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The defendant's petition for certification to appeal from the Appellate Court, 194 Conn. App. 598 (AC 41053), is denied.

Judie Marshall, assigned counsel, in support of the petition.

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

Decided December 8, 2020

HEATHER S. *v.* COMMISSIONER OF CORRECTION

The petitioner Heather S.'s petition for certification to appeal from the Appellate Court, 200 Conn. App. 904 (AC 42085), is denied.

D'AURIA, J., did not participate in the consideration of or decision on this petition.

J. Patten Brown III, assigned counsel, in support of the petition.

Nancy L. Chupak, senior assistant state's attorney, in opposition.

Decided December 8, 2020

STATE OF CONNECTICUT *v.* LUIS CASTRO

The defendant's petition for certification to appeal from the Appellate Court, 200 Conn. App. 450 (AC 43386), is denied.

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

Emily Graner Sexton, assigned counsel, in support of the petition.

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

Decided December 8, 2020

LONNIE ANDERSON *v.* COMMISSIONER OF CORRECTION

The petitioner Lonnie Anderson's petition for certification to appeal from the Appellate Court, 201 Conn. App. 1 (AC 42515), is denied.

Vishal K. Garg, assigned counsel, in support of the petition.

Timothy F. Costello, senior assistant state's attorney, in opposition.

Decided December 8, 2020

STATE OF CONNECTICUT *v.* ROBERT S. BUIE

The defendant's petition for certification to appeal from the Appellate Court, 201 Conn. App. 903 (AC 42626), is denied.

Deren Manasevit, assigned counsel, in support of the petition.

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

Decided December 8, 2020

STATE OF CONNECTICUT *v.* LONNIE ANDERSON

The defendant's petition for certification to appeal from the Appellate Court, 201 Conn. App. 21 (AC 42703), is denied.

Vishal K. Garg, assigned counsel, in support of the petition.

Timothy F. Costello, senior assistant state's attorney, in opposition.

Decided December 8, 2020

STATE OF CONNECTICUT *v.* JERMAINE JONES

The defendant's petition for certification to appeal from the Appellate Court, 201 Conn. App. 901 (AC 42996), is denied.

Jermaine Jones, self-represented, in support of the petition.

Sarah Hanna, senior assistant state's attorney, in opposition.

Decided December 8, 2020

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CONNECTICUT APPELLATE REPORTS

Vol. 201

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* BRIAN MANSFIELD (AC 41587)

Alvord, Cradle and Sullivan, Js.

Syllabus

Convicted, after a jury trial, of the crimes of breach of the peace in the second degree and assault of public safety personnel, the defendant appealed to this court. On election day on November 8, 2016, the defendant went to the polling place located at the Bethel Town Hall where he proceeded to remove papers from a dry erase board and throw them on the ground and erase information written on the board. He entered the part of the town hall where voting was taking place and was given a ballot, which he then refused to return. Volunteers asked a police officer, P, who was providing security, for assistance. The defendant, who continued to refuse to return the ballot, then placed the ballot in his pants and dared P to retrieve the ballot from his pants. At this point, the volunteers allowed the defendant to keep the ballot and the defendant exited the area, knocking over a basket of stickers as he did so. He then took several boxes of cookies from Girl Scouts who were selling cookies outside the voting location and, when told by P to return the boxes, threw them aggressively onto the table. P then began to escort the defendant out of the town hall and, as they were walking, the defendant spit on a picture hanging on the wall. The next day, two police officers, B and C, went to the defendant's home to serve a summons for breach of the peace in violation of the applicable statute (§ 53a-181 (a) (1)), based on the defendant's conduct the day before. C handed the summons to the defendant and asked that he sign it. The defendant crumpled the summons, threw it on the ground, and then spat in C's face, at which point the defendant was arrested and charged with assault of public safety personnel. *Held*:

1. The defendant's challenges to his conviction of breach of the peace in violation of § 53a-181 (a) (1) were unavailing:

   a. The evidence was sufficient to support the defendant's conviction of breach of the peace in the second degree, as the jury reasonably could have concluded that the cumulative force of the evidence established that the defendant's conduct on November 8, 2016, was physically tumultuous and contained the requisite level of physicality.

b. This court found unavailing the defendant's claim that § 53a-181 (a) (1) was unconstitutionally vague as applied to him, as a reasonable person would anticipate that § 53a-181 (a) (1) would apply to the defendant's conduct on November 8, 2016.

c. The defendant could not prevail on his unpreserved claim that the trial court improperly instructed the jury regarding the definition of "tumultuous behavior" in § 53a-181 (a) (1), as the defendant implicitly waived his claim of instructional error; defense counsel had an opportunity to review the jury charge language, acquiesced in the use of the instructional language at issue, and stated that he had no objection to the removal of the language now challenged by the defendant.

d. The defendant could not prevail on his claim that the trial court committed plain error in its instructions to the jury, which was based on his assertion that the court's decision to remove certain language from the conduct element of § 53-181 (a) (1) may have led the jury to convict him for bad manners, rather than for conduct that portended imminent physical violence, as the court clearly instructed the jury that the defendant's conduct must be more than mere bad manners.

2. The defendant could not prevail on his claim that the evidence was insufficient to support his conviction of assault of public safety personnel because the state failed to prove that C was acting in the performance of his official duties; C was on duty and wearing his uniform on November 9, 2016, and, on the basis of that fact, the jury reasonably could have concluded that his decision to accompany B to the home of the defendant and to issue the summons was made in his official capacity as a police officer and, therefore, C was acting within the scope of his employment.

3. The defendant could not prevail on his unpreserved claim that the trial court failed to adequately instruct the jury regarding the law governing police discretion to issue and serve a summons on an individual who has not been arrested: the defendant implicitly waived his claim that the court's instructions were improper, as defense counsel had an opportunity to review the jury instructions and did not object to them, he agreed that the instructions given were sufficient and, after the jury sent a note requesting clarification, he agreed with the court's decision not to further charge the jury on that issue, the court having concluded that the issue was one that the jurors had to deliberate on and reach themselves; moreover, the defendant could not prevail on his claim that the court committed plain error in declining to answer the jury's note requesting clarification as to when an officer's duties end, as there was no reasonable possibility that the jury would have concluded that C was not performing his lawful duty and acquitted the defendant because whether a police officer has lawful authority to conduct an arrest or serve a summons was irrelevant to the question of whether C was acting in the performance of his official duties.

Argued October 6—officially released December 22, 2020

Procedural History

Substitute informations charging the defendant, in the first case, with one count of the crime of breach of the peace in the second degree and two counts of the crime of littering, and, in the second case, with the crime of assault of public safety personnel, brought to the Superior Court in the judicial district of Danbury, geographical area number three, where the court, *Russo*, *J.*, granted the state's motion for joinder; thereafter, the charges of breach of the peace in the second degree and assault of public safety personnel were tried to the jury before *Russo*, *J.*; verdicts of guilty; subsequently, the charges of littering were tried to the court; judgment of not guilty; thereafter, the court rendered judgments of guilty in accordance with the verdicts, from which the defendant appealed to this court. *Affirmed.*

Timothy H. Everett, assigned counsel, with whom, on the brief, were *Alexis C. Coudert* and *Jeremy A. Weyman*, certified legal interns, for the appellant (defendant).

Jonathan M. Sousa, deputy assistant state's attorney, with whom, on the brief, were *Stephen J. Sedensky*, state's attorney, and *Warren Murray*, former supervisory assistant state's attorney, for the appellee (state).

Opinion

SULLIVAN, J. The defendant, Brian Mansfield, appeals from the judgments of conviction, rendered after a jury trial, of the crimes of breach of the peace in the second degree in violation of General Statutes § 53a-181 (a) (1) and assault of public safety personnel in violation of General Statutes § 53a-167c (a) (5). On appeal, with regard to his conviction of breach of the peace, the defendant "challenges the sufficiency of the state's evidence to prove the theory of liability for which he was prosecuted: that he . . . engaged in tumultuous behavior"; (emphasis omitted); claims that "[t]he prosecution's theory of criminal liability rendered § 53a-181 (a)

(1) unconstitutionally vague as applied," and that the trial court's instruction on the definition of "tumultuous behavior" misled the jury. With regard to his conviction of assault of public safety personnel, the defendant claims that "[t]he state offered insufficient evidence to prove that [the] [o]fficer . . . was acting lawfully in the performance of his official duties," and that "[t]he trial court did not respond adequately to the jury's request . . . to be instructed on the law governing police discretion to issue and serve a summons [on] an individual who has not been arrested first." We affirm the judgments of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to the defendant's appeal. On the evening of November 8, 2016 —election day—Officer Leonard Penna of the Newtown Police Department was working a private duty job providing security at the Bethel Town Hall (town hall) from 6 to 10 p.m. While Officer Penna was working, the defendant entered the town hall and approached a dry erase board in the lobby. The defendant removed several documents from the board and threw them on the ground, and erased the information that had been written on the board. The defendant then entered the gymnasium inside of the town hall where voting was taking place, and the volunteers working the polling place gave the defendant a ballot. The volunteers requested that the defendant return the ballot, and he refused. The volunteers then called to Officer Penna for assistance. After Officer Penna entered the gymnasium, the defendant continued to refuse to return the ballot and put the ballot in his pants. Officer Penna requested that the defendant return the ballot to the volunteers, and the defendant responded: "I bet you would like to go retrieve that out of my pants." After the defendant made this remark, the volunteers allowed him to keep the ballot.

As the defendant exited the gymnasium, he knocked over a basket of "I Voted Today" stickers.

Outside of the gymnasium, a group of Girl Scouts had set up a table where they were selling cookies. After exiting the gymnasium, the defendant took several boxes of cookies from the Girl Scouts and placed them inside of the bag that he was carrying. One of the girls began to yell at the defendant, and Officer Penna exited the gymnasium to respond to the commotion. Officer Penna told the defendant to return the boxes of cookies that he had taken, and the defendant responded by throwing the boxes onto the table in an aggressive manner. Officer Penna then began to escort the defendant to the exit of the town hall, and, as they walked down the hallway, the defendant spat on a picture hanging on the wall. Officer Penna then contacted the Bethel Police Department (department). Officers Jason Broad and Courtney Whaley of the department responded to Officer Penna's call. Officer Whaley arrived first, and she spoke with the defendant and attempted to calm him down. Officer Broad arrived shortly after Officer Whaley, and he assisted Officer Penna in helping the defendant get into his vehicle while Officer Whaley spoke with Lisa Berg, the Bethel Town Clerk. The defendant left the town hall in his vehicle, and he was not issued a summons that night.

The following day, November 9, 2016, Officer Broad was directed to complete a summons and issue it to the defendant at his home. The summons was for breach of the peace, based on the defendant's conduct the prior night. Officer Broad was not on duty on November 9, 2016, but he was directed to complete and issue the summons because he was the investigating officer. Because Officer Broad was off duty, he was not in uniform. For this reason, Sergeant James Christos of the department, who was on duty and in uniform, decided that he should accompany Officer Broad to the home of the defendant

and issue the summons himself. Upon arrival at the defendant's home, Officer Broad and Sergeant Christos knocked on the door, and the defendant answered. Sergeant Christos handed the defendant a copy of the summons and requested that he sign it. The defendant crumpled the copy of the summons, threw it on the ground, and then spat in Sergeant Christos' face. The defendant attempted to close the door on them, but Officer Broad and Sergeant Christos stopped him and took him into custody. The defendant subsequently was charged with assault of a public safety officer.

Following a jury trial, the defendant was convicted of breach of the peace in the second degree, based on his conduct on the night of November 8, 2016, and assault of public safety personnel, based on his conduct on November 9, 2016. It is from these judgments of conviction that the defendant appeals. Additional facts and procedural history will be set forth as necessary.

I

The defendant challenges his conviction of breach of the peace in the second degree on the following grounds: the state failed to produce sufficient evidence to prove the theory of liability under which the defendant was prosecuted, the state's theory of criminal liability rendered the breach of the peace in the second degree statute unconstitutionally vague as it was applied, and the trial court misled the jury by providing an inappropriate instruction with regard to the definition of "tumultuous behavior." We address each claim in turn.

A

First, we address the defendant's claim that the state failed to produce sufficient evidence to prove the theory of liability under which he was prosecuted. Specifically, the defendant claims that "[t]he meaning of the term 'tumultuous' is dependent on the terms that surround

it[1] . . . [and that] the state chose not to include any of those terms in the information, offered no evidence of physicality or imminent violence to satisfy the conduct element of the . . . statute, and did not request that the trial court instruct the jury that it had to find an element of physicality in order to convict." (Footnote added.) The defendant further claims that the state's "global argument"—that the defendant is guilty "based on [his] 'collective behavior' " on the night of November 8, 2016—inappropriately frames the requirements of § 53a-181 (a) (1). We disagree.

We begin by setting forth the applicable standard of review. "In reviewing the question of whether the evidence was sufficient to sustain the conviction, we apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the jury reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Internal quotation marks omitted.) *State* v. *Allen*, 289 Conn. 550, 555–56, 958 A.2d 1214 (2008). Review of a claim of insufficient evidence "must necessarily begin with the elements that the charged statute requires to be proved. Such a review involves statutory construction, which is a question of law. Our review, therefore, is plenary." *State* v. *Carolina*, 143 Conn. App. 438, 443, 69 A.3d 341, cert. denied, 310 Conn. 904, 75 A.3d 31 (2013).

[1] General Statutes § 53a-181 (a) provides in relevant part: "A person is guilty of breach of the peace in the second degree when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person: (1) Engages in fighting or in violent, tumultuous or threatening behavior in a public place . . . ."

The statute at issue is § 53a-181 (a) (1), and the defendant claims that the state failed to produce evidence sufficient to satisfy that statute's conduct element, which requires that the person engage "in fighting or in violent, tumultuous or threatening behavior in a public place . . . ." In interpreting this requirement, our Supreme Court has noted that this court has held that violent, tumultuous or threatening behavior means "conduct which actually involves physical violence or portends imminent physical violence"; (internal quotation marks omitted) *State* v. *Indrisano*, 228 Conn. 795, 811, 640 A.2d 986 (1994), citing *State* v. *Lo Sacco*, 12 Conn. App. 481, 491, 531 A.2d 184, cert. denied, 205 Conn. 814, 533 A.2d 568 (1987); and our Supreme Court has held that "the terms 'fighting' and 'violent' lend an aspect of physicality to the more nebulous terms 'tumultuous' and 'threatening.' Thus . . . subdivision (1) of § 53a-182 (a) prohibits *physical* fighting, and *physically* violent, threatening or tumultuous behavior." (Emphasis in original.) *State* v. *Szymkiewicz*, 237 Conn. 613, 619, 678 A.2d 473 (1996).[2]

The defendant's argument—that the state failed to satisfy the conduct element of the breach of the peace statute and that the state's "global argument" inappropriately framed the requirements of § 53a-181 (a) (1)—is unavailing. Although the defendant is correct in stating that a conviction of breach of the peace in the second degree requires conduct with an element of physicality, we disagree with his claim that the evidence relative to his conduct on the night of November 8, 2016 "is insufficient to sustain the jury's verdict." To the contrary, there is ample evidence in the record from which the jury reasonably could have concluded that

[2] Although *Indrisano* and *Szymkiewicz* both involve charges of disorderly conduct, as opposed to charges of breach of the peace, they are still applicable to the present case because "[t]he elements of the two statutes are identical, except that § 53a-181 (a) (1) . . . concerns behavior in a public place." *State* v. *Szymkiewicz*, supra, 237 Conn. 618.

the defendant's conduct on the night in question contained the requisite level of physicality to constitute a breach of the peace. On election night, the defendant entered a polling place, wherein he removed and threw documents, and erased information from a white board; refused to return a ballot; put the ballot in his pants and told the police officer that he "bet [the officer] would like to go retrieve that out of [his] pants"; knocked over a basket of "I Voted Today" stickers; took boxes of cookies from Girl Scouts and then aggressively threw them when instructed to return them; and spat on a picture hanging on the wall. Any one of these isolated incidents may not be enough to satisfy the requirements of the statute, but a conviction need not be based on only one isolated act. See *State* v. *Szymkiewicz*, supra, 237 Conn. 623. Because the cumulative force of the evidence leads to the conclusion that the defendant's conduct on the night of November 8, 2016 was physically tumultuous, we reject the defendant's claim that the state failed to produce sufficient evidence from which the jury reasonably could have concluded that the defendant was guilty of breach of the peace in the second degree.

B

We next address the defendant's claim that the state's theory of criminal liability rendered § 53a-181 (a) (1) unconstitutionally vague as it was applied to him. Specifically, the defendant claims that his conviction of breach of the peace in the second degree should be overturned because "[t]he state chose to prosecute the defendant on a theory of breach of [the] peace . . . fashioned by redacting from the . . . statute language that is needed in order to avoid constitutional infirmity." In response, the state argues that the defendant's claim must fail because "at the time of the offense, he reasonably understood that his behavior was prohibited by

§ 53a-181 (a) (1), and . . . [because] the evidence sufficiently established that [the defendant's] behavior amounted to breach of [the] peace under the statute." We agree with the state.

The long form information charging the defendant with breach of the peace in the second degree employed the following language: "[T]he state . . . accuses [the defendant] of breach of peace and charges that in the town of Bethel on or about November 8, 2016, [the defendant], with the intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, engaged in tumultuous behavior in a public place . . . in violation of [§ 53a-181 (a) (1)]." At trial, the court's charge to the jury as to the conduct element of § 53a-181 (a) (1), which reflected the language employed in the information, provided: "Element two, conduct. The second element is the defendant engaged in tumultuous behavior. The defendant's conduct must be more than a display of mere bad manners. It must cause or create a risk of causing inconvenience, annoyance or alarm among members of the public." Accordingly, both the state and the court removed language from § 53a-181 (a) (1), shortening the phrase "engages in fighting, or in violent, tumultuous or threatening behavior," to "engages in tumultuous behavior."

Before addressing the defendant's claim in full, we first set forth the applicable standard of review. "The determination of whether a statutory provision is unconstitutionally vague is a question of law over which we exercise de novo review. . . . In undertaking such review, we are mindful that [a] statute is not void for vagueness unless it clearly and unequivocally is unconstitutional, making every presumption in favor of its validity. . . . To demonstrate that [a statute] is unconstitutionally vague as applied to him, the [defendant] therefore must . . . demonstrate beyond a reasonable doubt that [he] had inadequate notice of what was

prohibited or that [he was] the victim of arbitrary and discriminatory enforcement." (Citation omitted; internal quotation marks omitted.) *State* v. *Winot*, 294 Conn. 753, 758–59, 988 A.2d 188 (2010). "The proper test for determining [whether] a statute is vague as applied is whether a reasonable person would have anticipated that the statute would apply to his or her particular conduct. . . . The test is objectively applied to the actor's conduct and judged by a reasonable person's reading of the statute. . . . If the language of a statute fails to provide definite notice of prohibited conduct, fair warning can be provided by prior judicial opinions involving the statute . . . or by an examination of whether a person of ordinary intelligence would reasonably know what acts are permitted or prohibited by the use of his common sense and ordinary understanding." (Internal quotation marks omitted.) *State* v. *Lavigne*, 121 Conn. App. 190, 205–206, 995 A.2d 94 (2010), aff'd, 307 Conn. 592, 57 A.3d 332 (2012).

The defendant's claim is one of arbitrary and discriminatory enforcement, as he argues that "by redacting language from the . . . statute . . . the [state] . . . rendered § 53a-181 (a) (1) unconstitutionally vague as applied." This claim fails because the statute, as applied to the defendant, is not unconstitutionally vague. The proper test for claims of this nature was articulated previously as "whether a reasonable person would have anticipated that the statute would apply to his or her particular conduct." (Internal quotation marks omitted.) *State* v. *Lavigne*, supra, 121 Conn. App. 205. In the present case, there is no question that a reasonable person would anticipate that § 53a-181 (a) (1) would apply to the conduct of the defendant on the night of November 8, 2016, as described in part I A of this opinion. Accordingly, we reject the defendant's claim that § 53a-181 (a) (1) is unconstitutionally vague as it was applied to him.

C

We now turn to the defendant's claim that the trial court misled the jury by providing an inappropriate instruction with regard to the definition of "tumultuous behavior." Specifically, the defendant claims that "[b]y telling the jury that the conduct element [of breach of the peace in the second degree] required only that the jury find that the defendant engaged in 'tumultuous' behavior, the trial court did not provide the jury with a viable theory of liability under which the jury could properly convict the defendant." In response, the state argues that the defendant's claim in this regard is not reviewable because he "induced the alleged error or implicitly waived his unpreserved instructional error claim." In the alternative, the state claims that "the trial court's instruction was correct in law and sufficiently guided the jury [in deciding] whether the defendant committed breach of [the] peace under § 53a-181 (a) (1)." We conclude that the defendant implicitly waived his claim of instructional error.

At trial, the following exchange took place during the charging conference:

"The Court: [W]e begin with the charges, the amended information . . . breach of the peace in the second degree?

"[The Prosecutor]: There is something that the state has here, Your Honor. . . . In the charging document, the state's only making the claim that the defendant engaged in tumultuous behavior in a public place. . . .

"The Court: So, you're suggesting to excise 'fighting or in violent,' those words?

"[The Prosecutor]: Yes and 'or threaten[ing] behavior.' And just leave . . . tumultuous behavior.

"The Court: [Defense counsel], so the proposal would read: Such person engages in tumultuous behavior in a public place.

"[Defense Counsel]: Your Honor, I . . . have no objection to the change. . . .

"The Court: So . . . the state's position is it should read: So that such person engages in tumultuous behavior in a public place?

"[The Prosecutor]: Correct.

"The Court: [Defense counsel].

"[Defense Counsel]: I have no objection to the change, Your Honor."

The following colloquy later took place regarding the specific language that the court would use when instructing the jury as to the conduct element of § 53a-181 (a) (1):

"[The Prosecutor]: [I]n the breach of peace statute . . . [the] element on conduct . . . says . . . that the defendant engaged in fighting, violent or tumultuous, threatening behavior. We had earlier . . . requested that the court take out all that language except for the tumultuous behavior language. Now, I find myself wondering if the tumultuous behavior has to be tumultuous behavior that actually involved physical violence or [portended] imminent physical violence . . . [s]o I'm not [going to] ask that that be removed. It creates a higher burden for the state . . . [but] I'm . . . worried about being reversed for charging inappropriately. . . . Does the court understand what I'm saying?

"The Court: I understand exactly what you're saying, and . . . if I remember right, we went over this and agreed that 'tumultuous' . . . would remain and everything else would come out.

"[Defense Counsel]: That's my recollection, Your Honor. . . .

"[The Prosecutor]: I just ask the court and [defense counsel] if either of you think that the tumultuous behavior also has to be tumultuous behavior that actually involved physical violence or [portended] imminent

physical violence. . . . I don't want to excise something out of the charge that makes the charge bad. . . .

"The Court: Well, I think the actually involved physical violence or [portended] imminent physical violence, there's really nothing in the record that would suggest [the defendant] . . . [was] involved in any physical violence.

"[Defense Counsel]: I would agree with the court, Your Honor. . . . [M]y recollection . . . was that [the prosecutor] had asked for that extra language to be removed . . . and I had no objection to it being removed."

The court, *Russo*, *J.*, then instructed the jury as follows: "Element one, intent. The first element is the defendant acted with the intent to cause inconvenience, annoyance or alarm. The predominant intent must be to cause what a reasonable person operating under contemporary community standards would consider a disturbance to or impediment of a lawful activity, a deep feeling, a vexation or provocation, or a feeling of anxiety prompted by threatened danger or harm. A person can also be found guilty of breach of peace if he recklessly creates a risk of causing inconvenience, annoyance or alarm so that such person engages in tumultuous behavior in a public place. A person acts recklessly with respect to a result or circumstances when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstances exist. Element two, conduct. The second element is the defendant engaged in tumultuous behavior. The defendant's conduct must be more than a display of mere bad manners. It must cause or create a risk of causing inconvenience, annoyance or alarm among members of the public. Element three, public place. The third element is that the conduct took place in a public place. 'Public place' means any area that is used or held out for use by the public whether owned

or operated by public or private interest. Conclusion. In summary, the state must prove beyond a reasonable doubt that the defendant, one, intended to cause or recklessly created a risk of causing inconvenience, annoyance or alarm; two, the defendant engaged in tumultuous behavior; and three, it was in a public place."

We first address the state's argument that the defendant's instructional error claim is not reviewable on appeal. Although the state claims that the defendant "induced the alleged error or implicitly waived his unpreserved instructional error claim," it primarily makes an argument of implicit waiver. Specifically, the state argues that the defendant implicitly waived his instructional error claim because "[he] played an active role along with the state in limiting the breach of peace instruction to 'tumultuous behavior' and acquiesced to the trial court's finding that there was no evidence of 'physical violence.' " The state also argues that the defendant "not only failed to object to the court's instruction as given, despite notice of the charge and the multiple discussions about it on the record, but also voiced his agreement with both the instruction as given and the trial court's finding that the evidence did not warrant instruction on the remaining statutory language." (Emphasis omitted.) We agree with the state that the defendant implicitly waived his claim of instructional error.

"It is well established . . . that unpreserved claims of improper jury instructions 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)] unless they have been induced or implicitly waived. . . . [W]aiver is an intentional relinquishment or abandonment of a known right or privilege. . . . It involves the idea of assent, and assent is an act of understanding. . . . The rule is applicable that no one shall be permitted to deny that he intended the natural consequences of his acts and conduct. . . . In order to waive a claim of law it is not

necessary . . . that a party be certain of the correctness of the claim and its legal efficacy. It is enough if he knows of the existence of the claim and of its reasonably possible efficacy. . . . Connecticut courts have consistently held that when a party fails to raise in the trial court the constitutional claim presented on appeal and affirmatively acquiesces to the trial court's order, that party waives any such claim [under *Golding*]. . . . Both [our Supreme Court] and [this court] have found implied waiver on grounds broader than those required for a finding of induced error. These include counsel's failure to take exception or object to the instructions together with (1) acquiescence in, or expressed satisfaction with, the instructions following an opportunity to review them, or (2) references at trial to the underlying issue consistent with acceptance of the instructions ultimately given. . . . The rationale for declining to review jury instruction claims when the instructional error was induced or the claim was implicitly waived is precisely the same: [T]o allow [a] defendant to seek reversal [after] . . . his trial strategy has failed would amount to allowing him to . . . ambush the state [and the trial court] with that claim on appeal." (Citations omitted; internal quotation marks omitted.) *State* v. *Kitchens*, 299 Conn. 447, 468–70, 10 A.3d 942 (2011).

We conclude that the defendant has implicitly waived his instructional error claim. The record indicates that defense counsel had an opportunity to review the jury charge language, and that he acquiesced in the use of the instructional language at issue. In fact, defense counsel clearly stated that he had no objection to the removal of the language now challenged by the defendant, and actually expressed agreement with the court's use of that limited language over the state's suggestion, in a reconsideration of its prior request, that the language of the statute be used in its entirety. For these reasons, reviewing the defendant's claim of instructional error on the merits would be in contravention of

the principle of implicit waiver, as it would allow the defendant to challenge his failed trial strategy on appeal. See id., 470. Accordingly, we conclude that this claim has been implicitly waived.

Having reached this conclusion, we now address the defendant's claim that "the trial court's jury charge requires reversal as plain error." In support of his claim of plain error, the defendant asserts that "[t]here is a reasonable possibility that the jury convicted [him] for 'bad manners' but not conduct that portended imminent physical violence." Specifically, the defendant claims that "[an] error here is plain upon the face of the record . . . [because] the jury was left to its own understanding of the word 'tumultuous' and was deprived of the judicial interpretations of the conduct element that are necessary to prevent arbitrary enforcement of the breach of [the] peace statute." We disagree.

"An appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is patent [or] readily [discernible] on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . This determination clearly requires a review of the plain error claim presented in light of the record. Although a complete record and an obvious error are prerequisites for plain error review, they are not, of themselves, sufficient for its application. . . . [T]he plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . [I]n addition to examining the patent nature of the error, the reviewing court must examine that error for the grievousness of its consequences in order to determine whether reversal under the plain error doctrine is appropriate. A party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice. . . . [Previously], [our Supreme Court has]

described the two-pronged nature of the plain error doctrine: [An appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is *both* so clear *and* so harmful that a failure to reverse the judgment would result in manifest injustice. . . . It is axiomatic that, [t]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly reserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment . . . for reasons of policy. . . . Put another way, plain error review is reserved for only the most egregious errors. When an error of such a magnitude exists, it necessitates reversal.'' (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *State* v. *McClain*, 324 Conn. 802, 812–14, 155 A.3d 209 (2017).

We turn to the first prong of the plain error doctrine, namely, whether the trial court's decision to remove language from the conduct element of the breach of the peace statute in its charge to the jury, is so clear an error that a failure to reverse the judgment would result in manifest injustice. See id., 812. The defendant's claim in this regard hinges on his assertion that ''[t]here is a reasonable possibility that the jury convicted [him] for 'bad manners' but not conduct that portended imminent physical violence.'' Considering the record in its entirety, we conclude that no such reasonable possibility exists, and that the trial court's instruction to the jury does not constitute a clear error. In charging the jury as to the conduct element of § 53a-181 (a) (1), the court specifically defined tumultuous as follows: ''The defendant's conduct *must be more than a display of mere bad manners*. It must cause or create a risk of causing inconvenience, annoyance or alarm among members of the public.'' (Emphasis added.) This language used by the court shows that no clear error exists

with regard to the court's instructions, as the court expressly stated that the defendant's conduct "must be more than . . . mere bad manners." Accordingly, we conclude that the defendant is not entitled to relief under the doctrine of plain error.

II

The defendant challenges his conviction of assault of public safety personnel on the following grounds: the state did not offer sufficient evidence to prove that Sergeant Christos was acting lawfully in the performance of his official duties, and the court failed to instruct the jury adequately on the law governing police discretion to issue and serve a summons on an individual who has not yet been arrested. We address each claim in turn.

A

We first address the defendant's claim that the state did not offer sufficient evidence to prove that Sergeant Christos was acting lawfully in the performance of his official duties. Specifically, the defendant claims that "[i]n the absence of an actual arrest, law enforcement officers do not have statutory authority to issue a summons," and that "the police lacked 'speedy information' to arrest the defendant for his . . . past behavior." We disagree.

We begin by setting forth the applicable standard of review. As noted in part I A of this opinion, a two part test applies to claims of insufficient evidence. First, we construe the evidence in the light most favorable to sustaining the verdict. *State* v. *Allen*, supra, 289 Conn. 555–56. Second, we determine whether, based upon the facts so construed and the inferences reasonably drawn therefrom, the jury reasonably could have concluded that the evidence before it established guilt beyond a reasonable doubt. Id., 556. Because such review involves statutory construction—a question of law—our review is plenary. *State* v. *Carolina*, supra, 143 Conn. App. 443.

The statute at issue—§ 53a-167c (a) (5)—provides in relevant part: "A person is guilty of assault of public safety . . . personnel . . . when, with intent to prevent a reasonably identifiable peace officer . . . from performing his or her duties, and while such peace officer . . . is acting in the performance of his or her duties . . . such person throws or hurls, or causes to be thrown or hurled, any bodily fluid including . . . saliva at such peace officer." Accordingly, the defendant's claim—that the state did not offer sufficient evidence to prove that Sergeant Christos was acting lawfully in the performance of his official duties—focuses solely on the requirement of § 53a-167c (a) (5) that the officer must be "acting in the performance of his or her duties" at the time of the assault. The defendant claims that the state failed to offer sufficient evidence to prove that, under the circumstances, Sergeant Christos had statutory authority to issue a summons to the defendant. Specifically, the defendant cites General Statutes §§ 54-1h[3] and 54-1f[4] to support the claim that "[t]he state failed to prove that [Sergeant Christos] [was] operating within [his] legal authority when [he] confronted the defendant at his home and attempted to serve [the] . . . summons upon him." Accordingly, the defendant's claim can be broken down as follows: Sergeant Christos lacked authority to serve a summons upon the defendant on the morning of November 9, 2016, and therefore

[3] The specific language of the statute on which the defendant relies is: "Any person who has been arrested with or without a warrant for commission of a misdemeanor . . . may, in the discretion of the arresting officer, be issued a written complaint and summons and be released on his written promise to appear on a date and time specified." General Statutes § 54-1h. The defendant also cites Practice Book § 36-4 (Direction by Judicial Authority for Use of Summons) and Practice Book § 36-8 (Issuance of Summons by Prosecuting Authority in Lieu of Arrest Warrant) in support of this claim.

[4] General Statutes § 54-1f (a) provides in relevant part: "Peace officers . . . shall arrest, without previous complaint and warrant, any person for any offense in their jurisdiction, when the person is taken or apprehended . . . on the speedy information of others . . . ."

was not "acting in the performance of his . . . duties," as is required by § 53a-167c (a) (5). We disagree.

The question of "[w]hether [an officer] is acting in the performance of his duty within the meaning of . . . [§ 53a-167c (a)][5] must be determined in the light of that purpose and duty. If he is acting under a good faith belief that he is carrying out that duty, and if his actions are reasonably designed to that end, he is acting in the performance of his duties. . . . The phrase in the performance of his official duties means that the police officer is simply acting within the scope of what [he] is employed to do. The test is whether the [police officer] is acting within that compass or is engaging in a personal frolic of his own. . . . [W]hether the police officer was acting in the performance of his official duties or engaging in a personal frolic [are] factual questions for the jury to determine on the basis of all the circumstances of the case and under appropriate instructions from the court." (Citation omitted; footnote added; internal quotation marks omitted.) *State* v. *Davis*, 261 Conn. 553, 566, 804 A.2d 781 (2002). Accordingly, the question before us is not, as the defendant suggests, whether Sergeant Christos had the authority to serve a summons upon the defendant but, rather, whether Sergeant Christos was "acting within the scope of what [he] is employed to do." (Internal quotation marks omitted.) Id. There is clear evidence in the record from which the jury reasonably could have concluded that Sergeant Christos was acting within the scope of his employment, and was not engaged in a personal frolic, when he served the summons upon the defendant. Sergeant Christos was on duty and in uniform on November 9, 2016, and, on the basis of that fact, the

[5] Although our Supreme Court, in setting forth this standard, was referring to General Statutes § 53a-167a (a); *State* v. *Davis*, 261 Conn. 553, 566, 804 A.2d 781 (2002); its analysis is equally applicable to § 53a-167c (a). See id., 567.

jury reasonably could have concluded that his decision to accompany Officer Broad to the home of the defendant and to issue the summons himself was made in his official capacity as a police officer and as Officer Broad's supervisor, as Officer Broad was not in uniform, and Sergeant Christos believed that because he "would be readily identifiable as a police officer, there would be no question as to who was taking the action . . . ." For these reasons, we conclude that the state offered sufficient evidence from which the jury reasonably could have concluded that Sergeant Christos was acting within the scope of his employment.

B

We now address the defendant's final claim—that the court failed to instruct the jury adequately on the law governing police discretion to issue and serve a summons on an individual who has not yet been arrested. Specifically, the defendant claims that "[t]he trial court's failure to respond adequately to the jury's . . . request for clarification . . . deprived the defendant of his right to a fair trial by jury." According to the defendant, "the jury needed to be instructed on the law governing police discretion to issue and serve a summons [upon] an individual who has not been arrested first." In response, the state argues that "the defendant implicitly waived this instructional error claim." In the alternative, the state argues that "the trial court properly instructed the jury on the elements of the assault [of a public safety officer] charge."

At trial, the court provided the following instruction to the jury regarding the charge of assault of a public safety officer: "Element one, assault of officer. The first element is that the person allegedly assaulted was a reasonably identifiable public safety officer. The standard is whether a reasonable person under the same circumstances should have identified the other person as a public safety officer. In determining this, such facts

as whether the other person wore a uniform, whether he identified himself or showed his badge or other identification or the manner in which he acted and conducted himself, are all relevant to your decision of whether that person was reasonably identifiable as a public safety officer. It is irrelevant whether the public safety officer was officially on duty at the time of the attempted arrest as long as he was identifiable as a public safety officer. Element two, in the performance of his duties. The second element is that the conduct of the defendant occurred while the public safety officer was acting in the performance of his duties. The phrase 'in the performance of his official duties,' means that the public safety officer was acting within the scope of what he is employed to do and that his conduct was related to his official duties. The question of whether he was acting in good faith in the performance of his duties, is a factual question for you to determine on the basis of the evidence in the case. Element three, intent to prevent the performance of his duties. The third element is that the defendant had the specific intent to prevent the public safety officer from performing his lawful duties. A person acts intentionally with respect to a result, when his conscious objective is to cause such result. Element four, by certain means. The fourth element is that the defendant threw or hurled or caused to be thrown or hurled any bodily fluid, including but not limited to, saliva, at [Sergeant] Christos. Conclusion. In summary, the state must prove beyond a reasonable doubt that, one, the defendant assaulted a public safety officer; two, in the performance of his duties; three, with the intent to prevent the performance of his duties; and, four, by means of throwing or hurling or causing to be thrown or hurled any bodily fluid, including but not limited to saliva, at [Sergeant] Christos."

During its deliberations, the jury wrote a note requesting clarification from the court with regard to

the charge of assault of a public safety officer: "Can we have clarification as to when an officer's duties end? (This in reference to the charge of an assault on an officer)." The court informed both the state and defense counsel of the existence of the note and, after discussing its contents, all parties agreed that the jury charge as given by the court could not be expanded upon or embellished. The court responded to the request by explaining to the jury: "The answer lies in your deliberations. That's a factual finding that you will deliberate upon. . . . [T]here are a few things that can assist you in that; the testimony of the individuals involved and the court's jury charge to you. You work within that framework, within that context, and through your deliberations you will arrive at an answer to that question."

We first address the state's argument that the defendant's instructional error claim is not reviewable on appeal. Specifically, the state argues that "[t]he defendant implicitly waived his unpreserved claim that the court erred by failing to instruct the jury on the speedy information issue in response to the jury's note . . . [because] [he] was clearly on notice of the speedy information issue . . . but chose not to raise that issue in the context of the court's instruction on the assault charge, despite the jury's note on that specific charge." According to the state, the defendant "[i]nstead . . . agreed with the court's proposed response . . . and . . . voiced no objection when the court issued its response." We agree with the state that the defendant implicitly waived his claim of instructional error.

As set forth in part I C of this opinion, unpreserved claims of instructional error are reviewable under *Golding*, unless they have been induced or implicitly waived by the defendant. *State* v. *Kitchens*, supra, 299 Conn. 468. "Connecticut courts have consistently held that when a party fails to raise in the trial court the constitutional claim presented on appeal and affirmatively acquiesces to the trial court's order, that party waives

any such claim [under *Golding*].'' (Internal quotation marks omitted.) Id., 469. More specifically, a defendant has waived his instructional error claim if he has failed to take exception with or object to the instructions at issue, and also has acquiesced in the court's use of the instructions after having had the opportunity to review them. Id., 469–70.

In the present case, it is clear that the defendant has implicitly waived his claim of instructional error. The record shows that defense counsel had the opportunity to review the jury instructions, and that he did not object to them. Furthermore, defense counsel was given the opportunity to consider the question posited to the court by the jury, and he clearly acquiesced in the court's charge to the jury by agreeing that the instructions already given were sufficient. For these reasons, we conclude that the defendant has implicitly waived his instructional error claim.[6]

Having reached this conclusion, we now turn to the defendant's claim that he is entitled to a new trial because the court's jury charge requires reversal as plain error. Specifically, the defendant claims that ''[i]f the jury had been informed that [the] law of arrest required the police to apply for a warrant before going to the defendant's home to confront him . . . [t]here is a reasonable possibility that the jury would have concluded that [Sergeant] Christos, when spat upon, was not performing his lawful duty and the jury [therefore] would have acquitted.''

As established in part I C of this opinion, the plain error doctrine consists of two prongs: ''[An appellant] cannot prevail under [the plain error doctrine] . . .

[6] Notwithstanding this conclusion, even if the defendant's claim of instructional error was reviewable on the merits, it did not warrant a reversal of the judgment of the trial court because there is virtually no possibility that the jury was misled by the instruction at issue.

unless he demonstrates that the claimed error is *both* so clear *and* so harmful that a failure to reverse the judgment would result in manifest injustice." (Emphasis in original; internal quotation marks omitted.) *State* v. *McClain*, supra, 324 Conn. 812.

We turn to the first prong of the plain error doctrine, namely, whether the trial court's decision not to inform the jury "that [the] law of arrest required the police to apply for a warrant before going to the defendant's home to confront him" is so clear an error that a failure to reverse the judgment would result in manifest injustice. See id., 812. The defendant's claim in this regard is dependent on his assertion that if the jury was instructed as to the law of arrest, "[t]here is a reasonable possibility that the jury would have concluded that [Sergeant] Christos . . . was not performing his lawful duty and . . . would have acquitted." Considering the record in its entirety, we conclude that no such reasonable possibility exists. As we concluded in part II A of this opinion, whether a police officer has lawful authority to conduct an arrest or serve a summons is irrelevant to the question of whether that officer is acting in the performance of his duties. This means that no clear error occurred because, even if the court had provided this instruction to the jury, it would not have changed the question before the jury or the factors that the jury could consider in determining whether Sergeant Christos was acting in good faith in the performance of his duties. Accordingly, we conclude that the defendant is not entitled to relief under the doctrine of plain error.

The judgments are affirmed.

In this opinion the other judges concurred.

PETER FEATHERSTON *v.* KATCHKO & SON CONSTRUCTION SERVICES, INC., ET AL.
(AC 42280)

Moll, Alexander and Suarez, Js.

