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CONNECTICUT REPORTS

Vol. 338

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* MICHAEL T.*
(SC 20230)

McDonald, D'Auria, Mullins, Ecker, Keller and Vertefeuille, Js.

Syllabus

Pursuant to statute (§ 54-84 (b)), "[u]nless the accused requests otherwise, the court shall instruct the jur[ors] that they may draw no unfavorable inferences from the accused's failure to testify."

Convicted of multiple counts of first degree sexual assault and risk of injury to a child in connection with the sexual abuse of the victim, the daughter of his girlfriend, the defendant appealed to this court. The victim, who

* In accordance with our policy of protecting the privacy interests of the victims of sexual abuse 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.

was eleven years old at the time of trial, was reluctant to testify about the sexual assaults. On direct examination, the victim indicated that the defendant had hurt her "private" with "[h]is private." Shortly thereafter, the prosecutor reworded the victim's testimony and referred to the victim's testimony that the defendant had "put his private in [the victim's] private." In response to a question about whether anything had come out of either her private or the defendant's private, the victim responded that blood had come out of "[h]is" private, but the prosecutor subsequently referred to the blood that came out of the victim's, not the defendant's, private parts. The defendant did not testify at trial, and defense counsel requested that the trial court instruct the jury that the defendant "elected not to testify" rather than use the specific language in § 54-84 (b) regarding his "failure to testify," which counsel claimed has a negative connotation and suggested that the defendant had an obligation that he did not fulfill. The trial court denied counsel's request, indicating that its failure to use the statutory language might constitute plain error. The trial court subsequently instructed the jury that it could draw no unfavorable inference from the defendant's failure to testify. On appeal, the defendant claimed that he was denied his due process right to a fair trial by virtue of certain improprieties the prosecutor made while questioning the victim and during closing and rebuttal arguments. The defendant also challenged the trial court's jury instruction regarding his "failure" to testify. *Held*:

1. There was no merit to the defendant's claim that the prosecutor improperly relied on facts not in evidence by referring to the victim's testimony that the defendant had "put his private in [the victim's] private" and that blood had come out of her private: although it would have been preferable for the prosecutor to ask the victim clarifying questions rather than rephrase her words to correct the victim's plainly mistaken testimony, the prosecutor's statement that the defendant penetrated the victim was a reasonable and necessary inference drawn from the victim's testimony that the defendant had hurt her private with his private, the victim expressly testified on redirect examination that the defendant's private went into her private, and defense counsel did not object to the prosecutor's questions rephrasing the victim's testimony or contest the ample evidence that the victim had suffered a traumatic penetrating injury, contending only that the defendant was not the perpetrator; moreover, the salient point of the victim's testimony was the presence, not the source, of blood in her genital area after the assault, and the jury could reasonably infer that, at her young age, the victim simply did not know the source of the blood; furthermore, in light of the victim's age and reluctance to testify, it was within the trial court's discretion to allow the use of leading questions during the prosecutor's examination of the victim, and the prosecutor's remarks rephrasing the victim's testimony were not significantly more suggestive of independent knowledge of facts than a leading question would have been or deliberately

intended to distort the victim's testimony or to suggest that the prosecutor had knowledge of facts that could not be presented to the jury.

2. The defendant could not prevail on his claim that the prosecutor engaged in certain improprieties during closing and rebuttal arguments: the prosecutor did not improperly argue facts not in evidence or appeal to the jurors' emotions by thanking the jurors for paying attention to the evidence, apologizing to them for any anxiety the evidence, particularly certain photographs, had caused, and remarking on the difficulty of viewing evidence and hearing testimony of such a nature, as those statements were based on facts in evidence and the reasonable inferences that could be drawn therefrom, defense counsel did not object to those remarks and thanked the jurors during his own closing argument, acknowledging that the case was difficult, emotionally compelling, and "disgusting," and the prosecutor's remark that the state had "tried to keep it to a minimum" was, at most, a comment on the state's effort not to present cumulative evidence rather than a suggestion that the state possessed additional photographic evidence that would strengthen its case; moreover, the prosecutor did not improperly appeal to the jurors' emotions or vouch for the victim's credibility when she asked whether the victim looked like the type of child who would have made up the sexual assault, by characterizing the victim as extremely shy and passive, and by noting that the victim had been tearful and embarrassed during a video-recorded forensic interview, as those remarks were in response to an argument initially raised by the defense, namely, that the victim had lied about the sexual assault allegations because she did not want to live with the defendant, and simply attempted to rebut that argument on the basis of the evidence before the jury of the victim's appearance and demeanor; furthermore, although it was a closer question as to whether the prosecutor improperly vouched for the victim's credibility by asking if her emotions were real, answering that question in the affirmative, and stating that such emotion is hard to fake, in context, those remarks did not improperly induce the jurors to trust the state's judgment in lieu of their own views of the evidence but, rather, referred to evidence that had been presented at trial and appealed to the jurors' common sense and life experiences; furthermore, the prosecutor's comments concerning the victim's injuries to her genital area, namely, that she had been "ripped" and torn without the benefit of pain medication, although approaching an impermissible plea for sympathy, did not materially mischaracterize the testimony of the pediatrician who had examined the victim or exaggerate the severity of the victim's suffering and, therefore, were not improper.

3. The defendant could not prevail on his claim that the trial court improperly denied defense counsel's request that the court deviate from the language of § 54-84 (b) and his alternative claim that § 54-84 (b) is unconstitutional insofar as it violates the constitutional right to remain silent by referring to the defendant's "failure" to testify:

a. The trial court did not violate § 54-84 (b) by denying defense counsel's request that it instruct the jury that it could draw no adverse inference from the fact that the defendant elected not to testify: contrary to the defendant's claim that the phrase "[u]nless the accused requests otherwise," as used in § 54-84 (b), required the trial court to give the requested instruction, a review of relevant case law, including *State* v. *Casanova* (255 Conn. 581), revealed that, although a trial court may grant a defendant's request for an instruction that deviates from the specific wording of § 54-84 (b) if the instruction would not materially alter the substantive meaning of the statute, it is not required to grant such a request but may give any instruction that accurately states the law, and, in the absence of a request by a defendant that the court give no instruction concerning the fact that he did not testify, the court's failure to give an instruction pursuant to § 54-84 (b) constitutes plain error; accordingly, although the trial court incorrectly determined that any deviation from the specific wording of § 54-84 (b) would be plain error, and the trial court could have given the instruction that defense counsel requested, as it would not have mischaracterized the defendant's conduct or altered the substantive meaning of the statute, it was not improper for the trial court to instruct the jury using the statute's specific wording; moreover, the defendant's claim that *Casanova* should be overruled was unreviewable, as it was inadequately briefed.

b. This court rejected the defendant's claim that § 54-84 (b) was unconstitutional to the extent that it authorized the trial court to refer to the defendant's "failure" to testify; although this court agreed with the defendant that more neutral language is preferable to the use of the word "failure," which has a relatively negative connotation and tends to confirm the jurors' natural assumption that an innocent person would take the stand to respond to accusations against him, there is no completely neutral way to characterize the fact that the defendant did not take the stand, and the semantic difference between the phrase "failure to testify" and other wordings was too slight to have constitutional significance in the overall context of the instruction in the present case.

(*One justice concurring separately*)

Argued October 14, 2020—officially released April 22, 2021**

Procedural History

Substitute information charging the defendant with three counts each of the crimes of sexual assault in the first degree and risk of injury to a child, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Blue*, *J.*; verdict and judgment

** April 22, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

of guilty, from which the defendant appealed to this court. *Affirmed.*

Julia K. Conlin, assigned counsel, with whom was *Emily Graner Sexton*, assigned counsel, for the appellant (defendant).

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Maxine Wilensky* and *Lisa D'Angelo*, senior assistant state's attorneys, for the appellee (state).

Opinion

VERTEFEUILLE, J. A jury found the defendant, Michael T., guilty of three counts of first degree sexual assault in violation of General Statutes § 53a-70 (a) (1) and three counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2). The trial court rendered judgment in accordance with the verdict and sentenced the defendant to a total effective sentence of sixty years imprisonment. The defendant appeals directly to this court pursuant to General Statutes § 51-199 (b) (3), claiming that the prosecutor engaged in prosecutorial impropriety, thereby depriving him of his constitutional due process right to a fair trial, by (1) assuming facts not in evidence while questioning the victim, and (2) during closing argument, assuming facts not in evidence, vouching for the victim's credibility and appealing to the jurors' emotions. The defendant further claims that the trial court violated General Statutes § 54-84 (b)[1] and infringed on his constitutional right to remain silent when it denied his request to instruct the jury that he *elected not* to testify and, instead, referred to his *failure* to testify. We affirm the judgment of conviction.

[1] General Statutes § 54-84 (b) provides in relevant part: "Unless the accused requests otherwise, the court shall instruct the jury that they may draw no unfavorable inferences from the accused's failure to testify. . . ."

The record reveals the following facts, which the jury reasonably could have found, and procedural history. The victim was born in December, 2006, and was eleven years old at the time of trial. In 2014 and 2015, when the victim was seven and eight years old, respectively, she lived on Orchard Street in New Haven with her biological mother, her four younger sisters and the defendant. The defendant was the boyfriend of the victim's mother, and the victim referred to him as her "stepfather." On a number of occasions during that period, the defendant called the victim into his bedroom, undressed her,[2] lay her on his bed and penetrated her with his penis vaginally, orally and anally. The defendant told the victim not to tell anyone about the assaults and threatened to kill her if she disobeyed him.

In August, 2015, the victim and her sisters were removed from the Orchard Street residence as the result of an investigation by the Department of Children and Families (department) that was unrelated to the sexual assaults of the victim. The victim and one of her sisters were placed in June Turpin's licensed foster home. After they had been there for several days, Turpin found in their bedroom a pair of the victim's underwear with a clean sanitary napkin stuck to it and another pair of underwear covered in dried blood. Turpin called Quentin Scott, an investigative social worker for the department, who referred Turpin to Cherise Rowan, a physician at the Fair Haven Community Health Center.

Rowan examined the victim on August 27, 2015. The victim denied that she was still bleeding but nodded her head when Rowan asked her if the defendant had done anything to "her private area." Rowan determined that the victim was prepubertal and that menstruation would not have been possible.

[2] There was conflicting evidence as to whether the defendant undressed the victim or directed her to undress herself.

The day after Rowan's examination of the victim, Monica Vidro, a forensic interviewer at the Yale Child Abuse Clinic (clinic), conducted a forensic interview of the victim. During the interview, the victim reported that the defendant had assaulted her vaginally, orally and anally. The victim was extremely reluctant to speak to Vidro during the interview; her speech was frequently inaudible, and she wept almost continuously.

Rebecca Moles, a child abuse pediatrician with the clinic, examined the victim immediately after the forensic interview. Moles determined that a portion of the victim's hymen was missing as the result of a tearing injury to the adjacent skin and mucosa,[3] resulting in a purplish discoloration of the area. The injury, which Moles likened to "an episiotomy[4] or [the] tearing that can happen with childbirth," was severe and would have caused pain to the victim. (Footnote added.) In addition, because that area of the body is highly vascular, i.e., permeated by blood vessels, the injury would have caused bleeding. Moles concluded that the victim's injury was diagnostic of a prior penetrating trauma. Moles recorded her examination of the victim using a video colposcope, and a still image of the victim's injury taken from the video recording was presented to the jury as an exhibit. Moles again examined the victim two months after her initial examination to assess whether the injury was healing, and a photograph of the injury that she took during that examination was also presented to the jury.

[3] Mucosa is the moist tissue that lines certain parts of the inside of the body. See National Institutes of Health, United States National Library of Medicine, MedlinePlus, "Mucosa" (last modified February 26, 2021), available at https://medlineplus.gov/ency/article/002264.htm (last visited April 19, 2021).

[4] Moles testified that an episiotomy is a medical procedure performed by an obstetrician during childbirth whereby the obstetrician cuts the tissue between the opening of the vagina and the anus in order to prevent a tearing injury.

The defendant was charged in a six count information with (1) compelling the victim to engage in vaginal/penile intercourse by the use of force in violation of § 53a-70 (a) (1), (2) having contact with the victim's genital area in a sexual and indecent manner likely to impair her health or morals in violation of § 53-21 (a) (2), (3) compelling the victim to engage in fellatio by the use of force in violation of § 53a-70 (a) (1), (4) causing the victim to have contact with his genital area in a sexual and indecent manner likely to impair her health or morals in violation of § 53-21 (a) (2), (5) compelling the victim to engage in anal intercourse by the use of force in violation of § 53a-70 (a) (1), and (6) having contact with the victim's anus in a sexual and indecent manner likely to impair her health or morals in violation of § 53-21 (a) (2).

Before trial, the trial court granted the prosecutor's request that the victim's stepmother sit with her on the witness stand pursuant to General Statutes § 54-86g (b).[5] The trial court observed that "there's no compelling necessity test [for granting such a request], it's just simply the question of whether it will help [the victim] to testify completely and reliably . . . ." The court further observed, however, that, based on its interview of the victim on the stand in the absence of the jury, "if there were a stronger requirement, [it] would find that in this case, because it's very clear [that the victim] will clam up otherwise."

During trial, the prosecutor asked the victim what the defendant had done to her. The victim responded,

[5] General Statutes § 54-86g (b) provides in relevant part: "In any criminal prosecution of an offense involving assault, sexual assault or abuse of a child twelve years of age or younger, the court may, upon motion of the attorney for any party, order that the following procedures be used when the testimony of the child is taken . . . (2) an adult who is known to the child and with whom the child feels comfortable shall be permitted to sit in close proximity to the child during the child's testimony, provided such person shall not obscure the child from the view of the defendant or the trier of fact . . . ."

"[h]e hurt me." The prosecutor then asked her, "how did he hurt you? Did he hurt your private?"[6] The victim responded, "[y]es." After the victim responded, defense counsel made an objection, which the trial court overruled. The prosecutor then asked the victim, "what did [the defendant] hurt your private with?" The victim responded, "[h]is private." A short time later, the prosecutor asked the victim, "[w]hat does he do . . . when you're on the bed? You said he put his private in your private." After the victim responded "[y]es," defense counsel objected, and the trial court again overruled the objection. During subsequent questioning of the victim, the prosecutor indicated on several occasions that the defendant had "put his private in [the victim's] private."[7] On redirect examination, the prosecutor asked the victim: "[J]ust so everybody understands, where did [the defendant's] private go, in or outside of your private?" The victim responded, "[i]n."

The prosecutor also asked the victim whether anything had "come out of [her] private or [the defendant's] private . . . ." She responded "[h]is" and indicated that the substance was blood. The prosecutor then asked: "And where did the blood—it came out of your private and went where? The bed, your underwear, his—on him, where?" The victim responded, "[b]ed." The victim also testified that the defendant had put his "private" in her "private" on multiple occasions, that he had put his "private" inside her mouth, that he had put his "pri-

[6] During the forensic interview of the victim, the victim indicated that she referred to genitals as "privates." A redacted video recording of the interview was presented to the jury.

[7] The prosecutor asked the following questions: "[W]here was [the defendant] when he put his private in your private?" "[W]hen he put his private in your private . . . how did it feel?" "Did [the defendant put his private in your mouth] on the same day he put his private in your private or a different day?" "When [the defendant] put his private in your private, were you on your stomach, your back, your side, which?" And "when [the defendant] put his private in your private, did he tell you that this was okay because he did it to your mom, too?"

vate" inside her "butt," and that, during one of the assaults, he held her face down on the bed so that she had difficulty breathing.[8]

The victim further testified that she was frightened of the defendant. The victim's aunt testified that, when the victim came to stay with her, the victim would not want to return home because she was scared and that, when they saw the defendant at a store once during an outing, the victim cried and tried to hide behind her.

Lisa Melillo, a school psychologist and trained forensic interviewer, testified as an expert witness for the state about behaviors that are typical for children who have been sexually abused. Melillo testified that trauma can heighten a child's memory of an event and that sexual abuse by a person known to the child can increase the trauma.

During closing argument, the prosecutor stated to the jury: "I . . . want to thank you for the attention that you have paid to the evidence in this case, and I could see sometimes it wasn't as easy as it either would've been, should've been, if it were a different type of trial, and I apologize for any anxiety any of the evidence may have caused you. . . . I also want to apologize for the photos that you had to view. The state tried to keep it to a minimum. Unfortunately, it was necessary that you viewed them."

Defense counsel stated to the jury during closing argument that "[t]his is an exceptionally difficult and disappointing and disgusting case, and I am very thankful that you came down here and sat through this . . . . [I]t's a very emotionally compelling case; it's a case that gets you fired up . . . ." Defense counsel also argued that the victim had fabricated the allegations that the

[8] The victim stated during the forensic interview that this occurred when the defendant penetrated her anally.

defendant had sexually assaulted her because "she wanted out of that house . . . ." Defense counsel further argued that the victim might have identified the defendant as the person who assaulted her because of Rowan's suggestive question to the victim during her initial examination at the Fair Haven Community Health Center whether the defendant had done anything to her "private area."

During rebuttal argument, the prosecutor stated that "[defense counsel] . . . asked you to assume, not draw a reasonable inference, but assume that the reason [the victim] brought all of this up is that she wanted out of the house. Did you hear anyone on that witness stand say anything about her wanting out of the house? Does she look like the type of child who would have been evil enough to make this up to get out of the house?" The prosecutor further stated that "[the victim] is an extremely passive, helpless girl folding in on herself, shy, painfully shy. She was highly uncomfortable. In the forensic [interview], there were tears, she was embarrassed. Were those emotions real? The state submits to you absolutely they were. It's easy to fake facts. It's much harder to fake emotion like you saw [in] the forensic [interview] and on that witness stand."

Later during rebuttal, the prosecutor stated: "Moles talked about that scar below where the hymen is missing. She said it's a scar, it was a tearing injury similar to an episiotomy. [The victim] did not have the luxury of an episiotomy and a doctor who could give her . . . some sort of pain medication. She was ripped. You heard the doctor say that was a tearing injury."

The prosecutor also asked, with reference to the victim's testimony that the defendant had held her head against the bed during one of the assaults: "Does she look like a child who's sophisticated enough to give you that kind of facts? If wishes could come true, this

would never have happened, but it did. [The victim] told people in 2015, and she told them and told you in 2018, and, if wishes could come true, we wouldn't have to have witnesses like [the victim], children, who have to be—who have to become embarrassed, they have to show you their pain, they have to describe to you their betrayal of trust, and show you [their] tears, all when she was seven and eight."

During the course of the trial, the trial court conducted a conference with the prosecutor and defense counsel to review the court's proposed jury instructions. Defense counsel objected to the proposed instruction that the jury could draw no unfavorable inference from the defendant's "failure" to testify, arguing that "[the word failure] gives a negative connotation, and it makes it seem as though he had an obligation and he failed to do it." Defense counsel requested that the trial court instead instruct the jury that the defendant "elected not to testify." The trial court stated that "the legislature mandates this charge" and indicated that, if the court did not give the instruction in "the way that the legislature mandates, that itself may be plain error." Accordingly, the trial court denied the defendant's request. The court ultimately instructed the jury that "[t]he defendant has not testified in this case. An accused person has the option to either testify or not testify at trial. He's under no obligation to testify. He has a constitutional right not to testify. You must draw no unfavorable inference from the defendant's failure to testify."

The jury found the defendant guilty on all counts. The court rendered judgment in accordance with the verdict and sentenced the defendant to twenty years imprisonment on each count, with the first two counts to run concurrently with each other, the third and fourth counts to run concurrently with each other, and the fifth and sixth counts to run concurrently with each

other. The first, third and fifth counts were to run consecutively to each other, for a total effective sentence of sixty years imprisonment.

This appeal followed. The defendant claims on appeal that the prosecutor, while questioning the victim and during closing and rebuttal arguments, improperly assumed facts not in evidence, vouched for the victim's credibility and appealed to the jurors' emotions, and that these improprieties deprived him of his due process right to a fair trial. The defendant also contends that the trial court violated § 54-84 (b) when it denied his request to instruct the jury that it could draw no unfavorable inference from the fact that he "elected" not to testify and, instead, referred to his "failure" to testify. He further contends that, if we conclude that § 54-84 (b) authorized the trial court to refer to his "failure to testify," even though he requested alternative language, the statute infringed on his constitutional right to remain silent. We reject all of these claims.

I

We first address the defendant's claims that the prosecutor improperly referred to facts not in evidence when she asked the victim (1) "[y]ou said [the defendant] put his private in your private," and other questions using that phrase, and (2) "the blood . . . came out of your private and went where," and other questions using that phrase. We conclude that these questions did not constitute prosecutorial impropriety.

At the outset, we address the state's assertion that these claims are not reviewable because they are not constitutional in nature, as the defendant contends, but are instead unpreserved evidentiary claims insofar as defense counsel did not properly object to the prosecutor's questions at trial.[9] This court has repeatedly held

[9] The state acknowledges that defense counsel objected when the victim responded "[y]es" to the prosecutor's question, "[y]ou said he put his private in your private . . . [i]s that when it happened," but contends that the

that, "[i]n cases of unpreserved claims of prosecutorial [impropriety] . . . it is unnecessary for the defendant to seek to prevail under the specific requirements of . . . [*State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn 733, 781, 120 A.3d 1188 (2015)] . . . and, similarly, it is unnecessary for a reviewing court to apply the four-pronged *Golding* test. The reason for this is that the touchstone for appellate review of claims of prosecutorial [impropriety] is a determination of whether the defendant was deprived of his right to a fair trial, and this determination must involve the application of the factors set out by this court in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987)." (Internal quotation marks omitted.) *State* v. *Spencer*, 275 Conn. 171, 178, 881 A.2d 209 (2005). We also have held, however, that "unpreserved evidentiary claims masquerading as constitutional claims will be summarily dismissed" as unreviewable. *State* v. *Golding*, supra, 241.

In the present case, the state contends that the defendant's claims that the prosecutor engaged in prosecutorial impropriety during her questioning of the victim are actually evidentiary claims because he is challenging the manner in which the prosecutor phrased the questions, not the information that the prosecutor sought to elicit. The state further contends that the questions that the defendant is challenging were permissible leading questions. We conclude that we need not resolve this issue because the defendant cannot prevail on the merits of his claims. See, e.g., *State* v. *William L.*, 126 Conn. App. 472, 483 n.11, 11 A.3d 1132 ("[w]e do not need to decide whether the defendant waived his claim, as we resolve the claim on other grounds"), cert. denied, 300 Conn. 926, 15 A.3d 628 (2011). Indeed,

claims related to this question are unreviewable because defense counsel did not object until after the victim answered and did not indicate the basis for the objection.

to determine whether the defendant's claims are reviewable constitutional claims or unreviewable evidentiary claims, we would have to determine whether the prosecutor's questions improperly assumed facts not in evidence or reflected reasonable inferences from the evidence, which is precisely the same analysis that we apply to the claims on their merits.[10] Cf. *State* v. *Spencer*, supra, 275 Conn. 178 (application of *Golding* test is superfluous when considering claim of prosecutorial impropriety because determining whether due process rights were violated requires court to consider "the fairness of the entire trial, and not the specific incidents of [impropriety] themselves" (internal quotation marks omitted)).

We turn, therefore, to the merits of the defendant's claims. "In analyzing claims of prosecutorial impropriety, we engage in a two step analytical process. . . . The two steps are separate and distinct. . . . We first examine whether prosecutorial impropriety occurred. . . . Second, if an impropriety exists, we then examine whether it deprived the defendant of his due process right to a fair trial. . . . In other words, an impropriety is an impropriety, regardless of its ultimate effect on the fairness of the trial. Whether that impropriety was harmful and thus caused or contributed to a due process violation involves a separate and distinct inquiry." (Cita-

[10] Although the state cites authority for the proposition that the prosecutor may ask leading questions of certain state witnesses; see, e.g., Conn. Code Evid. § 6-8 (b), commentary (under § 6-8 (b) (3), "the court may allow the calling party to put leading questions to a young witness who is apprehensive or reticent"); "a prosecutor is not permitted to pose a question that implies the existence of a factual predicate when the prosecutor knows that no such factual basis exists." *State* v. *Salamon*, 287 Conn. 509, 564, 949 A.2d 1092 (2008). We further note that there are circumstances under which even an evidentiary error can rise to the level of a constitutional violation. See, e.g., *State* v. *Turner*, 334 Conn. 660, 675, 224 A.3d 129 (2020) ("[a] claim of evidentiary error . . . premised on a generalized violation of a party's due process right is constitutional in nature [only] if the harm resulting from the error is sufficient to require a new trial" (internal quotation marks omitted)).

tions omitted; internal quotation marks omitted.) *State* v. *Long*, 293 Conn. 31, 36–37, 975 A.2d 660 (2009).

"A prosecutor, in fulfilling his duties, must confine himself to the evidence in the record. . . . Statements as to facts [that] have not been proven amount to unsworn testimony . . . ." (Citations omitted.) *State* v. *Williams*, supra, 204 Conn. 544; see also *State* v. *Fauci*, 282 Conn. 23, 49, 917 A.2d 978 (2007) ("[w]e long have held that a prosecutor may not comment on evidence that is not a part of the record"). "[W]hen a prosecutor suggests a fact not in evidence, there is a risk that the jury may conclude that he or she has independent knowledge of facts that could not be presented to the jury." *State* v. *Singh*, 259 Conn. 693, 718, 793 A.2d 226 (2002).

In the present case, the defendant contends that the prosecutor improperly referred to facts not in evidence during her examination of the victim when she stated that (1) the defendant "put his private in [the victim's] private," and (2) "blood . . . came out of [the victim's] private . . . ." We disagree. With respect to the first claim, we note that the victim had testified that the defendant hurt her "private" with his "private." We cannot conceive how the defendant could have done so without penetrating the victim's genital area with his penis. Accordingly, although it may have been preferable for the prosecutor to ask the victim a question to clarify this issue instead of stating "[y]ou said he put his private in your private," this statement was not just a reasonable inference from the victim's testimony; it was a necessary inference. Moreover, the victim expressly testified on redirect examination that the defendant's "private" went "[i]n" her "private." In addition, later witnesses provided ample evidence that the victim had suffered a traumatic penetrating injury to her genital

area.[11] Indeed, the defendant did not dispute that that was the case but contended only that he was not the perpetrator. We further note that defense counsel raised no objection to the prosecutor's questions rephrasing the victim's testimony. See *State* v. *Medrano*, 308 Conn. 604, 612, 65 A.3d 503 (2013) ("defense counsel's failure to object to the prosecutor's argument when it was made suggests that defense counsel did not believe that it was [improper] in light of the record of the case at the time" (internal quotation marks omitted)). Finally, we note that the child victim was, quite understandably, a very challenging witness who was extremely reluctant to provide details of the sexual assaults to which she allegedly had been subjected. Under these circumstances, we cannot conclude that the prosecutor's reframing of the victim's testimony that the defendant had hurt her "private" with his "private" as testimony that the defendant had put his "private" in her "private" was a deliberate attempt to distort the testimony or to suggest that the prosecutor had knowledge of facts that could not be presented to the jury. We conclude,

[11] The Appellate Court has observed that "it is not improper for a prosecutor, when using leading questions to examine a hostile witness, to include facts in those questions—as to which no other evidence has yet been introduced—as long as the prosecutor has a good faith basis for believing that such facts are true." *State* v. *Marrero*, 198 Conn. App. 90, 105, 234 A.3d 1, cert. granted, 335 Conn. 961, 239 A.3d 1214 (2020); see also *State* v. *Payne*, 233 Ariz. 484, 512, 314 P.3d 1239 (2013) (prosecutor's use of leading question was proper when prosecutor had "a good faith basis for the question"), cert. denied, 572 U.S. 1004, 134 S. Ct. 1518, 188 L. Ed. 2d 454 (2014); cf. *Commonwealth* v. *Wynter*, 55 Mass. App. 337, 339, 770 N.E.2d 542 (prosecutor's use of leading questions was improper when questions had no "mooring in evidence in the trial record or a presented good faith basis"), review denied, 438 Mass. 1102, 777 N.E.2d 1264 (2002). We similarly conclude that, if a prosecutor has a good faith basis to believe that evidence of a fact will be later admitted, courts may consider that circumstance when determining whether the prosecutor's reference to the fact while questioning a witness was improper, even if the reference was not part of a leading question. Because the question is not before us, we express no opinion on what other circumstances might constitute a good faith basis for a prosecutor's reference to a fact not in evidence while questioning a witness.

therefore, that the prosecutor did not improperly refer to facts not in evidence.

For similar reasons, we conclude that the prosecutor's questions that were premised on her statement that blood came out of the victim's "private" were not improper. Again, it would have been preferable for the prosecutor to ask additional questions allowing the witness to clarify and correct her plainly mistaken testimony that the blood came out of the defendant, or to ask the victim if, at any point after the assaults, blood had come out of her "private," instead of making a statement to that effect. The question "it came out of your private and went where" was not significantly more suggestive of independent knowledge of facts, however, than the leading question "isn't it true that blood came out of your private" would have been, and it would have been well within the trial court's discretion to allow the prosecutor to lead this young, apprehensive and reluctant witness on this point. See Conn. Code Evid. § 6-8 (b), commentary (under § 6-8 (b) (3), "the court may allow the calling party to put leading questions to a young witness who is apprehensive or reticent"); see also *State* v. *Salamon*, 287 Conn. 509, 560, 949 A.2d 1092 (2008) (trial court properly permitted prosecutor to use leading questions when examining victim, who was sixteen years old, nervous, very soft-spoken, uneasy and reticent); *State* v. *Marrero*, 198 Conn. App. 90, 105, 234 A.3d 1 ("it is not improper for a prosecutor, when using leading questions to examine a hostile witness, to include facts in those questions—as to which no other evidence has yet been introduced—as long as the prosecutor has a good faith basis for believing that such facts are true"), cert. granted, 335 Conn. 961, 239 A.3d 1214 (2020). This is particularly so because it is within the knowledge of an ordinary juror that blood does not come out of a penis during intercourse. The salient point of the victim's testimony was

that there was blood in her genital area immediately after the assault, not her belief as to the source of the blood. Indeed, the prosecutor acknowledged during her rebuttal argument to the jury that the victim had stated that blood came out of the defendant's penis and argued that the jury could reasonably infer that, at the age of seven or eight, the victim simply did not know where the blood in her genital area came from. We further note that other witnesses provided evidence that the traumatic, penetrating injuries to the victim's genital area had resulted in copious bleeding; the defendant never disputed that fact, and he raised no objection to the questions to the victim at the time of trial. We conclude, therefore, that the prosecutor did not engage in prosecutorial impropriety during her questioning of the victim.

II

We next address the defendant's claim that the prosecutor engaged in prosecutorial impropriety during closing and rebuttal arguments by arguing facts not in evidence, appealing to the jurors' emotions and vouching for the victim's credibility. We disagree.

"As we previously have recognized, prosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments. . . . When making closing arguments to the jury, [however] [c]ounsel must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument. . . . Thus, as the state's advocate, a prosecutor may argue the state's case forcefully, [provided the argument is] fair and based upon the facts in evidence and the reasonable inferences to be drawn therefrom. . . . Moreover, [i]t does not follow . . . that every use of rhetorical language or device [by the prose-

cutor] is improper. . . . The occasional use of rhetorical devices is simply fair argument. . . .

"Nevertheless, the prosecutor has a heightened duty to avoid argument that strays from the evidence or diverts the jury's attention from the facts of the case. [The prosecutor] is not only an officer of the court, like every attorney, but is also a high public officer, representing the people of the [s]tate, who seek impartial justice for the guilty as much as for the innocent. . . . By reason of his office, he usually exercises great influence upon jurors. His conduct and language in the trial of cases in which human life or liberty [is] at stake should be forceful, but fair, because he represents the public interest, which demands no victim and asks no conviction through the aid of passion, prejudice, or resentment. If the accused [is] guilty, he should [nonetheless] be convicted only after a fair trial, conducted strictly according to the sound and [well established] rules which the laws prescribe. While the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment upon, or to suggest an inference from, facts not in evidence, or to present matters which the jury ha[s] no right to consider." (Internal quotation marks omitted.) *State* v. *Martinez*, 319 Conn. 712, 727–28, 127 A.3d 164 (2015).

"Furthermore, a prosecutor may not express her own opinion, either directly or indirectly, as to the credibility of a witness or the guilt of the defendant. . . . Such expressions of personal opinion are a form of unsworn and unchecked testimony. . . . These expressions of opinion are particularly difficult for the jury to ignore because of the special position held by the prosecutor. . . . A prosecutor's voucher for a witness is particularly dangerous for two reasons. First, such comments may convey the impression that the prosecutor is aware of evidence supporting charges against the defendant of

which the jury has no knowledge. . . . Second, the prosecutor's opinion carries with it the imprimatur of the [state] and may induce the jury to trust the [state's] judgment rather than its own view of the evidence. . . . [I]t is axiomatic that a prosecutor may not advance an argument that is intended solely to appeal to the jurors' emotions and to evoke sympathy for the victim or outrage at the defendant. . . . An appeal to emotions, passions, or prejudices improperly diverts the jury's attention away from the facts and makes it more difficult for it to decide the case on the evidence in the record. . . . When the prosecutor appeals to emotions, he invites the jury to decide the case, not according to a rational appraisal of the evidence, but on the basis of powerful and irrelevant factors [that] are likely to skew that appraisal. . . . An improper appeal to the jurors' emotions can take the form of a personal attack on the defendant's character . . . or a plea for sympathy for the victim or her family." (Citation omitted; internal quotation marks omitted.) *State* v. *Maguire*, 310 Conn. 535, 554–55, 78 A.3d 828 (2013).

The defendant in the present case first claims that the prosecutor engaged in prosecutorial impropriety during closing argument when she stated: "I . . . want to thank you for the attention that you have paid to the evidence in this case, and I could see sometimes it wasn't as easy as it either would've been, should've been, if it were a different type of trial, and I apologize for any anxiety any of the evidence may have caused you. . . . I also want to apologize for the photos that you had to view. The state tried to keep it to a minimum. Unfortunately, it was necessary that you viewed them." The defendant contends that these comments argued facts not in evidence, namely, that viewing the evidence had been difficult and caused anxiety to the jurors, and that the state had additional evidence that it did not present at trial. The defendant further contends that

the comments appealed to the jurors' emotions and were intended to evoke outrage at the defendant.

We are not persuaded. As we have explained, "a prosecutor may argue the state's case forcefully, [provided the argument is] fair and based upon the facts in evidence and the reasonable inferences to be drawn therefrom. . . . Moreover, [i]t does not follow . . . that every use of rhetorical language or device [by the prosecutor] is improper." (Internal quotation marks omitted.) *State* v. *Martinez*, supra, 319 Conn. 727. Indeed, the Appellate Court has found even more forceful rhetoric to be proper in a case involving very similar facts. In *State* v. *Williams*, 65 Conn. App. 449, 783 A.2d 53, cert. denied, 258 Conn. 927, 783 A.2d 1032 (2001), "[t]he defendant subjected the victim [the young daughter of the defendant's girlfriend] to repeated sexual acts, including vaginal intercourse, digital penetration, fellatio and cunnilingus." Id., 452. During closing argument, the prosecutor stated that "[the] case involves many brutal, violent and unpleasant facts. . . . The six year old . . . was the victim of horrible and repulsive crimes and she suffered this degradation at the hands of the defendant . . . . She was humiliated in the worst way imaginable." (Internal quotation marks omitted.) Id., 467. The Appellate Court concluded that these comments were "not improper in view of the evidence presented." Id. Moreover, in the present case, defense counsel himself stated during closing argument that "[t]his is an exceptionally difficult and disappointing and disgusting case, and I am very thankful that you came down here and sat through this . . . . [I]t's a very emotionally compelling case; it's a case that gets you fired up . . . ." It is also significant that defense counsel did not object to the prosecutor's remarks, thereby indicating that he did not believe that they were improper in light of the evidence at the time. See, e.g., *State* v. *Medrano*, supra, 308 Conn. 612. We conclude,

therefore, that the remarks were not improper. For the same reasons, we conclude that the prosecutor did not improperly appeal to the jurors' emotions or vouch for the victim's credibility when she stated, "[i]f wishes could come true, this would never have happened, but it did. . . . [A]nd, if wishes could come true, we wouldn't have to have witnesses like [the victim], children, who have to . . . become embarrassed, they have to show you their pain, they have to describe to you their betrayal of trust, and show you [their] tears, all when she was seven and eight."

