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CONNECTICUT REPORTS

Vol. 337

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* DONALD RAYNOR (SC 20183)

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

Syllabus

Convicted, after a jury trial, of the crime of murder in connection with the shooting death of the victim, the defendant appealed. The defendant and the victim were members of rival street gangs in Hartford. On the day of the shooting, the defendant called R, another member of his gang, and told him that he wanted to test an assault rifle. R drove with the defendant through areas of Hartford frequented by members of the victim's gang, and, as R drove, the defendant shot at the victim and killed him. Thirteen months later, the police recovered an assault rifle in connection with an unrelated investigation, and the state's expert witness, S, a firearm and toolmark examiner, testified that several casings recovered from the scene of the victim's murder and the scene of a subsequent, unrelated shooting were positively identified as having been fired from the same assault rifle the police recovered. In affirming the defendant's conviction, the Appellate Court concluded that the trial court properly denied the defendant's motion to exclude or limit the scope of S's testimony and that the trial court did not abuse its discretion in admitting evidence of uncharged misconduct related to the subsequent shooting. On the granting of certification, the defendant appealed to this court. *Held*:

1. The Appellate Court improperly upheld the trial court's denial of the defendant's motion for a hearing, pursuant to this court's decision in *State* v. *Porter* (241 Conn. 57), on the reliability and accuracy of the methodology used by S in connection with his anticipated firearm and toolmark testimony: the trial court, having based its decision to deny the defendant's motion soley on earlier Appellate Court precedent concluding that the science of firearm and toolmark identication is well established, abused its discretion by failing to determine whether the criticisms of firearm and toolmark analysis contained in certain reports cited by the defendant in his motion cast enough doubt on whether the science in that field remained well established so as to warrant a *Porter* hearing; moreover, this court lacked a fair assurance that the admission of S's testimony did not substantially affect the verdict, and, thus, the trial court's denial of the defendant's motion for a *Porter* hearing was not harmless; accordingly, the defendant was entitled to a new trial.

(*Three justices concurring separately in one opinion*)

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

2. The Appellate Court properly upheld the trial court's denial of the defendant's motion to limit the scope of S's conclusions regarding the ballistics evidence to a "more likely than not" standard; given that the trial court was asked to limit S's testimony in a highly proscribed manner, and in light of the scant information and lack of case law provided in support of the defendant's motion, the trial court's denial of that motion was not an abuse of discretion.

3. The Appellate Court improperly upheld the trial court's admission of uncharged misconduct evidence concerning a shooting in which the defendant allegedly was involved and that occurred subsequent to the shooting that formed the basis of the murder charge in the present case, as the prejudicial impact of that evidence unduly exceeded its probative value: the subsequent shooting was a less severe crime than the murder in the present case because neither of the victims of the subsequent shooting was struck by the shots fired, and both shootings shared common characteristics, including individuals being shot at outside of their homes; moreover, evidence of the subsequent shooting was introduced through the testimony of one of the victims of that shooting and was not limited to the the fact that there was a shooting but consisted of details regarding the surrounding events that could have aroused the jurors' emotions; furthermore, the subsequent shooting occurred eight months after the murder at issue in the present case, and no evidence suggested that the subsequent shooting was motivated by or related to the murder.

Argued February 21—officially released December 4, 2020**

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Hartford and tried to the jury before the court, *Kwak*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court, which transferred the appeal to the Appellate Court, *Keller*, *Elgo* and *Eveleigh*, *Js.*, which affirmed the judgment of the trial court, and the defendant, on the granting of certification, appealed to this court. *Reversed*; *new trial.*

Andrew P. O'Shea, with whom was *Damon A. R. Kirschbaum*, for the appellant (defendant).

** December 4, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, former state's attorney, and *Patrick J. Griffin*, state's attorney, for the appellee (state).

Maura Barry Grinalds and *Darcy McGraw* filed a brief for the Connecticut Innocence Project et al. as amici curiae.

Lisa J. Steele, assigned counsel, filed a brief for the Connecticut Criminal Defense Lawyers Association as amicus curiae.

Charles D. Ray, *Angela M. Healey*, and *M. Chris Fabricant*, pro hac vice, filed a brief for the Innocence Project, Inc., as amicus curiae.

Opinion

KAHN, J. The defendant, Donald Raynor, appeals from the judgment of the Appellate Court, which affirmed the judgment of conviction, rendered after a jury trial, of the crime of murder in violation of General Statutes § 53a-54a (a).[1] *State* v. *Raynor*, 181 Conn. App. 760, 778, 189 A.3d 652 (2018). The defendant claims that the Appellate Court incorrectly concluded that the trial court had properly (1) denied his motion for a *Porter*[2]

[1] This court granted the defendant's petition for certification to appeal, limited to the following issues: (1) "Did the Appellate Court correctly conclude that the trial court had properly denied the defendant's motion for a *Porter* hearing to determine the reliability of firearm and toolmark identification?" (2) "Did the Appellate Court correctly conclude that the trial court had properly denied the defendant's motion in limine to limit the scope of the testimony of the state's expert on firearm and toolmark analysis?" And (3) "[d]id the Appellate Court correctly conclude that the trial court had properly admitted the uncharged misconduct evidence?" *State* v. *Raynor*, 330 Conn. 910, 193 A.3d 49 (2018).

[2] *State* v. *Porter*, 241 Conn. 57, 80–90, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998). "In *Porter*, we followed the United States Supreme Court's decision in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and held that testimony based on scientific evidence should be subjected to a flexible test to determine the reliability of methods used to reach a particular conclusion. . . . A *Porter* analysis involves a two part inquiry that assesses the reliability and relevance of the witness' methods. . . . First, the party offering the expert testimony must show that the

hearing on the reliability of ballistics evidence, (2) denied his motion in limine seeking to limit the scope of testimony from the state's firearm and toolmark examiner, and (3) denied the defendant's motion to exclude uncharged misconduct evidence related to a subsequent shooting. As to the first issue, the defendant claims that reports authored by the National Academy of Sciences (NAS)[3] call into question the reliability of methodolo-

expert's methods for reaching his conclusion are reliable. A nonexhaustive list of factors for the court to consider include: general acceptance in the relevant scientific community; whether the methodology underlying the scientific evidence has been tested and subjected to peer review; the known or potential rate of error; the prestige and background of the expert witness supporting the evidence; the extent to which the technique at issue relies [on] subjective judgments made by the expert rather than on objectively verifiable criteria; whether the expert can present and explain the data and methodology underlying the testimony in a manner that assists the jury in drawing conclusions therefrom; and whether the technique or methodology was developed solely for purposes of litigation. . . . Second, the proposed scientific testimony must be demonstrably relevant to the facts of the particular case in which it is offered, and not simply be valid in the abstract. . . . Put another way, the proponent of scientific evidence must establish that the specific scientific testimony at issue is, in fact, derived from and based [on] . . . [scientifically reliable] methodology. . . .

"Additionally, we recognized in *Porter* that . . . [t]he actual operation of each [*Porter*] factor, as is the determination of which factors should be considered at all, depends greatly on the specific context of each case in which each particular [threshold admissibility] analysis is conducted. . . . There is, however, a critical postulate that underlies the *Porter* factors and indeed underlies the entire *Porter* analysis: in order for the trial court, in the performance of its role as the gatekeeper for scientific evidence, properly to assess the threshold admissibility of scientific evidence, the proponent of the evidence must provide a sufficient articulation of the methodology underlying the scientific evidence. Without such an articulation, the trial court is entirely ill-equipped to determine if the scientific evidence is reliable upon consideration of the various *Porter* factors. Furthermore, without a clear understanding as to the methodology and its workings, the trial court also cannot properly undertake its analysis under the fit requirement of *Porter*, ensuring that the proffered scientific evidence, in fact, is based upon the reliable methodology articulated." (Internal quotation marks omitted.) *State* v. *Edwards*, 325 Conn. 97, 124–25, 156 A.3d 506 (2017).

[3] The defendant cites two particular publications. See National Research Council of the National Academies, Strengthening Forensic Science in the United States: A Path Forward (2009) (2009 NAS report); National Research Council of the National Academies, Ballistic Imaging (2008) (2008 NAS report). For the sake of simplicity, we collectively refer to these publications as the NAS reports.

gies employed in firearm and toolmark examinations and that, as a result, a *Porter* hearing was necessary to determine if such evidence is admissible. Furthermore, the defendant argues that both the trial court and the Appellate Court construed *State* v. *Legnani*, 109 Conn. App. 399, 421, 951 A.2d 674, cert. denied, 289 Conn. 940, 959 A.2d 1007 (2008), too broadly by concluding that a *Porter* hearing on the reliability of firearm and toolmark examinations is never necessary because it is a well established and admissible science. As to the second issue, the defendant argues that, even if the firearm and toolmark examination evidence was admissible without a *Porter* hearing, the trial court improperly denied his motion in limine, which would have required the state's expert, James Stephenson, to clarify that his conclusions that certain bullet casings were fired from a specific firearm were not certainties but merely "more likely than not" to be correct. As to the third issue, the defendant claims that the probative value of evidence related to a subsequent shooting, which was admitted to establish the defendant's identity and to show that he had access to the firearm used in the present case, was outweighed by its prejudicial effect. For the reasons that follow, we conclude that the Appellate Court (1) improperly upheld the trial court's denial of the defendant's motion for a *Porter* hearing on the reliability of ballistics evidence based solely on the holding in *Legnani*, (2) properly upheld the trial court's denial of the defendant's motion in limine, which sought to limit the scope of Stephenson's conclusions, and (3) improperly upheld the trial court's denial of the motion to exclude evidence of uncharged misconduct. We therefore conclude that the defendant is entitled to a new trial and, accordingly, reverse the judgment of the Appellate Court.

The record reveals the following relevant facts and procedural history. The defendant was a member of the Money Green Bedrock (Bedrock) street gang in Hart-

ford, and the victim, Delano Gray, was a member of a rival street gang, The Avenue, also known as The Ave. Prior to the events giving rise to the present case, the defendant and the victim were involved in two incidents stemming from the rivalry between their gangs. The first incident, which occurred at an unspecified date prior to 2006, involved the victim's firing shots at the defendant and another Bedrock member. The second incident, which occurred approximately one week prior to the events giving rise to the present case, occurred when the victim saw the defendant and another Bedrock member, Jose Rivera, at a restaurant in The Avenue's territory. As the defendant and Rivera were leaving the restaurant, Rivera noticed that the victim was taking a photograph of the defendant's car. Rivera relayed this to the defendant, who responded that "[the victim] had to go," which Rivera understood to mean that "[the victim] had to get killed for what he did."

During the early morning hours of June 18, 2007, the defendant called Rivera and told him that he wanted to "test out [a] .223 [caliber] assault rifle and that [the defendant] wanted to go see if [they] could find any Avenue guys," which Rivera understood to mean they were "gonna go look for some Avenue guys to kill." The defendant had owned that assault rifle for approximately one month, and Rivera had been with the defendant when he purchased it. The defendant picked up Rivera and drove to the back of the defendant's apartment building on Bedford Street, parking next to a nonfunctioning vehicle that belonged to Rivera and was used for "stashing drugs [and] guns . . . ." The defendant put on latex gloves, removed the .223 caliber assault rifle from a bag stored in the trunk of the nonfunctioning vehicle, and loaded the assault rifle with "a big magazine clip." The defendant and Rivera then got back into the functioning vehicle; Rivera drove, and the defendant sat in the backseat with the assault rifle.

Rivera drove the vehicle around certain areas in the north end of Hartford frequented by members of The

Avenue. While Rivera was driving on Enfield Street, he told the defendant that he saw the victim standing on the sidewalk engaged in conversation with a woman. At the defendant's instruction, Rivera drove back around the block. As Rivera drove down Enfield Street for the second time, he rolled down the rear driver's side window and slowed the vehicle down to a roll. The defendant hung out of the window and started shooting the assault rifle at the victim. The victim and his female companion attempted to flee, running in different directions, but the victim fell to the ground after taking only about three steps. The defendant kept shooting after the victim fell to the ground, firing at least ten to fifteen times, and then Rivera and the defendant drove away. The victim died as a result of gunshot wounds to his chest and neck.

On July 16, 2008, thirteen months after the Enfield Street murder, the police recovered a .223 caliber Kel-Tec assault rifle in an unrelated investigation after receiving a tip from a confidential informant. In August, 2011, after being arrested for an unrelated homicide, Rivera gave a statement to the police in which he confessed to his involvement in the victim's murder, implicated the defendant as the shooter, and he identified the .223 caliber Kel-Tec assault rifle recovered by the police in July, 2008, as the weapon that the defendant used to shoot the victim. Simultaneously, in August, 2011, the police met with and obtained a written statement from the victim of a shooting on Baltimore Street that occurred on February 16, 2008—a shooting at which Rivera was not present. That individual identified the defendant as the shooter in that crime and stated that he had fired a rifle at her and her partner. Stephenson testified that casings recovered from the crime scenes of the victim's murder on Enfield Street and the subsequent shooting on Baltimore Street were positively identified as having been fired from the .223 caliber Kel-Tec assault rifle that had been recovered by the police.

In 2013, the defendant was charged with murder in violation of § 53a-54a (a), conspiracy to commit murder in violation of General Statutes §§ 53a-48 and 53a-54a (a), and criminal use of a firearm in violation of General Statutes § 53a-216 (a). The defendant's first jury trial, conducted in 2014, ended in a mistrial after the jury was unable to agree on a verdict. At the second trial, conducted in 2015, the state charged the defendant with only one count of murder in violation of § 53a-54a (a). The second jury returned a guilty verdict, and the court sentenced the defendant to sixty years of incarceration with a twenty-five year mandatory minimum.

The defendant subsequently appealed, claiming "that the trial court (1) improperly denied [his] motion in limine to exclude or limit the scope of the testimony of the state's expert witness on firearm and toolmark identification, and (2) abused its discretion by granting the state's motion for uncharged misconduct related to a shooting that occurred approximately eight months after the events of [the present] case." *State* v. *Raynor*, supra, 181 Conn. App. 762. The Appellate Court concluded that the trial court "properly relied upon *Legnani*, and did not abuse its discretion by denying the defendant's motion in limine to exclude or limit Stephenson's testimony." Id., 771. Furthermore, the Appellate Court concluded that the trial court "did not abuse its discretion by admitting the uncharged misconduct evidence related to [a subsequent shooting]." Id., 778. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

EXPERT BALLISTIC TESTIMONY

We begin with the defendant's claims challenging the admissibility and scope of Stephenson's testimony relating to firearm and toolmark analysis. The following additional facts and procedural history are relevant to the resolution of these claims. In anticipation of testi-

mony by Stephenson at trial, the defendant filed (1) a motion for a *Porter* hearing on the admissibility of firearm and toolmark analysis, and, in the alternative, (2) a motion in limine to limit the scope of Stephenson's conclusions.

The defendant argued in his motion for a *Porter* hearing that the NAS reports called into question the reliability and accuracy of the methodology employed by Stephenson and that there was "relatively little legal accounting" for those reports.[4] The defendant contended that a *Porter* hearing would demonstrate that the methodology used by Stephenson was not scientifically valid and was, therefore, inadmissible. The state opposed the defendant's motion for a *Porter* hearing, arguing that "Connecticut state law firmly holds that the science of firearm and toolmark identification has been so well established that a trial court does not have to conduct a *Porter* hearing prior to admitting such evidence."

In the event that the motion for a *Porter* hearing was denied, or if one were held and resulted in the admission of Stephenson's testimony, defense counsel argued during oral argument on the motion that Stephenson should be restricted to stating only that casings recovered from the crime scenes were "more likely than not" fired from the .223 caliber Kel-Tec assault rifle. Anticipating that Stephenson would testify that "the shell casings recovered from the shooting of [the victim] were fired from the same weapon as the shell casings recovered from the [Baltimore Street shooting] based upon his forensic toolmark analysis of those casings," defense counsel cited to the NAS reports for the proposition that,

[4] For example, in his principal brief to this court, the defendant interprets the NAS reports to stand for the proposition that "firearm toolmark identification has not been proven to be scientifically valid for three primary reasons: (1) the fundamental assumptions of the methodology are not reliable, (2) the standard for identifying matches to particular firearms is impermissibly vague and subjective, and (3) there is no quantification of the accuracy and error rates of identifications."

"[b]ecause not enough is known about the variabilities among individual tools and guns, we are not able to specify how many points of similarity are necessary for a given level of confidence in the result. Sufficient studies have not been done to understand the reliability and repeatability of the methods." (Emphasis omitted; internal quotation marks omitted.) Defense counsel noted that the authors of the NAS reports agreed that "class characteristics are helpful in narrowing the pool of [firearms] that may have left a distinctive mark [on a casing]. Individual patterns from manufacture or from wear might, in some cases, be distinctive enough to suggest one particular source, but additional studies should be performed to make the process of individualization more precise and repeatable."[5] (Emphasis omitted; internal quotation marks omitted.)

On the basis of these observations, defense counsel asked that a "limiting order and instruction, similar to that in [*United States* v. *Glynn*, 578 F. Supp. 2d 567, 574–75 (S.D.N.Y. 2008)], be granted," to permit Stephenson to testify only that a firearms match was "more likely than not." In response, the state claimed that "while the defendant has located a federal judge in the Southern District of New York who might agree with

[5] At trial, Stephenson described the three sets of characteristics that firearm and toolmark examiners compare between casings recovered from a crime scene and a test fire from a suspected weapon to determine the existence of a match. Class characteristics are the general ammunition characteristics that are intentionally made during the manufacturing process, including, but not limited to, the size, shape, weight, diameter, grooves, and other features that indicate the manufacturer and caliber of that specific ammunition. Subclass characteristics are markings on the ammunition that are not made for the purpose of the ammunition itself but that are unintentionally made during the manufacturing process. These markings are made by the tools as the ammunition is manufactured, for example, the bore tool as it cuts the grooves. Individual characteristics are fine striated marks that are left on the ammunition by a specific firearm due to unique markings left by the actual manufacturing of a barrel or the repeated use of the firearm that has worn down or chipped that barrel.

his contention, the appellate courts of . . . Connecticut do not." Following oral arguments, the trial court denied the defendant's motion for a *Porter* hearing and motion in limine, concluding that the forensic science of firearms experts "has been well established, and we have a case, [*Legnani*], which stands for the proposition that this is not a new science. Therefore, a *Porter* hearing is not necessary." The trial court expounded that it had "read the [2009 NAS] article. [The judge] understood [NAS] recommend[ed] some further studies or data collection. That's their recommendation, but, again, the case law in Connecticut is what it is."

Stephenson subsequently testified before the jury that the Connecticut State Forensic Laboratory employed the Association of Firearm and Tool Mark Examiners' (AFTE) theory of identification, which is generally accepted in the science of firearm and toolmark identification, and he explained the tenets of that theory. He explained that "we know that, through the theory of identification, that no two tools are—have left—will leave an examiner to the point where he would make a false identification based on his examination." Stephenson proceeded to testify that twelve of the fifteen casings recovered from the Enfield Street murder were "positively matched" to the .223 caliber Kel-Tec assault rifle and that the remaining three casings had insufficient marks found for the purpose of identification. In addition, Stephenson testified that seventeen of the twenty-two casings recovered from the Baltimore Street shooting were "positively identified as being fired from the Kel-Tec rifle" and that the remaining five casings did not have sufficient marks to make a comparison for identification. During an extensive cross-examination, "[d]efense counsel . . . highlighted the ways in which firearm and toolmark identification does not follow precisely the scientific method—i.e., by not protecting against confirmation bias—and

that the [AFTE] theory of identification is not a completely objective theory." *State* v. *Raynor*, supra, 181 Conn. App. 768. Stephenson also acknowledged that he was aware of the 2009 NAS report and conceded that some—but not all—of the criticisms of firearm and toolmark analysis were valid.

On appeal to the Appellate Court, the defendant claimed that the trial court "abused its discretion by denying his motion in limine and request for a *Porter* hearing. The defendant argue[d] that the [NAS reports] establish that the methodology underlying firearm and toolmark identification is not reliable, and, as a result, the [trial] court should have precluded Stephenson from opining that particular cartridge casings positively matched the firearm in evidence. In the alternative, the defendant argue[d] that the [trial] court should have limited Stephenson's testimony so that he could opine only that his conclusions were 'more likely than not . . . correct.' " *State* v. *Raynor*, supra, 181 Conn. App. 768. "The state argue[d] that the [trial] court properly relied upon [*Legnani*] in concluding that the admissibility of firearm and toolmark identification evidence is well established and, therefore, properly denied the defendant's motion." Id.

The Appellate Court concluded that "*Legnani* is controlling precedent on the issue of whether the science of firearm and toolmark identification is well established, and thus binds our resolution of this claim." [6] Id., 770. The Appellate Court acknowledged that *Legnani* pre-

[6] The Appellate Court also noted that "policy dictates that one panel should not . . . reverse the ruling of a previous panel. The reversal may be accomplished *only* if the appeal is heard en banc." (Emphasis in original; internal quotation marks omitted.) *State* v. *Raynor*, supra, 181 Conn. App. 770 n.4. "On November 27, 2017, the defendant filed a motion for consideration en banc, which [the Appellate Court] denied on January 10, 2018. Additionally, the entire [Appellate Court did not order] that [the] case be considered en banc pursuant to Practice Book § 70-7 (b), nor [was it] persuaded that en banc review [was] warranted. Therefore, [the Appellate Court would] not overrule *Legnani*." Id.

dated the NAS reports but clarified that the reports "do not overrule or otherwise abrogate the existing case law in this state; nor do the [United States] District Court cases or the cases from other states that the defendant has cited in support of his claim. More importantly, the defendant did not proffer his own expert witness to testify that the science of firearm and toolmark identification is not reliable. The evidence admitted during the cross-examination of Stephenson included the flaws and criticisms of firearm and toolmark identification. The jury was free to give this evidence as much or as little weight as it saw fit." Id., 771. For these reasons, the Appellate Court upheld the trial court's denial of the defendant's motion for a *Porter* hearing and motion in limine, holding that "[a] *Porter* hearing to determine the validity of firearm and toolmark identification was not required. The state had to establish only that the firearm and toolmark evidence was relevant, which it did." Id.

The Appellate Court acknowledged, however, "that there has been some evolvement in the field of firearm and toolmark identification since [it] decided *Legnani*." Id., 770 n.4. Despite its familiarity with the NAS reports, the Appellate Court highlighted that "[d]efense counsel . . . extensively cross-examined Stephenson regarding the recent criticisms of firearm and toolmark identification, during which Stephenson acknowledged the validity of at least some of those criticisms. Even if [the Appellate Court] were inclined to review the scientific validity of firearm and toolmark identification—and therefore [were] inclined to review the holding of *Legnani*—the circumstances of the [case did] not warrant a departure from [its] precedent. The defendant [had] not proffered his own expert to rebut the notion that firearm and toolmark evidence is sufficiently reliable as to be admitted without first requiring a *Porter* hearing. Therefore, [the Appellate Court] adhere[d] to [its] prec-

edent that holds that the admissibility of firearm and toolmark identification is well established." Id., 770–71 n.4. This appeal followed.

A

Porter Hearing

In the present case, the defendant claims that the Appellate Court improperly upheld the trial court's denial of his motion for a *Porter* hearing because both the trial court and the Appellate Court interpreted *Legnani* too broadly when each determined that it was bound by that precedent, notwithstanding the fact that the defendant had highlighted new evidence and case law that questioned the reliability of the methodology used in firearm and tookmark analysis. The defendant claims that such a broad interpretation of *Legnani* "would result in trial courts admitting false testimony merely on the basis that the methodologies supporting that testimony, which we now know to be unreliable and unvalidated, were admissible at some point in the past." In response, the state claims that "[t]he trial court properly concluded that *Legnani* remained good law, even after the [NAS reports], because courts in Connecticut and throughout the nation, including those which have conducted [*Porter*] hearings, have overwhelmingly reaffirmed that expert testimony regarding firearm and toolmark identification is admissible, notwithstanding the concerns expressed in that report." We agree with the defendant that the trial court's exclusive reliance on *Legnani* in assessing the request for a *Porter* hearing was erroneous.

"It is axiomatic that [t]he trial court's ruling on the admissibility of evidence is entitled to great deference. In this regard, the trial court is vested with wide discretion in determining the admissibility of evidence. . . . Accordingly, [t]he trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . Because a

trial court's ruling under *Porter* involves the admissibility of evidence, we review that ruling on appeal for an abuse of discretion." (Citation omitted; internal quotation marks omitted.) *State* v. *Sorabella*, 277 Conn. 155, 214, 891 A.2d 897, cert. denied, 549 U.S. 821, 127 S. Ct. 131, 166 L. Ed. 2d 36 (2006). Implicit in that well established principle, however, is the requirement that the trial court exercise its discretion. "Where . . . the trial court is properly called upon to exercise its discretion, its failure to do so is error." (Internal quotation marks omitted.) *Higgins* v. *Karp*, 243 Conn. 495, 504, 706 A.2d 1 (1998). Therefore, "we must determine whether the trial court abused its discretion in deter-mining that a *Porter* hearing was not required and, if so, we must also determine whether this ruling was nevertheless harmless." *State* v. *Martinez*, 143 Conn. App. 541, 557, 69 A.3d 975 (2013), rev'd on other grounds, 319 Conn. 712, 127 A.3d 164 (2015). "In order to establish the harmfulness of a trial court ruling, the defendant must show that it is more probable than not that the improper action affected the result." (Internal quotation marks omitted.) *State* v. *Torres*, 85 Conn. App. 303, 328, 858 A.2d 776, cert. denied, 271 Conn. 947, 861 A.2d 1179 (2004).

In the present case, it is apparent from the record that the trial court failed to exercise its discretion when it denied the defendant's motion for a *Porter* hearing. The trial court did not consider the NAS reports that the defendant cited in his motion; it noted that it had reviewed the reports but that it was bound by *Legnani* to find that the science of firearm and toolmark identification is well established. Similarly, the Appellate Court stated that "*Legnani* is controlling precedent on the issue of whether the science of firearm and toolmark identification is well established, and thus binds [its] resolution of [the defendant's] claim." *State* v. *Raynor*, supra, 181 Conn. App. 770. We conclude that the trial court failed to exercise—and, therefore, abused—its discretion to determine whether the criticisms of fire-

arm and toolmark analysis contained in the NAS reports and highlighted by the defendant cast substantial enough doubt on whether the science of that field remains well established to warrant a *Porter* hearing.[7]

A mere cursory look at the ramifications of a trial court's being absolutely bound by *Legnani* illustrates why such an approach would be impractical. Trial court judges serve a gatekeeping function with respect to the admissibility of expert testimony, and, in performing that function, they assess the validity of the methodologies underlying proffered scientific evidence. See *State* v. *Porter*, 241 Conn. 57, 80–90, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998); see also *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589–90, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Over two decades ago, this court held that "an admissibility test for scientific evidence premised *solely* on its 'general acceptance' is conceptually flawed," thereby rejecting the then applicable *Frye*[8] standard and adopting the *Daubert* approach to the admissibility of scientific evidence.[9] (Emphasis in origi-

[7] We emphasize that the question of whether the evidence referenced in the defendant's motion for a *Porter* hearing casts sufficient doubt on the reliability of the methodology employed by the firearm and toolmark expert to warrant a *Porter* hearing must be vested, in the first instance, in the sound discretion of the trial court. See, e.g., *State* v. *Jackson*, 304 Conn. 383, 412, 40 A.3d 290 (2012). We note, however, that various courts have considered the NAS reports and concluded that firearm and toolmark evidence continues to be both reliable and admissible. See, e.g., *United States* v. *Otero*, 849 F. Supp. 2d 425, 430, 437–38 (D.N.J. 2012), aff'd, 557 Fed. Appx. 146 (2014); *State* v. *Terrell*, Superior Court, judicial district of New Haven, Docket No. CR-17-0179563-S (March 21, 2019) (68 Conn. L. Rptr. 323, 325, 327); *Johnston* v. *State*, 27 So. 3d 11, 20–22 (Fla.), cert. denied, 562 U.S. 964, 131 S. Ct. 459, 178 L. Ed. 2d 292 (2010); *State* v. *Adams*, Docket No. COA10-1363, 2011 WL 1938270, *6–7 (N.C. App. May 17, 2011).

[8] *Frye* v. *United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

[9] *Porter* hearings held by trial courts are synonymous with *Daubert* hearings held by federal district courts and state courts of other jurisdictions. The hearings, regardless of their title, involve the application of the principles articulated in *Daubert*. See footnote 2 of this opinion.

nal.) *State* v. *Porter*, supra, 75–76. This court noted, however, that "some scientific principles have become so well established than an explicit *Daubert* analysis is not necessary for admission of evidence thereunder. By this, we do not mean to reestablish the *Frye* general acceptance test. We do acknowledge, however . . . that a very few scientific principles are so firmly established as to have attained the status of scientific law, such as the laws of thermodynamics, [and that such principles] properly are subject to judicial notice . . . . Evidence derived from such principles would clearly withstand a *Daubert* analysis, and thus may be admitted simply on a showing of relevance." (Citation omitted; internal quotation marks omitted.) Id., 85 n.30.

The Appellate Court has held that a trial court did not abuse its discretion where it concluded that ballistics and firearms analysis fell into that category of scientific principles so firmly established as to negate the need for a *Porter* hearing. *State* v. *Legnani*, supra, 109 Conn. App. 419–21. Science, however, is not static. Methodologies are continually challenged and improved so that an approach once favored by the scientific community may later cede to a novel approach or simply fall out of favor in its entirety. See, e.g., *Bone Shirt* v. *Hazeltine*, 461 F.3d 1011, 1026 (8th Cir. 2006) (Gruender, J., concurring in the judgment) ("Science evolves, and scientific methods that were once considered unassailable truths have been discarded over time. Unreliable testimony based upon those outdated theories and methods must be discarded as well, lest scientific stare decisis ensure that such theories survive only in court."); cf. *Upjohn Co.* v. *Finch*, 422 F.2d 944, 951 (6th Cir. 1970). The gatekeeping function of the trial court requires, *at a minimum*, that judges consider any new evidence that a defendant presents when deciding whether to grant or deny a motion for a *Porter* hearing. To hold otherwise would transform the trial court's gatekeeping function—which requires judges to regu-

late carefully which categories of scientific evidence are sufficiently reliable to present to the fact finders—into one of routine mandatory admission of such evidence, regardless of advances in a particular field and its continued reliability.

Having concluded that it was an abuse of discretion for the trial court to deny the defendant's motion for a *Porter* hearing without considering the proffered evidence challenging the methodology supporting toolmark and firearm analysis, we must now determine whether that error was harmful. "When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [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. . . . Most importantly, we must examine the impact of the . . . evidence on the trier of fact and the result of the trial. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. . . . 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.) *State* v. *Edwards*, 325 Conn. 97, 133, 156 A.3d 506 (2017).