Syllabus

The plaintiff sought to recover damages from the defendants, S Co. and P Co., for violations of the Connecticut Uniform Fraudulent Transfer Act (CUFTA) (§ 52-552a et seq.) and the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.). In 2012, the trial court rendered judgment for the plaintiff against S Co. in a separate action. Soon after the 2012 judgment, S Co. ceased doing business, and the former president of S Co. filed a certificate of incorporation forming P Co. The plaintiff alleged that S Co. had fraudulently transferred all of its assets to P Co. in order to prevent him from collecting on the 2012 judgment. The plaintiff requested punitive damages under CUTPA in his second revised complaint and in his posttrial brief; the trial court did not address punitive damages in rendering judgment in favor of the plaintiff on all counts. The court also awarded the plaintiff attorney's fees on his CUTPA count. The defendants appealed to this court. After the appeal had been filed, the plaintiff filed a motion to amend the complaint to conform the pleadings to the proof adduced at trial and a motion for punitive damages. The court granted the motion to amend but denied the motion for punitive damages. The defendants then amended their appeal. *Held*:

1. The defendants' original appeal was not taken from a final judgment, and this court lacked subject matter jurisdiction to entertain it, but, nonetheless, the defendants' amended appeal was jurisdictionally proper; a final judgment was not rendered in this matter until the trial court had denied the plaintiff's motion for punitive damages, following the original appeal, and the defendants' amended appeal encompassed the claims raised by the defendants in their original appeal, in addition to the granting of the plaintiff's postjudgment motion to amend, and this court could review all of the defendants' claims in the context of their amended appeal.
2. The trial court abused its discretion in granting the plaintiff's motion to amend the complaint following judgment: no special circumstances existed to warrant the amended complaint, in which the plaintiff improperly asserted successor liability as a stand-alone claim, after the court had rendered judgment; moreover, by granting the motion to amend, the court enabled the plaintiff to present a claim after judgment that, standing alone, was not legally cognizable, as successor liability is a theory of liability to be alleged in support of a claim rather than raised as an independent claim.

3. The trial court did not err in determining that the defendants had violated CUFTA:

a. The trial court properly found that there had been a transfer of assets between S Co. and P Co., the record having supported the court's finding, by clear and convincing evidence, that S Co. transferred assets, specifically two excavators, to P Co., but those were the only assets shown by the plaintiff to have been transferred, and a finding that any other assets were transferred by S Co. to P Co. would be based on assumption and speculation.

b. The trial court properly determined that the defendants were liable under § 52-552e (a) (1) of CUFTA, in that the plaintiff produced sufficient evidence of S Co. having transferred assets to P Co. with an actual intent to hinder, delay, or defraud the plaintiff; in determining that the defendants had violated § 52-552e (a) (1), the court found that the transfer between S Co. and P Co. met a number of the indicia of fraud set forth in § 52-552e (b), including that S Co. had been sued and the 2012 judgment was rendered before the transfer had been made, S Co., which the court found had ceased its business shortly following the 2012 judgment, was insolvent or became insolvent shortly following the transfer, and the formation of P Co. following the rendering of the 2012 judgment increased the difficulty facing the plaintiff in his efforts to collect on the judgment.

c. The trial court improperly determined that the defendants were liable under § 52-552f (a) of CUFTA, as the plaintiff did not produce sufficient evidence that S Co. was insolvent at the time of the transfer or became insolvent as a result thereof; although there was evidence in the record demonstrating that S Co. became insolvent by the end of 2012, sometime following the transfer, there was no evidence reflecting the date of the transfer, thus, it could not be determined whether S Co. was insolvent at the time of the transfer, and there was insufficient evidence to make a finding as to whether the transfer of the excavators, itself, resulted in S Co. becoming insolvent.

d. The trial court erred in encompassing any other property, besides two excavators, within its order of relief under CUFTA, as the order was overbroad in authorizing the attachment of property that was not subject to the action: the two excavators, which remain in the possession of P Co., were the only assets that were properly found, on the record, to have been fraudulently transferred from S Co. to P Co.; moreover, there was no error in the court's ordering that the plaintiff may attach the two excavators in the sum of the 2012 judgment, plus interest, and that the defendants were enjoined from transferring those excavators; furthermore, the defendants' claim that the court's relief under CUFTA was improper because the court failed to determine the value of the assets transferred pursuant to statute (§ 52-552i) was unavailing, as the court did not award damages under CUFTA, only a monetary sum in the form of attorney's fees under CUTPA, which had no bearing on the

relief afforded under CUFTA, and the defendants' reliance on § 52-552i (b), which grants a trial court the discretion to award, as damages against the appropriate party, the lesser of the value of the asset transferred and the amount necessary to satisfy the creditor's claim, was misplaced.

4. The defendants' claim that the trial court erred in rendering judgment in favor of the plaintiff on the count of his complaint sounding in a violation of CUTPA was unavailing; the crux of the defendants' contention was that the success of the plaintiff's CUTPA claim was predicated on the court's finding that the defendants had committed a fraudulent transfer under CUFTA, and, as the court properly determined that that the defendants had engaged in a fraudulent transfer in violation of § 52-552e (a) (1), the defendants' claim failed.

Argued September 14—officially released December 22, 2020

Procedural History

Action to recover damages for, inter alia, the defendants' alleged fraudulent transfer of assets, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk where the matter was tried to the court, *Hon. Taggart D. Adams*, judge trial referee; judgment for the plaintiff, from which the defendants appealed to this court; thereafter, the court, *Hon. Taggart D. Adams*, judge trial referee, granted the plaintiff's motion to amend the complaint and denied the plaintiff's motion for an order of punitive damages, and the defendants amended their appeal. *Appeal dismissed in part*; *reversed in part*; *judgment directed.*

David W. Rubin, with whom was *Jonathan D. Jacobson*, for the appellants (defendants).

Brenden P. Leydon, with whom, on the brief, was *Mark Sank*, for the appellee (plaintiff).

Opinion

MOLL, J. The defendants, Katchko & Son Construction Services, Inc. (Son Singular), and Katchko & Sons Construction Services, Inc. (Sons Plural),[1] appeal from

[1] As the record makes apparent, confusion may arise when discerning Katchko *& Son* Construction Services, Inc., from Katchko *& Sons* Construction Services, Inc. For purposes of clarity, we refer to Katchko *& Son* Construction Services, Inc., as Son Singular, to Katchko *& Sons* Construction Services, Inc., as Sons Plural, and to both corporate entities collectively as the defendants.

the judgment of the trial court rendered in favor of the plaintiff, Peter Featherston. On appeal, the defendants claim that the court (1) abused its discretion in granting the plaintiff's motion to amend his second revised complaint, (2) improperly rendered judgment in favor of the plaintiff on counts one and two of his second revised complaint sounding in violations of the Connecticut Uniform Fraudulent Transfer Act (CUFTA), General Statutes § 52-552a et seq., and (3) improperly rendered judgment in favor of the plaintiff on count three of his second revised complaint sounding in a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq.[2] We dismiss, sua sponte, the defendants' original appeal for lack of a final judgment; see part I of this opinion; and, with respect to the amended appeal, we affirm in part and reverse in part the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. In 2006, the plaintiff commenced a civil action against, among other parties, Katchko Construction Services, Inc., raising claims sounding in, inter alia, breach of contract. See *Featherston* v. *Tautel & Sons Consulting, LLC*, Superior Court, judicial district of Fairfield, Docket No. CV-06-5002924-S (2006 action). On February 7, 2011, while the 2006 action was pending, Robert Katchko, the president of Katchko Construction Services, Inc., filed a certificate of amendment with the Secretary of the State changing

[2] In their principal appellate brief, the defendants also claim that the trial court improperly denied a motion filed by them seeking a judgment of dismissal pursuant to Practice Book § 15-8. On March 12, 2020, we ordered the parties to be prepared to address at oral argument " 'the effect, if any, of *Moutinho* v. *500 North Avenue, LLC*, 191 Conn. App. 608, 614, cert. denied, 333 Conn. 928, (2019), on the defendants' claim that the trial court erred in denying their motion to dismiss for failure to make out a prima facie case pursuant to Practice Book § 15-8.' " During oral argument, the defendants' counsel withdrew the claim challenging the denial of the defendants' motion to dismiss.

the name of Katchko Construction Services, Inc., to Son Singular. On April 17, 2012, the trial court, *Tyma*, *J.*, rendered judgment in favor of the plaintiff on his breach of contract claim against Son Singular[3] in the amount of $216,972.83 (2012 judgment). Son Singular appealed from the 2012 judgment, but the appeal was dismissed on December 12, 2012.

Less than three months after the judgment, on July 1, 2012, Son Singular ceased doing business. On August 6, 2012, a certificate of incorporation was filed with the Secretary of the State forming Sons Plural. On January 27, 2014, Robert Katchko filed a certification of dissolution with the Secretary of the State dissolving Son Singular.

On August 22, 2016, the plaintiff commenced the present action against the defendants. On April 24, 2017, the plaintiff filed a second revised three count complaint. Count one asserted a fraudulent transfer claim under CUFTA, specifically, General Statutes § 52-552e. Count two also asserted a fraudulent transfer claim under CUFTA, specifically, General Statutes § 52-552f. Count three asserted a violation of CUTPA. The crux of the plaintiff's allegations was that Son Singular had transferred all of its assets to Sons Plural in order to prevent the plaintiff from collecting on the 2012 judgment. On January 23, 2018, the defendants filed an answer denying the material allegations of the second revised complaint.

The matter was tried to the court, *Hon. Taggart D. Adams*, judge trial referee, on January 24 and 25, 2018. During his case-in-chief, the plaintiff introduced several exhibits and elicited testimony from Anthony Branca,

[3] Katchko Construction Services, Inc., was not a separate and distinct entity from Son Singular; rather, the certificate of amendment filed on February 7, 2011, changed the name of Katchko Construction Services, Inc., to Son Singular. In an effort to avoid confusion, unless otherwise necessary, we hereinafter refer to Son Singular when discussing events that the record attributes to Katchko Construction Services, Inc.

an accountant who had performed tax preparation services for the defendants. The plaintiff also testified. On January 25, 2018, after the plaintiff had rested, the defendants orally moved for a judgment of dismissal for failure to make out a prima facie case pursuant to Practice Book § 15-8.[4] The court reserved its decision on the motion to dismiss until the parties had an opportunity to file memoranda on the motion. On June 11, 2018, after the parties had submitted their respective memoranda, the court issued a memorandum of decision denying the motion to dismiss, concluding that the plaintiff had established a prima facie case for his fraudulent transfer and CUTPA claims. On July 17, 2018, the parties appeared before the court, and the defendants' counsel represented that the defendants had elected to rest without putting on evidence.

On November 8, 2018, after the parties had submitted their respective posttrial briefs,[5] the court issued a memorandum of decision rendering judgment in favor of the plaintiff on all three counts of his second revised complaint. As to the defendants' violation of CUFTA, the court ordered relief pursuant to General Statutes § 52-552h, including permitting the plaintiff to attach property of the defendants in the amount of the 2012 judgment, plus interest. As relief for the defendants' violation of CUTPA, the court awarded the plaintiff $18,388 in attorney's fees under CUTPA. On November 14, 2018, the defendants filed their original appeal chal-

[4] Practice Book § 15-8 provides: "If, on the trial of any issue of fact in a civil matter tried to the court, the plaintiff has produced evidence and rested, a defendant may move for judgment of dismissal, and the judicial authority may grant such motion if the plaintiff has failed to make out a prima facie case. The defendant may offer evidence in the event the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made."

[5] The defendants filed their posttrial brief on September 14, 2018. The plaintiff filed his posttrial brief on April 19, 2018, which he also utilized as a response to the defendants' motion to dismiss.

lenging the November 8, 2018 judgment and the denial of their motion to dismiss.[6]

On November 28, 2018, the plaintiff filed a motion to amend his second revised complaint, with an accompanying proposed amended complaint filed the same day, to conform the pleadings to the proof adduced at trial (motion to amend). The proposed amended complaint set forth, as a new fourth count, a purported standalone claim for successor liability, and added into the prayer for relief a request for a finding of successor liability. The complaint otherwise was identical to the second revised complaint. On December 27, 2018, the defendants objected to the motion to amend. On January 11, 2019, the plaintiff filed a reply brief. On January 14, 2019, the court granted the motion to amend and overruled the defendants' objection. Thereafter, no motion was filed, and no action was taken by the court, directed to the November 8, 2018 judgment. On January 24, 2019, the defendants filed an amended appeal to encompass the court's granting of the motion to amend. Additional facts and procedural history will be set forth as necessary.

I

As a preliminary matter, we address, sua sponte, whether the defendants' original appeal filed on November 14, 2018, was taken from a final judgment.[7] "The jurisdiction of the appellate courts is restricted to appeals from judgments that are final. . . . The policy concerns underlying the final judgment rule are to discourage piecemeal appeals and to facilitate the speedy

[6] The denial of the defendants' motion to dismiss is no longer at issue in this appeal. See footnote 2 of this opinion.

[7] Although the parties have not addressed on appeal whether the defendants' original appeal is subject to dismissal for lack of a final judgment, the parties have briefed the finality of judgment issue in the context of the defendants' claim that the trial court abused its discretion in granting the plaintiff's motion to amend.

and orderly disposition of cases at the trial court level. . . . The appellate courts have a duty to dismiss, even on [their] own initiative, any appeal that [they lack] jurisdiction to hear. . . . We therefore must always determine the threshold question of whether the appeal is taken from a final judgment before considering the merits of the claim." (Citations omitted; internal quotation marks omitted.) *Wolfork* v. *Yale Medical Group*, 335 Conn. 448, 459, 239 A.3d 272 (2020). We conclude that the original appeal was not taken from a final judgment, and, therefore, we lack subject matter jurisdiction to entertain it. We nonetheless conclude that the defendants' amended appeal, filed on January 24, 2019, is jurisdictionally proper and encompasses all of their claims on appeal.

Our jurisdictional analysis is governed by *Perkins* v. *Colonial Cemeteries, Inc.*, 53 Conn. App. 646, 734 A.2d 1010 (1999). In *Perkins*, this court dismissed, for lack of a final judgment, an appeal challenging the denials of the defendants' postverdict motions because, although the defendants had been found liable under CUTPA by a jury, the trial court had not yet ruled on the plaintiff's request for punitive damages under CUTPA. Id., 649; see also *Hylton* v. *Gunter*, 313 Conn. 472, 487 n.15, 97 A.3d 970 (2014) (citing *Perkins* in explaining that "statutory punitive damage awards, which in many cases may be awarded in addition to attorney's fees and costs . . . present unique final judgment considerations" (citation omitted)).

In the present case, the plaintiff requested punitive damages under CUTPA[8] in his second revised complaint

[8] General Statutes § 42-110g (a) provides: "Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by section 42-110b, may bring an action in the judicial district in which the plaintiff or defendant resides or has his principal place of business or is doing business, to recover actual damages. Proof of public interest or public injury shall not be required in any action brought under this section. *The court may*,

and in his posttrial brief.[9] In rendering judgment in favor of the plaintiff on his CUTPA claim, the court made no mention of punitive damages; instead, the court awarded the plaintiff $18,338 in attorney's fees upon its determination that the attorney's fees requested were reasonable and compensable under CUTPA.[10] On November 29, 2018, after the defendants had filed their original appeal, the plaintiff filed a motion requesting that the court award punitive damages, which the court summarily denied on January 14, 2019.[11]

Under *Perkins*, a final judgment was not rendered in this matter until January 14, 2019, when the court denied the plaintiff's motion for punitive damages. Therefore, the defendants' original appeal, filed on November 14, 2018, was not taken from a final judgment, and we dismiss, sua sponte, the original appeal for lack of a final judgment.

Notwithstanding the jurisdictional defect in the defendants' original appeal, the defendants' amended appeal, filed on January 24, 2019, is jurisdictionally proper. See Practice Book § 61-9 ("[i]f the original appeal is dismissed for lack of jurisdiction, the amended appeal

in its discretion, award punitive damages and may provide such equitable relief as it deems necessary or proper." (Emphasis added.)

[9] In his posttrial brief, the plaintiff stated that he was "entitled to punitive damages under [CUTPA] at least in the amount of his total attorney's fees. A [h]earing should be scheduled by the court in order to determine the total amount of [the] plaintiff's attorney's fees and costs in order to arrive at punitive damages . . . and attorney's fees . . . ." We do not construe the plaintiff's statements to mean that, if awarded the total amount of attorney's fees requested by him, he was not seeking any additional sum in punitive damages.

[10] General Statutes § 42-110g (d) provides in relevant part: "In any action brought by a person under this section, the court may award, to the plaintiff, in addition to the relief provided in this section, costs and reasonable attorneys' fees based on the work reasonably performed by an attorney and not on the amount of recovery. . . ."

[11] On January 23, 2019, the plaintiff cross appealed from the denial of his motion for punitive damages, but he later withdrew the cross appeal.

shall remain pending if it was filed from a judgment or order from which an original appeal properly could have been filed"). The amended appeal encompasses the claims raised by the defendants in their original appeal, in addition to the granting of the plaintiff's motion to amend. Accordingly, we may review all of the defendants' claims in the context of their amended appeal. See, e.g., *Randazzo* v. *Sakon*, 181 Conn. App. 80, 87 n.7, 189 A.3d 616 (dismissing original appeal for lack of final judgment but reviewing claims under amended appeal pursuant to § 61-9), cert. denied, 330 Conn. 909, 193 A.3d 560 (2018); *Rosa* v. *Lawrence & Memorial Hospital*, 145 Conn. App. 275, 282 n.9, 74 A.3d 534 (2013) (same); *Midland Funding, LLC* v. *Tripp*, 134 Conn. App. 195, 196 n.1, 38 A.3d 221 (2012) (same).

II

Turning to the defendants' claims on appeal, we first address the defendants' assertion that the trial court abused its discretion in granting the plaintiff's motion to amend. For the reasons that follow, we agree.

"Our standard of review . . . is well settled. While our courts have been liberal in permitting amendments . . . this liberality has limitations. Amendments should be made seasonably. Factors to be considered in passing on a motion to amend are the length of the delay, fairness to the opposing parties and the negligence, if any, of the party offering the amendment. . . . The motion to amend is addressed to the trial court's discretion which may be exercised to restrain the amendment of pleadings so far as necessary to prevent unreasonable delay of the trial. . . . Whether to allow an amendment is a matter left to the sound discretion of the trial court. This court will not disturb a trial court's ruling on a proposed amendment unless there has been a clear abuse of that discretion." (Internal quotation marks omitted.) *Burton* v. *Stamford*, 115 Conn. App. 47, 57, 971 A.2d 739, cert. denied, 293 Conn. 912, 978

A.2d 1108 (2009). "It is the [burden of the party challenging the court's ruling] to demonstrate that the trial court clearly abused its discretion." (Internal quotation marks omitted.) *Berlin Batting Cages, Inc.* v. *Planning & Zoning Commission*, 76 Conn. App. 199, 211, 821 A.2d 269 (2003).

The following additional facts and procedural history are relevant to our disposition of this claim. In his second revised complaint, in support of his claims sounding in violations of CUFTA and CUTPA, the plaintiff alleged in relevant part that (1) the 2012 judgment had been rendered in his favor and against Son Singular,[12] (2) Robert Katchko formed Sons Plural on or about August 6, 2012, and (3) Son Singular transferred all of its assets to Sons Plural. The plaintiff did not expressly allege that Sons Plural was liable to him for any claim under a theory of successor liability. In his posttrial brief, the plaintiff asserted that he was entitled to an award of damages against Sons Plural under a theory of successor liability, contending that (1) Robert Katchko was the principal of both Son Singular and Sons Plural, and (2) the cessation of Son Singular's business in July, 2012, and the formation of Sons Plural in August, 2012, were carried out with an intent to deprive him of his ability to collect on the 2012 judgment.

The trial court did not render judgment in the plaintiff's favor on any claim predicated upon a theory of successor liability; however, it found that the plaintiff had "shown . . . that a Katchko entity [Sons Plural] was operating [certain] equipment in 2016 while the Katchko entity that operated the equipment in 2012 and against which [the plaintiff] obtained a six figure civil

[12] The second revised complaint, as well as the amended complaint filed by the plaintiff in conjunction with his motion to amend, alleged that the 2012 judgment was rendered against Sons Plural. As the trial court noted in its order granting the plaintiff's motion to amend, the plaintiff's reference to Sons Plural appears to have been made in error.

court judgment [Son Singular] was without assets and closed." Additionally, in denying the defendants' motion to dismiss, on which the court relied in rendering judgment in the plaintiff's favor, the court found that the plaintiff had "submitted evidence of his judgment against [Son Singular] in 2012, the subsequent cessation of that entity in the middle of 2012, and the creation of a new corporate entity, [Sons Plural], in August, 2012, just days after the [2012] judgment was entered, that apparently took over the business in full and left the prior company closed and without assets."

On November 26, 2018, after the defendants had filed their original appeal, they filed with this court a preliminary statement of the issues in compliance with Practice Book § 63-4 (a) (1), raising, inter alia, the following issue: "Did the trial court err in finding, in essence, successor liability, when such a claim was neither plead nor tried before the trial court?"

Two days later, the plaintiff filed the motion to amend "to more specifically call for successor liability so as to conform the pleadings to the proof as found by the court." The plaintiff asserted that the evidence in the record and the findings made by the court demonstrated that Sons Plural "was a mere continuation of [Son Singular] and that the transaction was fraudulent." The plaintiff further asserted that the defendants were not prejudiced by the motion to amend as the proposed amended complaint did "not add a single new factual allegation and merely more clearly [set] forth a claim for successor liability, which has already been properly found by the court." Additionally, the plaintiff contended that successor liability was an appropriate remedy under CUTPA. Finally, the plaintiff stated that, "[a]lthough the [second revised complaint] and the proof at trial are likely sufficient anyway, out of an abundance of caution the plaintiff is seeking to amend to more clearly set this forth

so the case can fairly be reviewed on its merits rather than allow the defendants to continue to evade justice on procedural technicalities." The court, over the defendants' objection, granted the motion to amend.

In articulating its decision granting the plaintiff's motion to amend,[13] the court explained that, "[a]lthough not stated in those terms, the question of successor liability has been at issue in this controversy at least since the defendant's[14] decision to form a new corporation and change its name shortly after the [2012 judgment]. . . . Previously, in 2011, [Katchko Construction Services, Inc.] had changed its name by simply filing an amendment with the Secretary of the State. . . .

"The evidence at trial included very persuasive testimonial evidence by the plaintiff that [certain] equipment at [Sons Plural's] place of business in late 2016 was the same equipment he saw working at a residence he was building in 2005 (work that gave rise to the [2012 judgment]). There was also unrebutted evidence by [Branca] who prepared tax returns for [Son Singular] showing that [Son Singular] was 'closed' or dissolved as of July 1, 2012, and the company's equipment was transferred to some other entity at no gain or loss to [Robert] Katchko or his business. Therefore, the Katchko business entities have a history of transferring valuable assets from one to another, and this court has already determined that the defendants have violated the fraudulent transfer statutes. . . . With this background the court determined that the proposed amendment relating to successor liability was undoubtedly somewhat late, but was not unfairly prejudicial to the defendants, and did not simply appear out of thin air.

[13] On January 24, 2019, the defendants filed a motion requesting that the trial court articulate its decision granting the plaintiff's motion to amend. On February 22, 2019, the court issued an articulation.

[14] We presume that the court was referring to Robert Katchko here as "the defendant."

"In that connection the court notes that the defendants have declined to present evidence on their own behalf, and in their motion for articulation have pointed to no evidence that they have been prevented from offering. The court also finds the defendants' contention that the amended complaint 'introduces an entirely new measure of damages' against them is completely unsupported by any legal or factual argument." (Citations omitted; footnote added.)

The defendants claim that the court abused its discretion by permitting the plaintiff to amend his complaint after the court had issued its November 8, 2018 memorandum of decision rendering judgment in his favor. More specifically, the defendants contend that the court permitted the amendment without identifying any special circumstances warranting the amendment following the rendering of the November 8, 2018 judgment. For the reasons that follow, we conclude that the court abused its discretion in permitting the amendment.[15]

It is well established that a "trial court may permit an amendment to pleadings at any time"; *Maloney* v. *PCRE, LLC*, 68 Conn. App. 727, 753, 793 A.2d 1118 (2002); including, under special circumstances, after a judgment is rendered. In *Burton* v. *Stamford*, supra, 115 Conn. App. 47, immediately after the trial court had granted the defendant's oral motion for a directed verdict on the ground of governmental immunity, the plaintiff made an oral motion to amend his complaint, which the court denied. Id., 52. Thereafter, the plaintiff

[15] Additionally, the defendants claim that the court's granting of the plaintiff's motion to amend violated the automatic appellate stay created in connection with their original appeal pursuant to Practice Book § 61-11. As we concluded in part I of this opinion, the defendants' original appeal was not taken from a final judgment. Accordingly, no automatic appellate stay was in effect following the filing of the original appeal. See *Cunniffe* v. *Cunniffe*, 150 Conn. App. 419, 430, 91 A.3d 497 (holding "definitively that no enforceable appellate stay of execution results from the filing of a jurisdictionally infirm appeal"), cert. denied, 314 Conn. 935, 102 A.3d 1112 (2014).

filed a motion to set aside the directed verdict on the ground that the court had improperly denied his motion to amend. Id. The court agreed that the motion to amend should have been granted, whereupon it set aside the verdict and ordered a new trial. Id., 52–53. The defendant appealed from that judgment,[16] contending, initially, that it was impermissible to file a motion to amend a pleading after the granting of a directed verdict. Id., 58. This court rejected that proposition, citing, inter alia, precedent from our Supreme Court providing that "an amendment after a verdict has entered may be allowed under special circumstances, but it will not be in ordinary cases and that such determination is . . . a matter of discretion . . . ." (Internal quotation marks omitted.) Id., 59, quoting *McAlister* v. *Clark*, 33 Conn. 253, 257 (1866). Relying on *McAlister* and other appellate case law, this court determined "that the [trial] court is not prohibited from granting a motion to amend after judgment is rendered. Rather, the court must determine whether the particular circumstances mandate such exercise of its discretion." *Burton* v. *Stamford*, supra, 59. Turning then to the merits of the defendant's claim, this court concluded, upon review of the record and the arguments of the parties, that the trial court did not abuse its discretion in permitting the amendment.[17] Id., 61–62; see id. (affirming granting of postverdict motion to amend when, although plaintiff's counsel had been negligent in belatedly requesting amendment, there was no substantial delay, defendant was not preju-

[16] In *Burton*, following the filing of the defendant's appeal, the trial court vacated its order granting a new trial and directed a verdict in the defendant's favor for lack of sufficient evidence. *Burton* v. *Stamford*, supra, 115 Conn. App. 53–54. The plaintiff filed a separate appeal from that judgment, which was consolidated with the defendant's appeal. Id., 54. On appeal, this court held that the defendant's appeal was not moot notwithstanding the court's having vacated its order for a new trial. Id., 56–57.

[17] This court also addressed, and rejected, the defendant's claim that the plaintiff had improperly failed to file a written motion to amend. *Burton* v. *Stamford*, supra, 115 Conn. App. 59–60.

diced, and court's initial denial of motion to amend had "turned a plaintiff claiming serious injuries out of court without a decision on the merits of his claim" (internal quotation marks omitted)).

We construe *Burton* as demonstrating that, in exercising their discretion with regard to motions to amend pleadings filed after a judgment has been rendered, trial courts must recognize that such amendments should be permitted sparingly and only when special circumstances exist to warrant them. See *Burton* v. *Stamford*, supra, 115 Conn. App. 61–62; see also *Ideal Financing Assn.* v. *LaBonte*, 120 Conn. 190, 195–96, 180 A. 300 (1935) (reversing denial of motions to open judgment and for permission to file amended answer when defendant sought to raise special defense that would have resulted in complete defense to action); *Betts* v. *Hoyt*, 13 Conn. 469, 471 (1840) (advising Superior Court to deny plaintiff's motion to amend declaration filed following court's granting of defendant's motion for arrest of judgment, but observing that amendment would have been permissible if plaintiff had set forth facts in motion demonstrating that he would suffer "serious and irretrievable loss" from refusal of amendment, such as loss of debt by operation of statute of limitations or discharge of lien created by attachment).

Here, in granting the plaintiff's motion to amend, the trial court determined that, although the motion was untimely, the issue of successor liability had been in controversy since before the inception of the present case and the defendants were not prejudiced by the amendment. Nothing in the record or in the court's articulation, however, reflects any special circumstances that justified the untimely amendment. Moreover, by granting the motion to amend, the court enabled the plaintiff to present a claim after judgment that, standing alone, is not legally cognizable. In the plaintiff's amended complaint, the plaintiff added a fourth count incorporating therein allegations set forth in the preceding third count

and further alleging that Sons Plural was liable for the debt of Son Singular under a theory of successor liability. As the plaintiff acknowledged in his appellate brief, however, our Supreme Court has stated that "successor liability does not create a new cause of action against the [successor] so much as it *transfers* the liability of the predecessor to the [successor]." (Emphasis in original; internal quotation marks omitted.) *Robbins* v. *Physicians for Women's Health, LLC*, 311 Conn. 707, 716, 90 A.3d 925 (2014), quoting *In re Fairchild Aircraft Corp.*, 184 B.R. 910, 920 (Bankr. W.D. Tex. 1995), vacated on other grounds, 220 B.R. 909 (Bankr. W.D. Tex. 1998). Successor liability is a theory of liability to be alleged in support of a claim rather than raised as an independent claim, and, therefore, it was improper for the plaintiff to plead successor liability as a stand-alone count in the amended complaint.

We are mindful that it is rare for this court to disturb a trial court's exercise of its discretion in determining whether to permit an amendment. See *Watson Real Estate, LLC* v. *Woodland Ridge, LLC*, 187 Conn. App. 282, 300, 202 A.3d 1033 (2019) ("[o]n rare occasions, this court has found an abuse of discretion by the trial court in determining whether an amendment should be permitted" (internal quotation marks omitted)). Nevertheless, our precedent instructs that amendments following the rendering of a judgment should be granted only when special circumstances justify them. In the present case, no special circumstances existed to warrant the amended complaint, in which the plaintiff improperly asserted successor liability as a stand-alone claim, after the court had rendered the November 8, 2018 judgment.[18] Accordingly, we conclude that the trial

[18] Our determination in part I of this opinion that the November 8, 2018 judgment was not a final judgment until the court had denied the plaintiff's motion for punitive damages does not alter our analysis. The November 8, 2018 judgment adjudicated the defendants' liability under each count raised in the plaintiff's second revised complaint. The finality of the November 8, 2018 judgment for purposes of an appeal has no bearing on that fact.

court abused its discretion in granting the plaintiff's motion to amend.[19]

III

We next consider the defendants' claims that the trial court improperly rendered judgment in favor of the plaintiff on counts one and two of his second revised complaint sounding in violations of CUFTA.[20] More specifically, the defendants assert that the court (1) incorrectly determined that the plaintiff met his burden to demonstrate that the defendants had committed a fraudulent transfer under §§ 52-552e (a) (1) and 52-552f (a), and (2) committed error in awarding relief to the plaintiff under CUFTA. We address each of these arguments in turn.

A

The defendants claim that the court erred in determining that the plaintiff established that they had committed a fraudulent transfer under §§ 52-552e (a) (1) and 52-552f (a). We conclude that the court properly

We also observe that, following the granting of the plaintiff's motion to amend, none of the parties took any action with respect to the amended complaint and no judgment was ever rendered thereon. This further bolsters our determination that no special circumstances were present to justify the granting of the amendment, as, ostensibly, the amendment was not considered to be necessary to vindicate the plaintiff's claims for relief.

[19] Our reversal of the court's decision to grant the motion to amend does not affect the defendants' remaining claims on appeal challenging the judgment rendered on the plaintiff's second revised complaint, as no judgment was ever rendered on the amended complaint.

[20] In his appellate brief, the plaintiff argues that "[a]ny of the remedies ordered by the trial court are properly supported by a finding of successor liability or CUTPA. Thus, if either successor liability or CUTPA [is] affirmed, a further analysis of the technical niceties of the fraudulent conveyance statutes could have no practical effect on the outcome of the appeal." This argument is unavailing because (1) none of the relief awarded by the court was actually predicated on a finding of successor liability and (2) the relief granted by the court under CUTPA was limited to attorney's fees. See part III B of this opinion.

determined that the defendants were liable under § 52-552e (a) (1) and improperly determined that they were liable pursuant to § 52-552f (a).

We begin by setting forth the following standard of review and legal principles governing our review of the defendants' claims. "The determination of whether a fraudulent transfer took place is a question of fact and it is axiomatic that [t]he trial court's [factual] findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . We cannot retry the facts or pass on the credibility of the witnesses. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . The elements of fraudulent conveyance, including whether the defendants acted with fraudulent intent, must be proven by clear, precise and unequivocal evidence." (Citation omitted; internal quotation marks omitted.) *Certain Underwriters at Lloyd's, London* v. *Cooperman*, 289 Conn. 383, 395, 957 A.2d 836 (2008). This standard, also referred to as the "clear and convincing" standard, "is met if the evidence induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist. . . . Put another way, the clear and convincing standard should operate as a weighty caution upon the minds of all judges, and it forbids relief whenever the evidence is loose, equivocal or contradictory." (Citation omitted; internal quotation marks omitted.) *Thurlow* v. *Hulten*, Superior Court, judicial district of Hartford, Docket No. X04-CV-05-4059315-S (October 15, 2004) (reprinted at 173 Conn. App. 698,

718, 164 A.3d 858 (2017)), aff'd, 173 Conn. App. 694, 164 A.3d 858 (2017).

"To establish that a transfer is fraudulent, the creditor may, but need not, prove actual fraudulent intent. See General Statutes § 52-552e (a) (1) and (b) . . . . Liability also can be established on the basis of constructive fraud when a transfer of the debtor's assets occurs after the creditor's claim arose and other circumstances are present, including that the debtor has not received reasonably equivalent value in exchange for the transfer, that the transfer renders the debtor insolvent (i.e., greater debts than assets), and/or that the transfer is made to an insider, such as the debtor's relative. See General Statutes § 52-552e (a) (2); General Statutes § 52-552f (a) and (b) . . . ." (Footnotes omitted; internal quotation marks omitted.) *Geriatrics, Inc.* v. *McGee*, 332 Conn. 1, 11–12, 208 A.3d 1197 (2019).

The following additional facts are relevant to our resolution of the defendants' claims. In rendering judgment in the plaintiff's favor, the court relied on the findings set forth in its decision denying the defendants' motion to dismiss. In that decision, the court made the following relevant findings. "[The plaintiff] testified [at trial] in a very credible fashion. [The 2012] judgment against Son [Singular] arose out of excavation work performed by [Son Singular] . . . in connection with the construction of a single family residence for investment purposes on property owned by [the plaintiff] in Fairfield . . . in 2005. During that project, [the plaintiff] visited the site a number of times, sometimes in the company of his young sons, and had a clear recollection of the construction equipment [Son Singular] had on that site in 2005, which included a very large excavator. Specifically, [Son Singular] used two excavators while working on the foundation and septic system for the residence, one larger, one smaller, and some additional trucks. [The plaintiff] testified he was at the

site . . . several times a week and at least one of his sons climbed on the . . . equipment during one or more of these visits.

"Subsequently, on November 12 and 13, 2016, [the plaintiff] drove by [Sons Plural's] business headquarters in Stamford . . . and testified at trial in response to an inquiry by the court that he was 'absolutely sure' that the large and small excavators at that location were the same equipment [Son Singular] used on his property in 2005. . . . He testified on direct examination that the very large excavator 'was the exact same as far as I could tell it was the exact same machine. It had the paint, it had the scratches, it had, you know, it had all the same—the same look and feel as the one we were—we were next to and riding in consistently.' . . . The essence of this testimony was repeated on cross-examination. In response to questions by [the defendants'] attorney, [the plaintiff] testified that one piece of equipment used in 2005, 'was the one with the extended long arm that is used for big digs, where you have to go further out and it isn't just a regular little dump—you know excavator. So that one is very vivid and clear. The other was very vivid and clear because [Son Singular] used it on the septic system.' . . . When asked what equipment he had a recollection of his son riding that provides a 'special memory' of the equipment, [the plaintiff] said, 'yes one was an excavator and one was the extended large excavator.' . . .

"[The plaintiff] continued: 'But all I know is that the equipment that [Son Singular] used on my property [in 2005] is the same equipment that [Sons Plural] was using when I went to [its] place of business in [2016], and I witnessed the same equipment. Matter of fact . . . it's not only the same equipment, it's the same writing on the equipment because I'm in the publishing business, and I was at that time, and have been for many, many years. . . . So to make it shorter, it was when I went [to Sons Plural's place of business] in 2016,

I noticed the same thing I noticed back when [Son Singular] was working on my property [in 2005], with the exact same equipment. The fonts on the actual machines that were written in the back in—in yellow type on this big green background that says Katchko were in different fonts on different equipment. And I remember noticing at that time saying, geesh, [Robert Katchko] didn't even use the right font consistently on his product, on his—the branding. And I just thought that was odd that one would be more Helvetica and one would be more of an Arial, Courier look . . . but that's kind of one of the memories that came back about the equipment in particular." (Citations omitted.)

The court further found in relevant part: "Branca, a certified public accountant . . . performed accounting services, including tax return preparation, for [Son Singular] and related or successor entities up to 2013. . . . [Plaintiff's trial] [e]xhibit 5 is a copy of the 2012 federal income tax return prepared by Branca's firm for [Son Singular], an S corporation. . . . Branca . . . testified that the amount of gross sales or receipts reported on [e]xhibit 5—$511,696—only represented sales or receipts for the first half of 2012 . . . . This is confirmed by the fact that gross receipts for the full year 2011, were $1,329,971. . . . Branca also testified from the [Son Singular] records that various pieces of its equipment were transferred to 'somebody or some other entity' during 2012, at 'book value,' i.e., 'no gain, no loss.' . . . The 2012 federal income tax return for [Son Singular], Form 4562, 'Depreciation and Amortization Report,' contains an entry for 'heavy equipment' put in service in the year 2000, with a cost of $311,585 and fully depreciated by the year 2012. . . . All of the equipment [was] transferred out of [Son Singular] as set forth above for no gain or loss. Furthermore there was no gain or loss to Robert Katchko personally, on his schedule K-1." (Citations omitted.) The court also

found, on the basis of evidence in the record, that Son Singular was " 'closed' " on July 1, 2012, and that Sons Plural was formed on August 6, 2012.

The court then concluded that the plaintiff had submitted sufficient evidence to support a prima facie claim that the defendants had violated CUFTA. Specifically, the court determined that "[the plaintiff] has submitted evidence of his judgment against [Son Singular] in 2012, the subsequent cessation of that entity in the middle of 2012, and the creation of a new corporate entity, [Sons Plural], in August, 2012, just days after the [2012] judgment was entered, that apparently took over the business in full and left the prior company closed and without assets. This transfer meets many of the indicia of an intent to defraud set forth in [§ 52-552e (b)] and all of the indicia of a fraudulent transfer set forth in § [52-552f (a)]. Specifically, § 52-552e (b) articulates a minimum of eleven factors to consider in determining whether there was actual intent to defraud and the record in this case arguably supports a finding by clear and convincing evidence that at least seven or eight of these factors pointing toward a fraudulent intent exist, i.e., § 52-552e (b) (1) through (4), (5), (7), (9), and (10).

"It is worth noting in this regard that in 2011, before [the 2012 judgment], [Robert] Katchko simply filed an amendment to the corporate name [of Katchko Construction Services, Inc.] changing it to [Son Singular]. However, after the judgment was entered, an entirely new corporate entity was created—[Sons Plural]—a circumstance that increased the difficulty facing [the plaintiff] in efforts to collect on the [2012] judgment.

"With respect to liability under § 52-552f (a), [Son Singular] transferred assets to [Sons Plural] after [the plaintiff's] claim arose. [Son Singular] received no equivalent value in return, and without any assets, simply ceased doing business thereafter."

In its subsequent memorandum of decision rendering judgment in the plaintiff's favor, the court stated in relevant part that, in denying the defendants' motion to dismiss, it had "found that [the plaintiff] testified 'in a very credible fashion,' and specifically quoted [the plaintiff's] testimony to point out how specific it was in describing the defendants' construction equipment, which is the subject of this case and the circumstances that allowed that testimony to be so specific. [The] court concluded that [the plaintiff's] testimony and other evidence supported the court's finding that his claim was proven by 'clear, precise and unequivocal evidence.'

"The defendants' [posttrial brief] . . . argued that [the] plaintiff failed to carry his burden of proving there was not reasonable value given for the assets transferred. This is a particularly weak argument. In this case the plaintiff proved that there was no value given by [Sons Plural] because [Son Singular] was left without assets, and the business was closed . . . . The fact that [the plaintiff] could not definitively give a value to the transferred equipment is of no moment. He did give evidence that equipment he saw on the construction site where his almost $217,000 judgment against [Son Singular] arose in 2012, was the same as he saw at the [Sons Plural] facility in Stamford in 2016. This evidence was persuasive, and no contradictory evidence was offered. Thus, [the plaintiff] has shown, as found by this court, that a Katchko entity, [Sons Plural], was operating the equipment in 2016, while the Katchko entity that operated the equipment in 2012, and against which [the plaintiff] obtained a six figure civil court judgment, [Son Singular], was without assets and closed. . . .

