decisive of, the controversy. . . . Rather, such action constitutes an act of the court [that] it will thereafter recognize as a binding decision." (Internal quotation marks omitted.)).

2d 484 (1972).[13] "The written statement required by *Gagnon* and *Morrissey* helps to insure accurate [fact-finding] with respect to any alleged violation and provides an adequate basis for review to determine if the decision rests on permissible grounds supported by the evidence." *Black* v. *Romano*, 471 U.S. 606, 613–14, 150 S. Ct. 2254, 85 L. Ed. 2d 636 (1985).

Moreover, in *Turner* v. *Rogers*, 564 U.S. 431, 444–45, 131 S. Ct. 2507, 180 L. Ed. 2d 452 (2011), the United States Supreme Court addressed the issue of whether the due process clause grants an indigent defendant a right to state appointed counsel at a civil contempt proceeding, which may lead to his or her incarceration. Id., 441. The court explained that, in such cases, like in probation revocation proceedings for failure to pay restitution, "the critical question likely at issue . . . [concerns] the defendant's ability to pay." Id., 446. In its analysis, the court considered "the distinct factors that . . . [it] has previously found useful in deciding what specific safeguards the [c]onstitution's [d]ue [p]rocess [c]lause requires in order to make a proceeding fundamentally fair." (Internal quotation marks omitted.) Id., 444, citing *Mathews* v. *Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). Those factors are: "(1) the nature of the private interest that will be affected, (2) the comparative risk of an erroneous deprivation of that interest with and without additional or substitute procedural safeguards, and (3) the nature and magnitude of any countervailing interest in not providing additional or substitute procedural requirement[s]." (Internal quotation marks omitted.) *Turner* v. *Rogers*, supra, 444–45.

The private interest at issue in *Turner* was the same as it is here: "an indigent defendant's loss of personal

[13] In *Gagnon* v. *Scarpelli*, supra, 411 U.S. 782, the court held that the due process requirements established for parole revocation proceedings were also applicable to probation revocation proceedings.

liberty through imprisonment." Id., 445. The court reasoned that "[t]he interest in securing . . . freedom from bodily restraint, lies at the core of the liberty protected by the [d]ue [p]rocess [c]lause. . . . And we have made clear that its threatened loss through legal proceedings demands due process protection. . . . Given the importance of the interest at stake, it is obviously important to ensure accurate [decision-making] in respect to the key ability to pay question." (Citations omitted; internal quotation marks omitted.) Id. The court then proceeded to identify procedural safeguards that "can significantly reduce the risk of an erroneous deprivation of liberty," one of which is "an express finding by the court that the defendant has the ability to pay." Id., 447–48.

In light of the constitutional significance of the interests at stake when a trial court considers revoking probation for the failure to pay restitution, it is imperative that the court engages in the requisite inquiry into the reasons for the failure to pay, and makes accurate "findings" regarding whether the defendant was "somehow responsible for the failure." *Bearden* v. *Georgia*, supra, 461 U.S. 665. If these findings are not made on the record, it is more difficult to review on appeal the soundness of the court's decision, as the present case illustrates. Both the probationer and the state have an interest in assuring that the probationer is not unjustifiably deprived of his liberty. See *Black* v. *Romano*, supra, 471 U.S. 621 (Marshall, J., concurring) ("[I]n choosing probation, the [s]tate expresses a conclusion that its interests will be met by allowing an individual the freedom to prove that he can rehabilitate himself and live according to the norms required by life in a community. *Bearden* then recognizes that, once this decision is made, both the [s]tate and the probationer have an interest in assuring that the probationer is not deprived of this opportunity without reason."); see also *Gagnon*

v. *Scarpelli*, supra, 411 U.S. 785–86 ("[b]oth the probationer . . . and the [s]tate have interests in the accurate finding of fact and the informed use of discretion—the probationer . . . to insure that his liberty is not unjustifiably taken away and the [s]tate to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community"). We therefore hold that the trial court is required to make explicit findings on the record as to whether the probationer had the ability to pay and, if so, whether the failure to pay was wilful, and, if not, whether the probationer made sufficient bona fide efforts legally to acquire the resources to pay.

This holding is consistent with appellate courts in other states that have persuasively held that, in probation revocation proceedings for the failure to pay restitution, trial courts are required to make explicit findings regarding whether the defendant was able to pay restitution and whether the failure to pay was wilful. See *Del Valle* v. *State*, 80 So. 3d 999, 1011 (Fla. 2011) ("To comply with the rules set forth in *Bearden* and *Stephens* [v. *State*, 630 So. 2d 1090 (Fla. 1994)], trial courts must inquire into a probationer's ability to pay *and* make an explicit finding of [wilfulness] . . . . We emphasize that the probationer's ability to pay is an element of [wilfulness] in the context of determining whether there is a [wilful] violation for failure to pay a monetary obligation as a condition of probation." (Emphasis in original.)); *Commonwealth* v. *Marshall*, 345 S.W.3d 822, 824 (Ky. 2011) ("We . . . reconfirm the principle of due process that the trial court must make clear findings on the record specifying the evidence relied upon and the reasons for revoking probation. This requirement specifically includes findings about whether the defendant made sufficient bona fide efforts to make payments."); *State* v. *Parsons*, 717 P.2d 99, 102–103 (N.M.

App. 1986) ("Was the trial court required to adopt findings of fact or indicate in the record its determination of whether defendant had the ability to pay sums ordered and whether defendant's failure to pay was [wilful]? We answer the question in the affirmative."). But see *United States* v. *Mitchell*, 317 Fed. Appx. 963, 965 (11th Cir. 2009) ("[A]lthough the district court did not explicitly state that [the defendant's] behavior was [wilful], it did find that [the defendant] made a mockery of supervised release. The record thus reveals that the district court implicitly found [the defendant's] failure to pay to be [wilful] and that [the defendant] did not make a bona fide effort to acquire resources to pay the fee."); *State* v. *Brady*, 300 P.3d 778, 780 (Utah App. 2013) ("These comments by the trial court illustrate its implicit finding of [wilfulness]. [The probationer] argues that an explicit finding is mandatory. We disagree.").

The judgment is reversed and the case is remanded for a new probation revocation hearing.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* RICKIE LAMONT KNOX
(AC 41168)
(AC 41644)

Alvord, Alexander and Harper, Js.

Syllabus

Convicted, after a jury trial, of the crime of criminal possession of a firearm in connection with the shooting death of the victim, and with being a persistent serious felony offender, the defendant appealed to this court. The victim and some friends argued outside a cafe with another group that included the defendant. At some point, the defendant withdrew a handgun. The victim appeared to reach for a gun in his waistband and the defendant shot the victim, who fell to the ground injured. The victim discharged his gun while on the ground. The defendant then fled the

scene with his gun. The victim later died as a result of his injuries. Approximately one month after the incident, the defendant was arrested and was briefly interviewed by a detective, B, before invoking his right to counsel, ending the interview. The next day, the defendant informed another officer that he wanted to speak with B. During this second interview, B informed the defendant of his *Miranda* rights (384 U.S. 436). The defendant expressly stated that he understood and waived these rights. During the course of the second interview, the defendant admitted to being outside the cafe at the time of the shooting. Certain statements made by the defendant during his second interview with B were admitted into evidence. After a jury trial, the defendant was found guilty of criminal possession of a firearm and tampering with physical evidence and with being a persistent serious felony offender. Thereafter, the trial court granted the defendant's motion for judgment of acquittal as to the charge of tampering with physical evidence, and the state, on the granting of permission, appealed to this court. *Held*:

1. The trial court properly granted the defendant's motion for a judgment of acquittal with respect to the charge of tampering with physical evidence, as no reasonable trier of fact could have found the defendant guilty; the state presented insufficient evidence that the defendant intended to impair the availability of his gun in a subsequent criminal investigation, there having been no evidence regarding the defendant's intent, apart from the evidence that, after shooting the victim, the defendant left the scene with the gun; moreover, the state's claim that it could rely on the defendant's prior felony conviction to support a finding that the defendant had removed the gun from the scene to avoid a charge of criminal possession of a firearm and, therefore, tampered with physical evidence, was unavailing, as evidence of that conviction had been admitted by stipulation only for the limited purpose of establishing an element of the crime of criminal possession of a firearm.

2. The defendant could not prevail on his claim that his statements made to the police during the second interview should have been excluded because he made an ambiguous request for counsel that required the police to stop the interview and clarify this request pursuant to *State* v. *Purcell* (331 Conn. 318); the defendant's explanation to B that he had changed his mind about speaking with the police because a lawyer had not come to see him after the first interview and he felt "left for dead," would not have caused a reasonable officer to construe that explanation as an ambiguous request for counsel as that statement did not contain any of the conditional or hedging terms that have been deemed ambiguous or equivocal invocations of that right, and the defendant made no clear and unequivocal request for an attorney; moreover, the conclusion that the defendant's explanation was not a request for counsel was supported by the circumstances of the two interviews, including, at outset of the second interview, the defendant's indication that he did not want to be recorded, his expressed concern for his safety, and

his reluctance to identify certain individuals involved in other criminal activity, and, at the first interview, the defendant, who B knew to have been involved in previous criminal matters, had unambiguously invoked his right to counsel, which resulted in the termination of that interview.

3. The trial court did not abuse its discretion in making its evidentiary ruling regarding the admission of certain portions of B's interview with the defendant: the court's decision to admit only that portion of the interview in which the defendant identified himself in a photograph taken from a surveillance video on the night of the shooting and to not admit the portion the defendant sought to introduce in which he identified another man in the photograph as the shooter did not violate the applicable rule (§ 1-5) of the Connecticut Code of Evidence because the evidence the defendant sought to introduce did not change or alter the fact that he identified himself as present at the scene and would not demonstrate that the portion of the interview that was introduced had been taken out of context; moreover, the defendant failed to establish that the court's evidentiary rulings violated his constitutional rights to due process and to present a complete defense.