After reviewing the evidence in the present case, we lack a fair assurance that the trial court's admission of Stephenson's testimony did not substantially affect the verdict. There is no doubt that Stephenson was important to the state's case; his testimony was the only objective evidence that connected the casings found at the

Enfield Street murder with the .223 caliber Kel-Tec assault rifle recovered by the police. There can be little doubt that the jurors likely found Stephenson's expert opinion highly convincing in light of the technical nature of his analysis and his various credentials.[10] See, e.g., *State* v. *Jackson*, 334 Conn. 793, 819, 224 A.3d 886 (2020) ("[t]here can be little doubt that jurors would have viewed as highly convincing [the] expert opinion; the testimony was presented in technical terms and used impressive visual displays to convey important information, and it came from a law enforcement officer unconnected to the department that investigated the crime").

The exclusion of Stephenson's expert testimony would have made the state's overall case against the defendant much weaker because Stephenson corroborated the testimony of Rivera, the only witness to identify the defendant as the shooter. Without Stephenson's expert testimony, the state would have relied primarily on Rivera's testimony related to the Enfield Street murder.[11] Rivera was also the sole witness to testify that

[10] From 1994 to 2014, Stephenson was employed by the Connecticut State Forensic Laboratory's Firearms Identification Unit as a firearm and toolmark examiner. From 2008 to 2014, he also served as a member of the Scientific Working Group for Firearms and Toolmarks, which "wrote protocol and procedures and adopted information that was disseminated to the firearms and toolmark examiners" throughout the world. Since 2014, Stephenson had worked as a private consultant for firearm and toolmark identification. In addition, Stephenson had attended numerous trainings offered by the AFTE, the Bureau of Alcohol, Tobacco, Firearms and Explosives, and the Federal Bureau of Investigation. Over the course of his career, Stephenson had examined tens of thousands of firearms and testified a total of 321 times in both state and federal courts.

[11] The jury heard testimony from Alisha Stevens, who was standing with the victim on Enfield Street when he was murdered. Stevens, however, could not identify the shooter or the firearm. The jury also heard testimony from Deborah Parker and Stephenson about the shooting on Baltimore Street. Parker identified the defendant as having fired a rifle at her and her partner, but she could not positively identify the .223 caliber Kel-Tec assault rifle as the weapon used. As described in part II of this opinion, however, testimony related to the Baltimore Street shooting had extremely limited probative value.

the defendant and the victim had a confrontation in the week leading up to the murder, to identify the defendant as the shooter on Enfield Street, to confirm that the .223 caliber Kel-Tec assault rifle was the same one used by the defendant, and to acknowledge that the defendant knew the police had subsequently recovered the murder weapon. Rivera, however, had both a motive to testify falsely and credibility issues. See *State* v. *Jackson*, supra, 334 Conn. 819–20. Rivera testified that he was involved with the victim's murder on Enfield Street in June, 2007, but he did not provide information to the police about that murder until August, 2011, more than four years later. In addition, when Rivera finally did speak to the police about the Enfield Street murder, it was only after he had been arrested in connection with an incident that occurred on July 1, 2011. Rivera confessed his role in the July 1, 2011 incident and provided a written statement to the police. He also provided additional statements related to several other incidents in Hartford, one of which was the Enfield Street murder. At trial, Rivera testified that he had been sentenced as a result of the July 1, 2011 incident and was serving a total effective sentence of forty-two years of incarceration for convictions of murder, conspiracy to commit murder, and a weapons charge. In addition, the jury heard Rivera testify that he was arrested pursuant to a warrant on November 5, 2013, for his involvement in the Enfield Street murder and had pending charges of accessory to commit murder, conspiracy to commit murder, and criminal possession of a firearm. Rivera also had a number of other pending charges that, when combined, added up to several decades of potential jail time.[12]

[12] The jury heard Rivera testify to the following pending cases in addition to the charges related to the Enfield Street murder, all of which he was arrested for, pursuant to a warrant issued on November 5, 2013: (1) an incident on December 15, 2007, for which he was charged with attempted murder and conspiracy to commit murder; (2) an incident on July 22, 2008, for which he was charged with conspiracy to commit murder, two counts of attempt to commit murder, and two counts of accessory to commit assault in the first degree; (3) an incident on August, 9, 2008, for which he was

In order to testify at the defendant's trial, Rivera entered into a written cooperation agreement with the state, in which he agreed to disclose truthfully any and all matters related to his criminal activity, and the criminal activity of others with whom he was involved. In exchange, the state agreed that, if Rivera did so when called upon, it would agree to consent to a hearing for sentence modification before a judge of the Superior Court. In addition, the state agreed that it would recommend that any sentences Rivera received for his pending charges run concurrently to the sentence of forty-two years that he was serving.

Nor did the extensive cross-examination of the ballistics expert render the admission of his testimony harmless. Defense counsel rigorously cross-examined Stephenson on the methodology, critiques, and partial subjectivity of firearm and toolmark analysis, including questions about his knowledge of, and the conclusions from, the NAS reports. In this manner, the jury heard testimony that cast at least some doubt on the reliability of the methodology. Stephenson, however, consistently explained that while the NAS reports contained suggestions for improving the methodology—some of which he acknowledged were sound—the criticisms did not undermine its scientific validity. Throughout his cross-examination, Stephenson maintained that his conclusions were accurate. See, e.g., *State* v. *Edwards*, supra, 325 Conn. 134–35 (rigorous cross-examination of expert by defense counsel led to admission that expert could not guarantee accuracy of maps or determine exact

charged with manslaughter in the first degree with a firearm, six counts of accessory to commit assault in the first degree, and weapons offenses; (4) an incident on August 9, 2008, for which he was charged with conspiracy to commit murder, two counts of accessory to commit murder, and criminal possession of a firearm; and (5) an incident on August 10, 2008, for which he was charged with conspiracy to commit murder, two counts of attempt to commit murder, two counts of assault in the first degree, and weapons offenses. In addition, Rivera was also arrested pursuant to a warrant issued in October, 2012, and charged with the sale of narcotics.

location of defendant's cell phone, contributing to determination that trial court's improper admission of certain testimony regarding cell phone data constituted harmless error). In addition, juries "tend to give great credence and weight to what . . . experts say," and the defendant sought to have this expert testimony excluded, thereby preventing the jury from hearing Stephenson testify at all. "Symposium on Forensic Expert Testimony, *Daubert*, and Rule 702," 86 Fordham L. Rev. 1463, 1508 (2018); see also D. McQuiston-Surrett & M. Saks, "Communicating Opinion Evidence in the Forensic Identification Sciences: Accuracy and Impact," 59 Hastings L.J. 1159, 1189 (2007) ("unfortunately, cross-examination and the use of opposing experts do not appear to effectively counter expert testimony, regardless of the logical vulnerability of the initial expert testimony"). We therefore cannot conclude that the rigorous cross-examination mounted by defense counsel so undercut Stephenson's testimony that its admission was necessarily harmless.

The state's sole claim that any error by the trial court is harmless is restricted to an argument regarding mootness. Specifically, the state argues that "this issue already has been examined by a Connecticut Superior Court after a *Porter* hearing; [*State* v. *Terrell*, Superior Court, judicial district of New Haven, Docket No. CR-17-0179563-S (March 21, 2019) (68 Conn. L. Rptr. 323)]; and its conclusions in support of admissibility mirror those reached following similar hearings by courts in other jurisdictions."[13] Relying on *State* v. *Balbi*, 89 Conn.

[13] In *Terrell*, the defendant "moved to preclude the [s]tate from presenting the testimony of . . . a firearm and toolmark examiner . . . to the jury . . . because the methodology of toolmark analysis is not scientifically valid. In the alternative, the defendant request[ed] that the [trial] court limit the scope of [the expert's] testimony by prohibiting him from testifying that the shell casing found at the scene was fired from the firearm located there." *State* v. *Terrell*, supra, 68 Conn. L. Rptr. 324. In that case, the court, *Alander*, *J.*, granted the defendant's request for a *Porter* hearing notwithstanding *State* v. *Raynor*, supra, 181 Conn. App. 760, and *State* v. *Legnani*, supra, 109 Conn. App. 399. See *State* v. *Terrell*, supra, 324. In so doing, the court

App. 567, 576–77, 874 A.2d 288, cert. denied, 275 Conn. 919, 883 A.2d 1246 (2005),[14] the state argues that "[a] determination by one court that a methodology satisfies the *Porter* test renders [it] unnecessary for other courts to repeat the process. . . . There is no compelling rea-

in *Terrell* noted that "both [*Raynor* and *Legnani*] held that the trial court did not abuse its discretion in refusing to conduct . . . a hearing on the issue of firearm analysis . . . implicitly leav[ing] a trial court the discretion to hold such a hearing." (Citation omitted.) Id. Furthermore, it concluded that, "[g]iven recent national studies raising questions regarding the methodology used in firearm and toolmark examination . . . a hearing on the validity of the methodology was warranted." Id. The court in *Terrell* proceeded to hold a *Porter* hearing and concluded that the state had established that "basic techniques employed by firearm and [toolmark] examiners are generally accepted in the relevant scientific community." Id., 327.

As part of the *Porter* hearing, the court in *Terrell* considered the NAS reports as well as a report issued by the President's Council of Advisors on Science and Technology, titled "Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature Comparison Methods . . . ." (Internal quotation marks omitted.) Id., 325–26. The court also denied the defendant's motion to preclude the testimony of the expert in its entirety but prohibited the expert from testifying that "the likelihood that a firearm other than the [one] recovered at the crime scene could have fired the recovered [subject] casing is so remote as to be considered a practical impossibility." (Internal quotation marks omitted.) Id., 327; see id., 328.

[14] In *Balbi*, the trial court took judicial notice of its own decision in a separate case, as well as the decision of another Superior Court judge, that a horizontal gaze nystagmus test was a scientifically reliable and relevant test. *State* v. *Balbi*, supra, 89 Conn. App. 572. During the pendency of the appeal in *Balbi*, the Appellate Court considered horizontal gaze nystagmus evidence in *State* v. *Commins*, 83 Conn. App. 496, 501–502, 850 A.2d 1074, aff'd, 276 Conn. 503, 886 A.2d 824 (2005). "In *Commins*, the trial judge conducted a *Porter* hearing during which he heard extensive testimony . . . . At the conclusion of the *Porter* hearing, the court found that the horizontal gaze nystagmus test and its underlying methodology [are] generally accepted in the scientific community—a conclusion that alone would likely suffice to establish a sufficient foundation for admission—but also that [they satisfy] many of the remaining *Porter* criteria. On the basis of that determination, the [trial judge] allowed evidence related to the test." *State* v. *Balbi*, supra, 575–76. The Appellate Court affirmed the judgment of the trial court in *Commins*. *State* v. *Commins*, supra, 514. Returning to the appeal in *Balbi*, the Appellate Court held that its "determination in *Commins* that horizontal gaze nystagmus evidence satisfies the *Porter* test for the admission of scientific evidence rendered it unnecessary for the [trial] court in [*Balbi*] to conduct its own *Porter* hearing prior to admitting evidence about the test." *State* v. *Balbi*, supra, 576. There is no indication that additional evidence challenging the horizontal gaze nystagmus test was brought to the attention of the trial court in *Balbi* that was not previously considered in *Commins*.

son to put the state to the burden of having to reestablish, in case after case, the same proposition. Requiring our trial judges to repeatedly hold *Porter* hearings would serve no legitimate purpose and would needlessly squander judicial resources." (Citations omitted; internal quotation marks omitted.) Although, as discussed subsequently in this opinion, we agree that a *Porter* hearing is not necessary in every trial in which scientific evidence is presented, that fact does not mean that a *Porter* hearing held by one trial court is binding on another. See, e.g., *In re Emma F.*, 315 Conn. 414, 432–33, 107 A.3d 947 (2015) ("[A] trial court decision does not establish binding precedent. . . . Indeed, under the law of the case doctrine, the trial court's decision need not even be followed by a judge making a subsequent decision in [that] very case." (Citations omitted; internal quotation marks omitted.)). Although the Superior Court in *Terrell* considered the same evidence presented by the defendant in the present case in his motion for a *Porter* hearing; see footnote 13 of this opinion; *Terrell* was also not appealed to, or reviewed by, this court. The state's argument that the result of the *Porter* hearing in *Terrell* renders the issue presented in this appeal moot must, therefore, fail. For the foregoing reasons, we conclude that the error was harmful and that the defendant is entitled to a new trial.

This court's conclusion that a trial court must exercise its discretion to at least consider evidence presented by the defendant when deciding whether to grant a motion for a *Porter* hearing does not mean that a defendant's challenge, no matter how slight, to an established methodology warrants a full *Porter* hearing. We provide the following examples to illustrate the gatekeeping function of the trial courts in light of this decision. When a trial court considers a defendant's motion for a *Porter* hearing, it may decide that the methodology prior to that point either (1) has been deemed so well established so as to not warrant a *Porter* hearing, as

was the case with firearm and toolmark analysis at the time of the defendant's trial, or (2) has been subject to a *Porter* hearing by another trial court. Under both of these scenarios, the trial judge has several options depending on the strength of the evidence presented in a motion for a *Porter* hearing.

Under the first scenario, the trial court begins from the premise that the methodology is well established and that, as a result, a *Porter* hearing is not necessary. It must then consider the evidence presented by the defendant to determine whether that well established methodology has been sufficiently challenged to warrant a *Porter* hearing. The trial court has the discretion to deny the motion, concluding that the defendant has not presented sufficient evidence in his motion to demonstrate that the methodology may no longer be well established, or to grant the motion, concluding that the defendant has presented evidence sufficiently casting doubt on the continued reliability of the methodology and, therefore, that a full *Porter* hearing is necessary.[15] Although, under this scenario, the defendant bears the heavy burden of challenging a potentially lengthy scientific and legal history of the reliability of the methodology without a *Porter* hearing, that burden is not insurmountable. This was recently evidenced when, despite the Appellate Court's decision in *Legnani*, a Superior Court granted a *Porter* hearing on firearm and toolmark analysis. *State* v. *Terrell*, supra, 68 Conn. L. Rptr. 324; see footnote 13 of this opinion.

Under the second scenario, once any trial court has held a *Porter* hearing on a particular methodology, then judges have slightly different options when considering

[15] Even when an appellate court has upheld a trial court's denial of a *Porter* hearing, such a decision is binding only to the extent that a future challenge to the reliability of the methodology relies on the same evidence considered by the prior trial court. In the present case, the NAS reports submitted by the defendant postdated the decision in *Legnani*.

motions for subsequent *Porter* hearings. If a party highlights the same evidence challenging a methodology as was evaluated in a previous *Porter* hearing, the trial court may—but is not required to—take judicial notice of the previous hearing and consider the prior court's analysis of the methodology and conclusion as to its reliability when exercising its discretion to grant or deny the defendant's motion for a subsequent *Porter* hearing.[16] If a party highlights new evidence regarding the reliability of the methodology that was not evaluated in the previous *Porter* hearing, the trial court may—but, again, is not required to—take judicial notice of the previous hearing and consider the prior court's analysis of the methodology and conclusion in conjunction with the additional evidence presented in determining whether to grant or deny a subsequent motion for a *Porter* hearing.[17]

For the foregoing reasons, we conclude that the trial court improperly denied the defendant's motion for a *Porter* hearing based solely on *Legnani*, without considering new evidence offered by the defendant, and we do not have a fair assurance that this error was not harmless. As a result, the defendant is entitled to a new trial.

B

Scope of Testimony

We address the defendant's second claim because it is likely to arise on remand. Specifically, the defendant

[16] For example, a trial court may take judicial notice of the conclusions reached with respect to firearm and toolmark methodology following the *Porter* hearing in *Terrell*. See generally *State* v. *Terrell*, supra, 68 Conn. L. Rptr. 323.

[17] The purpose of taking judicial notice of previous *Porter* hearings is to avoid redundancies created by holding successive hearings when another trial court has considered the same evidence challenging the methodology. This does not, however, mean that the reliability of the underlying methodology is insulated from appellate review. A trial court's decision to deny a *Porter* hearing is still subject to appellate review, and taking judicial notice does not prevent review for abuse of discretion.

claims that the Appellate Court improperly upheld the trial court's denial of his motion in limine to proscribe the scope of Stephenson's testimony, highlighting that at least one Superior Court in this state, as well as other courts across the country, have limited the opinions of firearm and toolmark examiners in a variety of manners, "including precluding them from stating that expelled casings or bullets are matched to a firearm to the exclusion of all other firearms, requiring them to clarify that the likelihood of their conclusions being true is 'more likely than not,' or requiring them to clarify that the certainty of their opinions was limited in some other manner." (Footnotes omitted.) The defendant argues that such a limitation is particularly appropriate as recent decades have ushered in a "greater reliance on interchangeable parts in manufacturing [that] has substantially altered the degree of unique features in the firing pins and other components of firearms," thereby eroding the fundamental assumptions of firearm and toolmark examinations so as to render them insufficiently reliable to permit match statements. The defendant further requests that, even if this court were to conclude that it was permissible for firearm and tool-mark experts to testify that a particular casing was fired from a specific firearm, we use our supervisory authority to limit the scope of such testimony in Connecticut courts. In response, the state claims that the specific restriction requested by the defendant—"more likely than not"—is arbitrary, inaccurate, and unsupported by the law generally applicable to expert testimony. The state concedes, however, that "it may be true that the methodology employed by firearm and toolmark identification experts would not currently support any representation that their conclusions are 100 percent infallible . . . ." Furthermore, if this court were to adopt a rule proscribing the language that an expert must use in stating his opinion that a particular casing was fired from a specific

firearm, the state indicated that it would support a requirement that the expert phrase his opinion in terms of "a reasonable degree of certainty" or "a practical certainty . . . ." (Internal quotation marks omitted.) We agree with the state.

We begin with the applicable standard of review. "[A] trial court retains broad discretion in ruling on the qualifications of expert witnesses and [in] determining whether their opinions are relevant." *State* v. *Guilbert*, 306 Conn. 218, 257, 49 A.3d 705 (2012). "[S]uch testimony is admissible if the trial court determines that the expert is qualified and that the proffered testimony is relevant and would aid the jury." *State* v. *Williams*, 317 Conn. 691, 702, 119 A.3d 1194 (2015). When a party seeks to exclude or limit the scope of an expert's testimony, the burden is on the party who files the motion in limine to show that the challenged remarks were prejudicial in light of the entire proceeding. Cf. *State* v. *Binet*, 192 Conn. 618, 628, 473 A.2d 1200 (1984). "We review a trial court's decision to preclude expert testimony for an abuse of discretion. . . . We afford our trial courts wide discretion in determining whether to admit expert testimony and, unless the trial court's decision is unreasonable, made on untenable grounds . . . or involves a clear misconception of the law, we will not disturb its decision." (Internal quotation marks omitted.) *State* v. *Williams*, supra, 701–702.

In the present case, defense counsel requested that the trial court restrict Stephenson to using very specific language that connoted a narrow scientific conclusion but did not provide the court with sufficient information to inform its decision. With respect to limiting the scope of Stephenson's testimony, the defendant's motion in limine simply requested that "a limiting order and instruction, similar to that in *Glynn*, be granted" without providing additional details as to what that instruction would entail, why it would be appropriate for the

trial court to adopt that standard, or how failing to limit the scope of Stephenson's testimony would prejudice the defendant. During pretrial argument on the motion, defense counsel urged the trial court to adopt the approach used in *Glynn* and to conclude that, due to the shortcomings of firearm and toolmark analysis described in the NAS reports, it should limit Stephenson to testifying only that it was "more likely than not" that the bullets were fired from the same gun. In addition, in both the motion in limine and oral arguments on the motion, the defense relied on a single United States District Court decision from the Southern District of New York to support its argument. Given the highly proscribed language requested, combined with the scant information and lack of case law provided in support of the defendant's motion, we conclude that the trial court's denial of the motion was not an abuse of discretion. See, e.g., *State* v. *Binet*, supra, 192 Conn. 624 ("[t]he record before the court . . . could hardly provide it with a solid basis upon which to grant the defendant's motion").

We pause briefly to qualify our holding. Our conclusion that the trial court in the present case properly declined to limit the scope of Stephenson's testimony to only "more likely than not" should not be taken as blanket approval of unlimited testimony from firearm and toolmark experts. As both the defendant and the state acknowledge, a substantial number of courts addressing this issue, including the United States Court of Appeals for the Second Circuit, have prohibited experts from testifying that a bullet or casing matched a specific firearm with absolute certainty or to the exclusion of all other firearms. See, e.g., *United States* v. *Gil*, 680 Fed. Appx. 11, 13–14 (2d Cir. 2017); *United States* v. *Diaz*, Docket No. CR-05-00167 (WHA), 2007 WL 485967, *1 (N.D. Cal. February 12, 2007). These courts, however, do not agree on what language is appropriate. Options include requiring an expert to state

that his degree of certainty is only "more likely than not"; (internal quotation marks omitted) *United States* v. *Glynn*, supra, 578 F. Supp. 2d 574–75; that the identification is to "a reasonable degree of certainty"; *United States* v. *Monteiro*, 407 F. Supp. 2d 351, 355 (D. Mass. 2006); that the identification is to "a practical certainty"; (internal quotation marks omitted) *United States* v. *McCluskey*, Docket No. 10-2734 (JCH), 2013 WL 12335325, *10 (D.N.M. February 7, 2013); that the identifying characteristics on two items are "consistent with" each other (internal quotation marks omitted); *United States* v. *Johnson*, Docket No. 16 Cr. 281 (PGG), 2019 WL 1130258, *20 (S.D.N.Y. March 11, 2019); that the recovered firearm "cannot be excluded as the source" of the recovered casing; *United States* v. *Shipp*, 422 F. Supp. 3d 762, 783 (E.D.N.Y. 2019); or that the expert be requested to describe only similar and distinguishing features without characterizing a conclusion. *United States* v. *Green*, 405 F. Supp. 2d 104, 108–109 (D. Mass. 2005). At least one Connecticut trial court has prohibited a firearm and toolmark expert from testifying that "the likelihood that a firearm other than [the one] recovered at the crime scene could have fired the recovered [subject] casing is so remote as to be considered a practical impossibility." (Internal quotation marks omitted.) *State* v. *Terrell*, supra, 68 Conn. L. Rptr. 327. In addition, the state concedes that testifying to the certainty of a match "to the exclusion of all others" would not be appropriate and that it has no objection to a standard requiring an expert to limit his conclusions to either "a reasonable degree of certainty" or "a practical certainty . . . ." (Internal quotation marks omitted.) The defendant asks this court to exercise its supervisory authority[18] to limit the scope of testimony from firearm and

[18] "It is well settled that [a]ppellate courts possess an inherent supervisory authority over the administration of justice. . . . Under our supervisory authority, we have adopted rules intended to guide the lower courts in the administration of justice in all aspects of the criminal process. . . . Generally, cases in which we have invoked our supervisory authority for rule

toolmark experts. Although we decline to do so, our decision does not preclude trial courts from imposing appropriate limits on such expert testimony when deemed necessary.

For the foregoing reasons, we conclude that the trial court properly denied the defendant's motion in limine to limit the scope of Stephenson's testimony to a "more likely than not" standard.

II

UNCHARGED MISCONDUCT

Although our conclusion in part I A of this opinion is dispositive of the present appeal, in the interest of judicial economy, we address the defendant's claim that the trial court improperly admitted uncharged misconduct because we conclude the issue is likely to arise on remand. The following additional facts and procedural history are relevant to the resolution of this claim. Prior to the start of trial, the state filed a motion in which it sought permission to offer evidence of uncharged misconduct related to the Baltimore Street shooting in order to prove identity and means. Defense counsel opposed the motion, claiming that evidence of the Baltimore Street shooting was surplus and prejudicial in light of the fact that Rivera would provide in court identifications of both the defendant and the firearm used in the Enfield Street murder. Defense counsel further argued that testimony indicating that the defendant may have used the same gun in the subsequent Balti-

making have fallen into two categories. . . . In the first category are cases wherein we have utilized our supervisory power to articulate a procedural rule as a matter of policy, either as [a] holding or dictum, but without reversing [the underlying judgment] or portions thereof. . . . In the second category are cases wherein we have utilized our supervisory powers to articulate a rule or otherwise take measures necessary to remedy a perceived injustice with respect to a preserved or unpreserved claim on appeal." (Citation omitted; internal quotation marks omitted.) *State* v. *Weatherspoon*, 332 Conn. 531, 552–53, 212 A.3d 208 (2019).

more Street shooting was not relevant to the present case and served only to implicate him in a separate, unrelated crime. Following argument, the trial court granted the state's motion for permission to offer evidence of uncharged misconduct, concluding that the evidence fell within the identity and means exceptions under § 4-5 (c) of the Connecticut Code of Evidence.

At trial, the state proceeded to introduce evidence of the Baltimore Street shooting, primarily through the testimony of Deborah Parker, the victim of that crime. Parker testified that, at approximately 2:30 a.m. on February 16, 2008, she and her partner, Darryl Spence, returned to their residence on Baltimore Street in Hartford, where they lived with two of their sons. As Parker and Spence got out of their vehicle, which belonged to Parker's oldest son, who did not live at the residence on Baltimore Street, Parker noticed two men walking on the street. As the men approached, Parker saw the taller of the two men fire a handgun in her direction. Then, the shorter of the two men fired a rifle in her direction, but she could not identify the specific weapon used. Parker saw the faces of both shooters illuminated by a streetlight as she took cover underneath a vehicle, and Spence ran away to hide elsewhere. Even though at least twenty-nine shots had been fired, neither Parker nor Spence was injured.

The police responded to the Baltimore Street shooting, but Parker declined to provide a written statement about the incident, and, at that time, she did not know the identity of the shooters and was not confident that she would be able to identify them in the future. Later that morning, Parker walked through her kitchen as her sons were looking at photographs on the computer from a concert they attended the night before and discussing a fight they got into at that concert. Parker recognized the shooters in the photographs, and her sons provided the first name or nickname for each of

the men she identified, including the defendant. Parker called the police and told them where they could find the photographs, but indicated that she did not know the shooters' full names and declined to file a written statement. The police never got back to Parker, and she did not follow up thereafter. In April, 2011, over three years after the Baltimore Street shooting, Parker's oldest son was murdered in an unrelated incident. Then, on August 24, 2011, Parker was approached by the police to discuss the Baltimore Street shooting. At that time, Parker identified both shooters from a photographic array and learned the defendant's last name from the police; she then signed a written statement regarding the Baltimore Street shooting. Parker was not aware of the victim's murder on Enfield Street and had never heard his name.

In addition, Stephenson testified regarding the casings that were recovered from the Baltimore Street shooting. Of the twenty-two .223 caliber casings recovered from the crime scene, Stephenson positively identified seventeen as having been fired from the recovered Kel-Tec assault rifle, the same weapon that Stephenson testified matched the casings from the Enfield Street murder and that Rivera identified as having been used by the defendant in that crime. See part I of this opinion. Stephenson's testimony, combined with Parker's, established that eight months following the Enfield Street murder, the defendant was identified as having been involved in the Baltimore Street shooting using a weapon that was matched through ballistics evidence to the weapon used in the Enfield Street murder, which was subsequently recovered five months later through an unrelated investigation.

On appeal to the Appellate Court, the defendant argued that the probative value of the uncharged misconduct evidence was outweighed by the risk of unfair prejudice. *State* v. *Raynor*, supra, 181 Conn. App. 772.

Specifically, the defendant argued that "the evidence [was] more prejudicial than probative because Parker's identification of the defendant was exceedingly unreliable, that the similarities between the charged and uncharged conduct [rendered the] admission of the uncharged misconduct overly prejudicial, and that the uncharged misconduct painted the defendant as a deranged gunman." (Internal quotation marks omitted.) Id., 774. The state argued that the trial court properly admitted the evidence to establish identity and means. Id., 772. The Appellate Court reasoned that, "[a]lthough the facts of the uncharged misconduct involved the defendant attempting to shoot Parker and Spence, [it was] much less severe than [that] of the charged conduct, and, therefore, admission of the uncharged misconduct evidence cannot be said to have unduly aroused the jurors' emotions."[19] Id., 778. "Additionally, the [trial] court . . . gave the jury limiting instructions on three occasions . . . . These . . . instructions provided, inter alia, that the uncharged misconduct evidence was being admitted solely to show or establish [the] identity of the person who committed the crimes alleged . . . and the availability of the means to commit those crimes." (Internal quotation marks omitted.) Id., 777. Accordingly, the Appellate Court concluded that the trial court had not abused its discretion in determining that the probative value of the uncharged misconduct was not outweighed by the risk of unfair prejudice. Id., 777–78. This appeal followed.

[19] The Appellate Court also could not say that "admission of the uncharged misconduct evidence created a distracting side issue, as the evidence admitted linked the rifle and the perpetrator of the uncharged shooting to the murder at issue in [the present] case. Additionally, the presentation of evidence related to the Baltimore Street shooting did not take up an inordinate amount of time, as the presentation of the uncharged misconduct evidence comprised at most one and one-half days of a six day trial. Finally, the defendant was not unfairly surprised by the admission of this evidence, as it was admitted in the defendant's first trial and [as] the state filed a pretrial motion for the admission of uncharged misconduct evidence." (Footnote omitted.) *State* v. *Raynor*, supra, 181 Conn. App. 778.

In the present case, the defendant claims that the Appellate Court incorrectly upheld the trial court's admission of uncharged misconduct related to the Baltimore Street shooting because the "tremendous prejudicial impact of the prior misconduct evidence overwhelmed its minimal probative value." In response, the state claims that the trial court's ruling that the probative value of the Baltimore Street shooting outweighed its prejudicial impact was neither so arbitrary as to vitiate logic, nor based on improper or irrelevant factors.[20] Specifically, the state highlights that this court has recognized the probative value of evidence when a defendant used the same weapon in another crime, and that this court has observed that there is a reduced risk of unduly arousing the jurors' emotions when the severity of the uncharged misconduct is less than the severity of the crime at issue. On the basis of the evidence contained within the record presently before us, we agree with the defendant that the trial court incorrectly admitted the challenged evidence because its prejudicial impact outweighed its probative value.

"[A]s a general rule, evidence of prior misconduct is inadmissible to prove that a criminal defendant is guilty of the crime of which the defendant is accused. . . . Such evidence cannot be used to suggest that the defendant has a bad character or a propensity for criminal behavior." (Internal quotation marks omitted.) *State* v. *Collins*, 299 Conn. 567, 582, 10 A.3d 1005, cert. denied, 565 U.S. 908, 132 S. Ct. 314, 181 L. Ed. 2d 193 (2011). "The well established exceptions to the general prohibition against the admission of uncharged misconduct are set forth in § 4-5 [c] of the Connecticut Code of Evidence, which provides in relevant part that '[e]vidence of other crimes, wrongs or acts of a person is admissible . . .