With respect to the defendant's claim that, by stating that, with respect to the photographs of the victim's injury, "[t]he state tried to keep it to a minimum," the prosecutor suggested that the state had additional evidence that it did not produce at trial, we conclude that this comment merely indicated that, although, in order to prove its case, the state was required to present evidence that an ordinary person would find difficult to view, the state had made an effort to minimize any discomfort by not dwelling on the most disturbing evidence or making it a focal point throughout the case. At most, the comment could be understood to mean that the state made an effort not to present cumulative evidence. The prosecutor did not suggest that the state was in possession of additional photographic evidence that would strengthen the case against the defendant.

The defendant also claims that the prosecutor improperly appealed to the jurors' emotions and vouched for the victim's credibility when she asked the jurors, "[d]oes [the victim] look like the type of child who would have been evil enough to make this up to get out of the house?" The defendant cites *State* v. *Alexander*, 254 Conn. 290, 755 A.2d 868 (2000), in support of this claim. In *Alexander*, the prosecutor "implied that the victim testified truthfully because she is young and therefore honest. The summation further con-

tended that no child would possibly make up a story regarding sexual abuse." Id., 305. This court concluded that the remarks were "improper vouchers for the victim's credibility. Statements such as these [were] likely to sway a jury in favor of the prosecutor's argument without properly considering the facts in evidence. This [was] especially significant in [*Alexander*], [in which] the credibility of the victim and the defendant comprised the principal issue of the case. Improper comments on the part of the prosecutor regarding the veracity of one party over the other can easily skew a proper jury deliberation." Id.; see also *State* v. *Singh*, supra, 259 Conn. 708 (it is improper for prosecutor to suggest that, "in order to acquit the defendant, [the jury] must find that the witness has lied").

We conclude that the prosecutor's remark in the present case was not improper under *Alexander* and *Singh*. The prosecutor made the remark in response to defense counsel's argument that the victim had fabricated the allegations that the defendant had sexually assaulted her because "she wanted out of that house . . . ." Thus, it was defense counsel who initially suggested that the victim was not merely confused or mistaken about the identity of her assailant, but that she had deliberately lied about the defendant's conduct for personal gain. Although we generally disapprove of remarks suggesting to the jury that it must conclude that a witness is deliberately lying and, by implication, evil, before it may question the witness' credibility, the prosecutor here was simply attempting to rebut the defendant's claim to that effect by arguing that the victim's appearance and demeanor did not support the claim. See, e.g., *State* v. *O'Brien-Veader*, 318 Conn. 514, 547, 122 A.3d 555 (2015) ("a prosecutor may argue about the credibility of witnesses, as long as her assertions are based on evidence presented at trial and reasonable inferences that jurors might draw therefrom" (internal

quotation marks omitted)). We further note that, unlike in *State* v. *Alexander*, supra, 254 Conn. 305, the prosecutor did not suggest that the victim was honest because she was young or that *no* child could make up an allegation of sexual abuse, thereby suggesting that she had knowledge of facts that could not be presented to the jury; she suggested only that the jury could infer from *this* child's appearance and demeanor on the stand that she was not lying in order to obtain something of value, namely, getting out of the house.

Similarly, we reject the defendant's claim that the prosecutor improperly appealed to the jurors' emotions and vouched for the victim's credibility when she stated that the victim "is an extremely passive, helpless girl folding in on herself, shy, painfully shy. She was highly uncomfortable. In the forensic [interview], there were tears, she was embarrassed." Again, the prosecutor was responding to defense counsel's argument that the victim had lied by asking the jury to consider the victim's appearance and demeanor. The record reflects that, during her examination of the victim, the prosecutor was required to ask her repeatedly to speak louder, to repeat her response and to lift her head while speaking. In addition, the victim was tearful, withdrawn and obviously uncomfortable during the forensic interview, a video recording of which was shown to the jury. Thus, the prosecutor's assertions were supported by evidence that was before the jury.

The defendant further contends that the prosecutor improperly vouched for the victim's credibility when she asked rhetorically, "[w]ere those emotions real," and stated that "[t]he state submits to you absolutely they were. It's easy to fake facts. It's much harder to fake emotion like you saw [in] the forensic [interview] and on that witness stand." We acknowledge that the propriety of these remarks is a closer question. On the one hand, it is well established that a prosecutor may

not express her opinion as to the credibility of a witness, thereby inducing the jury "to trust the [state's] judgment rather than its own view of the evidence." (Internal quotation marks omitted.) *State* v. *Maguire*, supra, 310 Conn. 554. On the other hand, however, jurors "are not expected to lay aside matters of common knowledge or their own observations and experiences, but rather, to apply them to the facts as presented to arrive at an intelligent and correct conclusion. . . . Therefore, it is entirely proper for counsel to appeal to [the jurors'] common sense in closing remarks." (Internal quotation marks omitted.) *State* v. *O'Brien-Veader*, supra, 318 Conn. 547. Moreover, not every use of a rhetorical flourish by the prosecutor is improper. See, e.g., *State* v. *Martinez*, supra, 319 Conn. 727.

The Appellate Court's decision in *State* v. *Cromety*, 102 Conn. App. 425, 925 A.2d 1133, cert. denied, 284 Conn. 912, 931 A.2d 932 (2007), is instructive on this issue. The defendant in *Cromety* claimed that the prosecutor had improperly asked the jury "[i]s that something somebody would make up" with respect to the victim's testimony that "white stuff came out" when the defendant forced her to perform fellatio, that she did not know at the time what the "white stuff" was, and that, after the assault, she brushed her teeth. (Internal quotation marks omitted.) Id., 438–39. The court concluded that the prosecutor's rhetorical question did not constitute improper vouching for the victim's credibility because he was asking the jury to apply common sense to determine whether the victim was "a vulnerable deaf child or a vengeful stepdaughter, as the defendant claimed." Id., 440.

The present case presents a closer question than *Cromety* did because the prosecutor not only asked a rhetorical question appealing to the jury to evaluate the victim's credibility, but also answered her own question when she stated that "[t]he state submits to you [that

the victim's emotions] absolutely . . . were [real]." It would have been preferable if the prosecutor had not made her remark in the form of a direct opinion but, instead, had phrased it to advocate the state's view that the evidence supports such a finding. Nevertheless, we conclude that neither this statement nor the prosecutor's statements that the victim's emotions were real and that it is "[hard] to fake emotion like you saw [in] the forensic [interview] and on that witness stand" improperly induced the jury "to trust the [state's] judgment rather than its own view of the evidence." (Internal quotation marks omitted.) *State* v. *Maguire*, supra, 310 Conn. 554. In context, the statements appealed to the jurors' common sense and life experiences, and referred to evidence that had been presented at trial. See *State* v. *Gibson*, 302 Conn. 653, 661, 31 A.3d 346 (2011) ("when the prosecutor immediately followed [his] recitation of the evidence with the rhetorical question, '[d]id the defendant wilfully [fail] to appear in court on May 5, 2006?' and then responded, 'I think he did,' he was attempting to persuade the jury to draw this inference from the circumstantial evidence of intent that he had just recited, and was not giving improper unsworn testimony or attempting to insinuate that he had secret knowledge of the defendant's guilt"). For the same reasons, we reject the defendant's claim that the prosecutor's rhetorical question, "[d]oes she look like a child who's sophisticated enough to give you that kind of facts," was improper.

The defendant finally claims that the prosecutor improperly appealed to the jurors' emotions when, during rebuttal argument, she stated in reference to the injuries to the victim's genital area that "[s]he was ripped," that she suffered "a tearing injury similar to an episiotomy" and that she did not have the luxury of having a doctor prescribe pain medication during the assault. We disagree. The prosecutor made these com-

ments in response to defense counsel's contention that the victim may have mistakenly identified the defendant as her assailant because Rowan had suggestively asked her whether the defendant had done anything to her "private area." The state's expert witness, Melillo, had testified that trauma can heighten a child's memory of an incident of sexual abuse, especially if the assailant is known to the child. Accordingly, the jury reasonably could have inferred from the severe nature of the victim's injuries that, contrary to defense counsel's argument, her memory of the assault was accurate. In addition, the comments were responsive to defense counsel's argument that the victim lied about the identity of her assailant because she wanted to get out of the house that she shared with the defendant. The jury reasonably could have inferred that, if the victim had wanted to get out of the house, it was because the defendant had brutally assaulted her. Although the prosecutor did not expressly make these arguments, she did indicate that the severe nature of the victim's injuries went to the defendant's claim that the victim was suggestible, and the jury may take any reasonable inference from the evidence before it. See, e.g., *Champagne* v. *Raybestos-Manhattan, Inc.*, 212 Conn. 509, 544, 562 A.2d 1100 (1989).

We acknowledge, however, that it would have been preferable if the prosecutor had not used the phrase "[s]he was ripped," which arguably has more violent connotations than the language that Moles used to describe the victim's injuries. In addition, we view with some skepticism the prosecutor's mordant observation that, unlike a woman who undergoes an episiotomy during childbirth, the victim did not have the luxury of receiving pain medication during the assault. These comments came very close to the line between permissible comment on the evidence and an impermissible plea for sympathy. Because we conclude that the com-

ments did not materially mischaracterize Moles' testimony or exaggerate the severity of the victim's suffering, however, we conclude that they did not cross that line. We conclude, therefore, that the comments were not improper.

III

We finally address the defendant's claim that the trial court violated § 54-84 (b) when it denied the defendant's request to instruct the jury that it could draw no unfavorable inference from the fact that he *elected* not to testify. The defendant also contends that, if we conclude that the trial court was not statutorily required to give the instruction that he requested, § 54-84 (b) infringed on his constitutional right to remain silent to the extent that it authorized the trial court to instruct the jury that it could draw "no unfavorable inferences from the accused's failure to testify." We reject both of these claims.

A

We first address the defendant's statutory claim. The defendant contends that, contrary to the trial court's determination that it was required to instruct the jury using the specific wording of § 54-84 (b), the clause of the statute "[u]nless the accused requests otherwise" required the trial court to give the instruction that he requested. The proper interpretation of § 54-84 (b) is a question of statutory interpretation to which we apply well established rules of construction and over which we exercise plenary review. See, e.g., General Statutes § 1-2z (plain meaning rule); *Canty* v. *Otto*, 304 Conn. 546, 557–58, 41 A.3d 280 (2012) (general rules of construction aimed at ascertaining legislative intent).

We begin our analysis with a review of our past cases construing § 54-84 (b). In *State* v. *Wright*, 197 Conn. 588, 594, 500 A.2d 547 (1985), the defendant, like the

defendant in the present case, contended that the trial court had improperly instructed the jury that it could draw no unfavorable inferences from his " 'failure to testify' " because that language implied that he had a duty to testify. This court noted that the trial court had used the specific language of § 54-84 (b). Id. We also observed that this court previously had held that "a failure by the trial court to comply with § 54-84 (b) is plain error . . . and that deviations from the statutory language that alter the meaning of the charge constitute grounds for reversal." (Citations omitted.) Id., 595. In addition, we observed that, "[i]f the defendant felt that the word 'failure' had unfavorable connotations, he could have requested that the court modify the charge or not give it at all." Id. Accordingly, we concluded that "it was not error for the trial court to instruct the jury as it did." Id.

The defendant in *State* v. *Casanova*, 255 Conn. 581, 767 A.2d 1189 (2001), also challenged the trial court's use of the language "failure to testify" to describe the defendant's decision not to testify on the ground that the "use of the word 'failure' had a negative connotation." Id., 597. The defendant had requested that the trial court substitute more "neutral" language, without suggesting any specific alternative. Id., 598. This court observed that "[a] refusal to charge in the exact words of a request . . . will not constitute error if the requested charge is given in substance." (Internal quotation marks omitted.) Id., 599. We further observed that "[a] party always may take exception to the trial court's jury charge or request that the trial court modify its language. See Practice Book §§ 42-19 and 42-24. The language 'unless the accused requests otherwise,' however, permits the defendant to elect whether the court should give the jury an instruction concerning the defendant's failure to testify. . . . We have not interpreted that language to mean that the court *must* use the

defendant's requested language." (Citation omitted; emphasis in original; footnote omitted.) Id., 600–601. Accordingly, this court concluded that the trial court had properly instructed the jury. Id., 601.

We glean the following principles from these cases. First, a defendant may request, and the trial court may give, a jury instruction that deviates from the specific wording of § 54-84 (b), as long as the instruction does not materially alter the substantive meaning of the statute. See id., 600 ("[a] party always may take exception to the trial court's jury charge or request that the trial court modify its language"); *State* v. *Wright*, supra, 197 Conn. 595 (defendant "could have requested that the court modify the charge"); *State* v. *Wright*, supra, 595 (only "deviations from the statutory language that alter the meaning of the charge constitute grounds for reversal").[12] Second, the trial court is not *required* to grant a

[12] This court and the Appellate Court have repeatedly concluded that instructions that deviate from the language of § 54-84 (b) are proper when the instructions convey the substantive meaning of the statute. See *State* v. *Sinclair*, 197 Conn. 574, 584 n.11, 500 A.2d 539 (1985) ("[i]n cases [in which] a no unfavorable inferences charge was given, but in language deviating slightly from the precise wording of the statute, we have examined the entire charge to see if the words as given were sufficient to satisfy the statute"); *State* v. *Boulware*, 183 Conn. 444, 447–48, 441 A.2d 1 (1981) (trial court's deviation from precise language of § 54-84 (b) was not improper when "a reasonable juror hearing [the] instruction within the context of the entire charge would naturally assume that the defendant's silence formed no part of the case"); *State* v. *Reid*, 22 Conn. App. 321, 327, 577 A.2d 1073 ("[s]ubstituting 'adverse' for 'unfavorable' [was] not improper . . . because the terms are synonymous and such a substitution does not change the meaning of the sentence"), cert. denied, 216 Conn. 828, 582 A.2d 207 (1990); cf. *State* v. *Tatem*, 194 Conn. 594, 599–600, 483 A.2d 1087 (1984) (trial court's instruction that jury could draw " 'no unreasonable inference' " from defendant's failure to testify was improper because it "clearly permitted the jury to draw an unfavorable inference which was also a reasonable inference"); *State* v. *Vega*, 36 Conn. App. 41, 48, 646 A.2d 957 (1994) (trial court's use of word "unfair" instead of "unfavorable" when giving instruction pursuant to § 54-84 (b) was improper because "the jury could draw a fair or just, although unfavorable or adverse, inference from the defendant's failure to testify"). But see *State* v. *Townsend*, 206 Conn. 621, 626, 539 A.2d 114 (1988) ("the trial court's minor deviation from the literal wording of

defendant's request for an alternative instruction under § 54-84 (b) but may give any instruction that accurately states the law. See *State* v. *Casanova*, supra, 255 Conn. 601 (defendant may request alternative language, but that does not "mean that the court *must* use the defendant's requested language" (emphasis in original)); see also *State* v. *Whipper*, 258 Conn. 229, 286, 780 A.2d 53 (2001) ("there is no requirement in . . . § 54-84 (b) that a trial court must use the language requested by a defendant when he chooses not to testify"), overruled in part on other grounds by *State* v. *Cruz*, 269 Conn. 97, 848 A.2d 445 (2004), and *State* v. *Grant*, 286 Conn. 499, 944 A.2d 947, cert. denied, 555 U.S. 916, 129 S. Ct. 271, 172 L. Ed. 2d 200 (2008). Third, § 54-84 (b) requires the trial court to grant a defendant's request that the court give no instruction concerning the defendant's failure to testify. See *State* v. *Casanova*, supra, 600 ("[t]he language 'unless the accused requests otherwise' . . . permits the defendant to elect whether the court should give the jury an instruction concerning the defendant's failure to testify"). Fourth, in the absence of such a request, the failure to give a no unfavorable inference instruction pursuant to § 54-84 (b) is plain error. *State* v. *Wright*, supra, 595 ("a failure by the trial court to comply with § 54-84 (b) is plain error"); see also *State* v. *Carter*, 182 Conn. 580, 581, 438 A.2d 778 (1980) (trial

§ 54-84 (b)" was error, but error was harmless because instruction conveyed "substantive meaning" of statute); *State* v. *Cobb*, 199 Conn. 322, 324–25, 507 A.2d 457 (1986) (same). We further note that the Connecticut Judicial Branch's model criminal jury instructions contain the following instruction: "The defendant has not testified in this case. An accused person has the option to testify or not to testify at the trial. (He/she) is under no obligation to testify. (He/she) has a constitutional right not to testify. You must draw no unfavorable inferences from the defendant's *choice not to testify*." (Emphasis added.) Connecticut Criminal Jury Instructions 2.2-4, available at https://www.jud.ct.gov/JI/Criminal/Criminal.pdf (last visited April 19, 2021). Although the model instructions are not binding on this court; see *Snell* v. *Norwalk Yellow Cab, Inc.*, 332 Conn. 720, 762, 212 A.3d 646 (2019); the inclusion of this instruction is at least suggestive that a deviation from the specific wording of § 54-84 (b) is not automatically plain error.

court's failure to give instruction pursuant to § 54-84 (b) was plain error).

These principles are consistent with the underlying purpose of the statute. When § 54-84 (b) was enacted in 1977; see Public Acts 1977, No. 77-360; "neither the United States Supreme Court nor this court had yet recognized the [no adverse inference] instruction as a component of self-incrimination protections." (Internal quotation marks omitted.) *State* v. *Cohane*, 193 Conn. 474, 483, 479 A.2d 763, cert. denied, 469 U.S. 990, 105 S. Ct. 397, 83 L. Ed. 2d 331 (1984); see also *State* v. *Branham*, 171 Conn. 12, 16, 368 A.2d 63 (1976) ("[i]n the absence of controlling statutory provisions the accused is not entitled to an instruction that no opinion prejudicial to him shall be drawn from his failure to testify" (internal quotation marks omitted)). It was not until 1981 that the United States Supreme Court held in *Carter* v. *Kentucky*, 450 U.S. 288, 101 S. Ct. 1112, 67 L. Ed. 2d 241 (1981), that "a state trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify" by giving a no adverse inference instruction. Id., 305; see *State* v. *Cohane*, supra, 483. It is reasonable to conclude, therefore, that the purpose of § 54-84 (b) was to fill this statutory gap and to ensure prophylactically that the defendant would pay no price for exercising his constitutional right to remain silent. Thus, it is also reasonable to conclude that the statute was intended to create a *floor* of prophylactic protection, not a ceiling. Indeed, we can perceive no reason why the legislature would have wanted to bar trial courts from deviating from the specific language of the statute when instructing the jury, as long as the courts give an instruction that is at least as protective of the defendant's constitutional right as the statutory language.[13] To the extent that this court has previously

[13] Of course, we do not suggest that the trial court has unlimited discretion to deviate from the statutory language when giving a no adverse inference

held that a minor deviation from the specific wording of § 54-84 (b) is improper, even if the instruction does not alter the substantive meaning of the statute; see, e.g., *State* v. *Townsend*, 206 Conn. 621, 626, 539 A.2d 114 (1988) ("the trial court's minor deviation from the literal wording of § 54-84 (b)" was error, but error was harmless because instruction conveyed "the substantive meaning" of statute); *State* v. *Cobb*, 199 Conn. 322, 324–25, 507 A.2d 457 (1986) (same); those cases are hereby overruled.

We conclude, therefore, that the trial court in the present case incorrectly determined that *any* deviation from the specific wording of § 54-84 (b) would be plain error. Because instructing the jury that the defendant "elected" not to testify instead of referring to his "failure" to testify would not have mischaracterized the defendant's conduct in any way and would not have altered the substantive meaning of the statute, we conclude that the trial court could have given the instruction that the defendant requested. Indeed, the state does not contend otherwise.

Contrary to the defendant's contention, however, we have already expressly rejected the proposition that, if a defendant requests that the trial court give a no unfavorable inference instruction that deviates from the specific wording of § 54-84 (b), the trial court is *required* to give that instruction. See *State* v. *Casanova*, supra, 255 Conn. 600–601. Indeed, it would make little sense for the legislature to mandate that the trial court *must* give *whatever* instruction the defendant asks for

instruction, as long as the instruction is at least as protective as § 54-84 (b). For example, it would obviously be improper for a trial court to give an instruction that the fifth amendment prevented the defendant from testifying or that the jury must draw a favorable inference from the fact that the defendant did not testify because it implied confidence in the weakness of the state's case. We hold only that a deviation from the statutory language that does not mischaracterize the facts and that conveys the substantive meaning of the statute is not improper.

in lieu of the specific wording of § 54-84 (b). Rather, it is reasonable to conclude that the legislature intended that the trial court may give any instruction that accurately states the law, which obviously would include an instruction that contains the specific wording of the statute.

We also disagree with the defendant's claim that *Casanova* is distinguishable because, unlike in the present case, the defendant in that case did not ask for a specific instruction. Nothing in *Casanova* suggests that the absence of such a request had any bearing on our holding that the trial court is not required to grant a request for an instruction that deviates from the wording of § 54-84 (b). We also conclude that the defendant's claim that our decision in *Casanova* should be overruled because it was incorrect as a matter of statutory interpretation is unreviewable because it has been inadequately briefed. See, e.g., *Estate of Rock* v. *University of Connecticut*, 323 Conn. 26, 33, 144 A.3d 420 (2016) ("Claims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion. . . . Claims are also inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record . . . ." (Internal quotation marks omitted.)). The defendant has merely made the bare assertion that the case should be overruled, without citing any authority or providing any analysis as to why he believes that this court misconstrued § 54-84 (b).[14]

[14] In his reply brief, the defendant contends for the first time that *Casanova* was wrongly decided because to conclude that the legislature wanted trial courts "to give an instruction that would suggest to the jury that the defendant had done something wrong by invoking [the right to remain silent] defies all common sense." "It is a well established principle that arguments [cannot] be raised for the first time in a reply brief." (Internal quotation marks omitted.) *State* v. *Garvin*, 242 Conn. 296, 312, 699 A.2d 921 (1997). In any event, the defendant does not dispute that § 54-84 (b) expressly authorizes the trial courts to use the word "failure," and he does not explain why the legislature would have used that language if, contrary to our decision in *Casanova*, its intent was to *require* trial courts to use more neutral

We conclude, therefore, that § 54-84 (b) did not require the trial court to grant the defendant's request to instruct the jury that the defendant had elected not to testify.

B

We next address the defendant's claim that § 54-84 (b) is unconstitutional to the extent that it authorizes the trial court to refer to the defendant's "failure to testify" when giving a no unfavorable inference instruction.[15] We are not persuaded.

"Determining the constitutionality of a statute presents a question of law over which our review is plenary. . . . It [also] is well established that a validly enacted statute carries with it a strong presumption of constitutionality, [and that] those who challenge its constitutionality must sustain the heavy burden of proving its unconstitutionality beyond a reasonable doubt. . . . The court will indulge in every presumption in favor of the statute's constitutionality . . . . Therefore, [w]hen a question of constitutionality is raised, courts must approach it with caution, examine it with care, and sustain the legislation unless its invalidity is clear." (Internal quotation marks omitted.) *Allen* v. *Commissioner of Revenue Services*, 324 Conn. 292, 314, 152 A.3d 488 (2016), cert. denied, U.S. , 137 S. Ct. 2217, 198 L. Ed. 2d 659 (2017).

The fifth amendment to the United States constitution prohibits the government from forcing a defendant to be a witness against himself, and the United States

language at the defendant's request. If the legislature had wanted to require trial courts to use more neutral language, we cannot conceive why it would not have used more neutral language in the statute. Thus, the defendant's argument goes more properly to his claim that the statute is unconstitutional, a claim that was not raised in *Casanova*.

[15] Although unpreserved, this claim is reviewable pursuant to *State* v. *Golding*, supra, 213 Conn. 239–40 (unpreserved claim is reviewable if record is adequate for review and claim is of constitutional magnitude).

Supreme Court has concluded that this protection also prohibits prosecutors from commenting at trial on the defendant's decision not to testify.[16] *Griffin* v. *California*, 380 U.S. 609, 615, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965); see also *State* v. *Parrott*, 262 Conn. 276, 292, 811 A.2d 705 (2003) ("[i]t is well settled that comment by the prosecuting attorney . . . on the defendant's failure to testify is prohibited by the fifth amendment to the United States constitution" (internal quotation marks omitted)). "In *Griffin*, the court reasoned that allowing a prosecutor to comment on the defendant's refusal to testify would be equivalent to imposing a penalty for exercising his constitutional right to remain silent." *State* v. *A. M.*, 324 Conn. 190, 200, 152 A.3d 49 (2016).

In addition, as we have already explained, "an accused who exercises his right to refuse to testify has a constitutional right to a no adverse inference instruction when requested" under *Carter* v. *Kentucky*, supra, 450 U.S. 288. *State* v. *Smith*, 201 Conn. 659, 662, 519 A.2d 26 (1986). "The raison d'etre for . . . the constitutional right [to such an instruction] . . . is to reduce to a minimum jury speculation as to why an accused would remain silent in the face of a criminal accusation. 'No judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation, but a judge can, and must . . . use the unique power of the jury instruction to reduce that speculation to a minimum.' *Carter* v. *Kentucky*, supra, 303." *State* v. *Smith*, supra, 662–63; see also *State* v. *Ruocco*, 322 Conn. 796, 804, 144 A.3d 354 (2016) ("[w]ithout proper instructions . . . a jury may prejudge a defendant because he failed to take the stand and [to] protest his

[16] The self-incrimination clause of the fifth amendment is made applicable to state prosecutions through the due process clause of the fourteenth amendment to the United States constitution. E.g., *Malloy* v. *Hogan*, 378 U.S. 1, 6, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

innocence in the face of a criminal accusation" (internal quotation marks omitted)).

The defendant in the present case contends that the "failure to testify" language of § 54-84 (b) "implies that the defendant [did] something wrong by exercising his right not to testify." He points out that one source's definition of the word "failure" includes "an act or instance of failing or proving unsuccessful; lack of success," "nonperformance of something due, required, or expected," and "a subnormal quantity or quality; an insufficiency . . . ." Dictionary.com, available at https://www.dictionary.com/browse/failure (last visited April 19, 2021). Thus, the defendant argues, the word "plants in the minds of the jurors a deficiency about the defense" and effectively penalizes the defendant for exercising his constitutional rights.

The defendant also cites to the decision of the Indiana Court of Appeals in *Moreland* v. *State*, 701 N.E.2d 288 (Ind. App. 1998). In that case, the trial court instructed the jury that "[t]he defendant's failure to testify shall not be considered by the jury in determining the [guilt] or innocence of the defendant." (Internal quotation marks omitted.) Id., 294. The Indiana Court of Appeals concluded that, in the absence of any objection by the defendant, the instruction was not improper. Id. The court also observed, however, that the defendant's claim was "not without merit. In the exercise of their discretion, trial courts when instructing juries may wish to avoid the use of the phrase 'defendant's failure,' which is subject to pejorative construction. A defendant's exercise of his constitutional right not to incriminate himself is not a 'failure.' " Id., 294 n.2.

In *State* v. *Tyson*, 23 Conn. App. 28, 579 A.2d 1083, cert. denied, 216 Conn. 829, 582 A.2d 207 (1990), the Appellate Court considered an identical constitutional claim. The defendant in *Tyson* argued that the use of

the word "failure" in § 54-84 (b) "nullifies the presumption of innocence by raising the implication that the defendant had an unmet obligation, an obligation either to respond to the accusation or to prove his innocence." Id., 43. The Appellate Court rejected this claim, reasoning that, even if "the word 'failure' has a negative connotation, [it] cannot agree that it is the word itself [that] generates the prejudice to the defendant. The court's use of this word did not alert the jury to a fact of which it had been unaware, or make it more likely that the jury would draw an adverse inference from the defendant's silence." Id. The Appellate Court further observed that "[t]he jury is patently aware of this failure. The United States Supreme Court has noted that [i]t has been almost universally thought that juries notice a defendant's failure to testify. . . . The laymen's natural first suggestion would probably be that the resort to privilege in each instance is a clear confession of crime." (Internal quotation marks omitted.) Id.

The Appellate Court concluded that "[t]he very nature of the no adverse inference instruction specified in § 54-84 (b) is to dispel and ameliorate the inevitable speculation and to mitigate the damage to the defendant. The defendant [in *Tyson*] merely prefers his own phrasing of this warning not to speculate. Calling such failure by a different name would not completely counter the risk inherent in the defendant's choosing to stand silent, and we cannot fault the [trial] court's adherence to statutory mandates." (Internal quotation marks omitted.) Id., 43–44.

Although we ultimately agree with the Appellate Court's holding in *Tyson*, we do not entirely agree with its analysis. The use of the word "failure" may not "alert the jury to a fact of which it had been unaware"; id., 43; but it does have the tendency to *confirm* the validity of the jury's natural assumption that an innocent person would take the stand to respond to the accusations

against him. We therefore agree with the defendant in the present case that the use of more neutral language, such as "the defendant's choice not to testify," or "the fact that the defendant did not testify," would be preferable. Indeed, as the defendant points out, the Connecticut Judicial Branch's model criminal jury instructions contain the following instruction: "The defendant has not testified in this case. An accused person has the option to testify or not to testify at the trial. (He/she) is under no obligation to testify. (He/she) has a constitutional right not to testify. You must draw no unfavorable inferences from the defendant's *choice not to testify*." (Emphasis added.) Connecticut Criminal Jury Instructions 2.2-4, available at https://www.jud.ct.gov/JI/Criminal/Criminal.pdf (last visited April 19, 2021). As we concluded in part III A of this opinion, it is well within the trial courts' discretion to use this alternative language, and we encourage them to do so.

We conclude, however, that the semantic difference between the phrase "failure to testify" and the phrase "choice not to testify" is too slight to have constitutional significance within the overall context of the jury instruction under consideration. There simply is no completely neutral way to characterize the fact that the defendant did not take the stand, which is why a no adverse inference instruction is constitutionally required upon the defendant's request in the first instance. For example, if the jury were instructed only that the defendant elected not to testify, as was his constitutional right under the fifth amendment, that instruction would in no way curb the natural tendency of the jury to assume that the defendant would not have made that choice if he were innocent. Although the jury would be aware that the defendant had no *obligation* to testify, it would still know that the defendant had the *ability* to testify if he so chose, and, in the absence of a no adverse inference instruction, it would still naturally

assume that, by choosing not to testify, he did what an innocent person would not have done. We conclude, therefore, that, although the phrase "failure to testify" has a slightly more negative connotation than the phrase "choice not to testify" because the word "failure" suggests the nonperformance of an obligation, that slight difference does not have a material impact on a defendant's constitutional right to remain silent. This is especially so when, as in the present case, the trial court has expressly instructed the jury that the defendant had no obligation to testify and a constitutional right not to testify. Accordingly, we reject the defendant's claim that § 54-84 (b) is unconstitutional. Having rejected the defendant's other claims on appeal, we affirm the judgment of conviction.

The judgment is affirmed.

In this opinion the other justices concurred.

D'AURIA, J., concurring. I agree with and join parts I and II of the majority opinion. I also agree with and join part III A and B, which concludes that the trial court did not violate (1) General Statutes § 54-84 (b) by denying the request by the defendant, Michael T., to instruct the jury that it could draw no unfavorable inference from his "elect[ion]" not to testify, rather than his "failure" to testify, or (2) his exercise of his constitutional right to remain silent by concluding that the same statute required the trial court to instruct the jury that it could draw "no unfavorable inferences from the accused's *failure* to testify." (Emphasis added.) General Statutes § 54-84 (b). I write briefly and separately because I believe the court's resolution of the defendant's "no unfavorable inference" claims leaves in its wake confusion for trial courts. I respectfully suggest that the legislature consider clarifying whether it intended for courts to use any particular language—

including the phrase, "failure to testify"—when giving this legislatively and constitutionally compelled instruction.

The trial court in the present case believed it was required to use the language of the statute ("failure to testify") or risk committing plain error. The court today properly disabuses trial courts of that notion. The majority opinion contains four predicates, which I agree are accurate under our law. First, "a defendant may request, and the trial court may give, a jury instruction that deviates from the specific wording of § 54-84 (b), as long as the instruction does not materially alter the substantive meaning of the statute." Second, the trial court is not *required* to grant a defendant's request for a particular alternative instruction but may give any instruction that accurately states the law. Third, § 54-84 (b) requires the trial court to grant a defendant's request that the court give no instruction concerning the defendant's failure to testify. See *State* v. *Casanova*, 255 Conn. 581, 600, 767 A.2d 1189 (2001). And, fourth, in the absence of a request not to give an instruction at all, the failure to give a "no unfavorable inference" instruction pursuant to § 54-84 (b) is plain error. *State* v. *Wright*, 197 Conn. 588, 595, 500 A.2d 547 (1985).

Even when considering these axioms together, there remains to me something incongruous. Specifically, the majority agrees with the defendant, as do I, that the statutory phrase "failure to testify," while violating no constitutional rule, nonetheless has "the tendency to *confirm* the validity of the jury's natural assumption that an innocent person would take the [witness] stand to respond to the accusations against him." (Emphasis in original.) The majority even goes so far as to "agree with the defendant in the present case that the use of more neutral language, such as 'the defendant's choice not to testify,' or 'the fact that the defendant did not testify,' would be preferable," and states that "it is well

within the trial courts' discretion to use this alternative language, and we encourage them to do so." The majority also notes and encourages use of the Judicial Branch's model criminal jury instructions, which provide in relevant part: "The defendant has not testified in this case. . . . You must draw no unfavorable inferences from the defendant's *choice not to testify*." (Emphasis added.) Connecticut Criminal Jury Instructions 2.2-4, available at https://www.jud.ct.gov/JI/Criminal/Criminal.pdf (last visited April 22, 2021). The majority goes so far as to say: "[W]e can perceive no reason why the legislature would have wanted to bar trial courts from deviating from the specific language of the statute when instructing the jury, as long as the courts give an instruction that is at least as protective of the defendant's constitutional right as the statutory language."[1]

So, where does this leave our trial courts? If it is plain error to give no instruction even without a request, presumably, trial courts should have a canned instruction to give in every case in which a defendant does not testify. Should courts default to use of the statutory language? The majority's answer appears to be that they can, but they don't have to. The majority's answer is the same when a defendant proposes language that departs from the legislative language: courts may depart but don't have to.

Although we might be able to envision examples of a defendant who wishes for a trial court to use the statutory phrase, "failure to testify," in its instruction, it is not apparent to me under what circumstances the court could appropriately exercise discretion to *decline* to use alternative language that we have recognized not only as valid, but preferable. In fact, it is significant to

[1] The majority even overrules cases that have "previously held that a minor deviation from the specific wording of § 54-84 (b) is improper, even if the instruction does not alter the substantive meaning of the statute . . . ." (Citations omitted.)

me that a committee of the Judicial Branch's criminal trial judges, presumably after careful consideration of the statutory language, has proposed a model instruction that deviates from the statute's language and that we encourage trial courts to use: "The defendant has not testified in this case. . . . You must draw no unfavorable inferences from the defendant's *choice not to testify*." (Emphasis added.) Connecticut Criminal Jury Instructions, supra, 2.2-4. It is also significant to me that the state has voiced no objection to the language in the model instruction.