Argued September 9—officially released November 24, 2020

Procedural History

Two part substitute information charging the defendant, in the first part, with the crimes of murder, criminal possession of a firearm, and tampering with physical evidence and, in the second part, with being a persistent serious felony offender, brought to the Superior Court in the judicial district of Waterbury, and tried to the jury before *Alander*, *J.*; verdict of guilty of criminal possession of a firearm, tampering with physical evidence, and with being a persistent serious felony offender; thereafter, the court granted the defendant's motion for a judgment of acquittal as to the charge of tampering with physical evidence; subsequently, the court, *Alander*, *J.*, rendered judgment of guilty of criminal possession of a firearm and enhanced the defendant's sentence for being a persistent serious felony offender, from which the state, on the granting of permission, and the defendant filed separate appeals to this court. *Affirmed.*

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Terence Mariani* and *Elena Palermo*, senior assistant state's attorneys, for the appellant in Docket No. AC 41168 (state).

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Terence Mariani*, senior assistant state's attorney, for the appellee in Docket No. AC 41644 (state).

Erica A. Barber, assigned counsel, for the appellant in Docket No. AC 41644 and the appellee in Docket No. AC 41168 (defendant).

Opinion

ALEXANDER, J. This case involves two separate appeals. First, in the appeal in Docket No. AC 41168, the state appeals from the decision of the trial court granting the motion for judgment of acquittal filed by the defendant, Rickie Lamont Knox, with respect to the charge of tampering with physical evidence in violation of General Statutes § 53a-155. The state contends that sufficient evidence existed to support this conviction. Second, in the appeal in Docket No. AC 41644, the defendant appeals from the judgment of conviction, rendered after a jury trial, of criminal possession of a firearm in violation of General Statutes § 53a-217. The defendant contends that his postarrest statements to the police had been obtained following a violation of the prophylactic rule created by our Supreme Court in *State* v. *Purcell*, 331 Conn. 318, 203 A.3d 542 (2019), and, therefore, should have been excluded from evidence. The defendant also argues that the court abused its discretion and violated his constitutional rights by admitting into evidence certain inculpatory portions of his police interview while excluding related contextual portions. We affirm the judgment of the trial court.

The following facts, as the jury reasonably could have found, and procedural history are necessary for the resolution of these appeals. On October 17, 2015, Isaiah James spent the day socializing with the decedent, Anthony Crespo, at the decedent's apartment. At some point that night, two other individuals, Ismail Abdus-Sabur and Timothy Minnifield, joined James and the decedent. After consuming all of the alcohol at the decedent's apartment, the group walked to the Barley Corn Cafe (cafe) around 1 a.m. on October 18, 2015. James and the decedent attempted to enter the cafe while the other two men, who were under the age of twenty-one, waited outside. After being denied entry into the cafe, James "bumped" into another man standing outside, and a brief verbal disagreement ensued. James then walked over to Abdus-Sabur and Minnifield. An individual, who the state argued was the defendant, then placed his hand, positioned to resemble a gun, to James' head, and cautioned him to "[w]atch [his] ass . . . ."

After being threatened, James spoke with the decedent. James turned around and realized that there was "a group of guys around [them]." The decedent began to argue with this group. The defendant, standing directly in front of the decedent, drew a handgun from his waistband. The decedent appeared to reach for a gun in his waistband. The defendant shot the decedent, who fell to the ground, injured.[1] The decedent discharged his gun while on the ground. The defendant then fled the scene.

Edward Bergin, the owner of the cafe, came outside and was directed to the decedent, who remained on the ground. Bergin overheard the decedent ask Edwin Melendez to retrieve the decedent's gun from under a

[1] During the autopsy, a single nine millimeter bullet was removed from the decedent's back.

nearby parked motor vehicle. Melendez looked under the motor vehicle, grabbed the decedent's gun and placed it in his vehicle. Bergin relayed this information regarding the relocating of the decedent's gun to Brian Brunelli, a Waterbury police officer who had been dispatched to the cafe.

Brunelli observed a small hole in the center of the decedent's chest. The decedent's gun was recovered from Melendez' vehicle. While on the ground outside of the cafe, the decedent informed Brunelli that he could neither breathe nor feel his legs. Medical personnel transported the decedent to the hospital, where he died soon thereafter.[2]

Joe Rainone, a Waterbury police lieutenant, processed the crime scene where the police recovered three firearm cartridges: a fired nine millimeter cartridge, an unfired .45 caliber cartridge, and a fired .45 caliber cartridge, which later testing revealed had been discharged from the decedent's gun.[3] On the basis of the evidence at the crime scene, the police concluded that two different guns had been used in the shooting outside of the cafe, and that the decedent had fired one shot during the altercation.

After an investigation, the police arrested the defendant approximately one month later. Recorded police interviews with the defendant occurred on November 20 and 21, 2015. At the start of the trial, the state filed an information charging the defendant with murder in violation of General Statutes § 53a-54, criminal possession of a firearm in violation of § 53a-217, carrying a pistol without a permit in violation of General Statutes

[2] James Gill, the forensic pathologist who performed the October 19, 2015 autopsy of the decedent, testified that the cause of death was a gunshot wound to the trunk of the torso. Gill further opined that the decedent would have been able to fire his gun after sustaining this gunshot wound.

[3] Rainone explained to the jury that a cartridge is often called a "live round" and consists of the canister, gun powder and the bullet.

§ 29-35 and tampering with physical evidence in violation of § 53a-155. At the conclusion of the trial, the state withdrew the charge of carrying a pistol without a permit and filed a new long form information charging the defendant with the crimes of murder, criminal possession of a firearm and tampering with physical evidence. The jury returned not guilty verdicts on the murder charge and certain lesser included offenses,[4] and a guilty verdict on the criminal possession of a firearm and tampering with physical evidence charges.

Following the jury's verdict, the court granted the defendant's motion for a judgment of acquittal with respect to the charge of tampering with physical evidence. The court concluded that the state had failed to present sufficient evidence that the defendant had removed his gun from the crime scene with the intent to hinder a criminal investigation. The court then proceeded to the state's part B information and the jury found the defendant guilty of being a persistent serious felony offender. See General Statutes § 53a-40 (c). On February 9, 2018, the court imposed a total effective sentence of twenty years incarceration. These appeals followed.

I

In the appeal in Docket No. AC 41168, the state claims that the court improperly granted the defendant's motion for judgment of acquittal with respect to the charge of tampering with physical evidence. Specifically, the state contends that it had produced sufficient evidence that the defendant had removed his gun from the crime

[4] The court charged the jury on the lesser included offenses of manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55a, manslaughter in the second degree with a firearm in violation of General Statutes § 53a-56a and criminally negligent homicide in violation of General Statutes § 53a-58.

scene with the intent to impair its availability in a criminal investigation by a law enforcement agency. We disagree.

The state charged the defendant with tampering with physical evidence in violation of § 53a-155 (a) (1) by fleeing from the crime scene with his gun.[5] On October 2, 2017, the defendant filed a motion seeking, in part, to dismiss the tampering charge. On October 17, 2017, the court heard arguments on this motion. The court denied that portion of the defendant's motion to dismiss "in essence" but noted that the defendant could raise arguments relating to the tampering with physical evidence charge at a later time.

Before the conclusion of the state's case, the parties stipulated that the defendant had been convicted of a felony prior to the events of October 18, 2015. As a result of this stipulation, the court instructed the jury[6] that the evidence of the prior conviction had been admitted for the limited purpose of establishing one of the elements of criminal possession of a firearm[7] and

[5] The operative information charged the defendant as follows: "AND FURTHER THAT THE SAID [defendant] did commit the crime of TAMPERING WITH PHYSICAL EVIDENCE in violation of . . . § 53a-155 (a) (1) in that on or about October 18, 2015, at approximately 1:13 a.m., at or near [the cafe], that said [defendant] did, believing that a criminal investigation conducted by a law enforcement agency was about to be instituted, remove a thing with purpose to impair its availability in such criminal investigation; to wit [the defendant] fled the scene of the shooting with the gun he used to kill [the decedent]."

[6] Specifically, the court instructed the jury as follows: "Ladies and gentleman, I'll be giving full instructions as of the close of evidence, but as you just heard, the state has offered evidence that the defendant has been previously convicted of a felony. That evidence is not being admitted to show that the defendant has bad character or propensity to commit crimes. It's been admitted for a limited purpose only, that limited purpose is to establish an element of the crime of criminal possession of a firearm. And you're to use it for that purpose only. And I'll be providing you with additional instructions later in my charge to you."

[7] General Statutes § 53a-217 (a) provides in relevant part: "A person is guilty of criminal possession of a firearm . . . when such person possesses a firearm . . . and (1) had been convicted of a felony committed prior to,

was not to be used for any other purpose. The court subsequently reiterated the limited purpose of the evidence of the defendant's prior felony conviction during its final instructions to the jury.[8]

On October 31, 2017, after the conclusion of the evidentiary phase of the trial, the defendant filed a motion for judgment of acquittal. See Practice Book § 42-40. The defendant asserted that the state had failed to produce evidence that he "altered, destroyed, concealed or removed a firearm with the purpose to impair its availability in a criminal investigation or official proceeding." During oral argument on the defendant's motion, the prosecutor noted that the requisite intent for tampering with physical evidence could be inferred from both the defendant's flight from the scene and the fact that, given his prior felony conviction, the defendant knew that possession of a firearm constituted evidence of criminal possession of a firearm. After hearing from the parties, the court reserved judgment on the motion until after the jury verdict. See Practice Book § 42-42.[9]

on or after October 1, 2013 . . . ." See generally *State* v. *Harris*, 183 Conn. App. 865, 871 n.9, 193 A.3d 1223, cert. denied, 330 Conn. 918, 193 A.3d 1213 (2018).