[20] The state also contends that any error in this regard was harmless. Because we address this claim as an issue likely to arise on remand, we need not address questions of harmless error in the present appeal.

to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony.' " Id., 583. "We have developed a two part test to determine the admissibility of such evidence. First, the evidence must be relevant and material to at least one of the circumstances encompassed by the exceptions [set forth in § 4-5 (c) of the Connecticut Code of Evidence].[21] . . . Second, the probative value of the evidence must outweigh its prejudicial effect. . . . Because of the difficulties inherent in this balancing process, the trial court's decision will be reversed only whe[n] abuse of discretion is manifest or whe[n] an injustice appears to have been done. . . . On review by this court, therefore, every reasonable presumption should be given in favor of the trial court's ruling." (Footnote added; internal quotation marks omitted.) Id., 582.

"In determining whether the prejudicial effect of otherwise relevant evidence outweighs its probative value, we consider whether: (1) . . . the facts offered may unduly arouse the [jurors'] emotions, hostility or sympathy, (2) . . . the proof and answering evidence it provokes may create a side issue that will unduly distract the jury from the main issues, (3) . . . the evidence offered and the counterproof will consume an undue amount of time, and (4) . . . the defendant, having no reasonable ground to anticipate the evidence, is unfairly surprised and unprepared to meet it." (Internal quotation marks omitted.) Id., 586–87.

This court has repeatedly held that "[t]he prejudicial impact of uncharged misconduct evidence is assessed in light of its relative 'viciousness' in comparison with the charged conduct." *State* v. *Campbell*, 328 Conn. 444, 522–23, 180 A.3d 882 (2018); see also *State* v. *Collins*,

[21] The defendant does not contest the relevancy of the evidence relating to the Baltimore Street shooting.

supra, 299 Conn. 588 ("[u]ncharged misconduct evidence has been held not unduly prejudicial when the evidentiary substantiation of the vicious conduct, with which the defendant was charged, far outweighed, in severity, the character of his prior misconduct" (internal quotation marks omitted)). The rationale behind this proposition is that the jurors' emotions are already aroused by the more severe crime of murder, for which the defendant is charged, and, thus, a less severe, uncharged crime is unlikely to arouse their emotions beyond that point. The question of whether the evidence is unduly prejudicial, however, does not turn solely on the relative severity of the uncharged misconduct. Instead, prejudice is assessed on a continuum—on which severity is a factor—but whether that prejudice is undue can only be determined when it is weighed against the probative value of the evidence.

In the present case, the Baltimore Street shooting was a less severe crime than the Enfield Street murder solely due to the fact that neither Parker nor Spence was hit by one of the dozens of shots fired. The Baltimore Street shooting and the Enfield Street murder, however, shared other common characteristics, including individuals being shot at by assailants outside of their own homes. Each incident involved two people, one male and one female, who were currently in, or had recently been in, a romantic relationship, as opposed to groups of friends or associates. These shootings each occurred in the middle of the night, involved dozens of shots being fired, and ended with the assailants fleeing the scene. While these two incidents were not identical, the similarities cannot be dismissed as irrelevant, and, together, they increase the risk of undue prejudice. See, e.g., *State* v. *Artieri*, 206 Conn. 81, 87, 536 A.2d 567 (1988) ("[w]here the prior crime is quite similar to the offense being tried, a high degree of prejudice is created and a strong showing of probative value would be neces-

sary to warrant admissibility" (internal quotation marks omitted)).

In addition, evidence of the Baltimore Street shooting was introduced through the testimony of Parker, the victim of that crime, and her testimony was not limited only to the fact that there was a shooting, with no other details regarding the surrounding events. See *State* v. *Collins*, supra, 299 Conn. 589 ("we find significant the trial court's efforts to have the prosecution admonish its witnesses that any testimony about the [previous uncharged misconduct] was to be limited only to the fact that there was a shooting"). Instead, Parker testified in detail about the shooting, including her feelings of being scared and her exact movements during the shooting, and she detailed her initial efforts to follow up with the police. Parker also described events beyond the Baltimore Street shooting. She suggested that her sons and the defendant had been involved in an altercation at a concert the night before and revealed that her oldest son was murdered shortly before she spoke to the police again in August, 2011. While none of these details in isolation is determinative of whether the evidence is unduly prejudicial,[22] when combined, they could arouse the jurors' emotions and require a higher level of probative value to overcome the prejudicial impact.[23]

[22] The judge at the defendant's first trial noted the risk of admitting improper character evidence. During pretrial oral arguments, the trial court stated that it was "very concerned in this case that the . . . defendant not be tried . . . under the theory of a bad man. We don't do that. So, I think both sides are going to have to be careful in not opening doors that—I don't know if I've seen a case with so many doors."

[23] The state claims that the prejudicial impact is negated "in light of the care with which the trial court, on three separate occasions, cautioned the jury as to the limited use for which [it was] to consider the evidence." We acknowledge that the trial court gave the jury limiting instructions that the uncharged misconduct evidence was being admitted "solely to show or establish [the] identity of the person who committed the crimes alleged in this information, and the availability of the means to commit those crimes" on the following three occasions: (1) prior to the state first presenting

The probative value of the Baltimore Street shooting was too low to overcome its prejudicial impact. The Baltimore Street shooting occurred eight months after the Enfield Street murder. There was no evidence to suggest that the Baltimore Street shooting was motivated by or related to the earlier Enfield Street murder. They were separate shootings and, with the exception of the defendant, involved different participants and unrelated victims. Parker's testimony relating to the Baltimore Street shooting was admitted to prove that the defendant had been involved in this separate, subsequent gun related crime, where the shell casings matched the .223 caliber Kel-Tec assault rifle. Evidence that the defendant was involved in a shooting in which he allegedly used the same weapon only minimally increased the probability that he was the shooter who used that weapon eight months prior during the Enfield Street murder. This connection is further eroded by the fact that the .223 caliber Kel-Tec assault rifle was not recovered at the scene of the Baltimore Street shooting but, instead, five months later from a different location following a lead provided by a confidential informant. Cf. *State* v. *Collins*, supra, 299 Conn. 570–76.[24] The state

evidence of the Baltimore Street shooting, (2) following Parker's testimony, and (3) during its final charge to the jury. See *State* v. *Beavers*, 290 Conn. 386, 406, 963 A.2d 956 (2009) ("the care with which the [trial] court weighed the evidence and devised measures for reducing its prejudicial effect militates against a finding an abuse of discretion" (internal quotation marks omitted)). Although limiting instructions serve to "minimize any prejudice that might arise from the admission of . . . prior misconduct evidence"; *State* v. *Cutler*, 293 Conn. 303, 314, 977 A.2d 209 (2009), overruled in part on other grounds by *State* v. *Elson*, 311 Conn. 726, 91 A.3d 862 (2014); the instructions would have needed to virtually eliminate the prejudice in the present case, given the very low probative value of the evidence of the Baltimore Street shooting. We cannot conclude that even multiple limiting instructions could have achieved that goal. In addition, limiting instructions may feature more prominently in a harmless error analysis. See footnote 20 of this opinion.

[24] The Appellate Court held that *Collins* guided its resolution of the claim based on the proposition that uncharged misconduct is admissible when the "severity of the charged conduct outweigh[s] the severity of the uncharged

did not need to introduce evidence of the Baltimore Street shooting to connect the defendant to the .223 caliber Kel-Tec assault rifle used in the Enfield Street murder that the police subsequently recovered from a different location. The state presented direct evidence from Rivera connecting the defendant to that gun and the Enfield Street murder.[25] Having reviewed the record in the present case, we conclude that the prejudicial effect of the uncharged misconduct unduly exceeded its probative value.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgment of the trial court and to remand the case to that court for a new trial.

In this opinion the other justices concurred.

D'AURIA, J., with whom PALMER and MULLINS, Js., join, concurring. I agree with and join the majority opinion. In particular, I agree with the majority that

conduct." *State* v. *Raynor*, supra, 181 Conn. App. 777. The facts of *Collins*, however, are distinguishable from the facts of the present case. In *Collins*, the uncharged misconduct involved a shooting that not only occurred in closer temporal proximity to the charged murder than in the present case—four months as opposed to eight months—it occurred *prior* to the charged murder. See *State* v. *Collins*, supra, 299 Conn. 570–72. We also observe that the defendant in that case admitted to committing the uncharged misconduct with a chrome and black nine millimeter handgun. Id., 572. Further, in *Collins*, a witness testified to having seen the defendant with the same gun used in the uncharged misconduct several days before the charged murder. Id., 573–74. Thus, the facts of *Collins* made the uncharged misconduct highly probative.

[25] Rivera provided eyewitness testimony that the defendant purchased the .223 caliber Kel-Tec assault rifle one to one and one-half months before the Enfield Street murder, and also testified that the defendant had called him for the purpose of finding and shooting members of The Avenue, the defendant used the .223 caliber Kel-Tec assault rifle as the shooter at the Enfield Street murder, and the defendant knew where the weapon was located prior to its being recovered by the police, because the defendant was the one who notified Rivera that it had been found. In addition, Stephenson testified that the casings recovered from the Enfield Street murder matched the recovered .223 caliber Kel-Tec assault rifle.

the trial court improperly refused to conduct a hearing pursuant to *State* v. *Porter*, 241 Conn. 57, 80–90, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998), and that the inclusion of the contested expert evidence substantially affected the verdict. Specifically, I agree that the trial court abused its discretion by relying on the holding of *State* v. *Legnani*, 109 Conn. App. 399, 421, 951 A.2d 674, cert. denied, 289 Conn. 940, 959 A.2d 1007 (2008), to deny the defendant, Donald Raynor, a *Porter* hearing. Moreover, I agree that a separate trial court's ruling in *State* v. *Terrell*, Superior Court, judicial district of New Haven, Docket No. CR-17-0179563-S (March 21, 2019) (68 Conn. L. Rptr. 323), which has not been subject to appellate scrutiny, cannot save the trial court's ruling in the present case. See footnote 13 of the majority opinion and accompanying text. I write separately to raise an issue regarding the proper remedy in cases like this one in which the trial court improperly refuses to hold a *Porter* hearing. I believe there is an argument that this error can be cured by a limited remand for a *Porter* hearing, with the vacatur of the trial court's judgment following only if the trial court ultimately finds the contested expert evidence inadmissible.

This court previously has held that, when the trial court conducts a *Porter* hearing but abuses its discretion by admitting or precluding the expert evidence, the proper remedy is a new trial if the admission of the expert evidence substantially affected the verdict. See, e.g., *Maher* v. *Quest Diagnostics, Inc.*, 269 Conn. 154, 157 n.4, 182–83, 847 A.2d 978 (2004). The reason for such a remedy is logical: the record establishes that the inadmissible evidence infected the trial court's judgment. Likewise, this court also has remanded a case for a new trial when the trial court improperly refused to hold a *Porter* hearing at all, and the expert evidence substantially affected the verdict, although the court could not determine whether the evidence was inadmis-

sible. See *Prentice* v. *Dalco Electric, Inc.*, 280 Conn. 336, 339, 907 A.2d 1204 (2006) ("We conclude that the testimony in question was scientific evidence that required a validity assessment designed to ensure reliability pursuant to our analysis in *Porter*. Accordingly, we reverse the judgment of the trial court and remand the case for a new trial."), cert. denied, 549 U.S. 1266, 127 S. Ct. 1494, 167 L. Ed. 2d 230 (2007). The reason for a new trial in this second scenario, however, is not as clear to me. This court has not had the opportunity to determine whether a different remedy is required.

In a future case, I would entertain an argument that, once an appellate court determines that the trial court improperly refused to conduct a *Porter* hearing and the contested expert evidence substantially affected the verdict, a new trial is not automatically the proper remedy but that, instead, we can direct the trial court on remand to hold the *Porter* hearing, even postjudgment. If the expert witness' methodology does not pass muster, then the trial court would have to vacate the conviction and order a new trial. If the methodology passes muster, however, the judgment of conviction would remain intact. After the *Porter* hearing, however, the defendant could appeal the trial court's ruling confirming the admissibility of the evidence.

I recognize, however, that it is not appropriate in the present case to address or decide this issue for two reasons. First, under current law, which neither party contests or asks us to overrule, this court has determined that a remand for a new trial is the proper remedy when the trial court improperly refused to hold a *Porter* hearing and the admission of the expert testimony substantially affected the verdict. Second, neither party has raised or briefed whether a remand for a *Porter* hearing is the appropriate remedy, before this court or the Appellate Court. I therefore agree with the majority's determination to remand the present case for a new trial.

I now turn to our case law. In *Prentice* v. *Dalco Electric, Inc.*, supra, 280 Conn. 345–47, a civil case, this court held that the trial court incorrectly determined that expert testimony by a mechanical and forensic engineer regarding the effect of wind conditions was not scientific, and, thus, the court improperly refused to conduct a *Porter* hearing. After determining that this error substantially affected the verdict, this court remanded the case for a new trial. Id., 359–61. My research has not turned up a criminal case from this court or the Appellate Court in which the trial court improperly refused to hold a *Porter* hearing and that error substantially affected the verdict, but it would have to follow that a new trial would be the remedy in criminal cases as well.[1]

Additionally, a remand for a new trial is the majority rule under jurisprudence regarding *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), the federal analogue to *Porter*. See, e.g., *Dodge* v. *Cotter Corp.*, 328 F.3d 1212, 1229 (10th Cir.) (when trial court fails to conduct *Daubert* hearing, proper remedy is new trial, not remand for *Daubert* hearing), cert. denied, 540 U.S. 1003, 124 S. Ct. 533, 157 L. Ed. 2d 408 (2003); cf. *Goebel* v. *Denver &*

[1] This is supported by this court's recent decision in *State* v. *Edwards*, 325 Conn. 97, 133–34, 156 A.3d 506 (2017), in which we held that the trial court improperly refused to hold a *Porter* hearing but that this failure was harmless, as it did not substantially affect the verdict. Nevertheless, in discussing the applicable standard of review and legal principles, we stated that a new trial would be required only if the defendant showed that the error substantially affected the verdict, citing to cases involving improper evidentiary rulings that did not involve *Porter*. Id., 123 (" '[i]f we determine that a court acted improperly with respect to the admissibility of expert testimony, we will reverse the trial court's judgment and grant a new trial only if the impropriety was harmful to the appealing party' "); id. (quoting *Weaver* v. *McKnight*, 313 Conn. 393, 405, 97 A.3d 920 (2014), which involved trial court's improper exclusion of expert testimony on ground that experts lacked sufficient qualifications). This at least suggests that a remand for a new trial would have been the proper remedy under current law if the defendant had proven harm.

Rio Grande Western Railroad Co., 215 F.3d 1083, 1089 (10th Cir. 2000) (explaining that, when trial court fails to conduct *Daubert* hearing, there are two possible remedies: new trial, or, if record is sufficient to determine reliability, appeals court may undertake its own *Daubert* analysis).

There is at least one court that has recognized that a limited remand for a *Porter* hearing may be the proper remedy in certain instances, however. See *United States* v. *Bacon*, 979 F.3d 766, 770 (9th Cir. 2020) (en banc) (overruling prior case law that required reviewing court to remand case for new trial if trial court improperly failed to hold *Daubert* hearing and holding instead that, "when a panel of [the Ninth Circuit] concludes that [a] district court has committed a [nonharmless] *Daubert* error, the panel has discretion to impose a remedy 'as may be just under the circumstances,' " including ordering limited remand); see *United States* v. *Bacon*, 829 Fed. Appx. 247, 248 (9th Cir. 2020) (directing District Court on remand to conduct whatever proceedings it deems appropriate to determine whether expert testimony was admissible pursuant to *Daubert*); see also *Estate of Barabin* v. *AstenJohnson, Inc.*, 740 F.3d 457, 468–69 (9th Cir.) (Nguyen, J., concurring in part and dissenting in part) (questioning majority's remedy of new trial and urging conditional vacating of judgment and remand to District Court to conduct *Daubert* determination in first instance), cert. denied, 574 U.S. 815, 135 S. Ct. 55, 190 L. Ed. 2d 30 (2014); *Estate of Barabin* v. *AstenJohnson, Inc.*, supra, 471, (Nguyen, J., concurring in part and dissenting in part) (remand for *Daubert* hearing is better remedy because it does not unreasonably burden judicial system by requiring new trial and because, in absence of *Daubert* hearing, reviewing court cannot determine whether expert testimony was inadmissible and, thus, cannot conduct harmless error analysis). In the present case, the trial court erred by failing

to exercise its discretion. A limited remand for a *Porter* hearing could remedy that error, requiring a new trial only if the expert witness' methodology does not pass muster. This procedure may be a more efficient use of judicial resources than requiring new trials in all cases involving the improper refusal to conduct a *Porter* hearing. "If the disputed expert testimony was admissible pursuant to . . . [*Porter*], despite the [trial] court's failure to fulfill its gatekeeping function, then no harm, no foul. On the other hand, if the testimony was inadmissible, *then* a . . . [new trial would be required]." (Emphasis added.) *Estate of Barabin* v. *AstenJohnson, Inc.*, supra, 469 (Nguyen, J., concurring in part and dissenting in part).

For similar efficiency reasons, this court has employed this exact procedure to remedy errors in other criminal cases that are at least arguably analogous. For example, in *State* v. *Jarzbek*, 204 Conn. 683, 684, 529 A.2d 1245 (1987), cert. denied, 484 U.S. 1061, 108 S. Ct. 1017, 98 L. Ed. 2d 982 (1988), a case involving sexual abuse of a minor victim, the state requested and was granted permission to exclude the defendant from the witness room during the videotaping of the minor victim's testimony. After a jury found the defendant guilty, he appealed, arguing that this violated his constitutional right to confrontation. Id., 690. This court held that, "in criminal prosecutions involving the alleged sexual abuse of children of tender years, the practice of videotaping the testimony of a minor victim outside the physical presence of the defendant is, in appropriate circumstances, constitutionally permissible" but that the trial court first "must determine, at an evidentiary hearing, whether the state has demonstrated a compelling need for excluding the defendant from the witness room during the videotaping of a minor victim's testimony." Id., 704. Because the trial court did not conduct this hearing prior to granting the state's request, this court

remanded the case for an evidentiary hearing, explaining that, "[i]f the [trial] court concludes that the state has not met its burden of proving such a need by clear and convincing evidence, the defendant is entitled to a new trial from which the videotaped testimony of [the victim] must be excluded. If the court concludes that the state has met its burden, the defendant's conviction must stand, subject to any further appeal by the defendant to this court concerning the validity of the trial court's ruling on this issue." Id., 708.

Similarly, when this court has determined that the trial court improperly failed to conduct or apply the proper standard for a competency hearing, this court has remanded the case for a competency hearing and required a new trial only if the trial court determines on remand that the defendant was incompetent to stand trial at the time of the trial. See *State* v. *Connor*, 292 Conn. 483, 528–29, 533, 973 A.2d 627 (2009). Likewise, this court has determined that, when the trial court improperly failed to conduct a hearing pursuant to *Batson* v. *Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), and the circumstances surrounding the voir dire can be reconstructed, a limited remand for a *Batson* hearing is the appropriate remedy, not a new trial. See *State* v. *Rigual*, 256 Conn. 1, 12–13, 771 A.2d 939 (2001). Additionally, this court has remanded cases for hearings pursuant to *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), conditioning the need for any new trial on the outcome of the *Brady* hearing. See *State* v. *Pollitt*, 205 Conn. 132, 134–37, 531 A.2d 125 (1987).[2]

[2] In *State* v. *Snook*, 210 Conn. 244, 555 A.2d 390, cert. denied, 492 U.S. 924, 109 S. Ct. 3258, 106 L. Ed. 2d 603 (1989), this court explained that it has "on several occasions remanded a case for the limited purpose of conducting an evidentiary hearing necessary for appellate review of a claim. See, e.g., *State* v. *Badgett*, 200 Conn. 412, 433–34, 512 A.2d 160 [(remanding case for factual hearing to determine whether illegally discovered evidence was admissible under recently articulated inevitable discovery rule), cert. denied, 479 U.S. 940, 107 S. Ct. 423, 93 L. Ed. 2d 373 (1986)]; *State* v. *Pollitt*,

In these cases, a reversal of the conviction followed only if the trial court on remand found that reversible error occurred. This is not unlike ordering a trial court to make findings by way of an articulation while an appeal is pending in our court, the only difference being that, procedurally, we would actually remand the matter rather than simply order an articulation. Even the rules for articulations prompted by a party's motion contemplate situations in which a trial court might take further evidence. See Practice Book § 66-5 ("[i]f any party requests it and it is deemed necessary by the trial court, the trial court shall hold a hearing at which arguments may be heard, evidence taken or a stipulation of counsel received and approved").

There might be contrary arguments I have not considered. But the state and the public have an interest in preserving convictions otherwise fairly arrived at. In light of the case law previously discussed, I would entertain an argument in a future case that such a procedure should be undertaken when the trial court improperly refuses to conduct a *Porter* hearing. Until a *Porter* hearing is held, we do not know if the defendant's trial was tainted and, thus, do not know whether a new trial is required.

Nevertheless, in light of our current law and the fact that the appropriate scope of the remedy has not been argued by the parties, I agree with the majority that we must remand the present case for a new trial.

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199 Conn. 399, 415–16, 508 A.2d 1 (1986) (remanding case for factual hearing to determine whether state suppressed exculpatory evidence); cf. *State* v. *Garrison*, 199 Conn. 383, 388–89, 507 A.2d 467 (1986) ([when] court [was] unable to determine from record whether state established defendant's guilt beyond reasonable doubt, court ordered remand for further articulation of trial court's grounds for rejecting defendant's defenses)." *State* v. *Snook*, supra, 254.

DANIEL KLEIN *v.* QUINNIPIAC UNIVERSITY (SC 20405)

Robinson, C. J., and McDonald, D'Auria, Mullins, Ecker, Vertefeuille and Bright, Js.*

Argued June 10—officially released December 7, 2020**

Procedural History

Action to recover damages for the defendant's alleged negligence, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Wahla*, *J.*; verdict and judgment for the defendant, from which the plaintiff appealed to the Appellate Court, *Lavine* and *Keller*, *Js.*, with *Bishop*, *J.*, dissenting, which affirmed the trial court's judgment, and the plaintiff, on the granting of certification, appealed to this court. *Appeal dismissed.*

Steven D. Jacobs, for the appellant (plaintiff).

James E. Wildes, for the appellee (defendant).

Opinion

PER CURIAM. The plaintiff, Daniel Klein, brought this premises liability action against the defendant, Quinnipiac University, for injuries he suffered while riding his bicycle on the defendant's campus. Following a trial, the jury returned a general verdict for the defendant. The plaintiff appealed to the Appellate Court, arguing that the trial court improperly declined to give a licensee instruction to the jury and that the trial court improperly admitted certain testimony regarding the plaintiff's speed. The Appellate Court concluded that the trial

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

** December 7, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

court properly declined to give a licensee instruction and that, even if it was error, it was harmless. The Appellate Court also concluded that the general verdict rule barred its review of the plaintiff's evidentiary claim. The plaintiff now appeals, following our grant of certification,[1] from the judgment of the Appellate Court, affirming the judgment in favor of the defendant. *Klein* v. *Quinnipiac University*, 193 Conn. App. 469, 470–71, 219 A.3d 911 (2019). On appeal, the plaintiff's claims are solely limited to the Appellate Court's ruling on his instructional claim. Specifically, the plaintiff claims that the Appellate Court incorrectly concluded that (1) the trial court did not err in failing to give the licensee instruction in the present case, and (2) any error was harmless.

After examining the entire record on appeal and considering the briefs and oral arguments of the parties, we have determined that the appeal should be dismissed on the ground that certification was improvidently granted.

The appeal is dismissed.

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[1] We granted the plaintiff's petition for certification to appeal from the Appellate Court, limited to the following issues: (1) "Did the Appellate Court correctly conclude that the trial court had properly decided to instruct the jury regarding the duty of care owed by a landowner to a trespasser but not to instruct the jury regarding the duty of care owed to a licensee?" And (2) "[i]f the answer to the first question is 'no,' did the Appellate Court correctly conclude that the error was harmless?" *Klein* v. *Quinnipiac University*, 334 Conn. 903, 219 A.3d 799 (2019).

BRASS CITY LOCAL, CACP *v.* CITY OF WATERBURY (SC 20337)

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

Syllabus

The plaintiff, a collective bargaining unit that represented employees of the Waterbury Police Department, appealed from the trial court's judgment dismissing for lack of subject matter jurisdiction the plaintiff's application to confirm an interest arbitration award that had been issued pursuant to statute (§ 7-473c). The plaintiff and the defendant city, which were parties to an expired collective bargaining agreement, entered into mandatory, binding arbitration after they failed to negotiate a successor agreement. The resulting arbitration award determined the terms and conditions of the successor agreement. The city filed a motion to dismiss the plaintiff's application to confirm, contending that the trial court lacked subject matter jurisdiction to consider it. In granting the city's motion, the trial court concluded, inter alia, that § 7-473c did not, by its terms, authorize judicial review of an interest arbitration award by way of an application to confirm filed pursuant to statute (§ 52-417). On appeal from the dismissal of the plaintiff's application to confirm, *held* that the trial court correctly determined that it lacked jurisdiction under § 52-417 to confirm an interest arbitration award issued pursuant to § 7-473c and, accordingly, properly granted the city's motion to dismiss: the provisions of chapter 909 of the General Statutes, including § 52-417, which generally govern agreements to arbitrate and arbitration proceedings, apply solely to arbitral awards resulting from written agreements to arbitrate, and it was undisputed that the parties' arbitration was not conducted pursuant to such an agreement but, rather, in accordance with the mandatory arbitration provisions of § 7-473c; moreover, although § 7-473c explicitly provides that parties may seek to vacate or modify an interest arbitration award under the statutes (§§ 52-418 and 52-419) governing applications to vacate and to modify arbitration awards, respectively, § 7-473c does not provide that parties may seek to confirm

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

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

an interest arbitration award under § 52-417, and the failure of the legislature to authorize confirmation of an interest arbitration award issued pursuant to § 7-473c was intentional and not an oversight.

Argued November 19, 2019—officially released December 9, 2020**

Procedural History

Application to confirm an arbitration award, brought to the Superior Court in the judicial district of Waterbury, where the court, *Brazzel-Massaro*, *J.*, granted the defendant's motion to dismiss and rendered judgment thereon, from which the plaintiff appealed. *Affirmed.*

Stephen F. McEleney, with whom was *David S. Taylor*, for the appellant (plaintiff).

Joseph B. Summa, for the appellee (defendant).

Opinion

PALMER, J. The plaintiff, Brass City Local, CACP (union), a collective bargaining unit representing employees of the Waterbury Police Department, appeals[1] from the judgment of the trial court granting the motion to dismiss of the defendant, the city of Waterbury (city), for lack of subject matter jurisdiction. The union filed this action, seeking to have the trial court confirm an interest arbitration award issued in accordance with the provisions of General Statutes § 7-473c[2] of the Munici-

** December 9, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] The union appealed to the Appellate Court from the judgment of the trial court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[2] General Statutes § 7-473c provides in relevant part: "(b) (1) If neither the municipal employer nor the municipal employee organization has requested the arbitration services of the State Board of Mediation and Arbitration (A) within one hundred eighty days after the certification or recognition of a newly certified or recognized municipal employee organization required to commence negotiations pursuant to section 7-473a, or (B) within thirty days after the expiration of the current collective bargaining agreement . . . or . . . the date the parties to an existing collective bargaining agreement commence negotiations to revise said agreement on any matter affecting wages, hours, and other conditions of employment, said board shall notify the municipal employer and municipal employee organization that . . . binding and final arbitration is now imposed on them . . . .

pal Employees Relations Act (MERA), General Statutes § 7-467 et seq. The union contends that the trial court incorrectly determined that it lacked subject matter jurisdiction to confirm the award under General Statutes § 52-417.[3] We disagree and, accordingly, affirm the judgment of the trial court.

The following undisputed facts and procedural history are relevant to our resolution of this appeal. The union and the city were parties to a collective bargaining agreement (agreement) that expired on June 30, 2012. On or about February 28, 2013, the parties began negotiating a successor agreement. After reaching an impasse in the negotiations, the parties, in accordance with § 7-473c, entered into compulsory binding arbitration before a panel of the state Board of Mediation and Arbitration. On April 18, 2016, the panel filed an arbitration statement, which included contractual provisions agreed on by the parties, as well as a list of unresolved issues to be determined by the panel. The parties thereafter submitted their last best offers with respect to each of the unresolved issues, and, on November 7, 2016, the arbitration panel issued its award. Approximately, one month later, the Waterbury Board of Aldermen (board of alderman) approved the award. Neither party filed a motion to

"(2) Within ten days of receipt of written notification required pursuant to subdivision (1) of this subsection, the chief executive officer of the municipal employer and the executive head of the municipal employee organization each shall select one member of the arbitration panel. Within five days of their appointment, the two members of the arbitration panel shall select a third member, who shall be an impartial representative of the interests of the public in general and who shall be selected from the panel of neutral arbitrators appointed pursuant to subsection (a) of this section. Such third member shall be the chairperson of the panel. . . ."

[3] General Statutes § 52-417 provides in relevant part: "At any time within one year after an award has been rendered and the parties to the arbitration notified thereof, any party to the arbitration may make application to the superior court . . . for an order confirming the award. The court . . . shall grant such an order confirming the award unless the award is vacated, modified or corrected as prescribed in sections 52-418 and 52-419."

vacate or to modify the award pursuant to § 7-473c (d) (10).[4]

On January 18, 2017, after the city began paying union members certain retroactive wages in accordance with the new agreement, the union requested that the city pay its members retroactive extra duty wages, which it believed were due under article VI of the agreement.[5] In a letter to the union dated January 26, 2017, the city denied the union's request for retroactive extra duty wages on the ground that no such payments were due under the agreement. In response, the union filed a complaint with the state Board of Labor Relations (labor board), alleging that the city had engaged in a prohibited practice under General Statutes § 7-470 (a) (6)[6] by refusing to pay the retroactive extra duty wages. The city subsequently filed a complaint with the labor board, alleg-

[4] General Statutes § 7-473c (d) (10) provides: "The decision of the panel and the resolved issues shall be final and binding upon the municipal employer and the municipal employee organization except as provided in subdivision (12) of this subsection and, if such award is not rejected by the legislative body pursuant to said subdivision, except that a motion to vacate or modify such decision may be made in accordance with sections 52-418 and 52-419."