We could adopt this language, or any other "neutral" or "preferable" language, as a matter of our supervisory authority over the administration of justice. "We ordinarily invoke our supervisory powers to enunciate a rule that is not constitutionally required but that we think is preferable as a matter of policy." (Internal quotation marks omitted.) *Marquez* v. *Commissioner of Correction*, 330 Conn. 575, 608, 198 A.3d 562 (2019). We have exercised this authority to "[adopt] rules intended to guide the lower courts in the administration of justice in all aspects of the criminal process"; (internal quotation marks omitted) *State* v. *Rose*, 305 Conn. 594, 607, 46 A.3d 146 (2012); including numerous times to direct trial courts to instruct or not to instruct juries in certain ways. See, e.g., *State* v. *Carrion*, 313 Conn. 823, 852–53, 100 A.3d 361 (2014); *State* v. *Aponte*, 259 Conn. 512, 522, 790 A.2d 457 (2002); *State* v. *Delvalle*, 250 Conn. 466, 475–76, 736 A.2d 125 (1999). The present case seems to fit the bill: the statutory language does not violate the constitution, but the majority considers other language preferable as a matter of policy. It would be odd if the court's reticence to exercise such authority in the present case and adopt particular language—the committee's model instruction or otherwise—stemmed from an unwillingness to deviate from the legislature's

language because we have in our opinion today encouraged trial courts to do exactly that.

I assume instead that our reluctance derives from the fact that the defendant has not specifically asked that we exercise our supervisory authority. Ultimately, it is for this reason that I do not dissent from the majority's election not to employ its supervisory authority to put its imprimatur on the committee's language or direct particular language. Instead, I humbly suggest that a signal from the legislature after its consideration of the statutory language would be useful so that courts might better understand the extent to which the legislature is wedded to any particular language.

I therefore respectfully concur.

STATE OF CONNECTICUT *v.* GREGORY JOHN POMPEI
(SC 20530)

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

Syllabus

Convicted of two counts of the crime of interfering with an officer, the defendant appealed, claiming that the trial court had improperly denied his motion to suppress certain evidence obtained after a police officer, L, positioned his cruiser behind the defendant's car and blocked the defendant's egress from the parking lot in which he was parked. L had reported to the parking lot in response to a dispatch concerning a possibly unconscious man in a parked car. L eventually aroused the defendant by tapping on the driver's side window, and, when the defendant lowered the window, L smelled alcohol. The defendant was uncooperative and slurring his words, and subsequently was arrested. Prior to trial, the defendant moved to suppress the evidence of his statements and actions in the parking lot, claiming that he had been seized in violation of the fourth amendment as soon as L positioned his cruiser behind the defendant's car and prevented him from leaving. The trial court denied the motion to suppress, concluding that the defendant's encounter with L did not become a seizure until after the defendant awoke and lowered the window, as, up until that point, L was checking

on the defendant's well-being pursuant to his community caretaking function rather than engaging in an investigatory stop. The court further concluded that, once the defendant awoke and began to interact with L, L had a reasonable and articulable suspicion that the defendant had been operating his vehicle under the influence of alcohol. On the defendant appeal, *held* that the trial court properly denied the defendant's motion to suppress on the ground that L was acting in his community caretaking capacity when he positioned his cruiser behind the defendant's car, as the limited intrusion on the defendant's liberty was reasonable and justified under the fourth amendment: L's arrival in the parking lot was in response to information, which made no mention of erratic driving or possible drunkenness, from a concerned citizen about an unconscious man in a parked car at nearly 2 a.m., L did not activate his lights, and, consistent with his purpose of determining whether the defendant required medical attention, L's first question upon arousing the defendant was whether he was okay; moreover, L testified that he positioned his cruiser where he did to ensure that the defendant's car did not roll backward or backup while he was ascertaining the situation, and there was no evidence that L was engaging in a general exploratory or pretextual stop when he parked his cruiser behind the defendant's car.

Argued January 11—officially released April 26, 2021*

Procedural History

Two part substitute information charging the defendant, in the first part, with the crime of operating a motor vehicle while under the influence of intoxicating liquor or drugs and two counts of the crime of interfering with an officer, and, in the second part, with operating a motor vehicle while his license was under suspension, brought to the Superior Court in the judicial district of Hartford, geographical area number fourteen, where the court, *Prats*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the case was tried to the jury before *Prats*, *J.*; verdict and judgment of guilty of two counts of interfering with an officer, from which the defendant appealed. *Affirmed.*

Jerald M. Lentini, with whom was *Robert T. Fontaine*, for the appellant (defendant).

* April 26, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, *Gail P. Hardy*, former state's attorney, and *Brenda L. Hans*, senior assistant state's attorney, for the appellee (state).

Opinion

ECKER, J. A jury found the defendant, Gregory John Pompei, guilty of two counts of interfering with an officer in violation of General Statutes § 53a-167a (a). The sole issue on appeal is whether the trial court properly denied the defendant's pretrial motion to suppress alleging that the defendant was seized in violation of the fourth amendment to the United States constitution when a marked police cruiser blocked the egress of his motor vehicle, which was parked with its engine running and the defendant asleep in the driver's seat. The state claims that no violation of the fourth amendment occurred because the responding officer was not engaged in an investigatory stop involving criminal activity but, rather, was checking on the defendant's well-being pursuant to the officer's community caretaking function. We agree with the state and affirm the judgment of conviction.

The record reflects the following facts found by the trial court after an evidentiary hearing on the defendant's motion to suppress evidence, as supplemented by the undisputed testimony of the arresting officer. On October 5, 2017, at approximately 1:56 a.m., Officer John Loud of the Manchester Police Department was on a routine patrol when he received a dispatch regarding a "possibly unconscious [male] in a white Ford Focus parked at Cumberland Farms . . . ." Upon arriving at Cumberland Farms, Loud parked his patrol car behind the Focus in order "to keep it from being able to roll backwards or backup until [he] could ascertain the situation at hand." When he approached the Focus,

Loud observed a male, whom he later identified as the defendant, sleeping or unconscious in the driver's seat with the key in the ignition and the engine running.

Loud attempted to rouse the defendant "to ascertain [his] physical well-being." The officer knocked "[v]ery hard" on the driver's side window, and the defendant eventually awoke. The defendant rolled down the window, and Loud asked whether he was okay. The defendant responded, "I'm fine." Loud immediately smelled the odor of alcohol emanating from the defendant.

Loud asked the defendant for his name and identification. The defendant responded with his first name, but Loud could not ascertain with clarity if his name was Craig or Greg because the defendant was mumbling and slurring his words. When asked for his last name, the defendant kept repeating his first name. The defendant indicated that his identification was in the trunk. When the defendant exited the car and walked to the trunk to retrieve his identification, he appeared to be unbalanced and had to hold on to the vehicle to keep himself steady. After the defendant opened the trunk of the Focus, Loud observed in plain view two twelve-packs of Bud Light; one pack was empty, and the other appeared to have a few bottles missing.

The defendant never found his identification and was uncooperative about giving his full name to Loud and a second police officer who had arrived on the scene. The officers spotted a piece of mail with the defendant's name and, on that basis, were able to confirm his identity. The engine of the car was running during the entire encounter, and the defendant kept repeating, "I don't know how I got here." The officers contacted dispatch and discovered that the defendant's driver's license had been suspended.

The defendant kept trying to walk away from the officers despite their verbal commands to stop. Loud

decided to restrain the defendant in order to "continue his investigation, based [on] what he noted at this point, the odor of alcohol, the defendant's inability to perform on the undivided tasks, his slurred speech, and his gait . . . ." Loud attempted to handcuff the defendant, but the defendant resisted by clenching and pulling away. The officers then called for backup. With the assistance of additional officers, the defendant finally was restrained, placed in handcuffs, and taken to the Manchester Police Department.

The defendant was charged with one count of operating under the influence of alcohol in violation of General Statutes § 14-227a (a) (1) and two counts of interfering with an officer in violation of § 53a-167a (a).[1] Prior to trial, the defendant moved to suppress the evidence of his statements and actions in the Cumberland Farms parking lot, claiming that he was seized in violation of the fourth amendment the moment his "vehicle was blocked and [he was] unable to leave." The trial court held an evidentiary hearing on the defendant's motion. Following that hearing, the trial court concluded that "Loud's initial encounter with the defendant was in his community caretaking capacity. . . . Loud was not engaged in an investigatory stop of criminal activity but, rather, was acting in [the] capacity of the [wellness] check or community caretaking function." The trial court elaborated that "[t]he facts in this case [support the conclusion] that the officer was acting only on information from the concerned citizen that the person was either asleep or unconscious in a parked car. There was no mention that the person might be drunk or engaging in erratic driving. The officer, when he arrived, never engaged his police lights. He parked

[1] The defendant also was charged in a part B information with one count of operation of a motor vehicle with a suspended license in violation of General Statutes § 14-215 (c) (1). The disposition of this charge is unclear from the record.

the [patrol] car behind the defendant for security reasons, and he observed a person who was either sleeping or unconscious in the parked car, and the engine was running. The officer knocked on the window to ask if the defendant was okay. There was never a display of any physical force or . . . any threats made to the defendant by the officer. Therefore, up to this point, there ha[d] been no intrusion [on] any constitutionally protected rights."

The trial court determined that the defendant's encounter with Loud did not become a seizure until after "the defendant woke up and rolled down his window and the officer smelled alcohol coming off of his body . . . ." The smell of alcohol was the "first indici[um] that this may not be a [wellness] check at all, but that this [was] turning into a motor vehicle investigatory stop . . . ." The trial court further concluded that Loud "developed a reasonable and articulable suspicion that the defendant had been operating a motor vehicle while under the influence of alcohol when he smelled the odor of alcohol on the defendant emanating from the car," heard the defendant's "mumbling" and "slurring" speech, observed the defendant's "unsteady gait," and found "two twelve-packs of beer that were in clear view when the defendant opened his [trunk] . . . ." Accordingly, the trial court denied the defendant's motion to suppress.

Following a jury trial, the defendant was found not guilty of driving under the influence of alcohol but found guilty of both counts of interfering with an officer. The trial court rendered judgment consistent with the jury's verdict and sentenced the defendant to one year imprisonment, execution suspended after thirty days, followed by one year of probation, on each count of interfering with an officer. The defendant appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursu-

ant to General Statutes § 51-199 (c) and Practice Book § 65-1.

On appeal, the defendant does not challenge the trial court's determination that, once Loud smelled the odor of alcohol, reasonable, articulable suspicion of criminal activity existed to justify the defendant's detention under *Terry* v. *Ohio*, 392 U.S. 1, 21–22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Instead, the defendant challenges the trial court's conclusion that there was no fourth amendment violation prior to the *Terry* stop, arguing that the community caretaking exception "is . . . irrelevant" to the present case because the defendant was seized "the moment . . . Loud pulled behind the defendant's vehicle and blocked his egress . . . ." The state responds that the trial court properly denied the defendant's motion to suppress on the ground that Loud was acting in a community caretaking capacity when he parked his police cruiser behind the defendant's vehicle.[2] Alternatively, the state argues that, even

[2] The state also contends that the defendant's claim is unreviewable because he abandoned it in the trial court and failed to brief it adequately in this court. We disagree. In the trial court, defense counsel argued that the defendant was seized the moment the defendant's "vehicle was blocked and [he was] unable to leave." Although defense counsel later conceded that the defendant "was asleep at this time and would not have known that he was blocked in," defense counsel nonetheless maintained that "[a] reasonable person awakened [by] a forceful knocking by [the] police with a police car blocking him in late at night is not going to feel free to terminate the encounter. . . . [The defendant] was effectively constitutionally seized at the moment that [Loud] blocked him in and he became aware of the fact that he was blocked." Thus, defense counsel consistently maintained that the defendant was seized *before* Loud smelled the odor of alcohol and there was a reasonable, articulable suspicion to justify the defendant's detention. We therefore conclude that the defendant's fourth amendment claim was not abandoned in the trial court.

The state also contends that the defendant's fourth amendment claim is unreviewable due to inadequate briefing because the defendant simply alleges that "the community caretaking exception is irrelevant." We agree with the state that the defendant's analysis of the community caretaking exception to the fourth amendment's warrant requirement is somewhat conclusory, but we nonetheless exercise our discretion to review the defendant's claim. See, e.g., *Ward* v. *Greene*, 267 Conn. 539, 546, 839 A.2d 1259

if the trial court improperly denied the defendant's motion to suppress, the record is inadequate to demonstrate harm.[3]

The standard of review for a motion to suppress is well settled. "A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [W]hen a question of fact is essential to the outcome of a particular legal determination that implicates a defendant's constitutional rights, [however] and the credibility of witnesses is not the primary issue, our customary deference to the trial court's factual findings is tempered by a scrupulous examination of the record to ascertain that the trial court's factual findings are supported by substantial evidence. . . . [W]here the legal conclusions of the court are challenged, [our review is plenary, and] we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision . . . ." (Internal quotation marks omitted.) *State* v. *Kendrick*, 314 Conn. 212, 222, 100 A.3d 821 (2014). Consistent with this general standard, in reviewing the applicability of the community caretaking exception, the trial court's "subordinate factual findings will not be disturbed unless clearly erroneous and the trial court's legal conclusion regarding the applicability of the [community caretaking] doctrine in light of these facts will be reviewed de novo." (Internal quotation marks omitted.) *State* v. *DeMarco*, 311 Conn. 510, 518–19, 88 A.3d 491 (2014).

(2004) (exercising discretion to review claim even though appellant had "failed to analyze in depth the issues presented").

[3] The defendant has not provided this court with the transcripts of the trial, and the state claims that, in the absence of such transcripts, the record is inadequate to establish that the challenged evidence was presented to the jury in support of the crimes of conviction. In light of our conclusion that the trial court properly denied the defendant's motion to suppress, we need not address the state's argument. See, e.g., *State* v. *Salgado*, 257 Conn. 394, 400 n.9, 778 A.2d 24 (2001).

The fourth amendment to the United States constitution prohibits unreasonable searches and seizures by government agents.[4] "Subject to a few well defined exceptions, a warrantless search and seizure is per se unreasonable. . . . The state bears the burden of proving that an exception to the warrant requirement applies when a warrantless search [and seizure have] been conducted." (Citations omitted; internal quotation marks omitted.) *State* v. *Rolon*, 337 Conn. 397, 409, 253 A.3d 943 (2020).

The exception to the fourth amendment's warrant requirement applicable to the present case is known as the community caretaking exception. The community caretaking exception has "evolve[d] outside the context of a criminal investigation and does not involve probable cause as a prerequisite for the making of an arrest or the search for and seizure of evidence." (Internal quotation marks omitted.) *State* v. *Fausel*, 295 Conn. 785, 794, 993 A.2d 455 (2010). This exception does not give police officers carte blanche to effectuate searches and seizures in the absence of probable cause or a warrant issued by a neutral and detached judicial officer. The police must have a valid reason "grounded in empirical facts rather than subjective feelings" to believe that a limited intrusion into liberty or property interests is justified for the exception to apply. (Internal quotation marks omitted.) Id., 795. "It is an objective and not a subjective test"; (internal quotation marks omitted) id.;

[4] The fourth amendment to the United States constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., amend. IV.

The fourth amendment's protection against unreasonable searches and seizures is made applicable to the states through the due process clause of the fourteenth amendment. See, e.g., *Mapp* v. *Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).

that "looks to the totality of the circumstances."[5] *State* v. *DeMarco*, supra, 311 Conn. 535.

The community caretaking exception was first recognized by the United States Supreme Court in *Cady* v. *Dombrowski*, 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973). The defendant in *Cady* was convicted of murder after incriminating evidence was found during a warrantless search of his motor vehicle following an automobile accident. Id., 434, 442. The police officers searched the defendant's motor vehicle because they knew that he was an off duty Chicago police officer who was required by regulation to carry his service revolver at all times. Id., 436–37. The court in *Cady* rejected the defendant's contention that the search was illegal, concluding that the search "was 'standard procedure in [that police] department,' to protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands." Id., 443. The court reasoned that police officers frequently "engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." Id., 441. The police had not violated the defendant's fourth amendment rights when they searched the trunk of his parked vehicle, the court held, because they reasonably

[5] Both *Fausel and DeMarco* involve the emergency doctrine, which "is rooted in the community caretaking function of the police . . . ." *State* v. *Blades*, 225 Conn. 609, 619, 626 A.2d 273 (1993); see also *State* v. *DeMarco*, supra, 311 Conn. 536–40; *State* v. *Fausel*, supra, 295 Conn. 799–802. Although the emergency doctrine and the community caretaking doctrine have a common origin, they are two separate and distinct exceptions to the fourth amendment's warrant requirement. As we explain in greater detail in this opinion, the community caretaking exception involves routine, nonemergency duties undertaken to protect the public, whereas the emergency doctrine requires state actors to have a reasonable belief "that life or limb is in immediate jeopardy and that the intrusion [on the defendant's liberty] is reasonably necessary to alleviate the threat." (Internal quotation marks omitted.) *State* v. *DeMarco*, supra, 536.

believed that it contained a loaded revolver that could endanger the public if left unsecured. Id., 447.[6]

This court followed *Cady* in *State* v. *Tully*, 166 Conn. 126, 348 A.2d 603 (1974), in which we recognized that a police officer acting in a community caretaking capacity may make "a reasonable intrusion not prohibited by the fourth amendment." Id., 133. In *Tully*, a police officer discovered marijuana in plain view when he made a warrantless intrusion into a car for "the purpose of removing a guitar from the motor vehicle for [safekeeping]." (Internal quotation marks omitted.) Id., 129. We held that the trial court properly denied the defendant's motion to suppress the marijuana, partly because there was "no evidence that this was a general exploratory search on the part of the policeman on the pretext of protecting the defendant's property . . . . On the contrary, the [trial] court expressly found that the purpose of the officer's entry was to remove the guitar for safekeeping." Id., 136. Furthermore, the defendant "was unable to obtain anyone to remove" the vehicle, which was parked in a vacant lot and "incapable of being secured" due to a missing vent window. (Internal quotation marks omitted.) Id., 137. Under these circumstances, "[w]here there [was] no indication that a search

[6] We recognize that the United States Supreme Court has granted certiorari to consider whether the community caretaking exception to the fourth amendment's warrant requirement extends to the home. See *Caniglia* v. *Strom*, U.S. , 141 S. Ct. 870, 208 L. Ed. 2d 436 (2020). Compare *Caniglia* v. *Strom*, 953 F.3d 112, 124 (1st Cir. 2020) (applying community caretaking exception to warrantless intrusion of defendant's home but noting that "the doctrine's reach outside the motor vehicle context is ill-defined and admits of some differences among the federal courts of appeals"), cert. granted, U.S. , 141 S. Ct. 870, 208 L. Ed. 2d 436 (2020), with *Sutterfield* v. *Milwaukee*, 751 F.3d 542, 554 (7th Cir.) ("taking the narrow view [of the community caretaking exception that] . . . has confined the doctrine to automobile searches" but noting that "state and federal courts have divided over the scope of the community caretaking doctrine recognized in *Cady*"), cert. denied, 574 U.S 993, 135 S. Ct. 478, 190 L. Ed. 2d 362 (2014). Because the present case does not involve the warrantless intrusion into a home, the outcome of *Caniglia* has no bearing on the resolution of this appeal.

for evidence of a crime was being made . . . [and] . . . [w]here a search is conducted as a service to an individual . . . evidence of a crime accidentally discovered need not be suppressed." (Citation omitted; internal quotation marks omitted.) Id.; see also *State* v. *Foote*, 85 Conn. App. 356, 362, 857 A.2d 406 (2004) (holding that officer who seized disabled vehicle on side of road initially "was not engaged in an investigatory stop of criminal activity, but rather was acting in accordance with his community caretaking function"), cert. denied, 273 Conn. 937, 875 A.2d 44 (2005), and cert. denied, 273 Conn. 937, 875 A.2d 43 (2005).

Applying these principles to the present case, we conclude that the intrusion on the defendant's liberty in the Cumberland Farms parking lot was reasonable under the fourth amendment because Loud was acting in a community caretaking capacity when he parked his patrol car behind the defendant's vehicle, knocked on the window, and inquired about his well-being. The evidence supports the trial court's determination that Loud was not acting in a criminal investigatory capacity when he parked his patrol car behind the defendant's motor vehicle but, rather, was responding to a dispatch from a concerned citizen who had reported an unconscious male in a Ford Focus in the Cumberland Farms parking lot at 1:56 a.m. Loud did not activate the lights on his patrol car and parked behind the defendant's vehicle because he wanted "to keep it from being able to roll backwards or backup until [he] could ascertain the situation at hand." Loud exited his patrol car and observed the unconscious or sleeping defendant in the driver's seat with the engine running. Loud knocked on the driver's side window to rouse the defendant and to ascertain whether he required medical attention. Indeed, consistent with this purpose, the first question Loud asked the defendant was whether he was okay. In light of the limited "purpose and scope of the intru-

sion," as well as the complete dearth of evidence indicating that "this was a general exploratory" or "pretext[ual]" stop; *State* v. *Tully*, supra, 166 Conn. 136, 138; we conclude that the defendant's encounter with Loud falls squarely within the community caretaking doctrine.[7]

The judgment is affirmed.

In this opinion the other justices concurred.

PENNY OUDHEUSDEN *v.* PETER OUDHEUSDEN (SC 20330)

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

Syllabus

The defendant, whose marriage to the plaintiff had been dissolved, appealed to the Appellate Court from the judgment of the trial court. The trial court had awarded the plaintiff $18,000 per month in alimony that was not modifiable in duration or amount. The trial court found that the defendant's gross annual income of $550,000 was derived from two closely held businesses that he owned, which were valued at $904,000. As part of its financial orders, the court awarded 50 percent of the fair market value of the two businesses to each party and ordered that the defendant retain 100 percent ownership of both businesses. On appeal to the Appellate Court, the defendant claimed, inter alia, that the trial court impermissibly double counted his income by considering it both for the purpose of valuing his businesses and in making its alimony award. The Appellate Court reversed in part the trial court's judgment and remanded the case for a new hearing on all financial issues. The Appellate Court concluded that the trial court had abused its discretion

[7] The defendant argues that he was seized in violation of the fourth amendment pursuant to *State* v. *Edmonds*, 323 Conn. 34, 145 A.3d 861 (2016), in which this court determined that an unlawful seizure had taken place when, inter alia, "two marked police cruisers converged on the defendant from opposite directions, effectively blocking him from exiting the [parking] lot . . . ." Id., 57. We reject the defendant's contention that this case is analogous to *Edmonds*. In *Edmonds*, the defendant's initial encounter with law enforcement originated as a result of an investigation into potential criminal activity. See id., 40–41. No such suspicion of potential criminal activity existed when Loud approached the defendant. We consider *Edmonds* inapposite.

in failing to issue equitable orders and to consider, with respect to its alimony award, the possibility that the defendant, who was fifty-eight years old at the time of the dissolution and had a history of alcohol abuse, could become ill or might want to retire, or that his businesses could fail to thrive through no fault of his own. The Appellate Court further determined that the trial court had engaged in double counting. On the granting of certification, the plaintiff appealed to this court. *Held*:

1. The Appellate Court correctly concluded that the trial court had abused its discretion in awarding the plaintiff $18,000 per month in alimony that was not modifiable in duration or amount, as there was insufficient evidence that the award accounted for a substantial change in the defendant's circumstances: the trial court failed to consider or afford any significant weight to the defendant's age, health and future earning capacity, and, to the extent that it did consider these factors, the court could not reasonably have concluded that the defendant would continue to earn the same income for the rest of his life; moreover, although the evidence certainly supported the conclusion that the defendant's businesses would likely thrive for some time, the evidence did not support a finding that the growth of those businesses would necessarily be perpetual, and it was unreasonable for the trial court to conclude that the defendant would have the ability to comply with his alimony obligation for the rest of his life without some provision for modification should health or economics prevent compliance; accordingly, this court upheld the Appellate Court's reversal of the trial court's financial orders and its remand for a new hearing on all financial issues.
2. The trial court did not improperly engage in double counting, as the rule against double counting does not apply when the distributed asset is the value of a business and alimony is based on income earned from that business: this court relied on the decisions of courts in other jurisdictions in concluding that it is not double counting to award a spouse a lump sum representing a portion of the value of a business as well as alimony that is based on the paying spouse's actual income from that business; nevertheless, trial courts should consider all statutorily required factors and ensure that the awards as a whole are fair and equitable, and such consideration might include ensuring that the property distribution of a portion of a business' value to the nonowing spouse does not unfairly reduce the owning spouse's ability to earn income from that business.

Argued June 10, 2020—officially released April 27, 2021*

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial dis-

* April 27, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

trict of Stamford-Norwalk and tried to the court, *Tindill*, *J.*; judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to the Appellate Court, *Alvord*, *Keller* and *Eveleigh*, *Js.*, which reversed the judgment in part and remanded the case for further proceedings, and the plaintiff, on the granting of certification, appealed to this court. *Reversed in part*; *further proceedings*.

Scott T. Garosshen, with whom were *Kenneth J. Bartschi* and, on the brief, *Michael T. Meehan*, for the appellant (plaintiff).

Yakov Pyetranker, for the appellee (defendant).

Opinion

D'AURIA, J. The dispositive issue in this appeal is whether the Appellate Court correctly concluded that the trial court had abused its discretion in awarding the plaintiff, Penny Oudheusden, $18,000 per month in permanent, nonmodifiable alimony. On this issue, we agree with the Appellate Court and the defendant, Peter Oudheusden, that the award constituted an abuse of discretion, and we therefore affirm the Appellate Court's order of remand to the trial court for a hearing on new financial orders.

Also presented in this appeal is the question of whether the trial court, in its financial orders, equitably divided the marital estate or, instead, inappropriately engaged in "double counting" by awarding the plaintiff half of the value of the defendant's businesses among its orders dividing the marital property, while also awarding the plaintiff alimony on the basis of income generated by those businesses, which made up the defendant's sole sources of income. Because the issue of double counting is likely to reoccur on remand, and because we have not provided sufficient guidance concerning what constitutes double counting in contexts

beyond those specifically implicated in our own case law, we reach this issue and agree with the plaintiff that this court's rule against double counting does not apply when, as in the present case, the asset at issue is the value of a business. Accordingly, we affirm in part and reverse in part the judgment of the Appellate Court.

The record reveals the following facts and procedural history. In its memorandum of decision, the trial court made several "key findings" of fact that the defendant does not challenge on appeal. The defendant was at fault for the irretrievable breakdown of the marriage in August, 2015. The defendant was the sole financial support of the plaintiff and their children beginning in 1988, and the plaintiff made significant, nonfinancial contributions to the family, including serving as the primary caretaker for the parties' children.

The defendant's gross annual income, which the court found to be $550,000, derives exclusively from his two closely held businesses. The defendant, "for the past thirty-two years, intentionally concealed the exact nature of the business[es] and marital finances from the plaintiff." The court found the defendant's testimony regarding the amount of his annual income, profit, cash flow, business expenses, and personal expenses not credible, and did not credit the testimony of his expert witness, who had testified as to the businesses' value. Instead, the court credited the testimony of the plaintiff and her expert witness, James R. Guberman, who determined that the combined fair market value of the defendant's two businesses was $904,000 ($512,000 for Connecticut Computer & Consulting Company, Inc., and $392,000 for WriteResult, LLC). Guberman used three different valuation methods and then applied a weighted average of those three methods to determine the fair market value of the businesses. Finally, the court found that the defendant's neglect of the marital home, located at 93 Cutler Road in Green-

wich, and his failure to pay the mortgage beginning October 1, 2015, caused a loss of equity in the home of $162,339.89.

On the basis of these findings, the trial court found that a lifetime, periodic alimony award to the plaintiff was "appropriate and necessary." Specifically, the court stated: "The purpose of the court's alimony award is to provide a measure of financial security to the plaintiff, who has not worked outside of the marital home in nearly three decades, has $2095 in retirement funds, and has significantly less ability to acquire income or assets in the future than does the defendant. The plaintiff has limited earning potential. She is fifty-five years old, hearing impaired, and a cancer survivor. The plaintiff earned a bachelor's degree in international marketing . . . and a master's degree in teaching . . . . She is no longer licensed to teach." The trial court made no express findings as to the defendant's age (it is undisputed that he was fifty-eight years of age at the time of dissolution), health, or future earning potential.

In its financial orders, the trial court awarded the plaintiff periodic alimony in the amount of $18,000 per month "until the plaintiff's death, remarriage, cohabitation . . . or civil union, whichever shall occur first." The court made the alimony award "nonmodifiable as to duration and amount." In its property distribution, the trial court distributed the marital assets and debts as follows. The parties had three significant assets: the defendant's two businesses and the marital home. The trial court awarded 50 percent of the fair market value of the defendant's two businesses to each party, ordering the defendant to pay the plaintiff $452,000, representing her half of the businesses' value. The court awarded the defendant 100 percent ownership of both businesses. The court also awarded the defendant ownership of the marital home but awarded the plaintiff $221,677, an amount representing 100 percent of the

estimated net equity in the house as it stood before the defendant's failure to maintain and pay the mortgage on the property caused a loss of equity of $162,339.89. The parties' remaining assets, which included personal property, pension and retirement accounts, bank accounts, and investment accounts, were awarded to whichever party listed the asset on his or her financial affidavit, with any joint accounts split equally.

The trial court ordered each party to be solely responsible for the debts and liabilities listed on their respective financial affidavits. It also ordered the defendant to maintain a ten year, term life insurance policy in the amount of $2 million, naming the plaintiff as the sole beneficiary. Finally, the trial court ordered the defendant to pay 100 percent of the plaintiff's legal, expert, and professional fees, totaling $223,298, either in a lump sum or by an agreed upon installment plan.[1]

The defendant appealed to the Appellate Court, claiming that the trial court's orders impermissibly double counted his income by considering it for business valuation purposes and also awarding alimony on the basis of his income from those businesses. The Appellate Court agreed with the defendant and reversed the judgment of the trial court as to its financial orders and remanded the case for a new hearing on all financial issues. See *Oudheusden* v. *Oudheusden*, 190 Conn. App. 169, 170, 209 A.3d 1282 (2019). The Appellate Court also agreed with the defendant that the trial court's financial orders constituted an abuse of discretion in other ways. See id., 182–85. The Appellate Court held that the trial court did not consider all of the statutory criteria and

[1] The defendant does not challenge the award of legal, expert, or professional fees to the plaintiff but does cite this award as evidence of his inability to comply with the trial court's other financial orders. The court also made the defendant responsible for any outstanding taxes for the years 1985 through 2015, as well as for any tax liability for 2016. The court did not expressly find the amount of the debts, liabilities, and taxes listed.

all of the evidence when it fashioned its financial orders. Id., 182. In particular, the Appellate Court held that the trial court, in ordering nonmodifiable lifetime alimony, failed to consider the possibility that the defendant could become ill, that his businesses could fail to thrive through no fault of his own, or that, at some point in time, he might want to retire. Id., 183. The Appellate Court also disagreed with the trial court's determination that the plaintiff had limited earning potential and held that the record failed to support this determination. See id., 183–85.

The plaintiff petitioned for certification to appeal to this court, arguing, first, that the Appellate Court misapplied this court's double counting test by treating a lump sum payment that was based on an asset's value as equivalent to the transfer of an ownership interest in that asset. The plaintiff also claimed that the Appellate Court improperly substituted its judgment for that of the trial court in determining that the trial court abused its discretion in crafting its financial orders. Specifically, the plaintiff argued that the Appellate Court mischaracterized the trial court's findings of fact regarding her earning potential and that the Appellate Court could properly have concluded that the defendant would continue to earn sufficient income indefinitely. Finally, the plaintiff argued that it was within the trial court's broad discretion to award her lifetime, nonmodifiable alimony.

We granted the plaintiff's petition for certification, limited to the following issues: (1) "Did the Appellate Court correctly conclude that the trial court had erroneously engaged in 'double dipping' by awarding the plaintiff alimony from income generated by the defendant's businesses and also awarding the plaintiff a percentage of those businesses in its division of property?" And (2) "[d]id the Appellate Court correctly conclude that the trial court had abused its discretion by failing to

enter financial orders that equitably divided the marital estate?" *Oudheusden* v. *Oudheusden*, 332 Conn. 911, 912, 209 A.3d 1232 (2019). Additional facts will be set forth as required.

I

Because the second certified issue is dispositive of this appeal, we address it first, and, specifically, we address one aspect of that issue: whether the Appellate Court incorrectly held that the trial court's permanent, nonmodifiable alimony award constituted an abuse of discretion. On this record, we agree with the Appellate Court that the trial court abused its discretion.

In reviewing the alimony award at issue, we note that the scope of our review of a trial court's exercise of its broad discretion in marital dissolution cases is limited to whether the court correctly applied the law and reasonably could have concluded as it did. See, e.g., *Misthopoulos* v. *Misthopoulos*, 297 Conn. 358, 372, 999 A.2d 721 (2010); *Greco* v. *Greco*, 275 Conn. 348, 354, 880 A.2d 872 (2005); *Krafick* v. *Krafick*, 234 Conn. 783, 805, 663 A.2d 365 (1995). We make every reasonable presumption in favor of the correctness of the trial court's action. *Gabriel* v. *Gabriel*, 324 Conn. 324, 336, 152 A.3d 1230 (2016); *Krafick* v. *Krafick*, supra, 805. It is, however, well established that, in awarding alimony, the trial court must take into account all of the statutory factors enumerated in General Statutes § 46b-82 (a)[2]

[2] General Statutes § 46b-82 (a) provides in relevant part: "In determining whether alimony shall be awarded, and the duration and amount of the award, the court shall consider the evidence presented by each party and shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81, and, in the case of a parent to whom the custody of minor children has been awarded, the desirability and feasibility of such parent's securing employment."

and that its failure to do so constitutes an abuse of discretion. See *Greco* v. *Greco*, supra, 360 (trial courts must "consider all of the criteria enumerated in . . . § 46b-82"). The trial court does not need to give each factor equal weight or make express findings as to each factor, but it must consider each factor. Id., 355; see also *Burns* v. *Burns*, 41 Conn. App. 716, 726, 677 A.2d 971 (" 'Although a specific finding . . . is not required, the record must indicate the basis for the trial court's award.' . . . Sufficient evidence must exist to support the award, and the award may not stand if it is logically inconsistent with the facts found or the evidence." (Citation omitted.)), cert. denied, 239 Conn. 906, 682 A.2d 997 (1996); cf. *Simmons* v. *Simmons*, 244 Conn. 158, 180–81, 708 A.2d 949 (1998) (trial court abused its discretion in failing to consider defendant's age, which was "significant" omission in court's failure to award defendant any alimony). In addition, it is a "long settled principle that the defendant's ability to pay is a material consideration in formulating financial awards." *Greco* v. *Greco*, supra, 361. Finally, the trial court's financial orders must be consistent with the purpose of alimony: to provide continuing support for the nonpaying spouse, who is entitled to maintain the standard of living enjoyed during the marriage as closely as possible. *Hornung* v. *Hornung*, 323 Conn. 144, 162, 146 A.3d 912 (2016); id., 163 (plaintiff's efforts as homemaker, primary caretaker of parties' children increased defendant's earning capacity at expense of her own earning capacity, thus entitling her, postdissolution, to maintain standard of living parties enjoyed during marriage to extent possible); see *Blake* v. *Blake*, 211 Conn. 485, 498, 560 A.2d 396 (1989) ("periodic . . . alimony is based primarily upon a continuing duty to support"). When exercising its broad, equitable, remedial powers in domestic relations cases, a court "must examine both the public policy implicated and the basic elements of fairness." *Greco* v. *Greco*, supra, 363.

In this case, the alimony award was both permanent and nonmodifiable. Permanent, or lifetime, alimony is alimony payable in regular installments and terminates upon the death of either spouse (and often upon the nonpaying spouse's remarriage or cohabitation).[3] See Black's Law Dictionary (11th Ed. 2019) p. 92 (defining "alimony"); cf. id. (defining "rehabilitative alimony," which is durational in nature). Permanent alimony is generally modifiable unless otherwise specified. See, e.g., *Eckert* v. *Eckert*, 285 Conn. 687, 693, 941 A.2d 301 (2008) ("[n]onmodification provisions that are clear and unambiguous . . . are enforceable"). General Statutes § 46b-86 (a) permits a court to make an alimony award that is not subject to modification. Id. An award may be nonmodifiable as to duration or amount, or both. See, e.g., *Way* v. *Way*, 60 Conn. App. 189, 197, 758 A.2d 884 (trial court improperly terminated award of household support pursuant to § 46b-86 (a) because award was nonmodifiable as to duration, amount), cert. denied, 255 Conn. 901, 762 A.2d 910 (2000). In this case, the trial court took the unusual step of awarding alimony that is both permanent and nonmodifiable as to duration and amount.