[8] The court instructed the jury as follows: "You will recall that some testimony and evidence were admitted during the course of this trial for a limited purpose only. Any testimony or evidence which I identified as being received for a limited purpose, you will consider only as it relates to the limited issue for which it was allowed. You shall not consider such testimony and evidence in finding any other facts or as to any other issue.

* * *

"Any evidence in this case that the defendant has previously been convicted of a felony has been admitted for a limited purpose, that purpose being to establish the second essential element of this offense. *The evidence may not be used for any other purpose*." (Emphasis added.)

[9] Practice Book § 42-42 provides that "[i]f the motion [for judgment of acquittal] is made at the close of all the evidence in a jury case, the judicial authority may reserve decision on the motion, submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or after it is discharged without having returned a verdict."

On November 6, 2017, the jury found the defendant guilty of criminal possession of a firearm and tampering with physical evidence. After excusing the jury, the court heard further argument from the parties regarding the defendant's motion for judgment of acquittal. At the outset, the court questioned whether the state had met its burden with respect to the tampering with physical evidence charge. The court inquired whether, under these facts, where there had been a "shootout and a valid claim of self-defense [and] where [the state had claimed that the defendant] had a duty to retreat," the defendant's flight from the scene with his gun was sufficient for the jury to find that he had intended to impair the criminal investigation. The prosecutor responded that the jury could have found that the defendant had a dual intent in that he wanted to flee the scene and prevent the police from gaining possession of his firearm.

The court then rendered its oral decision on the motion for judgment of acquittal. "My view is [that] the only evidence from which a jury could infer an intent to remove the gun to impair a criminal investigation is his flight from the scene. Under the circumstances of this case, where there was inarguably a shootout, where the [decedent] fired his weapon, and the defendant fled the scene claiming self-defense and the state argued a duty to retreat, looking at all those circumstances, I conclude a jury could not reasonably find that the state has proven beyond a reasonable doubt that he took the gun with him to impair its availability in a subsequent criminal investigation. So for those reasons, I'm going to grant the motion for judgment of acquittal."

Two days later, the state filed a motion for permission to appeal the granting of the defendant's judgment for motion of acquittal. See General Statutes § 54-96; Practice Book § 61-6 (b).[10] The court granted the state's

[10] General Statutes § 54-96 provides: "Appeals from the ruling and decisions of the Superior Court, upon all questions of law arising on the trial

motion for permission to appeal on November 28, 2017. See generally *State* v. *Richard P.*, 179 Conn. App. 676, 678 n.1, 181 A.3d 107 (trial court granted state permission to appeal), cert. denied, 328 Conn. 924, 181 A.3d 567 (2018); *State* v. *Brundage*, 148 Conn. App. 550, 552, 87 A.3d 582 (2014) (same), aff'd, 320 Conn. 740, 135 A.3d 697 (2016).

We begin with the relevant legal principles and our standard of review. A motion for a judgment of acquittal must be granted if the evidence would not reasonably permit a finding of guilt. *State* v. *Nival*, 42 Conn. App. 307, 308, 678 A.2d 1008 (1996); see also *State* v. *Greene*, 186 Conn. App. 534, 549, 200 A.3d 213 (2018). In ruling on such a motion, "the trial court must determine whether a rational trier of fact could find the crime proven beyond a reasonable doubt." *State* v. *Nival*, supra, 309.

In the present case, the court concluded that the state had failed to prove, beyond a reasonable doubt, that the defendant removed the gun from the crime scene with the intent to impair its availability in a subsequent criminal investigation. "In reviewing a sufficiency of the evidence claim, we apply a [two part] test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [trier of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . In evaluating evidence, the trier of fact is not required to accept as dispositive those inferences that

of criminal cases, may be taken by the state, with the permission of the presiding judge, to the Supreme Court or to the Appellate Court, in the same manner and to the same effect as if made by the accused."

Practice Book § 61-6 (b) provides in relevant part: "The state, with permission of the presiding judge of the trial court and as provided by law, may appeal from a final judgment."

are consistent with the defendant's innocence. . . . The trier may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . .

"The trial court should not set a verdict aside where there was some evidence upon which the jury could reasonably have based its verdict . . . . A jury can rely on both circumstantial and direct evidence when making its verdict. There is no legal distinction between direct and circumstantial evidence so far as probative force is concerned. . . . Because direct evidence of the accused's state of mind is rarely available . . . intent is often inferred from conduct . . . and from the cumulative effect of the circumstantial evidence and the rational inferences drawn therefrom." (Citations omitted; internal quotation marks omitted.) *State* v. *Mark*, 170 Conn. App. 241, 249–51, 154 A.3d 564, cert. denied, 324 Conn. 927, 155 A.3d 1269 (2017); see also *State* v. *Greene*, supra, 186 Conn. App. 549–50.

We now turn to the statutory language of the crime of tampering with physical evidence. See, e.g., *State* v. *Pommer*, 110 Conn. App. 608, 613, 955 A.2d 637 (review of any claim that evidence was insufficient to prove violation of criminal statute necessarily includes consideration of skeletal requirement of necessary elements that charged statute requires to be proved), cert. denied, 289 Conn. 951, 961 A.2d 418 (2008). Section 53a-155 (a) provides in relevant part: "A person is guilty of tampering with or fabricating physical evidence if, believing that a criminal investigation conducted by a law enforcement agency or an official proceeding is pending, or about to be instituted, such person: (1) Alters, destroys, conceals or removes any record, document or thing with purpose to impair its verity or availability in such criminal investigation or official proceeding . . . ."[11] Our Supreme Court has set forth the

[11] Effective October 1, 2015, "[§] 53a-155 was amended . . . to add that one may be guilty of tampering during a criminal investigation or when a

elements of this crime. "The state . . . must establish that the defendant (1) believed that an official proceeding [or criminal investigation] was pending or about to be instituted, (2) discarded the evidence at issue, and (3) *acted with the intent to prevent the use of the evidence at an official proceeding* [*or criminal investigation*]." (Emphasis added.) *State* v. *Jordan*, 314 Conn. 354, 377, 102 A.3d 1 (2014); see also *State* v. *Mark*, supra, 170 Conn. App. 251.

On appeal, the state argues that the evidence was sufficient to prove that the defendant removed the gun from the crime scene with the intent to impair its availability in the subsequent police investigation. It further contends that the jury could have inferred that the defendant, cognizant of his prior felony conviction, removed the gun for the purpose of avoiding the charge of criminal possession of a firearm. The defendant counters that his prior felony conviction had been admitted into evidence for the limited purpose of establishing an element of the crime of criminal possession of a firearm and could not be used for any other purpose. We agree with the defendant.

A brief review of the relevant case law will facilitate our analysis. In *State* v. *Foreshaw*, 214 Conn. 540, 542–43, 572 A.2d 1006 (1990), the defendant shot and killed the victim and then fled in her car. The police arrested the defendant a short time later and found a bullet on the floor of her vehicle. Id., 543. The defendant stated that she had thrown her gun out of the car window, and efforts to retrieve it proved to be unsuccessful. Id. At her criminal trial, the defendant admitted that she had discarded the gun while driving away from the site of the shooting "so that she would not be caught with

criminal proceeding is about to commence." *State* v. *Stephenson*, 187 Conn. App. 20, 33 n.9, 201 A.3d 427, cert. granted on other grounds, 331 Conn. 914, 204 A.3d 702 (2019); see also *State* v. *Mark*, supra, 170 Conn. App. 243 n.2.

it." Id. The jury found her guilty of murder, carrying a pistol without a permit, and tampering with physical evidence. Id., 541.

On appeal, the defendant challenged the sufficiency of the evidence with respect to the tampering with physical evidence charge. Id., 549. Although the defendant in *Foreshaw* did not focus on whether she had discarded the gun with the intent to make it unavailable for the subsequent official proceeding; see id., 550–51; our Supreme Court noted that she had testified to discarding the gun "so that she would not be caught with it." Id., 550. Thus, in *Foreshaw*, the defendant's own words provided evidence of her intent with respect to the unavailability of the gun in the subsequent proceeding.

In *State* v. *Jordan*, supra, 314 Conn. 354, our Supreme Court clarified certain aspects of its decision in *Foreshaw*. In *Jordan*, a witness observed an individual pull "aggressively" on the locked door of a closed bank while wearing a jacket, ski mask and gloves. Id., 358–59. After hearing the witness' report on his radio, a nearby police officer observed a likely suspect and called out to him. Id., 359. The suspect took off running. Id. During the ensuing chase, the suspect removed and discarded several items of clothing, including his jacket, sweatshirt, mask and gloves. Id., 359–60. The police eventually located and arrested the defendant, who was charged with various criminal offenses. Id., 360–63. The defendant was convicted of attempt to commit robbery in the third degree, conspiracy to commit robbery in the third degree and tampering with physical evidence. Id., 358.

On appeal, the defendant claimed that the evidence was insufficient to support his conviction of tampering with physical evidence. Id., 376. In addressing the defendant's contention that *Foreshaw* had been decided

incorrectly, our Supreme Court observed that § 53a-155 applies to some, but not all, attempts to discard evidence that occur during a police investigation. Id., 382.[12] Furthermore, it noted that "it is not the existence of an investigation that is key but, rather, whether the defendant believes an official proceeding is pending or probable. . . . This analysis ensures that the focus of the inquiry is on the culpability of the actor, rather than on external factors wholly unrelated to [the actor's] purpose of subverting the administration of justice." (Internal quotation marks omitted.) Id., 383.

In *Jordan*, our Supreme Court determined that the jury could not reasonably have concluded that, at the time the defendant discarded the evidence, he believed that an official proceeding against him was probable. Id., 385. "Instead, the only reasonable inference from the facts . . . is that the defendant discarded his clothing to prevent its use in an investigation in order to escape detection and avoid being arrested by the pursuing police officer. There is no evidence that when the defendant discarded the clothing he believed that the police officer had any information, other than the clothing, linking him to the attempted bank robbery." Id., 388–89.