[5] Article VI of the agreement, which governs work assignments and extra duty, provides in relevant part: "Section 1. The terms 'Extra Police Duty' or 'Extra Police Work' shall mean assignments made for work in off-duty hours for some party or entity other than the Police Department . . . which other party or entity shall pay (and not the Police Department) the rate of pay prescribed in this Article. . . .

* * *

"Section 3 (a). Effective upon signing of this Agreement the hourly rate of pay for extra police duty for a police officer shall be as follows:

"1. When working for and paid by the City or the Board of Education, one and one-quarter . . . times the hourly rate for Sergeant;

"2. When working for or paid by a party other than the City or the Board of Education, one and one-half . . . times the hourly rate for Sergeant. . . ."

[6] General Statutes § 7-470 (a) provides in relevant part: "Municipal employers or their representatives or agents are prohibited from . . . (6) refusing to comply with a grievance settlement, or arbitration settlement, or a valid award or decision of an arbitration panel or arbitrator rendered in accordance with the provisions of section 7-472."

ing, inter alia, that the union's complaint had been filed in bad faith.

The city eventually withdrew its complaint and moved to dismiss the union's complaint on the ground that the labor board lacked subject matter jurisdiction to consider the union's claims. Specifically, the city argued that § 7-470 (a) (6), by its express terms, applies only to grievance arbitration awards rendered in accordance with the provisions of General Statutes § 7-472, whereas the parties' interest arbitration award was rendered in accordance with the provisions of § 7-473c. The city maintained, moreover, that the union's claim that the city wrongfully refused to afford extra duty pay increases on a retroactive basis was "a mere breach of contract claim over which [the labor board had] no jurisdiction absent proof of repudiation," which the union had not alleged. In the absence of such proof, the city asserted, the union's sole recourse was to pursue the grievance procedures outlined in article XVI of the agreement applicable to breach of contract claims.[7]

On October 30, 2017, while the union's complaint was still pending before the labor board, the union filed an application in the trial court to confirm the interest arbitration award pursuant to § 52-417. After the labor board

[7] Article XVI of the agreement provides in relevant part: "Section 1. The grievance procedure prescribed by this Article is established to seek an equitable resolution of problems that arise as a result of disputes concerning the misinterpretation, misapplication or violation of a specific provision of this Agreement. A grievance shall be defined as a dispute between the City and the Union or between an employee and the City involving an alleged violation, misapplication or misinterpretation of a specific provision of this Agreement . . . . Such grievances shall be processed in accordance with the grievance procedure steps outlined in Section 2 hereof. . . ." Section 2 of article XVI, in turn, provides for a multistep grievance procedure culminating in arbitration before the state Board of Mediation and Arbitration in the event the parties are unable to resolve their dispute through one of the initial steps. Section 3 of article XVI further provides that "[t]he decision of the Arbitrator, or of the Arbitration Panel, shall be final and binding on both parties."

granted the city's motion to dismiss the union's complaint, the city filed a motion in the trial court seeking dismissal of the union's application to confirm for lack of subject matter jurisdiction. In support of its motion, the city argued, inter alia, that, by virtue of its plain language, chapter 909 of the General Statutes; see General Statutes §§ 52-408 through 52-424; applies only to arbitration awards resulting from written agreements to arbitrate, and not to interest arbitration awards resulting from compulsory arbitration conducted in accordance with § 7-473c. The city further argued that, although § 7-473c authorizes judicial review of interest arbitration awards via applications to vacate or to modify pursuant to General Statutes §§ 52-418 and 52-419, respectively; see General Statutes § 7-473c (d) (10);[8] § 7-473c does not authorize judicial review by way of an application to confirm brought pursuant to § 52-417. Thus, the city maintained, the court lacked subject matter jurisdiction to consider the union's application to confirm.

The union objected to the city's motion to dismiss, claiming, inter alia, that, contrary to the city's assertions, the statutory scheme governing consensual arbitration proceedings set forth in chapter 909 applies not only to written agreements to arbitrate but to statutory arbitration proceedings, as well. According to the union, although § 7-473c does not expressly authorize judicial review of an interest arbitration award via an application to confirm, it reasonably can be inferred that such an application "is the mechanism through which the arbitration decision becomes final and binding" in light of the fact that § 7-473c references other provisions of chapter 909, namely, §§ 52-418 and 52-419.

Following a hearing, the trial court granted the city's motion to dismiss, agreeing with the city that the court lacked subject matter jurisdiction to consider the union's

[8] See footnote 4 of this opinion.

application to confirm. The court reasoned that statutes in derogation of the common law, such as the statutory scheme contained in chapter 909, must be strictly construed and that, by its express terms, "a written agreement to arbitrate is required to fall within the purview of chapter 909. While arbitration awards that take place pursuant to statute may be subject to judicial review, the enabling statute at issue must specifically authorize it." Because, the court further explained, § 7-473c does not, by its terms, authorize judicial review of an interest arbitration award by way of an application to confirm under § 52-417, the court lacked jurisdiction to consider the union's application.

In reaching its decision, the trial court noted that other arbitration statutes, such as General Statutes § 38a-9 (b) (2), which governs disputes between insurance companies and claimants, and General Statutes § 42-181 (c) (4), which pertains to disputes between automobile manufacturers and consumers, specifically authorize judicial review of arbitration awards by use of applications to vacate, to modify *and* to confirm, whereas § 7-473c (d) contains no such language. In the trial court's view, this omission was significant because, if the legislature had wanted to authorize judicial review of an interest arbitration award by way of an application to confirm, it simply could have stated as much, as it did in the other statutory provisions. Finally, the trial court observed that, contrary to the assertions of the union, it was apparent that no further action was required to finalize and render binding on the parties a collective bargaining agreement resulting from interest arbitration conducted pursuant to § 7-473c because subsection (d) (10) of that statute expressly provides that "[t]he decision of the panel and the resolved issues shall be final and binding" on the parties.

On appeal, the union claims that the trial court improperly dismissed its application to confirm the

interest arbitration award. The union contends that, even if statutes authorizing judicial review of arbitration awards are in derogation of the common law and must be strictly construed, § 7-473c, unlike those provisions, is a remedial statute and, as such, should be liberally construed to permit confirmation of an interest arbitration award. The union argues that the purpose of § 7-473c is "to provide for the orderly and timely resolution of labor disputes" and that interpreting § 7-473c to authorize applications to confirm furthers this goal by "provid-[ing] parties to binding [interest] arbitration assurance that the outcome [of the arbitration proceeding] will be respected and enforced." We reject the union's contention.[9]

It is well established that MERA "imposes compulsory arbitration on a municipality and the representatives of its employees whenever the parties have reached an impasse in their collective bargaining." *International Brotherhood of Police Officers, Local 564* v. *Jewett City*, 234 Conn. 123, 124, 661 A.2d 573 (1995); see General Statutes § 7-473c (b). The primary purpose of interest arbitration under § 7-473c "is to avoid strikes and their attendant disruptions of municipal services by providing a mechanism to resolve by arbitration those issues concerning which the parties to an expiring municipal collective bargaining agreement have been unable to reach agreement by negotiations." (Internal quotation marks omitted.) Id., 131; see also C. Fisk & A. Pulver, "First Contract Arbitration and the Employee Free Choice Act," 70 La. L. Rev. 47, 50 (2009) ("Interest arbi-

[9] We note, preliminarily, that, "because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction." (Citation omitted; internal quotation marks omitted.) *Fedus* v. *Planning & Zoning Commission*, 278 Conn. 751, 755, 900 A.2d 1 (2006).

tration is nothing new: it is a time-tested process in which the terms and conditions of employment are established by a final and binding decision of an arbitrator or an arbitration panel. Unlike grievance arbitration, a process that seeks to interpret and apply the rules of an existing contract to determine whether a breach has occurred, interest arbitration is designed to develop the contractual rules that will govern the relationship going forward." (Footnote omitted.)).

"The mandatory binding arbitration that is authorized by MERA does not permit the arbitration panel to exercise the broad discretion normally associated with consensual arbitration. Section 7-473c (d) limits the discretion of the arbitration panel in two significant respects. First, with regard to any issue that the parties have not been able to resolve themselves, the statute confines the discretion of the arbitration panel to a choice between the 'last best offer' of one party or another. General Statutes § 7-473c (d) [6]. . . . Second, in the exercise of a choice between one or another 'last best offer,' the arbitration panel must 'give priority to the public interest and the financial capability of the municipal employer . . . .' General Statutes § 7-473c (d) [9]. . . .

"When an arbitration panel exercises the limited discretion conferred [on] it by MERA, the 'decision of the panel and the resolved issues' ordinarily are final and binding [on] the municipal employer and the union. General Statutes § 7-473c (d) [10]. Pursuant to § 7-473c (d) [12], however, the legislative body of the municipal employer may reject the award by 'a two-thirds majority vote of the members of such legislative body present at a regular or special meeting called and convened for such purpose.' Such a rejection triggers further mandatory arbitral review of each 'rejected issue' by a new arbitration panel that must take as its point of departure the unresolved issues initially considered by the original arbitration panel. General Statutes § 7-473c (d) [14]. The

award of the new arbitration panel, or of the original panel in the absence of a legislative rejection, may be vacated or modified upon appeal to the Superior Court on one of the limited grounds for judicial review stated in . . . §§ 52-418 and 52-419. See General Statutes § 7-473c (d) [10] and [15]." (Citations omitted; footnote omitted.) *International Brotherhood of Police Officers, Local 564* v. *Jewett City*, supra, 234 Conn. 132–33.

Whether, as the union claims, the award of the arbitration panel also may be confirmed[10] by the Superior Court in accordance with the provisions of § 52-417 is an issue of statutory construction over which we exercise plenary review. See, e.g., *Fedus* v. *Planning & Zoning Commission*, 278 Conn. 751, 756, 900 A.2d 1 (2006). Our fundamental objective in construing a statute "is to ascertain and give effect to the apparent intent of the legislature . . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply . . . . In seeking to determine the meaning . . . [General Statutes] § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Williams* v. *New Haven*, 329 Conn. 366, 375, 186 A.3d 1158 (2018).

As the trial court explained, it is well established that the provisions of chapter 909 of the General Statutes,

[10] Once confirmed by a court, an arbitration award has the force and effect of a judgment. See, e.g., *Phoenix Windows, Inc.* v. *Viking Construction, Inc.*, 88 Conn. App. 74, 77 n.3, 868 A.2d 102 ("[c]onfirmation of an arbitration award converts it into an enforceable judgment of the Superior Court" (internal quotation marks omitted)), cert. denied, 273 Conn. 932, 873 A.2d 1001 (2005).

including § 52-417, apply solely to arbitral awards resulting from written agreements to arbitrate. See, e.g., *Bennett* v. *Meader*, 208 Conn. 352, 360–61, 545 A.2d 553 (1988) ("The statutes relating to, and governing, arbitration in this state are set out in chapter 909 of the General Statutes. The basis for arbitration in a particular case is to be found in the written agreement between the parties. . . . [As with] other statutory arbitration schemes, such as the United States Arbitration Act, 9 U.S.C. [§ 1 et seq.], which is modeled after the Uniform Arbitration Act, *the parties must have a written agreement to gain the benefit of its provisions*." (Citations omitted; emphasis added; footnote omitted; internal quotation marks omitted.)). Thus, we have held that "a trial court cannot confirm an arbitration award unless the parties expressly have agreed to arbitrate the matter . . . . This is consistent with a review of the broader statutory scheme. . . . General Statutes § 52-421 (a) requires that '[a]ny party applying for an order confirming, modifying or correcting an award shall, at the time the order is filed with the clerk [of the court] for the entry of judgment thereon, file the following papers with the clerk: (1) The agreement to arbitrate . . . .' This suggests that, at the very minimum, a trial court must determine whether there is an agreement to arbitrate before it [may confirm] an award on the basis of that agreement." (Emphasis omitted.) *MBNA America Bank, N.A.* v. *Boata*, 283 Conn. 381, 395–96, 926 A.2d 1035 (2007). Accordingly, because it is undisputed that the parties' arbitration was not conducted pursuant to a written agreement to arbitrate but, rather, in accordance with the mandatory arbitration provisions of § 7-473c, the trial court lacked jurisdiction to entertain the union's application unless § 7-473c authorizes judicial review of an interest arbitration award via an application to confirm under § 52-417. See, e.g., *International Brotherhood of Police Officers, Local 564* v. *Jewett City*, supra, 234 Conn. 139 ("There is . . .

no [common-law] right to judicial review of a compulsory arbitral award that is itself the creature of statute. The absence of compliance with the statutory requirements for such an award deprive[s] the trial court of jurisdiction just as the absence of compliance with statutory requirements for administrative appeals deprives trial courts of jurisdiction.").

Section7-473c (d) (10) provides: "The decision of the panel and the resolved issues shall be final and binding upon the municipal employer and the municipal employee organization except as provided in subdivision (12) of this subsection and, if such award is not rejected by the legislative body pursuant to said subdivision, except that a motion to vacate or modify such decision may be made in accordance with sections 52-418 and 52-419." Thus, § 7-473c explicitly provides that parties may seek to vacate or modify an interest arbitration award under §§ 52-418 and 52-419, respectively, but does not provide that parties may seek to confirm an award under § 52-417. We agree with the trial court that this omission is telling and, ultimately, dispositive of the union's appeal. As the trial court explained, other statutes authorizing arbitration, including statutes requiring mandatory binding arbitration, expressly authorize applications to modify, to vacate *and to confirm* an arbitrator's award. See, e.g., General Statutes § 38a-9 (b) (2) ("[e]ither party may make application to the superior court . . . for an order confirming, vacating, modifying or correcting any award, in accordance with the provisions of sections 52-417, 52-418, 52-419 and 52-420"); General Statutes § 42-181 (c) (4) (same). These provisions indicate that, when the legislature wishes to authorize confirmation of an arbitration award via an application to confirm, it does so explicitly. Accordingly, we agree with the trial court that the failure of the legislature to authorize confirmation of an interest arbitration award issued pursuant to § 7-473c was intentional and not an over-

sight. See, e.g., *McCoy* v. *Commissioner of Public Safety*, 300 Conn. 144, 155, 12 A.3d 948 (2011) ("[o]ur case law is clear . . . that when the legislature chooses to act, it is presumed to know how to draft legislation consistent with its intent" (internal quotation marks omitted)); *Hartford/Windsor Healthcare Properties, LLC* v. *Hartford*, 298 Conn. 191, 205, 3 A.3d 56 (2010) ("The text of [General Statutes] § 19a-490 (a) . . . indicates that the legislature knows how to use the specific term 'nursing home' in our statutes when it intends to and thus suggests to us that its failure to use that term in [General Statutes] § 12-62n was purposeful"); *Windels* v. *Environmental Protection Commission*, 284 Conn. 268, 299, 933 A.2d 256 (2007) (legislature knows how to convey its intent expressly).

In arguing to the contrary, the union contends primarily that, because MERA is a labor relations act, § 7-473c must be liberally construed to authorize judicial confirmation of an interest arbitration award. In the view of the union, this construction properly furthers the act's salutary purpose of "provid[ing] for the orderly and timely resolution of labor disputes . . . ." The union does not explain, however, how converting the parties' collective bargaining agreement into a judgment pursuant to an application to confirm furthers this goal in any material way.[11] See *Phoenix Windows, Inc.* v. *Viking Construction, Inc.*, 88 Conn. App. 74, 77 n.3, 868 A.2d 102 ("[c]onfirmation of an arbitration award [simply] converts it into an enforceable judgment of the Superior Court" (internal quotation marks omitted)), cert. denied, 273 Conn. 932, 873 A.2d 1001 (2005). Even if it did, the general tenet that directs a liberal construc-

[11] As the city argues, the dispute underlying this appeal is whether the city is required to pay retroactive extra duty wages under the parties' agreement once the actions of the interest arbitration panel and the board of alderman fully and finally determined the terms of that agreement. Article XVI of that agreement provides that any such dispute *shall be resolved* by the grievance procedures outlined in § 2 of article XVI of the agreement, none of which permits a party to bring an action to enforce the contract.

tion of remedial statutes does not permit us to read words into such statutes when it is apparent that the legislature has opted not to include them. See, e.g., *Dept. of Public Safety* v. *State Board of Labor Relations*, 296 Conn. 594, 605, 996 A.2d 729 (2010) (in construing labor relations act, "[w]e are not permitted to supply statutory language that the legislature may have chosen to omit" (internal quotation marks omitted)); see also *Robinson* v. *Guman*, 163 Conn. 439, 444, 311 A.2d 57 (1972) ("[t]his court should not be asked to read into the statutes words [that] are not there"). Accordingly, we conclude that the trial court correctly determined that it lacked jurisdiction under § 52-417 to confirm an interest arbitration award issued pursuant to § 7-473c.

The judgment is affirmed.

In this opinion the other justices concurred.

THOMAS G. STONE III *v.* EAST COAST SWAPPERS, LLC
(SC 20382)

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

Syllabus

Pursuant to statute (§ 42-110g (d)), "[i]n any action brought by a person" under the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.), "the court may award . . . reasonable attorneys' fees based on the work reasonably performed by an attorney and not on the amount of recovery."

The plaintiff sought to recover damages and attorney's fees from the defendant, a motor vehicle repair shop, for violation of CUTPA in connection with the installation of a modified engine in a car owned by K, the plaintiff's son-in-law, and financed through W Co., a third-party automobile finance company. The plaintiff had loaned K the money to pay the defendant for the requested work, but the engine was never installed because K did not want to pay for certain additional costs that the defendant indicated were necessary for installation. K subsequently failed to repay the loan, and the plaintiff obtained a judgment against K and secured a lien on the car that was subsequent in right only to that of W Co. The plaintiff informed the defendant of his status as a

second position lienholder on the car's title. Subsequently, the defendant, which had retained the car, sold it at an auction. The plaintiff alleged that the defendant had violated CUTPA by refusing to perform the work that had been paid for and by failing to provide the plaintiff, a lienholder, with statutory notice of the auction. The trial court concluded that the plaintiff had proven a CUTPA violation and awarded him damages. The court also concluded, however, that the plaintiff had not proven the evil motive or malice necessary to award punitive damages, and it exercised its discretion by finding that the plaintiff was not entitled to attorney's fees. The plaintiff appealed from the trial court's judgment to the Appellate Court, claiming that the trial court improperly had declined to award him attorney's fees. The Appellate Court affirmed the trial court's judgment, and the plaintiff, on the granting of certification, appealed to this court. *Held*:

1. The plaintiff could not prevail on his claim that this court should adopt a presumption pursuant to which a plaintiff prevailing in a CUTPA action should ordinarily recover attorney's fees under § 42-110g (d) unless special circumstances would render such an award unjust: there was no language in § 42-110g (d) or legislative history indicating that the legislature intended a presumption in favor of attorney's fees, this court has previously held that an award of attorney's fees under CUTPA is discretionary, and this court declined to import such a presumption into CUTPA when the legislature did not choose to include one; moreover, the legislature has directed that the courts of this state, in interpreting the provisions of CUTPA, shall be guided by interpretations given by the Federal Trade Commission in interpreting the federal analogue to CUTPA, and that commission has not adopted a presumption in favor of awarding attorney's fees for violations of the federal analogue.
2. The Appellate Court incorrectly determined that the trial court had not abused its discretion when it declined to award the plaintiff attorney's fees under the test applicable to awarding punitive damages under CUTPA: the trial court failed to recognize the different purposes that attorney's fees and punitive damages serve under CUTPA, and, by identifying the more demanding test for awarding punitive damages, namely, intentional, wanton, malicious, or evil conduct, as its rationale for not awarding attorney's fees under § 42-110g (d), the trial court improperly required a more demanding showing from the plaintiff, which was at odds with the purpose of the attorney's fees provision in CUTPA, that is, to foster the use of private attorneys in vindicating the public goal of ferreting out unfair trade practices by commercial actors in connection with consumer transactions; accordingly, the case was remanded for reconsideration of the plaintiff's request for an award of attorney's fees.

Argued June 1—officially released December 11, 2020*

* December 11, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Action to recover damages for, inter alia, violation of the Connecticut Unfair Trade Practices Act, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Huddleston*, *J.*, granted in part the defendant's motion to strike; thereafter, the case was tried to the court, *Noble*, *J.*; judgment for the plaintiff, from which the plaintiff appealed to the Appellate Court, *Alvord*, *Bright* and *Norcott*, *Js.*, which affirmed the trial court's judgment, and the plaintiff, on the granting of certification, appealed to this court. *Reversed*; *further proceedings*.

William J. O'Sullivan, with whom, on the brief, was *Michelle M. Seery*, for the appellant (plaintiff).

Mario Cerame, with whom, on the brief, was *Timothy Brignole*, for the appellee (defendant).

J.L. Pottenger, Jr., *Jeffrey Gentes*, and *Sophie Laing* and *Stefanie Ostrowski*, law student interns, filed a brief for the Housing Clinic of the Jerome N. Frank Legal Services Organization et al. as amici curiae.

Opinion

McDONALD, J. This certified appeal requires us to consider the circumstances under which a plaintiff may be denied attorney's fees under the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. The plaintiff, Thomas G. Stone III, appeals from the judgment of the Appellate Court affirming the judgment of the trial court, which found that the defendant, East Coast Swappers, LLC, had violated CUTPA and awarded the plaintiff compensatory damages, but declined to award punitive damages or attorney's fees. See *Stone* v. *East Coast Swappers, LLC*, 191 Conn. App. 63, 65, 213 A.3d 499 (2019). The plaintiff contends that we should adopt a presumption whereby a plaintiff prevailing in a CUTPA action should ordinarily recover

attorney's fees under General Statutes § 42-110g (d) unless special circumstances would render such an award unjust. Regardless of whether we adopt such a presumption, the plaintiff contends that the Appellate Court incorrectly concluded that the trial court had not abused its discretion when it failed to award the plaintiff attorney's fees. Although we decline to adopt the plaintiff's suggested presumption, we conclude that the trial court abused its discretion.

The Appellate Court's decision sets forth a detailed recitation of the facts as found by the trial court; see id., 65–71; which we summarize in relevant part. Patrick Keithan, who was the plaintiff's son-in-law at the time, purchased a 2008 Mitsubishi Lancer Evolution from a car dealership in Georgia, where he was stationed for his military service. He financed the purchase, in part, through a loan from Wachovia Dealer Services, Inc.[1]

Thereafter, Keithan experienced performance issues with the car's engine. He towed the car from Georgia to Windsor Locks, Connecticut, where the defendant, a motor vehicle repair shop, was located. The defendant initially replaced the car's turbocharger, but the engine still experienced performance issues. Keithan returned to Georgia to fulfill his military service obligations and left the car with the defendant. Keithan ultimately decided to have the defendant install a Buschur Racing short block.[2] A co-owner of the defendant, Paul Scott, drafted an estimate for this work, which he sent to Keithan. The estimate referenced the purchase of the Buschur Racing short block and its installation and provided an estimated cost of more than $9000.

The plaintiff loaned Keithan the money to pay the defendant. A promissory note for the loan was executed by Keithan and his wife, the plaintiff's daughter. Kei-

[1] It is undisputed that Wells Fargo Auto Finance is the successor in interest to Wachovia Dealer Services, Inc., and that it subsequently acquired the debt.

[2] A short block is a component of an engine on which other components are assembled.

than's wife subsequently sent a check to the defendant for the contracted amount.

Upon receipt of the payment, the defendant shipped the car's engine to Buschur Racing, which performed the requested work on the engine and returned the modified engine to the defendant. As Scott prepared the modified engine for installation, his foreman informed him that additional parts were needed to install the engine. The foreman discovered that these parts were damaged when he took the original engine apart to prepare to send it to Buschur Racing. A request for additional funding for the parts was communicated to Keithan, but he did not want to pay the extra money, and the modified engine was never installed in the car.[3] The car remained in the defendant's possession.

Keithan never repaid the plaintiff any portion of the loan. Consequently, the plaintiff attempted to obtain title to the car by filing a title application with the motor vehicle division of the Georgia Department of Revenue. He was unsuccessful because the title application required Keithan's signature, which was missing.

The plaintiff subsequently traveled from his residence in Maryland to the defendant's location and asked to see the car. Scott refused to allow the plaintiff to look at the car or the modified engine and informed him that the engine had never been reinstalled and that Keithan had refused to pay for any of the extra work or parts involved. Thereafter, another co-owner of the defendant sent a letter to Keithan, in which she indicated that she had been contacted by the plaintiff. The letter referenced the sum of $14,151.71 being owed to the defendant, which represented the costs of additional shipping, engine parts, and storage over the previous year.

[3] At trial, Scott testified that, although the estimate stated that it included installation, he intended the word "installation" to include only the removal of the car's engine and not the subsequent installation of the modified engine.

The plaintiff subsequently filed an action against Keithan in Maryland and obtained a judgment in the amount of $10,348. This judgment permitted the plaintiff to eventually secure a lien on the car subsequent in right to that of Wells Fargo Auto Finance. See footnote 1 of this opinion. The lien was reflected in a certificate of title, which was issued by the Georgia Department of Revenue.

Thereafter, the defendant filed a "Notice of Intent to Sell" or an "Artificer's Lien"[4] with the Connecticut Department of Motor Vehicles, claiming a lien of $1792. The Department of Motor Vehicles issued the defendant an "Affidavit of Compliance and Ownership Transfer" for use in providing valid title to a purchaser for a vehicle subject to an artificer's lien.

Extensive communications took place between the plaintiff, the plaintiff's wife, and the defendant's owners regarding the plaintiff's obtaining the car in satisfaction of his lien. During these communications, the plaintiff informed the defendant that he had secured his status as a second position lienholder on the Georgia title.

[4] A motor vehicle repair shop may apply to obtain an artificer's lien if it claims a lien on a motor vehicle in its possession on which it had completed authorized work that is properly recorded on an invoice, and, "if no application that the lien be dissolved upon such substitution of a bond is made within thirty days of the date of the completion of the work upon the property by the bailor for hire, the bailee shall immediately send a written notice of intent to sell to the Commissioner of Motor Vehicles, stating . . . the date the work was completed . . . [and] the amount for which a lien is claimed . . . . Upon approval by the commissioner of such notice, the commissioner shall issue the bailee an affidavit of compliance and such bailee shall provide such affidavit to the purchaser at the time of sale. . . ." General Statutes § 49-61 (b); see also Form H-100A, Connecticut Department of Motor Vehicles, available at https://portal.ct.gov/-/media/DMV/20/29/H100Apdf.pdf (last visited December 9, 2020).

Although § 49-61 was the subject of certain amendments in 2014 and 2017; see Public Acts 2017, No. 17-104, § 1; Public Acts 2017, No. 17-79, § 20; Public Acts 2014, No. 14-130, § 27; those amendments have no bearing on the merits of this appeal. See footnote 7 of this opinion. In the interest of simplicity, we refer to the current revision of the statute.

The plaintiff, however, had not provided the defendant with a copy of the new Georgia title.

Keithan filed for bankruptcy protection in Maryland and secured the discharge of the plaintiff's judgment. Wells Fargo's security interest was identified as $10,700 at the time of the bankruptcy petition. The bankruptcy petition, which was obtained by the defendant's counsel, identified the plaintiff as an unsecured creditor.

Thereafter, both parties retained counsel who exchanged communications regarding their clients' respective claims related to the vehicle. In September, 2013, the plaintiff commenced the underlying action against the defendant, alleging, among other things, that the defendant had violated CUTPA.[5] In November, 2013, the defendant, on the advice of its counsel, sold the car at an auction for $19,000. Although he had provided notice of the auction to Keithan and Wells Fargo and published notice in a local newspaper, Scott, on behalf of the defendant, did not provide notice of the auction to the plaintiff.

The record reveals the following procedural history. In December, 2016, the plaintiff filed the operative, single count complaint, alleging that the defendant had violated CUTPA by refusing to perform the work that had been paid for—namely, failing to install the modified engine in the car—and by failing to provide the plaintiff, a lienholder, with statutory notice of the auction.[6] The case was tried to the court in January, 2017.

[5] Specifically, the plaintiff alleged that the defendant had violated General Statutes § 14-65f (a) when it "obtained payment from Keithan, using [the plaintiff's] funds, through the artifice of falsely promising to install a new [e]ngine in the [v]ehicle and sought to perpetuate this ruse in its communications with [the plaintiff's] agent by deliberately attempting to pass off a used engine as new."

[6] During the trial, the trial court noted that the discharge of a personal debt is not "probative of whether . . . there was a valid lien." Because neither party has raised the issue of whether the plaintiff's lien is affected by the bankruptcy discharge of the plaintiff's judgment, we have no occasion to address it.

The trial court issued a memorandum of decision in which it concluded that the plaintiff "has proven a violation of CUTPA[7] [but] has not proven the evil motive

[7] The trial court found that the defendant violated General Statutes §§ 14-65f and 49-61. Section 14-65f provides in relevant part: "(a) (1) Prior to performing any repair work on a motor vehicle, a motor vehicle repair shop shall obtain a written authorization to perform the work . . . that includes an estimate in writing of the maximum cost to the customer of the parts and labor necessary for the specific job authorized. . . .

* * *

"(b) If the repair shop is unable to estimate the cost of repair because the specific repairs to be performed are not known at the time the vehicle is delivered to the repair shop, the written authorization required by this section need not include an estimate of the maximum cost of parts and labor. In such a case, prior to commencing any repairs, the repair shop shall notify the customer of the work to be performed and the estimated maximum cost to the customer of the necessary parts and labor, obtain the customer's written or oral authorization and record such information on the invoice. . . ."

The court found that, although an oral authorization was provided by Keithan with respect to the defendant's estimate for the Buschur Racing short block, the estimate's explicit inclusion of a fixed cost for the "installation" of the modified engine was a misrepresentation on the part of the defendant.

In addition, § 49-61 provides in relevant part: "(b) . . . . Within ten days of receipt of such information relative to any lienholder, the bailee shall mail written notice to each lienholder by certified mail, return receipt requested, stating that the motor vehicle is being held by such bailee and has a lien upon it for repair and storage charges. . . .

* * *

"(e) . . . [I]f the last usual place of abode of the bailor is known to or may reasonably be ascertained by the bailee, *notice of the time and place of sale shall be given by mailing the notice* to him by certified mail, return receipt requested, at least ten days before the time of the sale, and similar notice shall be given to any officer who has placed an attachment on the property and, *if the property is a motor vehicle . . . any lienholder. . . .*" (Emphasis added.)

The court found that the defendant violated § 49-61 by failing to provide written notice of the auction to the plaintiff. The court concluded that "[t]he violation of [§ 49-61 (e)], together with [the defendant's] purported acquisition of lien rights in violation of § 14-65f, constitute a violation of CUTPA because each violation was both deceptive and a violation of public policy as found in §§ 14-65f and 49-61."