The trial court has the authority to order lifetime, or permanent (but modifiable), alimony awards. See General Statutes § 46b-86 (a) (authorizing permanent alimony awards and providing for modification upon substantial change in circumstances of either party); see also *Keenan* v. *Casillo*, 149 Conn. App. 642, 663–64 and n.7, 89 A.3d 912 (upholding permanent alimony award of $1200 per week to forty year old woman after three year marriage), cert. denied, 312 Conn. 910, 93

[3] The terms "permanent" and "lifetime" are somewhat imprecise given that it is common for permanent alimony awards to include limited termination provisions such as those we have described. Nonetheless, these awards are of indefinite duration unless they are terminated by a triggering event specified in the awards.

A.3d 594 (2014). The defendant argues that, to incentivize the eventual self-sufficiency of the supported spouse, courts have begun to disfavor permanent alimony and favor time limited (also called rehabilitative) alimony. Such a policy would not in any way limit the trial court's broad discretion to award permanent alimony when appropriate. See *Dan* v. *Dan*, 315 Conn. 1, 11, 105 A.3d 118 (2014) (The court explained in dictum that "courts have begun to limit the duration of alimony awards in order to encourage the receiving spouse to become self-sufficient. Underlying the concept of time limited alimony is the sound policy that such awards may provide an incentive for the spouse receiving support to use diligence in procuring training or skills necessary to attain self-sufficiency." (Internal quotation marks omitted.)). Further, such a policy does not apply when, as in the present case, the trial court found that the supported spouse has limited earning potential due to her age, health, and the number of years she had been out of the workforce. Thus, we would not likely hold that the award of permanent alimony is an abuse of discretion under the facts of this case.

Although appellate level case law addressing a trial court's authority to make alimony awards nonmodifiable is sparse, the legislature has indisputably conferred such authority. General Statutes § 46b-86 (a);[4] see also

[4] General Statutes § 46b-86 (a) provides in relevant part: "Unless and to the extent that the decree precludes modification, any final order for the periodic payment of permanent alimony or support, an order for alimony or support pendente lite or an order requiring either party to maintain life insurance for the other party or a minor child of the parties may, at any time thereafter, be continued, set aside, altered or modified by the court upon a showing of a substantial change in the circumstances of either party . . . . By written agreement, stipulation or decision of the court, those items or circumstances that were contemplated and are not to be changed may be specified in the written agreement, stipulation or decision of the court. . . . If a court, after hearing, finds that a substantial change in circumstances of either party has occurred, the court shall determine what modification of alimony, if any, is appropriate, considering the criteria set forth in section 46b-82."

Brown v. *Brown*, 148 Conn. App. 13, 24–25, 84 A.3d 905, cert. denied, 311 Conn. 933, 88 A.3d 549 (2014); *Marshall* v. *Marshall*, 119 Conn. App. 120, 128–29, 988 A.2d 314, cert. granted, 296 Conn. 908, 993 A.2d 467 (2010) (appeal withdrawn November 18, 2010); *Sheehan* v. *Balasic*, 46 Conn. App. 327, 330–31, 699 A.2d 1036 (1997), appeal dismissed, 245 Conn. 148, 710 A.2d 770 (1998); *Burns* v. *Burns*, supra, 41 Conn. App. 724–25. As reflected in the first sentence of § 46b-86 (a), the exercise of this authority constitutes an exception to the general rule of modifiability. General Statutes § 46b-86 (a) ("[*u*]*nless and to the extent that the decree precludes modification*, any final order for the periodic payment of permanent alimony . . . may, at any time thereafter, be continued, set aside, altered or modified by the court upon a showing of a substantial change in the circumstances of either party . . . ." (emphasis added)). We have in fact recognized that the language of § 46b-86 "suggests a legislative preference favoring the modifiability of orders for periodic alimony." *Scoville* v. *Scoville*, 179 Conn. 277, 279, 426 A.2d 271 (1979). Although a clear and unambiguous nonmodification provision is enforceable; *Eckert* v. *Eckert*, supra, 285 Conn. 693; we have explained that, "because of the volatile nature of . . . personal circumstances, it has been recognized judicially that '[p]rovisions [that] preclude modification of alimony [or support] tend to be disfavored.' " *Amodio* v. *Amodio*, 247 Conn. 724, 730, 724 A.2d 1084 (1999); see also *Cummock* v. *Cummock*, 180 Conn. 218, 222–23, 429 A.2d 474 (1980); *Lawler* v. *Lawler*, 16 Conn. App. 193, 203, 547 A.2d 89 (1988), appeal dismissed, 212 Conn. 117, 561 A.2d 128 (1989).

As an exception to the general rule, it is therefore even more important that, before entering a nonmodifiable alimony order, the trial court consider the statutory factors it is obliged to balance. And it requires no citation to state that consideration of all statutory factors—

implicating "basic elements of fairness"—is more critical still when the trial court's alimony order is not only nonmodifiable, but also permanent.

In the present case, in addition to ordering the defendant to pay the plaintiff $452,000 (half the value of his businesses) and $221,677 (representing the equity in the marital home), to purchase a ten year, $2 million life insurance policy for the plaintiff's benefit, and to assume all of the debt in the marital home, the trial court ordered that the defendant pay the plaintiff $18,000 per month ($216,000 per year) in alimony. The court specifically made this lifetime award "nonmodifiable as to duration and amount": i.e., until one party dies, however long in the future that eventuality might occur. This provision of the award was clear and unambiguous. The parties do not argue otherwise. Although we make every reasonable presumption in favor of the correctness of the trial court's decision; *Krafick* v. *Krafick*, supra, 234 Conn. 805; we agree with the Appellate Court that a review of this alimony award in light of the record compels the conclusion that the trial court failed to consider all of the required statutory factors.

Specifically, on the basis of the evidence admitted at trial, we are obliged to conclude that the trial court either failed to consider the defendant's age, health, and future earning capacity, or failed to afford any significant weight to these factors. See *Hornung* v. *Hornung*, supra, 323 Conn. 164 ("The trial court must also look to the payor spouse's financial situation, in addition to that of the recipient spouse. Specifically, the trial court must consider the payor's age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, and employability." (Emphasis omitted.)). Although the trial court is not required to make express findings regarding every factor and need not give equal weight to each factor; *Greco* v. *Greco*, supra, 275 Conn. 355; notably, the trial

court made express findings as to the plaintiff's age, health, and future earning potential without making parallel findings regarding the defendant.

The plaintiff contends that the trial court's orders reflect that the court in fact considered these factors but, in its discretion, did not find them compelling. She argues, for example, that there was no evidence of the defendant's declining health or any likely future health issues. But, although the defendant considers himself to be in good health, the record reflects that he was fifty-eight years of age at the time of trial and has a history of alcohol abuse. His age itself could suggest the likelihood of health issues at some point in the future, let alone his alcohol abuse. Because the defendant has no retirement savings and derives all of his income from his two closely held businesses, this evidence also relates to his future earning potential and, therefore, his ability to comply with the court's orders because his health is directly tied to his ability to sustain his current income.

To illustrate how the trial court's permanent, nonmodifiable award could very well violate "basic elements of fairness" underpinning the statutory factors, we need only consider the not unlikely scenario in which both parties survive into their eighties. It requires no evidence to acknowledge that people can experience failing health as they advance into their later years. Yet, the trial court's award requires the defendant to continue to pay the plaintiff $216,000 per year even after twenty plus years of such payments and as both their health and ability to work dwindle.

The plaintiff argues that the trial court had before it enough evidence that the defendant's ability to earn income would not decrease over time, thereby supporting the alimony award. She notes that the defendant testified that he has no plans to retire and that his work

requires no physical labor. The plaintiff also points to evidence that the defendant's businesses were projected to grow at a rate of 1.5 percent and that the defendant thought his businesses would grow after the divorce.[5] Although the evidence certainly supports a conclusion that the defendant's businesses are likely to thrive for some time, the evidence does not support a finding that the businesses' growth would necessarily be perpetual. To support the nonmodifiable, lifetime award in this case, and reflect a proper consideration of the defendant's future income and ability to comply with the alimony award; see *Greco* v. *Greco*, supra, 275 Conn. 361; the trial court must have concluded that the defendant's earnings will either remain static or continue to increase until his alimony obligation terminates due to the death of either party or the plaintiff's remarriage or cohabitation. Such a conclusion ignores, or certainly does not account for, "the volatile nature of . . . personal circumstances" that has led this court to disfavor " '[p]rovisions [that] preclude modification of alimony' "; *Amodio* v. *Amodio*, supra, 247 Conn. 730; and to conclude that the legislature has done the same. See *Scoville* v. *Scoville*, supra, 179 Conn. 279 (§ 46b-86 "suggests a legislative preference favoring the modifiability of orders for periodic alimony").

The trial court ordered the defendant to pay $216,000 to the plaintiff annually in alimony, come what may. It is clear from the record that the defendant's ability to comply with the court's orders is contingent on his continued ability to work. It was unreasonable for the trial court to conclude that the defendant will have the

[5] In support of this proposition, the plaintiff cites Guberman's valuation report and asserts, in a parenthetical in her brief, that the defendant's businesses have a projected growth rate of 1.5 percent. The valuation report does not explain how the growth rate was calculated, but, like many aspects of closely held businesses, future growth rates are speculative and unpredictable, and, therefore, the defendant's income from these businesses is speculative and unpredictable as well.

ability to comply with this monthly alimony obligation for the rest of his life, however long that might be, without some provision for modification should health or economics prevent compliance. Thus, it is not clear from the record whether the trial court considered the defendant's age, health, or earning potential when it ordered lifetime alimony that was nonmodifiable as to duration and amount. To the extent that the court did consider these factors, it could not reasonably have concluded on this record that the defendant would continue to earn, at a minimum, the same income for the rest of his life.

It is of course *possible* he will have more than enough resources to comply with this order for his entire lifetime. As the Appellate Court held, however, it constitutes an abuse of discretion for the trial court to have failed to contemplate the realistic possibility of the defendant's illness, disability, or the loss of income through no fault of his own.[6] See *Oudheusden* v. *Oudheusden*, supra, 190 Conn. App. 183–85. Without either more detailed findings of fact or some indication in the orders themselves that the trial court considered these factors when fashioning the alimony award at issue, we conclude that the trial court either did not consider, or improperly considered, all of the statutory factors as required by § 46b-82 (a).

This is not to say that permanent, nonmodifiable alimony awards will always constitute an abuse of discre-

[6] The Appellate Court also held that the trial court's failure to consider the defendant's voluntary retirement in fashioning its financial orders constituted further evidence of an abuse of discretion. See *Oudheusden* v. *Oudheusden*, supra, 190 Conn. App. 183–85. Because we hold that the trial court abused its discretion by failing to consider, or that it improperly considered, the required statutory factors and the possibility that an *involuntary* decrease in earning capacity could affect the defendant's ability to comply with the financial orders for the rest of his life, we do not reach the issue of whether denying the defendant a voluntary retirement itself would render the alimony award an abuse of discretion.

tion. Under some circumstances, such an award may be appropriate when there is evidence that the paying spouse can afford to pay the set amount, regardless of future earning capacity. For example, nonmodifiable, lifetime alimony might be appropriate when the paying spouse's income is guaranteed by a pension or when the paying spouse's income greatly exceeds the amount of the alimony award. But nonmodifiable, lifetime alimony awards are strong medicine. In fact, the parties have not cited, and we have not found in our own research, any case in which an appellate court has reviewed a lifetime periodic alimony award that was both (1) permanent and (2) nonmodifiable as to both duration and amount. This dearth of case law alone demonstrates the extraordinary nature of the trial court's approach.

We note that, in those cases in which a party has unsuccessfully challenged an alimony award that was either permanent (but modifiable) or nonmodifiable (but of limited duration), the trial court clearly accounted for the possibility that the paying spouse could have a substantial change in income in the future. See, e.g., *Brown* v. *Brown*, supra, 148 Conn. App. 23–24 (trial court placed caps on parties' annual gross incomes from employment, the attainment of which would not be considered substantial change in circumstances that would permit modification of nine year alimony award of between $2000 and $2500 per week). Two of these cases specifically anticipate the paying spouse's voluntary retirement. See *Marshall* v. *Marshall*, supra, 119 Conn. App. 124 (defendant's periodic alimony payments would be reduced to $1 per year upon his retirement); *Burns* v. *Burns*, supra, 41 Conn. App. 719 (alimony award of $5666.67 per month could not be terminated but was modifiable upon defendant's retirement on basis of change in circumstances).

Here, by contrast, there is insufficient evidence that the trial court's orders account for the possibility of a substantial change in the defendant's circumstances. For this reason, the trial court's award of $18,000 per month in periodic alimony, permanent and nonmodifiable as to duration and amount, was an abuse of discretion. Because our holding disturbs the trial court's carefully crafted mosaic of financial orders; see, e.g., *Greco* v. *Greco*, supra, 275 Conn. 354; we must uphold the Appellate Court's reversal of the trial court's financial orders and remand of this case for a new hearing on all financial issues.[7]

II

Having upheld the Appellate Court's conclusion that the trial court's alimony award constituted an abuse of discretion, we agree with the Appellate Court that the case must be remanded to the trial court for a new hearing on all financial issues. We nevertheless address the plaintiff's remaining claim as to which we also granted certification to appeal because the issue of double counting is almost certain to arise on remand. See, e.g., *State* v. *Chyung*, 325 Conn. 236, 260 n.21, 157 A.3d 628 (2017) (reviewing court may resolve claims that are not necessary for resolution of appeal but are likely to arise during proceedings on remand).

The following additional facts are required for the disposition of this issue. The trial court credited the testimony of the plaintiff's expert, Guberman, regarding the fair market value of the defendant's two businesses. The plaintiff's expert valued the businesses using a weighted average of three valuation methods—the excess earn-

[7] Because we hold that the trial court improperly failed to consider or properly apply the factors in § 46b-82 pertaining to the defendant and his ability to comply with the financial orders, we do not reach the plaintiff's argument that the Appellate Court incorrectly reweighed the evidence or mischaracterized the trial court's findings as to his earning capacity.

ings method, the capitalization of income method, and the market approach. The excess earnings and capitalization of income methods—collectively referred to as "income methods" or "income approaches"—use the businesses' incomes to determine their fair market value.

A brief description of the two income methods of valuation used by the plaintiff's expert is necessary. In his capitalization of income valuation, Guberman used a multiyear weighted average of the businesses' adjusted pretax income to determine reasonable future cash flow. The adjustments made included subtractions for the "cash flows paid to or for the benefit of" the defendant. The adjustments also accounted for the "reasonable compensation payable to [the defendant] for the part-time services he provides to the company." In his excess earnings valuation, which calculates fair market value partly by considering the businesses' goodwill, Guberman found that goodwill accounts for 81 percent of the overall value of Connecticut Computer & Consulting Company, Inc., and 49 percent of the value of WriteResult, LLC. In arriving at a value for the businesses, Guberman weighted both of these two income methods at 40 percent, and weighted the market approach at 20 percent. He concluded that the combined fair market value of the defendant's business entities was $904,000 ($512,000 for Connecticut Computer & Consulting Company, Inc.; $392,000 for WriteResult, LLC). In its property distribution order, the trial court awarded the plaintiff 50 percent of this fair market value, or a $452,000 lump sum.

As discussed in part I of this opinion, the trial court's financial orders also awarded the plaintiff permanent, nonmodifiable periodic alimony in the amount of $18,000 per month, or $216,000 annually. The trial court did not explain how it came to this number but presumably it considered the appropriate statutory factors,

including the defendant's gross annual income, which the trial court found to be $550,000. See General Statutes § 46b-82 (a) (listing factors trial court must consider in awarding alimony). The trial court also did not explain how it determined the defendant's income.[8] The defendant requested an articulation as to whether the trial's court's finding of his gross annual income constituted actual income earned from the two businesses or his earning capacity. In response, the court clarified that it based the defendant's gross annual income on the actual income from the defendant's two businesses: it did not make a finding of earning capacity. Additionally, the trial court did not explain how the defendant's gross annual income factored into its determination of alimony, but the defendant did not request a further articulation.

We are asked to decide whether the trial court double counted by awarding the plaintiff alimony from income generated by the defendant's businesses and also awarding the plaintiff 50 percent of the fair market value of those businesses. The Appellate Court held, and the defendant maintains, that double counting is generally prohibited and occurs when a court "take[s] an income producing asset into account in its property division and also award[s] alimony based on that same income." *Oudheusden* v. *Oudheusden*, supra, 190 Conn. App. 178.

[8] It appears from the record that the trial court based the defendant's gross annual income on an opinion contained in Guberman's report. Guberman suggested in the report that, because the defendant has sole control of the earnings and cash flows of both businesses, the trial court should include in the defendant's actual income all of his actual compensation (between $323,369 and $394,319) as well as the net earnings retained by the businesses at year end, which Guberman calculated to total $540,000 annually (including the defendant's actual compensation). Therefore, it appears that the trial court included discretionary cash flow in the income determination, but it is unclear exactly how the trial court arrived at the slightly higher figure of $550,000. Once again, though, the defendant does not challenge any factual finding.

The defendant contends that the Appellate Court properly considered it double counting to award the plaintiff half the value of the businesses when the trial court valued the businesses, in part, on the basis of the companies' future earnings, including the defendant's income, which it also considered in calculating the alimony award. The plaintiff argues that double counting did not occur here, because, according to our case law, double counting can occur only when a party is ordered to pay alimony from an income stream he or she no longer has because it was distributed in the division of property orders, not when, as here, the trial court distributes a portion of the *value* of the businesses to the plaintiff while the defendant retains 100 percent ownership of those businesses. Because the defendant retains full ownership of the businesses, the plaintiff argues, he still has an income stream from which to make the alimony payments that is separate and distinct from the payment made to the plaintiff in the property distribution. We conclude that the trial court did not improperly double count the value of the defendant's businesses in the present case because any rule against double counting does not apply when the distributed asset is the value of a business and the alimony is based on income earned from that business.

A

"Courts and commentators have often disagreed . . . as to what constitutes [double counting], whether [double counting] ought to be prohibited as a matter of law, and if not so prohibited, whether it is inequitable in the circumstances of the particular divorce settlement." *Sampson* v. *Sampson*, 62 Mass. App. 366, 374, 816 N.E.2d 999, review denied, 443 Mass. 1102, 820 N.E.2d 259 (2004). "Double counting" or "double dipping" are not statutory terms: there is no legislative admonition against double counting in Connecticut, and we therefore have no direct legislative guidance on the issue. The

concept instead is ultimately an equitable one. "Double [counting] is a term used to describe the supposed unfairness that results when property is awarded to a spouse in equitable distribution but is also treated as a source of income for purposes of calculating maintenance or alimony." (Internal quotation marks omitted.) " 'Double Dipping,' " 14 Equitable Distribution J., no. 5, May, 1997, p. 49 (Double Dipping).

Concern about double counting arose in the context of pensions and retirement benefits, because, "in the case of pensions or other retirement assets, the asset *is* the income that will eventually be distributed." (Emphasis in original.) L. Morgan, " 'Double Dipping': A Good Theory Gone Bad," 25 J. Am. Acad. Matrim. L. 133, 140–41 (2012). Proponents of a general prohibition against double counting argue that it allows the alimony recipient to dip twice into the same asset. Double Dipping, supra, p. 49. Those who take the opposite view point to the different purposes of property distribution and spousal support argue that a strict prohibition on double counting may prevent the awards from fulfilling their distinct statutory purposes. See id.; see also *Mickey* v. *Mickey*, 292 Conn. 597, 615, 974 A.2d 641 (2009) ("[d]espite their close relationship . . . the purposes and operation of [General Statutes] §§ 46b-81 and 46b-82 are distinct and, to an extent, complementary, applying under different circumstances for different reasons"). "[T]he purpose of postdissolution property division is to unscramble the ownership of property" of each spouse; (internal quotation marks omitted) id., 614; whereas the purpose of alimony "is to recognize the obligation of support that spouses assume toward each other by virtue of the marriage." (Internal quotation marks omitted.) Id., 615–16.

This court has recognized that it is not double counting for the trial court to *consider* the same asset in both the property distribution and, as allocated, for purposes of determining spousal support. See *Krafick* v. *Krafick*,

supra, 234 Conn. 804–805 n.26.[9] Contra N.J. Stat. Ann. § 2A:34-23 (b) (14) (West Supp. 2020) ("[w]hen a share of a retirement benefit is treated as an asset for purposes of equitable distribution, the court shall not consider income generated thereafter by that share for purposes of determining alimony"). However, this court has suggested that it would be double counting for income from property that was awarded to the nonpaying spouse—and is therefore no longer available to the paying spouse—to be awarded to the nonpaying spouse in the alimony award. Although this court has never so held, our case law strongly suggests that we would prohibit this type of double counting in the pension context. See *Krafick* v. *Krafick*, supra, 804–805 n.26. Notably, this court never has been asked to determine if this double counting rule would apply when the asset at issue is the value of a business, as in the present case.

A brief discussion of double counting and our own case law on the issue illustrates the need for this court to provide additional guidance, specific to businesses.

B

In *Krafick* v. *Krafick*, supra, 234 Conn. 783, this court implicitly rejected a general prohibition on double counting when it held that the trial court improperly assigned the defendant's pension no value in the property distribution, even though the trial court acknowledged that the pension was an asset of the marriage. Id., 805–806. The court in *Krafick* rebuffed the "defendant's contention that to consider vested [pension] benefits for purposes of equitable distribution and also, *as allocated*, as a source of alimony constitutes impermissible 'double [counting].' " (Emphasis added.) Id., 804–805 n.26. The court went on to explain that "[o]ur alimony

[9] Courts in other jurisdictions that have considered the issue have declined to extend the prohibition to situations in which the asset at issue is the value of a business. See Double Dipping, supra, p. 54.

statute expressly provides that '[i]n determining whether alimony shall be awarded, and the duration and amount of the award, the court . . . shall consider . . . the award, if any, which the court may make pursuant to [§] 46b-81 [in distributing property].' . . . Relying on the pension benefits allocated to the employee spouse under § 46b-81 as a source of alimony would be improper only to the extent that any portion of the pension assigned to the nonemployee spouse [in the distribution of property] was counted in determining the employee spouse's resources for purposes of alimony." (Citation omitted.) Id., 805 n.26. Thus, this court has suggested that it would recognize a more limited prohibition on double counting in the pension context, but there was no double counting in *Krafick*.

This court also has considered the application of the double counting rule in the context of bank accounts, investment accounts, vested stock, stock options, and stock in a closely held business. For example, in *Greco*, we reviewed the trial court's order requiring the defendant to transfer the entirety of his stock in a business, or the value of that stock, to the plaintiff and also awarding the plaintiff alimony that was based in part on the salary the defendant earned as an employee of the same business. *Greco* v. *Greco*, supra, 275 Conn. 352, 361. Although we did not analyze why the rule against double counting should extend to the awarding of stock, we concluded that no double counting occurred because, notwithstanding that "the defendant's salary from [the business] appear[ed] to have been his main source of income . . . the stock itself did not constitute a significant resource or source of income and the trial court did not attribute any such income [e.g., cash dividends] to the defendant in determining his income for the purpose of calculating alimony." (Citation omitted.) Id., 357 n.8.[10]

[10] The defendant relies on *Greco*, arguing that, "[i]n this case, the trial court obviously made that *Greco* attribution by linking the defendant's income to

Similarly, in *O'Brien* v. *O'Brien*, 326 Conn. 81, 161 A.3d 1236 (2017), the assets at issue included bank and investment accounts, as well as vested stock and stock options in the company at which the plaintiff was employed but was not an owner. Id., 86–87. The court explained the general rule against double counting as follows: "A trial court's alimony award constitutes impermissible double [counting] only if the court considers, as a source of the alimony payments, assets distributed to the party *receiving* the alimony. . . . [I]f a trial court assigns a certain asset—a bank account, for example—to the party *receiving* alimony, it cannot consider that same bank account as a source of future alimony payments because the account has not been distributed to the party *paying* the alimony." (Citations omitted; emphasis in original.) Id., 120–21. Once again, though, we determined that there was no double counting because the assets the plaintiff would use to pay the alimony award were all awarded to the plaintiff himself. Id.[11]

the businesses in its clarification order." Although the facts here might appear to satisfy the test for double counting laid out in *Greco* (i.e., the businesses themselves *did* constitute a significant resource or source of income), this case is distinguishable because, as we will discuss more fully, the value of a business asset is not the same as stock.

[11] The Appellate Court has found double counting on only one occasion. In *Lynch* v. *Lynch*, 135 Conn. App. 40, 43 A.3d 667 (2012), the plaintiff had published a book. Id., 43. The Appellate Court held that the trial court double counted by awarding the defendant 30 percent of the value of the plaintiff's unsold books as well as 30 percent of all income the plaintiff would receive in the future from the sale of the same books. Id., 43–44, 53–54. Both of these awards were part of the court's property distribution under § 46b-81. Id., 52. In the present case, by contrast, the defendant does not claim that the same asset was distributed twice under § 46b-81. Rather, the question presented in this case—whether the same income was counted both for alimony and property distribution purposes—is clearly distinguishable.

The Appellate Court has considered and rejected double counting arguments on three other occasions. In *Callahan* v. *Callahan*, 157 Conn. App. 78, 116 A.3d 317, cert. denied, 317 Conn. 913, 116 A.3d 812 (2015), and cert. denied, 317 Conn. 914, 116 A.3d 813 (2015), and *McRae* v. *McRae*, 129 Conn. App. 171, 20 A.3d 1255 (2011), the Appellate Court held that double counting had not occurred when the alimony award was based on the paying spouse's

C

As noted, this court never has been asked to determine whether the rule against double counting applies when the value of a business is distributed, as in the present case. In concluding that the trial court engaged in double counting in this case, the Appellate Court cited one if its own cases for the "general principle . . . that a court may not take an income producing asset into account in its property division and also award alimony based on that same income." *Oudheusden* v. *Oudheusden*, supra, 190 Conn. App. 178, citing *Callahan* v. *Callahan*, 157 Conn. App. 78, 95, 116 A.3d 317, cert. denied, 317 Conn. 913, 116 A.3d 812 (2015), and cert. denied, 317 Conn. 914, 116 A.3d 813 (2015). The Appellate Court's statement of this "general principle" sweeps too far, however, and, in some contexts, is at odds with this court's holding in *Krafick* and with the text of §§ 46b-81 and 46b-82.

For the proposition quoted previously, the Appellate Court relied on dictum from its own precedent in *Callahan*. The language in *Callahan* is dictum because the parties in that case agreed to the application of this general principle and because the principle ultimately did not apply—the court in *Callahan* determined that the alimony award in that case was based on the defendant's earning capacity, not his actual income from the business. *Callahan* v. *Callahan*, supra, 157 Conn. App. 95–97. In addition, the court in *Callahan* derived this "general principle" from *Eslami* v. *Eslami*, 218 Conn. 801, 815, 591 A.2d 411 (1991), a decision that predates *Krafick*. See *Callahan* v. *Callahan*, supra, 95–97. In

earning capacity. *Callahan* v. *Callahan*, supra, 97; *McRae* v. *McRae*, supra 188. And, in *Utz* v. *Utz*, 112 Conn. App. 631, 963 A.2d 1049, cert. denied, 291 Conn. 908, 969 A.2d 173 (2009), the Appellate Court rejected a double counting argument when—unlike in the present case—no portion of the paying spouse's business or its value was transferred to the payee spouse. Id., 639–40.

Eslami, this court said, in dictum, that "[a] valuation method that does not differentiate between the goodwill of the practice as a saleable entity and the practitioner's own earning power as enhanced by such goodwill may well result in counting the same basis for a financial award in dissolution cases twice, once as an asset of his estate subject to allocation and again, as a component of his *earning capacity* forming the basis for alimony." (Emphasis added.) *Eslami* v. *Eslami*, supra, 815. Because the court in *Eslami* was not required to determine whether the double counting rule applied to the value of businesses, this statement was made without considering the unique characteristics of businesses. In addition, the dictum from *Eslami* does not apply to the present case because, here, the trial court made no finding of fact as to the defendant's earning capacity and the defendant did not request articulation as to how the trial court determined his earning capacity. Therefore, we are not persuaded that the dictum in *Eslami* supports extending the rule to the valuation of businesses. It is clear from this overview of Connecticut's double counting jurisprudence that the rule is not well developed and never has been applied to the business context at issue here.

Because this court never has clearly extended our case law regarding double counting to the valuation of businesses, we look to case law from other jurisdictions for guidance on how this rule applies to businesses. The defendant argues that double counting is implicated because the businesses were valued using a method that was based on income for property distribution purposes and the alimony award was based on the income from those businesses.[12] Yet, every jurisdiction

[12] To the extent that the businesses were valued using the market approach, double counting is not implicated because it does not use income to calculate fair market value. See L. Morgan, supra, 25 J. Am. Acad. Matrim. L. 145 ("no one would argue that valuing a business using the market approach results in double [counting]").

that has considered the issue has concluded that the double counting rule does not apply when the asset at issue is the value of a business, even when the business' fair market value was determined by an income method of valuation. See *Steneken* v. *Steneken*, 183 N.J. 290, 301–302, 873 A.2d 501 (2005) ("We find no inequity in the use of the individually fair results obtained due to the use of an asset valuation methodology normalizing salary in an [ongoing] close corporation for equitable distribution purposes, and the use of actual salary received in the calculus of alimony. The interplay of those two calculations does not constitute 'double counting.' "); *Keane* v. *Keane*, 8 N.Y.3d 115, 121, 861 N.E.2d 98, 828 N.Y.S.2d 283 (2006) ("We do not see why an inquiry as to double counting should depend on the valuation method used. After all, any valuation of an [income producing] property will necessarily take into account the [income producing] capacity of that property. To prevent any income derived from any [income producing] property from being 'double counted' would, therefore, significantly limit the trial court's considerable discretion in equitably distributing marital property and awarding maintenance."); *McReath* v. *McReath*, 335 Wis. 2d 643, 674–76, 800 N.W.2d 399 (2011) ("when determining maintenance . . . counting income from income earning assets [assigned to a spouse in property division] will typically not implicate double counting" (citations omitted; footnotes omitted)). These jurisdictions treat the income approach to valuation as simply a tool to determine a business' fair market value, just like the market approach and the asset approach.

In a case with strong similarities to the present appeal, the New Jersey Supreme Court explained the rationale behind this rule particularly well. In *Steneken*, the asset was a closely held business of which the defendant was the sole shareholder. *Steneken* v. *Stene-*

ken, supra, 183 N.J. 293–94. The defendant's expert in *Steneken* used the capitalization of earnings method to value the business. Id., 298. The trial court, in its property distribution, awarded 35 percent of this value to the plaintiff. *Steneken* v. *Steneken*, 367 N.J. Super. 427, 432, 843 A.2d 344 (App. Div. 2004), aff'd as modified, 183 N.J. 290, 873 A.2d 501 (2005). As in the present case, the defendant was awarded sole ownership of the business—i.e., the court did not order that the parties would own the business jointly. Id. The plaintiff also was awarded alimony that was based on the defendant's actual income from the business. Id. The defendant argued that it was double counting to use his actual income to calculate the alimony award because his excess earnings beyond his normalized income were also considered in valuing the business, of which the plaintiff received a share. *Steneken* v. *Steneken*, supra, 183 N.J. 294–95; *Steneken* v. *Steneken*, supra, 367 N.J. Super. 433.

The New Jersey Supreme Court disagreed. "Principles of fairness that properly account for the dichotomy between alimony, on the one hand, and equitable distribution, on the other, are what inform our analysis." *Steneken* v. *Steneken*, supra, 183 N.J. 300. "Because we embrace the premise that alimony and equitable distribution calculations, albeit interrelated, are separate, distinct, and not entirely compatible financial exercises, and because asset valuation methodologies applied in the equitable distribution setting are not congruent with the factors relevant to alimony considerations, we conclude that the circumstances here present a fair and proper method of both awarding alimony and determining equitable distribution." Id., 301. "Where, as here, the major marital asset is a [closely held] corporation and the supporting spouse has determined what his or her income was during the marriage, the supported spouse is entitled, [postdivorce], both to alimony

sufficient to maintain a reasonably comparable lifestyle and to a fair division of the asset. We do not agree with [the] defendant's view that this analysis effects a 'windfall' to the supported spouse. Trial courts remain free to consider, in the exercise of their discretion and in accordance with the statutory guidelines, the fair and proper quantum of alimony and equitable distribution attendant to each case before them." (Footnote omitted.) Id., 303–304.

In addition, the New Jersey Supreme Court pointed out a logical flaw at the core of the argument that it is improper double counting to use an income method of valuation on the property distribution side and actual income on the alimony side of the equation. "[T]he [d]efendant mistakenly equates the statutory and decisional methodology applied in the calculation of alimony with a valuation methodology applied for equitable distribution purposes that requires that revenues and expenses, including salaries, be normalized so as to present a fair valuation of a going concern. . . . [T]he proper issue is whether, under the circumstances, the alimony awarded and the equitable distribution made are, both singly and together, fair and consistent with the statutory design." Id., 301.

D

We are persuaded by our sister courts that have addressed the issue and concluded that it is not double counting for a trial court to award a spouse a lump sum representing a portion of the value of a business and also award the spouse alimony that is based on the paying spouse's actual income from that business. In the present case, that is precisely what happened. Therefore, we conclude that it was not improper for the trial court to base the property distribution on Guberman's valuation of the defendant's businesses while also considering the defendant's income from those businesses in its alimony award.

Nevertheless, trial courts should—consistent with our statutory scheme—consider all required statutory factors and ensure that each award is consistent with its respective statutory purpose and that the awards as a whole are fair and equitable. This consideration might include ensuring that the property distribution of a portion of a business' value to the nonowning spouse does not unfairly reduce the paying spouse's ability to earn income from that business (resulting in the undercapitalization of the business, for example). As with any alimony or property distribution award, reviewing courts may consider how a business has been awarded (i.e., divided) in determining whether the alimony and distribution awards serve their statutory purposes and whether the award as a whole is fair. See *Greco* v. *Greco*, supra, 275 Conn. 354–56, 362–63 (discussing appellate review of trial court's financial orders); see also *Steneken* v. *Steneken*, 183 N.J. 302 (second and final step in inquiry is whether result as whole is "fair under the circumstances and congruent with the standards set forth in [the alimony statute] and [the equitable distribution statute]"); *McReath* v. *McReath*, supra, 335 Wis. 2d 677 ("the focus should be on fairness, not rigid [double counting] rules"). In the present case, because we already have determined that the trial court's alimony award was an abuse of discretion, we need not undertake consideration of whether the award as a whole is fair. The trial court will have to conduct a new hearing on financial issues and, among other things, will be guided by the principles outlined in this opinion.

The judgment of the Appellate Court is affirmed with respect to its determination regarding the trial court's financial orders, the judgment of the Appellate Court is reversed with respect to its determination that the trial court improperly double counted the value of the defendant's businesses for purposes of the property division and alimony awards, and the case is remanded

to the Appellate Court with direction to remand the case to the trial court for a new hearing on all financial issues.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* JAVIER VALENTIN PORFIL
(SC 20379)

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

Argued October 13, 2020—officially released April 30, 2021*

Procedural History

Substitute information charging the defendant with the crimes of possession of narcotics with intent to sell by a person who is not drug-dependent, sale of narcotics within 1500 feet of a school, possession of drug paraphernalia, possession of narcotics and interfering with an officer, brought to the Superior Court in the judicial district of Waterbury, geographical area number four, and tried to the jury before *Harmon*, *J.*; verdict and judgment of guilty, from which the defendant appealed to the Appellate Court, *Prescott*, *Elgo* and *Harper*, *Js.*, which affirmed the judgment of the trial court, and the defendant, on the granting of certification, appealed to this court. *Appeal dismissed.*

James B. Streeto, senior assistant public defender, for the appellant (defendant).

Laurie N. Feldman, deputy assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *David A. Gulick*, senior assistant state's attorney, for the appellee (state).