Unlike in *Jordan*, here, the removal of evidence for the purpose of impairing its availability in a criminal investigation by law enforcement falls within the ambit of § 53a-155. See note 12 of this opinion. Nevertheless, the state failed to produce any evidence that, at the time the defendant departed the crime scene, he removed the gun with the intent to impair its availability in a subsequent criminal investigation. Cf. *State* v. *Mark*, supra, 170 Conn. App. 254 (witness testified that defendant was nervous and had wanted to return to crime

[12] Our Supreme Court's decision in *State* v. *Jordan*, supra, 314 Conn. 354, was released on November 4, 2014, approximately eleven months before § 53a-155 was amended to include criminal investigations.

scene to dispose of rock used to kill victim). The evidence indicates that the defendant shot the decedent, who fell to the ground and returned fire. The defendant then left the scene. There is no additional evidence that, when he left the scene of the shooting, the defendant took the gun with the intent to prevent its use in the subsequent police investigation.

The state argues that, in addition to his flight from the scene of the shooting, the jury could have relied on the defendant's prior felony conviction to satisfy the element that he had removed the gun with the intent to impair its availability in an investigation by law enforcement. The state maintains that the evidence of the defendant's flight, combined with his prior felony conviction, supported a finding that the defendant had removed the gun from the scene to avoid a charge of criminal possession of a firearm, and therefore tampered with physical evidence.

The state's argument, however, overlooks the limited purpose for which the defendant's prior felony conviction had been admitted into evidence. The parties and the court addressed the admissibility of the defendant's prior felony conviction. The court indicated that it would provide the jury with "a cautionary instruction . . . that the felony conviction *is only to be used for that count* [*of criminal possession of a firearm*] *and for no other*. It's not to be used to infer bad character or criminal propensity on the part of the defendant." (Emphasis added.) When the parties' stipulation regarding the defendant's prior felony conviction was admitted into evidence and read to the jury, the court limited its use to the charge of criminal possession of a firearm. The court repeated that limitation during its charge to the jury. At no point did the state object to the limited purpose for which the evidence of the defendant's prior felony conviction could be used.

"Evidence which is offered and admitted for a limited purpose only, and the facts found from such evidence, cannot be used for another and totally different purpose. *O'Hara* v. *Hartford Oil Heating Co.*, 106 Conn. 468, 473, 138 A. 438 (1927)." (Internal quotation marks omitted.) *Access Agency, Inc.* v. *Second Consolidated Blimpie Connecticut Realty, Inc.*, 174 Conn. App. 218, 229, 165 A.3d 174 (2017); see also *Damick* v. *Planning & Zoning Commission*, 158 Conn. 78, 80–81, 256 A.2d 428 (1969) (when court used evidence and testimony for purposes beyond limited ones for which it had permitted admission into evidence, such misuse was impermissible); see generally Conn. Code Evid. § 1-4. Given the state's agreement to use the defendant's prior felony conviction only for a limited purpose, we reject its efforts to now apply that evidence to the tampering with physical evidence charge.[13] We conclude, therefore, that

[13] In its reply brief, the state relies on *State* v. *Gradzik*, 193 Conn. 35, 475 A.2d 269 (1984). In that case, the defendant had been convicted of burglary in the third degree and, on appeal, challenged the sufficiency of the evidence that he entered the building. Id., 36. At the close of the state's evidence, he moved for a judgment of acquittal on the basis that the state had failed to prove that the defendant entered the cellar door of the building. Id., 37. The court denied the defendant's motion. Id. In its charge, the court instructed that in order to find the defendant guilty, the jury had to find that the defendant had entered the cellar. Id., 37–38.

On appeal, the defendant claimed that the court's charge had "narrowed the issue to entry into the cellar [and because] proof of the defendant's presence in the hatchway is not sufficient for conviction," his conviction could not stand. Id., 38. Our Supreme Court first noted that, contrary to the trial court's instructions to the jury, the defendant's presence in the hatchway was sufficient for a conviction of burglary in the third degree. Id. It then explained: "The trial court cannot by its instruction change the nature of the crime charged in the information. . . . The substituted information charged the defendant with burglary in the third degree which could have been proved by the defendant's unlawful entry into the hatchway. Though the instruction incorrectly limited the proof necessary for a conviction, on review of a sufficiency of the evidence claim this court looks to see if the evidence supports the verdict on the crime charged. As discussed earlier, we hold that it does." (Citation omitted.) Id., 38–39.

We conclude that *State* v. *Gradzik*, supra, 193 Conn. 35, is distinguishable from the present case. In *Gradzik*, our Supreme Court concluded that the trial court's erroneous instruction could not limit the elements of the crime

the state presented insufficient evidence regarding the defendant's intent when he departed from the scene of the shooting. The evidence regarding his prior felony conviction could not be used to establish the element of intent in the tampering with physical evidence charge. For these reasons, we conclude that no reasonable trier of fact could have found the defendant guilty of this charge, and the trial court properly granted the defendant's motion for judgment of acquittal as to the charge of tampering with physical evidence.

II

In the appeal in Docket No. AC 41644, the defendant claims that his statements to the police had been obtained after a violation of the prophylactic rule established by our Supreme Court in *State* v. *Purcell*, supra, 331 Conn. 318, and, therefore, the court should have excluded his statements from evidence. The defendant also contends that the court abused its discretion and violated his constitutional rights by admitting into evidence certain inculpatory portions of his police interview and excluding related contextual portions. The state counters, inter alia, that the defendant did not make an ambiguous request for counsel during his interview with the police and, therefore, the *Purcell* rule did not apply. Additionally, the state maintains that the court did not abuse its discretion or violate the defendant's constitutional rights with respect to its rulings regarding the admissibility of portions of the defendant's police interview. We agree with the state.

On November 20, 2015, approximately one month after the shooting, the police took the defendant into

of burglary in the third degree so as to require the state to prove entry into the cellar. The evidence of the defendant's entry into the hatchway was sufficient to support his conviction, despite that improper instruction by the court. In the present case, the agreement of the parties limited the use the defendant's prior felony conviction and the court instructed the jury accordingly. The state's reliance on *Gradzik*, therefore, is misplaced.

custody pursuant to an arrest warrant. The defendant was arrested in New Haven and then transported to Waterbury. During a brief custodial interview in the detective bureau, the defendant unambiguously asserted his right to have a lawyer present, and Stephen Brownell, a Waterbury police detective, ended the interview.

The defendant remained in custody overnight at the Waterbury police station. The next day, he informed Ricardo Viera, a Waterbury police officer, that he wanted to speak with Brownell. The defendant's affirmative request was relayed to Brownell, who returned to the police station to speak with the defendant on November 21, 2015. During this second interview, Brownell informed the defendant of his *Miranda* rights.[14] The defendant expressly stated that he understood and waived these rights. During the course of this second interview, the defendant admitted to being outside the cafe at the time of the shooting.

On October 2, 2017, the defendant filed a motion to suppress the statements he made to law enforcement officers. The defendant claimed that these statements were made (1) without a valid waiver of his state and federal rights against self-incrimination, (2) involuntarily, in violation of state and federal rights to due process and (3) in violation of his right to counsel. The defendant filed a memorandum of law in support of the motion to suppress approximately two weeks later.

On October 17, 2017, the court held a hearing on the defendant's motion to suppress. For purposes of the hearing, the state conceded that the defendant was in custody and subject to interrogation. The parties also agreed to focus on the November 21, 2015 interview. The court indicated that it had watched the video recordings of both interviews. After hearing from the

[14] *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

state's witnesses, the court orally denied the defendant's motion to suppress.

The court found that the defendant had asserted his right to have counsel present during the first interview,[15] at which time Brownell terminated the interrogation.[16] The next day, the defendant affirmatively requested to speak to Brownell, which led to the second interview. The court expressly found that, during the second interview, the defendant was informed of, understood and waived his *Miranda* rights. The court noted that, during the second interview, the defendant had expressed dissatisfaction that a lawyer had not come to see him following the conclusion of the first interview. The court, relying on *Edwards* v. *Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), concluded that the defendant had initiated further communication with the police,[17] and then had knowingly, intelligently and voluntarily waived his *Miranda* rights. Accordingly, it denied the defendant's motion to suppress.

[15] In *Miranda* v. *Arizona*, supra, 384 U.S. 469–73, the United States Supreme Court held that "a suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning, and that the police must explain this right to him before questioning begins." (Internal quotation marks omitted.) *State* v. *Purcell*, supra, 331 Conn. 330; see also *State* v. *Anonymous*, 240 Conn. 708, 720–21, 694 A.2d 766 (1997) (right of accused to have attorney present during custodial interrogation constitutes prophylactic rule to protect constitutional rights).

[16] In *Smith* v. *Illinois*, 469 U.S. 91, 98, 105 S. Ct. 490, 83 L. Ed. 2d 488 (1984), the United States Supreme Court acknowledged the "bright-line rule that *all* questioning must cease after an accused requests counsel." (Emphasis in original; internal quotation marks omitted.) See also *State* v. *Purcell*, supra, 331 Conn. 331; *State* v. *Rollins*, 245 Conn. 700, 704–706, 714 A.2d 1217 (1998); see generally annot., 83 A.L.R. 4th 454 § 2 [a] (1991).

[17] "We further hold that an accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication, exchanges, or conversations with the police.*" (Emphasis added.) *Edwards* v. *Arizona*, supra, 451 U.S. 484–85; see also *State* v. *Hafford*, 252 Conn. 274, 290, 746 A.2d 150 (after suspect requests counsel, further conversations between police and suspect do not violate *Miranda* if initiated by suspect), cert. denied, 531

On the last day of the state's case, the prosecutor, outside the presence of the jury, sought to have portions of the video recording of the defendant's second interview admitted into evidence. Defense counsel, who had not been provided with advance notice of the specific excerpts the state sought to have admitted, noted that he likely would ask that certain additional portions also be admitted into evidence to provide the jury with context. After viewing the state's proffer, defense counsel offered several video clips for admission into evidence. The court admitted only the excerpt of the interview offered by the state, in which the defendant admitted to being present outside of the cafe on the night of the shooting.