We note that the plaintiff was not a party to the transaction between the defendant and Keithan, and it is unclear on this record what legal authority entitled the plaintiff to assert a CUTPA violation on the basis of the defendant's misrepresentation to Keithan. It is also unclear how the defendant's failure to give notice to the plaintiff as a lienholder in accordance with § 49-61 constitutes a CUTPA violation because it is not obvious that the obligation

or malice necessary to award punitive damages, and [the trial court] exercise[d] its discretion by finding that the plaintiff is not entitled to an award of attorney's fees. Damages [were] awarded in the amount of $8300." (Footnote added.)

In declining to award either punitive damages or attorney's fees, the court reasoned: "The court finds as a matter of fact that the plaintiff has not proven that [the defendant's] actions constituted a reckless indifference to the rights of [the plaintiff], an intentional and wanton violation of his rights, malice or evil. [The defendant] had been given an application for a title listing [the plaintiff] as a second position lienholder but had never been provided with the actual title. [The defendant] did make the effort to review Keithan's bankruptcy filing, which listed [the plaintiff] as an unsecured creditor. [The defendant] did consult with counsel before selling the vehicle at auction. The court cannot find, therefore, that [the defendant's] actions warrant punitive damages. For similar reasons, the court exercises its discretion and does not award attorney's fees to the plaintiff."

The plaintiff appealed from the trial court's judgment to the Appellate Court, arguing that the trial court erred in failing to award him attorney's fees. While the appeal was pending, the plaintiff filed a motion requesting that the trial court articulate the factual and legal bases for its decision not to award attorney's fees. Specifically, the plaintiff requested that the court clarify its use of

to give statutory notice to a lienholder is within CUTPA's definition of "trade" and "commerce." See General Statutes § 42-110a (4) (" '[t]rade' and 'commerce' means the advertising, the sale or rent or lease, the offering for sale or rent or lease, or the distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value in this state"). We express no view on either of these issues because neither party has raised them before this court. See, e.g., *State* v. *Connor*, 321 Conn. 350, 362, 138 A.3d 265 (2016) ("[o]ur appellate courts generally do not consider issues that were not raised by the parties").

the phrase "[f]or similar reasons" in its memorandum of decision. The trial court issued an articulation, explaining: "The use of the phrase 'similar reasons' was meant to signify that the court relied on the *same* reasons enumerated in the preceding sentences, to wit, '[the defendant] had been given an application for a title listing [the plaintiff] as a second position lienholder but had never been provided with the actual title. [The defendant] did make the effort to review Keithan's bankruptcy filing, which listed [the plaintiff] as an unsecured creditor. [The defendant] did consult with counsel before selling the vehicle at auction.' " (Emphasis in original.)

The Appellate Court rejected the plaintiff's contention that it should recognize a rebuttable presumption whereby a prevailing plaintiff in a CUTPA action "should ordinarily recover attorney's fees unless special circumstances would render such an award unjust." (Internal quotation marks omitted.) *Stone* v. *East Coast Swappers, LLC*, supra, 191 Conn. App. 72. The Appellate Court reasoned that the use of the word "may" in § 42-110g (d) indicates that the statute does not provide for a mandatory award of fees; rather, the court has discretion to award attorney's fees. (Internal quotation marks omitted.) Id., 74. It also reasoned that such a rebuttable presumption would result in a loss of the trial court's statutory discretion. Id., 74–75. The Appellate Court also rejected the plaintiff's contention that the trial court abused its discretion in declining to award attorney's fees, reasoning that, "[a]lthough the [trial] court relied on the same factual findings in its decision not to award punitive damages, nothing in the court's memorandum of decision or articulation suggests that the court improperly required the plaintiff to show, in order to be entitled to recover attorney's fees, that the defendant acted with malice, reckless disregard, or evil intent." Id., 76.

We thereafter granted the plaintiff's petition for certification to appeal, limited to the following issue: "Did the Appellate Court correctly conclude that the trial court did not abuse its discretion when it denied an award of attorney's fees to the plaintiff after the plaintiff prevailed on his claim under [CUTPA]?" *Stone* v. *East Coast Swappers, LLC*, 333 Conn. 924, 217 A.3d 993 (2019).

On appeal, the plaintiff contends that the Appellate Court incorrectly focused on the phrase "may award" in § 42-110g (d) in isolation and should have construed CUTPA's fee shifting provision broadly in favor of the plaintiff, as one whom the legislature intended to benefit, and in light of CUTPA's remedial purpose to encourage attorneys to accept and litigate unfair trade practices claims. The plaintiff further contends that we should take this opportunity to emphasize that "a decision whether to award [attorney's] fees under CUTPA is distinct from the decision regarding punitive damages and requires a distinct analysis . . . ." In particular, he argues that we should adopt a presumption whereby a prevailing plaintiff in a CUTPA action should ordinarily receive a fee award unless a trial court finds that special circumstances would render a fee award unjust. Regardless of whether we adopt such a presumption, the plaintiff also contends that the Appellate Court incorrectly concluded that the trial court did not abuse its discretion because the trial court required proof of reckless disregard or malice as a prerequisite to an award of attorney's fees.

The defendant contends that the plaintiff's construction of "may award" in § 42-110g (d) is at odds with the plain meaning of the statute and there is no basis in the legislative history of the statute to conclude that this court should adopt a presumption in favor of awarding attorney's fees to a prevailing party. The defendant also contends that the trial court did not abuse its dis-

cretion in declining to award attorney's fees because, affording the trial court every reasonable presumption in favor of upholding the ruling, it simply found the plaintiff's arguments for fees unavailing.

Whether the phrase "may award" in § 42-110g (d) establishes a presumption that a prevailing plaintiff should ordinarily recover attorney's fees in a CUTPA action is a question of statutory interpretation over which our review is plenary. See, e.g., *Ulbrich* v. *Groth*, 310 Conn. 375, 448, 78 A.3d 76 (2013). "In making such determinations, we are guided by fundamental principles of statutory construction." *In re Matthew F.*, 297 Conn. 673, 688, 4 A.3d 248 (2010), overruled in part on other grounds by *In re Jose B.*, 303 Conn. 569, 34 A.3d 975 (2012); see General Statutes § 1-2z. "[O]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature." (Internal quotation marks omitted.) *Testa* v. *Geressy*, 286 Conn. 291, 308, 943 A.2d 1075 (2008). "[I]t is a basic tenet of statutory construction that [w]e construe a statute as a whole and read its subsections concurrently in order to reach a reasonable overall interpretation." (Emphasis omitted; internal quotation marks omitted.) *Thomas* v. *Dept. of Developmental Services*, 297 Conn. 391, 403–404, 999 A.2d 682 (2010). "Legislative intent is not to be found in an isolated sentence; the whole statute must be considered." (Internal quotation marks omitted.) *Historic District Commission* v. *Hall*, 282 Conn. 672, 684, 923 A.2d 726 (2007).

We are mindful that CUTPA, as a remedial act, is "construed liberally in an effort to effectuate its public policy goals." (Internal quotation marks omitted.) *Associated Investment Co. Ltd. Partnership* v. *Williams Associates IV*, 230 Conn. 148, 158, 645 A.2d 505 (1994); see also General Statutes § 42-110b (d). CUTPA's primary goal is "eliminating or discouraging unfair methods of competition and unfair or deceptive acts or

practices." (Internal quotation marks omitted.) *Hinchliffe* v. *American Motors Corp.*, 184 Conn. 607, 616–17, 440 A.2d 810 (1981). As a result, "[t]he plaintiff who establishes CUTPA liability has access to a remedy far more comprehensive than the simple damages recoverable under common law. The ability to recover both [attorney's] fees . . . and punitive damages . . . enhances the private CUTPA remedy and serves to encourage private CUTPA litigation." (Citations omitted; footnote omitted.) Id., 617.

We begin with the text of the statute. Section 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. . . ." The term "may award" is not defined in § 42-110g; nor is it defined in the provision setting forth the definitions used within CUTPA, § 42-110a.

We have previously explained that "the word 'may' imports permissive conduct and the conferral of discretion. . . . Only when the context of legislation permits such interpretation and if the interpretation is necessary to make a legislative enactment effective to carry out its purposes, should the word 'may' be interpreted as mandatory rather than directory." (Citations omitted.) *State* v. *Bletsch*, 281 Conn. 5, 17–18, 912 A.2d 992 (2007). Section 1-2z directs us to consider related statutory provisions to determine whether the text is ambiguous. Accordingly, we look to a related subsection of § 42-110g to put the legislature's use of "may award" in subsection (d) in context. See, e.g., *Studer* v. *Studer*, 320 Conn. 483, 489, 131 A.3d 240 (2016) ("[i]n interpreting a statute, [r]elated statutory provisions . . . often provide guidance in determining the meaning of a particular word" (internal quotation marks omitted)). Section 42-110g

(a), CUTPA's punitive damages provision, provides in relevant part: "Any person who suffers any ascertainable loss of money or property . . . as a result of the use or employment of a method, act or practice prohibited by section 42-110b, may bring an action . . . to recover actual damages. . . . The court may, in its discretion, award punitive damages . . . ."

We find it significant that the legislature employed the term "may award" in the attorney's fees provision; General Statutes § 42-110g (d); but employed "may, *in its discretion*, award" in the punitive damages provision. (Emphasis added.) General Statutes § 42-110g (a). The addition of the phrase "in its discretion" in subsection (a) renders the legislature's use of "may award" in subsection (d) ambiguous because it demonstrates that the legislature did not use "may award" uniformly in § 42-110g. Cf. *Felician Sisters of St. Francis of Connecticut, Inc.* v. *Historic District Commission*, 284 Conn. 838, 850, 937 A.2d 39 (2008) ("[t]he use of the different terms . . . within the same statute suggests that the legislature acted with complete awareness of their different meanings . . . and that it intended the terms to have different meanings" (internal quotation marks omitted)). We conclude that "may award" in § 42-110g (d) is ambiguous because, when read in context, it is susceptible to more than one reasonable interpretation. See, e.g., *Gonzalez* v. *O & G Industries, Inc.*, 322 Conn. 291, 303, 140 A.3d 950 (2016).

A broader understanding of the attorney's fees and punitive damages provisions of CUTPA is foundational to our analysis. We have previously explained the distinction between attorney's fees and punitive damages under CUTPA: "Section 42-110g (a) expressly authorizes the trial court to award punitive damages in addition to the award of attorney's fees authorized by § 42-110g (d). Nothing in the language of the statute suggests that punitive damages are the same as attorney's fees, consistent with the common-law rule. If the legislature

had intended to impose such a limitation, it presumably would have done so either by authorizing the trial court to award double attorney's fees or by authorizing it to award double punitive damages. The fact that the legislature enacted two distinct provisions indicates that it contemplated two distinct types of awards. See *Mead* v. *Burns*, 199 Conn. 651, 666 n.8, 509 A.2d 11 (1986) ('[when] CUTPA applies, it permits a recovery of punitive damages and attorney's fees that the common law does not ordinarily permit'); *Hinchliffe* v. *American Motors Corp.*, [supra, 184 Conn. 617] ('The plaintiff who establishes CUTPA liability has access to a remedy far more comprehensive than the simple damages recoverable under common law. The ability to recover both [attorney's] fees . . . and punitive damages . . . enhances the private CUTPA remedy and serves to encourage private CUTPA litigation.' . . .)." (Emphasis omitted; footnote omitted.) *Ulbrich* v. *Groth*, supra, 310 Conn. 449–50.

This distinction exists because, unlike the purpose of permitting an award of attorney's fees—to foster the use of private attorneys in vindicating the public goal of ferreting out unfair trade practices in consumer transactions by commercial actors generally—the purposes of punitive damages are focused on deterrence and punishment of particular commercial actors. See id., 455 n.64; see also *Hylton* v. *Gunter*, 313 Conn. 472, 486 n.14, 97 A.3d 970 (2014) (punitive damages under CUTPA are distinct from common-law punitive damages because "they are not intended merely to compensate the plaintiff for the harm caused by the defendant" (internal quotation marks omitted)). As such, punitive damages under CUTPA are not limited to the measure of common-law punitive damages, and the most important factor in measuring punitive damages under CUTPA is the "reprehensibility of a defendant's conduct . . . ." *Ulbrich* v. *Groth*, supra, 310 Conn. 455. The Appellate

Court has similarly explained that, under CUTPA, a plaintiff's "entitlement to recover attorney's fees stands on a different footing" than his or her entitlement to punitive damages. *New England Custom Concrete, LLC* v. *Carbone*, 102 Conn. App. 652, 667, 927 A.2d 333 (2007). In short, the analysis for awarding attorney's fees is distinct from the analysis for awarding punitive damages.

CUTPA's legislative history underscores the purpose of the attorney's fees provision. In 1976, the legislature amended the attorney's fees provision to strengthen CUTPA's mechanism of encouraging private litigation by removing the court's authority to award attorney's fees to the prevailing party and providing instead for fee awards only to prevailing plaintiffs.[8] See Public Acts 1976, No. 76-303, § 3; see also *Gill* v. *Petrazzuoli Bros., Inc.*, 10 Conn. App. 22, 32, 521 A.2d 212 (1987). Representative Raymond C. Ferrari remarked: "The purpose of this act is to stop unfair or deceptive practices. The only way to accomplish that effectively is to encourage litigation by private parties. The only way to encourage that litigation in the public interest is to provide only for attorney's fees in the case for plaintiffs." 19 H.R. Proc., Pt. 6, 1976 Sess., p. 2191. Similarly, Senator Louis Ciccarello explained: "[B]oth the [Department] of Consumer Protection and the Attorney General's [O]ffice and private attorneys are all of the opinion that in order to protect consumers of the [s]tate that plaintiff's fees are extremely necessary. The reason for, there is a lot

[8] The importance of the private consumer remedy itself has been emphasized during debate on various amendments to chapter 735a of the General Statutes. For example, Senator Stephen C. Casey remarked: "The bill in general would promote greater cooperation between public and private efforts to enforce the . . . trade practices act. The Attorney General's [O]ffice is hampered in this enforcement effort by limited staff. Private litigation under this act is essential and the proposal would ease the burden on private individuals and thus encourage private litigation." 22 S. Proc., Pt. 8, 1979 Sess., p. 2575; see also 19 H.R. Proc., Pt. 6, 1976 Sess., p. 2191, remarks of Representative Raymond C. Ferrari; 16 H.R. Proc., Pt. 14, 1973 Sess., p. 7323, remarks of Representative Howard A. Newman.

of hesitancy in bringing [an action] of this nature and in order to pursue this sort of private attorney general method, you have to have plaintiff's attorney's fees. I think it's fair and I think it should also be pointed out that reasonable attorney's fees are granted only upon discretion of the court, so therefore, a plaintiff may not be able to receive any fees whatsoever." 19 S. Proc., Pt. 6, 1976 Sess., p. 2278.

The attorney's fees provision is integral to effectuating CUTPA's policy of encouraging litigants to act as private attorneys general. It serves to "encourage attorneys to accept and litigate CUTPA cases. CUTPA cases, however, may entail long hours with little likelihood of an award that will cover reasonable expenses. For this reason . . . § 42-110g (d) offers an attorney who accepts a CUTPA case the prospect of recovering reasonable fees and costs." *Gill* v. *Petrazzuoli Bros., Inc.*, supra, 10 Conn. App. 33. The present case, in which the trial court awarded $8300 in compensatory damages, demonstrates the importance of the attorney's fees provision. If attorneys did not have the prospect of recovering fees, there would be little incentive for them to litigate cases with small damages at stake, even if the unfair trade practice conduct was substantial. See *Freeman* v. *A Better Way Wholesale Autos, Inc.*, 191 Conn. App. 110, 132, 213 A.3d 542 (2019) ("[t]he availability of statutory attorney's fees under CUTPA serves both to deter unfair trade practices and to *compensate attorneys for taking on small cases* to enforce the public policy of protecting consumers from unfair and deceptive conduct" (emphasis added)). Thus, a court's inquiry into whether to award attorney's fees is largely distinct from whether to award punitive damages because fees seek to encourage attorneys to take on CUTPA litigation, whereas punitive damages seek to address reprehensible conduct.

Having established that a trial court's determination of whether to award attorney's fees is distinct from the determination of whether to award punitive damages, the question that remains is whether we should adopt a presumption in favor of awarding attorney's fees to a prevailing plaintiff in a CUTPA action. There is no language in § 42-110g (d) and no legislative history indicating that the legislature intended a presumption in favor of attorney's fees. As this court has previously stated, "[a]warding . . . attorney's fees under CUTPA is discretionary . . . ." (Citations omitted.) *Gargano* v. *Heyman*, 203 Conn. 616, 622, 525 A.2d 1343 (1987); see also *Woronecki* v. *Trappe*, 228 Conn. 574, 580 n.7, 637 A.2d 783 (1994); *Chrysler Corp.* v. *Maiocco*, 209 Conn. 579, 590, 552 A.2d 1207 (1989). The legislative history of § 42-110g (d) also makes clear that legislators found it significant that "reasonable attorney's fees are granted only upon *discretion of the court*, so therefore, *a plaintiff may not be able to receive any fees whatsoever*." (Emphasis added.) 19 S. Proc., supra, p. 2278, remarks of Senator Ciccarello.

Our legislature has employed presumptions in other statutes and has chosen not to do so here. See, e.g., General Statutes § 5-145a (hypertension and heart disease presumed to have been suffered in performance of certain personnel's duty); General Statutes § 46b-56b (presumption that it is in best interest of child to be in custody of parent); General Statutes § 52-183 (presumption of agency in motor vehicle operation); General Statutes § 52-470 (d) (rebuttable presumption of delay without good cause for habeas petitions filed outside time limits). "Our case law is clear . . . that when the legislature chooses to act, it is presumed to know how to draft legislation consistent with its intent and to know of all other existing statutes . . . ." (Internal quotation marks omitted.) *McCoy* v. *Commissioner of Public Safety*, 300 Conn. 144, 155, 12 A.3d 948 (2011); see

also *Scholastic Book Clubs, Inc.* v. *Commissioner of Revenue Services*, 304 Conn. 204, 219, 38 A.3d 1183 ("it is a well settled principle of statutory construction that the legislature knows how to convey its intent expressly . . . or to use broader or limiting terms when it chooses to do so" (citation omitted)), cert. denied, 568 U.S. 940, 133 S. Ct. 425, 184 L. Ed. 2d 255 (2012). We decline to import such a presumption into CUTPA's statutory framework when the legislature did not choose to include one.

Moreover, we are mindful that, in interpreting the statutory provisions of CUTPA, "[t]he legislature has directed that 'courts of this state shall be guided by interpretations given by the Federal Trade Commission and the federal courts to Section 5 (a) (1) of the Federal Trade Commission Act (15 U.S.C. [§] 45 (a) (1)).' General Statutes § 42-110b (b)." *McLaughlin Ford, Inc.* v. *Ford Motor Co.*, 192 Conn. 558, 567, 473 A.2d 1185 (1984). Although a small number of states have mandated an award of attorney's fees to prevailing plaintiffs; see, e.g., *Skeer* v. *EMK Motors, Inc.*, 187 N.J. Super. 465, 469, 473, 455 A.2d 508 (App. Div. 1982) (under New Jersey law, award of attorney's fees to prevailing consumer is mandatory under provisions of state Consumer Fraud Act); *Woods* v. *Littleton*, 554 S.W.2d 662, 669 (Tex. 1977) (under Texas law, "the consumer who proves all the elements required to recover actual monetary damages shall recover three times the actual monetary damages and, supported by adequate proof, reasonable [attorney's] fees and court costs"); our research has not revealed, and the plaintiff does not contend, that the Federal Trade Commission has adopted a presumption similar to the one the plaintiff asks us to adopt.

The plaintiff nonetheless contends that we should adopt a presumption because claims brought under Title VII of the Civil Rights Act and similar federal statutes contain a similar fee shifting provision—"may

allow''—and the United States Supreme Court has held that a prevailing plaintiff ''should ordinarily recover [attorney's fees] unless special circumstances would render such an award unjust.'' (Internal quotation marks omitted.) *Christiansburg Garment Co.* v. *Equal Employment Opportunity Commission*, 434 U.S. 412, 416–17, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978). The plaintiff contends that the rationale supporting the presumption in Title VII and similar federal statutes applies with equal force to fee awards under CUTPA, given that CUTPA's purpose to encourage private attorney general actions is like that of Title VII and similar federal statutes. As the Appellate Court noted, however, Title VII protects civil rights, which hold an especially valued status in our law. See, e.g., *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, 88 S. Ct. 964, 19 L. Ed. 2d 1263 (1968) (plaintiff who brings civil rights action is ''vindicating a policy that Congress considered of the highest priority''). Although we do not diminish the significance or importance of deterring unfair or deceptive trade practices, the plaintiff does not identify any authority that suggests we should put protection from unfair trade practices on the same plane as vindicating violations of civil rights. Two of the cases the plaintiff relies on are also distinguishable from the present case because, unlike in CUTPA litigation, those cases involve circumstances in which the prevailing party did not otherwise have monetary recovery available. See *Christiansburg Garment Co.* v. *Equal Employment Opportunity Commission*, supra, 419, 421 (prevailing defendant should have possibility of recovering its expenses in resisting groundless action); *Newman* v. *Piggie Park Enterprises, Inc.*, supra, 402 (explaining that attorney's fees are significant because prevailing plaintiff is not otherwise entitled to damages). Accordingly, we decline to adopt a presumption in favor of attorney's fees under § 42-110g (d).

Although we do not agree with the plaintiff that there is an established statutory presumption in favor of an award of attorney's fees, a trial court should be able to articulate appropriate reasons why it would not exercise its discretion to award attorney's fees in furtherance of CUTPA's legislative objectives. Moreover, in exercising its discretion, a trial court must consider the purpose of CUTPA attorney's fees when deciding whether a prevailing plaintiff should be awarded such fees. See, e.g., *Red Rooster Construction Co.* v. *River Associates, Inc.*, 224 Conn. 563, 575, 620 A.2d 118 (1993) (trial court's exercise of discretion "imports something more than leeway in decision making and should be *exercised in conformity with the spirit of the law* and should not impede or defeat the ends of substantial justice" (emphasis added; internal quotation marks omitted)).

Applying these principles to the facts of this case, we are mindful that "[a]warding . . . attorney's fees under CUTPA is discretionary; General Statutes § 42-110g [d] . . . and the exercise of such discretion will not ordinarily be interfered with on appeal unless the abuse is manifest or injustice appears to have been done." (Footnote omitted; internal quotation marks omitted.) *Ulbrich* v. *Groth*, supra, 310 Conn. 446. As we have explained, however, "[a] court's discretion must be informed by the policies that the relevant statute is intended to advance." (Internal quotation marks omitted.) *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, 310 Conn. 38, 55, 74 A.3d 1212 (2013). Indeed, a statute's purpose is "a paramount factor for the trial court to consider" when exercising its discretion. Id., 59.

Here, the trial court failed to recognize the difference between statutory punitive damages and common-law

punitive damages,[9] and failed to recognize the different purposes that attorney's fees and punitive damages serve under CUTPA. In its memorandum of decision, the trial court stated: "The court finds as a matter of fact that the plaintiff has not proven that [the defendant's] actions constituted a *reckless indifference* to the rights of [the plaintiff], an *intentional and wanton* violation of his rights, *malice* or *evil*. . . . The court cannot find, therefore, that [the defendant's] actions warrant punitive damages. *For similar reasons*, the court exercises its discretion and does not award attorney's fees to the plaintiff." (Emphasis added.) When asked to articulate what it meant by "similar reasons," the trial court explained that "[t]he use of the phrase 'similar reasons' was meant to signify that the court relied on the *same* reasons enumerated in the preceding sentences . . . ." (Emphasis in original.) The court did not consider the remedial policy objectives of § 42-110g (d). Rather, the court identified the more demanding test for awarding punitive damages—intentional, wanton, malicious, or evil conduct—as its rationale for not awarding attorney's fees. It improperly required a more demanding showing from the plaintiff, which is at odds with the purpose of the attorney's fees provision of CUTPA. To interpret the attorney's fees provision so narrowly undermines the legislative intent because it neither enhances the private CUTPA remedy nor encourages private CUTPA litigation. See, e.g., *Hinchliffe* v. *American Motors Corp.*, supra, 184 Conn. 617.

[9] "[C]ommon-law punitive damages are akin to statutorily authorized attorney's fees in practicality and purpose, insofar as both provide the same relief and serve the same function . . . namely, fully compensating injured parties." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Hylton* v. *Gunter*, supra, 313 Conn. 485–86. As we explained, punitive damages under CUTPA are distinct from common-law punitive damages because they are not intended merely to compensate the plaintiff for the harm caused by the defendant; they also serve to punish and deter reprehensible conduct. See, e.g., *Ulbrich* v. *Groth*, supra, 310 Conn. 455.

The defendant contends that the trial court did not require intentional, wanton, malicious, or evil conduct. The defendant argues that affording the trial court every reasonable presumption in favor of upholding the ruling demonstrates that the trial court simply was not persuaded that the plaintiff was entitled to attorney's fees. We disagree. After initially stating that, "[f]or similar reasons," it was not awarding the plaintiff attorney's fees, the trial court removed any doubt that it was applying the punitive damages standard in its articulation, explaining: "The use of the phrase 'similar reasons' was meant to signify that the court relied on the *same* reasons enumerated in the preceding sentences . . . ." (Emphasis in original.) Those reasons in the preceding sentences were solely directed at determining whether the defendant's actions constituted a reckless indifference to the rights of the plaintiff, an intentional and wanton violation of his rights, malice or evil, in other words, a determination as to whether the defendant's conduct warranted punitive damages. We take the trial court at its word that it relied on the same factors to deny attorney's fees as it did to deny punitive damages. For the reasons set forth in this opinion, applying that standard to the determination of whether to award attorney's fees constituted an abuse of discretion. Cf. *Duncan* v. *Mill Management Co. of Greenwich, Inc.*, 308 Conn. 1, 19, 60 A.3d 222 (2013) (trial court abused discretion because it failed to apply proper legal test); *Misthopoulos* v. *Misthopoulos*, 297 Conn. 358, 367, 999 A.2d 721 (2010) ("[n]otwithstanding the great deference accorded the trial court in dissolution proceedings, a trial court's ruling . . . may be reversed if, in the exercise of its discretion, the trial court applies the wrong standard of law" (internal quotation marks omitted)). Accordingly, the Appellate Court incorrectly determined that the trial court had not abused its discretion when it declined to award the plaintiff attorney's fees under the test applicable to punitive damages.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgment of the trial court insofar as it declined to award attorney's fees to the plaintiff and to remand the case to that court for its consideration of the plaintiff's request for an award of attorney's fees consistent with this opinion.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* JOSE RUIZ
(SC 20275)

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

Syllabus

The defendant appealed to the Appellate Court from the trial court's judgment revoking his probation following an incident in which he allegedly robbed and threatened W, a customer at a donut shop. A police officer had been dispatched to the donut shop after a report that a customer had been robbed there. The officer was informed that the customer, W, had described the suspect as a Hispanic male with a tattoo under his eye and had indicated that the suspect was wearing dark clothing. Upon the officer's arrival at the donut shop, he saw someone causing a disturbance. That person retreated to the bathroom, where the officer found him. The officer immediately noticed that that person, the defendant, was a Hispanic male, had a tattoo under his eye, and was dressed in dark clothing. The defendant was then detained in a police cruiser in the donut shop's parking lot. The officer then went to W's house and took his statement. W told the officer that someone attempted to rob him at the donut shop by indicating that he had a gun. W also stated that he would be able to identify his assailant if he saw him again. The officer and W then went back to the donut shop. When they arrived, the officer asked another officer to remove the defendant from the cruiser and have him stand next to it. The officer aimed a spotlight on the cruiser and the defendant, and W stated, "without a doubt," that was the person who robbed him. That identification occurred within twenty minutes of the officer's initial arrival at the donut shop and within forty-five minutes after W first reported the incident. After the defendant was charged with violating his probation, he filed a motion to suppress W's identification of him, claiming that the one-on-one show

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

up procedure the police used in connection with the identification violated his due process rights. The trial court denied the motion, concluding that the procedure was not unnecessarily suggestive. On appeal, the Appellate Court concluded, inter alia, that the procedure the police had used, although suggestive, was not unnecessarily suggestive due to the exigencies of the ongoing investigation and affirmed the trial court's judgment. On the granting of certification, the defendant appealed to this court, claiming that the identification procedure the police used was unnecessarily suggestive and rendered the identification unreliable. *Held* that the defendant could not prevail on his claim that the trial court had improperly declined to suppress the identification because, even if the identification procedure the police used was unnecessarily suggestive, W's identification of the defendant, in light of the totality of the circumstances, was reliable; W had a good opportunity to view the defendant at close range while they were in the donut shop before the defendant threated him and again when the defendant confronted him face-to-face, W was attentive because of the defendant's strange and disturbing focus on him, W gave an accurate description of the defendant within moments of the incident, W had a high level of certainty with respect to his identification, and the identification was made less than one hour after W's initial encounter with the defendant.

Argued May 8—officially released December 11, 2020**

Procedural History

Information charging the defendant with violation of probation, brought to the Superior Court in the judicial district of New Haven, where the court, *Blue*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the case was tried to the court, *Blue*, *J.*; judgment revoking the defendant's probation, from which the defendant appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Alvord* and *Beach*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed*.

Mary Boehlert, assigned counsel, for the appellant (defendant).

Laurie N. Feldman, deputy assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's

** December 11, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

attorney, and *Brian K. Sibley, Sr.*, senior assistant state's attorney, for the appellee (state).

Opinion

PALMER, J. The defendant, Jose Ruiz, appeals, upon our granting of certification, from the judgment of the Appellate Court, which affirmed the judgment of the trial court revoking the defendant's probation following an incident in which he allegedly robbed and threatened a customer, Lawrence Welch, at a Dunkin' Donuts store in the city of New Haven. See *State* v. *Ruiz*, 188 Conn. App. 413, 416–17, 204 A.3d 798 (2019). After he was charged with violating a condition of his probation on the basis of that incident, the defendant filed a motion to suppress Welch's identification of him, claiming that the one-on-one showup procedure that the police used in connection with that identification violated his rights under the due process clause of the fourteenth amendment to the United States constitution.[1] The trial court denied the motion, concluding that the procedure was not unnecessarily suggestive and, following a hearing, found that the defendant had violated his probation. Thereafter, the court rendered judgment revoking the defendant's probation and imposing a sentence of seven and one-half years of incarceration, execution suspended after four years, and three years of probation. On appeal to the Appellate Court, the defendant claimed, inter alia, that, contrary to the determination of the trial court, the showup identification procedure was unnecessarily suggestive and, further, that the flawed procedure had

[1] The due process clause of the fourteenth amendment to the United States constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty or property, without due process of law . . . ."