* April 30, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Opinion

PER CURIAM. The defendant, Javier Valentin Porfil, appeals, upon our grant of his petition for certification,[1] from the judgment of the Appellate Court, which affirmed his conviction, rendered after a jury trial, of possession of narcotics with intent to sell by a person who is not drug-dependent in violation of General Statutes (Rev. to 2015) § 21a-278 (b), sale of narcotics within 1500 feet of a school in violation of General Statutes § 21a-278a (b), possession of drug paraphernalia in violation of General Statutes § 21a-267, possession of narcotics in violation of General Statutes (Rev. to 2015) § 21a-279 (a), and interfering with an officer in violation of General Statutes (Rev. to 2015) § 53a-167a. *State* v. *Porfil*, 191 Conn. App. 494, 497–98, 215 A.3d 161 (2019). On appeal, the defendant challenges the Appellate Court's conclusion that the evidence adduced at trial was sufficient to support his conviction of possession of narcotics with intent to sell by a person who is not drug-dependent and possession of narcotics because the state produced sufficient evidence to prove beyond a reasonable doubt that he had constructive possession of the narcotics recovered by the police from a building located at 126-128 Walnut Street in Waterbury. The defendant contends, specifically, that, because "the [narcotics] were found [on] the second floor landing of a stairway in a common portion of a multiunit apartment building," and because there was no evidence of a "direct connection, or 'nexus,' individually linking [him] to the contraband," the Appellate Court incorrectly

[1] We granted the defendant's petition for certification to appeal, limited to the following issue: "Did the Appellate Court correctly conclude that the evidence of constructive possession was sufficient to sustain the defendant's conviction of possession of narcotics and possession of narcotics with intent to sell by a person who is not drug-dependent, when the narcotics that formed the basis for the conviction were found in a common area over which the defendant did not have exclusive possession?" *State* v. *Porfil*, 333 Conn. 923, 923–24, 218 A.3d 67 (2019).

determined that there was sufficient evidence for the jury to find that the defendant was aware of the narcotics' presence and that he exercised dominion and control over the narcotics.

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.

KELLY SERVICES, INC. *v.* THE SENIOR NETWORK, INC.
(SC 20548)

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

Syllabus

Pursuant to statute (§ 52-192a (c)), if "[a] plaintiff has recovered an amount equal to or greater than the sum certain specified in the plaintiff's offer of compromise, the court shall add to the amount so recovered eight per cent annual interest on said amount . . . ."

The plaintiff, an employment staffing agency, sought to recover damages for, inter alia, breach of contract from the defendant in connection with the defendant's failure to pay for certain services. Prior to trial, the plaintiff filed an offer of compromise, which the defendant did not accept, even though it previously had agreed to pay an invoice in the amount of the offer. Following a bench trial, the trial court found the defendant liable and awarded the plaintiff compensatory damages in the exact amount of the offer of compromise. The trial court determined that the defendant had wrongfully withheld payment and that it was equitable to award the plaintiff double interest in light of the defendant's prior agreement and failure to pay. Accordingly, the court awarded the plaintiff both prejudgment interest and postjudgment interest at the annual rate of 8 percent pursuant to the statute (§ 37-3a) governing interest in civil actions generally, as well as both prejudgment and postjudgment offer of compromise interest pursuant to § 52-192a (c), at an annual rate of an additional 8 percent. The defendant moved for reargument, claiming, inter alia, that the trial court's award of postjudgment interest under § 52-192a was improper under *Gionfriddo* v. *Avis*

Rent A Car System, Inc. (192 Conn. 301), in which this court concluded that offer of compromise interest under § 52-192a runs only from the date the offer was filed to the date of judgment. The trial court denied the motion for reargument without explanation, and the defendant appealed. *Held* that the trial court improperly ordered that the offer of compromise interest continue to accrue until the date the judgment is satisfied, and, accordingly, this court reversed the trial court's judgment only as to the award of postjudgment interest under § 52-192a and remanded the case with direction to vacate that award; the trial court's award of postjudgment interest under § 52-192a was improper, as this court's conclusion in *Gionfriddo* that offer of compromise interest terminates as of the date of judgment and may not be awarded postjudgment under § 52-192a controlled, that conclusion was not, contrary to the plaintiff's argument, dictum, and the plaintiff did not argue that *Gionfriddo* should be overruled or limited.

Argued February 26—officially released May 4, 2021*

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendant filed a counterclaim; thereafter the case was tried to the court, *Hon. Edward R. Karazin, Jr.*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment for the plaintiff, from which the defendant appealed. *Reversed in part; judgment directed.*

James E. Nealon, for the appellant (defendant).

Robert C. Clark, pro hac vice, with whom was *Abraham M. Hoffman*, for the appellee (plaintiff).

Opinion

ECKER, J. The sole issue in this appeal is whether the trial court properly awarded postjudgment, offer of compromise interest to the plaintiff, Kelly Services, Inc.,

* May 4, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

under General Statutes § 52-192a[1] and Practice Book § 17-18.[2] We conclude that the trial court's award of

[1] General Statutes § 52-192a provides in relevant part: "(a) Except as provided in subsection (b) of this section, after commencement of any civil action based upon contract or seeking the recovery of money damages, whether or not other relief is sought, the plaintiff may, not earlier than one hundred eighty days after service of process is made upon the defendant in such action but not later than thirty days before trial, file with the clerk of the court a written offer of compromise signed by the plaintiff or the plaintiff's attorney, directed to the defendant or the defendant's attorney, offering to settle the claim underlying the action for a sum certain. . . . If the offer of compromise is not accepted within thirty days and prior to the rendering of a verdict by the jury or an award by the court, the offer of compromise shall be considered rejected and not subject to acceptance unless refiled. Any such offer of compromise and any acceptance of the offer of compromise shall be included by the clerk in the record of the case.

* * *

"(c) After trial the court shall examine the record to determine whether the plaintiff made an offer of compromise which the defendant failed to accept. If the court ascertains from the record that the plaintiff has recovered an amount equal to or greater than the sum certain specified in the plaintiff's offer of compromise, the court shall add to the amount so recovered eight per cent annual interest on said amount . . . the court shall add to the amount so recovered eight per cent annual interest on the difference between the amount so recovered and the sum certain specified in the counterclaim plaintiff's offer of compromise. The interest shall be computed from the date the complaint in the civil action . . . was filed with the court if the offer of compromise was filed not later than eighteen months from the filing of such complaint . . . . If such offer was filed later than eighteen months from the date of filing of the complaint . . . the interest shall be computed from the date the offer of compromise was filed. The court may award reasonable attorney's fees in an amount not to exceed three hundred fifty dollars, and shall render judgment accordingly. This section shall not be interpreted to abrogate the contractual rights of any party concerning the recovery of attorney's fees in accordance with the provisions of any written contract between the parties to the action."

[2] Practice Book § 17-18 provides: "After trial the judicial authority shall examine the record to determine whether the plaintiff made an offer of compromise which the defendant failed to accept. If the judicial authority ascertains from the record that the plaintiff has recovered an amount equal to or greater than the sum certain specified in that plaintiff's offer of compromise, the judicial authority shall add to the amount so recovered 8 percent annual interest on said amount. In the case of a counterclaim plaintiff under General Statutes § 8-132, the judicial authority shall add to the amount so recovered 8 percent annual interest on the difference between the amount so recovered and the sum certain specified in the counterclaim plaintiff's offer of compromise. Any such interest shall be computed as provided in General Statutes § 52-192a. The judicial authority may award reasonable

postjudgment, offer of compromise interest was improper under our holding in *Gionfriddo* v. *Avis Rent A Car System, Inc.*, 192 Conn. 301, 307–308, 472 A.2d 316 (1984), and therefore reverse in part the judgment of the trial court.

The relevant facts, which the trial court found following a bench trial, are not contested on appeal. The plaintiff is an employment staffing agency that provides workers for temporary assignments. In September, 2014, the plaintiff entered into a contract with the defendant, The Senior Network, Inc., to provide temporary workers for a ten week period to distribute marketing brochures encouraging Walmart customers to enroll in a program for Medicare supplemental benefits. After the work was completed, the plaintiff submitted invoices for payment. A dispute ensued regarding the value of the services rendered, and, following a series of communications, the defendant asked the plaintiff to " 'prepare an invoice for the $114,180.56 final payment and we will consider the assignment closed.' " The plaintiff responded shortly thereafter by submitting an invoice for $113,955.56, slightly less than the defendant had agreed to pay. On May 19, 2015, the defendant advised the plaintiff that it would pay the invoice within thirty to forty-five days. Notwithstanding this agreement, the defendant did not pay any portion of the final invoice.

The plaintiff commenced this action against the defendant to recover the $113,995.56 debt by filing a two count complaint for breach of contract and unjust enrichment. The defendant filed an answer and special defenses, as well as a counterclaim for breach of con-

attorney's fees in an amount not to exceed $350 and shall render judgment accordingly. Nothing in this section shall be interpreted to abrogate the contractual rights of any party concerning the recovery of attorney's fees in accordance with the provisions of any written contract between the parties to the action."

tract. More than two years later, on March 15, 2018, the plaintiff filed an offer of compromise "to settle this action and [to] stipulate to judgment in the amount of $113,955.56 in [its] favor . . . ." The defendant did not accept the offer of compromise. A five day bench trial took place in June, 2019.

On December 2, 2019, the trial court issued a memorandum of decision, finding that the defendant had breached its contractual payment obligations to the plaintiff and awarding compensatory damages in the amount of $113,955.56, the exact amount of the plaintiff's offer of compromise.[3] The court also awarded interest and attorney's fees to the plaintiff.[4] The interest award contained two components.

First, after finding that the defendant had wrongfully withheld payment of the final invoice, the trial court awarded the plaintiff interest under General Statutes § 37-3a, which permits interest to be awarded "as damages for the detention of money after it becomes payable." General Statutes § 37-3a (a). The trial court ordered interest under § 37-3a "at the rate of 8 percent per annum" and stated that the interest will run from the date when it determined that payment of the final invoice became due, "May 19, 2015, until the date [the defendant] completely pays [the plaintiff]." In other words, the § 37-3a interest award included both prejudgment interest and any postjudgment interest that may accrue until the judgment is fully satisfied. The award

[3] The trial court concluded that the defendant had failed to prove its special defenses and its counterclaim.

[4] The trial court awarded the plaintiff reasonable attorney's fees in the amount of $350. See General Statutes § 52-192a (c) ("[t]he court may award reasonable attorney's fees in an amount not to exceed three hundred fifty dollars, and shall render judgment accordingly"); Practice Book § 17-18 ("[t]he judicial authority may award reasonable attorney's fees in an amount not to exceed $350 and shall render judgment accordingly"). The trial court's award of attorney's fees is not at issue in this appeal.

of statutory interest under § 37-3a is not challenged on appeal.

The issue on appeal relates to the second component of the trial court's interest award, which was made under § 52-192a and Practice Book § 17-18. Section 52-192a (c) provides in relevant part that, if "the plaintiff has recovered an amount equal to or greater than the sum certain specified in the plaintiff's offer of compromise, the court shall add to the amount so recovered eight per cent annual interest on said amount . . . ."[5] Similarly, Practice Book § 17-18 provides in relevant part that, "[i]f the judicial authority ascertains from the record that the plaintiff has recovered an amount equal to or greater than the sum certain specified in that plaintiff's offer of compromise, the judicial authority shall add to the amount so recovered 8 percent annual interest on said amount. . . ." The disputed aspect of the trial court's interest award is the portion specifying that the interest owed to the plaintiff under § 52-192a and Practice Book § 17-18 shall be calculated "from the filing of the offer of compromise *until paid*," i.e., post-judgment. (Emphasis added.) The trial court determined that it would "not be inequitable" to award "double interest" under both § 37-3a and § 52-192a and Practice Book § 17-18 from March 15, 2018, until the

[5] The trial court determined that the plaintiff was entitled to interest under § 52-192a because it had recovered an amount "equal to" the offer of compromise. In fact, the plaintiff's recovery substantially exceeded the offer of compromise because the amount it "ha[d] recovered" under § 52-192a (c) included the trial court's award of prejudgment interest under § 37-3a. See *Blakeslee Arpaia Chapman, Inc.* v. *EI Constructors, Inc.*, 239 Conn. 708, 740 n.35, 687 A.2d 506 (1997) ("[t]he offer of judgment is to be compared to the amount that the plaintiff 'has recovered,' which includes compensatory interest"); see also *Gionfriddo* v. *Avis Rent A Car System, Inc.*, supra, 192 Conn. 304–305 ("it is the total judgment that is the relevant [basis] for comparison"); *Gillis* v. *Gillis*, 21 Conn. App. 549, 556, 575 A.2d 230 (concluding that trial court improperly denied offer of judgment interest on § 37-3a interest portion of verdict), cert. denied, 215 Conn. 815, 576 A.2d 544 (1990).").

judgment is paid in full because the offer of compromise "was the second demand for the approved and agreed on amount, the first one having been in March, 2015, and [the offer of compromise] was a further alert to the defendant [that] the money should be paid in March, 2018. In addition, the nature of the offer of compromise section is to, in some respect, act as a punitive device. If you [do not] settle the case and you lose, you pay. Accordingly, the court is exercising its discretion in this case and awarding the double interest . . . ."

The defendant moved for reargument in the trial court on numerous grounds, only one of which is relevant to this appeal, namely, its claim that the trial court's award of postjudgment interest under § 52-192a and Practice Book § 17-18 was improper. In support of this claim, the defendant relied on *Gionfriddo* v. *Avis Rent A Car System, Inc.*, supra, 192 Conn. 301, in which we rejected the contention that an award of interest under § 52-192a "continues to accrue until final payment of the principal debt has been tendered" and, instead, concluded that interest awarded under § 52-192a runs only until "the date of the judgment." Id., 307, 308. The plaintiff opposed reargument, claiming that the language in *Gionfriddo* was dictum. The trial court denied the motion for reargument without explanation. The defendant appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

"The question of whether the trial court properly awarded interest pursuant to § 52-192a is one of law subject to de novo review."[6] *Willow Springs Condomin-*

[6] Practice Book § 17-18 provides for an "identical computation method" as § 52-192a for offer of compromise interest. *Georges* v. *OB-GYN Services, P.C.*, 335 Conn. 669, 674 n.3, 240 A.3d 249 (2020); see also footnotes 1 and 2 of this opinion. For the sake of simplicity, and consistent with the parties' arguments on appeal, we limit our analysis to § 52-192a.

ium Assn., Inc. v. *Seventh BRT Development Corp.*, 245 Conn. 1, 55, 717 A.2d 77 (1998). In *Gionfriddo*, we addressed "the availability of statutory interest [under § 52-192a] when a plaintiff's offer of judgment has been rejected." *Gionfriddo* v. *Avis Rent A Car System, Inc.*, supra, 192 Conn. 302. After concluding "that § 52-192a, read as a statutory totality, encompasses recoveries in court cases as well as in jury cases"; id., 306; we proceeded to address "a number of subsidiary issues about the calculation of § 52-192a interest." Id., 307. One subsidiary issue was "the relationship between [offer of compromise] interest under § 52-192a and the postjudgment interest statute, [that is] § 37-3a . . . ." Id. We observed that § 52-192a "says nothing about when [offer of compromise] interest terminates" but held that § 37-3a definitively resolved the issue by explicitly limiting the amount of postjudgment interest that may be awarded. Id., 308. "Reading these two statutes in conjunction with each other, as we must," we held that "the rules of § 52-192a determine prejudgment interest, while the rules of § 37-3a determine postjudgment interest."[7] Id. Accordingly, we held that offer of compromise

[7] *Gionfriddo* was a personal injury action and, therefore, did not involve a claim for prejudgment interest under § 37-3a. See *Gionfriddo* v. *Avis Rent A Car System, Inc.*, supra, 192 Conn. 308 (recognizing that "a personal injury claim would not ordinarily constitute a claim for the wrongful detention of money" under § 37-3a "before the rendering of a judgment"), citing *Cecio Bros., Inc.* v. *Feldmann*, 161 Conn. 265, 274–75, 287 A.2d 374 (1971)). In a breach of contract action, however, prejudgment interest under § 37-3a may be awarded upon a finding that the defendant withheld money from the plaintiff after it became payable. See *White Oak Corp.* v. *Dept. of Transportation*, 217 Conn. 281, 302, 585 A.2d 1199 (1991) (holding that trial court improperly failed to award prejudgment interest under § 37-3a after finding that payment owed by defendant was wrongfully withheld under contract); see also *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, 310 Conn. 38, 49–50 n.11, 74 A.3d 1212 (2013) (identifying types of claims that would, and would not, permit award of prejudgment interest under § 37-3a). As we previously noted, the trial court in the present case awarded the plaintiff prejudgment and postjudgment interest under § 37-3a, and that award is not challenged on appeal.

interest under § 52-192a terminates as of "the date of the judgment." Id.; see also *Camp*, *Dresser & McKee, Inc.* v. *Technical Design Associates*, *Inc.*, 937 F.2d 840, 844 (2d Cir. 1991) ("Connecticut case law . . . makes it clear that interest under § 52-192a (b) terminates as of the date of the final judgment"), citing *Gionfriddo* v. *Avis Rent A Car System*, *Inc.*, supra, 308.

We agree with the defendant that our analysis of the issue presented on appeal begins and ends with *Gionfriddo*, which held that postjudgment, offer of compromise interest may not be awarded under § 52-192a. This aspect of our decision in *Gionfriddo* was not dictum but, instead, was necessary to our holding and, therefore, binding precedent.[8] See, e.g., *Cruz* v. *Montanez*, 294 Conn. 357, 376, 984 A.2d 705 (2009) ("a court's discussion of matters necessary to its holding is not

[8] To support its contention to the contrary, the plaintiff relies on *DiLieto* v. *County Obstetrics & Gynecology Group*, *P.C.*, 310 Conn. 38, 56–57, 74 A.3d 1212 (2013), in which we held that an award of postjudgment interest under § 37-3a was discretionary, rather than mandatory. The plaintiff points out that, in *DiLieto*, we observed that "the issue of postjudgment interest was not a contested issue in *Gionfriddo*," and, thus, "the discussion regarding the award of postjudgment interest pursuant to § 52-192a in *Gionfriddo* was dict[um]." This claim lacks merit. In *DiLieto*, we clarified that our language in *Gionfriddo* "purporting to recognize the plaintiff's 'entitlement' to postjudgment interest under § 37-3a" was not conclusive as to whether the award of such interest was mandatory in every case in which prejudgment interest was awarded under § 52-192a, reasoning that "the issue of whether postjudgment interest is automatic under § 37-3a in cases in which the plaintiff is entitled to prejudgment interest under § 52-192a was not before this court because the defendant in [*Gionfriddo*] did not challenge the plaintiff's entitlement to postjudgment interest. The defendant simply argued that such interest should be calculated at the annual rate of 8 percent pursuant to § 37-3a, rather than at the higher annual rate of 12 percent pursuant to § 52-192a. Thus, although we agreed with the defendant that § 37-3a governed an award of postjudgment interest in [*Gionfriddo*], we were not required to decide whether such an award was mandatory." *DiLieto* v. *County Obstetrics & Gynecology Group*, *P.C.*, supra, 58. Nothing in *DiLieto* suggests that we may consider as dictum the court's determination in *Gionfriddo* that controls the outcome in the present case, which is *Gionfriddo*'s conclusion that interest under § 52-192a terminates as of the date of judgment.

mere dictum"); see also *Voris* v. *Molinaro*, 302 Conn. 791, 797 n.6, 31 A.3d 363 (2011) ("[Dictum] includes those discussions that are merely passing commentary . . . those that go beyond the facts at issue . . . and those that are unnecessary to the holding in the case. . . . [I]t is not [dictum] [however] when a court . . . intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy . . . . Rather, such action constitutes an act of the court [that] it will thereafter recognize as a binding decision." (Internal quotation marks omitted.)). The plaintiff has not asked us to overrule or to limit our holding in *Gionfriddo*, and we see no reason to do so in this case.[9] We therefore conclude that the trial court improperly awarded the plaintiff postjudgment interest under § 52-192a.

The judgment is reversed only as to the award of postjudgment interest under § 52-192a and the case is remanded with direction to vacate that award of interest; the judgment is affirmed in all other respects.

In this opinion the other justices concurred.

ISAAC HERNANDEZ *v.* APPLE AUTO WHOLESALERS OF WATERBURY, LLC, ET AL.
(SC 20481)

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

Syllabus

Pursuant to statute (§ 52-572g (a)), "[a]ny holder in due course of a promissory note, contract or other instrument," executed by a buyer in connection with a credit transaction covering consumer goods, "shall be subject to all of the claims and defenses which the buyer has against the seller

[9] Indeed, counsel for both the plaintiff and the defendant informed this court during oral argument that they were unaware of any other case in which postjudgment, offer of compromise interest had been awarded under § 52-192a.

arising out of the transaction . . . limited to the amount of debt then outstanding . . . provided the buyer shall have made a prior written demand on the seller with respect to the transaction."

The plaintiff, who had purchased a motor vehicle from the defendant A Co. and entered into a retail installment contract with A Co. to finance the purchase, sought to recover damages from A Co. and the defendant W Co., the assignee of the contract, in the United States District Court for the District of Connecticut. The plaintiff alleged violations of the Truth in Lending Act (15 U.S.C. § 1601 et seq.) and the Connecticut Unfair Trade Practices Act (§ 42-110a et seq.), and that, pursuant to § 52-572g (a), W Co. was subject to any claims or defenses that the plaintiff had against A Co. The contract contained the Federal Trade Commission (FTC) "holder rule" language mandated by federal law (16 C.F.R. § 433.2). Shortly after the sale was completed, A Co. assigned the contract to W Co. Immediately after taking delivery of the vehicle, the plaintiff noticed certain problems and had it inspected by an independent auto body expert, who concluded that it was not safe to operate. Before making any payments under the contract, the plaintiff returned the vehicle to A Co., and his attorney notified A Co. and W Co., by certified letter, that the plaintiff had revoked his acceptance of the vehicle and was demanding the return of his down payment and the trade-in allowance that he had received from A Co. After receiving the letter, W Co. reassigned the contract back to A Co. After commencing the present action, the plaintiff filed a motion for a default judgment against A Co. and a motion for summary judgment as to W Co., and W Co. filed a separate motion for summary judgment. Following a hearing, the United States District Court rendered a default judgment against A Co. and denied the motions for summary judgment. The District Court also determined that the resolution of the plaintiff's claims against W Co. turned on the applicability of § 52-572g (a) and its relationship with the FTC holder rule, and certified to this court the questions of when the limit on an assignee's liability, "the amount of indebtedness then outstanding," is determined for purposes of applying § 52-572g; can an assignee avoid liability under § 52-572g by reassigning the promissory note, contract or other instrument back to the seller, and, if so, by what point in time must it do so to avoid liability; and, if a retail installment contract includes the FTC holder rule language, is an assignee's liability under the rule cumulative to its liability under § 52-572g. *Held*:

1. The limit on assignee liability under § 52-572g (a), which is "the amount of indebtedness outstanding," is determined at the time of the buyer's written demand on the seller: a review of the legislative history of that statute made clear that the purpose of the statute was to shift the costs of seller misconduct from the consumer to the creditor, who is in the best position not only to shoulder those costs but to prevent their occurrence in the first instance by refusing to do business with unscrupulous sellers; moreover, interpreting § 52-572g (a) as limiting the extent

of assignee liability to the amount of indebtedness outstanding at the time of the written demand was consistent with and furthered the remedial purpose of the statute because it ensures the greatest possible recovery for the consumer.

2. An assignee can avoid liability under § 52-572g (a) by reassigning the promissory note, contract or other instrument back to the seller, so long as it is done before the buyer makes written demand on the seller: this court, relying on dictionary and statutory definitions for guidance, interpreted the phrase "any holder in due course of a promissory note, contract or other instrument," as used in § 52-572g (a), to mean any person in legal possession of the subject instrument, not a person formerly in possession of it; moreover, the fact that the statute required legal possession of the instrument for liability to attach did not mean that it required continued possession for liability to remain attached, as this court read the word "shall" in the phrase "shall be subject to" as creating a mandatory duty and the phrase "provided the buyer shall have made a prior written demand on the seller" as creating a condition precedent for the imposition of that duty such that, once written demand is made on the seller, the holder's liability attaches; furthermore, contrary to W Co.'s assertion that the statement of basis and purpose for 16 C.F.R. § 433.2 supported its position that the FTC contemplated that assignees could avoid liability by executing repurchase contracts with the seller prior to purchasing the financing agreement, thereby reimposing full liability for the seller's misconduct on the seller, it was clear that the FTC was not discussing ways in which a creditor could avoid liability to the buyer but, rather, ways in which the creditor could recoup from the seller money it was required to pay to the buyer.

3. If a retail installment contract includes the FTC holder rule language mandated by 16 C.F.R. § 433.2, the assignee's liability under the rule is cumulative to its liability under § 52-572g (a); there was nothing in the text or legislative history of either § 52-572g or 16 C.F.R. § 433.2 stating or implying that the respective remedies afforded thereunder were intended to be exclusive, and the legislative history of 16 C.F.R. § 433.2 was explicit that its remedies were not intended to be exclusive but, rather, cumulative of any remedies available to consumers under state or local law.

Argued November 16, 2020—officially released May 7, 2021*

Procedural History

Action to recover damages for, inter alia, the named defendant's alleged violation of the federal Truth in Lending Act, and for other relief, brought to the United

* May 7, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

States District Court for the District of Connecticut, where the court, *Bolden, J.*, rendered a default judgment against the named defendant, denied the plaintiff's motion for summary judgment and denied the motion for summary judgment filed by the defendant Westlake Services, LLC; thereafter, the court, *Bolden, J.*, certified certain questions of law to this court concerning the scope of the assignee liability of the defendant Westlake Services, LLC.

Daniel S. Blinn, with whom was *Brendan L. Mahoney*, for the appellant (plaintiff).

Kenneth A. Votre, for the appellee (defendant Westlake Services, LLC).

Opinion

KELLER, J. General Statutes § 52-572g (a) provides in relevant part that "[a]ny holder in due course of a promissory note, contract or other instrument . . . executed by a buyer in connection with a credit transaction covering consumer goods . . . shall be subject to all of the claims and defenses which the buyer has against the seller arising out of the transaction . . . limited to the amount of indebtedness then outstanding in connection with the credit transaction, provided the buyer shall have made a prior written demand on the seller with respect to the transaction." In the present case, which comes to us on certification from the United States District Court for the District of Connecticut; see General Statutes § 51-199b (d);[1] we must decide when "the amount of indebtedness then outstanding in connection with the credit transaction" is determined for purposes of limiting an assignee's liability under

[1] General Statutes § 51-199b (d) provides in relevant part: "The Supreme Court may answer a question of law certified to it by a court of the United States . . . if the answer may be determinative of an issue in pending litigation in the certifying court and if there is no controlling appellate decision, constitutional provision or statute of this state."

§ 52-572g. We also must decide whether an assignee can avoid liability under the statute by reassigning the promissory note, contract or other instrument back to the seller and, if so, by when must the assignee reassign it to avoid liability. Finally, we must determine whether, if a retail installment contract includes the Federal Trade Commission (FTC) "holder rule" language mandated by 16 C.F.R. § 433.2,[2] an assignee's liability under that rule is cumulative to its liability under § 52-572g. We conclude that "the amount of indebtedness then outstanding" is the amount of indebtedness outstanding at the time of the buyer's written demand on the seller and that an assignee can avoid liability under § 52-572g only if the promissory note, contract or other instrument is reassigned back to the seller prior to the buyer making such demand. We further conclude that an

[2] Title 16 of the 2017 edition of the Code of Federal Regulations, § 433.2, which was promulgated by the FTC in 1975 pursuant to its rule-making authority under 15 U.S.C. § 46, provides in relevant part: "In connection with any sale or lease of goods or services to consumers, in or affecting commerce as 'commerce' is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice within the meaning of section 5 of that Act for a seller, directly or indirectly, to:

"(a) Take or receive a consumer credit contract which fails to contain the following provision in at least ten point, bold face, type:

"NOTICE

"ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER. . . ."

Title 16 of the Code of Federal Regulations, § 433.2, was enacted "in response to concerns that sellers of goods and services were increasingly separating the consumer's duty to pay from the seller's duty to perform either by selling loan instruments to a third party after execution or by acting as a conduit between purchasers and third-party lenders." (Internal quotation marks omitted.) *Kilgore* v. *KeyBank, N.A.*, 718 F.3d 1052, 1056 n.3 (9th Cir. 2013). Like § 52-572g, the holder rule "preserves a consumer's right to assert the same legal claims and defenses against the assignee of a credit contract as that consumer could have asserted against the assignor." *Pierre* v. *Planet Automotive, Inc.*, 193 F. Supp. 3d 157, 174 (E.D.N.Y. 2016).

assignee's liability under the FTC holder rule is cumulative to its liability under § 52-572g.

The record certified by the District Court contains the following undisputed facts and procedural history.[3] In July, 2017, the plaintiff, Isaac Hernandez, purchased a 2011 Ford Taurus from the defendant Apple Auto Wholesalers of Waterbury, LLC (Apple Auto). *Hernandez* v. *Apple Auto Wholesalers of Waterbury, LLC*, 460 F. Supp. 3d 164, 171 (D. Conn. 2020). The plaintiff paid $500 to Apple Auto as a down payment, received a trade-in allowance of $1000 for his 2003 Volkswagen Jetta, and financed $12,206.82 through a retail installment contract (contract), with interest accruing at a rate of 17.59 percent. See id. Pursuant to the contract, the plaintiff was required to pay $400.93 per month for forty-one months, beginning on September 3, 2017. Id. The total amount payable under the contract was $18,438.12. Id. The contract contained the FTC holder rule language mandated by 16 C.F.R. § 433.2. *Hernandez* v. *Apple Auto Wholesalers of Waterbury, LLC*, Docket No. 3:17-cv-1857 (VAB), 2020 WL 2542752, *3 (D. Conn. May 18, 2020); see footnote 2 of this opinion. In connection with the sale, Apple Auto provided the plaintiff with the statutorily mandated vehicle inspection form K-208,[4] which indicated that the vehicle had passed inspection as to each of the items listed on the form. *Hernandez* v. *Apple Auto Wholesalers of Waterbury, LLC*, supra, 460 F. Supp. 3d 171–72. Shortly after

[3] In its order certifying the questions, the District Court referred this court to its decision in *Hernandez* v. *Apple Auto Wholesalers of Waterbury, LLC*, 460 F. Supp. 3d 164 (D. Conn. 2020), for a more detailed factual background. See *Hernandez* v. *Apple Auto Wholesalers of Waterbury, LLC*, Docket No. 3:17-cv-1857 (VAB), 2020 WL 2542752, *1 (D. Conn. May 18, 2020).

[4] Form K-208 provides in relevant part: "This report shall be used by a CT licensed dealer to comply with [General Statutes §] 14-62 (g) and must be completed in its ENTIRETY. Before offering any used motor vehicle for retail sale, the selling dealer shall complete a comprehensive safety inspection of such vehicle." (Emphasis altered.)

the sale was completed, Apple Auto assigned the contract to the defendant Westlake Services, LLC, doing business as Westlake Financial Services (Westlake). Id., 172.

Immediately after taking delivery of the vehicle, "the plaintiff noticed that it shook when he drove it and made noises when the brakes were applied." (Internal quotation marks omitted.) Id. The plaintiff called Apple Auto to have the vehicle serviced and sent text messages to one of Apple Auto's managers, but his calls and text messages were never returned. Id. On or about August 15, 2017, the plaintiff had the vehicle inspected by Robert Collins, an independent auto body expert and the owner of Wreck Check Assessments of Boston, LLC. Id. From a review of the vehicle's CARFAX report, Collins determined that the vehicle had been in accidents on September 12, 2014, and May 12, 2016, and that it had been sold at auction on April 19, 2017, with a disclosure by the seller of structural damage. Id. After inspecting the vehicle, Collins concluded that it was not safe to operate on public roads.[5] Id., 173. He further concluded that "[a]ny automotive profession[al] performing a simple visual inspection [could] clearly see that [the] vehicle ha[d] been wrecked and . . . repaired to a [r]epair [l]evel 4, which entails the use of only some of the available procedures, parts, and materials to provide the minimum level of repair that would be acceptable to the average consumer's untrained eye." (Internal quotation marks omitted.) Id.

On August 28, 2017, before making any payments under the contract, the plaintiff returned the vehicle to

[5] Specifically, Collins determined that the vehicle had been involved in "an event that caused structural damage to the front and rear of the vehicle," that it was "unsafe due to [this] structural damage," and that it had "not been restored in a quality and workmanlike manner." (Internal quotation marks omitted.) *Hernandez* v. *Apple Auto Wholesalers of Waterbury, LLC*, supra, 460 F. Supp. 3d 173.

Apple Auto by leaving it in Apple Auto's parking lot. Id. On August 29, 2017, the plaintiff's attorney notified Westlake and Apple Auto by certified letter that the plaintiff had revoked acceptance of the vehicle and was demanding the return of his $500 down payment and either the 2003 Volkswagen Jetta or the $1000 trade-in allowance for it. Id. The plaintiff also asserted various claims against Apple Auto under state and federal law, which he offered to settle for $8000.

After receiving the letter, on October 13, 2017, Westlake reassigned the contract back to Apple Auto. Id. On November 3, 2017, the plaintiff commenced the underlying action against Apple Auto and Westlake in the United States District Court for the District of Connecticut, alleging violations of the Truth in Lending Act, 15 U.S.C. § 1601 et seq., breach of the implied warranty of merchantability under the Magnuson-Moss Warranty—Federal Trade Commission Act, 15 U.S.C. § 2301 et seq., and article 2 of the Uniform Commercial Code, General Statutes § 42a-2-101 et seq., and violations of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. Id., 174. The plaintiff further alleged that, pursuant to § 52-572g, Westlake was subject to any claims or defenses that the plaintiff had against Apple Auto. Id.

On September 6, 2019, the plaintiff filed a motion for a default judgment against Apple Auto based on its failure to appear[6] and a motion for summary judgment against Westlake. Id., 176. In response, Westlake filed a motion for summary judgment against the plaintiff. Id. On April 16, 2020, the District Court held a telephonic hearing on the parties' motions for summary judgment during which the court asked the parties to brief what,

[6] The court granted the plaintiff's motion for a default judgment against Apple Auto on May 18, 2020, awarding the plaintiff $24,300. *Hernandez* v. *Apple Automotive Wholesalers of Waterbury, LLC*, supra, 460 F. Supp. 3d 191.

if any, questions it should certify to this court regarding the applicability of § 52-572g to the plaintiff's claims against Westlake and the interplay between that statute and the FTC holder rule language contained in the contract between the plaintiff and Apple Auto. *Hernandez* v. *Apple Auto Wholesalers of Waterbury, LLC*, supra, 2020 WL 2542752, *2.

On April 27, 2020, the plaintiff submitted the requested briefing, in which he argued that Westlake was liable for the plaintiff's claims under both § 52-572g and the contractual holder rule language. Id., *2, *4. The plaintiff further argued that § 52-572g does not require that an assignee of a retail installment contract be in possession of the contract for liability to attach and that, in fact, "the statutory language contemplates that there may be multiple holders, each of which may be liable for seller misconduct." (Internal quotation marks omitted.) Id., *4. The plaintiff maintained, rather, that "Westlake's liability under [§] 52-572g was triggered when [the plaintiff] made prior written demand for his claims upon Apple Auto"; id.; and that none of the issues in the present case "[was] of sufficient public importance to justify certification to [this] [c]ourt." (Internal quotation marks omitted.) Id., *5. The plaintiff therefore argued that the District Court "should simply apply the plain meaning of the statute and impose liability upon Westlake for the amount outstanding at the time that the claim arose." (Internal quotation marks omitted.) Id.