A

The defendant first claims that his statements to the police during his second interview violated the prophylactic rule set forth by our Supreme Court in *State* v. *Purcell*, supra, 331 Conn. 318, and, therefore, the court should have excluded the statements from evidence. The defendant argues that he made an equivocal or ambiguous request for counsel at the beginning of the second interview and therefore the police should have confined any further questioning to narrow inquiries designed to clarify the defendant's desire for counsel, as required by *Purcell*. The state counters that the defendant's remarks did not constitute an ambiguous request for counsel, and, therefore, the police's subsequent questioning was not limited to a clarification of the desire for counsel, and that any error was harmless beyond a reasonable doubt. After a careful review of the record and our Supreme Court's decision in *Purcell*, we conclude that the defendant's comment did not amount to an equivocal or ambiguous request for counsel, and, therefore, the defendant's claim fails.

U.S. 855, 121 S. Ct. 136, 148 L. Ed. 2d 89 (2000); *State* v. *Mercer*, 208 Conn. 52, 67–68, 544 A.2d 611 (1988) (same).

The following additional facts are necessary for our analysis. Brownell first interviewed the defendant on November 20, 2015. This interview occurred after the defendant's arrest and transportation from New Haven to Waterbury. At the outset, Brownell informed the defendant that, before discussing the incident that had led to his arrest, the defendant had to be made aware of, and waive, certain rights.[18] The defendant stated that he was willing to talk to Brownell, but requested that he be permitted to telephone his father. After further conversation, Brownell again attempted to provide the defendant with his *Miranda* rights. After reading some of the *Miranda* rights aloud, the defendant again requested to make a telephone call. The defendant repeated that he was willing to speak with Brownell and added that he wanted a lawyer present.[19] Brownell asked if the defendant would prefer to have a lawyer and the defendant responded: "I'd rather have a lawyer present." At this point, Brownell ceased the interrogation of the defendant.

The next day, the defendant reinitiated communication with the police by affirmatively requesting to speak with Brownell, whom he described as the detective "controlling the case." After returning to the police station, Brownell commenced the second interview by attempting to obtain the defendant's waiver of his *Miranda* rights. The defendant repeatedly expressed his concerns about being recorded and for his safety.

After about fifteen minutes, the following colloquy occurred:

[18] For example, Brownell stated: "But if we wanna talk about the incident, if you wanna know why you're here, the things that happened, what I know, what people have been saying about you, at the bare minimum you have to understand these rights, you gotta read them out loud, and say that you understand them and you wanna speak with me."

[19] Specifically, the defendant stated: "Yes, I do [want to speak with Brownell], but I want to make a phone call, and my father and—and my girl, have her bring a lawyer—can I speak with you with a lawyer?"

"[Brownell]: Who did you, who did you reach out earlier to . . . say that you wanted to speak with me again? Did you reach out to somebody?

"[The Defendant]: Ye—couple of people.

"[Brownell]: Who was it? Officers downstairs?

"[The Defendant]: Mhhm.

"[Brownell]: Were they wearing like blue uniforms, like uniformed officers wear? Was that down in the cell block? You just—what did you say to them, that you wanted to speak with who?

"[The Defendant]: The controlling officer, that's all.

"[Brownell]: What's that?

"[The Defendant]: The controlling officer.

"[Brownell]: One of the controlling officers? Did you ask to speak with detectives from yesterday? Anything like that?

"[The Defendant]: Yeah, I said controlling the case.

"[Brownell]: Controlling the case?

"[The Defendant]: Cuz I just want to know like—it ain't—

"[Brownell]: Okay. *So you reached out to them correct? Is that fair to say, that you said you wanted to come back up here and speak with us? Okay. What changed your mind from yesterday when you said you didn't want to speak with us? Did you have some time to think about things?*

"[The Defendant]: *When the lawyer ain't come see me—*

"[Brownell]: No?

"[The Defendant]: *The lawyer ain't come see me, so now I feel like I'm being left for dead, like—*

"[Brownell]: *Shitty feeling*.

"[The Defendant]: Especially when I ain't—ain't nothing going—besides somebody probably saying something—I did something—like that's . . . ." (Emphasis added.)

After the defendant explained why he had changed his mind, Brownell made efforts to read to the defendant his *Miranda* rights. He also explained the various ways in which they could discuss the incident, as well as the parameters of such a discussion. After several attempts, Brownell read the defendant his rights. The defendant verbally acknowledged that he understood them and waived these rights. Brownell then proceeded to interview the defendant about the shooting at the cafe. Subsequently, in denying the defendant's motion to suppress, the court found that he had knowingly, intelligently and voluntarily waived his rights during the second interview.[20]

On appeal, the defendant contends that his response to Brownell's inquiry as to why he had changed his mind about speaking with the police constituted an equivocal or ambiguous request for counsel to be present at the second interview. At the time of the motion to suppress, and for purposes of the defendant's federal constitutional rights, this issue was controlled by *Davis* v. *United States*, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994). In that case, the United States Supreme Court noted the rule that requires the police to cease questioning a suspect after counsel has been requested until either a lawyer is actually present or the suspect

[20] During the hearing on the defendant's motion to suppress, defense counsel argued that the police had a legal obligation "to explain to [the defendant] the fact he need not sit here feeling like he's left for dead, that arrangement can, in fact, be made to secure an attorney here and now. And not just this nebulous, you know, this if you can't one will be provided to you, but explaining. A guy who has expressed, doesn't have one, wants one and is feeling left for dead—and frustrated . . . ."

reinitiates the conversation with law enforcement. Id., 458; see also *State* v. *Purcell*, supra, 331 Conn. 331. "The applicability of the rigid prophylactic rule . . . requires courts to determine whether the accused *actually invoked* his right to counsel. . . . [I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of the questioning." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Davis* v. *United States*, supra, 458–59. Stated differently, "the suspect must unambiguously request counsel. . . . Although a suspect need not speak with the discrimination of an Oxford don . . . he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." (Citations omitted; internal quotation marks omitted.) Id., 459.

During the pendency of the defendant's appeal, however, our Supreme Court issued its decision in *State* v. *Purcell*, supra, 331 Conn. 318. In that case, the defendant made the following statements during a custodial interrogation: "See, if my lawyer was here . . . then . . . we could talk. That's, you know, that's it. . . . I'm supposed to have my lawyer here. You know that." (Internal quotation marks omitted.) Id., 334. On appeal, our Supreme Court concluded that these statements "were not the type of expression necessary under *Davis* to require interrogation to cease" as they did not constitute an unambiguous request for counsel. Id., 341.

The court then considered whether article first, § 8, of the Connecticut constitution required the police to stop and clarify an ambiguous or equivocal request for the presence of counsel. Id. Specifically, the court described the issue as "whether to adopt an additional

layer of prophylaxis to prevent a significant risk of deprivation of those vital constitutional rights protected under *Miranda*." Id., 342. Our Supreme Court observed that it had "endorsed the stop and clarify rule and followed it for more than a decade prior to *Davis*. See *State* v. *Anderson*, 209 Conn. 622, 627–28, 553 A.2d 589 (1989); *State* v. *Barrett*, [205 Conn. 437, 448, 534 A.2d 219 (1987)]; *State* v. *Acquin*, [187 Conn. 647, 674–75, 448 A.2d 163 (1982), cert. denied, 463 U.S. 1229, 103 S. Ct. 3570, 77 L. Ed. 2d 1411 (1983)]." *State* v. *Purcell*, supra, 331 Conn. 347. Ultimately, the court concluded that the standard set forth in *Davis* failed to safeguard adequately the right to counsel during a custodial interrogation under our state constitution. Id., 361–62. "We therefore hold that, consistent with our precedent and the majority rule that governed prior to *Davis*, our state constitution requires that, *if a suspect makes an equivocal statement that arguably can be construed as a request for counsel, interrogation must cease except for narrow questions designed to clarify the earlier statement and the suspect's desire for counsel. . . .* Interrogators confronted with such a situation alternatively may inform the defendant that they understand his statement(s) to mean that he does not wish to speak with them without counsel present and that they will terminate the interrogation. In either case, if the defendant thereafter clearly and unequivocally expresses a desire to continue without counsel present, the interrogation may resume." (Citation omitted; emphasis added; internal quotation marks omitted.) Id., 362. As a corollary to this rule, however, if the suspect makes statements that cannot be construed as a request for counsel, then the interrogation may continue, subject to any other applicable constitutional limitations.

The trial in the present case predated our Supreme Court's decision in *Purcell*. Nevertheless, the parties agree, and we concur, that because this appeal was

pending when *Purcell* was released on March 29, 2019, the new rule set forth therein applies to this matter. See *State* v. *Dickson*, 322 Conn. 410, 450, 141 A.3d 810 (2016) (new constitutional rules of criminal procedure must be applied in future trials and cases pending on direct review), cert. denied, U.S. , 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017); *Morrison* v. *Sentence Review Division*, 84 Conn. App. 345, 351 n.6, 853 A.2d 638 (same), cert. denied, 272 Conn. 908, 863 A.2d 701 (2004).

The dispositive question, therefore, is whether the exchange between the defendant and Brownell constituted an ambiguous or equivocal request so as to trigger the requirement of *Purcell* that any further questioning was limited to clarifying whether the defendant, in fact, wanted to have an attorney present.