As we discuss more fully hereinafter, a police identification procedure will be deemed to violate principles of federal due process only if the procedure was *both* unnecessarily suggestive *and* the resulting identification was unreliable. See, e.g., *State* v. *Harris*, 330 Conn. 91, 101, 191 A.3d 119 (2018).

rendered the identification unreliable. See id., 417. The Appellate Court concluded that the procedure that the police used, although suggestive, was not unnecessarily suggestive due to the exigencies of the ongoing investigation; id., 421–22; and, in light of this determination, the court did not reach the issue of reliability. Id., 422 n.3. The Appellate Court also rejected the defendant's other claims[2] and, accordingly, affirmed the trial court's judgment. In this certified appeal, the defendant contends that the identification procedure used by the police violated the federal constitution because it was unnecessarily suggestive and rendered the identification unreliable. We affirm the judgment of the Appellate Court, albeit for a reason different from that relied on by the Appellate Court, namely, because Welch's identification of the defendant was reliable notwithstanding the inherent suggestiveness of the showup procedure.

The following facts, as set forth in the opinion of the Appellate Court, and procedural history are relevant to our resolution of this appeal. "On July 13, 2012, the defendant was convicted of three counts of assault in the first degree in violation of General Statutes § 53a-59 (a) (3) and one count of carrying a pistol without a permit in violation of General Statutes § 29-35 (a), and was sentenced to twelve years [of] incarceration, execution suspended after fifty-four months, and three years of probation. The defendant was released from incarceration on June 12, 2014, and placed on probation. As a condition of his probation, the defendant was not to violate the criminal laws of the United States, the state of Connecticut or any other state or territory.

"On November 22, 2015, as a result of an incident at a Dunkin' Donuts in New Haven, the defendant was

[2] On appeal to the Appellate Court, the defendant also maintained that the trial court incorrectly found that he had violated his probation and abused its discretion in revoking his probation. *State* v. *Ruiz*, supra, 188 Conn. App. 422, 425. Those claims are not the subject of this appeal.

arrested and charged with attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-49 and 53a-134, threatening in the second degree in violation of General Statutes [Rev. to 2015] § 53a-62 and breach of the peace in the second degree in violation of General Statutes § 53a-181. Following the defendant's arrest, his probation officer, Ada Casanova, on December 3, 2015, applied for an arrest warrant on the ground that the defendant had violated a condition of his probation. The next day, the application was granted and the arrest warrant was issued. The defendant denied the violation of probation charge and, on February 28, 2017, filed a motion to suppress the one-on-one showup identification that occurred shortly after the alleged incident on the ground that the identification procedure was unnecessarily suggestive." Id., 415–16.

"On May 23, 2017, the [trial] court held a hearing on the defendant's motion to suppress." Id., 416. "During the hearing . . . [Jason] Santiago [testified] that, on November 22, 2015, he was an officer with the New Haven Police Department and that, at sometime between 6 and 6:30 a.m., he was dispatched to the area of 291 Ferry Street in New Haven, following a report that a patron at a Dunkin' Donuts had been robbed. Santiago was informed that the victim, Welch, had described the suspect as a Hispanic male, with a tattoo under his eye, wearing dark clothing. Upon his arrival at the Dunkin' Donuts, Santiago entered the store with another officer and saw the defendant 'causing a disturbance.' After the officers entered the store, the defendant went into the bathroom, and the store employees indicated that they wanted the individual removed from the premises. Santiago knocked on the bathroom door and ordered the defendant to come out, but he did not comply. Santiago opened the door and saw the defendant 'just standing there.' Immediately, Santiago noticed that the defendant was a Hispanic male, with a tattoo under his eye,

dressed in dark clothing. The defendant was detained, handcuffed and placed in the back of one of the police cruisers in the parking lot."[3] Id., 419.

"After he had detained the defendant, Santiago went to Welch's home and took his statement. Welch told the officer that 'he was at Dunkin' Donuts and somebody attempted to rob him by indicating that [he] had a gun.' Welch also indicated in his statement that, if he saw the defendant again, he would be able to identify him. Accordingly, Santiago and Welch went back to the Dunkin' Donuts to conduct a one-on-one showup identification of the defendant. When they arrived in the parking lot, Santiago asked officers to remove the defendant from the police cruiser to have him stand next to the vehicle. Santiago then aimed the spotlight on his cruiser directly at the defendant. The moment that Welch saw the defendant, he stated 'without a doubt . . . this is the [individual] who tried to rob me at gunpoint.' Santiago further testified that the identification of the defendant occurred within approximately twenty minutes of the officer's initial arrival at the Dunkin' Donuts and approximately forty-five minutes after Welch first had reported the incident to the police." Id., 419–20.

The trial court concluded that, although the identification procedure that the police used was suggestive, it was not unnecessarily suggestive. The court reasoned that "confrontations like this are not unnecessary because it's prudent for the police to provide the victim with an opportunity to identify the assailant while the memory of the incident is still fresh and because it's necessary to allow the police to eliminate quickly any innocent parties [and] to continue the investigation with . . . minimum delay if the victim excludes the defen-

[3] "The defendant was patted down for weapons, given that the initial complaint indicated that a robbery had occurred. No weapons, however, were located on the defendant's person or in the vicinity of the Dunkin' Donuts." *State* v. *Ruiz*, supra, 188 Conn. App. 419 n.2.

dant as a suspect or is unable to identify him. . . . [T]hat is the case here." (Citation omitted.) After the court ruled on the defendant's motion to suppress, the hearing on the defendant's violation of probation charge commenced.

"During the violation of probation hearing, the court heard testimony from three witnesses . . . Welch, Casanova, and the first assistant clerk for the judicial district of New Haven, and also incorporated and considered Santiago's testimony from the earlier hearing on the motion to suppress. Following argument, the court found that the state had proven, by a preponderance of the evidence, that the defendant . . . violated his probation when 'he accosted . . . Welch at the Dunkin' Donuts . . . and threatened him in various verbal ways and, at one point, displayed in a threatening manner a . . . weapon with a black handle . . . and chased . . . Welch a great distance . . . causing . . . Welch a great and very understandable fear.' Although the court concluded that there was insufficient evidence to support a finding that the defendant had committed robbery or attempted robbery, it determined that the evidence was sufficient to support a finding that the defendant had committed an act of threatening in the second degree in violation of § 53a-62 (a) (1). The court revoked the defendant's probation and sentenced him [as previously indicated] . . . ." *State* v. *Ruiz*, supra, 188 Conn. App. 416–17.

The defendant appealed to the Appellate Court from the judgment of the trial court, claiming, inter alia, that the trial court should have granted his motion to suppress Welch's identification because the showup procedure employed by the police was unnecessarily suggestive, and, as a result, the identification was unreliable. See id., 417. The Appellate Court concluded that, although the procedure was "to some degree suggestive"; id., 421; it was not unduly so "inasmuch as there was an exigency

to provide Welch with an opportunity to identify the defendant while his memory of the incident was still fresh and to assist the police in determining whether they had apprehended the correct individual." Id., 422. Accordingly, the Appellate Court affirmed the judgment of the trial court. Id., 426.

On appeal to this court, the defendant maintains that the Appellate Court incorrectly concluded that the challenged identification was not unnecessarily suggestive. In support of this contention, the defendant notes that the police transported Welch back to the Dunkin' Donuts, the scene of the crime, where the defendant, the sole subject of the identification procedure, was seated in a police cruiser located in the rear of the parking lot. Welch watched as the defendant, in handcuffs and flanked by police officers, was removed from the cruiser and directed to stand next to it while one of the officers shone a bright spotlight directly on him. The record, moreover, contains no indication that the police ever cautioned Welch that the person he had been asked to view may or may not have been the perpetrator. The defendant also asserts that any legitimate interest the police may have had in promptly ascertaining whether Welch could identify the defendant as his assailant was outweighed by the highly prejudicial nature of the showup identification procedure, a procedure that clearly reflected the belief of the investigating officers that the suspect in their custody was the person who had accosted and threatened Welch. Finally, the defendant asserts that Welch's identification of him was unreliable. His primary argument in support of this claim is that, because Santiago, rather than Welch, testified at the hearing on the defendant's motion to suppress Welch's identification, there is an insufficient credible basis in fact to conclude that, under all of the circumstances, that identification was reliable.[4]

[4] As we noted previously and discuss more fully hereinafter, Welch did testify at the violation of probation hearing.

The state contends that the Appellate Court properly determined that the trial court was correct in concluding that the identification procedure at issue was not unnecessarily suggestive and, therefore, passes muster under the due process clause of the fourteenth amendment. Although urging us to affirm the judgment of the Appellate Court on that ground, the state also maintains that, even if we were to conclude that the identification procedure was unnecessarily suggestive, it nevertheless was reliable.[5] We need not decide whether that procedure, although obviously suggestive, was unnecessarily suggestive, because, for the reasons set forth in this opinion, we conclude that Welch's identification of the defendant was reliable.[6] Accordingly, the defendant cannot prevail on his claim that the trial court improperly declined to suppress the identification.[7]

[5] After the defendant filed his appeal, we granted the state's motion for permission to raise an alternative ground of affirmance, namely, that the due process standards for the admission of identification evidence at a criminal trial do not apply in the context of a probation revocation proceeding, an issue that this court has not yet resolved. See *State* v. *Daniels*, 248 Conn. 64, 80 n.16, 726 A.2d 520 (1999), overruled in part on other grounds by *State* v. *Singleton*, 274 Conn. 426, 876 A.2d 1 (2005). In light of our conclusion that the defendant is not entitled to the relief he seeks because Welch's identification was reliable, we need not address the state's alternative ground for affirmance.

[6] We note that we certified the following issue: "Did the Appellate Court correctly conclude that the one-on-one showup identification was not unnecessarily suggestive?" *State* v. *Ruiz*, 331 Conn. 915, 204 A.3d 703 (2019). As we have explained, however, both parties have briefed the issue of whether Welch's identification was reliable. Moreover, the defendant asserts that the record is adequate for our resolution of the reliability issue, even though the issue was not pursued in the trial court, and we agree. Although the state questions the adequacy of the record, it has identified no additional evidence that it would have adduced if the reliability of the identification had been fully litigated in the trial court. Our consideration of the issue will in no way prejudice the state because we agree with the state that the identification was reliable. We are therefore free to resolve the appeal on that basis.

[7] Before addressing the reliability issue, we first consider the state's contention that this appeal must be dismissed as moot. The state claims that, because the defendant did not litigate the issue of reliability in the trial court and, consequently, never received a ruling by the trial court on that

"The test for determining whether the state's use of an [allegedly] unnecessarily suggestive identification procedure violates a defendant's federal due process rights derives from the decisions of the United States Supreme Court in *Neil* v. *Biggers*, 409 U.S. 188, 196–97, 93 S Ct. 375, 34 L. Ed. 2d 401 (1972), and *Manson* v. *Brathwaite*, 432 U.S. 98, 113–14, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). As the court explained in *Brathwaite*, fundamental fairness is the standard underlying due process, and consequently, 'reliability is the linchpin in determining the admissibility of identification testimony . . . .' Id., 114. Thus, 'the required inquiry is made on an ad hoc basis and is two-pronged: first, it must be determined whether the identification procedure was unnecessarily suggestive; and second, if it is found to have been so, it must be determined whether the identification was nevertheless reliable based on examination

issue, he cannot prevail on appeal, even if we were to conclude that the Welch's identification was unnecessarily suggestive. In other words, in the state's view, because the defendant is required to prove both that the identification procedure was unnecessarily suggestive and that the identification was unreliable; see footnote 1 of this opinion; he would not be entitled to any relief from this court in view of the fact that he has not pursued a claim of unreliability, thereby rendering the appeal moot. See, e.g., *State* v. *Jevarjian*, 307 Conn. 559, 563–67, 58 A.3d 243 (2012) (because resolution of certified issue would not affect underlying judgment against defendant, appeal was moot, and court would not reach certified issue). The state's claim of mootness fails because it does not account for the fact that, even though the defendant apparently did not raise a claim of unreliability in the trial court, he did so in the Appellate Court, as permitted 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)—which set forth the requirements for claims of unpreserved constitutional error—and, despite the fact that our grant of certification was limited to the issue decided by the Appellate Court, that is, whether the identification was unnecessarily suggestive, the defendant has also raised the issue of reliability in this court. Indeed, even if he had not raised the issue of reliability in this court, the fact that he did so in the Appellate Court would require us to remand the case to that court for resolution of that issue in the event we decided the certified question in his favor. Thus, although we ultimately agree with the state that the defendant cannot prevail on the merits of his unreliability claim, this appeal is not moot.

of the totality of the circumstances.' *State* v. *Marquez*, 291 Conn. 122, 141, 967 A.2d 56, cert. denied, 558 U.S. 895, 130 S. Ct. 237, 175 L. Ed. 2d 163 (2009)." *State* v. *Harris*, 330 Conn. 91, 101, 191 A.3d 119 (2018).

With respect to the first prong of this analysis, "[b]ecause, [g]enerally, [t]he exclusion of evidence from the jury is . . . a drastic sanction, [it] . . . is limited to identification testimony [that] is manifestly suspect . . . . [Consequently] [a]n identification procedure is unnecessarily suggestive only if it gives rise to a very substantial likelihood of irreparable misidentification. . . . We have recognized that [ordinarily] a one-to-one confrontation between a [witness] and the suspect presented . . . for identification is inherently and significantly suggestive because it conveys the message to the [witness] that the police believe the suspect is guilty." (Citation omitted; internal quotation marks omitted.) *State* v. *Revels*, 313 Conn. 762, 772–73, 99 A.3d 1130 (2014), cert. denied, 574 U.S. 1177, 135 S. Ct. 1451, 191 L. Ed. 2d 404 (2015); see also *Neil* v. *Biggers*, supra, 409 U.S. 198 ("[s]uggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous"). For this reason, when not necessary, "the presentation of a single suspect to a witness by the police (as opposed to a lineup, in which several individuals are presented to the police, only one of whom is the suspect) . . . has . . . been widely condemned . . . ." (Citations omitted; internal quotation marks omitted.) *Brisco* v. *Ercole*, 565 F.3d 80, 88 (2d Cir.), cert. denied, 558 U.S. 1063, 130 S. Ct. 739, 175 L. Ed. 2d 542 (2009).

It is well established, however, that the use of a one-on-one showup identification procedure does not invariably constitute a denial of due process, as it may be justified by exigent circumstances. See, e.g., *State* v. *Revels*, supra, 313 Conn. 773; *State* v. *Wooten*, 227 Conn.

677, 686, 631 A.2d 271 (1993). Thus, a showup identification procedure conducted in close temporal and geographic proximity to the offense may be deemed reasonable, and, therefore, permissible for federal due process purposes, when "it was prudent for the police to provide the victim with the opportunity to identify [his] assailant while [his] memory of the incident was still fresh . . . and . . . [the procedure] was necessary to allow the police to eliminate quickly any innocent parties so as to continue the investigation with a minimum of delay, if the victim excluded the defendant as a suspect or was unable to identify him."[8] (Citation omitted; internal quotation marks omitted.) *State* v. *Wooten*, supra, 227 Conn. 686; accord *State* v. *Ledbetter*, 275 Conn. 534, 551, 881 A.2d 290 (2005) (overruled on other grounds by *State* v. *Harris*, 330 Conn. 91, 191 A.3d 119 (2018)), cert. denied, 547 U.S. 1082, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006). Moreover, when the police take prompt steps to identify a detained suspect in order to achieve these objectives, the use of handcuffs and illumination does not necessarily render the identification unduly suggestive.[9] E.g., *United States* v. *Bautista*, 23 F.3d 726, 730 (2d Cir.) ("The fact that the suspects were handcuffed, in the custody of law enforcement officers, and illuminated by flashlights . . . did not render the [pretrial] identification procedure unnecessarily suggestive.

[8] Consistent with these considerations regarding the necessity of a one-on-one showup identification procedure, we have stated that, "when . . . faced with the question of whether an exigency [sufficient to justify the procedure] existed, we have considered such factors as whether the defendant was in custody, the availability of the victim, the practicality of alternate procedures and the need of police to determine quickly if they are on the wrong trail. . . . We have also considered whether the identification procedure provided the victim with an opportunity to identify his assailant while his memory of the incident was still fresh." (Internal quotation marks omitted.) *State* v. *Revels*, supra, 313 Conn. 773.

[9] Such a procedure likely will be considered unnecessarily suggestive, however, if the police engage in conduct that is needlessly or gratuitously prejudicial. See, e.g., *Velez* v. *Schmer*, 724 F.2d 249, 250 (1st Cir. 1984) (during one-on-one showup identification procedure, police said to witnesses, " '[t]his is him, isn't it?' ").

. . . Because the on-the-scene identification was necessary to allow the officers to release the innocent, the incidents of that identification were also necessary."), cert. denied sub nom. *Minier-Contreras* v. *United States*, 513 U.S. 862, 115 S. Ct. 174, 130 L. Ed. 2d 110 (1994); see also *State* v. *Revels*, supra, 767, 774 (showup identification procedure was not unnecessarily suggestive even though identification took place while "the defendant was standing in the middle of the road, handcuffed and surrounded by uniformed police officers . . . [one of whom] directed [a] spotlight on his cruiser toward the [defendant]").

We need not opine on the propriety of the procedure used by the police in the present case, however, because, even if we were to assume, contrary to the conclusion of the Appellate Court, that it was unnecessarily suggestive, Welch's identification of the defendant was reliable under all of the relevant circumstances.[10] "As mandated in *Neil* v. *Biggers*, supra, 409 U.S. 188, and reiterated by the court in *Manson* v. *Brathwaite*, supra, 432 U.S. 98, for federal constitutional purposes, we determine whether an identification resulting from an unnecessarily suggestive procedure is reliable under the totality of the circumstances by comparing the corrupting effect of the suggestive identification against factors including the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the [identification], and the time between the crime and the [identifi-

[10] We decide the case on this alternative basis because, in our view, Welch's identification of the defendant was quite clearly reliable and, therefore, provides a firm basis on which to reject the defendant's claim without the need to address whether the identification procedure that the police used, although suggestive, was not unnecessarily so. We do not address the issue of whether the identification procedure was unnecessarily suggestive in light of our resolution of the appeal under the reliability prong of the due process test.

cation]. *Manson* v. *Brathwaite*, supra, 114, citing *Neil* v. *Biggers*, supra, 199–200." (Internal quotation marks omitted.) *State* v. *Harris*, supra, 330 Conn. 108. The relevant factors in the present case support the conclusion that Welch's identification was reliable.

Before reviewing those factors, however, we recite Welch's testimony at the violation of probation hearing, as summarized in the opinion of the Appellate Court, because it bears on the issue of reliability.[11] "[At that] hearing, Welch testified that, on [the day in question], he was at a Dunkin' Donuts in New Haven, sitting at a table and drinking a coffee, when the defendant, who was sitting at a nearby table, made him 'feel uncomfortable.' Welch stood up and went to exit the store. The defendant followed him and cut him off at the door. The defendant then approached Welch, made him feel uneasy and threatened him. When asked to explain what happened next, Welch stated: 'So, what happened next is he threatened me, and I didn't take kindly to that. So I—he lunged at me, and when I went to approach to defend myself, he jumped back and lifted up his shirt, and I saw a black handle in his waist, and he [said] we can do this right, let's not do it here, let's go over here.' Welch backed his way out of the Dunkin' Donuts into the parking lot, and the defendant continued to follow him. At some point, two bystanders yelled at the defendant to stop. He turned around and told one of them to be quiet. While the defendant was turned around, Welch took off running. The defendant chased after [Welch] until [he] reached a police barracks substation

[11] Although this testimony occurred during the portion of the hearing concerning the violation of probation rather than the motion to suppress, we may consider it in determining the propriety of the trial court's denial of the defendant's motion to suppress Welch's identification. See, e.g., *State* v. *Reynolds*, 264 Conn. 1, 42 n.30, 836 A.2d 224 (2003) (reviewing court may consider testimony adduced both at trial and at suppression hearing when determining propriety of trial court's ruling on motion to suppress), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004).

and was able to hide behind a brick wall. When Welch no longer saw the defendant following him, he ran back to his residence and called the police. Welch testified that he told the police that an individual had confronted him at a Dunkin' Donuts and then chased after him through the parking lot and nearby streets. He could not remember whether he had told the police that the individual had attempted to rob him. After he called the police, an officer responded to his home within approximately one-half hour. Welch provided a statement to the officer, and, together, they went back to the Dunkin' Donuts to ascertain whether Welch could identify an apprehended individual as the same person who had threatened and chased him earlier that morning." *State* v. *Ruiz*, supra, 188 Conn. App. 423–24.

Turning to the considerations pertinent to the issue of the reliability of Welch's identification, we agree with the state that each of them militates in favor of a determination of admissibility. With respect to the first two factors, namely, Welch's opportunity to observe the suspect and his degree of attentiveness, it is apparent that Welch had a good opportunity to view the defendant at close range while in Dunkin' Donuts, both when they were seated at nearby tables—before the defendant engaged in any physically assaultive behavior toward Welch—and, again, when the defendant confronted the defendant, face-to-face, at the door. Welch also was able to observe the defendant outside the store, albeit at a somewhat greater distance, when the defendant pursued Welch as he attempted to flee. Welch's testimony further indicates that he was attentive to the defendant because of the defendant's strange and disturbing focus on him; in fact, Welch was so keenly aware of the defendant's unusual reaction to him that he decided to leave Dunkin' Donuts.[12] With respect to the third relevant

[12] It also bears noting that the defendant himself believed that Welch was staring at him.

factor, the accuracy of Welch's original description of the defendant, Welch gave the police an accurate description of the defendant within moments of the incident, reporting that the suspect was a Hispanic male in dark clothing with a highly distinctive facial tattoo under his eye. As for Welch's level of certainty with respect to his identification, he told the police that he could identify the suspect, and, when given the opportunity, he did so immediately and with certainty. Finally, the identification was conducted promptly, less than one hour after Welch's initial encounter with the defendant.

We are fully satisfied that, considering the totality of the circumstances, Welch's identification of the defendant was reliable. Indeed, the defendant has identified no facts or circumstances to support a different conclusion. Consequently, we agree with the Appellate Court that the trial court properly denied the defendant's motion to suppress Welch's identification because its use by the state in connection with the defendant's violation of probation hearing did not violate the defendant's rights under the due process clause of the fourteenth amendment to the United States constitution.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

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CONNECTICUT APPELLATE REPORTS

Vol. 206

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* PAUL A. QUINTILIANO (AC 43137)

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

Syllabus

Convicted of the crime of criminal mischief in the first degree in connection with a property dispute with his neighbor, C, the defendant appealed to this court, claiming, inter alia, that there was insufficient evidence to demonstrate that he had no reasonable ground to believe that he had a right to remove certain trees C had planted on C's land. The defendant claimed to enjoy deeded easement rights to the land in question. C planted a number of trees, some of which were located along the border of the land subject to the easement, and the defendant, following advice from attorneys, subsequently dug up the trees along the border. The state charged the defendant with criminal mischief in the first degree for intentionally causing damage in excess of $1500 to C's tangible property without a reasonable ground to believe he had the right to do so. *Held*:

1. The trial court's finding that the trees were beyond the easement area was clearly erroneous; there was insufficient evidence in the record to establish the precise location of the easement area or the location of the trees in relation thereto, as none of the maps admitted into evidence established where the deeded easement actually ended or depicted the location of the trees, the witness testimony was imprecise and inadequate to support the court's finding, and there was no expert testimony presented on the topic of the location of the easement area or the trees.
2. The evidence adduced at trial was insufficient to support the defendant's conviction of criminal mischief in the first degree: the trial court failed to recognized the defendant's right under Connecticut easement law to remove the obstructing trees from his right-of-way without first seeking judicial intervention; moreover, because the court failed to recognize the defendant's right, it erred in finding that it was not credible that an attorney would advise his client that the client was entitled to remove property that was blocking access to a right-of-way granted in an easement, and, as a result, improperly concluded that, as a matter of law, the defendant could not have had a reasonable ground to believe that he had the right to remove the trees from the easement area; accordingly, a judgment of acquittal was directed.

Argued February 18—officially released August 17, 2021

Procedural History

Substitute information charging the defendant with the crime of criminal mischief in the first degree, brought

to the Superior Court in the judicial district of Waterbury, geographical area number four, and tried to the court, *Crawford*, *J.*; thereafter, the court denied the defendant's motion for a judgment of acquittal; judgment of guilty, from which the defendant appealed to this court. *Reversed*; *judgment directed.*

Alexander Copp, with whom were *Neil R. Marcus*, and, on the brief, *Barbara M. Schellenberg*, for the appellant (defendant).

Linda F. Currie, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Joseph Danielowski*, senior assistant state's attorney, for the appellee (state).

Opinion

MOLL, J. In this criminal appeal, which arises out of a property dispute between neighbors, the defendant, Paul A. Quintiliano, appeals from the judgment of conviction, rendered after a trial to the court, of criminal mischief in the first degree in violation of General Statutes § 53a-115 (a) (1).[1] On appeal, the defendant claims, inter alia, that there was insufficient evidence to demonstrate that he had no reasonable ground to believe that he had a right to remove certain trees planted by his former neighbor, Brian Collins, on a portion of land then owned by Collins with respect to which the defendant claimed to enjoy deeded or prescriptive easement rights.[2] We agree and, accordingly, reverse the judgment of the trial court.

[1] General Statutes § 53a-115 provides in relevant part: "(a) A person is guilty of criminal mischief in the first degree when: (1) With intent to cause damage to tangible property of another and having no reasonable ground to believe that such person has a right to do so, such person damages tangible property of another in an amount exceeding one thousand five hundred dollars . . . .

"(b) Criminal mischief in the first degree is a class D felony."

[2] The defendant also claims that the state presented insufficient evidence of (1) intent to cause damage to tangible property of another and (2) damage to tangible property of another in an amount exceeding $1500. In light

The following facts, as set forth in the court's memorandum of decision, are relevant to our decision. "On June 25, 2017 . . . Collins, and the defendant . . . owned lots in a subdivision in Southbury. [Collins] owned lot number [23.04], and the defendant owned lot number [23.03] . . . . There are two warranty deeds . . . and a quitclaim deed . . . . Each [deed] references a common driveway agreement, hereinafter referred to as a CDA. . . . The CDA includes an easement granted by the owner of lot number [23.04] to the owner of lot number [23.03]. The easement granted a perpetual right-of-way for ingress and egress, by foot or vehicle, including the right to construct, pave and maintain a driveway and use the same in common with the owner, present and future. The easement area is within the northerly most 1000 feet of the 30 foot wide portion of lot number [23.04] adjoining the westerly boundary of lot number [23.03] and lot number [23.02]. . . . The CDA was signed on June 2, 1993, and the easement runs with the land.

"Prior to 2013, the defendant had a box truck and small white tent parked in the corner of his lot. He used this for storage. His wife said [that] the small tent had been destroyed. [Collins] gave the defendant permission to access the storage area from the common driveway. [The defendant's wife] also stated [that] the permission was granted approximately one year before [Collins] started planting, and [Collins] had promised to leave access to the storage area on the property. And that was granted about one year before [Collins] started planting the trees.

"In 2013, the defendant erected a very large green tent and attached it to the box truck located on his property. The defendant expanded his excavating business in 2013. [Collins] stated that the defendant never came down to the area prior to erecting the large green

of our resolution of the defendant's first claim, we need not address his other claims.

tent. He was always in the back area on his property—on his own property. [The defendant's wife] said the defendant went down twice a week, and she drove down once every other week as she used the storage area to store items connected with her eBay business. However, it is unclear when she started her eBay business. The defendant did not live on the premises between 2002 and 2010. Furthermore, the defendant could access the storage area on his own lot without having to use the common driveway. With the expansion of his excavating business, the large green tent was needed to store additional equipment connected with that business. After the erection of the large green tent, the defendant started coming down to the area. . . .

"In 2013 or 2014, [Collins] informed the defendant he would be planting trees. On June 3, 2016, [Collins] paid Green Giant Arborvitaes Rapid Grow [$5423.21] for forty-three or forty-four trees to include the planting of the trees . . . . The trees were planted on June 11, 2016, eighteen of which were along the border beyond the thirty foot wide portion of lot number [23.04] adjoining the westerly boundary of lot number [23.03] and lot number [23.02]. After [Collins] planted the trees, the defendant informed him that he would tear out the trees. [Collins] also noticed one tree had been knocked over.

"[Collins] called the police and Officer [Brian] McKirryher responded. The defendant told the officer he had used the area for fifteen years. Officer McKirryher informed the defendant that any right he believed he had should be determined in a civil proceeding, but if he ran over the trees, there would be consequences. [Collins] said the officer told the defendant that it would be a crime.

"Thereafter, the defendant sent a letter to [Collins] informing him that he had four days to remove the trees

and that his attorney had advised him he could take out ten of the trees. . . .

"[O]n June 25, 2017, eighteen of the trees had been dug up and thrown on the side of the road . . . . [Collins] called the police. When the officer arrived, he saw the trees uprooted and on the side of the road in dirt. He also saw the defendant's excavator. Later he saw the defendant on the excavator, and he also saw the area where the defendant had ripped up the trees. The defendant informed the officer that the trees wouldn't die if they were watered and replanted and that his attorney had advised him he had a right to access the large green tent he had put up. And the trees blocked the access to his shed, and his attorney told him he had a right to tear them up. The officer informed the defendant that he had a right to access his property."

The defendant subsequently was charged by way of a substitute information with criminal mischief in the first degree in violation of § 53a-115 (a) (1), which provides that "[a] person is guilty of criminal mischief in the first degree when . . . [w]ith intent to cause damage to tangible property of another and having no reasonable ground to believe that such person has a right to do so, such person damages tangible property of another in an amount exceeding one thousand five hundred dollars."

A bench trial took place on March 18, 19, 20 and 25, 2019. On March 19, 2019, after the close of the state's case-in-chief, the defendant orally moved for a judgment of acquittal on the ground that the state had failed to present sufficient evidence of each element to convict him of criminal mischief in the first degree beyond a reasonable doubt. The court denied the motion. On March 20, 2019, after the close of evidence, the defendant again moved for a judgment of acquittal. The court deferred ruling until after closing arguments and subsequently denied the motion. The defendant additionally

submitted to the court written proposed legal findings as to each element of § 53a-115 (a) (1). The court rejected all of the defendant's proposed legal findings.