"[I]n the absence of any countervailing evidence since [the denial of the defendants' motion to dismiss], the court finds that the defendants have violated . . . §§ 52-552e and [52-552f]."

The defendants assert that the court improperly found that they had committed a fraudulent transfer under both §§ 52-552e (a) (1) and 52-552f (a). They raise arguments specific to each statute, which we address subsequently in this opinion. Initially, we consider the defendants' contention that the court erred in determining that they had violated both statutes because the court incorrectly found that there was a transfer of assets between Son Singular and Sons Plural. More specifically, they contend that the plaintiff did not introduce clear and convincing evidence of a transfer of any specifically identifiable assets. We are not persuaded.

To establish liability for a fraudulent transfer under either § 52-552e (a) (1) or § 52-552f (a), the plaintiff had the burden of proving that a transfer had been made by Son Singular to Sons Plural after the 2012 judgment had been rendered.[21] See General Statutes §§ 52-552e (a) and 52-552f (a). General Statutes § 52-552b (12) defines the term " '[t]ransfer' " as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease and creation of a lien or other encumbrance."

The record supports the court's finding, by clear and convincing evidence, that Son Singular transferred assets —specifically, two excavators (subject excavators)— to Sons Plural. First, the plaintiff testified, "very credibl[y]" according to the court, that he saw the subject

[21] In addition to requiring evidence of a transfer, both §§ 52-552e (a) (1) and 52-552f (a) require proof that a creditor had a claim that arose prior to the transfer. See General Statutes §§ 52-552e (a) and 52-552f (a). The defendants do not raise any cognizable claim on appeal challenging the court's finding that the transfer between Son Singular and Sons Plural occurred after the 2012 judgment had been rendered. Nevertheless, we note that there is uncontroverted evidence in the record demonstrating that Sons Plural was formed on August 6, 2012, several months following the 2012 judgment rendered on April 17, 2012. It necessarily follows that the 2012 judgment debt arose prior to any transfer between Son Singular and Sons Plural.

excavators in the possession of Son Singular in 2005, and subsequently in the possession of Sons Plural in 2016. Second, 2012 federal tax return documents and 2012 state tax return documents admitted into evidence as plaintiff's exhibits 5 and 6, respectively, reflect, individually or collectively, that (1) at the beginning of 2012, Son Singular owned assets, including "heavy equip-[ment]" placed into service in 2000, (2) Son Singular discontinued its business on July 1, 2012, and (3) Son Singular owned no assets by the end of 2012. Branca testified that the 2012 federal tax return documents "[tell] an educated reader that [Son Singular's assets were] transferred at book value" to "[s]omebody or some other entity" in 2012. We conclude that this cumulative evidence, which the defendants elected not to rebut, supports the court's finding that Son Singular transferred the subject excavators to Sons Plural.

We construe the court's memorandum of decision as finding that the subject excavators were the only assets transferred between the defendants, notwithstanding that the plaintiff had alleged in the second revised complaint that "all assets of [Son Singular] were transferred to [Sons Plural]." In awarding the plaintiff relief under CUFTA, the court specifically identified the "subject excavators," among other unspecified property, as being subject to its order of relief. In the event that the court had found that Son Singular had transferred any other assets to Sons Plural, the record would not support such a finding. Our careful review of the record reveals that the subject excavators were the only assets shown by the plaintiff to have been transferred by Son Singular to Sons Plural. On the basis of the evidence in the record, a finding that any other assets were transferred by Son Singular to Sons Plural would be based on assumption and speculation.

1

Having concluded that the court properly found that a transfer of the subject excavators had occurred

between Son Singular and Sons Plural, we next address the defendants' contention that the court improperly determined that the plaintiff established, by clear and convincing evidence, that the transfer was fraudulent under § 52-552e (a) (1).[22] Specifically, the defendants assert that the plaintiff did not produce sufficient evidence of Son Singular having transferred any assets to Sons Plural with an actual intent to hinder, delay, or defraud the plaintiff. We are not persuaded.

Section 52-552e (a) provides in relevant part: "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, if the creditor's claim arose before the transfer was made or the obligation was incurred and if the debtor made the transfer or incurred the obligation: (1) With actual intent to hinder, delay or defraud any creditor of the debtor . . . ."

"With respect to finding actual intent as set forth in § 52-552e (a) (1), we have stated that, because fraudulent intent is almost always . . . proven by circumstantial evidence, courts may consider numerous factors in determining whether a transfer was made with actual intent to defraud." (Internal quotation marks omitted.) *McKay* v. *Longman*, 332 Conn. 394, 422, 211 A.3d 20 (2019). Section 52-552e (b) provides that "[i]n determining actual intent under subdivision (1) of subsection

[22] The defendants also assert that the plaintiff failed to demonstrate that they had committed a fraudulent transfer under § 52-552e (a) (2), which requires a showing that a debtor made a transfer or incurred an obligation "without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor (A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction, or (B) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due." General Statutes § 52-552e (a) (2). Pursuant to § 52-552e, a fraudulent transfer may be established by demonstrating a violation of *either* § 52-552e (a) (1) *or* § 52-552e (a) (2). See General Statutes § 52-552e (a). In the present case, the trial court determined that the defendants had violated § 52-552e (a) (1), but it did not consider whether they had also violated § 52-552e (a) (2). Accordingly, we limit our analysis to the defendants' claim regarding § 52-552e (a) (1).

(a) of this section, consideration may be given, among other factors, to whether: (1) The transfer or obligation was to an insider, (2) the debtor retained possession or control of the property transferred after the transfer, (3) the transfer or obligation was disclosed or concealed, (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit, (5) the transfer was of substantially all the debtor's assets, (6) the debtor absconded, (7) the debtor removed or concealed assets, (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred, (9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred, (10) the transfer occurred shortly before or shortly after a substantial debt was incurred, and (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor."

In determining that the defendants had violated § 52-552e (a) (1), the court found that the transfer between Son Singular and Sons Plural met a number of the indicia of fraud set forth in § 52-552e (b), including that Son Singular was sued and the 2012 judgment was rendered before the transfer had been made, and that Son Singular, which the court found had ceased its business shortly following the 2012 judgment, was insolvent or became insolvent shortly following the transfer. The court also found that the formation of Sons Plural following the rendering of the 2012 judgment "increased the difficulty facing [the plaintiff] in efforts to collect on the judgment." These particular findings are supported by the record and are sufficient to uphold the court's determination that the transfer was made with an actual intent to hinder, delay, or defraud the plaintiff.[23] Accordingly, we reject the defendants' claim that

[23] The defendants do not substantively address each of the factors of fraud identified by the trial court under § 52-552e (b); instead, they thinly claim that there was insufficient evidence to support any of the factors.

the court improperly determined that the plaintiff sustained his burden to demonstrate that the defendants had committed a fraudulent transfer under § 52-552e (a) (1).

2

The defendants also contend that the court improperly determined that the plaintiff established, by clear and convincing evidence, that the defendants had committed a fraudulent transfer under § 52-552f (a). More specifically, the defendants assert that the plaintiff did not produce sufficient evidence that (1) Son Singular had transferred assets to Sons Plural for a reasonably equivalent value and (2) Son Singular was insolvent at the time of the transfer or became insolvent as a result thereof. We agree with the defendants' latter argument.

Section 52-552f (a) provides: "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation."

In determining that the plaintiff satisfied his burden of proof with respect to his § 52-552f (a) claim, the court found that, following the transfer of the subject excavators, Son Singular was left without assets and ceased doing business. Although there is evidence in the record demonstrating that Son Singular became insolvent by the end of 2012, sometime following the transfer, there is no evidence reflecting the date of the transfer. Thus, it cannot be determined whether Son Singular was insolvent at the time of the transfer. Additionally, there is insufficient evidence to make a finding as to whether the transfer of the subject excavators,

itself, resulted in Son Singular becoming insolvent. Accordingly, we conclude that the court erred in determining that the defendants had committed a fraudulent transfer in violation of § 52-552f (a).[24]

We pause to note that our conclusion that the court erroneously determined that the defendants had committed a fraudulent transfer in violation of § 52-552f (a) has no bearing on the relief that the court awarded to the plaintiff under CUFTA, which we subsequently address in part III B of this opinion. As we concluded in part III A 1 of this opinion, the court properly found that the defendants had committed a fraudulent transfer in violation of § 52-552e (a) (1). Section 52-552e (a) (1) is a distinct, independent basis for fraudulent transfer liability. See *Geriatrics, Inc.* v. *McGee*, supra, 332 Conn. 33 (*D'Auria, J.*, concurring in part and dissenting in part) (explaining that § 52-552e (a) (1) is one of four distinct bases for fraudulent transfer liability under CUFTA). There is nothing in the record to suggest that the relief awarded by the court under CUFTA was dependent on the plaintiff proving the defendants' liability under both §§ 52-552e (a) (1) and 52-552f (a). Accordingly, the failure of the plaintiff's § 52-552f (a) claim does not affect the relief awarded by the court under CUFTA.

B

We now turn to the defendants' claims that the court committed error in awarding relief to the plaintiff under CUFTA. More particularly, the defendants contend that

[24] To establish a fraudulent transfer under § 52-552f (a), a creditor must demonstrate conjunctively that the debtor did not receive reasonably equivalent value in exchange for the transfer *and* that the debtor was insolvent at the time of the transfer or became insolvent as a result thereof. Because we conclude that the plaintiff did not submit sufficient evidence to demonstrate that Son Singular was insolvent at the time of the transfer or became insolvent as a result thereof, we need not consider whether the plaintiff also met his burden to prove that Son Singular received reasonably equivalent value in exchange for the transfer.

the court improperly (1) granted the plaintiff a provisional order of attachment that was vague and overbroad and (2) awarded damages under § 52-552h without finding the value of the assets transferred in accordance with General Statutes § 52-552i (b). We agree, in part, with the defendants.

Our review of the defendants' claim requires us to construe §§ 52-552h and 52-552i (b), as well as the court's order of relief, which present questions of law over which we exercise plenary review. See *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, 193 Conn. App. 381, 428, 219 A.3d 801 (2019) ("The interpretation of a trial court's judgment presents a question of law over which our review is plenary. . . . As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole." (Internal quotation marks omitted.)), cert. denied, 334 Conn. 911, 221 A.3d 446 (2020), and cert. denied, 334 Conn. 911, 221 A.3d 446 (2020); *Village Apartments, LLC* v. *Ward*, 169 Conn. App. 653, 664, 152 A.3d 76 (2016) ("[t]he interpretation of a statute, as well as its applicability to a given set of facts and circumstances, presents a question of law over which our review is plenary" (internal quotation marks omitted)), cert. denied, 324 Conn. 918, 154 A.3d 1008 (2017).

At the outset, we discuss the scope of the relief awarded by the court. With regard to CUFTA, the court entered the following order: "Pursuant to . . . § 52-552h, the court orders that [the plaintiff] may, in accordance with the provisions of that statute, seek an attachment in the amount of the [2012 judgment] plus interest at 6 percent per annum against the subject excavators or other equipment of the defendants, and the defen-

dants are hereby enjoined from transferring that equipment or any other construction . . . equipment." With regard to CUTPA, the court awarded the plaintiff $18,388 in attorney's fees, for which the defendants were jointly and severally liable.

The parties' briefs and/or their statements at oral argument suggest that they are under the impression that the court awarded the plaintiff damages in the sum of the 2012 judgment, plus interest. That belief is belied by the record. The relief that the court granted was limited to (1) relief under § 52-552h for the defendants' violation of CUFTA in the form of (a) an attachment of the defendants' property in the sum of the 2012 judgment, plus interest, and (b) an injunction preventing the transfer of the property, and (2) attorney's fees for the defendants' violation of CUTPA. The court did not afford any other relief to the plaintiff.

1

The defendants contend that the relief awarded to the plaintiff under CUFTA was improper because it was (1) provisional in nature and (2) both vague in failing to identify the specific property it encompassed and overbroad in authorizing the attachment of property that was not subject to this action. We agree with the defendants that the relief awarded was overbroad, but we otherwise reject their assertions.

Our Supreme Court has explained that the policy underlying CUFTA is "protecting unsecured creditors from debtors who place assets beyond the reach of their unsecured creditors . . . ." *Geriatrics, Inc.* v. *McGee*, supra, 332 Conn. 15. Section 52-552h, pursuant to which the court granted the plaintiff relief, sets forth a variety of remedies that a creditor may obtain in a fraudulent transfer action brought under CUFTA. Section 52-552h provides: "(a) In an action for relief against a transfer or obligation under sections 52-552a to 52-

552*l*, inclusive, a creditor, subject to the limitations in section 52-552i, may obtain: (1) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim; (2) an attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure prescribed by chapter 903a;[25] (3) subject to applicable principles of equity and in accordance with applicable rules of civil procedure (A) an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property, (B) appointment of a receiver to take charge of the asset transferred or of other property of the transferee, or (C) any other relief the circumstances may require.

"(b) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds." (Footnote added.)

The defendants assert that the court's order permitting the plaintiff to attach their property constituted improper "provisional" relief under CUFTA. We disagree with that construction. Although § 52-552h (a) (2) provides that a creditor may obtain an attachment as a provisional remedy, in addition to "other provisional" relief as provided by the statute, § 52-552h (a) (3) (C) enables a trial court to award "any other relief the circumstances may require," and § 52-552h (b) permits a court to allow a creditor who has "obtained a judgment on a claim against the debtor," as the plaintiff had in the present case, to "levy execution on the asset transferred or its proceeds." Read logically, the court's order of relief allows the plaintiff to attach the defendants' property *and* levy execution thereon. Such relief is well within the court's authority to grant under § 52-552h after finding liability for a fraudulent transfer.

[25] General Statutes § 52-278a et seq.

We agree with the defendants, however, insofar as they claim that the relief granted by the court is overbroad because it applies to "other" property beyond the subject excavators, which were the only assets that were properly found, on this record, to have been fraudulently transferred from Son Singular to Sons Plural. Although we recognize that a creditor's remedies under CUFTA are not limited to the assets fraudulently transferred and proceeds derived therefrom; see *Robinson* v. *Coughlin*, 266 Conn. 1, 8–9, 830 A.2d 1114 (2003); there is nothing in the record to support the court's awarding relief to the plaintiff under CUFTA as to property other than the subject excavators, which, on the basis of the record, remain in the possession of Sons Plural.

In sum, we find no error in the court's ordering, pursuant to § 52-552h, that the plaintiff may attach the subject excavators in the sum of the 2012 judgment, plus interest, and that the defendants are enjoined from transferring the subject excavators, but we conclude that the court erred in encompassing any other property within its order of relief under CUFTA.

2

The defendants also contend that the court's order of relief under CUFTA is improper because the court failed to determine the value of the assets transferred pursuant to § 52-552i (b). More particularly, the defendants assert that the court awarded the plaintiff "a measure of damages" under § 52-552h, which obligated the court to make a finding of value in accordance with § 52-552i (b). We disagree.

Section 52-552i (b) provides: "Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under subdivision (1) of subsection (a) of section 52-552h, the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (d) of this section, or

the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against: (1) The first transferee of the asset or the person for whose benefit the transfer was made, or (2) any subsequent transferee other than a good-faith transferee who took for value or from any subsequent transferee."

By its plain terms, § 52-552i (b) bestows upon a trial court the discretion to award, *as damages* against the appropriate party, the lesser of the value of the asset transferred and the amount necessary to satisfy the creditor's claim. See *Stuart* v. *Stuart*, 112 Conn. App. 160, 179–80, 962 A.2d 842 (2009) ("[u]nder . . . § 52-552i (b), the [trial] court can award the value of the asset transferred *as damages*" (emphasis added; footnote omitted)), rev'd on other grounds, 297 Conn. 26, 996 A.2d 259 (2010). As we explained earlier in this opinion, the court did not award damages under CUFTA. The only monetary sum awarded by the court was in the form of attorney's fees under CUTPA, which had no bearing on the relief afforded by the court under CUFTA. Accordingly, the defendants' reliance on § 52-552i (b) is misplaced.

IV

The defendants' remaining claim is that the trial court erred in rendering judgment in favor of the plaintiff on count three of his second revised complaint sounding in a violation of CUTPA. This claim is unavailing.

"CUTPA provides that [n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. . . . It is well settled that whether a defendant's acts constitute . . . deceptive or unfair trade practices under CUTPA, is a question of fact for the trier, to which, on appellate review, we accord our customary deference." (Citation omitted; internal quotation marks omitted.) *Pedrini* v. *Kiltonic*, 170 Conn. App. 343, 353, 154 A.3d 1037, cert. denied, 325 Conn. 903, 155 A.3d 1270 (2017).

In denying the defendants' motion to dismiss as to the plaintiff's CUTPA claim, the court stated that, "[i]n the third count of his [second revised] complaint, [the plaintiff] allege[s] that the fraudulent transfers alleged in the first two counts of his [second revised] complaint [constitute] violations of [CUTPA] . . . . The court finds the evidence supporting the claims of fraudulent transfer support as well a prima facie case that the defendants also violated CUTPA . . . ." In rendering judgment in favor of the plaintiff on his CUTPA claim, the court stated that it "adheres to its earlier decision that there was prima facie evidence that the defendants violated CUTPA, and in the absence of any countervailing evidence, [the court] finds that the plaintiff has proved that they engaged in 'unfair and deceptive acts or practices in the conduct of any trade or commence.' General Statutes § 42-110b (a)."

The crux of the defendants' contention is that the success of the plaintiff's CUTPA claim was predicated on the court finding that the defendants had committed a fraudulent transfer, and, therefore, the CUTPA claim must fail if we conclude that the court incorrectly determined that the defendants had committed a fraudulent transfer. As we concluded in part III A 1 of this opinion, the court properly determined that the defendants had engaged in a fraudulent transfer in violation of § 52-552e (a) (1). Accordingly, we reject the defendants' assertion that the court committed error in rendering judgment in the plaintiff's favor on his CUTPA claim.

The original appeal is dismissed for lack of a final judgment; as to the amended appeal, the judgment is reversed only with respect to the plaintiff's motion to amend, the second count of the plaintiff's second revised complaint, and the order of relief entered under § 52-552h insofar as it encompassed property other than the subject excavators, and the case is remanded with direction to deny the plaintiff's motion to amend, to

render judgment in favor of the defendants on count two of the plaintiff's second revised complaint, and to vacate the portion of the relief awarded under § 52-552h regarding property other than the subject excavators; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

ALEXANDER M. PHILLIPS *v.* TOWN OF HEBRON ET AL.
(AC 42276)

Alvord, Moll and Bishop, Js.

Syllabus

The plaintiff, a minor child diagnosed with Down syndrome and without functional speech who was enrolled in the Hebron public school system, brought an action seeking damages from the defendants, the town of Hebron, the Board of Education, and eight of the board's employees, for, inter alia, negligence per se and statutory (§§ 46a-58 and 46a-75) discrimination. The plaintiff claimed that the defendants discriminated against him based on his disabilities by segregating him from students without disabilities and breached their duties to educate him in the least restrictive environment. The defendants filed a motion to dismiss the plaintiff's complaint on the ground that the plaintiff sought relief for the defendants' failure to provide special education services under the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et seq.), thus triggering an administrative exhaustion requirement contained in that act and in the applicable state statutory (§ 10-76a et seq.) scheme that implements the federal act, thereby depriving the trial court of subject matter jurisdiction. The defendants specifically contended that, although the plaintiff did not allege a violation of the federal act, he sought relief for the denial of a free appropriate public education under the federal act and that, regardless of whether the complaint alleged a violation of the federal act, the federal act and state law (§ 10-76h) mandated exhaustion of administrative remedies insofar as the crux of the complaint was the alleged denial of a free appropriate public education. The trial court granted the motion to dismiss and rendered judgment thereon, concluding that the plaintiff was required to exhaust his administrative remedies but had failed to do so. On appeal to this court, the plaintiff claimed, inter alia, that he was not required to exhaust his administrative remedies because he did not allege a denial of a free appropriate public education and sought monetary relief, a remedy that was unavailable under the federal act. *Held*:

1. The plaintiff's appeal with respect to the defendant town and the board employees M and W was dismissed for lack of subject matter jurisdiction for lack of a final judgment, as the judgment of dismissal did not dispose of all causes of action against these defendants.
2. The trial court properly concluded that the plaintiff was required to exhaust his administrative remedies, the plaintiff's complaint having clearly sought relief for the denial of a free appropriate public education: this court relied on the framework set forth in the United States Supreme Court decision in *Fry* v. *Napoleon Community Schools* (137 S. Ct. 743), and adopted by our Supreme Court in *Graham* v. *Friedlander* (334 Conn. 564), in determining that, because the plaintiff's claims could not have been brought outside the school setting, the gravamen of the plaintiff's claims being that the defendants failed to educate the plaintiff in the least restrictive environment when it placed his desk and chair inside of a coatroom and did not permit him to spend a certain number of hours per week with children without disabilities, as provided for in his Individualized Education Plan, and that because the history of the proceedings prior to the filing of the complaint demonstrated that the plaintiff had invoked the formal procedures for filing a due process complaint under the federal act, the plaintiff sought relief for the denial of a free appropriate public education; moreover, the plaintiff could not avoid the exhaustion requirements under the federal act merely because he sought monetary damages; furthermore, the plaintiff was still required to follow the federal act's administrative procedures even though he could not be awarded monetary damages, as the exhaustion requirement requires a party to follow the administrative procedures, not that they be successful at any point in the process and, therefore, the plaintiff did not exhaust his administrative remedies when he began to pursue, but did not complete, the administrative remedies provided for under the federal act.

Argued September 17—officially released December 22, 2020

Procedural History

Action to recover damages for, inter alia, negligence per se, and for other relief, brought to the Superior Court in the judicial district of Tolland, where the court, *Farley*, *J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Appeal dismissed in part*; *affirmed.*

Patricia A. Cofrancesco, for the appellant (plaintiff).

Alexandria L. Voccio, for the appellees (defendants).

Andrew A. Feinstein filed a brief for the Council of Parent Attorneys and Advocates, Inc., as amicus curiae.

Opinion

ALVORD, J. The minor plaintiff, Alexander M. Phillips,[1] appeals from the trial court's decision granting the motion of the defendants, the town of Hebron (town), the Hebron Board of Education (board), and eight of the board's employees,[2] to dismiss counts one through twenty of the plaintiff's complaint for lack of subject matter jurisdiction on the basis of a failure to exhaust administrative remedies.[3] We dismiss the appeal with respect to counts two through six, eight, ten, twelve through sixteen, eighteen, and twenty for lack of a final judgment.[4] The judgment is affirmed in all other respects.

The following facts, as alleged in the plaintiff's operative complaint dated December 2, 2017, and procedural history are relevant to our review of this appeal. The plaintiff asserted the following allegations in paragraphs 1 through 16 of count one of his complaint. The seven year old plaintiff is a student at Gilead Hill Elementary School in Hebron (school). He has been diagnosed with Down syndrome and is without functional speech, and he has an individualized education program (IEP).[5] On February 25, 2015, Ralph E. Phillips,

[1] We note that the present action was commenced on behalf of Alexander M. Phillips, through his father, Ralph E. Phillips. We hereinafter refer to Alexander M. Phillips as the plaintiff.

[2] The eight employees named as defendants are Timothy Van Tasel, Patricia Buell, Eric Brody, Margaret Ellsworth, Ellen Kirkpatrick, Joshua T. Martin, Barbara H. Wilson, and Sheryl Poulin.

[3] The Council of Parent Attorneys and Advocates, Inc., filed an amicus brief, in which it argued, inter alia, that exhaustion of administrative remedies was not required in the present case.

[4] See part I of this opinion.

[5] " 'Individualized education program' or 'IEP' means a written statement for a child with a disability that is developed, reviewed and revised by an individualized education program team in accordance with the [Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq. (2012)] and section 10-76d-11 of the Regulations of Connecticut State Agencies." Regs., Conn. State Agencies § 10-76a-1 (10).

the plaintiff's father, visited the school to observe the plaintiff in his therapy session and activities. During his visit to the plaintiff's kindergarten classroom, the plaintiff and his assigned paraprofessional went into the coatroom, where there was a desk and chair for the plaintiff.

The plaintiff's father met with Joshua T. Martin, the Director of Special Education, on or about March 2, 2015. The plaintiff's father asked Martin how much time the plaintiff spends in the coatroom each day. Martin responded that he could not imagine why the plaintiff would have to be in the coatroom unless there was discrete testing going on and that he would look into the matter.

On March 25, 2015, a Planning and Placement Team[6] meeting was held. The participants included the plaintiff's father, Sheryl Poulin, the plaintiff's classroom teacher, and Margaret Ellsworth, the plaintiff's special education teacher. During the meeting, Poulin stated that the plaintiff naps in the classroom in the afternoon, wakes up by 2 p.m., and will then use the computer.

"The IEP is the centerpiece of the [IDEA's] education delivery system for disabled children. . . . The IEP, the result of collaborations between parents, educators, and representatives of the school district, sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives. . . .

"Connecticut must deliver each disabled child a [free appropriate public education (FAPE)] pursuant to the child's IEP. . . . Connecticut accomplishes this through its State Department of Education and the Board of Education for each school district in the [s]tate, each of which is responsible for developing an IEP for disabled children in its district." (Citations omitted; internal quotation marks omitted.) *Mr. P.* v. *West Hartford Board of Education*, 885 F.3d 735, 741 (2d Cir.), cert. denied, U.S. , 139 S. Ct. 322, 202 L. Ed. 2d 219 (2018).

[6] " 'Planning and placement team' or 'PPT' means the individualized education program team as defined in the IDEA and who participate equally in the decision making process to determine the specific educational needs of a child with a disability and develop an individualized education program for the child." Regs., Conn. State Agencies § 10-76a-1 (14).

When the plaintiff's father asked Poulin where the plaintiff naps, Ellsworth responded that he naps in the coatroom. A daily communication sheet, used by the plaintiff's father and the school, indicated that the plaintiff slept an average of 2.5 hours per day during the kindergarten year.

Also during the March 25 meeting, the plaintiff's father asked how much time the plaintiff spends in the coatroom doing his classwork or projects, and Ellsworth responded that he spent an average of about forty minutes per day there. Ellsworth told the plaintiff's father that the plaintiff works in the coatroom because his projects require a lot of space, and there is not enough space in the classroom. She also stated that the plaintiff can be distracting to other children, and they can be distracting to him.

Prior to March 25, 2015, the plaintiff's father had not consented to or been notified of the plaintiff's desk and chair having been moved into the coatroom. The complaint alleged that "the practice of placing a child with a learning disability into a room away from nondisabled children is known as 'warehousing,' [which] is done due to low expectations by teachers of the child's ability to learn." Although the plaintiff's operative IEP, dated April 2, 2014, indicated that the plaintiff "will spend 26.33 hours per week with children/students who do not have disabilities," the plaintiff was spending approximately nine hours per week with children/students who do not have disabilities.

In the March 30, 2015 daily communication sheet, the plaintiff's father read that "Mrs. Poulin and I rearranged some of the furniture and moved [the plaintiff's] workspace into the classroom." On April 30, 2015, the plaintiff's father received a report card from the school that was blank, except for information as to the plaintiff's name, the classroom teacher's name, and the number of days the plaintiff was tardy.

Exhibits submitted to the court by the plaintiff, together with his opposition to the defendants' motion to dismiss counts one through twenty of his complaint, disclose the following additional facts concerning relevant administrative proceedings that preceded this action.[7] The plaintiff's counsel submitted to the state Department of Education, Bureau of Special Education (department) a Special Education Complaint Form (state complaint) and a Request for Impartial Special Education Hearing (request for due process hearing), both dated July 27, 2015. The plaintiff's counsel attached a complaint, which included the allegations described previously in this opinion and other allegations regarding the implementation of a feeding program for the plaintiff. The state complaint and the request for due process hearing did not identify any specific remedies sought. By way of amendment dated September 16, 2015, the plaintiff sought the following remedies: (1) a written explanation concerning the placement of the plaintiff in the coatroom; (2) the replacement of the feeding specialist; (3) unrestricted access to visit the school without advance notice; and (4) modifications to the plaintiff's IEP. By way of an e-mail dated September 24, 2015, the plaintiff's counsel communicated a request to amend the complaint to seek monetary damages. The plaintiff's state complaint was put in abeyance to allow the due process hearing to proceed, in accordance with applicable regulations.

By motion and accompanying memorandum of law dated October 6, 2015, the board sought dismissal of the request for a due process hearing "to the extent that such request seeks remedies not available under the [Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq. (2012)] or accompanying state statutes and/or regulations." Specifically, the board sought dismissal of any request (1) for money damages,

[7] The defendants had no objection to the court considering the exhibits attached to the plaintiff's opposition in adjudicating the motion to dismiss.

(2) for a written explanation of why the plaintiff's educational program was moved into the coatroom, and (3) that the board provide the plaintiff's father with unrestricted access to visit the school without advance notice. The motion did not seek the dismissal of the remaining remedies sought by the plaintiff, including the requested modifications to the plaintiff's IEP. In its accompanying memorandum of law, the board acknowledged that the plaintiff "has alleged that the board provided this young student with special education services in a more restrictive educational setting for part of the school day, instead of wholly within the regular education classroom. This claim is expressly based upon the provisions of the IDEA."

After the board filed its motion to dismiss, the plaintiff's father withdrew the request for a due process hearing. He requested that the department proceed with an investigation of the state complaint. The department completed its investigation and issued a report of its findings of fact and conclusions on March 14, 2016. The department concluded that "the district's use of the alcove space, its failure to communicate the use of this space to the parent and the miscalculation of the time the student spent with nondisabled peers did not result in a denial of a [free appropriate public education (FAPE)] to the student . . . ." In its final paragraph, the report stated that the parties may "request a due process hearing on these same issues through this office if a party disagrees with the conclusions reached in this investigation and meet the applicable statute of limitations." Following the issuance of the department's report, there was no further request made for a due process hearing. The plaintiff did file a complaint with the Commission on Human Rights and Opportunities (CHRO), which provided a release of jurisdiction on or about June 24, 2016.

The plaintiff commenced this action in September, 2016. On October 17, 2016, the defendants removed this case to the United States District Court for the District of Connecticut. On August 29, 2017, the District Court remanded the case back to the Superior Court after concluding that the complaint did not raise a substantial question of federal law.[8]

I

We deviate from our discussion of the facts and procedural history to address an issue of subject matter jurisdiction. On September 8, 2020, this court issued an order to the parties to be prepared to address at oral argument whether this appeal should be dismissed with respect to the town, Martin, and Barbara H. Wilson, for lack of a final judgment.

"The jurisdiction of the appellate courts is restricted to appeals from judgments that are final. General Statutes §§ 51-197a and 52-263; Practice Book § [61-1]. . . . The policy concerns underlying the final judgment rule are to discourage piecemeal appeals and to facilitate the speedy and orderly disposition of cases at the trial court level. . . . The appellate courts have a duty to dismiss, even on [their] own initiative, any appeal that [they lack] jurisdiction to hear. . . .

"A judgment that disposes of only a part of a complaint is not a final judgment . . . unless the partial judgment disposes of all causes of action against a particular party or parties; see Practice Book § 61-3; or if the trial court makes a written determination regarding the significance of the issues resolved by the judgment and the chief justice or chief judge of the court having appellate jurisdiction concurs. See Practice Book § 61-4 (a)." (Citation omitted; internal quotation marks omitted.) *Tyler* v. *Tyler*, 151 Conn. App. 98, 103, 93 A.3d 1179 (2014).

[8] In remanding the matter, the District Court noted that, because it lacked jurisdiction, it "need not consider the issue whether [the] plaintiff has exhausted his remedies under the IDEA."

In the present case, the operative complaint, dated December 2, 2017, contains thirty-two counts. Counts one, three, five, seven, and nine, all captioned "Discrimination," are alleged against the board, Martin, Wilson, Ellsworth, and Poulin, respectively. Counts eleven, thirteen, fifteen, seventeen, and nineteen, all captioned "Negligence per se," are alleged against the board, Martin, Wilson, Ellsworth, and Poulin, respectively. In counts two, four, six, eight, ten, twelve, fourteen, sixteen, eighteen, and twenty, the plaintiff seeks indemnification of the board and the individual defendants from the town pursuant to General Statutes § 7-465.

The defendants did not seek dismissal of counts twenty-one through thirty-two of the complaint, and those counts remain pending in the trial court.[9] Of those twelve counts that remain pending, several seek indemnification from the town, one is directed at Martin, and one is directed at Wilson. Because the judgment of dismissal did not dispose of all causes of action against the town, Martin, and Wilson, there is no final judgment under Practice Book § 61-3 with respect to those defendants. The appeal with respect to them is therefore dismissed.

II

Having dismissed the appeal in part, we next set forth the remaining relevant allegations of the operative

[9] The trial court summarized counts twenty-one through thirty-two as follows: "Some of counts twenty-one through thirty-two arise out of allegedly intrusive photographs taken by [board] employee Ellen Kirkpatrick and shared with a third party in May, 2016. In connection with this incident there are counts alleging civil assault by two defendants and negligence on the part of other defendants, who allegedly violated their duties to supervise others. There are also several counts incorporating the core factual allegations of counts one through twenty and alleging negligent supervision for both those events and the events underlying the claims of civil assault. The plaintiff asserts claims for indemnification against the defendant [town] in connection with all of the claims of negligence in counts twenty one through thirty two."

complaint dated December 2, 2017. As noted previously, counts one, seven, and nine, asserted against the board, Ellsworth, and Poulin, respectively, are all captioned "Discrimination" (collectively, discrimination counts). Counts eleven, seventeen, and nineteen, asserted against the board, Ellsworth, and Poulin, respectively, are all captioned "Negligence per se" (collectively, negligence per se counts).

In addition to the allegations set forth previously in this opinion, count one alleges that the plaintiff is a "member of a protected class and has a 'learning disability' and a 'physical disability' as defined by . . . General Statutes § 46a-51 (13) and (15)." It further alleges that the board, by and through its employees, "segregated the . . . plaintiff from other children/students without disabilities on the basis of the . . . plaintiff's disabilities." Count one alleges that the board, by and through its employees, "violated . . . General Statutes §§ 46a-58 (a)[10] and 46a-75 (a) and (b)[11] when it deprived the . . . plaintiff of his rights, privileges or immunities, secured or protected by the constitution

[10] General Statutes § 46a-58 (a) provides: "It shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of this state or of the United States, on account of religion, national origin, alienage, color, race, sex, gender identity or expression, sexual orientation, blindness, mental disability, physical disability or status as a veteran."

[11] General Statutes § 46a-75 provides in relevant part: "(a) All educational, counseling, and vocational guidance programs and all apprenticeship and on-the-job training programs of state agencies, or in which state agencies participate, shall be open to all qualified persons, without regard to race, color, religious creed, sex, gender identity or expression, marital status, age, national origin, ancestry, intellectual disability, mental disability, learning disability, physical disability, including, but not limited to, blindness, or status as a veteran.

"(b) Such programs shall be conducted to encourage the fullest development of the interests, aptitudes, skills, and capacities of all students and trainees, with special attention to the problems of culturally deprived, educationally handicapped, learning disabled, economically disadvantaged, or physically disabled, including, but not limited to, blind persons. . . ."

or laws of this state or of the United States on account of the disabilities of the . . . plaintiff." (Footnotes added.)

Paragraph 20 of count one recites § 1412 (a) (5) (A) of the IDEA,[12] which provides: "To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." Paragraph 21 alleges that the board, by and through its employees, "deprived the . . . plaintiff's right to be educated in the least restrictive environment as provided by law." Paragraph 22 alleges that the plaintiff filed a complaint alleging discrimination with the CHRO and received a release of jurisdiction.

Counts seven and nine incorporate by reference paragraphs 1 through 20 of count one. In counts seven and nine, the plaintiff alleges that Ellsworth and Poulin knew or should have known that "the relocation of the . . . plaintiff, his desk and chair into a coatroom and placing him in the coatroom, because he was disabled, and leaving him to sleep throughout the afternoon while nondisabled children were educated in the classroom would deprive the . . . plaintiff of his rights, privileges or immunities, secured or protected by the constitution or laws of this state or of the United States." The plaintiff alleges that Ellsworth and Poulin violated §§ 46a-58 (a) and 47a-75 (a) and (b) by "exploiting the fact that the . . . plaintiff did not have functional speech and could

[12] The complaint contains an apparent typographical error identifying the relevant section as 20 U.S.C. § 1412 (C) (5).

not tell his father what had been happening to him, when it started or how it made him feel."

With respect to Ellsworth, the plaintiff specifically alleges in count seven that she created the daily and weekly schedule for the plaintiff and "knew where the . . . plaintiff was at any given time during his school day based upon the schedule she created." The plaintiff alleges that Ellsworth met monthly with the plaintiff's father for progress meetings and never informed him that the plaintiff had been segregated from nondisabled children. With respect to Poulin, the plaintiff alleges in count nine that she "knew or should have known that the . . . plaintiff, his desk and chair were moved from her classroom into the adjacent coatroom [and that move] constituted wrongful segregation and violated the provisions of his IEP."

The negligence per se counts incorporate by reference paragraphs 1 through 20 of count one. In the negligence per se counts, the plaintiff alleges that the board, Ellsworth, and Poulin had a duty under 20 U.S.C. § 1412 (a) (5) to educate the plaintiff in the least restrictive environment. In count eleven, the plaintiff alleges that the board, "by and through its employees, analyzed the . . . plaintiff's daily and weekly schedules to calculate and determine the maximum amount of time wherein he would be educated with nondisabled children/students and set forth in the . . . plaintiff's IEP that he would spend at least [twenty-six] hours per week with nondisabled children." The plaintiff alleges that the board breached its duty under 20 U.S.C. § 1412 (a) (5) "by moving the . . . plaintiff, his desk and chair into a coatroom and placing him in the coatroom and leaving him to sleep throughout the afternoon while nondisabled children were educated in the classroom." The plaintiff alleges that the board "failed to act in accordance with [20 U.S.C. § 1412 (a) (5)] and subjected the . . . plaintiff to imminent harm to his academic and social development."

The plaintiff alleges in counts seventeen and nineteen that Ellsworth and Poulin breached their duty under 20 U.S.C. § 1412 (a) (5) as they "knew or should have known that the . . . plaintiff was not spending time with nondisabled children/students to the maximum extent possible." With respect to Ellsworth, the plaintiff alleges, upon information and belief, in count seventeen that she attended weekly team meetings regarding the plaintiff's progress and compliance with his IEP and that she "knew or should have known that, according to the schedule she set for the . . . plaintiff and her knowledge of the time the . . . plaintiff spent in the coatroom each day, he could not spend 26.33 hours per week with nondisabled children/students." The plaintiff alleges that Ellsworth's "acts and/or omissions subjected the . . . plaintiff to imminent harm and/or detriment to his academic and social development." With respect to Poulin, the plaintiff alleges in count nineteen that she "was a member of the Planning and Placement Team for the . . . plaintiff, had a duty under [20 U.S.C. § 1412 (a) (5)] to ensure the . . . plaintiff was educated in the least restrictive environment," that she knew the plaintiff was not "spending time with nondisabled children/students to the maximum extent possible in her own classroom," and that her "acts and/or omissions subjected the . . . plaintiff to imminent harm and/or detriment to his academic and social development."

On January 17, 2018, the defendants filed a motion to dismiss counts one through twenty of the complaint and a memorandum in support of the motion, arguing that the court lacked subject matter jurisdiction on the basis that the plaintiff had failed to exhaust the administrative remedies available under the IDEA. Specifically, the defendants argued that because the discrimination and negligence per se counts "allege that the defendants failed to educate the . . . plaintiff in the

least restrict[ive] environment, and as a result, caused harm to the . . . plaintiff's academic and social development, these counts are governed by the IDEA, and the plaintiff was required to exhaust his administrative remedies under 20 U.S.C. §§ 1415 (f) and (g). He has failed to do so. Therefore, these counts should be dismissed."

On March 22, 2018, the plaintiff filed a memorandum of law in opposition to the defendants' motion to dismiss and attached the exhibits referenced previously. In his opposition, the plaintiff argued, inter alia, that because he sought monetary damages, a remedy that is unavailable under the IDEA, for wrongful segregation, and he did not allege a denial of a FAPE, he was not required to exhaust his administrative remedies under the IDEA. With respect to his discrimination claims, the plaintiff argued, inter alia, that "the IDEA cannot be the sole and exclusive remedy for disability discrimination just because the plaintiff is a student" because "[t]he standard for accommodation by a public school system under the [Americans with Disabilities Act (ADA), 42 U.S.C. § 12131 et seq.] are not coextensive with the FAPE requirements under IDEA . . . ." The plaintiff also argued that the IDEA's exhaustion requirement does not apply to the plaintiff's disability discrimination claims "brought pursuant to Connecticut General Statutes over which the IDEA has no authority or exhaustion requirement." With respect to his negligence per se claims, the plaintiff argued, inter alia, that such counts allege wrongful segregation, not a denial of FAPE, and that they use the least restrictive environment provision of the IDEA as the duty element only.

The court, *Farley*, *J.*, held oral argument on the motion to dismiss on May 29, 2018. On October 5, 2018, the court issued a memorandum of decision granting the defendants' motion to dismiss counts one through

twenty.[13] The court concluded that the plaintiff's discrimination and negligence per se claims sought relief for a denial of FAPE and therefore were subject to the exhaustion requirement.[14] Because the plaintiff failed to exhaust his administrative remedies before filing suit, the court found that it lacked subject matter jurisdiction and granted the defendants' motion to dismiss. On October 23, 2018, the plaintiff filed a motion for reconsideration. On October 26, 2018, the defendants filed an objec tion to the plaintiff's motion for reconsideration. On October 29, 2018, the court denied the plaintiff's motion for reconsideration. This appeal followed.