We are mindful that "[i]nvocation [of the right to counsel] and waiver [of said right] are entirely different inquiries . . . ." (Internal quotation marks omitted.) *State* v. *Rollins*, 245 Conn. 700, 704, 714 A.2d 1217 (1998); see also *State* v. *Barrett*, supra, 205 Conn. 440–41 (noting analysis comprised of whether defendant had in fact invoked right to counsel and whether he had waived right to counsel). In *Davis* v. *United States*, supra, 512 U.S. 459, the United States Supreme Court identified the test for an ambiguous or equivocal invocation of the right to counsel as whether the defendant's reference to an attorney would lead a reasonable officer, under the circumstances, to understand that the defendant might be requesting counsel. See also *State* v. *Purcell*, supra, 331 Conn. 333 (noting test from majority opinion in *Davis*). Indeed, in considering the facts of *Purcell* under the federal constitution, our Supreme Court specifically recognized that a reasonable police officer could have interpreted the defendant's statements as the invocation of the right to counsel, but that his statements were reasonably amenable to a different

interpretation. Id., 339–40. We therefore will consider whether, under the circumstances, a reasonable officer could have interpreted the defendant's exchange with Brownell during the second interview as an invocation of the right to counsel. See id., 333–39; see also *State* v. *Anonymous*, 240 Conn. 708, 722–23, 694 A.2d 766 (1997).

After the defendant had reinitiated communication with the police, Brownell conducted the second interview. Brownell informed the defendant that they had to "go over" his rights. The defendant indicated that he did not want to be recorded, and he wanted to regain his freedom. The two men also addressed the defendant's concern for his safety and his reluctance to identify certain individuals.[21] After further discussion, the defendant stated that he had changed his mind about speaking to Brownell because a lawyer had not come to see him and that he had felt "left for dead . . . ." Brownell responded with "[s]hitty feeling." After further discussion, the defendant was read his rights, which he acknowledged and waived.

After a careful consideration of the facts and circumstances, we conclude that the defendant's explanation as to why he had changed his mind about speaking with Brownell did not constitute an ambiguous or equivocal request for counsel. Our Supreme Court has observed "that not every reference to an attorney during custodial

[21] During the argument on the motion to suppress, the court noted: "I, having viewed the videotape, I agree with [the prosecutor] that the hemming and hawing was not about [the defendant's] concern about whether he was waiving his rights, it's whether it was being recorded, whether someone else would find out what he was saying to the police because he had some desire to give information about other criminal activity he was aware of and he didn't want those people to know that he was talking to the police, that it was not in any way an uncertainty in his mind as to whether he wanted to talk to the police, but whether there would be a record of what he said, you know, written or recorded record of what he said to the police and I so find."

interrogation is an invocation of the right to counsel." *State* v. *Shifflett*, 199 Conn. 718, 737, 508 A.2d 748 (1986); see also *State* v. *Wilson*, 199 Conn. 417, 443, 513 A.2d 620 (1986) (fleeting reference to attorney, considered in context, may not amount to invocation of right to counsel depending on circumstances), overruled in part on other grounds by *State* v. *McCoy*, 331 Conn. 561, 586–87, 206 A.3d 725 (2019). Here, the defendant explained to Brownell that he changed his mind and agreed to speak with him about the shooting because "the lawyer ain't come see me . . . ." A statement made by a suspect in a custodial interrogation, even containing the word "attorney" or "lawyer," need not necessarily fall within the sphere of a request, clear or ambiguous, for counsel. Indisputably, the statement at issue did not constitute an "affirmative statement of present intent," which has been held to constitute a clear, unequivocal invocation of the right to counsel. *State* v. *Purcell*, supra, 331 Conn. 334–35. More importantly, it did not contain one or more conditional or hedging terms relating to the desire to have counsel present, which have been deemed ambiguous or equivocal invocations of that right. Id., 335–36.

Our conclusion that the defendant's explanation for speaking to the police would not cause a reasonable officer to construe it as an ambiguous request for counsel is supported by the circumstances of the two interviews. At the outset of the second interview, the defendant indicated that he did not want to be recorded and was worried about his safety. The defendant expressed his reluctance to provide names of individuals to Brownell and inquired as to whether other law enforcement agencieshad been involved in this matter. Those agitations caused him to interrupt Brownell's efforts to read the defendant his *Miranda* rights. Prior to his explanation for changing his mind, which occurred approximately fifteen minutes into the second interview, the defendant

said nothing that could remotely be construed as a request for counsel. Further, the defendant, who Brownell knew to have been involved in previous criminal matters, unambiguously had invoked his right to counsel the previous day which resulted in the termination of the first interview. Given the circumstances and the language used by the defendant during his second exchange with Brownell explaining his reason for choosing to speak about the shooting, there was nothing that would have alerted a reasonable officer that the defendant was requesting counsel. Accordingly, we conclude that his *Purcell* claim must fail.

B

The defendant next claims that the court abused its discretion and violated his constitutional rights by admitting into evidence certain inculpatory portions of his statement while excluding related contextual portions. Specifically, he argues that "the court permitted the prosecution to create a misleading impression for the jury by allowing the state to introduce inculpatory portions of the defendant's statements while omitting portions wherein he denied involvement in the shooting incident." The defendant further claims to have suffered both evidentiary and constitutional harm and therefore is entitled to a new trial. We are not persuaded by the defendant's claims.

The following additional facts are necessary for the resolution of these claims. On October 27, 2017, the prosecutor informed the court of his intention to offer portions of the defendant's recorded interview with Brownell for admission into evidence. The first portion contained Brownell showing the defendant a photograph from the surveillance video taken outside of the cafe on the night of the shooting and the defendant identifying himself in the photograph. The state also sought to have this photograph admitted into evidence.

Defense counsel objected to the state's proffer and argued that additional portions of the recording should be admitted into evidence. These portions included the defendant's identification of the shooter as a man dressed in all white clothing.

The court noted that defense counsel sought to have these additional portions of the defendant's interview with Brownell admitted into evidence pursuant to § 1-5 of the Connecticut Code of Evidence.[22] Defense counsel explained that the defendant's acknowledgment of his presence outside of the cafe at time of the shooting would be taken out of context by the jury if his identification of the shooter as the man dressed in all white clothing also was not admitted into evidence. The court noted that the defendant's "motivation as to why he's putting himself at the scene is not necessary to understand [the fact that he has identified himself as being present] at the scene."[23] Defense counsel conceded that, in the portion of the video that the state sought to have admitted into evidence, the defendant had identified himself in the photograph taken at the scene on the night of the shooting. After hearing further argument, the court declined to admit into evidence the additional portions of the recorded interview of the defendant by Brownell.

The court informed the parties that it would admit into evidence a twenty-three second portion of the defendant's recorded interview with Brownell. During this excerpt, identified as exhibit 62A, Brownell showed the defendant a photograph and asked if he was depicted

[22] Section 1-5 (b) of the Connecticut Code of Evidence provides: "When a statement is introduced by a party, another party may introduce any other part of the statement, whether or not otherwise admissible, that the court determines, considering the context of the first part of the statement, ought in fairness to be considered with it."

[23] The court also indicated that defense counsel was attempting to minimize the effect of the defendant's self-identification.

in that photograph. The defendant examined the photograph and responded in the affirmative. Brownell then inquired whether the defendant was "next to the dude in white?" The defendant again responded in the affirmative.

Brownell testified that he had interviewed the defendant for approximately three hours on November 21, 2015. He further stated that this interview had been audio and video recorded. The court admitted into evidence the short clip of the police interview conducted by Brownell, identified as exhibit 62A, and it was played for the jury. The court also admitted into evidence the photograph that Brownell showed to the defendant during the second interrogation.

Following the jury verdict, the defendant filed a motion for a new trial on November 13, 2017. Therein, the defendant again claimed that the admission of exhibit 62A was misleading and prejudicial. The court denied the defendant's motion for a new trial.

On appeal, the defendant claims both evidentiary and constitutional error with respect to the court's ruling regarding exhibit 62A. With respect to the former claim, the defendant contends that the court abused its discretion in admitting exhibit 62A and in excluding the portions of the police interview in which he identified the shooter as the man dressed in all white in violation of § 1-5 of the Connecticut Code of Evidence.

Before addressing the specifics of this claim, we set forth our standard of review. "To the extent a trial court's [ruling regarding] admission of evidence is based on an interpretation of the [Connecticut] Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. They require determinations about which reasonable

minds may not differ; there is no judgment call by the trial court . . . . We review the trial court's decision to admit evidence, if premised on a correct view of the law, however, for an abuse of discretion." (Internal quotation marks omitted.) *State* v. *Norman P.*, 169 Conn. App. 616, 628, 151 A.3d 877 (2016), aff'd, 329 Conn. 440, 186 A.3d 1143 (2018); see also *State* v. *Rivera*, Conn. , , A.3d (2020).

In the present case, the issue is whether the court properly admitted and excluded the various portions of the police interview pursuant to § 1-5 of the Connecticut Code of Evidence and therefore we apply the abuse of discretion standard of review. Pursuant to that standard, "[t]he trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling . . . and . . . upset it [only] for a manifest abuse of discretion." (Internal quotation marks omitted.) *State* v. *Brett B.*, 186 Conn. App. 563, 600, 200 A.3d 706 (2018), cert. denied, 330 Conn. 961, 199 A.3d 560 (2019); see also *State* v. *Garcia*, 299 Conn. 39, 56–57, 7 A.3d 355 (2010).

Section 1-5 (b) of the Connecticut Code of Evidence "applies to statements, and its purpose is to ensure that statements placed in evidence are not taken out of context. . . . This purpose also demarcates the rule's boundaries; a party seeking to introduce selected statements under the rule must show that those statements are, in fact, relevant to, and within the context of, an opponent's offer and, therefore, are part of a single conversation. . . . *State* v. *Castonguay*, 218 Conn. 486, 497, 590 A.2d 901 (1991). . . . [This] rule logically extends to written and recorded statements. Thus, like subsection (a), subsection (b)'s use of the word statement includes oral, written and recorded statements. In addition, because the other part of the statement is

introduced under subsection (b) for the purpose of putting the first part into context, the other part need not be independently admissible. Conn. Code Evid. § 1-5, commentary, subsection (b) . . . .'' (Internal quotation marks omitted.) *Cousins* v. *Nelson*, 87 Conn. App. 611, 617–18, 866 A.2d 620 (2005); see generally C. Tait & E. Prescott, Connecticut Evidence (5th Ed. 2014) § 1.28.2, pp. 89–90.