On March 25, 2019, the court found the defendant guilty of criminal mischief in the first degree in violation of § 53a-115 (a) (1). With specific regard to the third element of § 53a-115 (a) (1) (i.e., no reasonable ground to believe that one has the right to cause damage to tangible property of another), the court found: "The defendant had no reasonable ground to believe he had a right to tear out the trees and dump them on the side of the road. No reasonable person in his situation considering his point of view would believe he had a right to damage the trees. He had been given permission to access the storage area and he hardly—he never used or seldom used that until 2013, after he erected the large green tent and attached it to his box truck. His wife stated that they had been given permission approximately one year before the planting and that [Collins] in the planting had promised access. The defendant could access the storage area on his property without having to cross [Collins'] property. So if there is a right, then there was no need to be given permission or a promise to have access to the storage area. And the access to the storage area on his own property . . . over [Collins'] property is different than having access to a storage area on his property.

"It is not credible that an attorney would advise the defendant that the remedy for blocking a right-of-way granted in an easement is to destroy the property that is blocking access.[3] But, again, this is access to the shed

[3] During trial, the defendant's wife testified that two attorneys, Attorney Walter Flynn and Attorney Neil Marcus, separately advised the couple that they could uproot the trees. More specifically, she testified that Attorney Flynn advised them that "[b]ased on the deed, [they] had the right to drive over the trees . . . ." In addition, she testified that her belief that she was able to use the driveway to get to the shed was "based on the deed and that [they] used it for over twenty years and . . . were informed [they] could just drive over them."

and the tent, which is a storage area as opposed to blocking access in terms of ingress and egress onto his own property. The proper course of conduct as suggested by the officer was to go to civil court and have the question about the boundaries or the extent of the easement with the right for ingress and egress resolved in that forum. That advice, if given, the defendant and his wife did not follow it in terms of the advice from counsel, according to [the defendant's wife], because they were not that kind of people, but they clearly did not, in 2016, after saying if it wasn't removed in four days, they had a right to tear the trees out or, at a minimum, ten of the eighteen that were ripped out.

"In Connecticut, a [prescriptive] easement is acquired with continued and uninterrupted use for fifteen years. The state presented evidence that showed that there was no continued and uninterrupted use for fifteen years, that use being access to [the defendant's] storage shed that was located on his property. There was no evidence that the defendant could not enter or leave his property. To the contrary, he built a driveway off of the common driveway down to his own property. So there was definitely ingress and egress to his lot. So under the circumstances as laid out, no reasonable person would believe that, being in the defendant's position, that he had a right to access the storage shed on his own property via [Collins'] property."[4] (Footnote added.)

On June 14, 2019, the court sentenced the defendant to eighteen months of incarceration, execution suspended, followed by three years of probation. The court also ordered the defendant to pay $2218.58 in restitution. This appeal followed. Additional facts and procedural history will be set forth as necessary.

[4] The court further found that "there [was] no evidence that the defendant was told he could *uproot* the trees. The advice [of counsel] appears, from the testimony of [Collins] and [the defendant's wife], that they were told that they had an easement and they had a right-of-way. The easement gives them the right for ingress and egress onto their lot." (Emphasis added.)

The defendant claims on appeal that the evidence presented at trial was insufficient to prove beyond a reasonable doubt that he had no reasonable ground to believe that he had a right to remove the trees. In support of this claim, the defendant makes, inter alia, three contentions that we find dispositive: (1) the state failed to establish the location of the deeded easement area and the location of the trees in relation thereto; (2) the trial court failed to recognize the right of a dominant estate holder of a right-of-way easement, appurtenant to his or her adjoining land, to remove obstructions placed in the right-of-way that materially interfere with his or her reasonable enjoyment of the easement; and (3) as a result of the foregoing failure, the court further erred by not finding it credible that an attorney would so advise his client.[5] We agree with each of these contentions.[6]

Before we address the merits of the defendant's claim, we set forth the applicable standard of review. "In reviewing a sufficiency of the evidence claim, we apply a [two part] test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] 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 [fact finder's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Bradbury*, 196 Conn. App. 510, 515, 230 A.3d 877, cert. denied, 335 Conn. 925, 234 A.3d 980 (2020).

[5] Because the defendant's second and third contentions are closely interrelated, we address them together in part II of this opinion.

[6] For ease of discussion, we address the defendant's contentions in a different order than they are set forth in his principal appellate brief.

"A challenge to the sufficiency of the evidence is based on the court's factual findings. The proper standard of review is whether the court's findings were clearly erroneous based on the evidence. . . . A court's finding of fact is clearly erroneous and its conclusions drawn from that finding lack sufficient evidence 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." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Edwards*, 148 Conn. App. 760, 765, 87 A.3d 1144 (2014). "[A] defendant is entitled to a judgment of acquittal and retrial is barred if an appellate court determines that the evidence is insufficient to support the conviction." (Internal quotation marks omitted.) *State* v. *Tenay*, 156 Conn. App. 792, 801–802, 114 A.3d 931 (2015).

I

As a threshold matter, we first turn to the defendant's argument that the state failed to establish the location of the deeded easement area and the location of the trees in relation thereto. We agree with the defendant.[7]

By way of review, in its memorandum of decision, the trial court stated that "[t]he CDA includes an easement granted by the owner of lot number [23.04] to the owner of lot number [23.03]. The easement granted a perpetual right-of-way for ingress and egress, by foot or vehicle, including the right to construct, pave and maintain a driveway and use the same in common with the owner, present and future. The easement area is within the

[7] In light of our determination that the court erred with respect to the deeded easement and the rights related thereto, it is unnecessary for us to reach the defendant's arguments challenging the trial court's finding that a prescriptive easement did not exist. Thus, unless the context dictates otherwise, our references in this opinion to the "easement" are to the deeded easement.

northerly most 1000 feet of the 30 foot wide portion of lot number [23.04] adjoining the westerly boundary of lot number [23.03] and lot number [23.02]. . . . The CDA was signed on June 2, 1993, and the easement runs with the land." The court additionally found that "[t]he trees were planted on June 11, 2016, eighteen of which were along the border *beyond* the thirty foot wide portion of lot number [23.04] adjoining the westerly boundary of lot number [23.03] and lot number [23.02]." (Emphasis added.) Stated differently, the court found that the trees were planted "beyond" the easement area and concluded that, "under the circumstances as laid out, no reasonable person would believe that, being in the defendant's position . . . he had a right to access the storage shed on his own property via [Collins'] property."

Mindful of the standard of review principles recited previously, we conclude that, to the extent the court found that the trees were planted outside the easement area, such finding was clearly erroneous because there was insufficient evidence to establish the precise location of the easement area or the location of the trees in relation thereto. As an initial matter, none of the maps admitted into evidence (1) establishes where the 1000 foot deeded easement actually ends, or (2) depicts the location of the trees. In addition, the testimony of the witnesses who testified as to these issues—Collins and the defendant's wife—was imprecise and simply inadequate to support the court's finding that the trees were planted outside the easement area. Finally, there was no expert testimony on which the trial court could rely to make such finding. See *Thurlow* v. *Hulten*, 173 Conn. App. 694, 725, 164 A.3d 858 (2017) ("[w]here the testimony of witnesses as to the location of the land described in deeds is in conflict, it becomes a question of fact for the determination of the court which may rely upon the opinions of experts to resolve the problem and it is the court's duty to accept that testimony or

evidence which appears more credible" (internal quotation marks omitted)).

In light of the foregoing, the court's finding that the trees were beyond the easement area is clearly erroneous.

II

We next address the defendant's contention that the trial court erred in failing to recognize the legal principle that "any easement that grants a right of ingress and egress includes the right to remove any structure which constitutes a material obstruction to the rightful enjoyment of the easement, or which renders that enjoyment less beneficial or convenient than before its erection." The defendant also makes the related contention that, as a result of the foregoing failure, the court further erred by not finding it credible, effectively as a matter of law, that an attorney would so advise his client. We agree with both contentions.

We first briefly address the applicable standard of review. "When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Northeast Ct. Economic Alliance, Inc.* v. *ATC Partnership*, 256 Conn. 813, 827, 776 A.2d 1068 (2001). Although we generally defer to "the determinations of the trial court regarding factual findings on issues of credibility, unless they are clearly erroneous," the scope of our review remains plenary when the ultimate issue before the trial court was not truly a credibility question, but rather a question of law. *Lisiewski* v. *Seidel*, 72 Conn. App. 861, 870, 806 A.2d 1121; see id., 870–71 (in case involving property dispute, when deed at issue contained clear and unambiguous language, trial court's determination that plaintiff's expert witness testified credibly regarding latent ambiguity in deed did not restrict this court's plenary

review of legal questions regarding proper construction of deeds), cert. denied, 262 Conn. 921, 812 A.2d 865 (2002), and cert. denied, 262 Conn. 922, 812 A.2d 865 (2002).

Our analysis of this claim requires a discussion of certain principles of Connecticut easement law. "It is well settled that [a]n easement creates a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement." (Internal quotation marks omitted.) *Celentano* v. *Rocque*, 282 Conn. 645, 660, 923 A.2d 709 (2007). "An easement has six primary characteristics: (1) it is an interest in land in the possession of another, (2) it is an interest of a limited use or enjoyment, (3) it can be protected from interference by third parties, (4) it cannot be terminated at will by the possessor of the servient land, (5) it is not a normal incident of a possessory land interest, and (6) it is capable of creation by conveyance . . . . An easement may be affirmative or negative; appurtenant or in gross . . . .

"An affirmative easement authorizes uses of land that would be viewed as actionable trespasses if no easement existed. A right of way across a neighbor's property is a common example of an affirmative easement. . . .

"Although an easement does not create an ownership interest in the servient estate but creates a mere privilege to use the servient estate in a particular manner, an easement involves limited rights to enjoy or to restrict another's use of property. . . . If an easement is created to benefit and does benefit the possessor of the land in his use of the land, the benefit of that easement is appurtenant to the land. The land is being benefited by the easement in the neighboring property. . . . An important characteristic of appurtenant easements is that they continue in the respective properties, rather

than being merely personal rights of the parties involved. The easement's benefit or its burden passes with every conveyance affecting either the servient or dominant property." (Citations omitted; internal quotation marks omitted.) *Kepple* v. *Dohrmann*, 141 Conn. App. 238, 246, 249–50, 60 A.3d 1031 (2013).

Our Supreme Court previously has recognized the right of a dominant estate holder of a right-of-way easement, appurtenant to his or her adjoining land, to remove obstructions placed in the right-of-way that materially interfere with his or her reasonable enjoyment of the easement. In *Blanchard* v. *Maxson*, 84 Conn. 429, 80 A. 206 (1911), the plaintiff had erected a fence within a laneway to prevent the defendant and his tenants from having access thereto from a certain point on the defendant's land. The defendant later removed the fence, "doing no other damage than was necessary to accomplish that result." Id., 432 (preliminary statement of facts and procedural history). The plaintiff brought an action sounding in trespass, and judgment was rendered for the defendant. Id., 430 (same). On appeal, our Supreme Court found no error, concluding that the laneway was subject to a right-of-way easement appurtenant to the defendant's adjoining land. Id., 433. The court reasoned: "The fact that the defendant has never owned the fee to any part of the land covered by the lane does not militate against his right to keep it free from obstructions. Any structure which could not properly be placed thereon, and which constituted an obstruction to his free and full use of the lane in his rightful enjoyment of the easement, would be removable by him as a nuisance. *Greist* v. *Amrhyn*, 80 Conn. 280, 290, [68 A. 521 (1907)]. The fact that the fence which he took down did not wholly prevent passage up and down the lane did not save it from being an unlawful obstruction. Erected as it was, without reasonable justification or purpose, it was a nuisance abatable by him, if it materially interfered with his reasonable enjoyment of the easement, or rendered that

enjoyment less beneficial or convenient than before its erection." *Blanchard* v. *Maxson*, supra, 435–36; see also *Smith* v. *Muellner*, 283 Conn. 510, 518, 932 A.2d 382 (2007) ("The owner of the soil [over which a right-of-way exists] retains full dominion over his land subject merely to the right-of-way. . . . The owner may make any use of his land which does not interfere with a reasonable use of the way." (Internal quotation marks omitted.)); *Greist* v. *Amrhyn*, supra, 290–91 ("[O]ne in possession of premises to which an easement is appurtenant may have an action for a disturbance or obstruction of such easement. A tenant or a cestui que trust in possession of the dominant estate may have such an action for the injury to his possession. . . . It follows that he may remove the obstruction as a nuisance." (Citations omitted.)).

The state has not cited any authority—and we are not aware of any—that stands for the proposition that a dominant estate holder, with respect to a right-of-way easement appurtenant to his or her adjoining land, must seek judicial intervention prior to exercising the right to remove obstructions placed in the right-of-way that materially interfere with his or her reasonable enjoyment of the easement. The lack of such a requirement necessarily was implied in the aforementioned cases and was expressly acknowledged in the ancient case of *Quintard* v. *Bishop*, 29 Conn. 366, 373 (1860). In *Quintard*, our Supreme Court rejected the argument that, rather than clearing an obstruction (i.e., a fence) from the subject right-of-way, the defendant covenantee should have brought a civil action against the covenantor who placed the obstruction thereon. Id. The court stated: "[I]f the defendant had a clear right of way, he might insist that it should be in a condition to be used; and as the fence was removed avowedly for this purpose, he did no more than the law justified him in doing." Id.; see also 28A C.J.S. 640–41, Easements § 236 (2019) ("An obstruction placed in a private way is a

nuisance, and may be removed by any person having a right to use the right-of-way, provided the person can do so without a breach of the peace. . . . In removing obstructions the owner of the dominant tenement must do no unnecessary damage. *If the owner of the land has covenanted to keep the way open, the grantee need not in case of an obstruction resort to an action for a breach of the covenant, but may herself remove the obstruction.*" (Emphasis added; footnotes omitted.)).

In the present case, the trial court failed to recognize the foregoing right under Connecticut easement law, stating, in the form of a credibility determination relating to testimony by the defendant's wife, that "[i]t is not credible that an attorney would advise the defendant that the remedy for blocking a right-of-way granted in an easement is to destroy the property that is blocking access. . . . The proper course of conduct as suggested by the officer was to go to civil court and have the question about the boundaries or the extent of the easement with the right for ingress and egress resolved in that forum." Thus, the court improperly concluded that, as a matter of law, the defendant could not have had a reasonable ground to believe that he had the right to remove the obstructions from the easement area without first seeking judicial intervention.

In considering the foregoing errors, we find *State* v. *Hoskins*, 35 Conn. Supp. 587, 401 A.2d 619 (App. Sess. 1978), on which the defendant relies, to be particularly instructive. In *Hoskins*, the Appellate Session, inter alia, set aside the judgment of conviction of criminal mischief in the third degree pursuant to General Statutes (Rev. to 1975) § 53a-117, which also required the state to prove that the defendant had "no reasonable ground to believe that he had a right to [damage tangible property of another]." Id., 595. In that case, the defendant was a minister of a church who painted a religious message on plywood boards attached to the exterior of the church by the city of Hartford. Id., 589. Because

the ownership of the plywood boards was unclear, the Appellate Session reasoned that, if the boards were church property, then the city's consent was not needed and the facts supported "the reasonable hypothesis that the defendant . . . painted the message with the church's acquiescence, if not its blessing." Id., 595–96. On the basis of the record before it, the Appellate Session concluded that the trial court "could not find beyond a reasonable doubt that when he painted the message the defendant had no reasonable ground to believe that he had a right to do so." Id., 596.

Similarly here, based on the record before it, the court could not find beyond a reasonable doubt that when the defendant removed the trees, he had no reasonable ground to believe that he had a right to do so. Because the evidence is insufficient to support the conviction, the defendant is entitled to a judgment of acquittal.

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

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* FELIMON C.* (AC 43686)

Elgo, Cradle and Harper, Js.

Syllabus

Convicted, following a plea of guilty, of the crimes of sexual assault in the second degree and risk of injury to a child, the defendant appealed to this court from the judgment of the trial court denying his motion to correct an illegal sentence. The fourteen year old victim of the sexual

* In accordance with our policy of protecting the privacy interests of the victims of sexual assault and the crime of risk of injury to a child, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

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

assault indicated in a forensic interview that she and the defendant had engaged in two sexual encounters and, subsequently, she became pregnant. The victim delivered the child and arrangements were made for her sister to adopt the child. Under the plea agreement, the defendant's sentence included a condition of probation that he would not contest or interfere with the adoption of the child conceived by the sexual assault. The defendant claimed that the condition of probation at issue violated his constitutional rights and that the condition exceeded the court's authority. The court denied the defendant's motion, finding that the provisions of the applicable statute (§ 53a-30) were not exhaustive and that, given the severity of the offense, the condition was bargained for and was reasonable. Following oral argument before this court, this court ordered the trial court to resolve certain factual issues that were not clear from the record, and, after a hearing, the trial court found that the defendant's parental rights had been terminated by the Probate Court, the defendant's appeal of that decision had been dismissed, and the child had been adopted by order of the Probate Court. *Held* that because the defendant's parental rights had been terminated and the child had been adopted, the appeal was moot: the provisions of the applicable statute (§ 45a-719) concerning a motion to open or set aside a judgment terminating parental rights make clear that the court may not grant such a motion, if, prior to the filing of such a motion, a final decree of adoption has been issued; moreover, with respect to the adoption of the child, even if an avenue to challenge the adoption existed, the defendant would lack standing to pursue it, and, accordingly, this court could not grant the defendant any practical relief.

Argued April 12—officially released August 17, 2021

Procedural History

Information charging the defendant with the crimes of sexual assault in the second degree and risk of injury to a child, brought to the Superior Court in the judicial district of Danbury, where the defendant was presented to the court, *Krumeich, J.*, on a plea of guilty; judgment of guilty in accordance with the plea; thereafter, the court, *D'Andrea, J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Appeal dismissed.*

Judie Marshall, for the appellant (defendant).

Christopher A. Alexy, senior assistant state's attorney, with whom were *Melissa L. Streeto*, senior assistant state's attorney, and, on the brief, *Stephen J. Sedensky III*, state's attorney, for the appellee (state).

Opinion

HARPER, J. The defendant, Felimon C., appeals from the judgment of the trial court denying his motion to correct an illegal sentence. Specifically, he claims that (1) the sentencing court lacked statutory authority to impose a condition of probation prohibiting him from contesting the adoption of the minor child conceived as a result of his sexual assault (condition), (2) the condition was illegal because it violated his constitutionally protected right to familial association, (3) he did not waive his right to challenge the condition by voluntarily entering into a plea agreement, and (4) the appropriate remedy is to retain "the original sentence while striking the unlawful condition of probation." Because the defendant's parental rights have been terminated and the minor child has been adopted, we conclude that the appeal is moot.

The following facts and procedural history are relevant to our disposition of this appeal. On February 29, 2016, detectives with the Danbury Police Department were dispatched to Danbury Hospital following a reported sexual assault. Upon their arrival, they learned that the victim, who was fourteen years old, was three months pregnant. The detectives conducted a forensic interview, during which the victim indicated that she and the thirty-one year old defendant had begun exchanging text messages after he had delivered pizza to her home, and, following two sexual encounters, she became pregnant. The victim ultimately delivered the child, and arrangements were made for her sister to adopt the child.

On September 7, 2017, the defendant entered a guilty plea before the court, *Krumeich*, *J.*, to sexual assault in the second degree and risk of injury to a child. The agreed on disposition was a term of "fifteen years [of incarceration], execution suspended after . . . one

[year], followed by twenty years [of] probation." Additionally, under the plea agreement the sentence included the condition that the defendant would not contest or interfere with the adoption of the minor child conceived by the sexual assault. On October 19, 2017, the court, *Welch*, *J.*, sentenced the defendant in accordance with the plea agreement. The court also entered a no contact standing criminal protective order in favor of the victim and specified that "this order also protects the [victim's] minor children. This order shall remain in full force and effect until October 19, 2032."

On February 20, 2019, the defendant filed a motion to correct an illegal sentence, asserting that the condition violated his "constitutional rights under the first amendment and the due process clauses of the fifth and fourteenth amendments to the United States constitution and article first, §§ 8, 9, and 14, of the Connecticut constitution," and that the condition exceeded the court's authority "pursuant to General Statutes § 53a-30." He argued that he has a constitutional right to familial association and that, "[b]y requiring the defendant . . . to refrain from contesting [the] termination of his parental rights, the court's order require[d] the defendant to choose between exercising his right to contest the termination of his [parental] rights or risk violating his probation." With respect to § 53a-30, the defendant argued that the court lacked statutory authority to impose the condition because it was "not [one of the] specifically enumerated condition[s]" set forth in the statute. The defendant alleged that the proper remedy was to resentence him in accordance with the plea agreement and omit the condition concerning the adoption.

The trial court, *D'Andrea*, *J.*, heard argument on the defendant's motion to correct an illegal sentence on June 4, 2019. On October 1, 2019, the court issued a memorandum of decision denying the motion. The

court found that the provisions of § 53a-30 (a) are not exhaustive, and that, given the severity of the offense against the victim, "the condition of not contesting the adoption was one not only bargained for, but reasonable under all of the circumstances, and provided for the protection of the victim and the victim's child."

This appeal followed. On appeal, the parties disagree with respect to whether the defendant's parental rights had been terminated and whether the adoption had been completed prior to the hearing on the defendant's motion to correct an illegal sentence. The state argues that "[t]he record reveals that, on an unspecified date prior to the hearing on the defendant's motion, the defendant's parental rights had been terminated and the adoption had been completed in the Hartford [Regional Children's] Probate Court." The defendant counters that "the record does not reflect the child had been adopted" and that, "[c]ontrary to the state's assertion, there is nothing in the record indicating that the adoption had been finalized at the time of the hearing. The portion of the transcript referenced by the state [in support of its claim that the] adoption had been finalized, instead, addressed parental rights, which counsel for the defendant represented had been terminated."

Oral argument was held before this court on April 12, 2021. On May 25, 2021, we ordered the trial court, sua sponte, to resolve the following factual issues that were not clear from the record: "(1) Were the defendant's parental rights terminated, and, if so, when? (2) Was there an appeal of the decision terminating the defendant's parental rights and, if so, what is the outcome of that appeal? (3) Are adoption proceedings pending, or has the minor child been adopted and, if so, when did that order enter?" After a hearing, the trial court issued the following factual findings on June 24, 2021: "[T]he court finds (1) that the [defendant's] parental

rights were terminated by the Hartford Regional [Children's] Probate Court on December 17, 2018 . . . (2) that there was an appeal of the Hartford Regional [Children's] Probate [Court's decision] filed by the defendant . . . on January 16, 2019, in the Superior Court [in the judicial district of Fairfield] . . . Juvenile Matters at Bridgeport, which appeal was dismissed by the court for failure to appear and prosecute on July 31, 2019, and no further proceedings have occurred in the matter . . . [and] (3) that the minor child has been adopted by order of the Farmington Regional Probate Court on December 23, 2020."

Thereafter, we issued the following order on June 29, 2021: "The court having received the trial court's findings and having taken judicial notice of the attached documents hereby sua sponte orders the parties to file supplemental briefs, of no more than [ten] pages [within fourteen days] giving reasons, if any, why this appeal should not be dismissed as moot."

"Mootness is a threshold issue that implicates subject matter jurisdiction, which imposes a duty on the court to dismiss a case if the court can no longer grant practical relief to the parties. . . . Mootness presents a circumstance wherein the issue before the court has been resolved or had lost its significance because of a change in the condition of affairs between the parties. . . . [T]he existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow." (Internal quotation marks omitted.) *Wilcox* v. *Ferraina*, 100 Conn. App. 541, 547–48, 920 A.2d 316 (2007). "In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way." *Hechtman* v. *Savitsky*, 62 Conn. App. 654, 659, 772 A.2d 673 (2001).

On the basis of the trial court's findings of fact and the parties' supplemental briefs, we conclude that this appeal is moot. With respect to the termination of parental rights, the state argues that, because the adoption has been finalized, no court has the authority to open, set aside, or modify the termination of the defendant's parental rights. The defendant contends that the termination and adoption may be opened. The provisions of General Statutes § 45a-719, however, make clear that "[t]he court may grant a motion to open or set aside a judgment terminating parental rights . . . *except that no such motion or petition may be granted if a final decree of adoption has been issued prior to the filing of any such motion or petition*." (Emphasis added). Moreover, with respect to the adoption, we agree with the state that, even if an avenue to challenge the adoption existed, the defendant would lack standing to pursue it. See General Statutes § 45a-731 ("[a] final decree of adoption . . . shall have the following effect in this state . . . (5) . . . the legal relationship between the adopted person and the adopted person's biological parent or parents . . . is terminated for all purposes").

In his supplemental brief, the defendant requests, as relief, that we "reverse the decision of the trial court, remand, and order the trial court to correct the defendant's sentence by striking the condition of probation prohibiting him from contesting the termination of his parental rights and the adoption of his minor child." The minor child, however, has been adopted, the defendant's parental rights have been terminated, and the defendant's appeal of the termination of his parental rights was dismissed. Accordingly, we can no longer grant the defendant practical relief, and this appeal is moot.

The appeal is dismissed.

In this opinion the other judges concurred.

BERNARD W. NUSSBAUM ET AL. *v.* DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION
(AC 43865)

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

Syllabus

The plaintiffs, N and the trust of which N was the sole trustee, appealed to this court from the judgment of the trial court dismissing their administrative appeal from the decision of the Commissioner of Energy and Environmental Protection denying N's application for a permit to maintain fences on certain real property owned by the trust adjacent to Long Island Sound and ordering that the fences be removed. N had installed the fences, without the required permit from the defendant, the Department of Energy and Environmental Protection, in part to deter public access to the area waterward of the mean high waterline in front of the property. The property on the waterward side is public land held in trust by the state. The department thereafter issued to N a notice of violation, informing him that the fences were unauthorized and ordered him to remove them. After a hearing, a department hearing officer issued a decision recommending that N's permit application be denied. The commissioner adopted the hearing officer's decision and issued a final decision affirming the denial of the permit application and directing the hearing officer to finalize the removal order. The trial court concluded, inter alia, that the record contained substantial evidence to support the commissioner's determination that the fences were constructed on public land to deter public access to that land, and that the commissioner's decision and removal order were not unreasonable, arbitrary, capricious, illegal or an abuse of discretion. *Held* that upon this court's review of the record, and the briefs and arguments of the parties, the judgment of the trial court was affirmed, and this court adopted the trial court's thorough and well reasoned memorandum of decision as a proper statement of the facts and the applicable law on the issues.

Argued May 18—officially released August 17, 2021

Procedural History

Appeal from the decision of the defendant denying a permit application to maintain a fence on certain real property of the plaintiff Bernard W. Nussbaum Revocable Trust, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Cordani*,

J.; judgment dismissing the appeal, from which the plaintiffs appealed to this court. *Affirmed.*

John P. Casey, with whom were *Evan J. Seeman* and, on the brief, *Andrew A. DePeau*, for the appellants (plaintiffs).

David H. Wrinn, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellee (defendant).

Opinion

PER CURIAM. The plaintiffs, Bernard W. Nussbaum (Nussbaum) and the Bernard W. Nussbaum Revocable Trust (trust),[1] appeal from the judgment of the trial court dismissing their administrative appeal from the final decision of the Commissioner of Energy and Environmental Protection (commissioner), denying Nussbaum's application for a permit for two post and wire fences previously erected on certain shoreline property and ordering that the fences be removed. On appeal, the plaintiffs claim that the court erred in concluding (1) that the commissioner's final decision was not arbitrary, illegal, or an abuse of discretion, and (2) that the defendant, the Department of Energy and Environmental Protection (department), (a) properly considered that, under Connecticut law, changes to land, either natural or man-made, which amount to reclamation or erosion, *may*, under certain circumstances, alter the mean high waterline bordering private shoreline property, (b) correctly determined the location of the mean high waterline bordering the plaintiffs' property, and (c) properly balanced the plaintiffs' private rights with the public's interest in land held in trust under the statutes concerning structures, dredging, and fill; General Statutes §§ 22a-359 through 22a-363; and the Coastal Management Act,

[1] In this opinion, we refer to Nussbaum and the trust collectively as the plaintiffs, and individually by name when necessary.

General Statutes § 22a-90 et seq. We affirm the judgment of the trial court.

The record discloses the following relevant facts. The trust owns real property located at 100 and 104 Sea Beach Drive in Stamford (property), which is adjacent to Long Island Sound (sound).[2] The boundary of the property adjacent to the sound is defined by the mean high waterline and ends on the landward side of the mean high waterline. The property on the waterward side of the mean high waterline is public land held in trust by the state of Connecticut. There is a seawall on the property that generally runs parallel to the edge of the sound.

Without having first obtained a required permit from the department, Nussbaum installed two fences that run perpendicular to the seawall toward the sound. One of the fences is twenty-four and one-half feet in length, and the other one is twenty-seven and one-half feet in length. Nussbaum installed the fences, at least in part, to deter public access to the area waterward of the mean high waterline in front of the property.[3] In 2002, prior to the installation of the fences, the department had granted Nussbaum permission to place a small area of large stones, or "riprap," generally perpendicular to the seawall extending out into the sound. The area of riprap is comprised of large individual rocks with nothing, other than the ground on which they are placed, joining them. The fences at issue were installed on the riprap.

On July 16, 2012, the department issued a notice of violation to Nussbaum that the fences were unauthorized and ordered him to remove them. The fences were not removed. Instead, on October 30, 2014, Nussbaum filed an after-the-fact application with the department

[2] In their administrative appeal, the plaintiffs alleged that Nussbaum is the sole trustee of the trust.

[3] The area is covered by rocks; it is not a sandy beach. People generally access the area to fish.

for a permit for the fences. The department tentatively denied the permit application, and, on November 30, 2015, ordered that the fences be removed. Following timely requests for hearings on both the permit application and the removal order, the matters were consolidated for hearing purposes. A public comment hearing was held on August 4, 2016, and an evidentiary hearing was held on October 6, 2016. The department hearing officer issued his decision on April 21, 2017, recommending to the commissioner that the permit application be denied. The commissioner adopted the decision of the hearing officer as his own and issued a final decision on February 6, 2018, affirming the denial of the permit application and directing the hearing officer to finalize the removal order.

On March 21, 2018, the plaintiffs appealed the commissioner's decision to the Superior Court pursuant to the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq. See General Statutes § 4-183.[4] In their administrative appeal, the plaintiffs claimed that (1) they were aggrieved by the commissioner's final decision because it was illegal, arbitrary, capricious, and constituted an abuse of discretion, (2) their substantial rights were prejudiced because the commissioner's findings, inferences, conclusions or decision were in violation of statutory provisions or in excess of the commissioner's statutory authority, (3) their use and enjoyment of the property and the waters of the sound to which it is contiguous are adversely affected by the decision, and (4) the order to remove

[4] General Statutes § 4-183 provides in relevant part: "(a) A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to the Superior Court as provided in this section. The filing of a petition for reconsideration is not a prerequisite to the filing of such an appeal. . . .