For its part, Westlake argued that the plaintiff could not recover under § 52-572g because Westlake reassigned the contract back to Apple Auto prior to the commencement of the plaintiff's action, and, therefore, Westlake was no longer a "holder in due course" as contemplated by that statute. (Internal quotation marks omitted.) Id., *4. Westlake further argued that the District Court should seek this court's guidance as to the meaning of § 52-572g because "issues of assignee liability are

important to both lenders and consumers throughout Connecticut, and because there are no Connecticut Appellate Court or Supreme Court decisions addressing the applicability of . . . § 52-572g to innocent lenders in Westlake's position." Id., *5. Westlake proposed that the District Court certify the following questions:

"1. Whether an assignee['s] liability under . . . § 52-572g, which is limited to the amount of indebtedness then outstanding in connection with the credit transaction, is determined at the time the claim arose, at the time the consumer made a prior written demand on the seller with respect to the transaction, at the time the suit commences, at the time of the judgment, or at some other time?

"2. Whether under . . . § 52-[572g] the reassignment back to the seller assignor by an assignee of a promissory note, contract, or other instrument terminates liability of the assignee and if so at what point must [the] reassignment occur to terminate liability?

"3. How are the amounts paid under the contract determined by the court when the contract contains the language mandated by 16 C.F.R [§ 433.2] . . . ?" (Internal quotation marks omitted.) Id.

Although the plaintiff opposed certification, he agreed with Westlake's proposed questions should the District Court decide in favor of certification and recommended that the court also seek this court's guidance on whether an assignee's liability under § 52-572g and 16 C.F.R § 433.2 is cumulative or whether it is equal to the higher of the two limits specified in each of those provisions. Id.

The District Court agreed with Westlake that the issues concerning assignee liability under § 52-572g "[were] of sufficient public importance and lack[ed] sufficient guidance from Connecticut courts . . . to

warrant certification of versions of the questions proposed by parties." Id., *6. The court noted that "no [c]ourt of [a]ppeals, district court within the Second Circuit, or Connecticut state court has addressed whether a holder's reassignment of a loan before the filing of a lawsuit negates that holder's liability under the [FTC] [h]older [r]ule or under any state assignee liability laws. . . . And no court has addressed the relationship between the FTC [h]older [r]ule and . . . § 52-572g." Id., *4. The court further noted that "the questions of assignee liability raised here will not only be determinative of liability in this case but will also have implications for lender liability in consumer cases brought against sellers and lenders across [Connecticut]. . . . The issue is of equal importance to consumers, who frequently seek remedies against both the seller, based on breach of contract or unfair trade practices, and the creditor, based on assignee liability." (Citation omitted.) Id., *6. The District Court therefore certified the following questions to this court, which are "based on the parties' proposed questions and the [District] Court's own analysis:

"1. When is the limit on assignee liability, 'the amount of indebtedness then outstanding,' determined under . . . § 52-572g?

"2. Can an assignee avoid liability under . . . § 52-572g by [reassigning] the promissory note, contract or other instrument back to the seller? If so, by when must the assignee reassign the loan to avoid liability?

"3. If a retail installment contract includes the language mandated by 16 C.F.R. § [433.2], the FTC [h]older [r]ule, is the assignee liability under this incorporated contractual language cumulative to the statutory liability under . . . § 52-572g?" Id., *6–7.

I

We begin with the question of when the limit on assignee liability ("the amount of indebtedness then outstanding") is determined for purposes of applying § 52-572g. The plaintiff contends that that determination must be made when the buyer makes written demand on the seller because the phrase "then outstanding" requires that liability be fixed at a particular point in time, and the only point in time referenced in the statute is the time of the buyer's "prior written demand [on] the seller." The plaintiff further argues that, as a remedial statute, § 52-572g must be liberally construed in favor of those whom it was intended to benefit, and, "[s]ince the amount of indebtedness outstanding will decrease over time as payments are made by a debtor, it benefits consumers to set the 'amount of indebtedness' at an earlier point in time." Westlake disagrees. In its view, "the only practical time" to determine the limit on an assignee's liability is at the time of judgment or perhaps "at the time of trial" because the amount of indebtedness may increase or decrease after written demand is made on the seller depending on the actions of the debtor.[7] We agree with the plaintiff that "the amount of indebtedness then outstanding" is the amount of

[7] Rather than address the questions certified to us by the District Court, Westlake's primary contention, in response to each of those questions, is that the FTC holder rule "occupies the field" in this area such that its limit on assignee liability (the amount paid by the debtor under the contract) preempts the limit set by § 52-572g. Specifically, Westlake argues that "the [FTC] [h]older [r]ule effectively occupies the field and preempts . . . § 52-572g. Only the [h]older [r]ule is applicable, and, therefore, the only damages payable to the plaintiff are limited to those that were actually paid on the [contract]. That sum can only be finally determined at trial." The plaintiff understandably objects to this line of argument as outside the scope of the certified questions. The plaintiff further contends, and we agree, that the District Court is perfectly well situated to decide questions of federal preemption and would not have sought this court's guidance as to the meaning of § 52-572g if it believed that the statute was preempted by 16 C.F.R. § 433.2. It would have simply applied 16 C.F.R. § 433.2.

indebtedness outstanding at the time of the buyer's written demand on the seller.

When the "the amount of indebtedness then outstanding" is determined for purposes of applying § 52-572g presents a question of statutory interpretation. "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and [common-law] principles governing the same general subject matter . . . ." (Internal quotation marks omitted.) *Fedus* v. *Planning & Zoning Commission*, 278 Conn. 751, 756, 900 A.2d 1 (2006). It is axiomatic that "remedial statutes should be construed liberally in favor of those whom the law is intended to protect . . . ." (Citation omitted; internal quotation marks omitted.) *Fairchild Heights, Inc.* v. *Dickal*, 305 Conn. 488, 502, 45 A.3d 627 (2012).

Section 52-572g (a) provides in relevant part that "[a]ny holder in due course of a promissory note, contract or other instrument . . . evidencing an indebtedness, signed or executed by a buyer in connection with a credit transaction covering consumer goods . . . shall be subject to all of the claims and defenses which the buyer has against the seller arising out of the transaction . . . limited to the amount of indebtedness then outstanding in connection with the credit transaction,

provided the buyer shall have made a prior written demand on the seller with respect to the transaction." Thus, while the phrase "then outstanding" indicates that the "amount of indebtedness" is to be determined at a particular point in time, the statute does not specify when that time is. Because there are at least three reasonable possibilities—at the time of the prior written demand, at the commencement of an action, or at the time of judgment—the statute is ambiguous as to when the amount of indebtedness becomes fixed for purposes of setting a cap on an assignee's liability under the statute. It is necessary, therefore, to consult the legislative history and circumstances surrounding the statute's enactment for interpretative guidance. A review of those source materials persuades us that the amount of indebtedness then outstanding is determined at the time of the buyer's written demand on the seller.

The legislative history reveals that, prior to its passage, the Public Act that would later become § 52-572g (a); Public Acts 1972, No. 137; enjoyed near universal support in both the House of Representatives and the Senate. See, e.g., 15 S. Proc., Pt. 2, 1972 Sess., p. 638, remarks of Senator William E. Strada, Jr. (noting Senate's unanimous passage of bill at end of prior legislative session); 15 H.R. Proc., Pt. 5, 1972 Sess., p. 1963, remarks of Representative Albert R. Webber (noting bill's widespread acceptance and support). The legislative history further indicates that the statute was intended to abolish what one legislator described as "one of the most vicious of all consumer credit traps," the holder in due course doctrine.[8] 15 H.R. Proc., supra, pp. 1972–73,

[8] Under the holder in due course doctrine, as it was applied in many jurisdictions at the time of the enactment of § 52-572g, "if a seller sold goods on credit and transferred the credit contract to a lender, the lender could enforce the buyer's promise to pay even if the seller failed to perform its obligations under the sales contract. Similarly, despite a seller's breach, the buyer was obligated to pay the lender under a consumer loan contract that directly financed the purchase of goods or services from the seller." (Internal quotation marks omitted.) *Lafferty* v. *Wells Fargo Bank, N.A.*, 25 Cal. App.

remarks of Representative Howard Newman. For those members who were unfamiliar with that doctrine, Representative Newman explained that it generally arose when a consumer finances the purchase of goods or services through a retail installment contract or other instrument arranged by the seller, which is later assigned to a bank or other finance company. Id., p. 1973. "If the product turns out to be a lemon, is damaged or needs servicing under a warranty and the seller refuses to take whatever action is indicated, the finance company or bank has no responsibility to make good [on the contract]. If the buyer refuses to make payments

5th 398, 411, 235 Cal. Rptr. 3d 842 (2018), review denied, Docket No. S250794, 2018 Cal. LEXIS 8573 (Cal. October 31, 2018), cert. denied, U.S. , 139 S. Ct. 1456, 203 L. Ed. 2d 682 (2019). In other words, an assignee "could assert his right to be paid by the consumer despite misrepresentation, breach of warranty or contract, or even fraud on the part of the seller, and despite the fact that the consumer's debt was generated by the sale." (Internal quotation marks omitted.) Id. In Connecticut, however, an assignee of a consumer credit contract, even before the enactment of § 52-572g, "[stood] in the shoes of its assignor . . . and [had] no greater rights of recovery in [an] action [against the consumer] than [the assignor] . . . ." *Fairfield Credit Corp.* v. *Donnelly*, 158 Conn. 543, 552, 264 A.2d 547 (1969). Thus, in *Fairfield Credit Corp.*, this court rejected a claim by the holder of a retail installment contract that it was a "holder in due course" for purposes of enforcing the contract Id., 549. The contract in question contained a "waiver of defense clause," which stated that "[t]he [b]uyer . . . will not assert or use as a defense any . . . claim [it might have against the seller] against the assignee." (Internal quotation marks omitted.) Id., 548. Characterizing that clause as "an attempt to impart the attributes of negotiability to an otherwise nonnegotiable instrument"; id., 550; and "to give [an] assignee [of the contract] the status of a holder in due course of a negotiable instrument"; id., 549; this court held the clause unenforceable as against public policy. Id., 551. In so doing, the court stated: "There can be no question that there exists in Connecticut a very strong public policy in favor of protecting purchasers of consumer goods and that for a court to enforce a waiver of defense clause in a consumer-goods transaction would be contrary to that policy." Id. The court further stated that, "since Connecticut's adoption of the Uniform Commercial Code in 1959, it has become increasingly clear that the policy of our state is to protect purchasers of consumer goods from the impositions of overreaching sellers." Id., 550–51; see id. (citing various consumer protection statutes enacted following state's adoption of Uniform Commercial Code).

as they [become] due, the [finance company] may repossess the . . . goods or the buyer may be dunned for the entire balance of the loan, payable immediately." Id. In other words, "[t]he bank or finance company doesn't have to do anything about your defective appliance . . . but you have to continue to pay [for it]." Id., p. 1975, remarks of Representative Earl T. Holdsworth; see also id., p. 1965, remarks of Representative Rosario T. Vella (noting that holder in due course doctrine "deprives the consumer of his only effective bargaining tool when goods or services are defective," which is nonpayment); id., p. 1963, remarks of Representative Webber ("I know of no official . . . and no legal authority in the [n]ation who is familiar with the doctrine of holder in due course who does not favor its abolition. If there is one outrage against the common decencies of the marketplace this doctrine is it.").

Representative Webber explained that the bill would subject assignees of consumer credit contracts to all the claims and defenses that the consumer would have against the seller. Id., p. 1963. In this way, he explained, it would force "banks, finance companies and other buyers of installment [contracts] to police the companies [they do business with]. And if a retail seller has a record of poor performance [or history of selling] defective products and services, the buyer of paper will stay away from him. And this is all for the good. Such firms should be driven out of the avenues of commerce." Id.; see also 15 S. Proc., supra, p. 639, remarks of Senator Strada ("[T]his is a rather tough consumer [protection] bill" intended to put "the burden . . . on the banks because now banks will actually have to police the market. If they buy a note from a company that is not reputable, they do so at their [own] risk . . . ."); 15 H.R. Proc., supra, p. 1975, remarks of Representative Holdsworth ("This bill simply [makes] the bank or the finance company . . . liable for the same

claims and defenses as the original seller [would] be. It is very little to ask of a financing firm, especially in [a] field where the rate of return is one of the highest in [the] entire country. This is a fair bill . . . [that is] long overdue . . . .").

Although there was much commentary in both the House of Representatives and the Senate explaining the origins of the bill and extolling its virtues, the only discussion bearing directly on the question before us occurred when Representative Francis J. Collins voiced concern over language in the bill conditioning a consumer's right of recovery on the consumer's having first made a written demand on the seller. See 15 H.R. Proc., supra, p.1970, remarks of Representative Collins. Specifically, Representative Collins stated: "Perhaps the gentleman could shed some light on . . . the words . . . 'provided the buyer shall have made a prior written demand on the seller with respect to such transaction.' Would the gentleman tell us . . . what kind of a demand other than a written demand and what is the demand for?" Id. Representative Webber responded that it was "merely a written notice to the seller pointing out the complaint before [legal] action is taken [against the creditor]. This was the way we were able to get the bill out [of committee]. I think it is a very minor thing." Id. Representative Vella further responded that "*the demand would be in writing* [*and*] *would be limited to the amount of indebtedness then outstanding in connection with* [*the*] *credit transaction*." (Emphasis added.) Id., pp. 1970–71.

In the Senate, Senator Edward S. Rimer, Jr., expressed similar concern over the prior written demand requirement and asked the bill's sponsor, Senator Strada, to clarify, for purposes of "legislative intent," that the bill did not require the consumer "to institute legal action" against the seller prior to bringing an action against the creditor. 15 S. Proc., supra, pp. 641–42. Senator Strada

responded that it did not, explaining in relevant part: "What we are attempting to do here is to discourage . . . frivolous lawsuits [against the creditors] [be]cause this is a tremendous burden upon the banks, as I stated previously, and we think that it is only fair there should be some starting point, and the starting point would be a written demand [on] the [seller] and we are hopeful . . . that if it is a reputable retailer and the goods [are] defective, there can be a reconciliation worked out [between buyer and seller] and it will not reach the point of the [buyer suing] the bank, but certainly for legislative intent [it does] not mean that a lawsuit must be instituted [against the seller]." Id., p. 642.

Thus, to the extent the legislative history sheds any light on when "the amount of indebtedness then outstanding" is determined for purposes of calculating an assignee's maximum liability under § 52-572g (a), it indicates that it is the amount of indebtedness outstanding when the written demand is made on the seller. This is evident not only in Representative's Vella's response to Representative Collins—that the demand on the seller will be for the amount of the outstanding indebtedness; see 15 H.R. Proc., supra, pp. 1970–71; but also in the statement of Senator Strada that the demand letter is "the starting point" for an action against the creditor and largely a formality, albeit one that was deemed necessary to move the bill out of committee. 15 S. Proc., supra, p. 642.

Interpreting § 52-572g (a) as limiting the extent of assignee liability to the amount of indebtedness at the time of the written demand on the seller is consistent with and furthers the remedial purpose of the statute because it ensures the maximal recovery for the consumer. This is so because, if a consumer who continues to make payments under the contract during the pendency of the action ultimately prevails against the creditor, the consumer's potential recovery would be

inadequate under Westlake's proposed construction, which would limit the creditor's liability to the amount of indebtedness outstanding at the time of judgment. Because the legislative history makes clear that the purpose of the statute is to shift the costs of seller misconduct from the consumer to the creditor, who is in the best position not only to shoulder them but to prevent their occurrence in the first instance by refusing to do business with unscrupulous sellers, we conclude that "the amount of indebtedness then outstanding" under § 52-572g (a) is the amount of indebtedness outstanding when the buyer makes written demand on the seller.

II

We turn next to the question of whether an assignee can avoid liability under § 52-572g by reassigning the promissory note, contract or other instrument back to the seller and, if so, by when must the assignee do so to avoid liability. Although Westlake asserts that an assignee can avoid liability by reassigning the note "any time before judgment," it does not explain why this contention makes sense of § 52-572g as a textual matter or in light the statute's remedial purpose and legislative history. Instead, Westlake argues that interpreting § 52-572g to permit an assignee to avoid liability in this manner is consistent with the overarching purpose of 16 C.F.R. § 433.2, which, according to Westlake, is to prevent the separation of the seller's duty to perform from the consumer's duty to pay.

The plaintiff responds, inter alia, that neither § 52-572g nor its federal counterpart, 16 C.F.R. § 433.2, conditions liability on an assignee being in possession of the promissory note, contract or other instrument at the time of judgment—or at any other time for that matter—but, rather, imposes liability on "any holder" at any time, past or present. The plaintiff argues that,

if the legislature had wanted to limit liability under § 52-572g to present holders, it easily could have done so simply by using the phrase "the current holder" or even just "the holder," both of which convey a present temporal sense. To conclude otherwise, the plaintiff contends, would undermine the statute's remedial purpose of holding creditors liable for the misdeeds of sellers because it would allow a creditor, at the first sign of trouble, to avoid liability simply by reassigning the promissory note, contract or other instrument back to the seller. At a minimum, the plaintiff argues, an assignee cannot escape liability after the written demand is made on the seller because the statute's language and legislative history make clear that the written demand is what triggers the assignee's liability under the statute. We conclude that an assignee's liability under § 52-572g attaches at the time the buyer makes the required written demand on the seller, after which time the assignee cannot avoid liability by reassigning the promissory note, contract or other instrument back to the seller.

Whether an assignee can avoid liability under § 52-572g by reassigning a promissory note, contract or other instrument back to the seller and, if so, by when must the reassignment occur for liability to be avoided presents a question of statutory interpretation that is governed by the well established principles of statutory construction set forth in part I of this opinion. In applying these principles, we continue to be mindful that § 52-572g, as a remedial statute, "must be afforded a liberal construction in favor of those whom the legislature intended to benefit . . . ." (Citation omitted; internal quotation marks omitted.) *Dorry* v. *Garden*, 313 Conn. 516, 530, 98 A.3d 55 (2014).

As previously stated, § 52-572g (a) provides in relevant part that "[a]ny holder in due course of a promissory note, contract or other instrument" executed by a

buyer in connection with a consumer credit transaction "shall be subject to all of the claims and defenses which the buyer has against the seller arising out of the transaction . . . provided the buyer shall have made a prior written demand on the seller with respect to the transaction." Although it is true, as the plaintiff argues, "[t]he word 'any' has a diversity of meanings and may be employed to indicate 'all' or 'every' as well as 'some' or 'one' "; *Muller* v. *Town Plan & Zoning Commission*, 145 Conn. 325, 328, 142 A.2d 524 (1958); the word "holder" does not. It has a decidedly singular meaning in the law: "[s]omeone who has legal possession of a negotiable instrument and is entitled to receive payment on it." Blacks Law Dictionary (11th Ed. 2019), p. 879; see also General Statutes § 42a-1-201 (21) (A) (defining "[h]older" as "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession"). To establish "holder in due course" status, a holder must also prove that his taking of the instrument was for value, in good faith, and "without notice that it [was] overdue or has been dishonored or of any defense against or claim to it on the part of any person. General Statutes § 42a-3-302 . . . ." (Citations omitted; internal quotation marks omitted.) *Funding Consultants, Inc.* v. *Aetna Casualty & Surety Co.*, 187 Conn. 637, 640–41, 447 A.2d 1163 (1982); see also *Cadle Co.* v. *Errato*, 71 Conn. App. 447, 458, 802 A.2d 887 (plaintiff must prove that it is in possession of promissory note to establish holder in due course status), cert. denied, 262 Conn. 918, 812 A.2d 861 (2002). Given these definitions, it is apparent that the phrase "any holder in due course of a promissory note, contract or other instrument," as used in § 52-572g (a) can only mean any person in legal possession of the instrument, not a person formerly in possession of it.

Our inquiry does not end there, however. The fact that § 52-572g (a) requires legal possession of the prom-

issory note, contract or other instrument for liability to attach does not mean that it requires continued possession of it for liability to remain attached. The statute provides that the holder "*shall be subject to all of the claims and defenses which the buyer has against the seller arising out of the transaction . . . provided the buyer shall have made a prior written demand on the seller with respect to the transaction.*" (Emphasis added.) General Statutes § 52-572g (a). We read the word "shall" in the phrase "shall be subject to" as creating a mandatory duty and the phrase "provided the buyer shall have made a prior written demand on the seller" as creating a condition precedent for the imposition of that duty such that, once written demand is made on the seller, the holder's liability attaches. General Statutes § 52-572g (a).

We can perceive no reason, and Westlake has identified none, why the legislature would have intended any other result, particularly a result that would allow an assignee to evade liability simply by reassigning the instrument back to the seller as soon as written demand is made on the seller, as in the present case. Instead, we agree with the California Court of Appeals' recent analysis of this issue as applied to 16 C.F.R. § 433.2: "[The defendant] cites to no legal authority, and we found none, excusing a holder from liability simply because it reassigned the debt instrument to someone else before judgment was entered in the consumer's case. . . .

"[The defendant] maintains there was nothing in the car financing documents of a personal nature to preclude its assignment. Perhaps this is true, but it does not answer the issue at hand. The question is not whether the finance documents could . . . be [reassigned]. The question is whether a creditor-assignee can avoid liability under the [h]older [r]ule by [reassigning]

after the misconduct has occurred, [or] the lawsuit has been filed, [or] it has been named a defendant.

"[The defendant] does not suggest what policy or purpose would be served by giving a creditor-assignee such an easy exit strategy. The notice provides any holder is subject to all claims and defenses the consumer has against the original seller. Therefore, any effort by an . . . assignee to play hot potato with a consumer credit contract will not be effective. . . .

"The [purpose of 16 C.F.R. § 433.2 is to take] away the [financer's] traditional status as a holder in due course and [to subject] it to any potential claims and defenses the purchaser has against the seller. Based on a simple public policy determination, as between an innocent consumer and a third party financer, the latter is generally in a vastly superior position to: (1) return the cost to the seller, where it properly belongs; (2) exert an influence over the behavior of the seller in the first place; and (3) to the extent the financer cannot return the cost (as in the case of fly-by-night dealers), internalize the cost by spreading it among all consumers as an increase in the price of credit. Knowing that it bears the cost of seller misconduct, the creditor will simply not accept the risks generated by the truly unscrupulous merchant. The market will be policed in this fashion and all parties will benefit accordingly." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Duran* v. *Quantum Auto Sales, Inc.*, Docket No. G052968, 2017 WL 6333871, *15–16 (Cal. App. December 12, 2017); see also *Associates Home Equity Services, Inc.* v. *Troup*, 343 N.J. Super. 254, 277, 778 A.2d 529 (App. Div. 2001) ("[The lender], as a potential holder had notice that if it procured the purchase money loan arranged by [the seller], it may be stepping into [the seller's] shoes. We cannot accept the proposition that the FTC contemplated that such result would not attach simply because of a subsequent

assignment of the loan, especially when, as here, it is claimed that [the lender] actively participated with . . . the seller . . . in placing the loan with the [the buyers]." (Internal quotation marks omitted.)).

Westlake asserts, nevertheless, that the "Statement of Basis and Purpose" for 16 C.F.R. § 433.2 supports the view that the FTC contemplated that assignees could avoid liability by executing "repurchase" contracts with the seller prior to purchasing the financing agreement, thereby reimposing the full liability for the seller's misconduct on the seller. We disagree. In the section of the statement to which Westlake is referring, the FTC explains that, "[a]s a practical matter, the creditor is always in a better position than the buyer to return seller misconduct costs to sellers, the guilty party. This is the reallocation desired, a return of costs to the party who generates them. The creditor financing the transaction is in a better position to do this than the consumer, because (1) he engages in many transactions where consumers deal infrequently; (2) he has access to a variety of information systems which are unavailable to consumers; (3) he has recourse to contractual devices which render the routine return of seller misconduct costs to the sellers relatively cheap and automatic; and (4) the creditor possesses the means to initiate a lawsuit and prosecute it to judgment where recourse to the legal system is necessary." Preservation of Consumers' Claims and Defenses, 40 Fed. Reg. 53,506, 53,523 (November 18, 1975).

One of the contractual devices available to creditors, the FTC notes, is a " 'reserve' or 'recourse' arrangement or account with the seller for reimbursement." Id. "In cases [in which] 'repurchase' or 'reserve' contracts, or other recourse devices available to creditors, facilitate the return of an account to a seller . . . the creditor will compel the seller to carry the costs so occasioned." Id. It is clear, however, that the FTC is not discussing

in this section ways in which a creditor can avoid liability to the buyer but, rather, ways in which the creditor can recoup *from the seller* money it was required to pay to the buyer. The operative word in this section is "reimbursement." The costs for which the creditor is being "reimbursed," whether through a repurchase or reserve contract with the seller, are the costs the creditor incurred when it was forced, by operation of the FTC holder rule, to stand in the seller's shoes and to compensate the buyer for the seller's misconduct.

III

Finally, we turn to the question of whether, if a retail installment contract includes the FTC holder rule language mandated by 16 C.F.R. § 433.2, the assignee liability under this incorporated contractual language is cumulative to the statutory liability under § 52-572g. The plaintiff argues that the assignee liability is cumulative because the FTC commentary to 16 C.F.R. § 433.2 "explicitly contemplated the existence of state remedies such as 52-572g and expressed the . . . view that the holder rule remedy was not intended as a limitation on [those] remedies . . . ." The plaintiff further argues that the legislature was aware, when it enacted § 52-572g, that the FTC was in the process of promulgating 16 C.F.R. § 433.2, which, like § 52-572g, would abolish the holder in due course doctrine in consumer credit transactions, and, rather than wait for the FTC to act, the legislature chose to act independently. The plaintiff also notes that § 52-572g has been amended three times since the enactment of 16 C.F.R. § 433.2, but not once has the legislature seen fit to conform the remedy available thereunder to the remedy available under 16 C.F.R. § 433.2. Finally, the plaintiff argues that, in *Jacobs* v. *Healey Ford-Subaru, Inc.*, 231 Conn. 707, 652 A.2d 496 (1995), this court held that remedies available under two separate statutory schemes addressing the same abusive car dealer practice were cumulative; see id.,

711, 724; and that the reasoning we applied in *Jacobs* is fully applicable to the present case. Westlake responds that 16 C.F.R. § 433.2 preempts § 52-572g, and, therefore, the only remedy available to the plaintiff is the remedy available under the holder rule notice contained in the plaintiff's contract with Apple Auto.

We agree with the plaintiff that the answer to the third certified question is informed by our decision in *Jacobs* v. *Healey Ford-Subaru, Inc.*, supra, 231 Conn. 707. In *Jacobs*, the issue before the court was "whether [a car dealer], who has violated General Statutes [(Rev. to 1989)] § 42-98 [now § 36a-785] of the Retail Instalment Sales Financing Act (RISFA) and General Statutes [(Rev. to 1989)] § 42a-9-504 [now § 42a-9-610] of the Uniform Commercial Code (UCC) [by unlawfully repossessing a vehicle], must pay damages under each statute to the injured plaintiff." (Footnotes omitted.) Id., 708–10. We concluded that, "because the remedies [were] not explicitly exclusive, there [was] no conflict between the two provisions," and, therefore, "both must be given concurrent effect . . . ." Id., 710–11.

In reaching our determination, we rejected the defendant's contention that a conflict existed "solely because the provisions of RISFA and the UCC include different and distinct remedies."[9] Id., 719. We concluded, rather, that, "[a]lthough the remedy provisions of RISFA and the UCC provide different relief, we are persuaded that both can apply simultaneously. Mindful that consumer

[9] As we explained in *Jacobs*, in the event of an unlawful repossession, "RISFA provides a statutory formula that allows the retail buyer to recover 'his actual damages, if any, and in no event less than one-fourth of the sum of all payments which have been made under the contract.' General Statutes [(Rev. to 1989)] § 42-98 (i) [now § 36a-785 (i)]. The UCC allows the debtor to recover 'an amount not less than the credit service charge plus [10 percent] of the principal amount of the debt or the time price differential plus [10 percent] of the cash price.' General Statutes [(Rev. to 1989)] § 42a-9-507 (1) [now § 42a-9-625 (2)]." *Jacobs* v. *Healey Ford-Subaru, Inc.*, supra, 231 Conn. 719.

legislation must be interpreted so as to implement its remedial purpose of protecting consumer buyers; *Mack Financial Corp.* v. *Crossley*, 209 Conn. 163, 166, 550 A.2d 303 (1988); *Barco Auto Leasing Corp.* v. *House*, 202 Conn. 106, 116, 520 A.2d 162 (1987); and in accord with the reasoning other jurisdictions have applied to resolve this issue, we conclude[d] that there [was] no conflict between the remedy provisions of RISFA and the UCC, in the absence of a clear mandate that the remedies [were] exclusive." *Jacobs* v. *Healey Ford-Subaru, Inc.*, supra, 231 Conn. 722.

In reaching our determination in *Jacobs*, we also explained that our holding was consistent with the public policy behind the two statutes, which was "to protect the consumer from well documented repossession abuses and to encourage and promote compliance with the laws that govern such actions." Id. Noting that "[t]he award of damages [under RISFA] is too minimal to provide a 'stimulus to make it advantageous for the seller to follow [RISFA]' "; id., 723; we agreed with the view that "the drafters created a statutory penalty in [U.C.C. §] 9-507 [now § 9-625] to 'up the ante for those who would abuse the consumer' "; id., 724; and that it was "irrelevant that [that] penalty [bore] little or no relation to the actual loss." Id.

The same reasoning applies in the present case. There is nothing in the text or legislative history of § 52-572g or 16 C.F.R. § 433.2 stating or implying that the respective remedies afforded thereunder were intended to be exclusive. Indeed, as previously discussed, the legislative history of 16 C.F.R. § 433.2 is explicit that its remedies are *not* intended to be exclusive but, rather, cumulative of any remedies available to the consumer under state or local law. Whereas 16 C.F.R. § 433.2 limits recovery to money actually paid under the contract, including any down payment; see Guidelines on Trade Regulation Rule Concerning Preservation of Consum-

ers' Claims and Defenses, 41 Fed. Reg. 20,022, 20,023 (May 14, 1976); § 52-572g limits the consumer's recovery to the amount of indebtedness then outstanding. This means that, in cases such as the present one, in which the consumer has made no payments under the contract, the consumer's recovery may be greater than his or her actual losses. Given the legislative history of § 52-572g, there can be little doubt that this is what the legislature intended and deemed necessary to incentivize creditors to rid the marketplace of disreputable merchants. See, e.g., 15 S. Proc., supra, p. 639, remarks of Senator Strada (explaining that bill places "the burden . . . on the banks because now banks will actually have to police the market" and that, "[i]f they buy a note from a company that is not reputable, they do so at their [own] risk"); 15 H.R. Proc., supra, p. 1963, Remarks of Representative Webber ("whoever profits from a retail sales contract should also be required to stand behind the product and service"). When, however, the remaining indebtedness is less than the money paid under the contract, 16 C.F.R. § 433.2 ensures that the consumer will be able to recover an amount that is closer to the amount of his or her actual damages. In this way, the two provisions work in tandem to ensure the maximum recovery for the consumers whom they were intended to protect. For these reasons, we conclude that 16 C.F.R. § 433.2 and § 52-572g must be given concurrent effect and that the remedies awarded under them are cumulative.

The answer to the first certified question is that the limit on assignee liability under § 52-572g (a), which is "the amount of indebtedness then outstanding," is determined at the time of the written demand on the seller.

The answer to the second certified question is that an assignee can avoid liability under § 52-572g by reassigning the promissory note, contract or other instru-

ment back to the seller, so long as it is done before the buyer makes written demand on the seller.

The answer to the third certified question is that, if a retail installment contract includes the FTC holder rule language mandated by 16 C.F.R. § 433.2, the assignee's liability under that rule is cumulative to its liability under § 52-572g.

No costs shall be taxed in this case to any party.

In this opinion the other justices concurred.

ORDERS

CONNECTICUT REPORTS

VOL. 338

FRANCIS ANDERSON *v.* COMMISSIONER OF CORRECTION

The petitioner Francis Anderson's petition for certification to appeal from the Appellate Court, 204 Conn. App. 712 (AC 43455), is denied.

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

James P. Sexton, assigned counsel, in support of the petition.

Janelle R. Mederios and *Steven R. Strom*, assistant attorneys general, in opposition.

Decided October 5, 2021

STATE OF CONNECTICUT *v.* ANTHONY SINCHAK

The defendant's petition for certification to appeal from the Appellate Court, 205 Conn. App. 346 (AC 42348), is denied.

W. Theodore Koch III, assigned counsel, in support of the petition.

Ronald G. Weller, senior assistant state's attorney, in opposition.

Decided October 5, 2021

CALIBER HOME LOANS, INC. *v.* MICHAEL A. ZELLER ET AL.

The petition of the defendant Cambridge Holdings, Inc., for certification to appeal from the Appellate Court, 205 Conn. App. 642 (AC 43576), is denied.

Maria K. Tougas, in support of the petition.

Victoria L. Forcella, in opposition.

Decided October 5, 2021

MARIA MOULTHROP *v.* CONNECTICUT STATE BOARD OF EDUCATION

The plaintiff's petition for certification to appeal from the Appellate Court, 205 Conn. App. 489 (AC 43781), is denied.

John M. Gesmonde, in support of the petition.

Kerry Anne Colson, assistant attorney general, in opposition.

Decided October 5, 2021

ROGER SAUNDERS, TRUSTEE *v.* KDFBS, LLC, ET AL.

The petition of the defendants Daniel Davis and Karen Davis for certification to appeal from the Appellate Court, 206 Conn. App. 92 (AC 40918), is denied.

Neil R. Marcus and *Alexander Copp*, in support of the petition.

Michael J. Jones and *Ryan S. Tougias*, in opposition.

Decided October 5, 2021

TIM DUNN *v.* NORTHEAST HELICOPTERS FLIGHT SERVICES, LLC

The plaintiff's petition for certification to appeal from the Appellate Court, 206 Conn. App. 412 (AC 43594), is granted, limited to the following issues:

"1. Did the Appellate Court correctly conclude that the public policy contained in General Statutes § 31-73 (b) is inapplicable to the facts of this case and, as a matter of law, cannot form the basis for a common-law wrongful termination action?

"2. Did the Appellate Court correctly conclude, in the alternative, that the evidence presented at the summary

judgment stage failed to support the plaintiff's claim that the defendant actually violated the public policy contained in § 31-73 (b)?"

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

Megan L. Michaud, in support of the petition.

Michael C. Harrington, in opposition.

Decided October 5, 2021

KEVIN LEWIS MARSHALL *v.* COMMISSIONER OF CORRECTION

The petitioner Kevin Lewis Marshall's petition for certification to appeal from the Appellate Court, 206 Conn. App. 461 (AC 43693), is denied.

Naomi T. Fetterman, assigned counsel, in support of the petition.

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

Decided October 5, 2021

CHRISTOPHER A. CLARK *v.* TOWN OF WATERFORD, COHANZIE FIRE DEPARTMENT ET AL.

The named defendant's petition for certification to appeal from the Appellate Court, 206 Conn. App. 223 (AC 44170), is granted, limited to the following issue:

"Did the Appellate Court incorrectly determine that the definition of the term 'member' in General Statutes § 7-425 (5) is inapplicable to General Statutes § 7-433c?"

Kyle J. Zrenda and *James P. Berryman*, in support of the petition.

Decided October 5, 2021

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CONNECTICUT APPELLATE REPORTS

Vol. 208

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

BARBARA ORZECH *v.* GIACCO OIL COMPANY ET AL. (AC 43941)

Alvord, Moll and Norcott, Js.