In *State* v. *Norman P.*, supra, 329 Conn. 459, our Supreme Court defined the term ''context'' as ''[t]he weaving together of words in language . . . [t]he part or parts of a written or spoken passage preceding or following a particular word or group of words and so intimately associated with them as *to throw light upon their meaning* . . . .'' (Emphasis in original; internal quotation marks omitted.) It also set forth the following analytical pathway to determine whether a statement had been taken out of context so as to require the admission into evidence of the relevant additional sections. ''In accordance with these principles, when a portion of a statement introduced by a party has been taken out of context such that it distorts the meaning of the entire statement and could mislead the jury, § 1-5 (b) of the Connecticut Code of Evidence requires that the relevant remainder be admitted . . . . We have relied on a useful inquiry in determining whether § 1-5 (b) requires the admission of a remainder of a statement: does the remainder 'alter the context' of the already introduced portion of the statement? *State* v. *Castonguay*, [supra, 218 Conn. 497]. The nature of the question suggests a practical approach to applying § 1-5 (b): identify which portions of the statement were initially introduced into evidence, set forth the argument of the party proffering the remainder as to how the partial introduction distorts the meaning of the whole, then juxtapose that initial offering with the remainder. If the addition of the remainder would alter

the meaning of the initial offering—or, in other words, would demonstrate that the initial portion was taken out of context—then § 1-5 (b) requires that the remainder be admitted into evidence. This court followed precisely this approach in [*State* v. *Jackson*, 257 Conn. 198, 214, 777 A.2d 591 (2001)], in which the court first considered which portions of the statement had been admitted, identified the defendant's argument as to why the remainder was necessary to provide context, then juxtaposed the initial offering with the remainder of the statement and concluded that the original portions had not distorted the meaning of the entire statement." *State* v. *Norman P.*, supra, 329 Conn. 460.

Applying this analysis to the facts of the present case, we conclude that the court did not abuse its discretion with respect to its evidentiary rulings. Here, the court determined that in exhibit 62A the defendant identified himself in the photograph during his interview with Brownell. The additional information that the defendant sought to have introduced into evidence included the defendant's identification of the man in all white as the shooter. The evidence proffered did not change or alter the fact that the defendant had made this self-identification that placed him at the scene of the shooting. Stated differently, the defendant's identification of the individual in white clothing was not so intimately associated so as to "throw light" on the fact that the defendant identified himself in the photograph of the outside of the cafe on the night of the shooting. See *State* v. *Norman P.*, supra, 329 Conn. 459. The defendant's evidentiary claims, therefore, must fail.

The defendant also alludes to claims of constitutional error regarding the court's admission of exhibit 62A and its exclusion of the evidence proffered by the defendant. Specifically, he asserts that the court's rulings amounted to violations of due process and the right to present a complete defense. After a careful review of

the defendant's brief, we conclude that he has failed to establish violations of his constitutional rights. Having determined that the court properly admitted exhibit 62A into evidence and that § 1-5 of the Connecticut Code of Evidence did not require the admission of the evidence offered by the defendant regarding his identification of the man dressed in white as the shooter, the defendant's declarations of constitutional error do not persuade us that constitutional violations occurred.

The judgment is affirmed.

In this opinion the other judges concurred.

COMMISSIONER OF LABOR *v.* WALNUT TIRE SHOP, LLC, ET AL.
(AC 42986)

Lavine, Elgo and Alexander, Js.

Syllabus

The plaintiff sought to collect, inter alia, unpaid wages on behalf of two employees of the defendant W Co. A state marshal served two copies of the summons and complaint on the defendant B, W Co.'s president, in both his individual capacity and as president of W Co. Following the defendants' failure to respond to the plaintiff's pleadings, the trial court granted the plaintiff's motion for default and rendered judgment in favor of the plaintiff. Thereafter, the defendants filed a motion to open the default judgment pursuant to the applicable statute (§ 52-212), claiming that they had been deprived of actual notice of the proceedings by the plaintiff's failure to serve the summons and complaint on W Co. The court denied the defendants' motion to open, and the defendants appealed to this court. *Held* that the trial court did not abuse its discretion in denying the defendants' motion to open, as the defendants failed to comply with the requirements of § 52-212 in that the motion was not verified under oath by either the defendants or their attorney; furthermore, the defendants' claim that they lacked actual notice of the plaintiff's action because the summons listed a nonparty individual as W Co.'s registered agent for service was unavailing, the record having unequivocally indicated that both defendants were properly served with legal process by service in hand to B.

Submitted on briefs September 17—officially released November 24, 2020

Procedural History

Action to collect, inter alia, unpaid wages, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the defendants were defaulted for failure to appear; thereafter, the court, *Gordon*, *J.*, rendered judgment in favor of the plaintiff; subsequently, the court, *Sheridan*, *J.*, denied the defendants' motion to open the judgment, and the defendants appealed to this court. *Affirmed*.

Ramiro Alcazar filed a brief for the appellants (defendants).

Maria C. Rodriguez and *Philip M. Schulz*, assistant attorneys general, and *William Tong*, attorney general, filed a brief for the appellee (plaintiff).

PER CURIAM. The defendants, Walnut Tire Shop, LLC (company), and Ramon Balbuena, appeal from the judgment of the trial court denying their motion to open a default judgment rendered in favor of the plaintiff, the Commissioner of Labor. On appeal, the defendants claim that the court abused its discretion in denying that motion because they lacked actual notice of the plaintiff's action. We disagree and, accordingly, affirm the judgment of the trial court.

It is undisputed that, at all relevant times, Balbuena was the owner and president of the company.[1] On November 11, 2018, the plaintiff commenced an action against the defendants on behalf of two employees to recover unpaid wages pursuant to General Statutes § 31-72[2] and civil penalties pursuant to General Statutes

[1] In the complaint, the plaintiff alleged that Balbuena was the owner and principal of the company. Moreover, in opposing the defendants' motion to open, the plaintiff submitted, as an exhibit, a business inquiry conducted with the Secretary of the State's commercial recording division, which lists Balbuena as the "president" of the company.

[2] General Statutes § 31-72 provides in relevant part: "When any employer fails to pay an employee wages in accordance with the provisions of sections 31-71a to 31-71i, inclusive, or fails to compensate an employee in accordance with section 31-76k . . . such employee . . . shall recover, in a civil action,

§ 31-69a. On that date, a state marshal served two copies of the summons and complaint on Balbuena in both his individual capacity and as president of the company.[3]

When the defendants did not appear or otherwise respond to that pleading, the plaintiff filed a motion for default, which the court granted. The plaintiff then filed a motion for a default judgment that was accompanied by a sworn affidavit of debt. The court granted that motion on March 15, 2019, and rendered judgment in favor of the plaintiff in the amount of $24,136.35.[4] The plaintiff provided notice of that judgment to the defendants in accordance with Practice Book § 17-22.

On April 24, 2019, the defendants filed a motion to open the default judgment pursuant to General Statutes § 52-212.[5] In that motion, they alleged that the plaintiff

(1) twice the full amount of such wages, with costs and such reasonable attorney's fees as may be allowed by the court, or (2) if the employer establishes that the employer had a good faith belief that the underpayment of wages was in compliance with law, the full amount of such wages or compensation, with costs and such reasonable attorney's fees as may be allowed by the court. . . . The Labor Commissioner may collect the full amount of any such unpaid wages . . . as well as interest calculated in accordance with the provisions of section 31-265 from the date the wages or payment should have been received, had payment been made in a timely manner. In addition, the Labor Commissioner may bring any legal action necessary to recover twice the full amount of unpaid wages . . . and the employer shall be required to pay the costs and such reasonable attorney's fees as may be allowed by the court. The commissioner shall distribute any wages . . . collected pursuant to this section to the appropriate person."

[3] In the return of service, the marshal attested in relevant part: "Then and there by virtue hereof and at the special direction of the plaintiff's attorney, I made due and legal service upon the within named defendants: *Walnut Tire Shop, LLC* by leaving with and within the hands of *Ramon Balbuena, President* and *Ramon Balbuena* by leaving with and within the hands at *153 Walnut Street, Waterbury, Connecticut*, two true and attested copies of the within, summons-civil, complaint and amount in demand with my endorsement thereon." (Emphasis in original.)

[4] The court awarded the plaintiff $17,145.60 in unpaid wages, $6900 in civil penalties, and $90.65 in costs.

[5] General Statutes § 52-212 provides in relevant part: "(a) Any judgment rendered or decree passed upon a default or nonsuit in the Superior Court may be set aside, within four months following the date on which it was

had failed to serve the summons and complaint on the company, thereby depriving the defendants of "actual notice of those proceedings . . . ." The plaintiff filed an objection, and the court thereafter denied the defendants' motion to open. From that judgment, the defendants now appeal.

It is well established that "[a] motion to open and vacate a judgment . . . is addressed to the [trial] court's discretion, and the action of the trial court will not be disturbed on appeal unless it acted unreasonably and in clear abuse of its discretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action. . . . The manner in which [this] discretion is exercised will not be disturbed so long as the court could reasonably conclude as it did." (Citations omitted; internal quotation marks omitted.) *Walton* v. *New Hartford*, 223 Conn. 155, 169–70, 612 A.2d 1153 (1992); see also *Purtill* v. *Cook*, 197 Conn. App. 22, 26, 231 A.3d 245 (2020) ("[o]ur review of a ruling on a motion to open a default judgment is governed by the abuse of discretion standard").