On appeal, the plaintiff claims that the court erred in granting the defendants' motion to dismiss on the basis that he failed to exhaust his administrative remedies.

Before addressing the merits of this appeal, we note that subsequent to the trial court's memorandum of decision and the filing of the briefs by the parties, this court sua sponte stayed consideration of this appeal pending our Supreme Court's decision in *Graham* v. *Friedlander*, 334 Conn. 564, 567, 223 A.3d 796 (2020). On March 3, 2020, this court lifted the appellate stay

[13] The court first determined that the state statutes implementing the IDEA contain an exhaustion requirement. See *Graham* v. *Friedlander*, 334 Conn. 564, 574, 223 A.3d 796 (2020) (state law mandates exhaustion of administrative remedies where state law claims seek relief for denial of FAPE).

[14] The plaintiff also argued that the defendants were barred by the doctrine of judicial estoppel from arguing that the plaintiff was required to exhaust his administrative remedies. The board previously had moved to dismiss the request for due process hearing "to the extent that such request seeks remedies not available under the IDEA or accompanying state statutes and/or regulations." The court rejected the plaintiff's judicial estoppel argument on the basis that a failure to exhaust administrative remedies deprives the court of subject matter jurisdiction and a party cannot waive the absence of subject matter jurisdiction. The court further stated that even if the doctrine of judicial estoppel could be invoked to preclude a challenge to a court's subject matter jurisdiction, the first and second requirements of the doctrine were not met in this case. The plaintiff does not challenge on appeal this aspect of the court's ruling.

and ordered the parties to file supplemental briefs addressing the impact of that decision. It is appropriate to start with a discussion of that case, as it provides substantial guidance in resolving the present matter.

In *Graham*, parents of four children instituted an action against the Board of Education of the city of Norwalk and certain of its members, among other defendants. Id., 566. The plaintiffs brought state law claims in connection with the hiring of Spectrum Kids, LLC, and its owner, Stacy Lore, who had represented at the time she was hired that she "had received various master's degrees and was a board certified behavior analyst." Id., 568. None of the defendants performed a background check on Lore or confirmed her alleged credentials.[15] Id. Lore and Spectrum Kids were retained to provide the minor plaintiffs with autism-related services within the Norwalk public schools. Id., 569. The plaintiffs alleged that the "negligent and careless hiring and supervision of Lore proximately caused permanent and ongoing injuries and losses to their four children and to them individually as parents." Id. The trial court granted the defendants' motion to dismiss counts one through sixty of the plaintiffs' complaint on the basis that the plaintiffs had failed to exhaust their administrative remedies. Id., 569–70.

On appeal to the Supreme Court, the plaintiffs in *Graham* claimed that they were not required to exhaust administrative remedies because "their complaint advances a state law claim that does not allege a violation of the [IDEA]" and that they did "not seek relief for the denial of a FAPE but, rather, [they asserted] common-law claims of negligent hiring and supervision, loss of consortium and negligent infliction of emotional

[15] "[I]n a criminal action, Lore was charged with larceny, to which she pleaded guilty and was sentenced to three years in prison and five years of probation. See *State* v. *Lore*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CR-10-0125486-T (September 2, 2010)." *Graham* v. *Friedlander*, supra, 334 Conn. 568.

distress—all falling outside the exhaustion requirements contained in the [IDEA]." Id., 570.

The court in *Graham* first discussed the IDEA and its exhaustion requirements. "The [IDEA] is a federal statute that 'ensures that children with disabilities receive needed special education services.' *Fry* v. *Napoleon Community Schools*, U.S. , 137 S. Ct. 743, 748, 197 L. Ed. 2d 46 (2017); see also 20 U.S.C. § 1400 (d) (2012). 'The [IDEA] offers federal funds to [s]tates in exchange for a commitment: to furnish a . . . [FAPE] . . . to all children with certain physical or intellectual disabilities.' *Fry* v. *Napoleon Community Schools*, supra, 748. Once a state accepts the [IDEA's] financial assistance, eligible children acquire a 'substantive right' to a FAPE. Id., 749. The primary vehicle for providing each eligible child with a FAPE takes the form of an individualized special education plan. 20 U.S.C. § 1414 (d) (2012); *Fry* v. *Napoleon Community Schools*, supra, 749. . . .

"Disputes often arise over whether the special education services provided to children with physical or intellectual disabilities are sufficient to satisfy a child's individual education plan. To resolve these disputes, the [IDEA] requires state or local agencies to establish and maintain procedures to 'ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a [FAPE] by such agencies.' 20 U.S.C. § 1415 (a) (2012); see *Fry* v. *Napoleon Community Schools*, supra, 137 S. Ct. 748. '[A] dissatisfied parent may file a complaint as to any matter concerning the provision of a FAPE with the local or state education agency (as state law provides).' *Fry* v. *Napoleon Community Schools*, supra, 749; see 20 U.S.C. § 1415 (b) (6) (2012). . . .

"The [IDEA] also contains an exhaustion requirement pursuant to which individuals cannot file a civil action under the [IDEA] until they have satisfied the procedural dispute resolution mechanism established by the

relevant state agency. See 20 U.S.C. § 1415 (*l*) (2012). In relevant part, the statute provides: 'Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 . . . title V of the Rehabilitation Act of 1973 . . . or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures . . . shall be exhausted to the same extent as would be required had the action been brought under this subchapter.' 20 U.S.C. § 1415 (*l*) (2012).

"The plain language of the [IDEA] provides that exhaustion is required when a civil action is brought '*under such laws* . . . .' . . . 20 U.S.C. § 1415 (*l*) (2012). '[S]uch laws' plainly encompass the federal protections of the rights of children with disabilities embodied in the United States 'Constitution, the Americans with Disabilities Act of 1990 . . . title V of the Rehabilitation Act of 1973,' and the act itself. 20 U.S.C. § 1415 (*l*) (2012); accord *Moore* v. *Kansas City Public Schools*, 828 F.3d 687, 693 (8th Cir. 2016)." *Graham* v. *Friedlander*, supra, 334 Conn. 572–73. Because the plaintiffs in *Graham* did not allege violations of the constitution or the IDEA or any other federal statute protecting the rights of children with disabilities, but rather alleged state common-law negligence claims, the court concluded that the plaintiff's claims were not subject to the federal exhaustion requirements. Id., 573–74.

The court in *Graham* next considered whether state law mandates exhaustion of administrative remedies where state law claims seek relief for the denial of a FAPE. Id., 574. In concluding that it does so mandate, the court looked to General Statutes § 10-76a et seq., which implements the substantive and procedural requirements of the IDEA. Id. "The specific procedures

for resolving disputes are set forth in § 10-76h. Under § 10-76h (a) (1), a parent of a child requiring special education and related services 'may request a hearing of the local or regional board of education or the unified school district responsible for providing such services whenever such board or district proposes or refuses to initiate or change the identification, evaluation or educational placement of or provision of a [FAPE] to such child or pupil.' The request must be made in writing, contain a statement of the specific issues in dispute, and be requested within two years of the board's proposal or refusal to initiate a change in the child's education plan. General Statutes § 10-76h (a) (1) through (4).

"Upon receipt of the written request, 'the Department of Education shall appoint an impartial hearing officer who shall schedule a hearing . . . pursuant to the Individuals with Disabilities Education Act . . . .' General Statutes § 10-76h (b). Section 10-76h requires the Department of Education to provide training to hearing officers, delineates who may act as hearing officers and members of hearing boards, identifies the parties that shall participate in a prehearing conference to attempt to resolve the dispute, and describes the authority that the hearing officer or board of education shall have. See General Statutes § 10-76h (c) and (d). Section 10-76h also establishes the processes for appealing from decisions of the hearing officer or the board of education. Section 10-76h (d) (4) provides in relevant part: 'Appeals from the decision of the hearing officer or board shall be taken in the manner set forth in section 4-183' . . . . A plain reading of General Statutes § 4-183 of the Uniform Administrative Procedure Act, General Statutes § 4-166 et seq., informs us that, prior to bringing a claim in Superior Court, individuals must exhaust all administrative remedies available within the relevant agency." (Footnote omitted.) *Graham* v. *Friedlander*, supra, 334 Conn. 574–75.

The court in *Graham* also emphasized that "the extensive administrative scheme established by the legislature supports our conclusion that parties asserting a state law claim and seeking relief for the denial of a FAPE must first exhaust administrative remedies pursuant to § 10-76h. It is a settled principle of administrative law that if an adequate administrative remedy exists, it must be exhausted before the Superior Court will obtain jurisdiction to act in the matter. . . . The exhaustion requirement serves dual functions: it protects the courts from becoming unnecessarily burdened with administrative appeals and it ensures the integrity of the agency's role in administering its statutory responsibilities." (Citation omitted; internal quotation marks omitted.) Id., 575–76. The court concluded "[o]n the basis of the statute's clear and unambiguous language, as well as the established and extensive administrative scheme . . . that the plaintiffs must exhaust administrative remedies before filing a claim for the denial of a FAPE under state law." Id., 576.

Having determined that plaintiffs must exhaust administrative remedies before filing a claim for the denial of a FAPE under state law,[16] the court in *Graham* "look[ed] to the essence, or the crux, of each of the plaintiffs' claims within the complaint to evaluate whether each claim seeks relief for the denial of a FAPE." Id., 577. In so doing, it considered the two factors outlined by the United States Supreme Court in *Fry* v. *Napoleon Community Schools*, supra, 137 S. Ct.

[16] In his principal appellate brief, which was filed prior to the release of our Supreme Court's decision in *Graham* v. *Friedlander*, supra, 334 Conn. 564, the plaintiff suggests that exhaustion of administrative remedies is not required simply because he "has not brought any *federal* claims against the defendants." (Emphasis added.) During oral argument before this court, however, the plaintiff's counsel stated that she does not dispute that there is a state exhaustion requirement. See *Graham* v. *Friedlander*, supra, 567 (state law mandates exhaustion of administrative remedies where state law claims seek relief for denial of FAPE).

756. "The first factor requires consideration of whether the claim could have been brought outside the school setting," and "[t]he second factor requires consideration of the history of the proceedings prior to the filing of the complaint." *Graham* v. *Friedlander*, supra, 334 Conn. 580–81.

The first factor is evaluated on the basis of two hypothetical questions set forth in *Fry* v. *Napoleon Community Schools*, supra, 137 S. Ct. 756: "First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school—say, a public theater or library? And second, could an *adult* at the school—say, an employee or visitor—have pressed essentially the same grievance?" (Emphasis in original.) The court in *Fry* explained: "When the answer to those questions is yes, a complaint that does not expressly allege the denial of a FAPE is also unlikely to be truly about that subject; after all, in those other situations there is no FAPE obligation and yet the same basic suit could go forward. But when the answer is no, then the complaint probably does concern a FAPE, even if it does not explicitly say so; for the FAPE requirement is all that explains why only a child in the school setting (not an adult in that setting or a child in some other) has a viable claim." Id.

Under the second factor, the history of the proceedings, "a court may consider that a plaintiff has previously invoked the IDEA's formal procedures to handle the dispute—thus starting to exhaust the [a]ct's remedies before switching mainstream." Id., 757. The initial choice to pursue the administrative process "may suggest that she is indeed seeking relief for the denial of a FAPE—with the shift to judicial proceedings prior to full exhaustion reflecting only strategic calculations about how to maximize the prospects of such a remedy." Id. This inquiry depends on the facts. Id. "[A] court

may conclude, for example, that the move to a courtroom came from a late-acquired awareness that the school had fulfilled its FAPE obligation and that the grievance involves something else entirely. But prior pursuit of the IDEA's administrative remedies will often provide strong evidence that the substance of a plaintiff's claim concerns the denial of a FAPE, even if the complaint never explicitly uses that term." Id.

The court in *Graham*, applying the first factor outlined in *Fry*, answered the two hypothetical questions in the affirmative. It determined that the plaintiffs could have brought the same claim if they had attended a municipal summer camp that advertised a special needs program focused on certain therapies but was run by uncertified and unqualified staff. Id., 581. If the children suffered a regression in their development, they could claim that the negligent hiring of the staff proximately caused their injuries. Id., 581–82. As to the second hypothetical question, the court determined that "an adult participating in a municipally funded behavioral therapy treatment program offered in the evenings at a school could also bring the same claim for regression resulting from services provided by an uncertified and unqualified behavior therapist." Id., 582.

The court in *Graham*, viewing the complaint in the light most favorable to the plaintiffs, "read the complaint to allege that the board defendants negligently hired Lore, that the board defendants should have known of Lore's inability to provide services, and that Lore's failure to provide services directly and proximately caused injury to the children in the form of a regression unique to children suffering from autism spectrum disorder and an inability to communicate effectively. Viewed in this most favorable light, the claim sets forth an allegation for negligent hiring, not the denial of a FAPE, and thus is not subject to dismissal for failure to exhaust administrative remedies." Id., 586.

The court additionally considered that the complaint lacked "any mention of the [IDEA], other laws protecting children with disabilities, or the children's education plans." Id., 587.

Turning to the second factor outlined in *Fry*, the court in *Graham* recognized that the plaintiffs never invoked the formal procedures of filing a due process complaint or requesting a hearing. Id., 588. Thus, the history of the proceedings supported the court's conclusion that the plaintiffs sought relief for something other than a denial of a FAPE. Id.

Turning to the claim made in this appeal, we first set forth our standard of review. "Our review of the trial court's determination of a jurisdictional question raised by a pretrial motion to dismiss is de novo. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . In undertaking this review, we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Citation omitted; internal quotation marks omitted.) Id., 571.

In his appellate brief, the plaintiff argues that his complaint "does not seek declaratory relief (the basic remedy for a denial of FAPE) nor injunctive relief (for an IDEA obligation) . . . ." He argues that his "educational goals and objectives are not the gravamen of his complaint," but, rather, that "[h]is claims are based in his wrongful segregation from typical kids: they were in the classroom; he, his desk and chair were in the coatroom–without the knowledge and consent of his father." The plaintiff addresses the two hypothetical questions outlined in *Fry* by arguing first that he could have brought a disability discrimination claim against a movie theater that required children with Down syndrome to sit in the balcony, apart from the general

audience, and second, that an adult with Down syndrome could bring a claim of disability discrimination against a school for "requiring the disabled adult to use a different, nearby room to listen to the school chorus or band concerts," apart from the general audience seated in the auditorium.[17]

The defendants contend that the answers to the two hypothetical questions are no. The defendants argue that "[t]he plaintiff is challenging the provision of educational services to the . . . plaintiff . . . in regards to his IEP, and specifically in regards to the IDEA's requirements that students with disabilities be educated in the least restrictive environment, and that parents be notified of any progress and/or changes to their child's IEP. As in *Fry*, such a challenge could not be brought against a public facility other than a school, nor could it be brought by an adult visitor or employee in the school. The plaintiff could not, for instance, sue a library for failing to educate his son in [the] least restrictive environment or for failing to report on his academic progress because a library is not charged with the responsibility of educating his son at all. Similarly, an adult could not bring such a claim against a school."

[17] The plaintiff additionally argues in his brief that the District Court's memorandum of decision remanding the matter to the Superior Court, which stated that the plaintiff's claims "do not necessarily raise a question of federal law," should have "guided the resolution of the defendants' motion to dismiss." We disagree that the District Court's construction of the complaint *for purposes of determining whether it possessed removal jurisdiction* should have guided the trial court's resolution of the defendants' motion to dismiss, specifically, its determination of the gravamen of the plaintiff's claims for purposes of deciding whether state law required that the plaintiff exhaust his administrative remedies. The District Court's decision determined only that the plaintiff's case did not fall within the "special and small category of cases" in which a federal court must resolve a "substantial question of federal law in dispute between the parties." Moreover, the District Court expressly stated that it was making no determination of "whether [the] plaintiff has exhausted his remedies under the IDEA." Whether the plaintiff was required to exhaust his administrative remedies clearly was a question for the Superior Court in the present case.

We begin our analysis with an evaluation of the first factor, whether the plaintiff's claims could have been brought outside of the school setting, as set forth in *Fry* v. *Napoleon Community Schools*, supra, 137 S. Ct. 756, and applied in *Graham*. The court in *Fry* offered two contrasting examples to illustrate whether the gravamen of a complaint against a school concerns the denial of a FAPE or instead addresses disability-based discrimination. Id. The court in *Fry* offered the example of a wheelchair-bound student suing his school for discrimination under Title II of the ADA because the building lacked access ramps. Id. Although the court recognized that the architectural feature has educational consequences, and therefore a different suit could allege that it violates the IDEA, the denial of a FAPE was not the essence of the Title II complaint. Id. It reasoned: "Consider that the child could file the same basic complaint if a municipal library or theater had no ramps. And similarly, an employee or visitor could bring a mostly identical complaint against the school. That the claim can stay the same in those alternative scenarios suggests that its essence is equality of access to public facilities, not adequacy of special education." Id. The court contrasted this example with one of a child with a learning disability who sues his school under Title II for failing to provide him with remedial tutoring in mathematics. Id., 756–57. The court explained: "That suit, too, might be cast as one for disability-based discrimination, grounded on the school's refusal to make a reasonable accommodation; the complaint might make no reference at all to a FAPE or an IEP. But can anyone imagine the student making the same claim against a public theater or library? Or, similarly, imagine an adult visitor or employee suing the school to obtain a math tutorial? The difficulty of transplanting the complaint to those other contexts suggests that its essence—even though not its wording—is the provision of a FAPE . . . ." Id., 757.

Applying this analysis to the plaintiff's allegations in his complaint, we answer no to both of the hypothetical questions that drive the analysis of the first factor. A plaintiff could not have brought essentially the same claims outside the school setting, nor could an adult at a school have pressed essentially the same grievance. We view the plaintiff's claims as falling much closer to those of the student who was deprived of remedial tutoring in mathematics than the contrasting example in *Fry* of a lack of access to public facilities.

We first discuss the plaintiff's discrimination claims. As noted previously, the plaintiff alleges in the discrimination counts that the board, by and through its employees, "segregated the . . . plaintiff from other children/students without disabilities on the basis of the . . . plaintiff's disabilities," in violation of §§ 46a-58 (a) and 46a-75 (a) and (b). He further alleges that Ellsworth and Poulin violated §§ 46a-58 (a) and 47a-75 (a) and (b) by "exploiting the fact that the . . . plaintiff did not have functional speech and could not tell his father what had been happening to him, when it started or how it made him feel." Although these allegations, taken alone, could be made outside of the school setting, they must be read in context of the core allegations of the plaintiff's discrimination claims. In the discrimination counts, the plaintiff alleges that his operative IEP indicated that the plaintiff "will spend 26.33 hours per week with children/students who do not have disabilities," but that the plaintiff was spending approximately nine hours per week with children/students who do not have disabilities. The plaintiff recites § 1412 (a) (5) (A) of the IDEA, which provides that children with disabilities are to be educated, to the maximum extent appropriate, together with their nondisabled peers, and he incorporates the citation to 20 U.S.C. § 1412 (a) (5) (A) into each of his counts alleging discrimination. He further alleges in count one that the board, by and through its employees, "deprived the . . . plaintiff's right to be

educated in the least restrictive environment as provided by law." The allegations against each employee defendant in counts seven and nine likewise incorporate, and expand upon, the allegation that the plaintiff was not spending the specified amount of time with nondisabled children set forth in his IEP. The plaintiff alleges that Ellsworth, having created the plaintiff's schedule, knew where the plaintiff was situated but failed to report this information to the plaintiff's father during monthly progress meetings. With respect to Poulin, the plaintiff alleges that the plaintiff's placement in the coatroom "constituted wrongful segregation and violated the provisions of his lEP."

Moreover, in the negligence per se counts, the plaintiff expressly grounds his claims on the defendants' breach of their duty under 20 U.S.C. § 1412 (a) (5) to educate the plaintiff in the least restrictive environment. In count eleven, the plaintiff alleges that the board "failed to act in accordance with [20 U.S.C. § 1412 (a) (5)] and subjected the . . . plaintiff to imminent harm to his academic and social development." He also alleges in counts seventeen and nineteen that Ellsworth and Poulin breached their duty under 20 U.S.C. § 1412 (a) (5), as they "knew or should have known that the . . . plaintiff was not spending time with nondisabled children/students to the maximum extent possible." Specifically, the allegations in count seventeen against Ellsworth reference her attendance at weekly team meetings regarding compliance with the plaintiff's IEP, and assert that she "knew or should have known that, according to the schedule she set for the . . . plaintiff and her knowledge of the time the . . . plaintiff spent in the coatroom each day, he could not spend 26.33 hours per week with nondisabled children/students." With respect to Poulin, the plaintiff alleges in count nineteen that she "was a member of the Planning and Placement Team for the . . . plaintiff [and] had a duty under [20 U.S.C. § 1412 (a) (5)] to ensure the . . . plaintiff was educated in the least restrictive environment."

The plaintiff alleges in counts seventeen and nineteen that Ellsworth and Poulin's "acts and/or omissions subjected the . . . plaintiff to imminent harm and/or detriment to his academic and social development." We conclude that the gravamen of the plaintiff's claims—that the defendants failed to educate the plaintiff in the least restrictive environment—is a denial of a FAPE.

"The IDEA mandates that [t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. § 1412 (a) (5) (A) . . . . Educating a handicapped child in a regular education classroom . . . is familiarly known as mainstreaming. . . . We have underscored the IDEA's strong preference for children with disabilities to be educated, to the maximum extent appropriate, together with their [nondisabled] peers. . . . Nevertheless, we have also acknowledged that, [w]hile mainstreaming is an important objective, we are mindful that the presumption in favor of mainstreaming must be weighed against the importance of providing an appropriate education to handicapped students. Under the [IDEA], where the nature or severity of the handicap is such that education in regular classes cannot be achieved satisfactorily, mainstreaming is inappropriate. . . . Understandably, courts have recognized some tension between the IDEA's goal of providing an education suited to a student's particular needs and its goal of educating that student with his [nondisabled] peers as much as circumstances allow." (Citations omitted; internal quotation marks omitted.) *P. ex rel. Mr. & Mrs. P.* v. *Newington Board of Education*, 546 F.3d 111, 119 (2d Cir. 2008).

The United States Court of Appeals for the First Circuit recently considered whether an action brought pursuant to Title II of the ADA, and alleging that the school system unnecessarily segregated students with mental health disabilities in a separate school, was subject to the IDEA's exhaustion requirement. *Parent/Professional Advocacy League* v. *Springfield*, 934 F.3d 13, 18 (1st Cir. 2019). It stated: "On its surface, the complaint pleads disability-based discrimination: it alleges that the defendants are violating the ADA by unnecessarily segregating students with mental health disabilities in a separate and unequal educational program. And the complaint never uses the term FAPE. Yet, the crux of the complaint is that the defendants failed to provide the educational instruction and related services that the class plaintiffs need to access an appropriate education in an appropriate environment. That is not a claim of simple discrimination; it is a claim contesting the adequacy of a special education program." (Internal quotation marks omitted.) Id., 25. The court further looked to the complaint's allegations that the defendants were denying students the " 'opportunity to receive educational programs and services in the most integrated setting appropriate to their needs' " and that the school system was denying students the opportunity to benefit from educational services. Id. The court determined that such claims were "about obligations under the IDEA to educate students in the regular classroom with their nondisabled peers '[t]o the maximum extent appropriate,' " and "to offer students an appropriate educational benefit . . . ." Id. It explained: "These allegations are, in great part, simply another way of saying, in IDEA terms, that the school system has not provided the necessary special educational services to allow students to be educated in the [least restrictive environment]."[18] Id.; see also *M.A.* v. *New York Dept. of Education*, 1 F. Supp. 3d 125, 144 (S.D.N.Y. 2014) (claims that

[18] The court in *Parent/Professional Advocacy League* v. *Springfield*, supra, 934 F.3d 26, noted that "claims that schools isolated or separated disabled

student was removed to hallway for separate instruction and was excluded from music class related to appropriate level of mainstreaming and were subject to exhaustion requirement).

Here, the plaintiff's allegations, read in the light most favorable to him, seek redress for the defendants' failure to provide a FAPE,[19] specifically, their violation of the IDEA's provision that the school educate the plaintiff in the least restrictive environment. Accordingly, the answers to the two hypothetical questions set forth in *Fry* are no—the plaintiff could not sue a public facility for failing to educate him in the least restrictive environment, nor could an adult sue the school on such a basis.[20]

students have been subjected to IDEA exhaustion where those claims allege that the effects of the isolation or separation were educational." We note that in the present case, the discrimination counts lack clear allegations of the effects of the segregation. The plaintiff alleges generally that the board, by and through its employees, violated "§§ 46a-58 (a) and 46a-75 (a) and (b) when it deprived [him] of his rights, privileges or immunities, secured or protected by the constitution or laws of this state or of the United States on account of the disabilities of the . . . plaintiff" and that that the board, by and through its employees, deprived him of his "right to be educated in the least restrictive environment as provided by law." The negligence per se counts, however, specifically allege that the board, by and through its employees, "failed to act in accordance with [20 U.S.C. § 1412 (a) (5)] and subjected the . . . plaintiff to imminent harm to his academic and social development."

[19] Accordingly, we reject the plaintiff's argument, made on appeal, that, because the department's investigator concluded that the plaintiff had not been denied a FAPE and this finding of fact was unchallenged by the plaintiff and the defendants, the "trial court was bound to defer to that finding of fact." The lack of an express allegation that the plaintiff was denied a FAPE does not foreclose the conclusion that the gravamen of the plaintiff's claims is the denial of a FAPE. As explained by our Supreme Court in *Graham*, the framework set forth in *Fry* v. *Napoleon Community Schools*, supra, 137 S. Ct. 743, provides guidance "in determining what types of allegations should be construed as claims for the denial of a FAPE, even if the plaintiff, through artful pleading, does not allege the denial of a FAPE in the complaint." *Graham* v. *Friedlander*, supra, 334 Conn. 580.

[20] The plaintiff contends that "[t]he defendants mistakenly believe that a violation of [least restrictive environment] equates to a denial of FAPE," and cites *R.F.* v. *Cecil County Public Schools*, 919 F.3d 237, 246 (4th Cir.),

We next turn to the second factor outlined in *Fry*, which "requires consideration of the history of the proceedings prior to the filing of the complaint." *Graham* v. *Friedlander*, supra, 334 Conn. 580–81. As noted previously, "prior pursuit of the IDEA's administrative remedies will often provide strong evidence that the substance of a plaintiff's claim concerns the denial of a FAPE, even if the complaint never explicitly uses that term." *Fry* v. *Napoleon Community Schools*, supra, 137 S. Ct. 757. In the present case, the plaintiff initially pursued administrative remedies. He filed with the

cert. denied, U.S. , 140 S. Ct. 156, 205 L. Ed. 2d 46 (2019). In that case, the United States Court of Appeals for the Fourth Circuit first considered the claim that the school had failed to educate the plaintiff in the least restrictive environment, where it provided most of her instruction in an intensive communication support classroom (ICSC) in which she was the only student. Id. The court determined that the plaintiff's placement in the ICSC was "reasonably calculated to enable [her] to make progress appropriate in light of [her] circumstances" and that she was afforded opportunities to interact with other first graders. (Internal quotation marks omitted.) Id., 246–47. The court concluded that she was not denied a FAPE, particularly in light of the special education teacher's position that the plaintiff "had trouble concentrating and accessing material in the general education population." Id., 247. The court concluded that the plaintiff "had opportunities to interact with her peers '[t]o the maximum extent appropriate,' given [her] unique circumstances and academic and behavioral needs." Id.

It next considered the claim that the school violated the IDEA by failing to follow the plaintiff's IEP, in that it changed the plaintiff's placement and began providing her with more instruction hours in the ICSC than was provided for in her IEP. Id. The court concluded that increasing the plaintiff's hours in the ICSC beyond those specified in her IEP without giving notice to her parents amounted to a procedural violation of the IDEA, but that it did not constitute a substantive violation because the plaintiff was not denied a FAPE as a result. Id., 248.

We fail to see how *R.F.* v. *Cecil County Public Schools*, supra, 919 F.3d 237, advances the plaintiff's position. Indeed, in that case, the plaintiff had exhausted her administrative remedies. Id. The court noted that "[a]s required under the IDEA, [the plaintiff's parents] first filed a due process complaint with Maryland's Office of Administrative Hearings, resulting in a hearing before an [administrative law judge]," which hearing addressed whether the school denied the plaintiff a FAPE or failed to offer her an IEP that would provide her with a FAPE. Id., 244. Following issuance of the administrative law judge's decision, the plaintiff challenged that decision in the federal district court. Id.

department a state complaint and request for due process hearing, in which he alleged an abbreviated version of substantially the same factual allegations made in the present action. He also expressly alleged that he was denied a FAPE. Although the plaintiff elected to have his complaint investigated by the department, he withdrew his request for a due process hearing. Furthermore, upon completion of the department's investigation, it notified the plaintiff that the parties may "request a due process hearing on these same issues through this office if a party disagrees with the conclusions reached in this investigation and meet the applicable statute of limitations." The plaintiff made no such request and instead filed the present action.

This factual framework resembles that which the United States Supreme Court in *Fry* described as an indicator of a claim requiring exhaustion. As the court in *Fry* explained, "[a] plaintiff's initial choice to pursue [the administrative] process may suggest that she is indeed seeking relief for the denial of a FAPE—with the shift to judicial proceedings prior to full exhaustion reflecting only strategic calculations about how to maximize the prospects of such a remedy." *Fry* v. *Napoleon Community Schools*, supra, 137 S. Ct. 757. Accordingly, we conclude that the history of the proceedings in the present case is additional evidence that the plaintiff's claims seek relief for the denial of a FAPE. Cf. *Graham* v. *Friedlander*, supra, 334 Conn. 588 (history of proceedings, specifically, fact that plaintiffs never invoked formal procedures of filing due process complaint or requesting hearing, supported conclusion that plaintiffs sought relief for something other than denial of FAPE).

Although not expressly claiming that an exception to the exhaustion requirement applies,[21] the plaintiff

[21] The trial court likewise noted that "[t]he plaintiff has argued that the exhaustion requirement is not applicable to his claims, but has not alternatively asserted that any known exception applies."

argues that exhaustion is not required because he "seeks no remedies available under the IDEA." He contends that his requests for monetary damages and attorney's fees compel the conclusion that he is not making a claim for the denial a FAPE. He maintains that "[i]f a plaintiff is seeking monetary damages, he or she couldn't possibly be making a claim for the denial of a FAPE, because only declaratory or injunctive relief is allowed."[22] The defendants respond that "[n]either the IDEA, nor Connecticut's implementing statutes, nor the corresponding regulations, carve[s] out an exception to the IDEA's exhaustion requirement for parents seeking monetary damages."[23]

"Despite the important public policy considerations underlying the exhaustion requirement, [our Supreme Court has] grudgingly carved several exceptions from the exhaustion doctrine. . . . [It has] recognized such exceptions, however, only infrequently and only for narrowly defined purposes. . . . One of the limited exceptions to the exhaustion rule arises when recourse to the administrative remedy would be demonstrably futile or inadequate." (Citations omitted; internal quotation marks omitted.) *Hunt* v. *Prior*, 236 Conn. 421, 432, 673 A.2d 514 (1996).

[22] The plaintiff also argues that the trial court improperly used the " 'injury centered approach' that was rejected by the United States Supreme Court in *Fry* [v. *Napoleon Community Schools*, supra, 137 S. Ct. 752]." In *Fry*, the court stated that "a suit must seek relief for the denial of a FAPE, because that is the only 'relief' the IDEA makes 'available,' " and, "in determining whether a suit indeed 'seeks' relief for such a denial, a court should look to the substance, or gravamen, of the plaintiff's complaint." Id. The trial court performed this analysis and, accordingly, we reject the plaintiff's argument.

[23] The United States Supreme Court declined to address the question of whether exhaustion is "required when the plaintiff complains of the denial of a FAPE, but the specific remedy she requests—here, money damages for emotional distress—is not one that an IDEA hearing officer may award?" *Fry* v. *Napoleon Community Schools*, supra, 137 S. Ct. 752 n.4.

We disagree that the plaintiff was not required to exhaust his administrative remedies merely because he seeks monetary damages and attorney's fees. The United States Court of Appeals for the Second Circuit has held that the mere addition of a claim for damages "does not enable [a plaintiff] to sidestep the exhaustion requirements of the IDEA." *Polera* v. *Board of Education*, 288 F.3d 478, 488 (2d Cir. 2002); see also *Nelson v. Charles City Community School District*, 900 F.3d 587, 594 (8th Cir. 2018) ("[T]he IDEA's exhaustion requirement remains the general rule, regardless of whether the administrative process offers the particular type of relief that is being sought. . . . As others have explained, if the [plaintiffs'] position were to prevail, then future litigants could avoid the exhaustion requirement simply by asking for relief that administrative authorities could not grant." (Citation omitted; internal quotation marks omitted.)); *Wellman* v. *Butler Area School District*, 877 F.3d 125, 136 n.10 (3d Cir. 2017) (fact that plaintiff could not recover compensatory damages he sought in lawsuit as part of administrative proceedings does not convert his claims into non-IDEA claims); *Z.G.* v. *Pamlico County Public Schools Board of Education*, 744 F. Appx. 769, 777 n.14 (4th Cir. 2018) (fact that plaintiffs also seek damages does not free them from obligation to exhaust administrative remedies).[24] This analysis, albeit derivative of the complementary federal jurisprudence, persuades us that the plaintiff's request for monetary damages in the present case does not permit him to avoid the exhaustion requirement.

[24] See also *Donohue* v. *Lloyd*, United States District Court, Docket No. 18-CV-9712 (JPO) (S.D.N.Y. June 1, 2020) ("the mere addition of a claim for damages (which are not available under the IDEA) does not enable [a plaintiff] to sidestep the exhaustion requirements of the IDEA" (internal quotation marks omitted)); *Ziegler* v. *Multer*, United States District Court, Docket No. 1:18-CV-0881 (GTS/CFH) (N.D.N.Y. November 14, 2018) ("plaintiff's request for monetary damages does not negate her obligation to request an impartial due process hearing prior to commencing this action"), report

Lastly, the plaintiff briefly argues that he did exhaust his administrative remedies.[25] As noted previously, § 10-76h (b) provides that, upon receipt of written request pursuant to subsection (a), "the Department . . . shall appoint an impartial hearing officer who shall schedule a hearing . . . pursuant to the Individuals with Disabilities Education Act . . . ." Following the due process hearing, an aggrieved party may bring a civil action in state court seeking judicial review of the decision. See § 10-76h (d) (4). Specifically, § 10-76h (d) (4) provides in relevant part: "Appeals from the decision of the hearing officer or board shall be taken in the manner set forth in [General Statutes § 4-183 of the Uniform Administrative Procedure Act, General Statutes § 4-166 et seq.]." Section 4-183 "informs us that, prior to bringing a claim in Superior Court, individuals must exhaust all administrative remedies available within the relevant agency." *Graham* v. *Friedlander*, supra, 334 Conn. 575.

The plaintiff argues that he "did seek administrative redress until it was apparent that an IDEA hearing officer could not award the one last remaining remedy he sought, so the claim for a due process hearing was withdrawn but the Connecticut State Department of Education was charged with investigating his claim. The . . . plaintiff . . . unlike [the plaintiff in *Fry*], gave the administrative process a chance, not once but twice, and yet the trial court still ruled he was required to exhaust administrative remedies 'regardless of the remedy requested.' " (Footnote omitted.) As the United

and recommendation adopted, United States District Court, Docket No. 1:18-CV-0881 (GTS/CFH) (N.D.N.Y. March 6, 2019).

[25] The plaintiff's obtaining of a release of jurisdiction from the CHRO does not lead to the conclusion that he exhausted his administrative remedies. Because we conclude that the plaintiff alleges denial of a FAPE, the Department of Education is the relevant administrative agency through which the plaintiff was required to proceed. See General Statutes § 10-76 (h); see also *Avoletta* v. *Torrington*, United States District Court, Docket No. 3:07-CV-841 (AHN) (D. Conn. March 31, 2008) (failure to request due process hearings under IDEA not excused by complaints filed with other agencies).

States District Court for the District of Connecticut recently explained, however, "[t]o satisfy [the exhaustion] requirement, parties must simply follow IDEA's administrative procedures; they need not be successful at any point of that process." *Doe* v. *Westport Board of Education*, United States District Court, Docket No. 3:18-CV-01683 (KAD) (D. Conn. February 21, 2020); see id. (finding nothing inconsistent about requiring parties to exhaust IDEA's administrative procedures when seeking relief for denial of FAPE before bringing Section 504/ADA claims if Section 504/ADA claims also seek relief for denial of FAPE). Accordingly, we reject the plaintiff's argument that he exhausted his administrative remedies.

The appeal is dismissed with respect to counts two through six, eight, ten, twelve through sixteen, eighteen, and twenty; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

VILLAGE MORTGAGE COMPANY *v.* RONALD GARBUS ET AL.
(AC 42667)

Bright, C. J., and Lavine and Cradle, Js.*

Syllabus

The plaintiff, M Co., a mortgage company, sought a declaratory judgment to determine whether the defendants were lawful owners of shares of stock in M Co. In 1998, the defendants purchased 300 shares of stock in M Co. but, thereafter, they returned the certificate of stock and M Co. reimbursed the defendants their investment. M Co. alleged that in 2011, the stock certificate was returned to the defendants by V, the cofounder of M Co., and that the defendants' stock was improperly reissued or returned to them, without proper corporate authorization and for less than the fair value of the stock. The trial court determined that the defendants were not lawful shareholders of M Co. because,

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

although they were listed as original shareholders, their ownership interest was relinquished soon thereafter, and V had no actual or apparent authority to issue shares in M Co. to the defendants. On appeal, the defendants claimed that M Co. alleged a claim of tortious financial misconduct and, therefore, the trial court improperly concluded that the declaratory judgment action was not barred by the applicable statute of limitations (§ 52-577). *Held* that the trial court correctly determined that no statute of limitations applied to bar M Co.'s declaratory judgment action, rather, that the special defense of laches applied and that the defendants failed to prove that special defense: the trial court correctly interpreted that the allegations in M Co.'s complaint were not predicated on a note or agreement and that, despite the defendants' claim to the contrary, M Co. did not plead the elements of fraud, statutory theft, or conspiracy, and the defendants failed to identify those allegations in the complaint, M Co. did not seek damages but, rather, a judicial determination as to whether the defendants were legally shareholders, and the determination of who had the superior claim was inherently an equitable one, particularly where there was no claim or finding that any of the parties engaged in tortious financial misconduct or breached a contract; moreover, the trial court's decision to take judicial notice of a related proceeding, in which V was found to have engaged in various acts of financial misconduct, related to the defendants' laches special defense, in that the trial court had an evidentiary basis on which to find facts that explained how the shares of stock were returned to the defendants in 2011 and how M Co. learned of V's misconduct, and the trial court in the present case did not find or imply that either of the defendants participated in any of V's misconduct.

Argued September 14—officially released December 22, 2020

Procedural History

Action for a declaratory judgment to determine whether the defendants were lawful stockholders of the plaintiff, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Hon. Robert B. Shapiro*, judge trial referee; judgment declaring that the defendants are not lawful shareholders of the plaintiff, from which the defendants appealed to this court. *Affirmed.*

Gregory T. Nolan, with whom, on the brief, was *Patsy M. Renzullo*, for the appellants (defendants).

Richard P. Weinstein, with whom, on the brief, was *Sarah Black Lingenheld*, for the appellee (plaintiff).

Opinion

LAVINE, J. In this declaratory judgment action, the defendants, Ronald Garbus and Georganne Garbus, appeal from the judgment of the trial court, declaring that the defendants are not lawful stockholders of the plaintiff, Village Mortgage Company. The defendants claim that the court improperly concluded that the plaintiff's cause of action is akin to an equitable claim for injunctive relief subject to the doctrine of laches, rather than a legal claim for tortious financial misconduct subject to the statute of limitations, specifically General Statutes § 52-577. We affirm the judgment of the trial court.

The following facts are relevant to our resolution of the defendants' appellate claim. The plaintiff commenced the present action on March 17, 2016. On September 27, 2016, the plaintiff filed an amended complaint (complaint), alleging in relevant part that it is a corporation existing under the laws of this state since at least 1998. In 1998, the defendants were original stockholders of the plaintiff, having received 300 shares of stock, Certificate No. 2, for an investment of $30,000. That same year, the defendants returned Certificate No. 2 and were reimbursed $30,000, apparently as a result of issues involving the defendants' third-party creditors. The plaintiff alleged that the defendants' return of Certificate No. 2 and the plaintiff's reimbursement to them of the invested sum amounted to a rescission of the defendants' acquisition of stock in the plaintiff. The plaintiff further alleged that in June, 2011, Certificate No. 2 apparently was returned to the defendants in exchange for $30,000, without proper corporate authority. Moreover, the stock was transferred to the defendants for substantially less than the fair value of the stock in June, 2011.

In addition, the plaintiff alleged that the circumstances involving the defendants and the stock recently

had come to light as a result of the plaintiff's litigation against the cofounder of the corporation,[1] who surreptitiously was involved in the 1998 stock rescission and the 2011 return of stock to the defendants. On February 2, 2016, the plaintiff demanded a detailed explanation from the defendants with respect to the rescission and return of stock, but the defendants neglected and failed to respond to the demand. The plaintiff alleged that to the extent that the defendants' stock was improperly reissued or returned to the defendants in June, 2011, without proper corporate authorization and for less than the fair value of the stock, it contested whether the defendants are lawfully stockholders with rights to own, to possess, and to vote the shares of stock. Finally, the plaintiff alleged that a bona fide dispute exists with regard to the defendants' ownership of the shares for which there is no adequate remedy at law and which requires a judicial determination as to whether the defendants are lawfully shareholders of the plaintiff. The plaintiff claimed no damages.