Syllabus

The defendant employer, G Co., and its insurer appealed to this court from the decision of the Compensation Review Board affirming the Workers' Compensation Commissioner's award of survivorship benefits to the plaintiff. The plaintiff's deceased spouse, S, who had been an employee of G Co., slipped and fell while delivering oil to one of its customers. The fall aggravated S's existing knee injury to such an extent that he could no longer work or carry out his daily activities. S's physician recommended knee replacement surgery, however, S's health insurance had been canceled thirty days after the incident and he could not afford the procedure. S filed a workers' compensation claim relating to the compensability of the knee replacement surgery. Prior to the conclusion of the formal hearings before the commissioner, S died. Thereafter, the plaintiff filed a claim for survivorship benefits. Following the testimony of both expert and lay witnesses, the commissioner determined that S had died by suicide as a result of depression that stemmed from compensable work injuries and that the plaintiff was entitled to survivorship benefits. The defendants filed a petition for review of the commissioner's finding and award with the board, claiming that, inter alia, in accordance with *Sapko* v. *State* (305 Conn. 360), S's consumption of an excessive amount of alcohol and medication prior to his death constituted a superseding cause that broke the chain of causation between the work incident and S's death. The board disagreed and affirmed the commissioner's finding and award, and the defendants appealed to this court. *Held* that the board properly affirmed the commissioner's award

of survivorship benefits to the plaintiff: the commissioner's subordinate findings that the decedent developed depression following the work incident, that his compensable injuries were a substantial contributing factor to his development of depression, that the manner of his death was a suicide, and that his suicide stemmed from his depression, were reasonable and grounded in the evidence produced during the proceedings before the commissioner; moreover, the commissioner's finding that a chain of causation existed linking the decedent's compensable injuries to his death was supported by the record and was not the misapplication of law, as, unlike in *Sapko*, which involved a death resulting from an accidental overdose, in the present case, the decedent's manner of death, a suicide from acute intoxication, was an act not untethered to his compensable injuries or the depression that he thereafter developed.

Argued April 13—officially released October 19, 2021

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Eighth District finding that the plaintiff's decedent had sustained certain compensable injuries and awarding survivorship benefits, brought to the Compensation Review Board, which affirmed the commissioner's decision, and the defendants appealed to this court. *Affirmed*.

Nicholas C. Varunes, for the appellants (defendants).

Andrew E. Wallace, for the appellee (plaintiff).

Opinion

MOLL, J. In this workers' compensation matter, the defendant employer, Giacco Oil Company (Giacco), and its insurer, Federated Mutual Insurance Company, appeal from the decision of the Compensation Review Board (board) affirming the finding and award of the Workers' Compensation Commissioner for the Eighth District (commissioner) of the Workers' Compensation Commission (commission) awarding survivorship benefits

under General Statutes § 31-306[1] to the plaintiff, Barbara Orzech, the surviving spouse of the deceased employee, Stanley Orzech (decedent). In awarding survivorship benefits to the plaintiff, the commissioner found that the decedent had died by suicide as a result of depression that he had developed stemming from compensable work injuries. On appeal, the defendants claim that the board improperly affirmed the commissioner's award of survivorship benefits to the plaintiff because the commissioner erred in finding a causal link between the decedent's compensable injuries and his death when (1) subordinate facts found by the commissioner were speculative or inconsistent with the evidence and (2) the record established that the decedent engaged in conduct prior to his death that constituted a superseding cause breaking the chain of causation between his compensable injuries and his death. We disagree and, accordingly, affirm the decision of the board.

The following facts, as found by the commissioner or as undisputed in the record, and procedural history are relevant to our resolution of this appeal. The decedent began working for Giacco in 1994, delivering oil and performing other related services. On November 1, 2016, while delivering oil to a customer's home, the decedent slipped and fell, sustaining injuries to his back, right shoulder, and knees (work incident). Prior to the work incident, the decedent received periodic medical treatment to alleviate his "long-standing knee problems . . . ." The decedent and his treating physician frequently discussed the likelihood that the decedent would need a total replacement of his right knee, but, before the work incident, the knee replacement surgery "was always 'down the road.' . . ." Following the work

[1] General Statutes § 31-306 provides in relevant part: "(a) Compensation shall be paid to dependents on account of death resulting from an accident arising out of and in the course of employment or from an occupational disease . . . ."

incident, the decedent's right knee pain became "unbearable," and he wished to proceed with the knee replacement surgery; however, the decedent's health insurance was canceled thirty days after the work incident, and he could not afford to proceed with the surgery.

The decedent filed a workers' compensation claim in relation to the work incident. The defendants did not deny that the work incident had occurred, but they did deny the extent of the decedent's injuries. In particular, the defendants repudiated that the work incident was a substantial contributing factor in the decedent's need for knee replacement surgery. On June 15, 2017, the commissioner held a formal hearing on the compensability of the knee replacement surgery, during which the decedent testified. At the conclusion of the hearing, the commissioner left the record open and scheduled another formal hearing for August 18, 2017.

On July 22, 2017, the plaintiff and the decedent attended a family gathering and, thereafter, went to a bar for drinks before returning home. According to the plaintiff, the decedent drank two beers at the family gathering and consumed approximately four beers and four shots of alcohol at the bar. On July 23, 2017, the plaintiff found the decedent dead in their home. Maura DeJoseph, a pathologist in the Office of the Chief Medical Examiner (OCME), determined that the cause of the decedent's death was "acute intoxication due to the combined effects of alcohol, eszopiclone [also known as Lunesta], lorazepam [also known as Ativan], sertraline [also known as Zoloft] and diphenhydramine [also known as Benadryl]," and that the manner of the decedent's death was a suicide. Thereafter, the plaintiff filed a claim for survivorship benefits. The commissioner held several formal hearings on the plaintiff's claim between February 8 and August 21, 2018. The commissioner heard testimony from multiple lay witnesses,

including the plaintiff, and from expert witnesses. Additionally, several exhibits were admitted into evidence, including the decedent's medical records, a police report, and reports prepared by the OCME.

In her brief submitted to the commission, the plaintiff asserted that the decedent died by suicide as a result of depression that he had developed because of his compensable injuries. In their brief submitted to the commission, the defendants argued that the evidence did not support findings that the decedent became depressed following the work incident and died by suicide. In addition, the defendants argued that, prior to his death, the decedent "intentionally imbibed an excessive amount of alcohol" and then overdosed on a myriad of medications, notwithstanding the decedent knowing that mixing alcohol with his medications was contraindicated. Analogizing this case to *Sapko* v. *State*, 305 Conn. 360, 44 A.3d 827 (2012), the defendants argued that the decedent's consumption of alcohol and the medications was a superseding cause that broke the chain of causation between the work incident and the decedent's death.

On December 24, 2018, the commissioner issued a finding and award ordering the defendants (1) "to accept the November 1, 2016 need for right total knee replacement as compensable and to pay benefits associated with this finding"[2] and (2) to pay survivorship benefits to the plaintiff in accordance with § 31-306, along with other benefits provided under the statute. The commissioner found in relevant part that (1) the decedent became depressed following the work incident, (2) the decedent's compensable injuries were a substantial contributing factor in causing the decedent's

[2] In this appeal, the defendants do not contest the commissioner's finding and award as to the compensability of the decedent's need for knee replacement surgery.

depression, and (3) as a result of his depression, the decedent intended to cause his own death and died by suicide. On January 22, 2019, Giacco filed motions to correct and for articulation. On January 28, 2019, the commissioner granted three of Giacco's requested corrections, which are inconsequential to this appeal, but denied the remainder of Giacco's motion to correct. On the same day, the commissioner denied Giacco's motion for articulation in its entirety.

The defendants subsequently filed a petition for review of the commissioner's finding and award. In their brief submitted to the board, the defendants argued that the commissioner's findings that the decedent became depressed following the work incident and that the manner of his death was a suicide were not supported by the evidence or were based on conjecture. In addition, they argued that the commissioner minimized the effect of the decedent's consumption of alcohol on his death. Relying on *Sapko*, the defendants maintained that the decedent's consumption of an excessive amount of alcohol and an excessive quantity of medications prior to his death constituted a superseding cause breaking the causal link between the decedent's compensable injuries and his death. In her brief submitted to the board, the plaintiff argued that the commissioner's findings were supported by the record and that the commissioner properly applied the law to the facts he found.

On January 30, 2020, the board issued a decision affirming the commissioner's finding and award. The board concluded that the record contained evidence, credited by the commissioner, "creating a chain of causation" linking the decedent's compensable injuries to his death. The board determined that there was evidence, including testimony by the plaintiff's expert witness, demonstrating that the decedent had died by suicide, and that the commissioner was not obligated to

credit evidence to the contrary. The board further determined that the commissioner was not required to credit evidence that militated against his finding that the decedent had developed depression. As to the defendants' argument that the commissioner did not adequately consider the effect of the decedent's consumption of alcohol on his death, the board determined that "it was reasonable for the commissioner to discount the theory that this was a death by misadventure due to the abuse of alcohol as the evidence clearly supports his conclusion that the decedent had wilfully 'ingested a shockingly high number of pills.' " This appeal followed. Additional facts will be set forth as necessary.

We first set forth the standard of review and legal principles applicable to the defendants' claims. "[T]he principles [governing] our standard of review in workers' compensation appeals are well established. . . . The board sits as an appellate tribunal reviewing the decision of the commissioner. . . . [T]he review . . . of an appeal from the commissioner is not a de novo hearing of the facts. . . . [Rather, the] power and duty of determining the facts rests on the commissioner [and] . . . [t]he commissioner is the sole arbiter of the weight of the evidence and the credibility of witnesses . . . . Where the subordinate facts allow for diverse inferences, the commissioner's selection of the inference to be drawn must stand unless it is based on an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them." (Internal quotation marks omitted.) *Vitti* v. *Milford*, 190 Conn. App. 398, 405, 210 A.3d 567, cert. denied, 333 Conn. 902, 214 A.3d 870 (2019). "It matters not that the basic facts from which the [commissioner] draws this inference are undisputed rather than controverted. . . . It is likewise immaterial that the facts permit the drawing of diverse inferences. The [commissioner] alone is charged with the duty of initially

selecting the inference [that] seems most reasonable and [the commissioner's] choice, if otherwise sustainable, may not be disturbed by a reviewing court." (Internal quotation marks omitted.) *Sapko* v. *State*, supra, 305 Conn. 371. "This court's review of [the board's] decisions . . . is similarly limited. . . . [W]e must interpret [the commissioner's finding] with the goal of sustaining that conclusion in light of all of the other supporting evidence. . . . Once the commissioner makes a factual finding, [we are] bound by that finding if there is evidence in the record to support it." (Internal quotation marks omitted.) *Vitti* v. *Milford*, supra, 405.

"Furthermore, [i]t is well settled that, because the purpose of the [Workers' Compensation Act (act), General Statutes § 31-275 et seq.] is to compensate employees for injuries without fault by imposing a form of strict liability on employers, to recover for an injury under the act a plaintiff must prove that the injury is causally connected to the employment. To establish a causal connection, a plaintiff must demonstrate that the claimed injury (1) arose out of the employment, and (2) [arose] in the course of the employment. . . .

"[I]n Connecticut traditional concepts of proximate cause constitute the rule for determining . . . causation [in workers' compensation cases]. . . . [T]he test of proximate cause is whether the [employer's] conduct is a substantial factor in bringing about the [employee's] injuries. . . . Further, it is the plaintiff who bears the burden to prove an unbroken sequence of events that tied [the employee's] injuries to the [employer's conduct]. . . . The existence of the proximate cause of an injury is determined by looking from the injury to the negligent act complained of for the necessary causal connection. . . .

"As [our Supreme Court] previously [has] indicated, [the] court has defined proximate cause as [a]n actual

cause that is a substantial factor in the resulting harm . . . . Because actual causation, in theory, is virtually limitless, the legal construct of proximate cause serves to establish how far down the causal continuum tortfeasors will be held liable for the consequences of their actions. . . . The fundamental inquiry of proximate cause is whether the harm that occurred was within the scope of foreseeable risk created by the defendant's negligent conduct. . . . The question of proximate causation . . . belongs to the trier of fact because causation is essentially a factual issue. . . . It becomes a conclusion of law only when the mind of a fair and reasonable [person] could reach only one conclusion; if there is room for a reasonable disagreement the question is one to be determined by the trier as a matter of fact." (Citations omitted; internal quotation marks omitted.) *Sapko* v. *State*, supra, 305 Conn. 371–73.

This appeal does not concern the compensability of the primary injuries sustained by the decedent as a result of the work incident; see footnote 2 of this opinion; rather, the crux of the appeal is the compensability of a subsequent injury, that being the decedent's death. In *Sapko* v. *State*, supra, 305 Conn. 360, our Supreme Court expressly adopted the "direct and natural consequence rule" for subsequent injury cases. Id., 383–85. In *Sapko*, our Supreme Court concluded that a workers' compensation commissioner had "properly applied the superseding cause doctrine in finding that [an employee's] compensable work injuries were not the proximate cause of his death." Id., 371. As our Supreme Court explained: "The commissioner's application of the superseding cause doctrine is in accord with the approach advocated by Professor Arthur Larson for determining causation when an employee, having suffered a compensable primary injury during the course of his employment, later sustains a second injury outside the course of employment for which the employee

seeks compensation, claiming that the second injury relates back to the primary injury in a sufficiently direct way. Professor Larson explains: 'A distinction must be observed between causation rules affecting the primary injury . . . and causation rules that determine how far the range of compensable consequences is carried, once the primary injury is causally connected with the employment. As to the primary injury, it has been shown that the "arising" test is a unique one quite unrelated to common-law concepts of legal cause, and . . . the employee's own contributory negligence is ordinarily not an intervening cause preventing initial compensability. But when the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based [on] the concepts of "direct and natural results," and of [the employee's] own conduct as an independent intervening cause.' . . . 'The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.' . . . Professor Larson further explains that, when a subsequent injury or aggravation of the primary injury arises out of what he describes as a 'quasi-course' of employment activity, such as a trip to the doctor's office for treatment of the primary injury, 'the chain of causation should not be deemed broken by mere negligence in the performance of that activity . . . but only by intentional conduct which may be regarded as expressly or impliedly forbidden by the employer.' . . . Consequently, all the medical consequences and sequelae that flow from the primary injury are compensable. . . .

" 'When, however, the injury following the initial compensable injury does not arise out of a quasi-course activity, as when [an employee] with an injured hand

engages in a boxing match, the chain of causation may be deemed [to be] broken by either intentional or negligent [employee] misconduct.' . . . Thus, Professor Larson explains that 'compensability can be defeated by a certain degree of employee misconduct, and . . . that degree is something beyond simple negligence, and can best be described as an intentional violation of an express or implied prohibition in the matter of performing the act.' " (Citations omitted; footnotes omitted.) Id., 378–81. Observing that our appellate courts and courts in other jurisdictions had utilized the direct and natural consequence rule, the court stated that "the rule provides the best framework for analyzing the element of proximate cause in cases involving a subsequent injury or an aggravation of an earlier, primary injury." Id., 385.

Moreover, the court stated that "[d]ecisions in these sorts of cases are necessarily fact driven . . . ." (Internal quotation marks omitted.) Id.; see 1 L. Larson & T. Robinson, Larson's Workers' Compensation Law (2019) § 10.04, p. 10-13. "[T]herefore, results will vary depending on the case. Consequently, whether a sufficient causal connection exists between the employment and a subsequent injury is, in the last analysis, a question of fact for the commissioner. It is axiomatic that, in reaching that determination, the commissioner often is required to draw an inference from what [the commissioner] has found to be the basic facts. [As we previously have explained] [t]he propriety of that inference . . . is vital to the validity of the order subsequently entered. But the scope of judicial review of that inference is sharply limited . . . . If supported by evidence and not inconsistent with the law, the . . . [c]ommissioner's inference that an injury did or did not arise out of and in the course of employment is conclusive. No reviewing court can then set aside that inference because the opposite one is thought to be more reasonable; nor

can the opposite inference be substituted by the court because of a belief that the one chosen by the . . . [c]ommissioner is factually questionable. . . . Only if no reasonable fact finder could have resolved the proximate cause issue as the commissioner resolved it will the commissioner's decision be reversed by a reviewing court." (Citation omitted; internal quotation marks omitted.) *Sapko* v. *State*, supra, 305 Conn. 385–86. In addition, "[u]nless causation under the facts is a matter of common knowledge, the plaintiff has the burden of introducing expert testimony to establish a causal link between the compensable workplace injury and the subsequent injury. . . . When . . . it is unclear whether an employee's [subsequent injury] is causally related to a compensable injury, it is necessary to rely on expert medical opinion. . . . Unless the medical testimony by itself establishes a causal relation, or unless it establishes a causal relation when it is considered along with other evidence, the commissioner cannot reasonably conclude that the [subsequent injury] is causally related to the employee's employment." (Citation omitted; internal quotation marks omitted.) *Coughlin* v. *Stamford Fire Dept.*, 334 Conn. 857, 865–66, 224 A.3d 1161 (2020).

With these legal tenets in mind, we turn to the defendants' interrelated claims on appeal, which, taken together, challenge the commissioner's finding, as affirmed by the board, that a chain of causation existed linking the decedent's compensable injuries to his death. First, the defendants claim that the commissioner erred in making several subordinate findings forming the foundation of his finding that the decedent's compensable injuries and his death were causally linked. Second, the defendants claim that the commissioner committed error in failing to find that the decedent's consumption of alcohol and medications prior to his death constituted a superseding cause of his

death, thereby defeating compensability for his death. We disagree.

I

We first address the defendants' claim that the board improperly affirmed the commissioner's decision awarding survivorship benefits to the plaintiff because the commissioner erred in making several subordinate findings supporting his finding that a chain of causation existed connecting the decedent's compensable injuries to his death. Specifically, the defendants challenge the commissioner's findings that (1) the decedent developed depression following the work incident, (2) the decedent's compensable injuries were a substantial contributing factor in his development of depression, (3) the manner of the decedent's death was a suicide, and (4) the decedent's suicide stemmed from his depression. We are not persuaded.

The record before the commissioner contained the following relevant evidence. According to a police report generated in relation to the decedent's death, after being dispatched to the home of the plaintiff and the decedent on July 23, 2017, a police officer discovered the decedent's body in a bedroom, naked and positioned with his feet on the ground and his back flat on the bed. There were "a few small white pills" on the decedent's legs and on the ground near his feet, and there were approximately 20 Ativan pills on the ground. Additionally, there were several medicine bottles located on a small dresser near the decedent, including (1) Ativan, indicating a directed dosage of one pill three times per day, last filled on June 23, 2017, with a quantity of 270 pills, fifty-four of which were found in the bottle, and (2) Lunesta, indicating a directed dosage of one pill nightly, last filled on July 18, 2017, with a quantity of thirty pills, none of which remained in the bottle.[3]

[3] The police report reflected that four other medicine bottles were found in the bedroom, one of which was not labeled and the rest of which contained

The officer spoke at the scene with the plaintiff, who told the officer, inter alia, that the decedent had been injured in November, 2016, that the decedent had "been battling with [workers'] compensation," that the decedent was taking medication for depression, and that she gave the decedent his medication every day "because he [did not] know what to take." The plaintiff further told the officer that she had no inclination that the decedent was contemplating suicide, although, "for the past few months, [the decedent] ha[d] said 'this is no life.' "

In a deposition, DeJoseph testified as follows. DeJoseph's role in the decedent's case was to determine the cause of death and the manner of death. She defined "cause of death" as "the etiologically-specific entity that resulted in the person dying, so what sets into motion all of the metabolic injuries or injuries that resulted in the death . . . ." DeJoseph determined that the cause of the decedent's death was acute intoxication resulting from the effects of alcohol and four medications, namely, Ativan (an antianxiety medication), Lunesta (a sleeping medication), Zoloft (an antidepressant), and Benadryl (an antihistamine). With respect to alcohol, at the time of his death, the decedent had a blood alcohol content of 0.162, which equates to approximately eight alcoholic drinks in one hour. The decedent also had alcohol in his stomach that had not yet been absorbed. DeJoseph could not determine, however, the precise number of alcoholic drinks that the decedent had consumed prior to his death. With respect to Ativan and Lunesta, at the time of his death, the decedent had more than therapeutic levels of those medications in his bloodstream, and several tablets—ten of Ativan and three of Lunesta—remained unabsorbed in his stomach. DeJoseph determined that Ativan and Lunesta were

medications that were not determined to have contributed to the cause of the decedent's death.

substantial factors causing the decedent's death. In addition, at the time of his death, the decedent had Zoloft and Benadryl in his system, both of which, DeJoseph determined, were contributing factors causing his death.

DeJoseph classified the decedent's manner of death as a suicide. She defined "manner of death" as "the circumstances under which the death occurred," which must be classified as one of the following: natural, accident, suicide, homicide, undetermined, or therapeutic complication. To classify a death as a suicide, DeJoseph explained that there must be "enough evidence to support that there was intent to end one's own life." In deaths involving intoxication, to establish intent, DeJoseph relies on "pill counts . . . knowing the levels of drug[s] in the [deceased's] body . . . knowing whether or not there are more pills than should be taken represented in the gastric contents . . . information from the [deceased's] family . . . [and] other information regarding [the deceased's] mental health." A deceased's mental health information is obtained from family members and medical reports, including toxicology reports that may reflect the presence of an antidepressant. In classifying the decedent's manner of death as a suicide, DeJoseph determined that the decedent exhibited an intent to take his own life on the basis of (1) the number of pills found in the decedent's stomach, (2) the number of pills unaccounted for and found around the decedent's body, which suggested that he intended to take more pills than those found in his stomach, and (3) DeJoseph's belief that the plaintiff typically controlled the decedent's medications, such that his ingestion of medications unbeknownst to the plaintiff was an unusual circumstance. DeJoseph also noted that a toxicology report indicated the presence of an antidepressant in the decedent's system.[4]

[4] The decedent's death certificate was admitted into the record. A portion of the death certificate completed by the OCME reflected that the decedent's

During a formal hearing held on April 3, 2018, the plaintiff testified in relevant part as follows. Prior to the work incident, the decedent was "a happy-go-lucky kind of guy who loved his job" and who, among other things, enjoyed telling jokes, mowed the lawn every day, took out the garbage every Sunday, dusted and organized a collection of miniature lighthouses that he kept, and maintained a koi pond. Following the work incident, "[e]verything" changed. For instance, the decedent experienced increased pain in his back, shoulder, and knees, spent most of his time at home lying in bed or sitting in a chair, used a cane to walk, ascended and descended stairs on his buttocks, and was no longer able to drive or to perform his regular activities, like maintaining the koi pond and mowing the lawn. Additionally, after the decedent's health insurance was canceled following the work incident, receiving medical care became difficult, and the decedent lacked insurance coverage to undergo knee replacement surgery. The decedent conveyed to the plaintiff that " '[t]his is no life.' "

In December, 2016, concerned that the decedent "wasn't acting himself,"[5] the plaintiff scheduled an appointment for the decedent to meet with Joseph Tomanelli, his primary care physician. According to a medical record, on December 15, 2016, after noting that the decedent had a "depressed mood," Tomanelli prescribed the decedent Zoloft, instructing that he take one fifty milligram tablet daily.

Donald Werner, the plaintiff's brother who lived with the plaintiff and the decedent, testified during a formal

cause of death was acute intoxication due to alcohol and the four medications described earlier in this opinion and that the decedent's manner of death was a suicide.

[5] The plaintiff testified that she scheduled the appointment with Tomanelli after observing the decedent crying in his chair, which upset her because it was uncharacteristic of the decedent.

hearing held on April 5, 2018, that, prior to the work incident, the decedent was a "lighthearted, outgoing person who cared about the people around him, [who] was always helping people, [and who was] always working around the house . . . ." Werner further testified that, following the work incident, the decedent experienced mobility problems with his back and his knees, "to the point where he would just come downstairs and sit in his chair, and nothing," and the decedent experienced a "[c]ontinued frustration with the process. He really wanted to start getting stuff done. He wanted to go back to work. And . . . it wore on him. It wore him out; and he would be tired all the time." Werner also testified that the decedent stated that he "[did not] know how much longer [he could] do this," although Werner did not interpret that statement to mean that the decedent was contemplating suicide. Additionally, the police report reflected that Werner, who was at home with the plaintiff when she discovered the decedent's body, told the police that the decedent had been experiencing severe pain since the work incident but that the decedent was "happy throughout the entire process and never showed signs that he wanted to hurt himself."

During the April 5, 2018 hearing, Alexa Jamieson, the plaintiff's daughter and the decedent's stepdaughter, testified that, prior to the work incident, the decedent was "fun loving, active, loved doing all his hobbies, like taking care of the house . . . doing random chores around the house . . . [and] was active and in a good mindset." She also testified that, following the work incident, the decedent was "more detached," spent less time socializing with her, spent more time in his bedroom, and "didn't . . . [want] to do anything anymore. The little things that he used to enjoy, he never enjoyed them anymore," including tending to his two dogs. Jamieson further testified that, in discussing his injur-

ies, the decedent conveyed to her that " 'this is no life. How can someone do this?' "

Both parties retained psychiatrists as expert witnesses. Mark Waynik, the plaintiff's expert, prepared a report dated October 31, 2017, opining that, within a reasonable degree of medical probability, the work incident was "a substantial contributing factor in [the decedent's] diagnosis of anxiety and depression, and ultimately his demise." Waynik's opinion was based on his review of the decedent's medical records, the OCME reports, the police report, the decedent's death certificate, and certain transcripts. Kenneth Selig, the defendants' expert, prepared a report dated December 24, 2017, opining that, within a reasonable degree of medical probability, there was insufficient evidence to conclude whether the decedent intended to die by suicide or whether, if he did die by suicide, the work incident was a substantial contributing factor in his death. Selig wrote, inter alia, that (1) the decedent remained active following the work incident, (2) the materials he reviewed did not suggest that the decedent suffered from severe depression, and (3) the circumstances of the decedent's death could lead to the conclusion that he unintentionally overdosed in an attempt to medicate himself. In preparing his opinion, Selig reviewed various materials, including the decedent's medical records, the OCME reports, the police report, the decedent's death certificate, Waynik's report, and certain transcripts.

During a formal hearing held on June 5, 2018, Waynik testified that, after reviewing additional materials, including Selig's report and transcripts of the formal hearings held in April, 2018, he maintained the opinion that, within a reasonable degree of medical probability, the work incident was a substantial contributing factor in the decedent's development of depression and subsequent suicide. In explaining the basis of his opinion, Waynik testified as follows. Waynik explained that

symptoms supporting a diagnosis for depression include a "depressed mood, weepiness, insomnia or hypersomnia, either oversleeping or undersleeping . . . overeating [or] undereating, hopelessness, helplessness, irritability, lack of energy, lack of drive, [and] lack of motivation." According to Waynik, on the basis of his review of the materials provided to him, the decedent exhibited most of these symptoms following the work incident. Prior to the work incident, the decedent was an active person and a "hard worker" who had persevered through prior injuries,[6] but, after the work incident, there was a "dramatic change in his personality and his behavior," as he became "dysfunctional," "weepy," "stoic," "withdrawn," "apathetic," and "anhedonic," remained mostly confined to a chair at home, and suffered from insomnia. The decedent's medical records did not reveal any indication that he suffered from depression prior to the work incident, but, thereafter, Tomanelli prescribed the decedent Zoloft. Waynik linked the decedent's depression to the chronic pain stemming from his compensable injuries, explaining that "it's very common in people who have any kind of chronic illness . . . [to] get depressed after a while. If anything goes on and on and doesn't go away, depression frequently results."

As to the manner of the decedent's death, Waynik testified that the quantity of medication that the decedent ingested, which was in excess of the amount needed for treatment, demonstrated an intent to die, such that the decedent did not accidentally kill himself. Waynik believed that, as a result of the depression that the decedent had developed, the decedent "didn't see any way out," "felt hopeless and ultimately [died by]

[6] The commissioner found that, prior to the work incident, the decedent sustained a back injury that required surgery, after which he returned to work.

suicide." Waynik further testified that, although his conclusion that the decedent died by suicide was partially based on DeJoseph's classification of the decedent's manner of death as a suicide, he would have reached the same conclusion without the benefit of DeJoseph's determinations.

At a formal hearing held on August 21, 2018, Selig testified that he maintained his opinion that, within a reasonable degree of medical probability, there was not enough evidence to establish that the decedent became significantly depressed following the work incident or that, if he did, his death was a suicide stemming from his depression.

In his finding and award, the commissioner found that, following the work incident, the decedent (1) was totally disabled from work and never regained a work capacity before his death, (2) spent most of his time at home confined to his bed or to a chair, (3) had to use his buttocks to ascend and descend stairs, and (4) could no longer drive, tend to his dogs and koi pond, mow the lawn, or walk long distances. The commissioner found that the decedent became depressed "because he could no longer work [and] was no longer physically active. He wanted the knee replacement surgery, but the [defendants were] denying the surgery and he could not afford to have it done, given that his health insurance had been canceled and he did not have the financial resources outside of health insurance." The commissioner further found that the compensable injuries were "a substantial contributing factor in causing [the decedent's] depression" and that, "[a]s a result of his depression, [the decedent] intended to cause his death and did [die by] suicide . . . ." In making his findings, the commissioner expressly credited Waynik's opinion as being "persuasive." In contrast, the commissioner discredited Selig's opinion as "not persuasive because [Selig] believes that it is possible for [the decedent] to

have accidentally taken such a high number of pills . . . . [Selig] was also unaware that [the decedent] did not have the option of putting his surgery through a health insurance plan." In affirming the commissioner's decision, the board determined that there was sufficient evidence supporting the commissioner's findings.

The defendants claim that, contrary to the board's determination, the commissioner's subordinate findings are untenable for several reasons. First, the defendants contend that Waynik either overlooked or was not privy to information that undercut his opinion that the decedent developed depression and died by suicide, rendering Waynik's opinion conjectural. In particular, the defendants rely on evidence indicating that the decedent remained hopeful following the work incident, anticipated undergoing surgery, and looked forward to returning to work. We are not persuaded. In cross-examining Waynik during the formal hearing, the defendants' counsel elicited testimony from Waynik that the decedent exhibited signs that he was not "hopeless" following the work incident. On redirect examination, however, Waynik testified that the decedent exhibited many signs of "hopelessness" and that an individual who is depressed can experience both "good days and bad days . . . ." Earlier, during direct examination, Waynik had elucidated that point in testifying that "one [good] day is not as significant as the several months prior to that where [the decedent] showed consistent depression, consistent withdrawal, [and] consistent depressive symptoms." Thus, we disagree with the defendants that Waynik ignored or failed to account for information contradicting his opinion; rather, the record reflects that Waynik maintained his opinion in spite of such information. The commissioner was entitled to credit Waynik's opinion, which was not based on conjecture.

The defendants also contend that the commissioner's finding that the decedent died by suicide is unreasonable because DeJoseph's determination that the manner of the decedent's death was a suicide was based on an erroneous factual predicate. Specifically, during her deposition, DeJoseph testified that one of the factors that she considered in classifying the manner of the decedent's death as a suicide was that the police report reflected that the plaintiff had told the police that she ordinarily controlled the distribution of the decedent's medications. DeJoseph believed that the decedent's consumption of his medications without the plaintiff's knowledge suggested an intent to die by suicide. During the proceedings before the commissioner, however, the plaintiff testified that she occasionally dispensed the decedent's medications to him at his request, but otherwise the decedent took his medications without her help. Thus, the defendants posit, DeJoseph's determination that the manner of the decedent's death was a suicide was unsupported by the facts, and the commissioner's reliance on DeJoseph's determination in finding that the decedent died by suicide was improper. This contention is unavailing. Even assuming that DeJoseph's determination was unreliable because it was based, in part, on incorrect information,[7] Waynik's testimony provided an independent basis supporting the commissioner's finding that the decedent died by suicide. Although Waynik testified that he partially relied on DeJoseph's determination in rendering his opinion, he further testified that he would have reached the same conclusion without having knowledge of DeJoseph's determination. Thus, the defendants' assertion fails.

The defendants' remaining contentions assert that the commissioner's subordinate findings are speculative or

[7] We note that DeJoseph testified that she relied on a number of other factors in making her determination, including the number of pills located around the decedent's body and the presence of an antidepressant in his system.

cannot reasonably be drawn from the evidence. We are not persuaded. Mindful of the limited scope of our review, we conclude that the commissioner's subordinate findings—that (1) the decedent developed depression following the work incident, (2) the decedent's compensable injuries were a substantial contributing factor in his development of depression, (3) the manner of the decedent's death was a suicide, and (4) the decedent's suicide stemmed from his depression—are reasonable and grounded in the evidence produced during the proceedings before the commissioner.

II

We next turn to the defendants' claim that the board improperly affirmed the commissioner's award of survivorship benefits to the plaintiff because the commissioner improperly failed to find that the decedent's conduct leading up to his death—his excessive consumption of alcohol and medications—constituted a superseding cause of his death, thus defeating compensability for his death. The defendants assert that the commissioner, as well as the board in affirming the commissioner's decision, ran afoul of the principles set forth by our Supreme Court in *Sapko* v. *State*, supra, 305 Conn. 360, in determining that there was an unbroken chain of causation linking the decedent's compensable injuries to his death. This claim is unavailing.

We begin with an overview of *Sapko*, a workers' compensation matter involving the death of a state correction officer. Id., 365. The cause of the officer's death was "multiple drug toxicity due to the interaction of excessive doses of Oxycodone and Seroquel . . . ." (Internal quotation marks omitted.) Id., 364. The manner of the officer's death, or the "nature of the [officer's] death" as described in *Sapko*, "was an accident and not suicide." (Internal quotation marks omitted.) Id., 365. Leading up to his death, in the course of his employ-

ment, the officer "experienced four incidents [that] gave rise to claims for workers' compensation benefits," the latest of which resulted in a compensable back injury. (Internal quotation marks omitted.) Id. The officer was prescribed several medications, including Oxycodone, to treat his back pain. Id. The officer was counseled on the proper use of pain management drugs and was required to participate in a controlled substances agreement. Id. Additionally, prior to sustaining the compensable back injury, the officer was being treated for major depression. Id. One week before his death, to abate symptoms of depression and racing thoughts that the officer was experiencing, the officer's treating psychiatrist prescribed him Seroquel, an antipsychotic medication. Id., 365–66.

Following the officer's death, his spouse sought survivorship benefits. Id., 362. A workers' compensation commissioner denied the spouse's claim, finding that (1) no causal relationship existed between the officer's compensable injuries and his psychiatric treatment, including his use of Seroquel, and (2) the elevated level of Oxycodone in the officer's system, by itself, did not cause the officer's death, but rather the officer's "ingestion of excessive quantities of Oxycodone and Seroquel, [al]though accidental, constitute[d] a superseding cause of his death." (Internal quotation marks omitted.) Id., 367–68. The commissioner further found that "[the officer's] work injuries . . . were neither a substantial factor nor the proximate cause of [his] death." (Internal quotation marks omitted.) Id., 368. The spouse appealed to the board, which affirmed the commissioner's decision. Id. The board concluded in relevant part that the commissioner had properly applied the superseding cause doctrine, and that "the record supported the commissioner's finding that an outside causal agency, namely, the [officer's] ingestion of excessive quantities of prescribed medication, had intervened and broken

the chain of causation between the [officer's] compensable injuries and his death." Id. The spouse appealed to this court, which affirmed the board's decision. *Sapko* v. *State*, 123 Conn. App. 18, 21, 1 A.3d 250 (2010), aff'd, 305 Conn. 360, 44 A.3d 827 (2012).

After granting certiorari, our Supreme Court affirmed this court's decision, albeit on different grounds.[8] *Sapko* v. *State*, supra, 305 Conn. 364. The court concluded that the board properly upheld the commissioner's finding "on the issue of proximate cause, in particular, his determination that the [officer's] ingestion of excessive quantities of Oxycodone and Seroquel constituted an intervening event that broke the chain of causation" linking the officer's compensable injuries to his death. Id., 386. The court determined that (1) there was expert testimony, credited by the commissioner, that the level of Oxycodone in the officer's system was twenty times higher than the therapeutic dosage, but the Oxycodone likely would not have been fatal in the absence of the officer's simultaneous overdose on Seroquel, (2) there was evidence supporting the commissioner's finding that the officer's treatment with Oxycodone was unrelated to his treatment with Seroquel and that the two drugs could be ingested together safely, and (3) there was evidence supporting the commissioner's finding that the officer was counseled as to the proper use of pain medications and had entered into a controlled substances agreement. Id., 386–87. Additionally, the court noted that the spouse had failed to present expert testimony demonstrating any medical causal connection between the officer's overdose and his primary

[8] On appeal from the board's decision in *Sapko*, this court disagreed with the board's conclusion that the superseding cause doctrine was applicable to the case and, thus, concluded that the board improperly upheld the commissioner's finding that the officer's ingestion of excessive quantities of medications was a superseding cause of his death. *Sapko* v. *State*, supra, 123 Conn. App. 24–26. Nevertheless, this court affirmed the board's decision on the basis of the board's proximate cause analysis. Id., 26, 29–30.

compensable injury and that the spouse's sole expert witness' testimony, which attempted to causally tie the officer's depression to his employment, was discredited by the commissioner. Id., 387–88.