On appeal, the defendants contend that the court abused its discretion in denying their motion to open because they lacked actual notice of the plaintiff's action. For two distinct reasons, the defendants' claim

rendered or passed, and the case reinstated on the docket, on such terms in respect to costs as the court deems reasonable, upon the complaint or written motion of any party or person prejudiced thereby, showing reasonable cause, or that a good cause of action or defense in whole or in part existed at the time of the rendition of the judgment or the passage of the decree, and that the plaintiff or defendant was prevented by mistake, accident or other reasonable cause from prosecuting the action or making the defense. . . .

"(c) The complaint or written motion shall be verified by the oath of the complainant or his attorney, shall state in general terms the nature of the claim or defense and shall particularly set forth the reason why the plaintiff or defendant failed to appear. . . ."

is unavailing. First, as a procedural matter, they have failed to comply with the mandate of § 52-212 (c) and Practice Book § 17-43, which require motions to open default judgments pursuant to § 52-212 to "be verified by the oath of the complainant or [its] attorney . . . ." The motion to open in the present case was not verified under oath by either the defendants or their attorney. On that basis alone, the trial court was entitled to deny the defendants' motion. See *Lawton* v. *Weiner*, 91 Conn. App. 698, 712, 882 A.2d 151 (2005) (court did not abuse its discretion in denying defendants' motion to open because it was "not sworn to"); *Water Pollution Control Authority* v. *OTP Realty, LLC*, 76 Conn. App. 711, 713, 822 A.2d 257 ("[i]t is not an abuse of discretion for a court to deny a motion to open that does not set forth facts, upon oath, to demonstrate that a defendant has been prevented by mistake, accident or other reasonable cause from making a defense"), cert. denied, 264 Conn. 920, 828 A.2d 619 (2003).

Second, as a substantive matter, the defendants' claim that they lacked actual notice of the plaintiff's action is belied by the uncontroverted fact that the marshal served copies of the summons and complaint on Balbuena in both his individual capacity and as president of the company.[6] In so doing, the marshal properly served legal process on the company pursuant to General Statutes § 52-57 (c).[7]

[6] In their appellate brief, the defendants concede that "[t]he summons and complaint were served in hand on [Balbuena] individually and as president of [the company]."

[7] General Statutes § 52-57 (c) provides in relevant part: "In actions against a private corporation, service of process shall be made either upon *the president*, the vice president, an assistant vice president, the secretary, the assistant secretary, the treasurer, the assistant treasurer, the cashier, the assistant cashier, the teller or the assistant teller or its general or managing agent or manager or upon any director resident in this state, or the person in charge of the business of the corporation or upon any person who is at the time of service in charge of the office of the corporation in the town in which its principal office or place of business is located. . . ." (Emphasis added.)

The defendants nonetheless argue that, because the summons listed Ramiro Alcazar as the registered agent for service for the company, the service conducted on its president on November 11, 2018, was invalid. They offer no legal authority to support that assertion. To the contrary, this court has held that "there is no exclusive means for service on a limited liability company. Although General Statutes § 34-105 (a) provides that process 'may be served upon the limited liability company's statutory agent for service,' subsection (e) of § 34-105 expressly states that '[n]othing contained in this section shall limit or affect the right to serve any process, notice or demand required or permitted by law to be served upon a limited liability company in any other manner permitted by law.' " *Little* v. *Mackeyboy Auto, LLC*, 142 Conn. App. 14, 20, 62 A.3d 1164 (2013). For that reason, this court held that service of process conducted on an officer specified in § 52-57 (c) properly conferred notice of the plaintiff's action on the defendant limited liability company, even when its registered agent was not served. Id. That precedent compels a similar conclusion in the present case.

The record before us unequivocally indicates that both defendants were served with legal process on November 11, 2018. The court, therefore, did not abuse its discretion in denying the defendants' motion to open.

The judgment is affirmed.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 201

CHRISTOPHER ANTHONY BROWN
v. STATE OF CONNECTICUT
(AC 42562)

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

Argued November 12—officially released November 24, 2020

Plaintiff's appeal from the Superior Court in the judicial district of Hartford, *Hon. John F. Mulcahy, Jr.*, judge trial referee.

Per Curiam. The judgment is affirmed.

THE BANK OF NEW YORK MELLON *v.* CHUCK MERCIER, ADMINISTRATOR (ESTATE OF KATHLEEN A. MERCIER), ET AL.
(AC 42898)

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

Submitted on briefs November 16—officially released November 24, 2020

Appeal by the defendant Ian Mercier from the Superior Court in the judicial district of Windham at Putnam, *Auger, J.*

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

LYNN OSBORNE-PERRAULT *v.* TWIN OAKS CONDOMINIUM ASSOCIATION ET AL.
(AC 43399)

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

Argued November 16—officially released November 24, 2020

Plaintiff's appeal from the Superior Court in the judicial district of Litchfield at Torrington, *Hon. John W. Pickard*, judge trial referee.

Per Curiam. The judgment is affirmed.

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NOTICE OF CONNECTICUT STATE AGENCIES

Department of Social Services

Notice of Proposed Medicaid State Plan Amendment (SPA) SPA 21-F: Inpatient Hospital Reimbursement

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

Changes to Medicaid State Plan

Effective for inpatient hospital discharges on or after January 1, 2021, SPA 21-F will amend Attachment 4.19-A of the Medicaid State Plan to clarify which version of diagnosis-related group (DRG) relative weights will be used as part of the methodology for determining the payment for inpatient hospital services paid under the DRG methodology. The purpose of this SPA is to clarify the state plan language to reflect additional detail regarding the applicable version of DRG relative weights to account for recent changes in the available weight versions within the All-Patient Refined (APR) DRG National Weights established by 3M, which DSS uses in the DRG payment methodology.

Fiscal Impact

DSS anticipates that this SPA will not change annual aggregate expenditures because this SPA clarifies the existing approved Medicaid State Plan and will not change the overall fiscal impact.

Obtaining SPA Language and Submitting Comments

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

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference ''SPA 21-F: Inpatient Hospital Reimbursement Clarification''.

Anyone may send DSS written comments about the SPA. Written comments must be received by DSS at the above contact information no later than December 24, 2020.

NOTICE

OFFICE OF THE CHIEF PUBLIC DEFENDER

THE OFFICE OF CHIEF PUBLIC DEFENDER IS NOW ACCEPTING APPLICATIONS FOR HANDLING CASE ASSIGNMENTS FOR FISCAL YEAR July 1, 2021–June 30, 2022 IN THE FOLLOWING LOCATIONS ONLY:

CRIMINAL JUDICIAL DISTRICT COURTS:

Danbury JD
Hartford JD
Litchfield (Torrington) JD
Middlesex JD
New Britain JD
New London JD
Waterbury JD
Windham JD

CRIMINAL GEOGRAPHICAL AREA PART B COURTS:

GA 02–Bridgeport
GA 03–Danbury
GA 04–Waterbury
GA 09–Middletown
GA 10–New London
GA 11–Danielson
GA 12–Manchester
GA 18–Litchfield (Torrington)
GA 20–Norwalk
GA 21–Norwich
GA 22–Milford
GA 23–New Haven

JUVENILE DELINQUENCY COURTS:

Bridgeport
Hartford
Waterford

HABEAS CORPUS:

Rockville

CHILD PROTECTION COURTS:

Statewide.
Please note: By advertising statewide we are not indicating there are openings in general, or in any particular court. *Applicants should submit their* ***top 3 choices*** *of court locations*.

STATE-RATE ATTORNEY FOR MINOR CHILD / GUARDIAN AD LITEM:

Statewide–locations not needed.

Annual agreements will cover the period of July 1, 2021 through June 30, 2022. Compensation will be as follows:

FLAT RATE COMPENSATION *hourly billing only as approved*:

JUDICIAL DISTRICT CASES	$1000 per case
CRIMINAL GEOGRAPHICAL AREA CASES	$350 per case
CHILD PROTECTION CASES	$500 per case
ATTORNEY FOR MINOR CHILD / GUARDIAN AD LITEM	$500 per case

HOURLY COMPENSATION:

$75 per hour for Felony cases
$50 per hour for Misdemeanor cases
$50 per hour for Child Protection
$50 per hour for AMC/GAL cases
$75 per hour for Habeas Corpus or $65 as a habeas-focused vendor

QUALIFICATIONS FOR PRACTICE AREAS

JUDICIAL DISTRICT APPLICANTS:

Attorneys approved to represent clients in JD courts must have at least 2 years of criminal litigation experience and at least 2 felony trials to verdict as lead or sole counsel.

GEOGRAPHICAL AREA APPLICANTS:

Attorneys approved to represent clients in GA courts will handle misdemeanor cases and felony cases. Applicants should possess a working knowledge of the criminal statutes, practice book, diversionary programs, and alternatives to incarceration.

CHILD PROTECTION APPLICANTS:

Attorneys approved as Assigned Counsel for assignments in child protection matters will represent children and indigent parents in juvenile court matters dealing with abuse, neglect and termination of parental rights. Attorneys may also be appointed as guardian ad litem. The cases may also involve matters transferred from Probate Court and adoptions. Applicants will be required to participate in pre-service training and should possess general knowledge of the child protection statues, the administration and policies of the Department of Children and Families.

STATE-RATE ATTORNEY FOR MINOR CHILD / GUARDIAN AD LITEM:

Attorneys approved as Assigned Counsel in state-rate attorney for minor child / guardian ad litem cases in family court will represent children from indigent families in family matters as appointed by the court.

IF INTERESTED: please download the application form from the public defender web site:

http://www.ct.gov/ocpd/site/default.asp

APPLICATIONS ARE ACCEPTED FROM NOVEMBER 24, 2020 THROUGH DECEMBER 11, 2020 at 5:00 pm (***two weeks and 4 days only***, ***firm deadline***).

Send the application, cover letter and resume only via email (***USPS mail or fax not accepted***) to:

OCPD.AC.APPLICATIONS@JUD.CT.GOV

All applications must be received no later than Friday, December 11, 2020 by 5:00 PM.