In their answer to the complaint, the defendants admitted that the plaintiff is a corporation having been in existence since at least 1998. They denied the remaining allegations of the complaint and alleged three special defenses, essentially that the plaintiff's cause of action is barred by (1) the statute of limitations[2] or

[1] The cofounder was James Veneziano. See *Village Mortgage Co.* v. *Veneziano*, 175 Conn. App. 59, 167 A.3d 430, cert. denied, 327 Conn. 957, 172 A.2d 205 (2017).

[2] In their first special defense, the defendants alleged: "[I]n analyzing whether a declaratory judgment action is barred by a particular statutory period of limitations, a court must examine the underlying claim or right on which the declaratory action is based. . . . It necessarily follows that if a statute of limitations would have barred a claim asserted in an action for relief other than a declaratory judgment, then the same limitation period will bar the same claim asserted in a declaratory judgment action. (Internal quotation marks omitted.) *Interlude, Inc.* v. *Skurat*, 253 Conn. 531, 536–37, 754 A.2d 153 (2000), quoting *Wilson* v. *Kelley*, 224 Conn. 110, 116, 617 A.2d 433 (1992).

"General Statutes § 52-577 bars the plaintiff's action.

"General Statutes § 52-576 bars the plaintiff's action.

(2) laches,[3] and that (3) James Veneziano, the plaintiff's cofounder, acted with apparent authority.[4]

The plaintiff denied each of the defendants' special defenses and pleaded the following by way of avoidance. "Upon information and belief, the defendants conspired with . . . Veneziano to avoid disclosure of the defendants' purported stock interest in [the plaintiff] in order to conceal same from creditors and particularly the [Federal Deposit Insurance Company] and/or conceal same from the bankruptcy court in connection with a certain bankruptcy petition filed by one or more of the defendants. As a result of the aforesaid, the defendants are legally and equitably estopped from asserting the defenses raised in the instant action, especially in that . . . Veneziano concealed the facts in regard to the circumstances surrounding the transfers of the stock and any such action taken by . . . Veneziano was without corporate authority, apparent or otherwise, constituted [an] ultra vires act and an act which would have been in violation of civil if not criminal law. In order to invoke equitable considerations such as

"General Statutes § 52-581 bars the plaintiff's action.

"General Statutes § 52-588 bars the plaintiff's action."

[3] The second special defense alleged: "1. The plaintiff's neglect or omission to assert [its] alleged right, taken in conjunction with lapse of time and other circumstances, causes prejudice to the defendant[s] so as to operate as a bar to relief in equity.

"2. Important documentary evidence is unavailable, has been wrongfully withheld or has been destroyed.

"3. The plaintiff inexcusably delayed in bringing [its] claim.

"4. The plaintiff's delay prejudiced the defendant in that records are lost or unavailable and witnesses' memories have deteriorated with time."

[4] The third special defense alleged: "1. Apparent authority is a doctrine developed by the courts to protect, under certain circumstances, persons dealing with an agent who lacks express authority.

"2. Apparent authority is the authorization which a principal, through his own acts or inadvertences, causes or allows a third person to believe his agent possesses.

"3. In the present case, the plaintiff [is] liable for its agreement with the defendant[s] on the ground that the agent, James Veneziano, had apparent authority to execute the contract on the plaintiff's behalf."

laches, the defendants themselves [have] unclean hands and are precluded from relying upon said doctrine."

The case was tried to the court. Counsel for the parties presented evidence concerning ownership of the shares of stock at issue on October 17, 2018,[5] and thereafter submitted briefs on December 3, 2018. The court issued its memorandum of decision on January 29, 2019. In its decision, the court first reviewed the allegations of the complaint, the defendants' special defenses, and the plaintiff's reply to the special defenses and by way of avoidance.

The court noted that, in a case tried to the court, the judge is "the trier of fact, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony." (Internal quotation marks omitted.) *Taylor* v. *Commissioner of Correction*, 324 Conn. 631, 637, 153 A.3d 1264 (2017). It thereafter reviewed the law regarding an action for declaratory judgment.

General Statutes § 52-29 (a) provides: "The Superior Court in any action or proceeding may declare rights and other legal relations on request for such a declaration, whether or not further relief is or could be claimed. The declaration shall have the force of a final judgment." See also Practice Book § 17-55.[6]

[5] The defendants did not attend the trial and did not present evidence to support their counsel's representation that they were not well enough to travel to Connecticut from Florida.

[6] Practice Book § 17-55 provides: "A declaratory judgment action may be maintained if all of the following conditions have been met:

"(1) The party seeking the declaratory judgment has an interest, legal or equitable, by reason of danger of loss or of uncertainty as to the party's rights or other jural relations;

"(2) There is an actual bona fide and substantial question or issue in dispute or substantial uncertainty of legal relations which requires settlement between the parties; and

"(3) In the event that there is another form of proceeding that can provide the party seeking the declaratory judgment immediate redress, the court is of the opinion that such party should be allowed to proceed with the claim for declaratory judgment despite the existence of such alternate procedure."

"The purpose of a declaratory judgment action, as authorized by . . . § 52-29 and Practice Book § [17-55], is to secure an adjudication of rights [when] there is a substantial question in dispute or a substantial uncertainty of legal relations between the parties. . . . Subdivisions (1) and (2) of Practice Book § 17-55 respectively require that the plaintiff in a declaratory judgment action have an interest, legal or equitable, by reason of danger of loss or of uncertainty as to the party's rights or other jural relations and that there be an actual bona fide and substantial question or issue in dispute or substantial uncertainty of legal relations which requires settlement between the parties . . . ." (Citation omitted; internal quotation marks omitted.) *New London County Mutual Ins. Co.* v. *Nantes*, 303 Conn. 737, 747, 36 A.3d 224 (2012); see id., 740 (declaratory judgment action to determine whether claimed injuries were covered by subject insurance policy).

Our Supreme Court has observed that "our declaratory judgment statute provides a valuable tool by which litigants may resolve uncertainty of legal obligation." (Internal quotation marks omitted.) Id., 747–48. The court also has recognized that "our declaratory judgment statute is unusually liberal. An action for declaratory judgment . . . is a statutory action as broad as it well could be made." (Internal quotation marks omitted.) Id., 748. The statute "is broader in scope than . . . the statutes in most, if not all, other jurisdictions . . . and [w]e have consistently construed our statute and the rules under it in a liberal spirit, in the belief that they serve a sound social purpose. . . . [Although] the declaratory judgment procedure may not be utilized merely to secure advice on the law . . . it may be employed in a justiciable controversy where the interests are adverse, where there is an actual bona fide and substantial question or issue in dispute or substantial uncertainty of legal relations which requires settlement,

and where all persons having an interest in the subject matter of the complaint are parties to the action or have reasonable notice thereof." Id.

In the present case, the trial court found that the issue to be decided was whether the defendants are shareholders of the plaintiff, and that the issue presents a justiciable controversy where the interests are adverse, where there is an actual bona fide and substantial question or issue in dispute, and is properly the subject of a claim for declaratory relief. Furthermore, all parties having an interest in the subject matter of the action are parties.

The court made the following findings of fact on the basis of the evidence it credited. The court credited the testimony of Veneziano's former wife, Donna McGuire, that the defendants are friends of Veneziano and that, for many years, she personally had possession of the original Certificate No. 2 on which the defendants' names appear. Certificate No. 2 for 300 shares is dated May 1, 1998, and was placed into evidence. Although Certificate No. 2 is dated May 1, 1998, it was not issued until 2000. Veneziano gave McGuire Certificate No. 2 in the early 2000s and asked her to put it in her safe deposit box. McGuire held the certificate for quite a few years. The court found that Veneziano used McGuire's safe deposit box to hide the certificate there.

McGuire eventually gave Certificate No. 2 to Veneziano or to Justin Giroliman, an employee of the plaintiff. Giroliman later became the plaintiff's chief financial officer and senior vice president. Giroliman credibly testified that he possessed the certificate from 2010 to 2011, and that, at Veneziano's direction, kept it in his desk at the plaintiff's offices.

In addition to the evidence demonstrating that the defendants either relinquished or never possessed Certificate No. 2, in reaching its conclusion that the defendants were not shareholders of the plaintiff as of April,

1999, the court also relied on the fact that Ronald Garbus did not list an ownership interest in the plaintiff on Schedule B of his bankruptcy petition dated April 8, 1999. The court found that Ronald Garbus' deposition testimony in the present case and presented at trial was vague. He could not even recall when he filed a petition in bankruptcy. The court did not credit Ronald Garbus' testimony about being a shareholder. By contrast, the court found that Laurel Caliendo, the plaintiff's president, credibly testified that, as of November, 2007, the defendants were not shareholders of the plaintiff. Consequently, the court concluded that, although the defendants were listed as original shareholders of the plaintiff, their ownership interest was relinquished soon thereafter. The court also found that by asking his then wife to put Certificate No. 2 in her personal safe deposit box, and later by having Giroliman keep it in his desk, Veneziano kept the certificate secreted away for his later personal use.

The court was unpersuaded by the defendants' argument that they never relinquished their stock in exchange for their initial investment, but instead had received a $30,000 loan from the plaintiff, that they had executed a note and made payments to the plaintiff that are reflected in its records, and that all of this was authorized by Veneziano. Rather, the court found that Veneziano engaged in unauthorized conduct with the defendants in order to procure money for himself. The court concluded that any payments the defendants made did not establish that they were legitimate shareholders of the plaintiff.

Specifically, the court found that by the beginning of 2010, the defendants had paid $40,000, by personal checks, to the plaintiff, $10,000 of which was returned to the defendants. Although one of the checks the defendants sent to the plaintiff contained the words "loan repayment," the court found that Giroliman credibly testified that the plaintiff had made no loan to the defendants. According to Giroliman, Veneziano directed him

to record payments from the defendants initially as "Paid in Capital." Subsequently, at Veneziano's direction, Giroliman diverted the defendants' payments to Veneziano's personal account. By e-mail on December 30, 2011, Veneziano directed Giroliman that the defendants' payments should be posted: "against my advances 4 now." The court found that Veneziano's efforts to take the defendants' payments for himself also undermines the defendants' claims that they are lawful shareholders of the plaintiff.

In addition, the court found that the credibility of the defendants' claim of stock ownership was further undermined by Ronald Garbus' deposition testimony that he had a demand note with the plaintiff. The court found no credible evidence that a demand note ever existed, and that Ronald Garbus testified that he had no records with respect to the supposed demand note. The court also found no evidence of an agreement between Veneziano and the defendants concerning their purchase of shares in the plaintiff in 2010–2011 or afterward, or that Veneziano had actual authority to engage in such a transaction. "Actual authority exists when [an agent's] action [is] expressly authorized . . . or . . . although not authorized, [is] subsequently ratified by the [principal]." (Internal quotation marks omitted.) *Ackerman* v. *Sobol Family Partnership, LLP*, 298 Conn. 495, 508, 4 A.3d 288 (2010).

The court credited Caliendo's testimony that the plaintiff had not authorized the sale of shares to the defendants during the relevant time period. The court found no evidence that the plaintiff's board of directors expressly or impliedly authorized Veneziano to issue shares to the defendants during that period of time or that the board of directors ratified such an action. The court concluded that there is no credible evidence that Veneziano had actual authority to issue shares of the plaintiff to the defendants during that time.

Although the plaintiff's allegation in paragraph 3 of its complaint that Certificate No. 2 apparently was returned to the defendants in June, 2011, amounts to an admission,[7] the court found no credible evidence that the defendants possessed Certificate No. 2 at the time of trial. The court found the clear explanation for the payments that the defendants made to the plaintiff to be that "Veneziano, either alone or in concert with the defendants, engaged in unauthorized conduct to get money from the defendants in exchange for providing [Certificate No. 2] to the defendants in order for them to appear to be legitimate stockholders."

At trial, the defendants argued in the alternative that Veneziano acted with the apparent authority of the plaintiff. In addressing this argument, the court first set forth the law of apparent authority. "[A]pparent authority is that semblance of authority which a principal, through his own acts or inadvertences, causes or allows third persons to believe his agent possesses. . . . Consequently, apparent authority is to be determined, not by the agent's own acts, but by the acts of the agent's principal. . . . The issue of apparent authority is one of fact to be determined based on two criteria. . . . First, it must appear from the principal's conduct that the principal held the agent out as possessing sufficient authority to embrace the act in question, or knowingly permitted [the agent] to act as having such authority. . . . Second, the party dealing with the agent must have, acting in good faith, reasonably believed, under all the circumstances, that the agent had the necessary authority to bind the principal to the agent permitted [the agent] to act as having such authority to the agent's action." (Internal quotation marks omitted.) *Ackerman* v. *Sobol Family Partnership, LLP*, supra, 298 Conn. 508–509.

[7] See *Ferreira* v. *Pringle*, 255 Conn. 330, 345, 766 A.2d 400 (2001) (factual allegations in pleadings on which case is tried are judicial admissions and hence irrefutable as long as they remain in case).

The trial court then found the defendants' apparent authority argument unpersuasive for several reasons. First, there was no evidence of a specific agreement between the defendants and Veneziano to either lend funds or to sell shares to the defendants in 2010–2011. In the absence of an agreement, the contention that Veneziano had apparent authority to make an agreement on behalf of the plaintiff is unavailing.

Second, the court found that the defendants failed to prove that Veneziano was acting with apparent authority to provide shares to them. Although there is evidence that Veneziano was listed as a "control person" of the plaintiff, that fact does not show that he apparently was authorized by the plaintiff to engage in stock transactions or to issue shares of stock. Third, the court found that there was no evidence showing that the defendants, acting in good faith, reasonably believed, under all of the circumstances, that Veneziano had the authority necessary to bind the plaintiff. Thus, the court concluded, the defendants had failed to prove their special defense concerning apparent authority, namely, that Veneziano had the apparent authority to execute a contract on the plaintiff's behalf concerning shares of stock in the plaintiff.

With respect to the first statute of limitations special defense pleaded by the defendants, § 52-577, the court found that the defendants appeared to base the special defense on the erroneous premise that the plaintiff's declaratory judgment action was, in fact, an action to collect on a note or one asserting fraud or statutory theft, or a civil conspiracy between Veneziano and the defendants for the defendants to acquire shares in the plaintiff for less than full value. The defendants contended that, because fraud and statutory theft are governed by the three year limitation period of § 52-577,[8]

[8] General Statutes § 52-577 provides: "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of."

the plaintiff's action was time barred. The defendants pleaded other statutes of limitations, such as General Statutes § 52-576, which provides a six year period for actions founded on contract.

The court recited: "[I]n analyzing whether a declaratory judgment action is barred by a particular statutory period of limitations, a court must examine the underlying claim or right on which the declaratory action is based."[9] *Wilson* v. *Kelley*, 224 Conn. 110, 116, 617 A.2d 433 (1992); id., 121–22 (declaratory judgment action challenging manner in which taxable real property was assessed was barred by statute of limitations). "[I]f a statute of limitations would have barred a claim asserted in an action for relief other than a declaratory judgment, then the same limitation period will bar the same claim asserted in a declaratory judgment action." Id., 116.

In contrast, the court explained that "an action for a declaratory judgment in this state should be subject to equitable defenses such as laches when the underlying cause of action on which it is based sounds in equity." *Caminis* v. *Troy*, 112 Conn. App. 546, 559–60, 963 A.2d 701 (2009), aff'd on other grounds, 300 Conn. 297, 12 A.3d 984 (2011); id., 548 (declaratory judgment action regarding littoral rights and property boundaries). In *Caminis*, this court cited with approval to *Plymouth* v. *Church-Dlugokenski*, 48 Conn. Supp. 481, 488 n.7, 852 A.2d 882 (2003), a declaratory judgment action to

[9] The purpose of a declaratory judgment action as authorized by § 52-29, "is to secure an adjudication of rights where there is a substantial question in dispute or a substantial uncertainty of *legal relations* between the parties." (Emphasis in original; internal quotation marks omitted.) *Wilson* v. *Kelley*, 224 Conn. 110, 115, 617 A.2d 433 (1992). "[D]eclaratory relief is a mere procedural device by which various types of substantive claims may be vindicated." (Internal quotation marks omitted.) Id., 115–16. "Implicit in these principles is the notion that a declaratory judgment action must rest on some cause of action that would be cognizable in a nondeclaratory suit." Id., 116.

determine whether a bond referendum was valid, in which the Superior Court "determined that the defendant's counterclaim for a declaratory judgment was subject to laches because the ultimate remedy . . . sought, namely, to declare the referendum and approval of the bond issue void, was akin to that of an injunction and was quasi-equitable in nature." (Internal quotation marks omitted.) *Caminis* v. *Troy*, supra, 560.

The court in the present case found that the relief sought in the plaintiff's complaint is akin to that of an injunction, in that it seeks to prevent the defendants from acting as shareholders of the plaintiff with rights to own, to possess, and to vote the shares at issue. The court found that the complaint is not predicated on a note or a contract or on a conspiracy and does not plead the elements of fraud or statutory theft. The court, therefore, concluded that because the remedy the plaintiff sought is equitable in nature, the claim is subject to equitable defenses, but is not barred by the limitation periods set forth in § 52-577 and the other statutes of limitation alleged in the defendants' first special defense.

The court also addressed the defendants' remaining special defenses and found that they were unavailing.[10] Having found against the defendants with respect to the remainder of their special defenses, the court stated that it need not consider the legal issues raised by the plaintiff by way of avoidance and turned its attention to the plaintiff's remedy.[11]

Noting again that a trial court has "wide discretion to render a declaratory judgment unless another form of action clearly affords a speedy remedy as effective,

[10] Specifically, the court found that the defendants had not proven their special defense of laches and spoliation of evidence. On appeal, the defendants have not challenged the court's findings and conclusions as to laches and spoliation. We, therefore, need not address them.

[11] We agree that it was not necessary for the trial court to address the plaintiff's by way of avoidance pleading.

convenient, appropriate and complete"; *England* v. *Coventry*, 183 Conn. 362, 365, 439 A.2d 372 (1981); the court found that a declaratory judgment was warranted, as the plaintiff had proved that the defendants are not legitimate shareholders of the corporation.[12] The court concluded that a declaratory judgment is warranted, as no other remedy would be as effective, convenient, appropriate and complete. The court, therefore, rendered judgment declaring that the defendants are not lawfully shareholders of the plaintiff.[13] The defendants appealed.

The defendants' only claim on appeal is that the plaintiff alleged a claim of tortious financial misconduct and, therefore, the trial court improperly concluded that the declaratory judgment action was not barred by § 52-577.[14] We disagree.

"As an appellate court, our review of trial court decisions is limited to determining whether their legal conclusions are legally and logically correct, [and] supported by facts set out in the memorandum of decision."

[12] The court found that Caliendo testified that the plaintiff was prepared to refund the net $30,000 received from the defendants if the court found that they were not lawfully shareholders. The plaintiff's counsel acknowledged at oral argument before this court that it is obligated to make the $30,000 payment to the defendants if the judgment of the trial court in the present action is affirmed.

[13] On February 13, 2019, the defendants filed a motion to reargue in which they contended that the court inconsistently applied the plaintiff's judicial admissions and shifted the burden of proof to the defendants to disprove the judicially admitted facts, and that the court should have applied § 52-577 to bar the plaintiff's claim. The plaintiff opposed the motion to reargue. On February 28, 2019, the court issued a memorandum of decision denying the defendants' motion to reargue. The defendants have not claimed on appeal that the court improperly denied their motion to reargue.

[14] In their brief, the defendants make certain representations of fact and argue that there is no support for several of the court's factual findings or that those findings are otherwise erroneous. The plaintiff argues that we should not consider those claims or arguments because the defendants did not include them in their statement of issues and they are inadequately briefed. We agree with the plaintiff. See Practice Book § 67-4; *Label Systems Corp.* v. *Aghamohammadi*, 270 Conn. 291, 300 n.9, 82 A.2d 703 (2004) (court refused to consider claims not identified as issues in either preliminary statement of issues or within statement of issues in brief); *Coppola Construction Co.* v. *Hoffman Enterprises Ltd. Partnership*, 157 Conn. App. 139, 179,

(Internal quotation marks omitted.) *New England Rock Services, Inc.* v. *Empire Paving, Inc.*, 53 Conn. App. 771, 775, 731 A.2d 784, cert. denied, 250 Conn. 921, 738 A.2d 658 (1999). The defendants' claim is circumscribed by the allegations of the plaintiff's complaint. "Pleadings have an essential purpose in the judicial process. . . . The purpose of pleadings is to apprise the court and opposing counsel of the issues to be tried. . . . For that reason, [i]t is imperative that the court and opposing counsel be able to rely on the statement of issues set forth in the pleadings." (Internal quotation marks omitted.) *Kovacs Construction Corp.* v. *Water Pollution & Control Authority*, 120 Conn. App. 646, 659, 992 A.2d 1157, cert. denied, 297 Conn. 912, 995 A.2d 639 (2010). "Construction of pleadings is a question of law." Id. Our interpretation of a trial court's judgment also is a question of law subject to plenary review. See *Sosin* v. *Sosin*, 300 Conn. 205, 217, 14 A.3d 307 (2011).

The defendants contend that the underlying claim in the present declaratory judgment action is tortious financial misconduct to which § 52-577 applies. The plaintiff argues that its declaratory judgment action is equitable, in the nature of an injunction, and that it is not subject to or barred by a statute of limitations. We agree with the plaintiff.

"[I]n analyzing whether a declaratory judgment action is barred by a particular statutory period of limitations, a court must examine the underlying claim or right on which the declaratory action is based. . . . It necessarily follows that if a statute of limitations would have barred a claim asserted in an action for relief other than a declaratory judgment, then the same limitation period will bar the same claim asserted in a declaratory judgment action." (Citations omitted; internal quotation marks omitted.) *Wilson* v. *Kelley*, supra, 224 Conn. 116.

117 A.3d 876 (legal analysis rather than mere assertion required for issue to be adequately briefed), cert. denied, 318 Conn. 902, 122 A.3d 631 (2015), and cert. denied, 318 Conn. 902, 123 A.3d 882 (2015).

Our plenary review of the plaintiff's complaint discloses the following allegations. The defendants were original owners of 300 shares of stock in the plaintiff in 1998, evidenced by Certificate No. 2, and, in that same year, they returned the certificate and were reimbursed their $30,000 investment. In June, 2011, stock Certificate No. 2 apparently was returned to the defendants in exchange for $30,000, without corporate authorization. The complaint further alleges that because the shares of stock were returned to the defendants without corporate authorization, the plaintiff contests whether the defendants are lawfully shareholders with rights to own, to possess, and to vote said stock. Importantly, the complaint does not allege that the defendants engaged in fraud, civil conspiracy, or other tortious financial misconduct. The complaint merely alleges that there is a bona fide dispute as to the defendants' ownership of shares of stock in the plaintiff.

The plaintiff raised the issue of the defendants' conduct by way of avoidance to the defendants' special defenses. By way of avoidance, the plaintiff alleged that the defendants conspired with Veneziano to avoid disclosure of their purported stock interest in the plaintiff to creditors and to the bankruptcy court in connection with a certain bankruptcy petition filed by one or both of the defendants. As a result of the aforesaid allegations, the plaintiff alleged that the defendants were estopped from asserting their special defenses.

At trial, the plaintiff presented evidence in support of its allegations in avoidance of the defendants' special defenses. The court, however, did not have to address those allegations because it found that the plaintiff had proved the allegations of its complaint and that the defendants had failed to prove their special defenses. As a consequence, not only did the plaintiff not allege that the defendants engaged in any tortious financial conduct with respect to the 300 shares of the plaintiff's stock, but also the trial court never found that the defendants engaged in such conduct.

On appeal, the defendants have ignored the plain language of the complaint and the court's specific findings. Rather, the defendants' appellate claim is predicated in large measure on the trial court's having taken judicial notice of *Village Mortgage Co.* v. *Veneziano*, 175 Conn. App. 59, 167 A.3d 430, cert. denied, 327 Conn. 957, 172 A.2d 205 (2017), in which Veneziano was found to have engaged in various acts of financial misconduct while he was president of the plaintiff. Id., 61. The defendants' reliance on the trial court's discussion of this court's decision in *Village Mortgage Co.* is misplaced. Our review of the court's memorandum of decision in the present case reveals that the court took judicial notice of the plaintiff's suit against Veneziano because the facts of that case related to the defendants' laches special defense.[15] In particular, the factual findings in *Village Mortgage Co.* explained how the plaintiff came to learn that Certificate No. 2 was returned to the defendants in 2011, how Veneziano acted without actual or apparent authority to issue the plaintiff's stock, and why the plaintiff did not delay unreasonably in bringing the present action. See *Village Mortgage Co.* v. *Veneziano*, supra, 65–66. The trial court in the present case made no finding that either of the defendants participated in any of Veneziano's misconduct.[16] Nevertheless, the defendants argue that the court, in its memorandum of decision, *implied* that the defendants conspired with Veneziano. We are not persuaded. Not only does the complaint fail to allege that the defendants conspired with Veneziano, but also, the court, in its memorandum of decision, does not imply that they did.

[15] It is well known that a court may take judicial notice of the file in another case, whether or not the other case is between the same parties. See, e.g., *Jewett* v. *Jewett*, 265 Conn. 669, 678 n.7, 830 A.2d 193 (2003). "[J]udicial notice . . . meets the objective of establishing facts to which the offer of evidence would normally be directed." (Internal quotation marks omitted.) Id.

[16] In the plaintiff's action against Veneziano, Veneziano was found liable for conversion, statutory theft, and embezzlement. See *Village Mortgage Co.* v. *Veneziano*, supra, 175 Conn. App. 61.

By taking judicial notice of the plaintiff's case against Veneziano, the court had an evidentiary basis on which to find facts that explained how Certificate No. 2 was returned to the defendants in 2011 and how the plaintiff learned of Veneziano's misconduct. Those facts also support the testimony of Giroliman and Caliendo, which the court credited, that Veneziano lacked actual or apparent authority to issue shares of stock to the defendants. Veneziano's financial misconduct and lack of authority were relevant to whether the defendants were lawfully shareholders in the plaintiff, regardless of whether they participated in Veneziano's misconduct.

Having reviewed the allegations of the complaint ourselves, we agree with the court's interpretation that the allegations are not predicated on a note or agreement and that the plaintiff did not plead the elements of fraud, statutory theft, or conspiracy. Although the defendants claim that the complaint alleges tortious financial misconduct on their part, they have not identified those allegations. The defendants have overlooked the fact that the complaint does not allege any wrongdoing against them. Furthermore, the plaintiff did not seek damages, but a judicial determination as to whether the defendants are lawfully shareholders of the plaintiff. The court was called on to resolve competing claims for 300 shares of the plaintiff's stock. The determination of who had the superior claim is inherently an equitable one, particularly where there is no claim or finding that any of the parties engaged in tortious financial misconduct or breached a contract. We therefore conclude that the trial court correctly determined that no statute of limitations applies to bar the plaintiff's declaratory judgment action, rather, that the special defense of laches applies and that the defendants failed to prove that special defense.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MUHAMMAD A. QAYYUM
(AC 42456)

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

Syllabus

Convicted, after a jury trial, of the crimes of conspiracy to sell narcotics and possession of narcotics with intent to sell, the defendant appealed to this court. *Held*:

1. The defendant could not prevail on his claim that the trial court violated his due process rights by shifting the burdens of proof and persuasion to him to prove that he had a legitimate source of income, which was based on his claim that the court erred in permitting a state Department of Labor representative, R, to testify that the defendant had no reportable wages, thereby suggesting that he earned a living selling drugs: the defendant's claim challenging R's testimony was evidentiary rather than constitutional in nature; moreover, the trial court did not abuse its discretion in admitting R's testimony and determining that the probative value of the evidence of the defendant's lack of reportable wages outweighed its prejudicial effect, as that evidence was probative of whether the defendant was engaged in trafficking drugs and was not unduly prejudicial because R's testimony was not presented in a manner that would have improperly aroused the emotions of the jurors; furthermore, even if this court assumed that the trial court abused its discretion in admitting R's testimony, any error was harmless, as the defendant failed to satisfy his burden of proving that it was more probable than not that the admission of the testimony substantially affected the verdict.
2. The defendant's claim that the trial court erred in admitting impermissible expert opinion testimony from F, a police detective, on the ultimate issue of whether the defendant intended to sell narcotics was unavailing; that court did not abuse its discretion in admitting F's testimony, as his testimony concerned only general factors that he would consider when deciding to charge a person with possession of narcotics with intent to sell, including the general behavior of drug users and drug traffickers, and the prosecutor did not ask F for his specific opinion about whether the defendant possessed narcotics with intent to sell, and, therefore, F never expressed his opinion on the ultimate issue before the jury; moreover, even if this court assumed that the trial court improperly admitted F's testimony, the defendant failed to satisfy his burden of proving that the admission of F's testimony more probably than not affected the verdict and therefore was harmful.

Argued September 9—officially released December 22, 2020

Procedural History

Two part substitute information charging the defendant, in the first part, with the crime of conspiracy to sell narcotics and two counts of the crime of possession of narcotics with intent to sell, and, in the second part, with previously having been convicted of the crime of sale of narcotics, brought to the Superior Court in the judicial district of Litchfield at Torrington, where the first part of the information was tried to the jury before *Danaher*, *J.*; verdict of guilty; thereafter, the defendant was presented to the court, *Danaher*, *J.*, on a plea of guilty to the second part of the information; judgment of guilty in accordance with the verdict and plea, from which the defendant appealed to this court. *Affirmed.*

Robert L. O'Brien, assigned counsel, with whom, on the brief, was *William A. Adsit*, assigned counsel, for the appellant (defendant).

Linda F. Currie-Zeffiro, assistant state's attorney, with whom, on the brief, were *Dawn Gallo*, state's attorney, and *David Shannon*, supervisory assistant state's attorney, for the appellee (state).

Opinion

LAVERY, J. The defendant, Muhammad A. Qayyum, appeals from the judgment of conviction, rendered after a jury trial, of one count of conspiracy to sell narcotics in violation of General Statutes §§ 53a-48 and 21a-277 (a) and two counts of possession of narcotics with intent to sell in violation of § 21a-277 (a). On appeal, the defendant claims that the trial court (1) violated his due process rights by shifting the burdens of proof and persuasion to him to prove that he had a legitimate source of income and (2) erred by allowing impermissible expert opinion testimony regarding his intent to sell narcotics. We affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to our discussion. On April 12, 2017, Torrington Police Officer Matthew Faulkner went to 356 Migeon Avenue in Torrington to execute a search warrant following his investigation regarding possible drug sales being conducted from unit 1 North, the apartment of Oscar Pugh. Officer Faulkner surveilled the residence for approximately one hour. During that time, two people separately arrived at Pugh's apartment but departed quickly. Officer Faulkner also saw the defendant arrive in a dark gray Infiniti sedan bearing Massachusetts license plates, which the defendant had rented from Hertz. The defendant had rented cars from Hertz for sixty-three days during the period from January, 2017, until his arrest in April, 2017, with the rentals costing between $2500 and $2600. Officer Faulkner frequently had observed the defendant at Pugh's apartment over these preceding months.

Additional police arrived approximately one hour after Officer Faulkner began his surveillance. The police executed the search warrant and detained the defendant and Pugh. The defendant eventually admitted that he had narcotics in his front pockets, and Officer Faulkner then proceeded to search them. Inside, he found $267 in small bills, seven wax folds of heroin, and two "dubs" of crack cocaine.[1] The police did not find any drug paraphernalia on the defendant or in his rental car, but a canine officer alerted on the car's trunk and door.

The police also searched Pugh. They found six wax folds of heroin and $2 in his pockets and a single dub of crack cocaine in his sock. They also found seventeen dubs of crack cocaine in between the couch cushions where Pugh was seated, along with various items of drug paraphernalia such as crack pipes and cut straws. Additionally, they found a handwritten ledger documenting narcotics sales. Pugh admitted that the narcotics found

[1] Officer Faulkner testified at trial that a "dub" is a piece of crack cocaine weighing .2 grams.

on his person were his and that he was a heavy user, but he denied that the other narcotics in the apartment belonged to him. Other than the $2 found on Pugh's person, the police did not find any other money within the apartment.

The defendant was charged by way of a substitute long form information with one count of conspiracy to sell narcotics in violation of §§ 53a-48 and 21a-277 (a) and two counts of possession of narcotics with intent to sell in violation of § 21a-277 (a). The defendant also was charged in a part B information with having twice been convicted of the sale of narcotics in violation of § 21a-277 (a). The defendant pleaded not guilty and elected to be tried by a jury. On August 16, 2018, a jury of six found the defendant guilty of all three counts. Later that day, the defendant pleaded guilty to the two counts of the part B information. On November 9, 2018, the court sentenced the defendant to a total effective term of twenty years of incarceration, execution suspended after twelve years, with five years of probation. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the trial court violated his due process rights by shifting the burdens of proof and persuasion to him. Specifically, he argues that the court erred by permitting the state to present evidence that he had no reportable wages, thereby suggesting that he earned a living selling drugs, and thus placing the burden on him to prove that he had a legitimate source of income. In response, the state argues that the defendant's challenge to the disputed testimony presents an evidentiary issue rather than a constitutional one and that the trial court did not abuse its discretion in determining that the probative value of the evidence of the defendant's lack of reportable wages was not outweighed by its prejudicial effect. We agree with the state.

The following additional facts are relevant to this claim. At trial, Pugh testified that he had known the defendant for more than one year and that the defendant had told him that he needed a place to sell drugs. Pugh further testified that, in the year preceding their arrests, the defendant would come by his apartment every few days and that he gave Pugh a reduced price for the drugs that Pugh used in exchange for using Pugh's apartment to sell drugs. Pugh saw the defendant sell drugs in his apartment but never saw the defendant use any heroin or crack cocaine.

After the first day of evidence, defense counsel informed the court that he objected to the state's anticipated presentation of testimony from David Ricciuti, a representative from the Department of Labor (department). After defense counsel questioned the relevance of such testimony, the prosecutor responded that the state intended to call Ricciuti to testify that the defendant had no reportable wages for the relevant time period prior to his arrest. In response, defense counsel preliminarily argued that such evidence was irrelevant, not probative of any issues in the case, prejudicial, and might "play on certain biases that people hold, implicit biases as well." The court informed the parties that it would entertain argument on the issue the following morning, and the prosecutor stated his intent to rely on *State* v. *Perry*, 58 Conn. App. 65, 68–69, 751 A.2d 843, cert. denied, 254 Conn. 914, 759 A.2d 508 (2000), in support of the admissibility of Ricciuti's testimony. The next morning, defense counsel did not argue that the evidence was irrelevant. Instead, he stated that his objection was "primarily an evidentiary objection based on [the expected testimony] being overly prejudicial and more prejudicial than probative" because it did not demonstrate "an imminent financial burden on the defendant." Defense counsel argued that suggesting that someone is more likely to commit a crime because they do not have a job "inappropriately plays on biases that people may

have, it fits into a stereotype and . . . runs the risk of arousing the jury's potential prejudices and implicit biases . . . ." Defense counsel conceded that the issue was not "of a constitutional magnitude," although he did argue that admitting the evidence "would also shift the burden to [the defendant] to have to rebut the evidence, [which] would be impermissible or improper . . . ." In response, the prosecutor argued that, when considered with other evidence, specifically the facts that the defendant had spent several thousands of dollars on rental cars during the months leading up to his arrest and had $267 and narcotics in his pocket, the evidence concerning his lack of reportable wages was more probative than prejudicial. In particular, the prosecutor argued that Ricciuti's testimony, coupled with the other evidence, would permit the jury to infer that the defendant's otherwise unexplained wealth came from drug trafficking. The court, relying on this court's opinion in *Perry*, overruled the defendant's objection. The court reasoned that Ricciuti's testimony was "not simply evidence . . . that the defendant does not have great resources. It's some evidence that he doesn't have a visible source of income . . . and yet he has funds to expend." The court noted that this court in *Perry* held that similar evidence was admissible and not unduly prejudicial. The court further noted that the evidence that the state sought to introduce was significantly less detailed than what was offered in *Perry* and, therefore, less prejudicial.

On direct examination, Ricciuti testified that the defendant did not have any wages in either 2016 or 2017 that were reported to the department. He acknowledged, however, that some people have "under the table jobs," for which the department would have no record. He also admitted on cross-examination that income from self-owned businesses, Social Security disability benefits, rental properties, and lottery winnings are not reportable wages.

During closing argument, defense counsel reminded the jury of Ricciuti's testimony and commented that the state had presented no testimony that it had checked to see if the defendant had other sources of income. He also emphasized that the fact that the defendant did not have any taxable wages did not necessitate a finding that he sold drugs because there are numerous types of legitimate forms of income that would not need to be reported to the department.

We now set forth our standard of review and the relevant legal principles governing this claim. "[U]nless an evidentiary ruling involves a clear misconception of the law, [t]he trial court has broad discretion in ruling on the admissibility . . . of evidence. . . . The 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 . . . . Moreover, evidentiary rulings will be overturned on appeal only where there was an abuse of discretion and a showing by the defendant of substantial prejudice or injustice." (Internal quotation marks omitted.) *State* v. *Rosa*, 104 Conn. App. 374, 377–78, 933 A.2d 731 (2007), cert. denied, 286 Conn. 906, 944 A.2d 980 (2008).

"[E]vidence is relevant if it has a tendency to establish the existence of a material fact. . . . Relevant evidence is evidence that has a logical tendency to aid the trier [of fact] in the determination of an issue. . . . One fact is relevant to another if in the common course of events the existence of one, alone or with other facts, renders the existence of the other either more certain or more probable. . . .

"Although relevant, evidence may be excluded by the trial court if the court determines that the prejudicial effect of the evidence outweighs its probative value. . . . Of course, [a]ll adverse evidence is damaging to

one's case, but it is inadmissible only if it creates undue prejudice so that it threatens an injustice were it to be admitted. . . . The test for determining whether evidence is unduly prejudicial is not whether it is damaging to the defendant but whether it will improperly arouse the emotions of the jury. . . . The trial court . . . must determine whether the adverse impact of the challenged evidence outweighs its probative value." (Internal quotation marks omitted.) Id., 378.

In *Perry*, this court noted: "Numerous courts have recognized that evidence of an imminent financial burden on the defendant is admissible for the purpose of proving motive. . . . Financial condition and employment status may be relevant to a defendant's motive to commit a crime and, thus, are admissible on purely nonconstitutional evidentiary grounds." (Citation omitted; internal quotation marks omitted.) *State* v. *Perry*, supra, 58 Conn. App. 68–69. The defendant argues that *Perry* limited the admissibility of such evidence to the issue of motive and that the record shows that the state did not proffer Ricciuti's testimony for that purpose. Consequently, the defendant argues, the testimony had no probative value. Furthermore, he argues that the admission of Ricciuti's testimony impermissibly placed a burden on him to prove that he had a legitimate source for the money the state proved he had in his possession or had recently spent. We are not persuaded.

We note at the outset that defense counsel conceded that his objection to Ricciuti's proposed testimony was evidentiary in nature rather than one of constitutional magnitude. He objected to the proposed testimony only on the ground that it was more prejudicial than probative, and, although he argued briefly that admitting such testimony would impermissibly shift the burdens of proof and persuasion to the defendant, he did not suggest that doing so would violate the defendant's due process rights. Moreover, this court previously has held

that evidence of a defendant's financial condition or employment status is admissible on purely nonconstitutional evidentiary grounds. See *State* v. *Perry*, supra, 58 Conn. App. 68–69; see also *State* v. *Rosa*, supra, 104 Conn. App. 376 (unpreserved claim that trial court improperly admitted evidence showing that defendant was unemployed at time of incident concerned evidentiary and not constitutional matter, and was not reviewable). The defendant's attempt to turn his evidentiary claim into a constitutional one by arguing that the admission of Ricciuti's testimony concerning his lack of reportable wages violated his due process rights by unconstitutionally shifting the burden on him to prove he had a legitimate source of income is thus unavailing.[2] "Simply [p]utting a constitutional tag on a nonconstitutional claim will no more change its essential character than calling a bull a cow will change its gender." (Internal quotation marks omitted.) *State* v. *Rosa*, supra, 377. We, thus, review the defendant's evidentiary claim concern-

[2] Although the state has not raised the issue of preservation, we also note that the defendant's claim that the court erred by permitting Ricciuti to testify about his lack of reportable wages in violation of his due process rights was not preserved properly. "Appellate review of evidentiary rulings is ordinarily limited to the specific legal [ground] raised by the objection of trial counsel. . . . To permit a party to raise a different ground on appeal than [that] raised during trial would amount to trial by ambuscade, unfair both to the trial court and to the opposing party." (Internal quotation marks omitted.) *State* v. *Stenner*, 281 Conn. 742, 755, 917 A.2d 28, cert. denied, 552 U.S. 883, 128 S. Ct. 290, 169 L. Ed. 2d 139 (2007). Here, defense counsel conceded that his objection to Ricciuti's testimony was evidentiary in nature, and failed to make any argument that the admission of such testimony would violate the defendant's constitutional rights. Consequently, the court ruled on the admissibility of Ricciuti's testimony on purely evidentiary grounds. The defendant's claim on appeal that the admission of such testimony violated his due process rights is thus unpreserved. See id. (holding that defendant's constitutional claim was unpreserved when defendant objected on different, evidentiary basis during trial). Although a defendant is entitled to review of an unpreserved constitutional claim pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), we have concluded that the defendant's claim is not constitutional in nature. Accordingly, we review the defendant's claim concerning Ricciuti's testimony on the merits of the evidentiary ground raised at trial.

ing the admission of Ricciuti's testimony for an abuse of discretion.