"(i) The appeal shall be conducted by the court without a jury and shall be confined to the record. . . . The court, upon request, shall hear oral argument and receive written briefs. . . ."

the fence will allow members of the public to continue to trespass on the property and be at risk of injury due to the dangerous conditions on the property and its shoreline.

Following the parties' submission of briefs, the court heard argument on November 12, 2019, and issued a memorandum of decision on November 14, 2019, dismissing the plaintiffs' administrative appeal. The plaintiffs filed a motion for reconsideration and reargument on December 3, 2019, to which the defendant objected on January 2, 2020. The court granted the motion for reargument and held a hearing on the motion for reconsideration on January 9, 2020. The court issued an amended memorandum of decision on January 10, 2020, concluding that the department properly balanced the rights of the plaintiffs and the public, and that the record contains substantial evidence to support the commissioner's decision. The court also denied the motion for reconsideration.[5] The plaintiffs appealed to this court.

"Our standard of review of administrative agency rulings is well established. . . . Judicial review of an administrative decision is a creature of statute . . . and [§ 4-183 (j)] permits modification or reversal of an agency's decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) [i]n violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error or law; (5) clearly erroneous in view of the reliable,

[5] In its amended memorandum of decision, the court stated that the motion for reconsideration identified areas of the original decision that appeared to be unclear. The perceived lack of clarity arose primarily from nomenclature used by the court. The amended decision clarified those areas but did not substantively affect the court's decision or judgment. The motion for reconsideration did not raise any issue that caused the court to change substantially its decision or judgment.

probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. . . .

"Under the UAPA, the scope of our review of an administrative agency's decision is very restricted. . . . [R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither [the appellate] court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Citations omitted; internal quotation marks omitted.) *Miller* v. *Dept. of Agriculture*, 168 Conn. App. 255, 265–66, 145 A.3d 393, cert. denied, 323 Conn. 936, 151 A.3d 386 (2016). "It is fundamental that a plaintiff has the burden of proving the [agency], on the facts before [it], acted contrary to law and in abuse of [its] discretion . . . ." (Internal quotation marks omitted.) Id., 266.

In addressing the plaintiffs' claims in the administrative appeal, the court concluded that the commissioner's decision and the removal order were not unreasonable, arbitrary, capricious, illegal or an abuse of discretion. First, the court addressed the plaintiffs' claim that installation of riprap at the end of the property and into the sound moved the mean high watermark further into the sea and extended the boundary line between the property owned by the trust and the land held in trust by the state. The court observed that the

commissioner had recognized the common-law principle of reclamation by which natural or man-made structures, such as the riprap on which the fences were constructed, *may*, in certain circumstances, change the mean high waterline and, thus, extend a landowner's property into what might otherwise constitute public land held in trust by the state. It concluded, however, that the question of whether the riprap in the present case constituted reclaimed land was primarily a question of fact and that the commissioner reasonably determined, with substantial evidentiary support in the record, that the riprap had not changed the mean high waterline. Specifically, it concluded: "Seawater flows around the rocks and within the riprap. The tidal waters reach the face of the seawall, even directly behind the riprap. As such, the riprap does not stop the seawater from reaching the seawall with each high tide. Nearly all of the rocks composing the riprap are submerged at high tide. The facts substantially support the commissioner's finding that the mean high waterline did not change in this case. . . . The foregoing conclusion means that, essentially, all of the fences are on land [held] by the state in trust for the public." (Footnote omitted.)

Having concluded that the commissioner's determination that the fences were constructed on public land was supported by substantial evidence in the record, the court then addressed the plaintiffs' claim that the commissioner had failed to properly balance, pursuant to § 22a-359 (a),[6] the plaintiffs' asserted private property

[6] General Statutes § 22a-359 (a) provides in relevant part: "The Commissioner of Energy and Environmental Protection shall regulate dredging and the erection of structures and the placement of fill, and work incidental thereto, in the tidal, coastal or navigable waters of the state waterward of the coastal jurisdiction line. Any decisions made by the commissioner pursuant to this section shall be made with due regard for indigenous aquatic life, fish and wildlife, the prevention or alleviation of shore erosion and coastal flooding, the use and development of adjoining uplands . . . the use and development of adjacent lands and properties and the interests of the state, including pollution control, water quality, recreational use of public

rights in constructing the fences against the public's interest in accessing the public land that the fences obstruct. The court noted that the commissioner considered the plaintiffs' asserted rights (1) to quiet enjoyment of the land upward of the mean high waterline, (2) to be free from private nuisance, (3) to be free from trespass, and (4) to be free from lawsuits for injuries sustained by the public on public land held in trust by the state. The court concluded that, in balancing the rights asserted by the plaintiffs against the public's right to access the public land, the commissioner properly found that the plaintiffs' interests could be protected adequately without the fences, which, by design, significantly impair public access to the public land held in trust. Last, the court observed that the commissioner had acknowledged generally a landowner's ancient common-law littoral right to use and wharf out into an intertidal area, but also noted that such rights are not absolute and must be balanced against the public's right to access the land below the mean high waterline. Moreover, the commissioner determined that the very purpose of the fences was to deter the public's access to the area below the mean high waterline, not to facilitate the plaintiffs' littoral rights to access the water. In sum, the court found that the record contained substantial evidence to support the commissioner's findings and conclusions, which were reasonable under the circumstances.

We have reviewed the record and the proceedings in the trial court in accordance with the applicable standard of review. Our review of the record, as well as the briefs and arguments of the parties on appeal, persuades us that the judgment of the court should be affirmed. We, therefore, adopt the court's thorough and well reasoned amended memorandum of decision as a

water and management of coastal resources, with proper regard for the rights and interests of all persons concerned."

proper statement of the facts and the applicable law on the issues. See *Nussbaum* v. *Dept. of Energy & Environmental Protection*, Superior Court, judicial district of New Britain, Docket No. CV-18-6043337-S (January 10, 2020) (reprinted at 206 Conn. App. 742, A.3d). Any further discussion of the issues by this court would serve no useful purpose. See, e.g., *Woodruff* v. *Hemingway*, 297 Conn. 317, 321, 2 A.3d 857 (2010); *Lawrence* v. *Dept. of Energy & Environmental Protection*, 178 Conn. App. 615, 618, 176 A.3d 608 (2017).

The judgment is affirmed.

APPENDIX

BERNARD W. NUSSBAUM ET AL. *v.* DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION*

Superior Court, Judicial District of New Britain
File No. CV-18-6043337-S

Memorandum filed January 10, 2020

Proceedings

Memorandum of decision on plaintiffs' appeal from decision by defendant denying permit application to maintain fences and ordering removal of fences. *Appeal dismissed.*

John P. Casey, *Evan J. Seeman* and *Andrew A. DePeau*, for the plaintiffs.

Sharon M. Seligman and *David H. Wrinn*, assistant attorneys general, for the defendant.

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* Affirmed. *Nussbaum* v. *Dept. of Energy & Environmental Protection*, 206 Conn. App. 734, A.3d (2021).

Opinion

CORDANI, J.

INTRODUCTION

This is an administrative appeal of a final decision of the Department of Energy and Environmental Protection (defendant) denying the permit application of Bernard W. Nussbaum and the Bernard W. Nussbaum Revocable Trust (collectively, plaintiff) and ordering the plaintiff to remove certain fencing previously installed by the plaintiff.

This amended decision is being provided in response to the plaintiff's motion for reconsideration and reargument. The plaintiff's motion points out several areas where the plaintiff considers the court's original decision to be unclear, and, as such, this amended decision clarifies those areas. However, the plaintiff's motion does not raise any issue that causes the court to substantively change its decision or the judgment entered. The perceived unclarity arises, primarily, merely from certain nomenclature used by the court but does not substantively affect the decision or the judgment. Accordingly, the plaintiff's motion for reconsideration and reargument is respectfully denied.

FACTS AND PROCEDURAL HISTORY

The plaintiff owns property located at 100 and 104 Sea Beach Drive in Stamford (property). The property is adjacent to Long Island Sound. On its edge that is adjacent to Long Island Sound, the property line is defined by the mean high waterline, with the plaintiff's property ending on the landward side of the mean high waterline and property owned by the state of Connecticut as public trust on the waterward side of the mean high waterline. There is a seawall that generally runs parallel to the edge of Long Island Sound.

The plaintiff installed two fences. The date of the installation of the fences is not clear; however, it is clear that the fences were installed without a necessary permit from the defendant. The two fences separately run generally perpendicular to the seawall toward Long Island Sound. One fence is 24.5 feet in length, and the other is 27.5 feet in length. In 2002, the plaintiff, with the permission of the defendant, placed a small area[1] of large stones or riprap generally perpendicular to the seawall extending out into Long Island Sound. This area of riprap, placed by the plaintiff, is composed of large individual rocks with nothing, other than the ground on which they are placed, joining the rocks.

On July 16, 2012, the defendant issued the plaintiff a notice of violation for the two unpermitted fences and required that the fences be removed. The fences were not removed. On October 30, 2014, the plaintiff filed an after-the-fact permit application for the fences with the defendant. The defendant's staff issued a tentative determination to deny the plaintiff's permit application, and, on November 30, 2015, issued an order for the fences to be removed. The plaintiff timely requested hearings on both the permit application and the removal order. The matters were consolidated for hearing purposes. A public comment hearing was held on August 4, 2016, and an evidentiary hearing was held on October 6, 2016. The hearing officer issued his decision on April 21, 2017, recommending that the commissioner deny the permit application. A final decision was issued by the commissioner on February 6, 2018, affirming the denial of the permit applications and directing the hearing officer to finalize the removal order. The plaintiff has appealed the administrative action to this court.

[1] This area of stones, placed by the plaintiff, is referred to by the plaintiff as riprap and extends perpendicularly outward from the face of the seawall into the Sound. There is also a stone peninsula referred to as a "groin" in the applicable technical terminology, which also extends perpendicularly into the Sound.

The plaintiff is classically aggrieved because the final decision being appealed refused him a permit to maintain two fences and ordered him to remove the fences. Thus, specific legal issues, personal to the plaintiff and his property, are affected by the decision.

STANDARD OF REVIEW

This appeal is brought pursuant to the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-183.[2] Judicial review of an administrative decision in an appeal under the UAPA is limited. See, e.g., *Murphy* v. *Commissioner of Motor Vehicles*, 254 Conn. 333, 343, 757 A.2d 561 (2000). "[R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither [the Supreme Court] nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) Id.

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

Although the courts ordinarily afford deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes, "[c]ases that present pure questions of law . . . invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) *Dept. of Public Safety* v. *Freedom of Information Commission*, 298 Conn. 703, 716, 6 A.3d 763 (2010).

ANALYSIS

The fences in question cannot be lawfully installed and maintained without a permit issued by the defendant.[3] In order to be granted a permit, the fences must generally comply with the statutes concerning structures, dredging and fill (General Statutes §§ 22a-359 through 22a-363) and the Coastal Management Act (General Statutes §§ 22a-90 through 22a-111).[4] In making a decision as to whether a permit should issue for these fences, the commissioner was required to consider and balance the private landowner's property rights with the state's and the public's interest and rights in land, which is held in public trust, to determine whether the structure, the fences in this case, unreasonably impair the public rights in view of the balance of rights.

[3] Both the plaintiff and the defendant agree that at least some portion of the fences extend beyond the private property boundary of the plaintiff into land owned by the state in public trust. The parties only disagree about the extent of the incursion. Both parties agree that a permit from the defendant is necessary to install and maintain the fences. Each of the fences is within the defendant's permitting jurisdiction because they are waterward of the coastal jurisdiction line, which runs along the waterward face of the seawall.

[4] The parties agreed that the fences do not cause an adverse environmental impact and, thus, focused on balancing the plaintiff's asserted property rights against the right of the public to access the public trust (i.e., land waterward of the mean high waterline) to determine whether or not the public's access to the public trust was unreasonably impaired.

The fences in this matter were installed, at least in part, for the purpose of inhibiting the access of the public to the beach area waterward of the mean high waterline.[5] As noted previously, areas waterward of the mean high waterline are owned by the state in trust for the public. The plaintiff sought to inhibit public access to the public trust adjacent to his property for several reasons. He found that inhibiting access lessened the likelihood that the public would trespass on his property. He found that accessing the rocky area adjacent to his property was unsafe for the public. Finally, he found that some members of the public, when accessing the public trust created a nuisance that inhibited his peaceful enjoyment of his adjacent private property. The foregoing property interests were asserted on the plaintiff's side of the balance.[6]

On the other side of the balance, the public has a right to access and use the public beach, rocky or not, which includes the area adjacent to the property waterward of the mean high waterline, provided that right does not include trespassing on private property. In fact, General Statutes § 22a-92 (c) (1) (K) states that, in permitting any new coastal structure, public access to and along the public beach below the mean high waterline must not be unreasonably impaired.

In balancing these interests and determining reasonableness, we first must consider the extent of the incursion by the fences into the public trust. Neither party

[5] The permit application for the fences states that their purpose is to "deter the general public from using the immediate area around a rock strewn jetty which becomes [covered] by high tide waters. . . . The fences do not completely prohibit public access, but provide a visible barrier and warning [that, in the opinion of the applicant, the area] is unsafe and not monitored. There are other more safer areas nearby that the public could use for fishing." It should be noted that the "rock strewn jetty" referred to is part of the public trust.

[6] Although not directly asserted, a landowner bordering water has a right to wharf out into the water subject to reasonable regulation and subject to the public's right to access to the public trust.

disputes that at least a portion of each fence extends beyond the property owned by the plaintiff into the public trust. The parties only disagree about the extent of the incursion. The disagreement in this regard revolves around determining whether installation of the riprap shifted the mean high waterline.[7] Mean high waterline means the line where the arithmetic mean of the high water heights observed over a specific cycle (the National Tidal Datum Epoch) meets the shore. Thus, the mean high waterline is a fact to be measured for any particular piece of real estate. It is important because it determines the property boundary when private property borders the sea. For purposes of this appeal, it therefore determines the extent of the incursion of the fences onto public property.

The parties both agree that the mean high waterline, and therefore the property line, was at the waterward face of the seawall in the area of the fences prior to installation of the riprap. The plaintiff argues that installation of the riprap moved the mean high waterline farther into the sea. The defendant disagrees. It is clear that changes to the land may shift the mean high waterline. In both *Lockwood* v. *New York & New Haven Railroad Co.*, 37 Conn. 387, 391 (1870), and in *Rapoport* v. *Zoning Board of Appeals*, 301 Conn. 22, 49–50, 19 A.3d 622 (2011), our Supreme Court accepted that, changes to the land, either natural or man-made, which amount to either land reclamation or erosion, may change the mean high waterline. Thus, it is clear that changing the mean high waterline is theoretically possible. The question is, did the installation of the riprap change the mean high waterline in this case. The commissioner found that it did not. The court finds that this conclusion

[7] The permit issued for installation of the riprap noted that the authorization to install the riprap "conveys no property rights in real estate or material, nor any exclusive privileges, and is further subject to any and all public and private rights."

is supported by substantial evidence in the record, is not a clear error of law, is not arbitrary and capricious, and is not an abuse of discretion.

The riprap is a series of large rocks running perpendicular into the sea. Nothing connects the rocks other than their placement on the ground. Seawater flows around the rocks and within the riprap. The tidal waters reach the face of the seawall, even directly behind the riprap. As such, the riprap does not stop the seawater from reaching the seawall with each tide. Nearly all of the rocks composing the riprap are submerged at high tide. These facts substantially support the commissioner's finding that the mean high waterline did not change in this case.[8] The commissioner understood that the mean high waterline could theoretically change based on physical changes to the land but found in this case that the riprap did not in fact change the mean high waterline because of the physical attributes of the riprap and its physical interaction with the sea, and, as such, the riprap did not amount to reclaimed land.[9]

[8] The plaintiff's expert (Raymond L. Redniss) testified that the installation of the riprap did not change the mean high waterline for property boundary purposes but did change it for permitting purposes. This argument makes no sense. The mean high waterline is a fact that is measured. It cannot have two disparate answers. The defendant's expert (Brian D. Florek) testified that the mean high waterline remained coincident with the waterward face of the seawall in the area of the fences, and that the riprap was not a solid [or continuous] surface, and, as a result, could not move the mean high waterline. Given Florek's evidence, it is clear that the commissioner's finding is supported by substantial evidence in the record.

[9] In his final decision dated February 6, 2018, on page 8, the commissioner states: "Hearing Officer [Brendan] Schain found that the placement of the riprap *did not create the type of "reclamation"* that could result in a permanent accession to Mr. Nussbaum's property because water continues to flow over and around the riprap to the base of the seawall." (Emphasis added.) The hearing officer found that the riprap was not a continuous solid surface and, as such, the placement of the riprap did not constitute reclamation and did not move the mean high waterline. Thus, the commissioner, and the hearing officer, understood that reclamation could theoretically occur; however, they factually found that placement of the riprap was not reclamation and did not move the mean high waterline because of the physical attributes of the riprap and its interaction with the sea. Surveying expert

The foregoing conclusion means that, essentially, all of the fences are on land owned by the state in trust for the public.[10] As noted previously, the purpose of the fences is to restrict public access to areas within the public trust.[11] The record evidence indicates that the fences have in fact been significant deterrents to public access.[12]

In balancing the property rights of the plaintiff against the rights of the state and public to access the public trust,[13] the commissioner considered the following private property rights: (i) right to quiet enjoyment, (ii) right to be free from private nuisance, (iii) right to be free from trespass, and (iv) the right to be free from lawsuits for injuries sustained by the public.[14] In balancing these rights against the right of public access to the public beach, the hearing officer found that each of the foregoing private property rights can be exercised without the need to deter or constrain public access to the land of the public trust. The right to be free from trespass on the plaintiff's private property may be exercised by placing a fence on the private property line

Brian D. Florek agreed and testified as such, clearly providing substantial evidence in support of the foregoing findings by the commissioner and the hearing officer.

[10] However, regardless of the analysis of the riprap and the mean high waterline, a portion of the fences extends into the public trust, and the plaintiff has not asserted any property right which would justify his placing a fence on public land with the very purpose and function of impeding the public's access to its own land.

[11] There are about eight to ten feet between the end of the fences and the mean low waterline.

[12] The plaintiff himself confirmed this fact in his testimony concerning aggrievement at the hearing in this matter.

[13] The public has a right to access the land extending from the mean high waterline waterward to the water, although this right of access does not include a right to trespass on private property. In this area it is possible for the public to access the public trust without trespassing on the private property of the plaintiff.

[14] See April 21, 2017 hearing officer decision on page 10, first paragraph. The commissioner also considered the plaintiff's right to wharf out into the water.

within the private property of the plaintiff,[15] as opposed to extending a fence onto the public trust. The right to quiet enjoyment and to be free from nuisance can be asserted by contacting and cooperating with the public authorities in the enforcement of existing law.[16] The right to be free from lawsuits for injuries occurring on the plaintiff's private property may be asserted by placing a fence on the edge of his property, placing appropriate signs and/or contacting and cooperating with the authorities in the enforcement of existing law. Accordingly, the hearing officer found that the exercise of the plaintiff's private property rights did not justify placing a fence on public property when balanced against the right of the public to have access to the public property. This court finds no fault in the hearing officer's analysis and balancing, for it would be quite an unusual circumstance for one person's private property rights to extend as far as placing a fence on someone else's property for the very purpose of deterring access by the other owner to their own property.

The hearing officer correctly noted that the aforementioned private property rights asserted by the plaintiff concerned the use of his "upland property," meaning the property whose title is actually owned by the plaintiff. Thus, the hearing officer properly considered this in his balance of rights, ultimately concluding, as noted, that the rights asserted did not justify the fences' interference with the public's right to access the public trust.

Although not frontally asserted by the plaintiff, the hearing officer also considered and contrasted the

[15] The plaintiff previously had such a fence, but it was destroyed in a hurricane. The plaintiff has not sought permission to reconstruct such a fence within the bounds of his private property.

[16] The type of nuisance complained of by the plaintiff, such as litter, cannot justify the draconian remedy of preventing the public from accessing its own land, particularly when less drastic and more typical means of addressing the issue are available.

plaintiff's littoral rights, which, as a shore property owner, do authorize him to use the intertidal area, subject to the applicable statutes and regulations, and subject to the public's rights. These rights are ancient common-law rights that are subject to a balancing against the public's right to access the public trust. Thus, littoral rights include the right to wharf out into the water, and to build a pier, dock or other structure whose purpose is to facilitate the coastal landowner's access to and use of the water. These rights are not absolute and have been properly regulated. Here, the hearing officer compared those rights to the plaintiff's desire to place the fences. The hearing officer properly noted that, when authorization is given to construct wharfs, piers and other structures, the authorizations always seek to ensure that the structure does not unreasonably impair the public access. In this case, the very purpose, intent and function of the fence is to impair the public's access. Accordingly, the comparison further justified the hearing officer's rejection of the plaintiff's permit application.

The plaintiff takes the commissioner to task on several primary points. First, the plaintiff asserts that the commissioner's failure to find that the installation of the riprap moved the mean high waterline is inconsistent with *Lockwood* and *Rapoport*. Such is not the case. Clearly, the common law, and the foregoing two cases, recognize that natural and/or man-made structures or action *may* change the mean high waterline. However, whether the mean high waterline has in fact changed is primarily a fact question to be measured and assessed. Here, the commissioner considered the riprap and reasonably concluded, with substantial evidentiary support in the record, that the riprap had not changed the mean high waterline.[17]

[17] The plaintiff correctly points out that the mean high waterline is determined by elevation measurement, measuring where the water intersects the shore. However, the plaintiff ignores the issue that the finder of fact must

Second, the plaintiff claims that the commissioner did not consider all of the plaintiff's property rights in conducting the balance. The plaintiff complains that the commissioner only considered the plaintiff's littoral rights. Such is clearly not the case. The commissioner considered all of the property rights asserted by the plaintiff, as reflected in the April 21, 2017 decision. In this court's view, the commissioner considered and balanced all rights asserted by the plaintiff but arrived at the reasonable conclusion that the plaintiff's rights did not justify the incursion of the fences into the public's right of access. The court finds no clear error in this conclusion. In this regard, the commissioner properly considered and weighed the fact that the very purpose, intention and function of the fences is to impair public access to the public trust.[18]

The plaintiff asserts that the fences are also meant to protect the public, essentially, from itself. In this regard, the record indicates that the groin is slippery and that fishermen have gotten surrounded by the incoming tide when fishing on the groin. See footnote 1 of this opinion. Despite the foregoing, the plaintiff is not in a position to place a fence on public property even if it would function to protect the public by impeding its access to a dangerous area. Decisions to protect the public on public land are best left to the public itself and/or to the government.

CONCLUSION

Given the standard of review in this administrative appeal, and given the factually intensive determinations

determine—whether a specific structure, such as the riprap, constitutes land or the shore. Here, the commissioner determined, as supported by the evidence of surveying expert Brian D. Florek, that the riprap was not a continuous solid structure and did not amount to reclamation.

[18] Contrary to the plaintiff's assertions, the commissioner did not seek to maintain a policy of denying all structures, other than docks and piers, below the mean high waterline. Instead, the commissioner properly balanced the asserted private property rights against the public's right to access to

of determining the mean high waterline and then balancing the private property interests against the public's interest in access to the public trust land, the court finds that the record contains substantial evidence to support the commissioner's conclusions,[19] and the conclusions reached are reasonable. The court finds no clear error of law and no abuse of discretion in the underlying decision to deny the permit application and require removal of the unpermitted fences.

ORDER

The plaintiff's motion for reconsideration is denied.

The appeal is dismissed.

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the public trust and reached a conclusion that these two fences failed in the balance.

[19] The commissioner adopted the decision of the hearing officer as his own.

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NOTICE OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 21-AJ: Updates to Alternative Benefit Plan (ABP) for the Medicaid Coverage Group for Low-Income Adults Regarding Removal of Requirement for Providers to Obtain Registration Before Performing Routine Outpatient Behavioral Health Services

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS), which will amend the Alternative Benefit Plan (ABP) at Attachment 3.1-L of the Medicaid State Plan.

The ABP is the benefit package that, effective January 1, 2014, is provided to the Medicaid low-income adult population under section 1902(a)(10)(A)(i)(VIII) of the Social Security Act (also known as HUSKY D). Pursuant to section 2001 of the Affordable Care Act, effective January 1, 2014, Connecticut expanded Medicaid eligibility to low-income adults with incomes up to and including 133% of the federal poverty level. The expanded coverage group is referred to as Medicaid Coverage for the Lowest-Income Populations.

Changes to Medicaid State Plan

Effective July 1, 2021, SPA 21-AJ will amend the ABP (Attachment 3.1-L of the Medicaid State Plan) in order to remove references to the requirement for providers in specified categories (outpatient hospital services, behavioral health clinic services, physician services, and services of behavioral health clinicians in independent practice, specifically psychologists, licensed clinical social workers, licensed marital and family therapists, and licensed alcohol and drug counselors) to obtain registration before performing routine outpatient behavioral health services. Prior authorization has also been removed for electroconvulsive therapy. The purpose of this SPA is to remove administrative barriers to enabling Medicaid members to have full access to routine outpatient behavioral health services and is also designed to ensure that the ABP remains in compliance with all applicable requirements, including 42 C.F.R. §§ 440.345(c) and 440.395.

This SPA will not make any other changes to the ABP than as described above, which will continue to reflect the same coverage in the ABP for HUSKY D Medicaid members as in the underlying Medicaid State Plan. Accordingly, the ABP will continue to provide full access to Early and Periodic Screening, Diagnostic and Treatment (EPSDT) services to beneficiaries under age twenty-one. This includes informing them that EPSDT services are available and of the need for age-appropriate immunizations. The ABP also provides or arranges for the provision of screening services for all children and for corrective treatment as determined by child health screenings. These EPSDT services are provided by the DSS fee-for-service provider network. EPSDT clients are also able to receive any additional health care services that are coverable under the Medicaid program and found to be medically necessary to treat,

correct or reduce illnesses and conditions discovered regardless of whether the service is covered in Connecticut's Medicaid State Plan.

Likewise, this SPA will not make any changes to cost sharing for the services provided under the ABP. Connecticut does not currently impose cost sharing on Medicaid beneficiaries. Because there are no Medicaid cost sharing requirements for Connecticut beneficiaries, no exemptions are necessary in order to comply with the cost sharing protections for Native Americans found in section 5006(e) of the American Recovery and Reinvestment Act of 2009.

Fiscal Impact

This SPA will not change annual aggregate expenditures.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: https://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-State-Plan-Amendments. The SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference ''SPA 21-AJ: Updates to Alternative Benefit Plan (ABP) for the Medicaid Coverage Group for Low-Income Adults Regarding Removal of Requirement for Providers to Obtain Registration Before Performing Routine Outpatient Behavioral Health Services''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than September 16, 2021.

DEPARTMENT OF HOUSING

Notice Under the Affordable Housing Appeals Procedure Receipt of an Application for a Certificate of Affordable Housing Project Completion (aka for a Moratorium) from the Town of Brookfield

In accordance with C.G.S. 8-30g, the Connecticut Department of Housing is in receipt of a completed application (August 10, 2021) for a Certificate of Affordable Housing Project Completion (a Moratorium of Applicability) from the Town of Brookfield. A notice was previously published in the Connecticut Law Journal, however, additional information was necessary to complete the review. The revised effective date of application receipt is August 10, 2021. As per Connecticut General Statutes Section 8-30g(l)(4)(B), upon publication in the Connecticut Law Journal, a thirty (30) day public comment period will begin on August 17, 2021 and end on September 16, 2021. DOH will accept electronic input/comment on the completed application at CT.HOUSING.PLANS@ct.gov. All input and comments received will be taken into consideration. Any public comments received by DOH pursuant to that prior notice will also be considered. A copy of this completed application is available for viewing electronically at the Department of Housing website (www.ct.gov/doh) or at the Connecticut Department of Housing by appointment. For information please call or e-mail to Laura Watson, Economic and Community Development Agent, at (860) 270-8169 or laura.watson@ct.gov.

NOTICE

Notice of Interim Suspension of Attorney and Appointment of Trustee

Pursuant to § 2-54 of the Connecticut Practice Book, notice is hereby given that on July 15, 2021, in Docket No. LLI-CV20-6025780S, Richard P. Lawlor, Juris No. 033528 of Hartford, Connecticut, was placed on suspension from the practice of law for thirty (30) days, effective September 1, 2021.

Pursuant to Practice Book § 2-64, Attorney Henry C. Winiarski, Jr., Juris No. 10080 of Hartford, Connecticut is appointed as Trustee to take such steps as are necessary to protect the interests of respondent's clients, inventory the client files, receive the business mail, and take control of respondent's clients' funds, IOLTA, and all fiduciary accounts. Such Trustee shall not make any disbursements from said accounts without the prior authorization of the Court. The Trustee shall also notify all active clients of the respondent's suspension.

The Respondent shall not deposit into, or disperse any funds out of, any clients' funds, IOLTA, or fiduciary accounts.

The Respondent shall comply with Practice Book § 2-47B (Restrictions on the Activities of Deactivated Attorneys).

Within seventy-two (72) hours of this order, the respondent shall provide his client in the underlying proceeding with written notice advising the client of the entry of the nonsuit as well as any other disclosures required by the Rules of Professional Conduct. Written proof of receipt by the client of this notice shall be promptly provided to Disciplinary Counsel.

Prior to reinstatement, the respondent shall, by motion, demonstrate to the court that he has become proficient in the use of Microsoft Teams for the purpose of participating in remote court hearings and has the necessary computer or other devices available to him to do so.

Prior to reinstatement, the respondent shall, by motion, demonstrate to both the Disciplinary Counsel and the court that he has initiated a reliable office procedure for identifying and calendaring court notices and activity on his cases.

Within six (6) months of the date of this order, the respondent shall attend a continuing legal education course in small law office management. Respondent may request additional time to complete this condition if classes are not being offered.

The court reserves the right to impose additional disciplinary sanctions should the plaintiff's motion to reopen be denied and the plaintiff loses his right to prosecute his appeal through adverse judgement or otherwise.

The court will schedule a hearing approximately thirty (30) days from the date of respondent's suspension so that respondent may be heard on the issue of reinstatement and his compliance with these orders.

The respondent's failure to comply with this order shall be considered misconduct and may subject the respondent to additional discipline.

Dan Shaban
Assistant Administrative Judge