As to the merits of the defendant's evidentiary claim, we conclude that the defendant misreads *Perry* and that his reliance on it is misplaced. This court did not state in *Perry* that evidence of lack of employment is relevant only to motive. We merely stated that in that case it was relevant to motive. See *State* v. *Perry*, supra, 58 Conn. App. 68–69. We see no reason why such evidence could not be relevant to other issues such as intent, or, as in this case, to assist the jury in determining whether the defendant actually was engaging in the conduct that constituted the crime. The fact that the defendant had access to money despite having no reportable wages, combined with the other evidence presented by the state, makes it more likely that he was engaged in drug trafficking to procure that money. That evidence tends to make a fact more likely is all that is required to make the evidence relevant. As this court stated in a similar context: "Although evidence of the defendant's unemployment may [be] far from conclusive, [e]vidence is not rendered inadmissible because it is not conclusive. All that is required is that the evidence tend to support a relevant fact even to a slight degree . . . ." (Internal quotation marks omitted.) *State* v. *Rosa*, supra, 104 Conn. App. 378–79. Ricciuti's testimony thus had probative value.

Furthermore, the evidence was not unduly prejudicial. Although evidence of a defendant's chronic poverty may improperly arouse the emotions of the jurors in certain circumstances, "we recognize a distinction between evidence of chronic poverty and evidence of unemployment at a relevant time, as even a well-to-do person may be unemployed at times." *State* v. *Rosa*, supra, 104 Conn. App. 379.

In the present case, the state presented evidence of the defendant's lack of reportable wages only from the

year prior to his arrest through the time of his arrest. In addition, Ricciuti's testimony was very brief, and he conceded both on direct examination and on cross-examination that the defendant could have had sources of income, other than drug trafficking, that would not have been reported to the department. His testimony was not presented in a manner that improperly would have aroused the emotions of the jurors or invoked any feelings of bias, whether explicit or implicit. For these reasons, we agree with the state that the trial court acted within its discretion when it admitted Ricciuti's testimony concerning the defendant's lack of reportable wages.

Additionally, although it was not an abuse of discretion to admit Ricciuti's testimony, we further note that such admission was not harmful. "In order to establish reversible error on an evidentiary impropriety . . . the defendant must prove both an abuse of discretion and a harm that resulted from such abuse. . . . When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful." (Citation omitted; internal quotation marks omitted.) *State* v. *Alexis*, 194 Conn. App. 162, 170, 220 A.3d 38, cert. denied, 334 Conn. 904, 219 A.3d 800 (2019). "[W]hether [an improper ruling] is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) Id.

In the present case, the defendant has failed to meet his burden of demonstrating that the admission of Ricciuti's testimony concerning his lack of reportable wages was harmful. First, the state's case against the defendant was strong. Pugh testified extensively about the arrangement he had with the defendant whereby the defendant gave Pugh a reduced price for drugs in exchange for using Pugh's apartment to sell them. The state also presented evidence that drug paraphernalia was found in Pugh's apartment but that none was found on the defendant or in his rental car. Moreover, the state presented evidence that the defendant had $267 on him in small denominations, that he had seven wax folds of heroin on him along with two dubs of cocaine, that he had spent approximately $2500 on rental cars in the months leading up to his arrest, and that a canine officer twice had alerted on the defendant's rental car, indicating a residual odor of narcotics. The state, therefore, presented sufficient evidence that the jury reasonably and independently could have used to find the defendant guilty of all three charges. Second, Ricciuti's testimony was of negligible importance to the state's case. As discussed previously in this opinion, the state had a strong case, and the prosecutor referred to Ricciuti's testimony only once during his closing argument and not at all during his rebuttal argument. It, thus, cannot be said that Ricciuti's testimony was vital to the state's case. Third, the defendant had ample opportunity to cross-examine Ricciuti. Ricciuti, in fact, testified on cross-examination that income from self-owned businesses, Social Security disability benefits, rental properties, and lottery winnings were not reportable wages. In light of these considerations, even if we were to assume that the trial court abused its discretion in admitting Ricciuti's testimony, we would conclude that any error was harmless. The defendant has failed to meet his burden of proving that it was more probable than not that the admission of Ricciuti's testimony substantially affected the verdict.

II

We next turn to the defendant's claim that the trial court erred by admitting impermissible expert opinion testimony. Specifically, he argues that the court impermissibly permitted the state's expert, Scott Flockhart, a detective in the New Milford Police Department, to opine on the ultimate issue of the case, namely, whether the defendant intended to sell narcotics. In response, the state argues that the prosecutor elicited testimony from Flockhart concerning only general factors that he would consider when deciding to charge a person with possession of narcotics with intent to sell. The state further contends that such testimony was proper because the prosecutor did not ask specifically for Flockhart's opinion about whether the defendant possessed the narcotics with the intent to sell them. We agree with the state.

The following additional facts are relevant to this claim. During trial, the state presented the expert testimony of Flockhart, who testified about his extensive experience throughout his career dealing with narcotics. During his testimony, Flockhart explained that people who traffic narcotics frequently use rental cars to avoid detection. He also testified that narcotics traffickers often enlist intermediaries in an effort to insulate themselves from the actual criminal activity.

The prosecutor then attempted to ask Flockhart a hypothetical question by asking him: "If you came across a person with two $20 bags of crack [cocaine] and seven bags of heroin . . . would you be able to say whether that person possessed those drugs to use or possessed them with an intent to sell them?" Defense counsel objected to this question on the ground that it "[went] to the ultimate issue." Outside the jury's presence, defense counsel argued that the "hypothetical mirrors the facts of the case so closely that essentially the witness [was] being asked to give an opinion on the ultimate issue in this case." The court stated that

the question, as phrased, "[came] too close to asking this expert as to whether he [had] an opinion as to whether someone who's exactly situated like [the] defendant was engaged in possession of narcotics with intent to sell." The court cautioned the state to "[ask] the questions in a more general way . . . ." Shortly thereafter, the following exchange occurred between the prosecutor and Flockhart:

"Q. What type of factors do you look for, what type of things do you consider [when deciding to charge a person with possession of narcotics with intent to sell] . . . .

"A. We look [at] how the drugs are packaged [and] quantities. [We] look for paraphernalia. If somebody is an addict, they're most likely gonna have some type of paraphernalia on them.

"Q. Okay. Well, in your experience, do addicts generally, are they—are they ever far from their paraphernalia?

"A. Usually not, no.

"Q. [As] to how it's packaged, what are you looking for, specifically?

"A. Whether it's . . . broken down . . . to smaller quantities in smaller bags.

"Q. Smaller quantities would mean what, [regarding] that decision-making process?

"A. Would lead towards the possession with the intent to sell, because that's usually how it's broken up for street level distribution.

"Q. What else would you look for?

"A. You would take a look at [the person's hygiene] . . . track marks on their arms . . . [and] if they're gonna be getting dope sick.

* * *

"Q. What about money, is that a consideration at all?

"A. Yes.

"Q. Could you tell the jury how that would weigh in?

"A. Most addicts when they go to buy . . . their drug of choice . . . usually [they] go with an amount of money to buy a certain amount of that drug . . . if they have $100 on [them], they aren't gonna go and buy just $20 worth. . . .

"Q. Yes or no—well, if you found a large amount of money on a person versus a negligible amount of money, how would that factor into your decision?

"A. Most addicts aren't gonna have a large amount of money. . . .

"Q. And what about the denominations of money, would that factor into your decision at all . . . ?

"A. Yes."

Defense counsel did not object to any of the questions asked in this exchange. Following cross-examination, the prosecutor elicited additional testimony from Flock hart in which Flockhart testified that he does not focus on a single factor when deciding whether to charge a person with possession of narcotics with intent to sell but, rather, that he looks at all these things in the aggregate.

"An expert witness ordinarily may not express an opinion on an ultimate issue of fact, which must be decided by the trier of fact. . . . Experts can [however] sometimes give an opinion on an ultimate issue where the trier, in order to make intelligent findings, needs expert assistance on the precise question on which it must pass." (Internal quotation marks omitted.) *Hodges* v. *Commissioner of Correction*, 187 Conn. App. 394, 404, 202 A.3d 421, cert. denied, 331 Conn. 912, 203 A.3d

1246 (2019). "A trial court has broad discretion in admitting expert testimony concerning the sale of illicit drugs." (Internal quotation marks omitted.) *State* v. *Nelson*, 17 Conn. App. 556, 565, 555 A.2d 426 (1989). For example, "[e]xpert witnesses may testify that certain behavior by a defendant or his possession of particular items is conduct similar to that engaged in by the typical drug dealer. . . . A police officer, who is qualified as an expert witness, may even testify that, in light of the officer's personal observations of his conduct, it appeared that a defendant was engaged in narcotics sales." (Citation omitted.) *State* v. *Vilalastra*, 207 Conn. 35, 45, 540 A.2d 42 (1988). It also is proper for a prosecutor "to ask [a] police officer whether, in his expert opinion it is the common practice of drug sellers . . . to work with the items found. . . . An expert may give his opinion about the quantity of narcotics that a drug dealer might possess." (Citation omitted.) *State* v. *Nelson*, supra, 566.

In the present case, we agree with the state that the trial court did not abuse its discretion in admitting Flockhart's testimony.[3] During trial, Flockhart merely testified about the general behavior of drug users and

[3] Although the state also has not raised the issue of preservation for this claim, we note that the defendant's claim that the trial court improperly admitted Flockhart's testimony was not preserved properly. Defense counsel objected to the prosecutor's initial line of questioning when he attempted to ask Flockhart a hypothetical that closely mirrored the facts of the case. Defense counsel, however, failed to object to the customs and behavior questions that the prosecutor asked after the court instructed him to ask his questions in a more general way. Because defense counsel failed to object to this line of questioning, the defendant's claim concerning Flockhart's testimony following his counsel's objection is unpreserved. See *State* v. *Cromety*, 102 Conn. App. 425, 430, 925 A.2d 1133 (defendant's claim concerning testimony of expert witness was unpreserved evidentiary claim that was not reviewable because defendant failed to object timely to testimony), cert. denied, 284 Conn. 912, 931 A.2d 932 (2007). Although we are not required to review unpreserved evidentiary claims; see *State* v. *Omar*, 136 Conn. App. 87, 98–99, 99 n.3, 43 A.3d 766, cert. denied, 305 Conn. 923, 47 A.3d 883 (2012); we, nevertheless, address the defendant's claim on its merits.

drug traffickers. For example, Flockhart testified that drug users usually do not have large sums of money on them and that they are never far from their drug paraphernalia.

He also testified that, based on his experience, drug traffickers will often break down their narcotics into smaller packages to make distribution easier. Such testimony about the conduct of drug users and traffickers is entirely permissible. See *State* v. *Vilalastra*, supra, 207 Conn. 45; *State* v. *Nelson*, supra, 17 Conn. App. 566. Moreover, following defense counsel's objection, the prosecutor never asked Flockhart for his particularized opinion on the significance of the defendant's possession of money and drugs, and none of Flockhart's answers to the prosecutor's questions can be classified as an expression of his opinion on that topic. Flockhart, therefore, never expressed his opinion on the ultimate issue before the jury, namely, whether the defendant intended to sell narcotics. Accordingly, we conclude that the trial court did not abuse its discretion when it permitted Flockhart's testimony.

Furthermore, even if we were to assume that the admission of Flockhart's testimony was an abuse of discretion, the defendant again has failed to show that its admission was harmful. "The improper admission of opinion testimony that answers a question that a jury should have resolved for itself is not of constitutional significance and is a type of evidentiary error. . . . If the testimony is deemed to have answered a question that was solely for the jury's determination, the burden is on the defendant to show that the admission more probably than not affected the outcome of the verdict." (Citation omitted.) *State* v. *Wright*, 47 Conn. App. 559, 563, 707 A.2d 295, cert. denied, 244 Conn. 917, 714 A.2d 8 (1998).

Here, the state presented ample evidence independent of Flockhart's testimony from which the jury reasonably could have concluded that the defendant

intended to sell the narcotics in his possession. As previously observed, Pugh testified extensively about his dealings with the defendant. Officer Faulkner also corroborated Pugh's testimony by testifying that he had observed the defendant coming and going from Pugh's apartment for months, and another police officer testified that a canine officer had alerted for drugs on the trunk and door of the defendant's rental car. Moreover, the state presented evidence that the defendant had spent approximately $2500 on rental cars in the months leading up to his arrest, despite having no reportable income, and that the police found $267 in small bills on the defendant when they arrested him. Although the defendant argues that Pugh's testimony should be discredited because he was a compromised witness, witness credibility is solely the function of the jury, and it was well within the jury's province to find Pugh's testimony credible. See *State* v. *Michael T.*, 194 Conn. App. 598, 621, 222 A.3d 105 (2019) ("it is the [jury's] exclusive province to weigh the conflicting evidence and to determine the credibility of witnesses" (internal quotation marks omitted)). Accordingly, we conclude that, even if we were to assume that the trial court improperly admitted Flockhart's testimony, the defendant has failed to meet his burden of proving that the admission of his testimony more probably than not affected the verdict.

The judgment is affirmed.

In this opinion the other judges concurred.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 201

THOMAS NASH *v.* ROLAND DUMONT AGENCY, INC., ET AL.
(AC 43417)

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

Argued December 2—officially released December 22, 2020

Plaintiff's appeal from the Superior Court in the judicial district of New London, *Knox*, *J.*

Per Curiam. The judgment is affirmed.

MARK HENDERSON *v.* COMMISSIONER OF CORRECTION
(AC 42195)

Lavine, Prescott and Suarez, Js.*

Argued December 3—officially released December 22, 2020

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Kwak*, *J.*

Per Curiam. The appeal is dismissed.

DOVENMUEHLE MORTGAGE, INC. *v.* FRANK J. JANNIELLO ET AL.
(AC 41071)

Elgo, Alexander and DiPentima, Js.

Argued December 7—officially released December 22, 2020

Named defendant's appeal from the Superior Court in the judicial district of Stamford-Norwalk, *Lee*, *J.*

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

CHAD ST. LOUIS *v.* COMMISSIONER OF CORRECTION
(AC 42856)

Moll, Cradle and Lavery, Js.

Argued December 7—officially released December 22, 2020

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Newson*, *J.*

Per Curiam. The judgment is affirmed.

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

GAIL GALAZAN *v.* ANTONY GALAZAN
(AC 42836)

Moll, Cradle and Lavery, Js.

Argued December 7—officially released December 22, 2020

Defendant's appeal from the Superior Court in the judicial district of Hartford, *Margaret Murphy*, *J.*

Per Curiam. The judgment is affirmed.

RICHARD CAIRES *v.* JPMORGAN CHASE BANK, N.A.
(AC 41746)

Lavine, Prescott and Suarez, Js.*

Argued December 3—officially released December 22, 2020

Plaintiff's appeal from the Superior Court in the judicial district of Stamford-Norwalk, *Genuario*, *J.*

Per Curiam. The judgment is affirmed.

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

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CASES ARGUED AND DETERMINED

IN THE

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STATE OF CONNECTICUT *v.* ERVIN B.*
(AC 41482)

Alvord, Prescott and DiPentima, Js.

Syllabus

Convicted of the crime of threatening in the second degree, the defendant appealed to this court. The defendant allegedly was involved in a domestic disturbance during which he stabbed his wife in the leg. Over the defendant's objection, the trial court admitted portions of his wife's hearsay statement to a police officer that the defendant "was gonna continue to hurt her more." Neither the defendant nor his wife testified at trial. The defendant claimed that the evidence was insufficient to support a finding that he made a physical threat to his wife, a necessary element of threatening in the second degree in violation of statute (§ 53a-62 (a) (1)). *Held* that the evidence was not sufficient to support the defendant's conviction of threatening in the second degree in violation of § 53a-62 (a) (1), there having been insufficient evidence to support the conclusion beyond a reasonable doubt that the defendant made a physical threat to his wife: the state presented no direct evidence to the jury that the defendant had threatened his wife, either through words or some nonverbal expression, with imminent future harm; moreover, the state's argument that the jury reasonably could have inferred a threat from other evidence was unavailing, as the fact that evidence existed from which the jury could have concluded that the defendant had recently assaulted his wife, without more, was insufficient to support an inference that he necessarily made a threat of future violence, his

* In accordance with our policy of protecting the privacy interest of the victims of domestic violence, we decline to identify the defendant, the victim, or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

wife's statement that he "was gonna continue to hurt her more" did not connect her subjective fear of future harm to any particular act, expression or communication by the defendant, nor was there evidence that she complained of a threat, that other people heard threatening words or observed threatening behavior, or that the police inquired about a potential threat; furthermore, the jury was not permitted to speculate that a threat had been made solely on the basis of her assertion of fear, and, assuming the jury was permitted to consider the defendant's silence during his wife's statement as an evidentiary admission that he had stabbed her, this could not be viewed as an admission of a threat or have more effect than acknowledging her subjective fear.

Argued September 16—officially released December 22, 2020

Procedural History

Information charging the defendant with the crimes of assault in the first degree and threatening in the second degree, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, and tried to the jury before *Kavanewsky, J.*; thereafter, the court denied the defendant's motion for a judgment of acquittal; verdict and judgment of guilty of threatening in the second degree, from which the defendant appealed to this court. *Reversed*; *judgment directed.*

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

Brett R. Aiello, deputy assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Joseph J. Harry*, senior assistant state's attorney, for the appellee (state).

Opinion

PRESCOTT, J. The defendant, Ervin B., appeals from the judgment of conviction, rendered following a jury trial, of threatening in the second degree in violation of General Statutes § 53a-62 (a) (1). The defendant claims on appeal that the evidence was insufficient to prove beyond a reasonable doubt that he was guilty of threatening in the second degree. We agree with the defendant's insufficiency of the evidence claim and therefore

remand the case to the trial court with direction to render a judgment of acquittal.[1]

The following procedural history and evidence presented at trial is relevant to the defendant's insufficiency claim. The defendant is married to the complaining witness, Wanda. On February 13, 2016, at approximately 3:40 a.m., Officer Christopher Smith was dispatched to the defendant's and Wanda's apartment building in Bridgeport to respond to a report of a domestic disturbance. Smith met the defendant at the front door of the building, and he then accompanied Smith to apartment number eight. Smith found Wanda standing on the second floor landing outside of the apartment and bleeding from a stab wound to her right thigh. Wanda was upset and crying, and she appeared to be in pain. Smith quickly called for medical assistance and for the assistance of a Spanish speaking officer because Wanda speaks only Spanish.

Officer Ariel Martinez arrived at the apartment shortly thereafter and began to speak to Wanda in Spanish. Martinez asked Wanda what had happened. Wanda stated that she had come home from a night out and the defendant stabbed her.[2] She also stated that the

[1] The defendant also claims on appeal that the trial court (1) abused its discretion by admitting, pursuant to the excited utterance exception to the hearsay rule, a statement by the complaining witness, (2) violated his constitutional right to confrontation by admitting that statement, (3) improperly excluded a prior inconsistent statement of the complaining witness, and (4) violated his sixth amendment right to counsel by prohibiting defense counsel during closing argument from commenting on the fact that the state's complaining witness did not testify at trial. Because we agree with the defendant's insufficiency of the evidence claim and order a judgment of acquittal, it is unnecessary to reach the defendant's other claims on appeal.

[2] Although neither Smith nor Martinez testified directly regarding the manner in which Wanda identified the defendant as her assailant, they nonetheless testified that she had provided them with that information at the time they responded to the incident. Moreover, the jury heard Wanda's hearsay statement to Martinez that the defendant was "gonna continue to hurt her more." From that statement and the fact that the defendant was taken into custody following her identification, the jury could have inferred that Wanda accused the defendant by name.

defendant "was gonna continue to hurt her more." The defendant, who was standing nearby, did not respond to Wanda's accusation that he had stabbed her. At the end of this conversation, the defendant was arrested and transported to the Bridgeport police station. He subsequently was charged with assault in the first degree in violation of General Statutes § 53a-59 (a) (1) and threatening in the second degree in violation of § 53a-62 (a) (1).

Wanda was transported to a hospital for medical care. She received treatment for a serious laceration to her leg from a sharp object, and six staples were required to close the wound.[3]

Wanda did not testify at trial, and a portion of her hearsay statement to Martinez was admitted over the defendant's objection as an excited utterance. Following the conclusion of the state's case, the defendant made a motion for a judgment of acquittal on the ground that the evidence presented by the state was insufficient to prove beyond a reasonable doubt that the defendant had committed assault in the first degree or threatening in the second degree. The court denied the motion in its entirety.[4]

The jury subsequently found the defendant not guilty of assault in the first degree and guilty of threatening in the second degree. The court sentenced the defendant on the conviction of threatening in the second degree to one year of incarceration, suspended after four months, and two years of probation. This appeal followed.

The defendant claims on appeal that his conviction of threatening in the second degree must be reversed because the state failed to present sufficient evidence

[3] At trial, the court excluded statements attributed to Wanda in her medical records that identified the defendant as the person who stabbed her.

[4] The defendant did not testify at trial and presented no evidence during his case-in-chief.

to prove beyond a reasonable doubt each element of the crime. Specifically, the defendant argues that the hearsay statement of Wanda relied on by the state to establish the existence of a threat only conveyed Wanda's subjective belief that the defendant would harm her in the future, and not that any actual threat of harm was made by the defendant or that he intended to place Wanda in fear of imminent physical injury.[5] The state argues that the jury reasonably could have inferred that a threat was made, and advances three evidentiary bases in the record supporting such an inference: (1) the defendant stabbed Wanda; (2) Wanda stated that the defendant was going to "continue to hurt her more"; and (3) the defendant, who was present when Wanda made that statement and identified him as her assailant, offered no denial or explanation. We agree with the defendant that there was insufficient evidence of a threat.

"The standard of review we apply to a claim of insufficient evidence is well established. In reviewing the sufficiency of the evidence to support a criminal conviction 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 [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"We note that the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions

[5] The defendant's brief is not a model of clarity in identifying which of the elements of threatening in the second degree he challenges in his insufficiency claim. Read as a whole, however, there is no doubt that the defendant's analysis argues that the state offered insufficient evidence of an actual threat, and the state responded to that argument in its brief and at oral argument before this court.

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

"Because [t]he only kind of an inference recognized by the law is a reasonable one [however] . . . any such inference cannot be based on possibilities, surmise or conjecture. . . . It is axiomatic, therefore, that [a]ny [inference] drawn must be rational and founded upon the evidence. . . . [T]he line between permissible inference and impermissible speculation is not always easy to discern. When we infer, we derive a conclusion from proven facts because such considerations as experience, or history, or science have demonstrated that there is a likely correlation between those facts and the conclusion. If that correlation is sufficiently compelling, the inference is reasonable. But if the correlation between the facts and the conclusion is slight, or if a different conclusion is more closely correlated with the facts than the chosen conclusion, the inference is less reasonable. At some point, the link between the facts and the conclusion becomes so tenuous that we call it speculation. When that point is reached is, frankly, a matter of judgment. . . .

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

facts established by the evidence it deems to be reasonable and logical. . . .

"[A]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty. . . .

"Finally, [w]e . . . emphasize the weighty burden imposed on the state by the standard of proof beyond a reasonable doubt. Under bedrock principles of our criminal justice system, it is obviously not sufficient for the state to prove simply that it is more likely than not that the defendant [committed the offense], or even that the evidence is clear and convincing that he [committed the offense]. . . . Our Supreme Court has described the beyond a reasonable doubt standard as a subjective state of near certitude . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Gray-Brown*, 188 Conn. App. 446, 464–66, 204 A.3d 1161, cert. denied, 331 Conn. 922, 205 A.3d 568 (2019).

Section 53a-62 provides in relevant part: "(a) A person is guilty of threatening in the second degree when: (1) By physical threat, such person intentionally places or attempts to place another person in fear of imminent serious physical injury . . . ." The state in its amended information dated October 11, 2017, charged the defendant with threatening in the second degree in violation of § 53a-62 (a) (1) in that, "by physical threat, [he] intentionally placed or attempted to place one [Wanda] in fear of imminent physical injury . . . ." Thus, the state

was obligated to prove beyond a reasonable doubt the following elements of this offense: (1) the defendant made a physical threat to Wanda, and (2) he specifically intended by his conduct to put Wanda in fear of imminent serious physical injury. See *State* v. *Ramirez*, 107 Conn. App. 51, 65, 943 A.2d 1138 (2008), aff'd, 292 Conn. 586, 973 A.2d 1251 (2009); see also *State* v. *Kantorowski*, 144 Conn. App. 477, 488, 72 A.3d 1228, cert. denied, 310 Conn. 924, 77 A.3d 141 (2013) (threatening in second degree is specific intent crime). The defendant challenges, inter alia, the sufficiency of the evidence as it relates to the first element, that is, whether the defendant through his conduct or words made a physical threat to Wanda.

Our Supreme Court has stated that "a threat, by definition, is an *expression* of an intent to cause some future harm." (Emphasis added.) *State* v. *Cook*, 287 Conn. 237, 257, 947 A.2d 307, cert. denied, 555 U.S. 970, 129 S. Ct. 464, 172 L. Ed. 2d 328 (2008). This is consistent with the dictionary definition of a threat as "[a] *communicated* intent to inflict harm or loss on another . . . ." (Emphasis added.) Black's Law Dictionary (11th Ed. 2019) p. 1783; see also Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) p. 1302 (defining threat as "*expression of intention* to inflict evil, injury, or damage" (emphasis added)). In naming the offense at issue "threatening," the legislature used an active verb that describes the actions of the perpetrator. It follows, therefore, that a conviction for threatening requires proof of some action by the defendant, whether by word or gesture, that expresses or implies the future infliction of harm.

Our review of the record shows that the state presented no direct evidence to the jury that the defendant had threatened Wanda, either through words or some nonverbal expression, with imminent future harm. Wanda was not called to testify at trial, and, thus, the jury never heard from her directly whether the defendant had conveyed an overt or implied threat to her.

No other witness testified that they heard or observed the defendant, through word or deed, express an intent to hurt Wanda in the future. The state directs us to no such evidence in the record. Instead, as previously indicated, the state argues that the jury reasonably could have inferred from other evidence presented that the defendant made a threat, and it identifies three potential evidentiary sources as supporting such an inference.

First, the state argues that evidence was presented that the defendant had stabbed Wanda. The mere fact that evidence existed from which the jury could have concluded that the defendant recently had assaulted Wanda, however, is not probative of any intent to cause future harm and cannot, without more, be held sufficient to support an inference that he necessarily made a threat of additional violence in the future. If we were to agree with such a position, any assault or domestic altercation in which a victim later expressed to the police some fear of future harm by the perpetrator would, in the state's view, support not only a charge of threatening but ultimately a conviction, regardless of whether there was any independent evidence of a threat actually having been made. Such an obviously unjustifiable outcome demonstrates why drawing the inference that the state advances would depart from the realm of reasonable inferences that a jury permissibly may draw into pure speculation that cannot be a permissible basis for a criminal conviction.

Second, the state argues that the jury could have made a reasonable inference that the defendant had made a threat to Wanda on the basis of Martinez' trial testimony, in which he described what Wanda had told him during the investigation of the stabbing incident.[6]

[6] As indicated in footnote 1 of this opinion, the defendant challenges the propriety of the court's admission of the Wanda's statement under the excited utterance exception to the hearsay rule. In assessing the sufficiency of the evidence, however, we consider *all* evidence admitted at trial. See *State* v. *Chemlen*, 165 Conn. App. 791, 818, 140 A.3d 347 ("[c]laims of evidentiary

Specifically, the state directs us to the following colloquy between the prosecutor and Martinez:

"Q. [D]id you ask [Wanda], at the request of Officer Smith, what happened?

"A: Yes.

"Q. And what did—did she respond?

"A. Yes.

"Q. What did she say?

"A. She said, she came home from a night out into the apartment and she was stabbed.

"Q. Okay. And when she came home, she was stabbed. Did she say anything more?

"A: Yes. She said that *he was gonna continue to hurt her more*." (Emphasis added.)

According to the state, the jury reasonably could have inferred on the basis of Wanda's statement to Martinez that the defendant "was gonna continue to hurt her more," that the defendant had in fact threatened her with imminent physical injury.

In our view, Wanda's statement to Martinez could constitute evidence from which the jury reasonably could have inferred that the defendant previously had hurt her[7] and that she believed that he likely would hurt her again in the future. Nothing in her statement to Martinez, however, connected Wanda's subjective fear that the defendant would harm her again to any particular act, expression, or communication by the defendant from which the jury could have inferred the factual predicate for that fear. Nothing in the officers' testimony

insufficiency in criminal cases are always addressed independently of claims of evidentiary error" (internal quotation marks omitted)), cert. denied, 322 Conn. 908, 140 A.3d 977 (2016).

[7] Logically, the statement that Wanda believed he would "*continue* to hurt her *more*," if credited, reasonably implies that he had hurt her in the past.

suggested that Wanda had complained that the defendant had made a threat to her, that the officers or responding medical personnel had heard threatening words or observed threatening behavior, or even that the police had inquired about a potential threat. We do not find any such evidence from our review of the evidentiary record before us. Rather than resulting from any specific threat, Wanda's statement that the defendant "was gonna continue to hurt her more" reflected at most her fear that, because he previously had hurt her, he likely would do so again.

As demonstrated by our Supreme Court's recent decision in *State* v. *Rhodes*, 335 Conn. 226, A.3d (2020), the "line between permissible inference and impermissible speculation is not always easy to discern." (Internal quotation marks omitted.) Id., 238. "When we infer, we derive a conclusion *from proven facts* because such considerations as experience, or history, or science have demonstrated that there is a likely correlation between those facts and the conclusion. . . . [I]f the correlation between the facts and the conclusion is slight, or if a different conclusion is more closely correlated with the facts than the chosen conclusion, the inference is less reasonable. At some point, the link between the facts and the conclusion becomes so tenuous that we call it speculation." (Emphasis added; internal quotation marks omitted.) Id.

In the present case, there were no facts of any kind from which the jury could have inferred threatening words or conduct toward Wanda independent of the alleged assault. In other words, there were no facts from which the jury could have inferred that the defendant actively had engaged in threatening. No factual basis was offered to explain Wanda's general statement of fear that the defendant would hurt her again. In deciding whether the state had met its burden of proving beyond a reasonable doubt that a threat was made by the defendant, the jury was not permitted to guess at possibilities

or speculate that a threat was made solely on the basis of Wanda's assertion of her fear of the defendant.

Finally, the state claims that the jury reasonably could have drawn an inference of a threat from the fact that, when Wanda gave her statement to Martinez, the defendant was standing close enough to have overheard her statement, but he chose to remain silent, neither disputing Wanda's statement nor offering any explanation. The state cites to *State* v. *Leecan*, 198 Conn. 517, 504 A.2d 480, cert. denied, 476 U.S. 1184, 106 S. Ct. 2922, 91 L. Ed. 2d 550 (1986), for the proposition that "[w]hen a statement, accusatory in nature, made in the presence and hearing of an accused, is not denied or explained by him, it may be received into evidence as an admission on his part." (Internal quotation marks omitted.) Id., 522. The decision in *Leecan*, however, additionally states: "The circumstances, of course, must be such that a reply would naturally be called for even in the prearrest setting. . . . Although evidence of silence in the face of an accusation may be admissible under the ancient maxim that silence gives consent the inference of assent may be made only when no other explanation is consistent with silence." (Citation omitted; internal quotation marks omitted.) Id., 522–23.

In the present case, Martinez testified that the defendant was present and close enough to have overheard Wanda's statements to him. According to Martinez, the defendant made no denials regarding her statements, which included both Wanda's identification of the defendant as her attacker and her statement that the defendant "was gonna continue to hurt her more."[8] Even assuming the jury was permitted to consider the defendant's

[8] Although for purposes of this analysis we must assume the jury accepted the state's offer of the defendant's silence as an admission, it may have been reasonable for the defendant to have stayed silent in this situation because he was not being addressed by the police, he was not part of the conversation, and, had he interrupted to defend his innocence, it might have been perceived as aggressive or escalating an already de-escalated situation.

silence as an evidentiary admission that he was the person who stabbed Wanda, for the reasons previously discussed, it would have been unreasonable for the jury to infer solely from the fact that an assault had occurred that the defendant also made a physical threat of future harm to Wanda. Furthermore, Wanda's statement that the defendant would hurt her more contained no accusation that the defendant, either implicitly or expressly, had conveyed a threat of future harm. Accordingly, even assuming the defendant's silence was an admission, it only could have had the effect of acknowledging Wanda's subjective fear. It cannot be viewed as an admission of a threat. As we already have discussed, it would be nothing more than impermissible speculation to infer that Wanda's fear was the result of any specific threat by the defendant rather than simply the circumstances of the parties' relationship.

We conclude that there was insufficient evidence for the jury to have concluded beyond a reasonable doubt that the defendant made a physical threat to Wanda. Accordingly, his conviction of threatening in the second degree in violation of § 53a-62 (a) (1) cannot stand.

The judgment is reversed and the case is remanded with direction to render judgment of acquittal.

In this opinion the other judges concurred.

TOWN OF NEWTOWN *v.* SCOTT E. OSTROSKY ET AL.
(AC 42176)

Alvord, Suarez and Pellegrino, Js.

Syllabus

The defendant O appealed to this court, challenging the trial court's denial of his motion to reargue and for reconsideration of the trial court's judgment of foreclosure by sale. The plaintiff, the town of Newtown, had sought to foreclose a mortgage and filed a motion for default as to O for his failure to plead pursuant to the applicable rule of practice

(§ 10-18). The court clerk thereafter granted the motion. O claimed that the foreclosure judgment should be opened and vacated because, inter alia, the default entered by the clerk was invalid and could not serve as the basis for the foreclosure judgment. *Held* that the trial court properly denied the motion to reargue and for reconsideration; because the claim raised by O in this court essentially reiterated the claim he raised in the trial court, which thoroughly addressed his arguments, this court adopted the trial court's well reasoned memorandum of decision as a statement of the facts and applicable law.

Argued November 18—officially released December 22, 2020

Procedural History

Action to foreclose a mortgage on certain of the named defendant's real property, and for other relief, brought to the Superior Court in the judicial district of Danbury and transferred to the judicial district of Fairfield, where the named defendant was defaulted for failure to plead; thereafter, the court, *Hon. Alfred J. Jennings, Jr.*, judge trial referee, granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment of foreclosure by sale; subsequently, the court denied the named defendant's motion to reargue and for reconsideration, and the named defendant appealed to this court. *Affirmed.*

Robert M. Fleischer, for the appellant (named defendant).

Alexander Copp, with whom, on the brief, was *Jason A. Buchsbaum*, for the appellee (plaintiff).

Opinion

PER CURIAM. This is an appeal from a denial of a motion to reargue and for reconsideration filed by the defendant Scott E. Ostrosky[1] from the judgment of foreclosure by sale rendered by the trial court in favor

[1] The other defendants in this action are the town of Monroe, the Planning and Zoning Commission of the Town of Monroe, the Inland Wetlands Commission of the Town of Monroe, and Joseph Chapman, in his capacity as land use enforcement officer for the town of Monroe. Because they are not participating in this appeal, we refer to Ostrosky as the defendant.

of the plaintiff, the town of Newtown. On appeal, the defendant claims that the judgment should be opened and vacated because (1) the default that was entered by the court clerk was invalid and cannot serve as the basis for the foreclosure judgment and (2) the motion for a judgment of foreclosure was filed prematurely by the plaintiff. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to the resolution of this appeal. The plaintiff instituted foreclosure proceedings against the defendant on October 17, 2016. On May 23, 2018, the plaintiff filed a motion for default for failure to plead, pursuant to Practice Book § 10-18. On June 6, 2018, the plaintiff filed a motion for a judgment of strict foreclosure, pursuant to Practice Book § 17-25 et seq. On June 7, 2018, the court clerk granted the plaintiff's motion for default for failure to plead. On June 18, 2018, the court rendered judgment of foreclosure by sale against the defendant, setting a sale date of December 8, 2018. On July 3, 2018, the defendant filed a motion to reargue and for reconsideration, claiming that the default entered by the court clerk was invalid and could not serve as the basis for the foreclosure judgment, and that the plaintiff's motion for judgment was filed prematurely. On September 13, 2018, the court denied the defendant's motion to reargue and for reconsideration.

The defendant appealed to this court from the denial of his motion to reargue and for reconsideration and challenged the trial court's judgment of foreclosure by sale. On appeal, he essentially reiterates the same claim that he raised in the trial court in support of his motion to reargue and for reconsideration, namely, that the default entered by the court clerk was invalid and could not serve as the basis for the foreclosure judgment and that the plaintiff's motion for judgment of strict foreclosure was filed prematurely.

We carefully have examined the record of the proceedings before the trial court, in addition to the parties' appellate briefs and oral arguments, and we conclude that the judgment of the trial court should be affirmed. Because the court, *Hon. Alfred J. Jennings, Jr.*, judge trial referee, thoroughly addressed the arguments raised in this appeal, we adopt its well reasoned decision denying the defendant's motion to reargue and for reconsideration as a statement of the facts and the applicable law with respect to the issues raised in this appeal. See *Newtown* v. *Ostrosky*, Superior Court, judicial district of Fairfield, Docket No. CV-16-6060962-S (September 13, 2018) (reprinted at 201 Conn. App. 16, A.3d). Any further discussion by this court would serve no useful purpose. See, e.g., *Woodruff* v. *Hemingway*, 297 Conn. 317, 321, 2 A.3d 857 (2010).

The judgment denying the motion to reargue and for reconsideration is affirmed and the case is remanded for the purpose of setting a new sale date.

APPENDIX

TOWN OF NEWTOWN *v.* SCOTT E. OSTROSKY ET AL.*

Superior Court, Judicial District of Fairfield
File No. CV-16-6060962-S

Memorandum filed September 13, 2018

Proceedings

Memorandum of decision on named defendant's motion to reargue and for reconsideration. *Motion denied.*

Joshua Pedreira, for the plaintiff.

Robert M. Fleischer, for the named defendant.

* Affirmed. *Newtown* v. *Ostrosky*, 201 Conn. App. 13, A.3d (2020).

Opinion

HON. ALFRED J. JENNINGS, JR., JUDGE TRIAL REFEREE. The defendant Scott E. Ostrosky moves to reargue and for reconsideration of the ruling by the court on June 18, 2018, granting the plaintiff's motion for a judgment of foreclosure and entering judgment of foreclosure by sale on June 18, with a sale date of December 8, 2018. Since both parties have briefed the issue thoroughly, the court will decide this motion as a motion for reconsideration.

The defendant argues, first, that the default for failure to plead entered against him by the clerk on June 7, 2018, in response to the plaintiff's motion for default for failure to plead, dated May 23, 2018 (No. 114), was invalid and cannot serve as the basis for judgment. The defendant's reasoning is that the motion for default for failure to plead was filed "pursuant to Connecticut Practice Book § 10-18," which provides: "Parties failing to plead according to the rules and orders of the judicial authority may be nonsuited or defaulted, as the case may be. (See General Statutes § 52-119 and annotations.)" The referenced statute, § 52-119, provides: "Parties failing to plead according to the rules and orders of the court may be nonsuited or defaulted, as the case may be." The May 23, 2018 motion for default alleges that "the return date was November 8, 2016, and, to date, no responsive pleading has been filed by the defendant Scott Ostrosky, although the time limit for such has passed." The time limit at issue, as stated in Practice Book § 10-8, for a foreclosure action such as this, is fifteen days after the return date. There is no claim by the defendant that he had filed a responsive pleading to the complaint within that fifteen day time frame or at any subsequent date. The defendant argues that a motion for default for failure to plead may also be brought under Practice Book § 17-32 (a), which specifically authorizes that the motion "shall be acted on by the clerk not less than seven days from the filing of

the motion, without placement on the short calendar." Since the clerk is specifically authorized to act on a motion for default filed pursuant to Practice Book § 17-32 (a), but there is no such specific authority stated in Practice Book § 10-18 for the clerk to act on a motion for default filed pursuant to that section, the defendant argues that it was improper and invalid for the clerk to have granted the motion for default filed against him brought pursuant to § 10-18. The argument fails because Practice Book § 10-18 (and § 52-119) provide simply that the party who has failed to plead within the time specified in the rules "may be nonsuited or defaulted, as the case may be." The authority to grant or to deny such nonsuit or default is not stated or limited in Practice Book § 10-18, but left to other provisions of law. But the language of Practice Book § 17-32 (a) granting authority of the clerk to act on motions for default for failure to plead is clearly and expressly stated as applying "[w]here a defendant is in default for failure to plead pursuant to Section 10-8 . . . ." This motion for default was filed pursuant to Practice Book § 10-18 on May 23, 2018, for failure to plead within the time limit of Practice Book § 10-8. The motion was granted by the clerk more than seven days later, on June 7, 2018. As the Appellate Court has stated in *Deutsche Bank National Trust Co.* v. *Bertrand*, 140 Conn. App. 646, 657, 59 A.3d 864, cert. dismissed, 309 Conn. 905, 68 A.3d 661 (2013): "When a defendant fails to advance timely the pleadings in accordance with Practice Book § 10-8, Practice Book § 17-32 sets forth a procedure by which the clerk of the court, without input from the judicial authority, may act on a motion for default filed by the plaintiff." There was nothing improper or invalid about the clerk entering default for failure to plead within the Practice Book § 10-8 limits on June 7, 2018.

The defendant argues, second, that the plaintiff's motion for judgment of strict foreclosure (No. 115), filed on June 6, 2018, and granted as a judgment of

foreclosure by sale on June 18, 2018, was filed prematurely in violation of the language of Practice Book § 17-32 (b), which states: "A claim for a hearing in damages or motion for judgment shall not be filed before the expiration of fifteen days from the date of notice of the issuance of the default under this subsection." In this case, the motion for judgment of strict foreclosure was filed on June 6, 2018, which was one day prior to the entry of default for failure to plead on June 7, 2018. The plaintiff asserts, and the court agrees, that the foregoing fifteen day limitation of Practice Book § 17-32 (b) is excused by Practice Book § 17-33 (b) in the case [of] a judgment entered in a foreclosure case such as this. Practice Book § 17-33 (b) provides: "Since the effect of a default is to preclude the defendant from making any further defense in the case so far as liability is concerned, the judicial authority, at or after the time that it renders the default, notwithstanding Section 17-32 (b), may also render judgment in foreclosure cases, in actions similar thereto and in summary process actions, provided the plaintiff has also made a motion for judgment and provided further that any necessary affidavits of debt or accounts or statements verified by oath, in proper form, are submitted to the judicial authority." In this case, a motion for judgment of strict foreclosure had been filed by the plaintiff on June 6, 2018. Before that motion was granted on June 18, 2018, the plaintiff had filed all the requisite affidavits, appraisal, and foreclosure worksheet in proper form. The defendant argues, however, that the fifteen day limitation of Practice Book § 17-32 (b) is not excused because the foregoing excusing provision of Practice Book § 17-33 (b) only applies "at or after the time it renders the default" and that the word "it" refers back to the judicial authority" so that, in this case, where the default had been granted by the clerk, who, he claims, is not a "judicial authority," the fifteen day limit was not excused. Practice Book § 1-1 (c) defines the term "judicial authority" as

"the Superior Court, any judge thereof, each judge trial referee when the Superior Court has referred a case to such trial referee pursuant to General Statutes § 52-434, and for purposes of the small claims rules only, any magistrate appointed by the chief court administrator pursuant to General Statutes § 51-193*l*." The definition does not specifically include a clerk of the court, but it does include "the Superior Court," which would include an order of an officer of the court, such as an assistant clerk acting on behalf of the Superior Court pursuant to a mandatory grant of authority under Practice Book § 17-32 (a) (motion for default for default for failure to plead within deadline of Practice Book § 10-8 "SHALL be acted on by the clerk" (emphasis added)).

The strict interpretation of Practice Book § 17-33 (b) urged by the defendant is inconsistent with the Supreme Court's holding that "[t]he design of the rules of practice is both to facilitate business and to advance justice; they will be interpreted liberally in any case where it shall be manifest that a strict adherence to them will work surprise or injustice." (Internal quotation marks omitted.) *Coppola* v. *Coppola*, 243 Conn. 657, 665, 707 A.2d 281 (1998). Since Practice Book § 17-32 (a) mandated that motions for default for failure to plead "shall be acted on by the clerk," under the defendant's narrow interpretation, no judgment of strict foreclosure following default for failure to plead could ever be filed until fifteen days had elapsed following the granting of default, despite the obvious intent of Practice Book § 17-33 (b) to "facilitate business" by permitting the simultaneous filing of a motion for default for failure to plead and a motion for judgment of strict foreclosure in foreclosure and similar cases. That interpretation virtually eliminates rule 17-33 (b) from ever taking effect in a failure to plead situation—which would definitely not "facilitate business." It is manifest to this court that the liberal interpretation treating an authorized order by the clerk as an order of "the Superior Court" and, therefore, an

order of "the judicial authority" for the purposes of Practice Book § 17-33 (b) is appropriate. There should be no surprise that a defendant who has appeared by counsel but has not filed a responsive pleading to the complaint eighteen months after the return date should be defaulted for failure to plead and subject to an immediate motion for judgment of foreclosure. The expressed reasoning of the Practice Book § 17-33 (b) exception to waiting fifteen days applies here: "Since the effect of a default is to preclude the defendant from making any further defense in the case so far as liability is concerned . . . ." See *Chase Manhattan Mortgage Corp.* v. *Burton*, 81 Conn. App. 662, 841 A.2d 248, cert. denied, 268 Conn. 919, 847 A.2d 313 (2004), where the plaintiff had simultaneously filed a motion for judgment and a motion for default for failure to plead. The clerk granted the motion for default on September 11, 2002, and the court rendered judgment on September 16, 2002. Id., 667. The Appellate Court held that, because the case was a foreclosure proceeding, Practice Book § 17-33 (b) applied and the court properly rendered judgment despite only five days elapsing after the default had entered.

For the foregoing reasons, the defendant's motion to reargue and for reconsideration is denied, and the plaintiff's objection thereto is sustained.

ERIC T. KELSEY *v.* COMMISSIONER OF CORRECTION
(AC 42932)

Prescott, Suarez and DiPentima, Js.

Syllabus

The petitioner, who had been convicted of various crimes, sought a second writ of habeas corpus, claiming, inter alia, ineffective assistance of criminal trial counsel and former habeas counsel. The habeas court, upon the request of the respondent, the Commissioner of Correction, issued an order to show cause why the petition should be permitted to

proceed in light of the fact that the petitioner had filed it outside of the two year time limit for successive petitions set forth in the applicable statute (§ 52-470 (d) (1)). The court conducted an evidentiary hearing and, thereafter, dismissed the petition pursuant to § 52-470 for lack of good cause for the delay in filing the successive petition. On the granting of certification, the petitioner appealed to this court. *Held* that the habeas court did not abuse its discretion in dismissing the habeas petition and properly determined that the petitioner failed to establish good cause for the delay in filing his untimely habeas petition; the petitioner failed to rebut successfully the presumption of unreasonable delay set forth in § 52-470, as he failed to demonstrate that something outside of his control or the control of habeas counsel caused or contributed to the delay, as the only evidence having been presented was the petitioner's testimony that he was allegedly unaware of the statutory deadline imposed by § 52-470 and was never made aware of it by his former habeas counsel, and that he did not always have access to a law library or similar legal resource while he was incarcerated and was in lockdown, evidence that was insufficient to persuade the court that he had rebutted the presumption of unreasonable delay, and the court properly took into consideration the lengthy delay, indicating that the second petition was filed nearly three years beyond the filing deadline, and properly concluded that, even if it accepted the petitioner's proffered excuses at face value, a mere assertion of ignorance of the law, without more, was insufficient, the court having properly noted that ignorance of the law, in and of itself, was not a legally justified excuse, and the record sufficiently demonstrated that the court properly weighed relevant factors in reaching its decision to dismiss the petition, and the petitioner failed to demonstrate that, under the circumstances, the court's determination was an abuse of discretion.

Argued September 22—officially released December 22, 2020

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Newson, J.*, rendered judgment dismissing the petition; thereafter, the court granted the petition for certification to appeal, and the petitioner appealed to this court. *Affirmed.*

Naomi T. Fetterman, for the appellant (petitioner).

Laurie N. Feldman, special deputy assistant state's attorney, with whom, on the brief, were *Brian W. Preleski*, state's attorney, and *Jo Anne Sulik*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

PRESCOTT, J. The present appeal provides us with an opportunity to delineate the "good cause" standard that a petitioner must satisfy to overcome the rebuttable presumption that a successive petition for a writ of habeas corpus filed outside of statutorily prescribed time limits is the result of unreasonable delay that warrants dismissal of the petition; see General Statutes § 52-470;[1] and to clarify the appellate standard of review applicable to a habeas court's determination of whether a petitioner has satisfied the good cause standard.

[1] General Statutes § 52-470 provides in relevant part: "(a) The court or judge hearing any habeas corpus shall proceed in a summary way to determine the facts and issues of the case, by hearing the testimony and arguments in the case, and shall inquire fully into the cause of imprisonment and thereupon dispose of the case as law and justice require.

* * *

"(d) In the case of a petition filed subsequent to a judgment on a prior petition challenging the same conviction, there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed after the later of the following: (1) Two years after the date on which the judgment in the prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; (2) October 1, 2014; or (3) two years after the date on which the constitutional or statutory right asserted in the petition was initially recognized and made retroactive pursuant to a decision of the Supreme Court or Appellate Court of this state or the Supreme Court of the United States or by the enactment of any public or special act. For the purposes of this section, the withdrawal of a prior petition challenging the same conviction shall not constitute a judgment. The time periods set forth in this subsection shall not be tolled during the pendency of any other petition challenging the same conviction. Nothing in this subsection shall create or enlarge the right of the petitioner to file a subsequent petition under applicable law.

"(e) In a case in which the rebuttable presumption of delay . . . applies, the court, upon the request of the respondent, shall issue an order to show cause why the petition should be permitted to proceed. The petitioner or, if applicable, the petitioner's counsel, shall have a meaningful opportunity to investigate the basis for the delay and respond to the order. If, after such opportunity, the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition. For the purposes of this subsection, good cause includes, but is not limited to, the discovery of new evidence which materially affects the merits of the case and which

The petitioner, Eric T. Kelsey, appeals from the judgment of the habeas court dismissing his successive petition for a writ of habeas corpus pursuant to § 52-470 (d) and (e). The petitioner claims on appeal that the habeas court improperly determined that his purported ignorance of the filing deadline set forth in § 52-470 (d) (1) and his lack of meaningful access to a law library during some portions of his term of incarceration were insufficient to demonstrate good cause to overcome the statutory presumption of unreasonable delay. We disagree and, accordingly, affirm the judgment of the habeas court.

The procedural background underlying this appeal is as follows. In December, 2003, a jury convicted the petitioner of conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-134 (a) (3) and felony murder in violation of General Statutes § 53a-53c.[2] See *State* v. *Kelsey*, 93 Conn. App. 408, 889 A.2d 855, cert. denied, 277 Conn. 928, 895 A.2d 800 (2006). The court sentenced the petitioner to a total effective term of forty years of incarceration. This court affirmed the judgment of conviction on direct appeal, rejecting the petitioner's claims that the trial court improperly had admitted into evidence certain out-of-court statements and had denied his motion for a mistrial based on the state's failure to preserve and produce exculpatory evidence. Id., 410, 416. The Supreme Court denied certification to appeal this court's decision.

After exhausting his direct appeal, in August, 2007, the petitioner filed his first petition for a writ of habeas

could not have been discovered by the exercise of due diligence in time to meet the requirements of subsection . . . (d) of this section . . . ."

[2] The jury acquitted the petitioner of murder in violation of General Statutes § 53a-54a (a). See *State* v. *Kelsey*, 93 Conn. App. 408, 410 n.1, 889 A.2d 855, cert. denied, 277 Conn. 928, 895 A.2d 800 (2006). According to this court's recitation of the facts underlying the petitioner's conviction, the petitioner, during a robbery planned with several coconspirators, stabbed the victim with a knife. Id., 411. The victim later died during surgery. Id., 412.

corpus challenging his conviction.[3] Following a trial on the merits, the habeas court denied the petition. This court dismissed the petitioner's appeal from the judgment of the habeas court by memorandum decision; *Kelsey* v. *Commissioner of Correction*, 136 Conn. App. 904, 44 A.3d 224 (2012); and our Supreme Court thereafter denied him certification to appeal from the judgment of this court. *Kelsey* v. *Commissioner of Correction*, 305 Conn. 923, 47 A.3d 883 (2012).

Nearly five years later, on March 22, 2017, the petitioner filed the underlying second petition for a writ of habeas corpus that is the subject of the present appeal. The petitioner raised seven claims not raised in his earlier petition.[4] On May 9, 2017, the respondent, the Commissioner of Correction, filed a request with the habeas court pursuant to § 52-470 (e) for an order directing the petitioner to appear and show cause why his second petition should be permitted to proceed in light of the fact that the petitioner had filed it well outside the two year time limit for successive petitions set forth in § 52-470 (d) (1). See footnote 1 of this opinion. The habeas court, *Oliver*, *J.*, initially declined to rule on the respondent's request for an order to show cause, concluding that the request was premature and that the court lacked discretion to act on the respondent's request because the pleadings in the case were

[3] The petitioner, through court-appointed counsel, filed a one count amended petition in which he argued that his rights to due process and a fair trial had been violated because two coconspirators who testified against him at the criminal trial were offered consideration by the state in exchange for their testimony; that the state failed to disclose that it offered these witnesses consideration; that the witnesses lied when asked at trial if they were offered consideration by the state for their testimony, denying that they had received any consideration; and that the state failed to correct this false testimony.

[4] The petitioner filed the operative petition as a self-represented party. Although he later was appointed habeas counsel, counsel did not file an amended petition. In this second petition, the petitioner raised claims of ineffective assistance of criminal trial counsel and former habeas trial counsel, as well as claims directed at his coconspirator's testimony and other inculpatory evidence admitted at the criminal trial.

not yet closed.[5] See *Kelsey* v. *Commissioner of Correction*, 329 Conn. 711, 714, 189 A.3d 578 (2018).

After the habeas court denied the respondent's motion for reconsideration, the Chief Justice granted the respondent's request to file an interlocutory appeal from the order of the habeas court pursuant to General Statutes § 52-265a. The Supreme Court rejected the habeas court's reliance on § 52-470 (b) (1)[6] as its basis for not acting on the respondent's request for an order to show cause and concluded that "the habeas court's decision to take no action on the respondent's motion was predicated on its mistaken belief that it lacked discretion to act" and that "[i]t is well established that when a court has discretion, it is improper for the court to fail to exercise it."[7] Id., 726. The Supreme Court reversed the habeas court's decision and remanded the case to the habeas court for further proceedings consistent with its opinion. Id.

In accordance with the Supreme Court's remand order, the habeas court, *Newson*, *J.*, issued an order to show cause and conducted an evidentiary hearing. The only evidence presented at the hearing was the testimony of the petitioner. The respondent chose not to

[5] The court's order stated in relevant part: "No action will be taken pursuant to [§] 52-470 (b) (1) as the pleadings are not yet closed, thereby making the request premature. The respondent may reclaim the motion at the appropriate time. . . . Upon receipt of the certificate of closed pleadings, the court shall schedule a date to hear argument."

[6] General Statutes § 52-470 (b) (1) provides: "*After the close of all pleadings in a habeas corpus proceeding*, the court, upon the motion of any party or, on its own motion upon notice to the parties, shall determine whether there is *good cause for trial* for all or part of the petition." (Emphasis added.)

[7] The court reasoned that the motion for order to show cause filed by the respondent did not challenge whether there was good cause *to proceed to trial on the merits* with respect to all or part of the petition pursuant to § 52-470 (b), but, rather, only sought to have the court address the *timeliness* of the petition, irrespective of its merits, pursuant to subsection (e) of § 52-470, which, unlike subsection (b), did not contain any requirement that pleadings be closed before the court could consider the respondent's request. See *Kelsey* v. *Commissioner of Correction*, supra, 329 Conn. 720–23.

cross-examine the petitioner or to present any other evidence at the show cause hearing. The court also heard legal arguments from both sides.

Thereafter, on March 20, 2019, the habeas court issued a decision dismissing the petitioner's second habeas petition. In its decision, the habeas court first set forth the relevant provisions of § 52-470 and quoted this court's statement in *Langston* v. *Commissioner of Correction*, 185 Conn. App. 528, 532, 197 A.3d 1034 (2018), appeal dismissed, 335 Conn. 1, 225 A.3d 282 (2020), that good cause is "defined as a substantial reason amounting in law to a legal excuse for failing to perform an act required by law." The habeas court determined that the petitioner's proffered excuse failed to establish good cause under the statute, stating: "[T]he petitioner had until July 12, 2014, to file his next habeas petition challenging this conviction, but he did not file it until nearly three years beyond that date. The petitioner's claim for delay was that he was sometimes in and out of prison and did not always have access to law books and the law libraries at times when he was held in higher security facilities. He also attempts to offer the excuse that he was not aware of § 52-470. Neither of these is sufficient 'good cause' to excuse the petitioner's delay of nearly three years beyond the appropriate filing deadline for this matter." In support of its analysis, the habeas court, citing *State* v. *Surette*, 90 Conn. App. 177, 182, 876 A.2d 582 (2005), noted parenthetically that "ignorance of the law excuses no one." On the basis of its determination that the petitioner lacked good cause for the delay in filing the successive petition, the court dismissed the petition. The court subsequently granted certification to appeal, and this appeal followed.

The petitioner claims on appeal that the habeas court improperly determined that he failed to establish good cause for the delayed filing of his second petition for

a writ of habeas corpus. For the reasons that follow, we disagree.

I

A brief discussion of the governing statute, § 52-470, will aid in our discussion of the petitioner's claim. In *Kaddah* v. *Commissioner of Correction*, 324 Conn. 548, 153 A.3d 1233 (2017), our Supreme Court had its first opportunity to note the 2012 legislative amendments to § 52-470 that were made as part of "comprehensive habeas reform" and included, inter alia, the addition of subsections (d) and (e) that are at issue in the present appeal. Id., 566. Although the court did not discuss the specific subject of untimely petitions, the court recognized that the 2012 reforms to § 52-470 were "the product of collaboration and compromise by representatives from the various stakeholders in the habeas process" and were "intended to supplement that statute's efficacy in averting frivolous habeas petitions and appeals." Id., 567; see Public Acts 2012, No. 12-115, § 1.

Later, in *Kelsey* v. *Commissioner of Correction*, supra, 329 Conn. 715–24, our Supreme Court engaged in a more extensive discussion of § 52-470. The court first noted that subsection (a) was not altered substantively by the 2012 amendments and that "the legislature retained language that makes clear that the expeditious resolution of habeas petitions must be accomplished in a manner that does not curtail a petitioner's right to due process. In other words, the two principles of expediency and due process must be balanced in effectuating the legislative intent of the 2012 habeas reform." Id., 716–17. The court explained: "The 2012 amendments are significant . . . because they provide tools to effectuate the original purpose [of § 52-470] of ensuring expedient resolution of habeas cases. The 2012 habeas reform added two procedural mechanisms to

assist the habeas court in resolving the case in a summary way . . . . The amendments to § 52-470 set forth procedures by which the habeas court may dismiss meritless petitions and untimely ones. Specifically, § 52-470 (b) addresses the dismissal of meritless petitions, whereas § 52-470 (c), (d) and (e) provide mechanisms for dismissing untimely petitions." (Citations omitted; internal quotation marks omitted.) Id., 717. "[Section] 52-470 (b) provides the habeas court with a means—short of holding a trial on the merits—to screen out meritless petitions in a manner that allows the petitioner every opportunity to meet the required good cause showing . . . [whereas] § 52-470 (c), (d) and (e) together address whether the petitioner can establish good cause for a delay in filing a petition." Id., 718–19. In other words, these reforms represent the legislature's recognition that in order to resolve meritorious habeas petitions in an expeditious fashion, courts needed additional procedural tools to facilitate summary dispositions of habeas petitions that either failed to raise meritorious claims deserving a full trial or had been pursued in a dilatory manner.

Our Supreme Court recognized that "[a]s compared to the procedures available under § 52-470 (b) to demonstrate that good cause exists for trial, § 52-470 (e) provides significantly less detail regarding the procedures by which a petitioner may rebut the presumption that there was no good cause for a delay in filing the petition." Id., 721. "Nothing in subsection (e) expressly addresses whether the petitioner may present argument or evidence, or file exhibits, or whether and under what circumstances the court is required to hold a hearing, if the court should determine that doing so would assist it in making its determination. The only express procedural requirement is stated broadly. The court must provide the petitioner with a 'meaningful opportunity' both to investigate the basis for the delay and to respond

to the order to show cause. . . . The phrase 'meaningful opportunity' is not defined in the statute. That phrase typically refers, however, to the provision of an opportunity that comports with the requirements of due process." (Citations omitted.) Id., 722. "*The lack of specific statutory contours* as to the required 'meaningful opportunity' suggests that *the legislature intended for the court to exercise its discretion* in determining, considering the particular circumstances of the case, what procedures should be provided to the petitioner in order to provide him with a meaningful opportunity, consistent with the requirements of due process, to rebut the statutory presumption." (Emphasis added.) Id., 723.

The Supreme Court had no reason in *Kelsey* v. *Commissioner of Correction*, supra, 329 Conn. 711, to discuss in detail the parameters of the "good cause" standard because that issue was not before it. It noted only that § 52-470 (e) expressly recognizes that good cause for delay *may* include the "discovery of new evidence which materially affects the merits of the case and which could not have been discovered by the exercise of due diligence in time to meet the requirements of subsection (c) or (d) of this section."[8] (Emphasis omitted; internal quotation marks omitted.) Id., 723–24. The Supreme Court concluded that, "[i]n the absence of any language in [subsection (e)] cabining the discretion of the habeas court with respect to the timing of the issuance of an order to show cause for delay, we conclude that the legislature intended that the court exercise its discretion to do so when the court deems it appropriate given the circumstances of the case." Id., 724.

[8] The legislature chose not to define "good cause" beyond providing this sole example. Although "[w]e are not permitted to supply statutory language that the legislature may have chosen to omit"; (internal quotation marks omitted) *Kelsey* v. *Commissioner of Correction*, supra, 329 Conn. 721; we nevertheless are permitted, consistent with principles of statutory interpretation, to construe the meaning of the legislature's use of the term "good cause" in this context. See part III of this opinion.

We read our Supreme Court's discussion of § 52-470 as placing significant emphasis on the discretion that the legislature granted habeas courts to achieve the goals of habeas corpus reform, which included placing express, definitive time limitations on the filing of an initial petition that challenges the judgment of conviction; see General Statutes § 52-470 (c); and on any subsequent, successive petitions. See General Statutes § 52-470 (d). Rather than creating a rigid, unyielding time frame for the filing of petitions akin to that found in ordinary statutes of limitations, the legislature chose, instead, to create only a rebuttable presumption of undue delay, and to afford a petitioner an opportunity to avoid dismissal of an untimely petition by showing "good cause" for the delay. Consistent with our Supreme Court's analysis of the statute's "meaningful opportunity" provision and bearing in mind the goal of the statute to balance expediency and due process, we construe the absence of a detailed statutory definition of the good cause standard as an indication that the legislature intended the habeas court to exercise significant discretion in making determinations regarding "good cause."

II

Before we turn to a discussion of the appropriate standard of review applicable to a habeas court's good cause determination, some additional explication of the good cause standard itself is required.[9] No appellate

[9] We note that our Superior Courts have sometimes struggled to apply the good cause standard consistently, resulting in disparate results that are not easily reconciled. Compare, e.g., *Shuff* v. *Commissioner of Correction*, Superior Court, judicial district of Tolland, Docket No. CV-18-4009634-S (April 3, 2019) (holding habeas counsel's failure to advise petitioner of statutory time constraints sufficient to establish good cause for late filing), with *Greenfield* v. *Commissioner of Correction*, Superior Court, judicial district of Tolland, Docket No. CV-16-4008061-S (October 17, 2019) (holding that petitioner's claim of lack of knowledge of statutory time limits as result of habeas counsel's failure to advise him was insufficient to make showing of good cause needed to file untimely petition).

court has attempted to define with any degree of specificity the meaning of "good cause" in this context. Nevertheless, we do not start with an entirely blank canvas.

In *Langston* v. *Commissioner of Correction*, supra, 185 Conn. App. 528, as in the present case, this court considered a petitioner's appeal from a judgment of the habeas court dismissing, pursuant to § 52-470 (d), an untimely successive petition for lack of good cause.[10] The court in *Langston*, after taking note of the sole

[10] The petitioner in *Langston* argued before the habeas court and on appeal that there was good cause for the delay in the filing of the successive petition because an attorney who had represented him in conjunction with an earlier habeas petition allegedly had advised him to withdraw that timely filed petition and to file the successive petition in its place, purportedly without explaining to the petitioner the potential legal ramifications of such action. *Langston* v. *Commissioner of Correction*, supra, 185 Conn. App. 532. Because the petitioner did not call his former habeas counsel to testify at the show cause hearing, the habeas court concluded that there was "insufficient evidence to ascertain whether counsel had failed to apprise the petitioner of the time constraints governing his subsequent petition." Id., 533. This court stated that it could not conclude that the habeas court improperly dismissed the petition on that basis. Id.

This court also rejected the petitioner's legal argument that subsections (d) and (e) of § 52-470 were inapplicable because the sole purpose of those provisions was to curtail stale claims brought years after a final judgment was rendered in a prior habeas action. Id., 532–33. The petitioner argued that, although his latest petition technically was untimely, he nonetheless had been challenging his conviction continuously for nearly two decades and, thus, his latest petition was "not representative of the vexatious or frivolous claims that the 2012 reforms to § 52-470 were implemented to address." Id., 533. This court rejected the petitioner's proposed statutory construction, noting that the petitioner voluntarily had withdrawn his prior petition days before a hearing on a motion to dismiss it and on "the relative eve of trial." Id. This court explained that "[t]he fact that the petitioner has litigated previous habeas claims does not excuse or justify this tactic, nor does it explain his failure to refile this case before the [statutory] deadline." Id. At the conclusion of its analysis, this court stated: "We cannot conclude that this argument demonstrates good cause for this untimely petition." Id. To the extent that our conclusion could be misconstrued as having rendered de novo review as to whether the petitioner met his burden of establishing good cause, a standard of review that we reject in part III of this opinion, we clarify that we were rejecting, as a matter of law, the statutory construction argument advanced by the petitioner.

express example of good cause provided by the legislature in § 52-470 (e), stated that "[t]he parties also agree that good cause has been defined as a 'substantial reason amounting in law to a legal excuse for failing to perform an act required by law . . . [a] [l]egally sufficient ground or reason.' " Id., 532. The court appears to have accepted the parties' definition of "good cause" in resolving the appeal before it, but it never stated that it agreed with that definition, nor did it further elaborate on the definition.[11] In short, the *Langston* definition, while technically accurate, provides little guidance as to its application in the habeas context.

In attempting to synthesize a more fulsome definition of good cause as that term is used in § 52-470 (d) and (e), we are mindful that the statute itself provides some interpretive guidance. As we have indicated, the statute does not attempt to exhaustively define good cause. It does, however, provide one example, stating: "For the purposes of . . . [§ 52-470 (e)], good cause includes, *but is not limited to*, the discovery of new evidence which materially affects the merits of the case and which could not have been discovered by the exercise of due diligence in time to meet the requirements of subsection (c) or (d) of this section." (Emphasis added.) General Statutes § 52-470 (e). This example of good cause provides insight into the type of circumstances that the legislature intended would satisfy the good cause standard. By indicating that good cause for filing an untimely petition could be met by proffering new legally significant evidence that could not have been discovered with due diligence, the legislature signaled its intent that a good cause determination pursuant to § 52-470 (e) must emanate from a situation that lies

[11] The definition was taken from *Schoolhouse Corp.* v. *Wood*, 43 Conn. App. 586, 591, 684 A.2d 1191 (1996), cert. denied, 240 Conn. 913, 691 A.2d 1079 (1997), which was quoting a generalized definition of "good cause" found in Black's Law Dictionary (6th Ed. 1990), in the context of a discussion of a court's common-law, discretionary authority to grant an untimely motion to substitute a decedent's executor as a party defendant.

outside of the control of the petitioner or of habeas counsel, acting with reasonable diligence.

It is also helpful to seek interpretive guidance from similar instances in which our courts have applied a "good cause" standard in considering whether a party should be permitted to proceed on a late filing. The court in *Schoolhouse Corp.* v. *Wood*, 43 Conn. App. 586, 684 A.2d 1191 (1996), cert. denied, 240 Conn. 913, 691 A.2d 1079 (1997), which was cited by this court in *Langston*, noted that excuses that involved "[n]eglect, indifference, disregard of plainly applicable statutory authority and self-created hardship" would not comport with its definition of good cause. Id., 591–92. Our Supreme Court, in discussing whether to exercise its supervisory authority to consider an untimely filed appeal for "good cause shown" under our rules of practice; see Practice Book § 60-2 (5); similarly has indicated that good cause must involve exceptional circumstances beyond the control of the party seeking to be excused from the filing deadline. See *Connecticut Light & Power Co.* v. *Lighthouse Landings, Inc.*, 279 Conn. 90, 104, 900 A.2d 1242 (2006).

We conclude that to rebut successfully the presumption of unreasonable delay in § 52-470, a petitioner generally will be required to demonstrate that something outside of the control of the petitioner or habeas counsel caused or contributed to the delay. Although it is impossible to provide a comprehensive list of situations that could satisfy this good cause standard, a habeas court properly may elect to consider a number of factors in determining whether a petitioner has met his evidentiary burden of establishing good cause for filing an untimely petition. Based on the authorities we have discussed and the principles emanating from them, factors directly related to the good cause determination include, but are not limited to: (1) whether external forces outside the control of the petitioner had any bearing on

the delay; (2) whether and to what extent the petitioner or his counsel bears any personal responsibility for any excuse proffered for the untimely filing; (3) whether the reasons proffered by the petitioner in support of a finding of good cause are credible and are supported by evidence in the record; and (4) how long after the expiration of the filing deadline did the petitioner file the petition. No single factor necessarily will be dispositive, and the court should evaluate all relevant factors in light of the totality of the facts and circumstances presented.

III

We turn next to the standard of review applicable to the present appeal, which is a matter disputed by the parties. The petitioner argues that the habeas court's dismissal of his petition for lack of good cause is a legal conclusion that should be subject to plenary review. The petitioner further argues that whether he established good cause under § 52-470 presents an issue of statutory construction over which our review is likewise plenary. The respondent, on the other hand, notes that this court has provided "conflicting suggestions in prior cases" regarding the appropriate standard of review and asks that we "take this opportunity to clarify that the proper standard of review of the habeas court's finding of lack of good cause is abuse of discretion." We agree with the petitioner that, to the extent we must construe the meaning of "good cause," as that term is used in § 52-470, the issue involves principles of statutory interpretation over which our review is always plenary. See *Kelsey* v. *Commissioner of Correction*, supra, 329 Conn. 715–24. We also agree with the respondent, however, that a habeas court's determination of whether a petitioner has satisfied the good cause standard in a particular case requires a weighing of the various facts and circumstances offered to justify the delay, including an evaluation of the credibility of any

witness testimony. As such, the determination invokes the discretion of the habeas court and is reversible only for an abuse of that discretion.[12]

That an abuse of discretion standard of review should apply is consistent with other instances in which reviewing courts have applied that standard in reviewing a lower court's determination involving whether a party has established sufficient "good cause" to proceed on an untimely pleading. For example, in *State* v. *Ayala*, 324 Conn. 571, 585, 153 A.3d 588 (2017), our Supreme Court indicated that a trial court's decision whether to allow the state to amend a criminal information after a trial had commenced "for good cause shown" is reviewed for an abuse of discretion. Our Supreme Court has also applied an abuse of discretion standard of review when called on to consider this court's determination, pursuant to Practice Book § 60-2 (6), regarding whether a party has established good cause for its failure to file a timely appeal. See *Alliance Partners, Inc.* v. *Voltarc Technologies, Inc.*, 263 Conn. 204, 211, 820 A.2d 224 (2003) ("[w]e cannot conclude on the facts of this case that the Appellate Court abused its discretion in determining that the plaintiff's explanation for its late appeal did not constitute good cause"); see also *Georges* v. *OB-GYN Services, P.C.*, 335 Conn. 669, 689, 240 A.3d 249 (2020) (applying abuse of discretion standard in assessing "whether the defendants established the requisite 'good cause' under Practice Book §§ 60-2 (5) and 60-3"). Similar to the considerable discretion that this court exercises over whether to permit an untimely appeal to proceed, the legislature imparted the habeas court with procedural tools needed to manage its dockets, which included discretion to determine, on a case-by-case basis, whether a petitioner has established

[12] It is, of course, axiomatic that in applying the abuse of discretion standard, "[t]o the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous . . . ." (Internal quotation marks omitted.) *Carter* v. *Commis-*

"good cause" sufficient to permit an untimely petition to proceed.

We acknowledge that both this court and our Supreme Court have stated that "[t]he conclusions reached by the [habeas] court in its decision to dismiss [a] habeas petition are matters of law, subject to plenary review." *Foote* v. *Commissioner of Correction*, 170 Conn. App. 747, 753, 155 A.3d 823, cert. denied, 325 Conn. 902, 155 A.3d 1271 (2017); see also *Gilchrist* v. *Commissioner of Correction*, 334 Conn. 548, 553, 223 A.3d 368 (2020) ("[w]hether a habeas court properly dismissed a petition for a writ of habeas corpus presents a question of law over which our review is plenary"). Those cases, however, did not involve a review of a habeas court's dismissal of a petition following a show cause hearing under § 52-470 (e). Rather, that standard has been applied in appeals that challenged a habeas court's declining to issue a writ pursuant to Practice Book § 23-24, or dismissing a petition for lack of subject matter jurisdiction or other legal ground raised in a motion to dismiss pursuant to Practice Book § 23-29. These types of preliminary dismissals typically are made solely on the basis of the allegations contained in the pleadings, do not ordinarily involve the taking or weighing of evidence, and do not require the exercise of discretion by the habeas court in deciding whether good cause exists.[13]

sioner of Correction, 133 Conn. App. 387, 392, 35 A.3d 1088, cert. denied, 307 Conn. 901, 53 A.3d 217 (2012).

[13] The petitioner cites *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 566, 941 A.2d 248 (2008), for the proposition that our review should be plenary. *Johnson* also did not involve a challenge to a good cause determination made pursuant to § 52-470 but, instead, was an appeal following a trial on the merits of a habeas petition in which the habeas court had dismissed a portion of the petition on the basis of procedural default. As authority for the standard of review it imposed in *Johnson*, the court cited language from *In re Jonathan M.*, 255 Conn. 208, 217, 764 A.2d 739 (2001). In *In re Jonathan M.*, our Supreme Court reviewed the dismissal of a habeas petition that sought to collaterally attack a judgment terminating parental rights on the ground that the respondent received ineffective assistance of counsel. Because the question of whether a respondent in a termination of

In contrast, in evaluating whether a petitioner has established good cause to overcome the rebuttable presumption of unreasonable delay in filing a late petition under § 52-470, the habeas court does not make a strictly legal determination. Nor is the court simply finding facts. Rather, it is deciding, after weighing a variety of subordinate facts and legal arguments, whether a party has met a statutorily prescribed evidentiary threshold necessary to allow an untimely filed petition to proceed. This process is a classic exercise of discretionary authority, and, as such, we will overturn a habeas court's determination regarding good cause under § 52-470 only if it has abused the considerable discretion afforded to it under the statute.

"In reviewing a claim of abuse of discretion, we have stated that [d]iscretion means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . In general, abuse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors. . . . [Reversal is required only] [i]n those cases in which an abuse of discretion is manifest or where injustice appears to have been done . . . ." *D'Ascanio* v. *Toyota Industries Corp.*, 133 Conn. App. 420, 428, 35 A.3d 388 (2012), aff'd, 309 Conn. 663, 72 A.3d 1019 (2013).

IV

Having provided additional guidance on the meaning of good cause under the statute and clarifying our standard of review, we turn to our consideration of whether, under the circumstances of the present case, the court

parental rights case properly could assert a claim of ineffective assistance of counsel raised a pure question of law, the court's application of plenary review in that case is distinguishable from the decision under review in the present matter.

abused its discretion by determining that the petitioner failed to demonstrate good cause for his delay in filing the second habeas petition. The petitioner does not dispute that his second petition for a writ of habeas corpus challenged the same underlying conviction that he challenged in his first petition or that the second petition was not filed within two years after he had exhausted his appellate rights regarding the dismissal of his first petition. Further, he does not dispute that, pursuant to § 52-470 (d) (1), the untimely filing of the second petition created a rebuttable presumption that the untimely filing was the result of unreasonable delay or that he had the evidentiary burden to overcome that presumption. Rather, the petitioner's argument on appeal is that the habeas court improperly determined that he failed to satisfy this burden. The respondent counters that there is nothing in the record before us from which we could conclude that the habeas court abused its discretion in determining that the petitioner failed to meet his burden of establishing good cause for the delay, and, accordingly, the habeas court properly dismissed the untimely second petition. The respondent also argues that, due to the lack of any particular findings by the court assessing the credibility of the petitioner's testimony at the show cause hearing, we necessarily are limited in our review as to whether the habeas court was required to find good cause on this record as a matter of law. We conclude that the habeas court properly exercised its discretion in dismissing the petition.

The following additional facts and procedural history are relevant to our discussion of the petitioner's claim. The petitioner was the only witness who testified at the show cause hearing, and no other evidence was offered by the parties. According to his testimony, shortly after the Supreme Court in 2012 finally disposed of his appeal from the denial of his first petition, he received a letter from his appellate habeas counsel. That letter notified

him of the Supreme Court's decision regarding the first petition but did not inform him of any time limitation for filing a subsequent petition. Additionally, the petitioner testified about his access to legal resources, such as a law library, during his incarceration. According to the petitioner, beginning sometime in 2012, through the end of February, 2013, he was held in administrative segregation and had no access to a law library. He also testified that he had no access to a law library from February, 2013, through December, 2013, when he was in twenty-two hour a day lockdown. From December, 2013, onward, however, he testified that he was housed in the general prison population on a twenty hour a day lockdown and testified that, during that time, he had access to a law library or the equivalent. The petitioner asserted that, because of his lack of access to legal resources during segregation and lockdown and his former habeas counsel's failure to inform him of the time limitations of § 52-470, he was unaware of the deadline for filing his second habeas petition, and this lack of knowledge necessarily established "good cause" for any delay.

We are not persuaded that the petitioner's alleged lack of knowledge of the deadlines contained in § 52-470, even if deemed credible by the court, is sufficient to compel a conclusion that he had met his burden of demonstrating good cause for the delay. The habeas court properly concluded that a mere assertion of ignorance of the law, without more, is insufficient. The only evidence presented by the petitioner supporting his contention that he was unaware of § 52-470's filing deadline was his own testimony that he lacked personal knowledge of the deadline and that he was never informed of it by his former habeas counsel.

It is unclear whether the habeas court credited the petitioner's assertion. The court stated merely that the petitioner "*attempts to offer the excuse* that he was not

aware of § 52-470." (Emphasis added.) Certainly, the habeas court could have chosen not to credit the petitioner's assertion that he was unaware of the filing deadline in light of the fact that the petitioner had initiated both the former and present habeas actions himself, thereby suggesting some familiarity with habeas procedures. Additionally, the latest petition contained a handwritten attachment with legal citations that suggests that the petitioner was able to do some legal research and, with diligence, could have familiarized himself with the requirements of § 52-470. The petitioner's own testimony was that, for some portion of the time prior to the expiration of the two year limitation period, he was housed in the general prison population and had access to legal resources.

Regardless of whether the court credited the petitioner's claim of ignorance of § 52-470, it nevertheless went on to conclude that the petitioner's own ignorance of the law did not satisfy his burden to establish good cause for the untimely filing. This reasoning is legally sound. "The familiar legal maxims, that [everyone] is presumed to know the law, and that ignorance of the law excuses no one, are founded upon public policy and in necessity, and the [principle underlying] them is that one's acts must be considered as having been done with knowledge of the law, for otherwise its evasion would be facilitated and the courts burdened with collateral inquiries into the content of men's minds." *Atlas Realty Corp.* v. *House*, 123 Conn. 94, 101, 192 A. 564 (1937); see also *State* v. *Surette*, supra, 90 Conn. App. 182. We are also not persuaded that the petitioner overcame the presumption simply because he was not represented by counsel at the time he filed the petition. "Although we allow pro se litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules *of procedural and substantive law*." (Emphasis added.) *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 549, 911 A.2d 712 (2006).

Furthermore, the petitioner has failed to persuade us that there is any legal significance to the fact that former habeas counsel who represented him with respect to his first petition did not inform him about the statutory deadline for filing a successive petition. The petitioner fails to cite legal authority that imposes any such duty of disclosure on former habeas counsel, nor are we aware of any. Former habeas counsel was engaged to represent the petitioner with respect to the first petition and presumably, consistent with his or her professional obligation, would have endeavored to raise any and all nonfrivolous claims available to the petitioner in that petition.

Because our own habeas corpus standards have developed in tandem with federal habeas corpus jurisprudence; see, e.g., *Crawford* v. *Commissioner of Correction*, 294 Conn. 165, 181–82, 982 A.2d 620 (2009); Connecticut courts often have looked to federal habeas decisional law for guidance. Federal courts, in considering whether circumstances exist to warrant equitable tolling of the one year federal habeas corpus statute of limitations for persons incarcerated on state charges; see 28 U.S.C. § 2244 (d) (1) (2018); have held that a petitioner's ignorance of the limitation period or lack of legal experience generally is insufficient cause to excuse an untimely filed petition. See, e.g., *Waldron-Ramsey* v. *Pacholke*, 556 F.3d 1008, 1013 (9th Cir. 2009) (self-represented petitioner's deprivation of legal materials, confusion or ignorance of law are not circumstances warranting equitable tolling); *Delaney* v. *Matesanz*, 264 F.3d 7, 15 (1st Cir. 2001) (rejecting argument that District Court abused its discretion by not applying equitable tolling principles to save untimely petition filed by self-represented prisoner asserting ignorance of law, quoting *Fisher* v. *Johnson*, 174 F.3d 710, 714 (5th Cir. 1999), cert. denied, 531 U.S. 1164, 121 S. Ct. 1124, 148 L. Ed. 2d 991 (2001), for proposition that

"[i]gnorance of the law, even for an incarcerated pro se petitioner, generally does not excuse prompt filing"). Although the federal courts apply principles of equitable tolling, we can think of no valid reason why a different standard should apply to a petitioner's knowledge, or lack thereof, of the statutory filing requirements contained in § 52-470. To hold otherwise threatens to create an easily asserted excuse, difficult to disprove, and, if readily accepted, would threaten to undermine the reform that the legislature intended by enacting the statutory time limits.

In light of the deferential standard of review and the record before us, the petitioner has failed to demonstrate on appeal that the habeas court abused its discretion by dismissing his untimely successive petition. The habeas court provided the petitioner with an evidentiary hearing at which he could have presented evidence to satisfy his burden of establishing good cause for the untimely petition. Ultimately, the habeas court concluded that the petitioner failed to provide sufficient evidence to persuade it that he had rebutted the presumption of unreasonable delay. In so concluding, the court properly took into consideration the lengthy delay, indicating that the second petition was filed nearly three years beyond the filing deadline. The court acknowledged the excuses offered by the petitioner for the delay, including that he allegedly was unaware of § 52-470 and that he did not always have access to a law library or similar legal resource while incarcerated. The court made no express findings as to whether it found the petitioner credible, but appeared to conclude that, even if it accepted the petitioner's proffered excuses at face value, they were insufficient in the court's assessment to overcome the statutory presumption of unreasonable delay imposed by the legislature. The court properly noted that ignorance of the law is not, in and of itself, a legally justified excuse. We are satisfied from

our review of the record that the habeas court properly weighed relevant factors in reaching its decision to dismiss the petition, and the petitioner simply has failed to demonstrate that, under the circumstances, the habeas court's determination amounted to an abuse of discretion.

The judgment is affirmed.

In this opinion the other judges concurred.

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Threatening in second degree; claim that evidence was insufficient to support finding that defendant made physical threat against his wife for purposes of conviction of threatening in second degree in violation of statute (§ 53a-62 (a) (1)).

SUPREME COURT PENDING CASES

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

STATE *v.* LEROYA M., SC 20351
Judicial District of New Haven

Criminal; Whether Trial Court Improperly Rejected Defendant's Affirmative Defense That She Was Not Guilty of Murder by Reason of Mental Disease or Defect. The defendant caused the deaths of her two minor children by giving them sleeping pills and thereafter attempted to commit suicide. A few days later, the police discovered the children's bodies in the defendant's home. The defendant was charged with two counts of murder and elected to be tried by a three-judge panel. At trial, the defendant did not contest the fact that she had killed the children. Instead, she asserted the affirmative defense of mental disease or defect pursuant to General Statutes § 53a-13 (a), which provides for an affirmative defense if the defendant "lacked substantial capacity, as a result of mental disease or defect, either to appreciate the wrongfulness of [her] conduct or to control [her] conduct within the requirements of the law" at the time she committed the subject offense. Dr. Paul Amble, a forensic psychiatrist, testified at trial in support of the defendant's affirmative defense that the defendant had developed a "religious delusion" that killing her children and herself was "God's plan." He opined that the defendant "was psychotic at the time she did these acts and [she] was not able to appreciate what she was doing was wrong nor was she able to control her conduct in accordance with the law." Dr. Catherine Lewis, a forensic psychiatrist, testified for the state and opined that, while the defendant suffers from a "personality disorder with antisocial and borderline features," she did not see evidence of either "a serious mental disease or defect" or "a psychotic disorder" at the time of the alleged offense. She also disagreed with Dr. Amble's conclusion that the defendant was acting under the influence of a "religious delusion" when she killed the victims. The trial court concluded that the defendant failed to satisfy her lack of capacity affirmative defense by a preponderance of the evidence, even assuming arguendo that she suffered from a mental disease or defect at the time she killed her children. It found in support thereof that Dr. Amble's opinion "was undermined by his failure to investigate, or adequately explain, evidence that is at variance with that opinion." The trial court ultimately found the defendant guilty of the charged offenses. The defendant appeals directly from the judgment of conviction to the Supreme Court under General Statutes § 51-199 (b) (3). She claims that the trial court erred in rejecting

her mental disease or defect affirmative defense under § 53a-13 and argues that she presented substantial evidence and expert testimony in support of her affirmative defense, that no rational fact finder could reasonably conclude that she failed to establish her affirmative defense by a preponderance of the evidence, and that the trial court's rejection of Dr. Amble's testimony is not supported by the record.

JOSEPH HALLADAY *v.* COMMISSIONER OF CORRECTION, SC 20369
Judicial District of New Haven

Habeas; Appellate Jurisdiction; Whether Appellate Court Properly Dismissed Petitioner's Appeal Challenging Discovery Order Compelling Disclosure of His Criminal Defense File for Lack of Final Judgment; Whether Habeas Court Properly Rejected Petitioner's Claim of Privilege in His Criminal Defense File. In 2011, the petitioner pleaded guilty to murder, and the trial court sentenced him to forty years incarceration. In 2013, he brought a habeas action, claiming that his trial attorneys rendered ineffective assistance in myriad ways. The respondent, the Commissioner of Correction, filed a motion for production of the petitioner's criminal defense and investigative files (defense files) on the ground that the petitioner had waived the attorney-client privilege as to the defense files by raising an ineffective assistance of counsel claim in the petition. The habeas court, *Newsom, J.*, denied the motion, concluding that the respondent's request was overbroad and noting that, although the petitioner may raise claims that would require the disclosure of certain portions of the defense files, production of the complete files would expose privileged materials that are unnecessary for the respondent to respond the petitioner's ineffective assistance claim. After the case was assigned to a new judge for trial, the respondent filed a second motion for production seeking any materials contained in the defense files that relate to the ineffective assistance of counsel claim. The habeas court, *Blue, J.*, granted the motion and ordered the petitioner to produce copies of any related materials from the defense files and to produce a privilege log identifying any undisclosed materials that he contends are unrelated to his claim. The petitioner filed a petition for certification to appeal from the discovery order, which the habeas court denied. The petitioner appealed to the Appellate Court, and the respondent moved to dismiss the appeal for lack of a final judgment, claiming that the discovery order is an interlocutory order that is not immediately appealable under *State* v. *Curcio*, 191 Conn. 27, 31 (1983). Under *Curcio*, an interlocutory order is appealable in two circum-

stances: (1) where the order terminates a separate and distinct proceeding or (2) where the order so concludes the rights of the parties that further proceedings cannot affect them. The Appellate Court dismissed the appeal for lack of a final judgment, and the Supreme Court granted the petitioner certification to appeal. The Supreme Court will decide whether the Appellate Court properly dismissed the petitioner's appeal for lack of a final judgment, and if not, whether the habeas court properly rejected the petitioner's claim of privilege in his attorney's case file. The petitioner claims that the habeas court's order satisfies both prongs of the *Curcio* test, in that the order terminated a separate and distinct proceeding concerning his property rights in the defense files and so concluded his right to maintain the privilege in the files. The respondent argues in turn that the discovery order fails to satisfy either prong of the *Curcio* test because it is intertwined with the underlying ineffective assistance claim and because further proceedings could affect the parties' rights where the habeas court ordered the petitioner to create a privilege log identifying those portions of the file that he claims are privileged.

CECILIA PFISTER et al. *v.* MADISON BEACH HOTEL, LLC, SC 20478
Judicial District of New Haven

Zoning; Permanent Injunction; Whether Defendants' Use of Neighboring Municipal Park Was Expansion of Preexisting Nonconforming Use of Defendants' Property. The defendants own and operate a hotel on property in a residential zone in the town of Madison (town). Because the hotel predates the enactment of the town zoning regulations, the hotel and its restaurant are permitted as preexisting nonconforming uses. Immediately next to the hotel property is a grassy strip of land that is part of West Wharf Beach Park (Grassy Strip), which the town has owned and used as a park since 1896. Like the hotel property, the park is permitted in the residential zone as a preexisting nonconforming use. As a park, the Grassy Strip may be used for "active or passive recreational purposes" under the zoning regulations. In 2012, the hotel, in accordance with town rules, began using the Grassy Strip to sponsor a free annual summer concert series that runs one night each week for about ten weeks. The hotel hires the bands, runs the concerts using its own electricity, pays the town for the extra police detail, and advertises the event. Although the concerts take place on the Grassy Strip, the hotel allows attendees to watch the event from its property and to purchase food and drinks there. As a result, approximately 200 attendees traverse both properties

during the concerts. The plaintiffs, neighboring property owners aggrieved by the noise and traffic on concert nights, commenced this action for a permanent injunction prohibiting the concerts. The plaintiffs claim that the defendants are in violation of the town's zoning regulations because the concerts amount to an expansion of the defendants' preexisting nonconforming use of the hotel property. The defendants contend that any restrictions that apply to their use of the hotel property do not apply to the Grassy Strip and that concerts are a permissible use of the Grassy Strip under the zoning regulations. The trial court agreed with the plaintiffs and enjoined the defendants from holding the summer concert series. It found that the concerts are fundamentally commercial in nature and "functionally inseparable" from the hotel's business operations. As a result, the court concluded that the concerts were a prohibited expansion of the hotel's preexisting nonconforming use of the hotel property. The defendants appealed to the Appellate Court (197 Conn. App. 326), which reversed the judgment. That court reasoned that neither the restrictions on the hotel property nor the commercial benefits that the hotel derived from the concerts were relevant to the defendants' use of the Grassy Strip. It was unpersuaded by the plaintiffs' argument that, because the park had not been used to host concerts prior to the enactment of the town's zoning regulations, the summer concerts were not a preexisting nonconforming use. The court determined that the preexisting nonconforming use of the Grassy Strip was as a park and that, under the current zoning regulations regarding parks, the summer concerts were permissible as an "active or passive recreational" activity. The plaintiffs, on the granting of certification, appealed to the Supreme Court. They claim that the Appellate Court improperly applied plenary review to the trial court's findings that the concerts span both parcels and are commercial in nature, improperly rejected their claim that the actual use of the park prior to the enactment of the zoning regulations determines its nonconforming use, and improperly concluded that the concerts were a permissible use of a park under the regulations.

CENTERPLAN CONSTRUCTION COMPANY, LLC, et al. *v.*
CITY OF HARTFORD, SC 20526
Judicial District of Hartford

Contracts; Whether Trial Court Properly Concluded That Builder and Developer Plaintiffs Were Responsible for Architect's Acts and Omissions; Whether Trial Court Erred in Treating Plaintiffs as Single Entity; Whether Trial Court Erred in Failing to Instruct Jury to Consider Whether Defendant City's Actions

Resulted in "Concurrent Delay"; Whether Trial Court Properly Instructed Jury on City's Counterclaim for Liquidated Damages. The defendant city of Hartford (City) entered into an agreement (Architect Agreement) with an architect firm, Pendulum Studio II, LLC, to design Dunkin' Donuts Park, the home stadium for the Hartford Yard Goats minor league baseball team. The City thereafter entered into a "Developer Agreement" with plaintiff DoNo Hartford, LLC, a developer, to construct the stadium. DoNo in turn entered into a "Builder Agreement" with a builder, plaintiff Centerplan Construction Company, LLC. Subsequently, the plaintiffs filed a "Notice of Claim" claiming, inter alia, that the City's failure to timely assign the Architect Agreement had likely delayed the construction of the stadium. In order to resolve the dispute, the City and DoNo entered into a new agreement, entitled the "Term Sheet," which, inter alia, established a new substantial completion deadline for the stadium of May 17, 2016. The City then issued a "change order" increasing the maximum guaranteed price for the construction of the stadium by $7,573,079. After the plaintiffs failed to complete the construction of the stadium by the new deadline, the City terminated the plaintiffs from the project. The plaintiffs brought this action, alleging breach of contract and breach of the implied covenant of good faith and fair dealing, and the City filed a counterclaim. After trial, the jury returned a verdict in favor of the City, finding that the plaintiffs were responsible for the stadium not being completed by the May 17, 2016 deadline, and the jury awarded the City $335,000 in liquidated damages. The plaintiffs appeal and claim that the trial court erred in deciding as a matter of law that, under the parties' agreements, they -- and not the City -- "controlled" the architect firm and were therefore responsible for its mistakes in and changes to the design of the stadium. The plaintiffs also claim that the trial court improperly concluded that, under the terms of the Term Sheet, the City was not required to (1) give them notice, (2) provide them with an opportunity to cure any default, and (3) participate in mediation with them. Alternatively, noting that Centerplan was not a party to the Term Sheet, the plaintiffs claim that the court improperly treated DoNo and Centerplan as one entity when it determined that the City had no obligation to give Centerplan notice and an opportunity to cure. In addition, the plaintiffs claim that the court erred in refusing to instruct the jury that, if it found that there was concurrent delay by virtue of the City's acts or omissions, Centerplan would be entitled to an extension of time and DoNo could not be in default. Finally, the plaintiffs claim that the trial court erred in refusing to give their requested jury charge that would have allowed the jury to determine the value of the benefits conferred by the plaintiffs to the City and offset that amount against the City's liquidated damages award.

JOANN RICCIO, EXECUTRIX (ESTATE OF THERESA RICCIO) *v.* BRISTOL HOSPITAL INC., SC 20529

Judicial District of New Britain

Accidental Failure of Suit Statute; General Statutes § 52-592; Whether Plaintiff Could Bring Second Medical Malpractice Action under Accidental Failure of Suit Statute After First Action Was Dismissed for Failure to Attach Sufficient Written Opinion From Similar Health Care Provider. Theresa Riccio died while receiving care at the defendant hospital, and her estate brought a wrongful death action against the defendant. The plaintiff attached to the complaint two written opinions of similar health care providers stating that there appeared to be evidence of medical negligence, as required by General Statutes § 52-190a. The defendant moved to dismiss the action on the ground that the written opinions were legally insufficient because neither opinion disclosed the author's credentials and qualifications. The trial court granted the motion to dismiss and cited *Bell* v. *Hospital of Saint Raphael*, 133 Conn. App. 548 (2012), and *Lucisano* v. *Bisson*, 132 Conn. App. 549 (2011), in which the Appellate Court held that § 52-190a mandates that the written opinion include the author's credentials and qualifications. The plaintiff then brought a second action against the defendant pursuant to the accidental failure of suit statute, General Statutes § 52-592. Per *Plante* v. *Charlotte Hungerford Hospital*, 300 Conn. 33 (2011), if a medical malpractice action is dismissed for failure to file a sufficient written opinion under § 52-190a, a plaintiff may commence an otherwise time barred new action under the "matter of form" provision of § 52-592 when the failure in the first action resulted from mistake, inadvertence or excusable neglect and not egregious conduct or gross negligence by the plaintiff or his attorney. The plaintiff alleged in her complaint that the first action had been dismissed as a matter of form due to mistake, inadvertence or excusable neglect in that she failed to set forth the authors' credentials in their written opinions. The defendant moved to dismiss the action as time barred, claiming that the plaintiff's action cannot be saved under § 52-592 because the failure in the first action was the result of her attorney's gross negligence. After conducting an evidentiary hearing, the trial court found that the failure in the first action was not due to "mistake, inadvertence, or excusable neglect" but rather was due to gross negligence on the part of the plaintiff's attorney in failing to read and comply with the relevant Appellate Court authority. Accordingly, the court held that the plaintiff could not avail herself of § 52-592 and dismissed the action. The plaintiff filed this appeal in the Appellate Court, and it was subsequently transferred to the Supreme Court. The Supreme Court will decide whether the trial court

properly found that the failure to include the health care providers' credentials in their written opinions constituted gross negligence or egregious conduct where the plaintiff argues that the trial court improperly based its decision on the maxim that ignorance of the law is not an excuse.

STATE *v.* GREGORY JOHN POMPEI, SC 20530
Judicial District of Hartford at G.A. 14

Criminal; Search and Seizure; Whether Trial Court Properly Denied Defendant's Motion to Suppress Statements to and Observations Made by Police on Ground that Parking of Police Vehicle Behind Defendant's Vehicle was an Illegal Seizure. On October 5, 2017, Manchester police officer John Loud received a report of a potentially unconscious man in a white Ford Focus parked in the lot of a convenience store. Loud arrived at the convenience store, parked his police vehicle behind the Focus, and approached the Focus, where he saw the defendant either asleep or unconscious in the driver's seat. He knocked on the driver's side window, and the defendant awoke. As they spoke, Loud observed the keys in the ignition, the smell of alcohol, and the defendant's disoriented behavior. The defendant exited the vehicle to get his identification from the trunk, at which time other officers arrived on the scene. After the defendant repeatedly attempted to walk away from the officers, he was put in handcuffs and taken to the Manchester police station. He was later arrested and charged with operating a motor vehicle under the influence and interfering with a police officer. The defendant filed a motion to suppress all of his statements and all of the police officers' observations of him made before he was read his *Miranda* rights at the police station. The defendant argued that Loud's parking of the police vehicle behind his vehicle in the convenience store lot constituted a seizure in violation of his fourth amendment rights because Loud did not have a reasonable and articulable suspicion that he was engaged in illegal conduct at the time. The trial court denied the motion to suppress and held that the defendant was not seized when Loud parked his police vehicle behind the defendant's vehicle because Loud was performing a well-being check, not conducting an investigatory stop. The trial court noted that Loud was acting pursuant to the report of an unconscious man in a parked car, that he parked behind the defendant for security reasons, and that he did not use his police lights or make a display of force towards the defendant when he approached the defendant's vehicle. The trial court further concluded that the encounter became a seizure when the defendant woke up and began to interact with Loud but

that, given the surrounding circumstances, Loud had a reasonable and articulable suspicion that the defendant had been operating his vehicle under the influence. The case was tried to a jury, which found the defendant not guilty of operating under the influence but guilty of interfering with an officer. The defendant filed this appeal from his conviction in the Appellate Court, and it was subsequently transferred to the Supreme Court. The Supreme Court will decide whether the trial court properly denied the defendant's motion to suppress. The defendant argues that he was seized when Loud parked behind his vehicle under *State* v. *Edmonds*, 323 Conn. 34 (2016), where the Supreme Court determined that the defendant there was seized for fourth amendment purposes when multiple police officers converged on him in a parking lot and told him to stop when he attempted to walk away.

JAMES G. GALLAGHER *v.* TOWN OF FAIRFIELD et al., SC 20533
Judicial District of Fairfield

Contracts; Whether Defendant Town Is Required to Reimburse Plaintiff Retiree for Medicare Premiums and Whether Plaintiff Is Entitled to Same Health Insurance as Defendant's Active Employees under Collective Bargaining Agreement in Effect When He Retired. The plaintiff was previously employed as a police officer by the defendant town of Fairfield. On October 9, 1986, his disability retirement request was approved. The plaintiff was covered at the time by a police union collective bargaining agreement providing in relevant part that "employees who retire under the disability provisions of the retirement plan and their enrolled dependents shall also be entitled to town paid health insurance coverage." The defendant town accordingly paid the premiums of the plaintiff and his wife for the health insurance coverages that were in effect at the time of his retirement. The defendant town entered into a new collective bargaining agreement with its police union in 2010, which contained a new provision stating that "employees eligible for Social Security Medicare Benefits shall be required to participate in Medicare Part A and B Plans upon attaining eligibility." The plaintiff became eligible for Medicare when he turned sixty-five years old in 2016, and he was subsequently moved to a Medicare Supplement Plan with premiums that he was required to pay. The defendant town continued to pay for health insurance coverage but did not reimburse the plaintiff for his Medicare premiums. The plaintiff brought this contract action against the defendants—the town, its personnel department, and its Police and Retirement Board—seeking in relevant part monetary damages

and "an order that the defendants restore to the plaintiff the medical and health coverage as provided" in the collective bargaining agreement in effect when he retired. The trial court rejected the plaintiff's claim that he was entitled to the same health insurance coverage in effect on the date of his retirement and that his benefits have been reduced by virtue of his mandated Medicare enrollment, finding that he and his wife have not experienced a decrease in benefits. The trial court agreed with the plaintiff, however, that he was entitled to reimbursement for his Medicare premiums under the collective bargaining agreement in effect when he retired and determined that the agreement provision regarding "town paid health insurance coverage" could not be construed to exclude the plaintiff's Medicare premiums. The trial court accordingly awarded damages to the plaintiff that corresponded to his past Medicare premiums and ordered the defendant town to reimburse the plaintiff for his present and future Medicare premiums. The defendants appealed and the plaintiff cross appealed to the Appellate Court, and the Supreme Court transferred the matter to itself thereafter. The Supreme Court will decide in the defendants' appeal whether the trial court properly found that the defendant town was required to reimburse the plaintiff for Medicare premiums under the collective bargaining agreement in effect when he retired. It will further decide in the plaintiff's cross appeal whether the trial court properly held that he was not entitled to the same health insurance coverage as the town's active employees under that collective bargaining agreement and that he was not entitled to damages representing amounts (1) he reimbursed to Medicare from a personal injury settlement and (2) not covered by Medicare.

TORO CREDIT CO. *v.* BETTY ANNE ZEYTOONJIAN, AS TRUSTEE, et al., SC 20534
Judicial District of Tolland

Foreclosure; Choice of Remedies Provision in Mortgage Agreement; Whether Trial Court Erred in Ordering Foreclosure by Sale When Strict Foreclosure Would Satisfy Underlying Debt. The plaintiff is the financing arm of a parent company that sells outdoor power equipment through various independently-owned dealers, including the dealership owned by the defendants. In 2003, the defendants' dealership restructured $14 million in debt that it owed the plaintiff and, as part of that transaction, the defendants gave the plaintiff a mortgage on two parcels in Enfield to secure a $1,662,500 note. The mortgage contains a choice of remedies provision that provides that the plaintiff may pursue a foreclosure by sale in the event of a default.

The parties agree that the defendants defaulted on their obligations under the note and that the plaintiff has the right to foreclose. They also agree that the fair market values of the two parcels are $950,000 and about $850,000. The parties dispute, however, whether the appropriate remedy is to render a judgment of strict foreclosure or foreclosure by sale. The principal amount of the unpaid debt is $756,785.07, and the plaintiff sought, as of April 5, 2019, an additional $67,313.22 in interest, $9750 for an appraisal and the appraiser's testimony, and $68,598.83 in attorney's fees, for a total debt of $902,447.12. Both parties' appraisers testified that it would take at least one year to market and sell the parcels. In light of that testimony, the court reasoned that if it ordered a strict foreclosure of the one parcel whose value exceeds the debt, then the costs incurred by the plaintiff during the time it took to market the property would make it less likely that the plaintiff would be made whole. The court determined that, instead, it would be more equitable to order a foreclosure by sale in which the defendants could choose whether to sell both parcels together or to sell one parcel initially. If they chose to sell one parcel first and the sale was insufficient to satisfy the debt, then the second parcel would be sold to satisfy the outstanding amount due. The defendants appealed the judgment of foreclosure by sale to the Appellate Court, and the Supreme Court transferred the appeal to itself. The defendants claim on appeal that the trial court erred in ordering a foreclosure by sale when the $950,000 fair market value of one parcel "materially exceeded" the total amount of the debt on April 5, 2019. They argue that the trial court erred by taking into account the plaintiff's postjudgment costs related to the time that it would take to market and sell the property. The defendants also claim that the trial court improperly overlooked the plaintiff's failure to file a motion for a judgment of foreclosure by sale, as required by General Statutes § 49-24, and that the choice of remedy provision in the parties' mortgage is invalid because it is inconsistent with state foreclosure law.

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

Jessie Opinion
Chief Staff Attorney

NOTICE OF CONNECTICUT STATE AGENCIES

Paid Family & Medical Leave Insurance Authority

Notice of Policy Change

In accordance with sections 1-121 and 31-49h of the Connecticut General Statutes, notice is hereby given that the Board of Directors of the Connecticut Paid Family and Medical Leave Insurance Authority (''hereinafter the CT Paid Leave Authority'') intend to adopt the following policy relating to the usage of credit cards by employees of the CT Paid Leave Authority, including the Credit Card Use Agreement and Lost Receipt Certification form.

All written comments regarding these procedures must be submitted by January 21, 2021 to the CT Paid Leave Authority via email at PFMLIAComments@ct.gov.

CREDIT CARD POLICY

Policy brief & purpose

The Paid Family and Medical Leave Insurance Authority (the ''Authority'') may provide employees with credit cards that can be used for business-related expenses. Having these cards helps us track and process our expenses, prevent fraud, and make payments more efficiently. We want to make sure that employees who hold Authority credit cards will use them properly and will know their limitations and responsibilities.

Scope

This policy applies to all employees who are eligible to use an Authority card. It also applies to employees who have the right to approve the use of an Authority card for their team members.

Policy elements

Here we outline our general rules about Authority credit cards.

How does an Authority credit card work?

Usually, the Authority will take out a credit card in your name. You will be able to use it for business-related expenses and the Authority will pay the card bills.

Employee credit card agreement

When the Authority gives you a credit card, you will need to sign and abide by a credit card agreement. This is to acknowledge that the credit card belongs to the Authority and that we can process and investigate charges as we see fit. It will also refer to your responsibilities and the consequences for incorrect use.

Apart from the agreement, you can consult this policy every time you need more information about the use of the Authority credit card.

Who can hold an Authority credit card?

Authority credit cards may be given to those individuals authorized by the Chief Executive Officer (CEO).

Sometimes, employees who do not hold an Authority credit card need to pay for large business-related expenses (e.g. plane tickets for work travel). In these cases, please ask your manager for approval and ask the Controller to coordinate with an individual who has an Authority credit card to pay on your behalf. Alternatively, you can pay for the charge yourself and expense it via our Business Travel & Related Expenses Policy. If it meets our requirements, the expense will be reimbursed.

We have the right to withdraw an Authority credit card from an employee at any point.

What expenses are allowed on an Authority credit card?

You can use an Authority card to pay for work-related expenses only. This includes:

- Expenses involved in meeting with clients, board members, vendors, or other appropriate business partners (e.g. dinner, printed material)
- Hotel or similar accommodations during work-related travel
- Legal document expenses (e.g. Visa)
- Air, train, ship, or other transportation fares
- Local transportation during work-related travel (taxi fares, rental cars etc.)
- Other minor or per diem expenses that have been approved by your manager (e.g. meals, business materials)
- Training and educational material approved by your manager
- Other expenses allowed under the Business Travel & Related Expenses Policy

You must not use an Authority credit card for non-authorized or personal expenses. Any personal expenses must be reimbursed to the Authority within thirty days of the charge. Never withdraw cash using the Authority's credit card or use it to purchase traveler's checks. You are also not allowed to purchase alcohol, drugs, weapons, pornography or any illegal material or substances or incur charges for any kind of adult entertainment.

All receipts for purchases made with the Authority credit card must be submitted to the Authority no more than 30 days after the charges are incurred.

Exceptions

You may apply for an exception to this policy if absolutely necessary. Inform the CEO and your manager about the expense you want to make – you might receive authorization in special cases. If you fail to obtain special authorization, you will be responsible for any expenses you incur and you may also face further disciplinary action, up to and including termination.

The limits of the Authority credit card

The card limits depend on a number of factors, including your position within the Authority, your job functions and responsibilities and the frequency or type of the expenses you incur. You will usually see your card's limits on the employee agreement, but, as a general rule, the monthly limits are:

- $5,000 in cards used by non-executives.
- $10,000 in cards used by executives.

We may adjust these limits based on your job's specific needs. If you are not sure about the limits of your Authority credit card, ask our accounting department.

Your responsibilities

If you have an Authority credit card, we expect you to:

- **Protect it to the best of your ability**. Do not leave it unattended or give it to unauthorized people (e.g. friends, family, colleagues) even just to hold. Keep it in accessible but secure locations, and make sure that account numbers on Authority credit cards are not posted or left in conspicuous places.
- **Report it stolen or lost as soon as possible**. If, for example, there's a break-in at your home and your Authority card is taken, you need to immediately report it to the card issuer, inform the CEO, and file a police report if appropriate. Statistics on stolen charge cards indicates that unauthorized use of stolen cards is greatest in the first few hours after the theft.
- **Use it only for approved reasons**. Follow the instructions in this policy and the employee card agreement, and do not use the card for personal or unauthorized expenses, even if you intend to compensate the charges later. Authority credit cards must NOT be used to pay for personal vacation or travel.
- **Document all charges to an Authority card and submit on an expense report**. Please keep receipts and submit documentation with the date and purpose of the expense. All purchases must be supported by an invoice and documentation of the goods/services purchased and, if applicable, related to a specific event, meeting, or project. Receipts for all expenditures must be kept in good order and to furnish those receipts promptly (within 30 days of the transaction), together with such additional documentation that may be required by IRS and good business practices, including but not limited to person, place, purpose, and account to which each expense should be charged. The credit card statement is not considered adequate documentation for a purchase. If a receipt cannot be provided, then a Lost Receipt Certification Form must be completed and signed in its place.

If you are responsible for authorizing and approving credit card invoices, please do so within the time limits to avoid late fees.

Use of Authority credit card policy

When you are using the Authority credit card, you should:

- Confirm that the particular expense is allowed under this policy and the Business Travel & Related Expenses Policy.
- Mind the credit card limit and the transaction limit so you can plan business expenses properly.
- Keep the credit card number and physical card secure.
- Use the card sensibly and avoid unnecessary expenses even if they are allowed under this policy and the Business Travel & Related Expenses Policy.

Violating this policy

We expect you to comply with this Authority credit card policy and the employee agreement and we may need to take action if you violate them – see the Progressive Discipline Policy and Standards of Conduct sections of the Employee Manual. All transactions processed on an Authority credit card are subject to examination by internal and external auditors. The Authority has the right to review your credit card use and withdraw permission to use the credit card it if there is any instance or pattern of inappropriate or unauthorized use. For example:

- Using the Authority credit card for personal use or unauthorized expenses is prohibited. If you incur personal or unauthorized expenses, they will be repaid by you immediately, deducted from future reimbursement, or considered a personal loan to be repaid through payroll deduction. If you do this consistently, you may face disciplinary action, up to and including termination.
- If you lose a receipt, you will need to inform the accounting department in writing immediately. We may find a solution if this happens rarely, including the completion of a Lost Receipt Certification Form, but if you fail to submit receipts consistently, you may lose the right to hold an Authority card.
- If you fail to submit expenses on time, and the Authority incurs late fees as a result of your failure to adhere to the credit card policies, you will be responsible for paying the late fees. Doing this repeatedly will mean loss of the Authority credit card privileges and may lead to further disciplinary action.
- Giving an Authority credit card to unauthorized people or abusing the expense limits may result in suspension or termination of the card and subject you to disciplinary action, including termination.
- Making prohibited purchases as mentioned previously (e.g. weapons, drugs) will result in immediate termination, and possibly legal action.
- Intentional misuse or fraudulent abuse of any Authority credit card may result in disciplinary action, up to and including dismissal and/or criminal or ethical sanctions. In addition, the authorized card holder shall promptly reimburse the Authority for any improper or unacceptable purchases, and has personal liability for misuse.
- Honest inconsequential improper use of the card (you make an honest error) that is brought to the attention of the CEO and quickly remedied will not be considered misappropriation of funds, but may result in temporary suspension of card usage.

The Paid Family & Medical Leave Insurance Authority does not accept liability for the following:

- Unauthorized use of Authority credit cards.
- Account numbers that are fraudulently used.

Authority responsibilities

- **Review of credit card statements/purchases**

  Your immediate supervisor is responsible for reviewing all expenses submitted on your expense report, including those made by credit card. In addition,

the Controller will review credit card activity no less than quarterly, and the Chief of Staff will do a secondary review no less than every six months.

If there is any suspected irregular or potentially inappropriate use, this should be brought to the CEO's attention immediately. Any confirmed cases of inappropriate use of at least $1,000 should be brought to the Board's attention at the next regularly scheduled meeting.

- **Inventory of credit cards**

  No less than annually, the Controller will verify the cardholders are in possession of their cards to proactively identify any inadvertent cases of loss.

- **Cancellation of cards**

  Any cards to be cancelled or suspended because the card is lost, stolen, misused, etc. will be done so immediately by the Controller.

(*continued*)

CREDIT CARD USE AGREEMENT

This Credit Card Use Agreement (''Agreement'') is between the Paid Family & Medical Leave Insurance Authority (''Authority'')

and

_____ _____.

Employee Name (Print) Credit Card Number (last four digits on card)

I am the employee named above and I received the above-listed credit card associated with the commercial credit account of the Authority (''Card'') and I confirm all my information is correct. By my signature on this Agreement, I will agree to comply with and be bound by the following conditions:

1. I understand this Card is Authority property and I will be making financial commitments on behalf of the Authority when using this Card. I agree that use of this Card is limited to business purposes authorized by the Authority. I agree this Card must not be used for any personal, unauthorized, or illegal charges and any such misuse will result in cancellation of this Card and may further result in disciplinary action up to and including termination of my employment.

2. I understand the Authority may review and investigate use of this Card and I have no expectation of privacy concerning any charges incurred. I will cooperate with any such review or investigation. I agree to be held personally liable for the total dollar amount of any improper charges incurred plus any administrative fees assessed in connection with misuse of this Card. I agree that any personal, unauthorized, or illegal charges made by me, including any administrative fees, finance charges, and/or late fees assessed in connection with such charges, and paid for by the Authority on my behalf, will be repaid immediately, deducted from future reimbursement, or considered a personal loan to be repaid through payroll deduction. I understand that a payroll deduction on my loan will be subject to the limits set forth by applicable law. If such deductions are not permitted by law or are insufficient to fully reimburse the Authority, I will repay the Authority these amounts plus finance or other charges due in connection with the misuse of this Card and the Authority may take appropriate legal action to collect the monies owed. If the Authority is required to take legal action to collect monies owed, I agree that I may be liable for improper charges that result from allowing others to use this Card.

3. I agree to reconcile my expenses and timely submit an expense report from which the Authority will pay the charges incurred in connection with this Card. The expense report will be submitted using the Authority's standard expense reporting system and shall be supported by appropriate documentation as required by the Authority. If I fail to timely submit accurate and complete expense reports, the Authority will consider the unsupported charges incurred in connection with this Card to be a personal loan and may collect those amounts from me as described herein.

4. I agree to return this Card immediately upon request by management or upon termination of my employment for any reason (including retirement) with the Authority. I understand that this Agreement is revocable by me at any time upon written notice to my immediate supervisor at the Authority. If revoked, I understand I must stop using the Card immediately and return it

to the Chief Executive Officer (CEO) with my revocation notice. I understand that if revoked, I remain responsible for any misuse and remain indebted to the Authority for any personal, unauthorized, or illegal charges made prior to the revocation and return of the Card.

5. I agree to immediately notify the CEO upon discovering this Card has been lost, misused, or stolen or this Card has been the subject to fraud, unauthorized use or misuse. I agree to cooperate with any investigation concerning the loss, theft, or suspected misuse of this Card.

6. I acknowledge that I have received, read, and will follow the Authority's Credit Card Policy.

Date:_____ _____
Employee Signature

Received:
Date:_____ By:_____

(*continued*)

LOST RECEIPT CERTIFICATION FORM

If an original receipt is lost, the traveler or requester must ask the vendor for a duplicate. If the vendor is unable to provide a duplicate, the traveler or requester must indicate that they attempted to secure a copy of the lost receipt. A ''Lost Receipt Certification Form'' must be completed for each lost receipt and attached to the expense report submitted for reimbursement.

This certification attests to the following:

a. No original receipt is available for this expense. Please check applicable statements below.

- ❍ A duplicate receipt obtained from the vendor is attached.
- ❍ The vendor is unable to provide a duplicate receipt.
- ❍ Proof of payment is attached (i.e., credit card statement, cancelled check) Note: This is required.

b. The expense was incurred on behalf of the Authority.

c. The item and amount of the expense are accurate.

d. No reimbursement of this expense has been or will be sought or accepted from another source.

Please provide a brief description of the expense.

Amount $ Date Expense Incurred
Vendor
Description of Expense

Please provide signatures.

Requester/Traveler Signature Date

Approver (typed or printed)
Approver's Title (typed or printed)

Approver's Signature Date

NOTICES

DIVISION OF CRIMINAL JUSTICE

(Affirmative Action/Equal Opportunity Employer)

STATE'S ATTORNEY
JUDICIAL DISTRICT OF NEW LONDON

Applications are being accepted for the full-time position of State's Attorney for the Judicial District of New London (PCN 4861). The successful applicant shall hold office from the date of appointment through June 30, 2025, and thereafter be subject to appointment to an eight (8) year term. The annual salary is $163,292.17. For a description of this position, please go to : **https://portal.ct.gov/DCJ/Employment/Job-Descriptions/States-Attorney.**

At the time of appointment, the successful candidate must be an attorney-at-law and shall have been admitted to the practice of law for at least three years; residency in the State of Connecticut is a prerequisite to appointment. All applicants must complete division of Criminal Justice application forms. These forms may be downloaded from the Division website at **www.ct.gov/csao.** A job description for this position may also be viewed on this website.

Two (2) complete sets of application forms along with resumes must be sent via U.S. Mail to**:** The Honorable Andrew J. McDonald, Chairman, Criminal Justice Commission, c/o Human Resources - Office of the Chief State's Attorney, 300 Corporate Place, Rocky Hill, CT 06067, Attn: SA-New London JD (PCN 4861) and must be postmarked no later than **January 7, 2021**. In addition, an electronic copy (pdf) of application materials should be sent to **DCJ.HR@ct.gov**. Applications received by facsimile will not be accepted. The Division of Criminal Justice is an Affirmative Action/Equal Opportunity Employer.

Notice of Application for Reinstatement

DOCKET NO. CV09-4036109-S. CHIEF DISCIPLINARY COUNSEL VS. HWANG, GEORGE. SUPERIOR COURT, JUDICIAL DISTRICT OF NEW HAVEN AT NEW HAVEN, DATE: 12/3/2020.

NOTICE

This is to advise that George Hwang (422058) has filed an Application for Reinstatement to the practice as an attorney in Connecticut. The application, which was filed in the Superior Court for the Judicial District of New Haven on December 2, 2020, has been filed in the following original grievance file:

Chief Disciplinary Counsel vs. Hwang, George (NNH CV09-4036109-S). The application will be referred To the Chief Court Administrator for referral to a Standing Committee on Recommendations for Admission to the Connecticut Bar.

Giovanni Spennato
Chief Clerk
New Haven, Superior Court

Revised Law Journal Deadlines for Issues Published January 2021 through December 2021

To submit material to the Connecticut Law Journal please send a Word file to: COLPLJ@JUD.CT.GOV.

The deadline for submitting material is Wednesday at noon for publication in the Law Journal on the Tuesday six days later.

If one or more holidays fall within the 6 day time period, the deadline will change as noted in bold type in the following deadline listing:

Law Journal Publication Date (every Tuesday)	Deadline Date (at 12:00 Noon)
January 05, 2021	**Tuesday, December 29, 2020**
January 12, 2021	Wednesday, January 06, 2021
January 19, 2021	**Tuesday, January 12, 2021**
January 26, 2021	Wednesday, January 20, 2021
February 02, 2021	Wednesday, January 27, 2021
February 09, 2021	Wednesday, February 03, 2021
February 16, 2021	**Tuesday, February 09, 2021**
February 23, 2021	Wednesday, February 17, 2021
March 02, 2021	Wednesday, February 24, 2021
March 09, 2021	Wednesday, March 03, 2021
March 16, 2021	Wednesday, March 10, 2021
March 23, 2021	Wednesday, March 17, 2021
March 30, 2021	Wednesday, March 24, 2021
April 06, 2021	**Tuesday, March 30, 2021**
April 13, 2021	Wednesday, April 07, 2021
April 20, 2021	Wednesday, April 14, 2021
April 27, 2021	Wednesday, April 21, 2021
May 04, 2021	Wednesday, April 28, 2021
May 11, 2021	Wednesday, May 05, 2021
May 18, 2021	Wednesday, May 12, 2021
May 25, 2021	Wednesday, May 19, 2021
June 01, 2021	**Tuesday, May 25, 2021**
June 08, 2021	Wednesday, June 02, 2021
June 15, 2021	Wednesday, June 09, 2021
June 22, 2021	Wednesday, June 16, 2021
June 29, 2021	Wednesday, June 23, 2021

July 06, 2021	**Tuesday, June 29, 2021**
July 13, 2021	Wednesday, July 07, 2021
July 20, 2021	Wednesday, July 14, 2021
July 27, 2021	Wednesday, July 21, 2021
August 03, 2021	Wednesday, July 28, 2021
August 10, 2021	Wednesday, August 04, 2021
August 17, 2021	Wednesday, August 11, 2021
August 24, 2021	Wednesday, August 18, 2021
August 31, 2021	Wednesday, August 25, 2021
September 07, 2021	**Tuesday, August 31, 2021**
September 14, 2021	Wednesday, September 08, 2021
September 21, 2021	Wednesday, September 15, 2021
September 28, 2021	Wednesday, September 22, 2021
October 05, 2021	Wednesday, September 29, 2021
October 12, 2021	**Tuesday, October 05, 2021**
October 19, 2021	Wednesday, October 13, 2021
October 26, 2021	Wednesday, October 20, 2021
November 02, 2021	Wednesday, October 27, 2021
November 09, 2021	Wednesday, November 03, 2021
November 16, 2021	**Tuesday, November 09, 2021**
November 23, 2021	Wednesday, November 17, 2021
November 30, 2021	**Tuesday, November 23, 2021**
December 07, 2021	Wednesday, December 01, 2021
December 14, 2021	Wednesday, December 08, 2021
December 21, 2021	Wednesday, December 15, 2021
December 28, 2021	**Tuesday, December 21, 2021**