The defendants argue that the present case is analogous to *Sapko* in that the decedent's consumption of an excessive amount of alcohol and medications constituted a superseding cause breaking the chain of causation between the decedent's compensable injuries and his death, such that his death cannot be deemed a direct and natural consequence of his compensable injuries. The defendants point to uncontroverted evidence in the record indicating that the decedent was cognizant that mixing alcohol with his medications was contraindicated, but he nevertheless consumed an excessive amount of alcohol and an excessive amount of medications before his death—actions, the defendants posit, that were too far removed from the compensable injuries to be treated as a link connecting the compensable injuries to the decedent's death.

We disagree with the defendants' contention that this case is analogous to *Sapko*. There is a critical distinction between *Sapko* and this case, namely, the manner of the officer's death in *Sapko* was an accident; id., 367–68; whereas, in the present case, the commissioner found the manner of the decedent's death to be a suicide—a finding that, for the reasons set forth in part I of this opinion, we may not disturb. The conclusion in *Sapko* that the officer's *accidental* overdose on medications, including one that had no connection to the officer's compensable injuries, was a superseding cause breaking the causal link between his compensable injuries and his *accidental* death is wholly sound. See id., 371. In contrast, when an employee's death is found to be a suicide that is the sequelae of a compensable injury, the employee's conduct in carrying out the suicide can-

not be regarded as a superseding cause defeating compensability; otherwise, the employee's suicide, by the mere virtue of the method by which the death occurred, would never be compensable under the workers' compensation laws of our state, which would conflict with our appellate precedent. See *Wilder* v. *Russell Library Co.*, 107 Conn. 56, 61–62, 139 A. 644 (1927); *Dixon* v. *United Illuminating Co.*, 57 Conn. App. 51, 61–62 n.8, 748 A.2d 300, cert. denied, 253 Conn. 908, 753 A.2d 940 (2000).

Here, the decedent's consumption of alcohol and medications, which, as the defendants note, the decedent knew to be contraindicated and which resulted in the acute intoxication constituting the physiological cause of the decedent's death, was the method by which the decedent died by suicide; it was not an act untethered to the decedent's compensable injuries and the depression he developed thereafter.[9] Put simply, the

[9] The defendants take issue with a finding made by the commissioner that the decedent "died . . . of a drug overdose. *Although he did have some alcohol in his bloodstream at the time of death*, he had ingested a shockingly high number of pills." (Emphasis added.) The defendants contend that the record establishes that the decedent had an excessive amount of alcohol in his body when he died, such that the commissioner minimized the impact of alcohol on the cause of the decedent's death. We do not construe the commissioner's finding as indicating that he overlooked the undisputed evidence in the record demonstrating that the cause of the decedent's death was acute intoxication as a result of the effects of both alcohol and medications. Earlier in his decision, the commissioner expressly stated that DeJoseph had determined that the mixture of both alcohol and medications had caused the decedent's death. We interpret the commissioner's finding, instead, as rejecting the notion, as the board described it, that the decedent suffered a "death by misadventure due to the abuse of alcohol . . . ." The commissioner found that the decedent had consumed a "shockingly high number of pills," which, for the commissioner, dispelled any suggestion that the decedent's death was accidental. This finding aligned with Waynik's testimony, which the commissioner cited in his decision, that the excessive quantity of medication that the decedent ingested suggested an intent to die. Moreover, the commissioner discredited Selig's expert testimony, in part, because of Selig's belief that it was possible for the decedent to have accidentally consumed the large quantity of medications that he did. Thus, we disagree with the defendants' position that the commissioner overlooked

decedent's conduct was a link in the chain connecting the compensable injuries to the decedent's death, not a superseding cause breaking the chain of causation.

We further note that how the decedent carried out his suicide is of no moment. Whether "an injured employee [dies by] suicide by alcohol alone or a combination of alcohol with other toxins should make no difference; suicide caused by depression arising from a compensable injury is compensable," regardless of how the suicide occurred. R. Carter et al., 19 Connecticut Practice Series: Workers' Compensation Law (Supp. 2020–2021) § 5:5, p. 164. That the decedent died by suicide by consuming alcohol and certain medications that bore no relation to his compensable injuries[10] does not affect our analysis.

In sum, iterating that "[d]ecisions in these sorts of cases are necessarily fact driven"; (internal quotation

that alcohol was a critical component causing the decedent's death.

Additionally, in their reply brief, the defendants thinly assert that there is no evidence demonstrating that the decedent's consumption of alcohol prior to his death was related to his suicide. The record reflects that the decedent, despite knowing that mixing alcohol with his medications was contraindicated, consumed a large amount of alcohol and later consumed a large quantity of medications, the combination of which caused his death. Although circumstantial, it is reasonable to infer from this evidence that decedent's consumption of alcohol was part and parcel of his suicide.

Finally, we note that there are two arguments that the defendants are not raising on appeal. First, the defendants do not argue that the decedent died by suicide as a result of alcoholism that was unrelated to his employment; indeed, as the defendants acknowledge in their appellate briefs, there is no evidence suggesting that the decedent was an alcoholic suffering from chronic alcohol abuse. Second, although, in their reply brief, the defendants make a passing reference to evidence implying that the decedent's judgment was impaired as a result of his consumption of alcohol, the defendants have not pursued an intoxication defense pursuant to General Statutes § 31-284 (a), which is an affirmative defense that must be asserted and proven by the defendants. See *Gamez-Reyes* v. *Biagi*, 136 Conn. App. 258, 274–75, 44 A.3d 197, cert. denied, 306 Conn. 905, 52 A.3d 731 (2012).

[10] The record reflects that the decedent was prescribed Ativan, one of the medications that DeJoseph determined to be a substantial factor in causing the decedent's death, prior to the work incident.

marks omitted) *Sapko* v. *State*, supra, 305 Conn. 385; see 1 L. Larson & T. Robinson, supra, § 10.04, p. 10-13; we conclude that the commissioner's finding, as affirmed by the board, that a chain of causation existed linking the decedent's compensable injuries to his death was supported by the record and not the result of a misapplication of law. Accordingly, we conclude the board properly affirmed the commissioner's award of survivorship benefits to the plaintiff.

The decision of the Compensation Review Board is affirmed.

In this opinion the other judges concurred.

SCOTT MENARD *v.* STATE OF CONNECTICUT

DARREN CONNOLLY *v.* STATE OF CONNECTICUT

ROBERT ZDROJESKI *v.* STATE OF CONNECTICUT

(AC 42342)

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

Syllabus

The plaintiffs, M and C, Connecticut State Police troopers who suffered injuries when a motor vehicle driven by a nonparty tortfeasor, B, struck a police cruiser, sending it into physical contact with them, sought to recover underinsured motorist benefits allegedly due under insurance coverage provided by the defendant state of Connecticut, a self-insurer, pursuant to a collective bargaining agreement. Following a bench trial, the trial court found, inter alia, that, to the extent B was underinsured, the state was contractually obligated to provide coverage to the plaintiffs, the plaintiffs' claims for damages caused by the alleged post-traumatic stress disorder (PTSD) they developed were not compensable under the underinsured motorist claims statute (§ 38a-336), and it calculated the plaintiffs' damages. The plaintiffs filed a joint appeal to this court. The parties then filed a stipulation before the trial court regarding sums that the plaintiffs had already received, and the court held a hearing to consider any reductions to the plaintiffs' damages. It concluded that certain workers' compensation benefits the plaintiffs had received were

deductible from the plaintiffs' damages, but that certain recoveries the plaintiffs received under the Dram Shop Act (§ 30-102) were not, adjusted the plaintiffs' damages accordingly, and rendered judgments for the plaintiffs. The plaintiffs then filed an amended joint appeal, and the state filed a cross appeal to this court. *Held*:

1. This court concluded that the plaintiffs' original joint appeal was not taken from final judgments and it must be dismissed for lack of subject matter jurisdiction, but the plaintiffs' amended joint appeal was jurisdictionally proper; final judgments were not rendered in the trial court until the court had reduced the plaintiffs' damages to account for certain sums received by the plaintiffs, which occurred after the original appeal had been filed; the plaintiffs' amended joint appeal encompassed all of the claims raised by the plaintiffs in their original joint appeal, and this court could review all of the plaintiffs' claims in the context of their amended joint appeal.
2. The trial court properly declined to award the plaintiffs damages related to their claims of PTSD, as those claims were not compensable under § 38a-336: guided by our Supreme Court's decision in *Moore* v. *Continental Casualty Co.* (252 Conn. 405), in which the term bodily was determined to relate to something physical and corporeal, as opposed to purely emotional, this court concluded that bodily injury in § 38a-336 (a) (1) (A) must necessarily be physical in nature, and, under that interpretation, PTSD, in and of itself as a purely emotional injury, could not be construed as a "bodily injury" within the purview of § 38a-336; moreover, guided by the rationale in *Moore*, in which the question was the legal meaning of "bodily injury" as defined in an insurance policy and not the medical or scientific question of the degree to which the mind and the body affect each other, this court was not convinced that the PTSD purportedly developed by the plaintiffs was transformed into a "bodily injury" under the statute by virtue of the physical manifestations accompanying it.
3. The trial court properly reduced the plaintiffs' damages by the sums of certain workers' compensation benefits they had received, as the statutory and regulatory scheme governing underinsured motorist coverage in Connecticut did not impose a requirement on a self-insurer to notify claimants of an election of permissive offsets under the applicable state regulation (§ 38a-334-6): although, as a self-insurer, the state must maintain a preaccident writing reflecting its election of permissive regulatory offsets as mandated by *Piersa* v. *Phoenix Ins. Co.* (273 Conn. 519) and clarified in *Garcia* v. *Bridgeport* (306 Conn. 340), it had no legal obligation to provide its employees with notice of its election to offset its liability for underinsured motorist benefits by the amount of any workers' compensation benefits paid, as our Supreme Court expressly construed § 38a-334-6 of the regulations not to be a notice provision, determining that it served the substantive function of specifying the basic requirement of how an insurer may limit its liability, and the court

made no mention of self-insurers providing claimants with copies of such written documents or otherwise notifying claimants of the election of permissive regulatory offsets; accordingly, it was sufficient for the state to maintain a written memorandum containing its election in its files as a public record.

4. The trial court committed error in declining to reduce C's damages by the sums he had recovered pursuant to the Dram Shop Act, as C was being compensated twice for the same injury; the parties stipulated that, among other sums received by C, he recovered certain sums from an establishment under the act as compensatory damages, and, without a reduction of C's damages to account for his dram shop recovery, C was compensated twice for the same injury in violation of the common-law rule precluding double recovery, a legal principle ingrained in this state's underinsured motorist laws.

5. This court concluded that, because neither plaintiff was entitled to recover damages against the state, the trial court, on remand, must render judgments in favor of the state in the plaintiffs' respective cases.

Argued March 9—officially released October 19, 2021

Procedural History

Actions to recover underinsured motorist benefits allegedly due under automobile insurance coverage provided by the defendant pursuant to a collective bargaining agreement, brought to the Superior Court in the judicial district of Hartford, where the matters were consolidated and tried to the court, *Shapiro, J.*; decision for the plaintiffs, and the plaintiffs appealed to this court; thereafter, the court, *Hon. Robert B. Shapiro*, judge trial referee, granted in part the defendant's motion for remittitur and a collateral source hearing and rendered judgments for the plaintiffs, from which the plaintiffs filed an amended appeal and the defendant cross appealed to this court; subsequently, the plaintiff Robert Zdrojeski withdrew his appeal. *Appeal dismissed in part*; *reversed in part*; *judgments directed.*

Daniel J. Krisch, with whom, on the brief, was *Jeffrey L. Ment*, for the appellants-cross appellees (plaintiffs Scott Menard and Darren Connolly).

David A. Haught, with whom, on the brief, was *Lorinda S. Coon*, for the appellee-cross appellant (state).

MOLL, J. In these underinsured motorist matters, the plaintiffs, Scott Menard and Darren Connolly, jointly appeal, and the defendant, the state of Connecticut, cross appeals, from the judgments of the trial court rendered in favor of the plaintiffs following a bench trial. In addition, the state cross appeals from the judgment of the trial court rendered in favor of a third plaintiff, Robert Zdrojeski,[1] after the bench trial. On appeal, the plaintiffs claim that the court improperly (1) declined to award them damages in relation to the post-traumatic stress disorder (PTSD) that they purportedly developed, and (2) reduced their damages by the sums of workers' compensation benefits that they had received. On cross appeal, the state claims that the court improperly declined to reduce the plaintiffs' damages by the sums that they had recovered pursuant to the Connecticut Dram Shop Act (dram shop act), General Statutes § 30-102. We dismiss, sua sponte, the plaintiffs' original joint appeal for lack of a final judgment. See part I of this opinion. As for the amended joint appeal and the cross appeal, we (1) reverse the judgments rendered in favor of the plaintiffs and (2) affirm the judgment rendered in favor of Zdrojeski.[2]

The following facts, as set forth by the trial court, and procedural history are relevant to our resolution of this appeal and this cross appeal. "[O]n September 1, 2012,

[1] This joint appeal, as later amended, was filed by Menard, Connolly, and Zdrojeski, but Zdrojeski subsequently withdrew his portion of the joint appeal and is not participating in the joint appeal or the cross appeal. For the purpose of clarity, we refer in this opinion to Menard, Connolly, and Zdrojeski individually by their surnames, and we refer to Menard and Connolly collectively as the plaintiffs.

[2] As we explain in footnote 17 of this opinion, although the state's cross appeal against Zdrojeski remains pending notwithstanding Zdrojeski's withdrawal of his portion of the joint appeal, as amended, the state has abandoned its claim on cross appeal against Zdrojeski.

[Menard, Connolly, and Zdrojeski] were on duty as Connecticut state troopers with the Connecticut State Police. At approximately 1:40 a.m. . . . Connolly was on patrol on Interstate 84 and pulled over a vehicle traveling westbound, due to suspected intoxicated driving, at exit 46 in Hartford, the Sisson Avenue exit. After reaching the bottom of the exit ramp, Connolly parked his [police] cruiser on the right side of the exit, under the directional sign, to the rear of the vehicle, which had stopped before the intersection with Sisson Avenue. The Sisson Avenue exit has four lanes at this point.

"Connolly exited his cruiser to speak with the driver of the vehicle and then returned to his cruiser. . . . Menard drove up to the scene also, parked his police cruiser and also exited to speak with the occupants of the vehicle [that] . . . Connolly had pulled over. Both cruisers had their lights activated.

"Connolly and Menard then began to approach the vehicle. Unbeknownst to Connolly and Menard . . . Zdrojeski also responded to the scene in his police cruiser. He parked his cruiser to the rear and left of Connolly's cruiser, and to the left of Menard's cruiser, in the right center travel lane, also with lights activated. Just after Zdrojeski arrived, another vehicle, driven by nonparty William Bowers, struck Zdrojeski's cruiser from behind, sending Zdrojeski's parked cruiser forward toward Connolly and Menard, where physical contact occurred.

"Menard attempted to jump clear of the cruiser, tumbled in the air, and came down on his head between Zdrojeski's cruiser and the stopped vehicle. Connolly pushed himself away from the cruiser, using his right arm against the hood of the cruiser. At the time of the impact, Zdrojeski had not gotten out of his cruiser. [Menard, Connolly, and Zdrojeski] were ambulatory

after the accident and were transported by ambulance to Hartford Hospital."

On June 10, 2014, the plaintiffs commenced separate underinsured motorist actions against the state. In the plaintiffs' respective one count complaints, which were substantively identical, the plaintiffs alleged in relevant part that (1) they sustained injuries from the accident, which occurred as a result of the negligence and/or carelessness of Bowers (nonparty tortfeasor), (2) their personal automobile liability insurance policies and the nonparty tortfeasor's automobile liability insurance policy were insufficient to compensate them in full for their injuries, (3) at the time of the accident, the state carried automobile liability insurance, including underinsured motorist coverage, for their benefit pursuant to a collective bargaining agreement between the state and the state police union, (4) the state was self-insured with respect to its underinsured motorist coverage, (5) pursuant to General Statutes § 38a-336,[3] the state was required to provide them with underinsured motorist coverage, and (6) the state had not disbursed underinsured motorist benefits to them for their injuries.

On January 30, 2017, the state answered the plaintiffs' complaints, admitting that it provides underinsured motorist coverage to state troopers who are parties to the aforementioned collective bargaining agreement, that it is self-insured with respect to that coverage, and that it had not remitted underinsured motorist benefits to the plaintiffs in relation to the accident. The state otherwise denied the plaintiffs' material allegations or left the plaintiffs to their proof. The state also asserted three special defenses. In its first special defense, the

[3] Although § 38a-336 has been amended by the legislature since the events underlying the present appeal; see Public Acts 2014, No. 14-20, § 1; Public Acts 2014, No. 14-71, § 1; Public Acts 2015, No. 15-118, § 69; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

state alleged that the plaintiffs' recoveries, if any, were "limited to the $1,000,000 amount of underinsured motorist coverage as set forth in the [state's] [s]elf-[i]nsured [m]otorist [c]overage [f]orm and any other terms and conditions of the [state's] self-insured coverage for the Department of Public Safety." In its second and third special defenses, the state alleged that, in the event that the plaintiffs succeeded on their claims, the state was entitled to certain reductions and setoffs. On January 31, 2017, the plaintiffs filed replies denying the special defenses.

The plaintiffs' respective cases were consolidated for trial and tried to the court, *Shapiro*, *J.*, over the course of several days in April and May, 2018. At the beginning of the first day of trial, at the parties' joint request, the court agreed to "focus in this initial stage on the questions of liability and damages without any question of offsets or coverage or collateral sources. And that's similar to the way a lot of cases are presented so we need not consider that. And [the court] understand[s] those issues are for a later day if necessary and that you'll be—if needed, we'll schedule another day for a hearing about those issues and hearing evidence that relates to that or to those things." Following trial, the parties filed posttrial briefs.

On August 24, 2018, the court issued a combined memorandum of decision addressing the plaintiffs' respective cases. With respect to liability, the court determined that (1) the accident was caused by the negligence of the nonparty tortfeasor, (2) the plaintiffs' conduct did not amount to negligence, and (3) to the extent that the nonparty tortfeasor was underinsured, the state was contractually obligated to provide underinsured motorist coverage to the plaintiffs for damages caused by the nonparty tortfeasor. As to damages, the court first

rejected a request by the plaintiffs to award them damages stemming from the PTSD that they allegedly developed, determining that (1) the plaintiffs' PTSD claims were not compensable under § 38a-336, and (2) the opinion of the plaintiffs' expert witness, Jennifer Honen, a licensed professional counselor who diagnosed the plaintiffs with PTSD, was not credible.

The court proceeded to calculate the plaintiffs' damages. The court determined that Menard's damages were $171,965.40, consisting of: $43,218.63 in lost wages; $11,839.68 in lost overtime; $56,907.09 in medical expenses; and $60,000 in noneconomic damages. The court calculated Connolly's damages to be $186,738.67, consisting of: $53,144.43 in lost wages; $27,409 in lost overtime; $36,185.24 in medical expenses; and $70,000 in noneconomic damages. In light of the parties' agreement at trial, the court ordered the parties to file a stipulation "account[ing] for items of economic damages which have been paid and for medical expense discounts . . . ." The court further stated that it would render judgments thereafter.

On September 11, 2018, the plaintiffs jointly filed a combined motion to reconsider and for additur, asserting that the court improperly declined to award them PTSD-related damages. On October 1, 2018, the state filed an objection. On November 13, 2018, after hearing argument on October 23, 2018, the court denied the plaintiffs' combined motion. On December 3, 2018, the plaintiffs filed a joint appeal.

On February 13, 2019, the parties filed a stipulation regarding sums that the plaintiffs had received "on account of the personal injuries sustained in the motor vehicle collision of September 1, 2012." As to Menard, the parties stipulated that he had recovered $253,723.30, consisting of: $130,223.63 in workers' compensation benefits for medical bills, lost wages, and permanent

partial disabilities, less $3583.33 that was repaid on a workers' compensation lien; a $10,750 recovery from the nonparty tortfeasor; a $33,000 personal underinsured motorist coverage payment; and an $83,333 dram shop payment.[4] As to Connolly, the parties stipulated that he had recovered $224,532, consisting of: $134,033 in workers' compensation benefits for medical bills, lost wages, and permanent partial disabilities, less $3583 that was repaid on a workers' compensation lien; a $10,750 recovery from the nonparty tortfeasor; and an $83,332 dram shop payment.[5] In addition, the parties represented that they were making no stipulations as to (1) "the state's right of [setoff] under the terms of the underinsured motorist coverage provided to the plaintiffs," (2) whether the stipulated amounts could be set off or credited against the damages awarded by the court, and (3) whether the plaintiffs' dram shop recoveries could be set off against the damages awarded by the court.

On March 6, 2019, the court held a hearing to consider any reductions to the plaintiffs' damages.[6] The parties

[4] The record before us does not reflect the policy limits of the nonparty tortfeasor, nor does it reflect the name of the dram shop.

[5] The parties further stipulated that, prior to trial, they had agreed that "the full amount of the [plaintiffs'] medical bills would be allowed into evidence without objection, but that any recovery for said medical bills would be limited to the actual amounts paid, with any adjustments to be handled as a [postjudgment] matter." To that end, the parties stipulated that the difference between Menard's medical expenses and the amount paid in satisfaction thereof by the state's workers' compensation insurance carrier was approximately $33,500, and that the difference between Connolly's medical expenses and the amount paid in satisfaction thereof was approximately $12,633.

[6] The court and the parties referred to the March 6, 2019 hearing as a collateral source hearing, a transcript of which was not ordered by any party in conjunction with this joint appeal, as amended, or this cross appeal. As reflected in its decision issued on May 16, 2019, however, the court reduced the plaintiffs' damages by noncollateral sources. For the sake of clarity, we avoid referring to the March 6, 2019 hearing as a collateral source hearing.

submitted briefs addressing whether the plaintiffs' damages could be reduced to account for (1) the workers' compensation benefits that the plaintiffs had received, and (2) the plaintiffs' dram shop recoveries.[7] On May 16, 2019, the court issued a combined memorandum of decision concluding that the workers' compensation benefits were deductible from the plaintiffs' damages, but that the dram shop recoveries were not. Taking into account the workers' compensation benefits, along with the additional sums stipulated to by the parties other than the dram shop payments, the court reduced Menard's damages to zero dollars and Connolly's damages to $32,905.67. The court then rendered judgments for the plaintiffs.[8] On May 24, 2019, the plaintiffs filed an amended joint appeal to encompass the judgments rendered by the court following the May 16, 2019 decision. On May 31, 2019, the state filed a cross appeal. Additional facts and procedural history will be set forth as necessary.

I

As a preliminary matter, we address, sua sponte, whether the plaintiffs' original joint appeal, filed on December 3, 2018, was taken from final judgments. "The jurisdiction of the appellate courts is restricted to appeals from judgments that are final. . . . The policy

[7] The record before us does not indicate that the plaintiffs objected to the court reducing their damages by the $10,750 payment that each plaintiff received from the nonparty tortfeasor or, in Menard's case, by the $33,000 personal underinsured motorist coverage payment that he received. The plaintiffs do not claim on appeal that the court committed error in deducting those amounts from their damages.

[8] Zdrojeski filed a separate action against the state seeking underinsured motorist benefits, which was consolidated with the plaintiffs' actions for trial. The court rendered judgment in favor of Zdrojeski in the amount of $29,963.03. The judgment rendered for Zdrojeski is not at issue in the joint appeal, as amended. See footnote 1 of this opinion. As for the state's cross appeal, the judgment rendered for Zdrojeski is at issue, but the state has abandoned its claim as to Zdrojeski. See footnote 17 of this opinion.

concerns underlying the final judgment rule are to discourage piecemeal appeals and to facilitate the speedy and orderly disposition of cases at the trial court level. . . . The appellate courts have a duty to dismiss, even on [their] own initiative, any appeal that [they lack] jurisdiction to hear. . . . We therefore must always determine the threshold question of whether the appeal is taken from a final judgment before considering the merits of the claim." (Citations omitted; internal quotation marks omitted.) *Wolfork* v. *Yale Medical Group*, 335 Conn. 448, 459, 239 A.3d 272 (2020). We conclude that the original joint appeal was not taken from final judgments, and, therefore, we lack subject matter jurisdiction to entertain it. We further conclude that the amended joint appeal is jurisdictionally proper and encompasses the claims raised by the plaintiffs in the original joint appeal.

Here, in the August 24, 2018 combined decision, the court determined in relevant part that, insofar as the nonparty tortfeasor was underinsured, the state was contractually required to afford underinsured motorist coverage to the plaintiffs for damages caused by the nonparty tortfeasor. In addition, the court calculated the full amount of damages established by the plaintiffs; however, the court expressly stated that it would render judgments in the plaintiffs' respective cases after the parties had filed a stipulation, in accordance with their agreement at trial, "account[ing] for items of economic damages which have been paid and for medical expenses discounts . . . ." The record reflects that the court rendered judgments in the plaintiffs' respective cases on May 16, 2019, after it had reduced the plaintiffs' damages to account for certain sums received by the plaintiffs. Under these circumstances, we conclude that no appealable final judgments were rendered until May 16, 2019. Accordingly, the original joint appeal, filed on December 3, 2018, was not taken from final judgments

and, therefore, must be dismissed for lack of subject matter jurisdiction.

Nevertheless, we may consider all of the plaintiffs' claims in the context of the amended joint appeal, filed on May 24, 2019, which was taken from final judgments. See Practice Book § 61-9 ("[i]f the original appeal is dismissed for lack of jurisdiction, any amended appeal shall remain pending if it was filed from a judgment or order from which an original appeal properly could have been filed"). The amended joint appeal encompasses all of the claims pursued by the plaintiffs in the original joint appeal. Thus, all of the plaintiffs' claims in the context of their amended joint appeal are properly before us for review. See *Featherston* v. *Katchko & Son Construction Services, Inc.*, 201 Conn. App. 774, 783, 244 A.3d 621 (2020), cert. denied, 336 Conn. 923, 246 A.3d 492 (2021), and cases cited therein.

II

Turning to the plaintiffs' amended joint appeal, the plaintiffs claim that the trial court improperly (1) declined to award them PTSD-related damages, and (2) reduced their damages by the sums of the workers' compensation benefits that they had received. We disagree.

A

We first address the plaintiffs' claim that the court improperly declined to award them PTSD-related damages. The dispositive contention raised by the plaintiffs is that the court committed error in concluding that their PTSD claims are not compensable under § 38a-336. We are not persuaded.[9]

[9] The plaintiffs also assert that the court erred in discrediting the opinion of their expert witness who diagnosed them with PTSD. In light of our determination that the court properly concluded that the plaintiffs' PTSD claims are not compensable under § 38a-336, we need not reach the merits of this claim of error.

The following additional facts and procedural history are relevant to our resolution of this claim. In their respective complaints, the plaintiffs alleged that, as a result of the accident, they sustained physical injuries and PTSD. During trial, in addition to testifying as to the physical injuries that they suffered, the plaintiffs testified as to emotional distress that they experienced following the accident. Menard testified, inter alia, that he had nightmares, intrusive thoughts, difficulty sleeping, and flashbacks of the accident, that he would wake up in cold sweats and "jump out of bed and scream," that he felt hypervigilant, short-tempered, and antisocial, and that he could not stand outside of his patrol car without feeling fearful. Connolly testified, inter alia, that he had irritability, nightmares, difficulty sleeping, and flashbacks of the accident. The plaintiffs' expert witness testified that she treated the plaintiffs following the accident and that it was her opinion that the plaintiffs had developed PTSD stemming from the accident.

In their joint posttrial brief, the plaintiffs both requested damages predicated, in part, on the alleged PTSD that they had developed. In its respective posttrial brief, the state argued that the plaintiffs could not recover damages for PTSD because the coverage that the state afforded them was premised on § 38a-336, which permits recovery for "damages because of bodily injury . . . ." General Statutes § 38a-336 (a) (1) (A). The state posited that the PTSD purportedly developed by the plaintiffs neither constituted a "bodily injury" compensable under the statute nor was derived from a predicate "bodily injury."

In declining to award the plaintiffs PTSD-related damages, the court determined that the terms of § 38a-336 are plain and unambiguous, although the court observed that the statute did not define " 'bodily injury.' " Relying on decisions by our Supreme Court supporting the proposition that "emotional distress,

without accompanying physical harm, does not constitute a 'bodily injury,' " the court concluded that the state's coverage, which coincided with § 38a-336, did not encompass the plaintiffs' PTSD claims. The court continued: "Here . . . the plaintiffs' PTSD claims are not a result of their personal injuries. Rather, they are premised on having gone through a life-threatening accident and having to reexperience similar work-related scenarios on a regular basis. Thus, there is no underinsured motorist coverage for these aspects of their claims since they do not constitute 'damages because of bodily injury' [under the statute]."

In their combined motion to reconsider and for additur, the plaintiffs asserted that the PTSD that they allegedly developed was accompanied by physical manifestations, "including sleeplessness, hyper alertness, rapid heart beating, sweating, anxiety, and outbursts of anger," such that the PTSD from which they suffer constitutes a "bodily injury" under § 38a-336 (a) (1) (A). In its objection, the state argued that the PTSD allegedly developed by the plaintiffs was a purely psychological injury and that the court correctly concluded that the statutory term "bodily injury" does not encompass such emotional distress. In denying the plaintiffs' combined motion to reconsider and for additur, the court maintained its reliance on precedent by our Supreme Court, providing that a " 'bodily injury' " does not encompass " 'emotional distress, without accompanying physical harm,' " and declined to consider out-of-state authority presented by the plaintiffs for the first time in their combined motion.

On appeal, the plaintiffs contend that the court's interpretation of § 38a-336 (a) (1) (A) was improperly narrow insofar as the court determined that the PTSD that they allegedly developed did not constitute a "bodily injury" under the statute. The plaintiffs assert that § 38a-336 (a) (1) (A) is ambiguous because there

is more than one reasonable reading of the statute vis-à-vis whether PTSD, with accompanying physical manifestations, is encapsulated within the terms of the statute requiring automobile liability insurance policies to provide uninsured and underinsured motorist coverage "for the protection of persons insured thereunder who are *legally entitled to recover damages because of bodily injury* . . . ." (Emphasis added.) General Statutes § 38a-336 (a) (1) (A). This claim is unavailing.

The plaintiffs' claim requires us to construe § 38a-336 (a) (1) (A), which "presents a question of statutory interpretation over which our review is plenary." (Internal quotation marks omitted.) *Reserve Realty, LLC* v. *Windemere Reserve, LLC*, 205 Conn. App. 299, 325, A.3d (2021). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In seeking to determine that meaning, General Statutes § 1-2z[10] 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. . . . In interpreting statutes, words and phrases are to be construed according to their commonly approved usage . . . . Generally, in the absence of statutory definitions, we look to the contemporaneous dictionary definitions of words to ascertain their commonly approved usage." (Citation omitted; footnote in original; internal quotation marks omitted.) Id.

[10] "General Statutes § 1-2z provides: 'The meaning of a statute shall, in the first instance, be ascertained from 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.' " *Reserve Realty, LLC* v. *Windemere Reserve, LLC*, supra, 205 Conn. App. 325 n.28.

Section 38a-336 (a) (1) (A) provides: "Each automobile liability insurance policy shall provide insurance, herein called uninsured and underinsured motorist coverage, in accordance with the regulations adopted pursuant to section 38a-334, with limits for bodily injury or death not less than those specified in subsection (a) of section 14-112, for the protection of persons insured thereunder who are legally entitled to recover damages because of bodily injury, including death resulting therefrom, from owners or operators of uninsured motor vehicles and underinsured motor vehicles and insured motor vehicles, the insurer of which becomes insolvent prior to payment of such damages."

The parties do not cite, and our research has not revealed, any appellate case in this state that has interpreted the term "bodily injury" as used in § 38a-336 (a) (1) (A), which is not defined in the statute. We note that § 38a-334-2 (a) of the Regulations of Connecticut State Agencies, promulgated by the insurance commissioner pursuant to General Statutes § 38a-334,[11] defines "[b]odily injury," as used in §§ 38a-334-1 through 38a-334-9 of the regulations, to mean "bodily injury, sickness or disease, including death resulting therefrom . . . ." Section 38a-334-6 (a) of the regulations contains language similar to the statute, providing in relevant part: "The insurer shall undertake to pay on behalf of the insured all sums which the insured shall be legally entitled to recover as damages from the owner or operator of an uninsured or underinsured motor vehicle because of bodily injury sustained by the insured caused by an accident involving the uninsured or underinsured motor vehicle. . . ."

[11] General Statutes § 38a-334 (a) provides in relevant part: "The Insurance Commissioner shall adopt regulations with respect to minimum provisions to be included in automobile liability insurance policies issued after the effective date of such regulations . . . ."

Although neither § 38a-336 (a) (1) (A) nor the regulations shed additional light on the meaning of "bodily injury" in the statute, our Supreme Court has had occasion to consider the ordinary use of the term "bodily." In *Moore* v. *Continental Casualty Co.*, 252 Conn. 405, 746 A.2d 1252 (2000), our Supreme Court concluded that an allegation of emotional distress arising out of economic loss did not trigger an insurer's duty to defend under a homeowners insurance policy providing coverage for "[b]odily [i]njury," which was defined in the policy to mean "bodily harm, sickness or disease . . . ." (Internal quotation marks omitted.) Id., 410. One ground on which the court relied in reaching that conclusion was that "the word bodily as ordinarily used in the English language strongly suggests something physical and corporeal, as opposed to something purely emotional. Webster's Third New International Dictionary confirms this notion, and associates the term bodily with the physical aspects of the human body, and contrasts it with the nonphysical aspects of the human experience such as the mental and spiritual.[12] In the insurance policy, the word bodily is used as an adjective to modify the terms injury, harm, sickness and disease. Including purely emotional harm arising out of economic loss as a form of bodily injury would be tantamount to defining the term bodily injury with an antonym. At the very least, such a construction would render the term bodily superfluous as an adjective modifying the term injury. It is fair to infer that the use of the term bodily was employed in the policy both accurately and purposefully." (Footnote in original.) Id., 410–11.

[12] "Webster's Third New International Dictionary defines 'bodily' as 'having a body or a material form: PHYSICAL, CORPOREAL . . . of or relating to the body . . . concerning the body . . . BODILY contrast with *mental* or *spiritual* . . . .' " (Emphasis in original.) *Moore* v. *Continental Casualty Co.*, supra, 252 Conn. 411 n.6.

We find the application in *Moore* of the ordinary meaning of "bodily" to be persuasive in our construction of § 38a-336 (a) (1) (A). We interpret "bodily" in § 38a-336 (a) (1) (A) to concern "something physical and corporeal, as opposed to something purely emotional." *Moore* v. *Continental Casualty Co.*, supra, 252 Conn. 410. Because "bodily" is used as an adjective to modify "injury," a "bodily injury" under the statute must necessarily be physical in nature. Under this interpretation, PTSD, in and of itself as a purely emotional injury, cannot be construed as a "bodily injury" within the purview of the statute.

The plaintiffs assert that the PTSD that they purportedly developed was accompanied by physical manifestations, such as nightmares and difficulty sleeping, thereby bringing their PTSD claims within the realm of § 38a-336 (a) (1) (A). Our application of *Moore*, however, forecloses this contention. In *Moore*, in rejecting the plaintiff's argument that emotional distress stemming from economic loss fell within the definition of "[b]odily [i]njury" in the homeowners insurance policy, our Supreme Court observed that an "overwhelming majority of jurisdictions" had concluded that, as a matter of law, the term "bodily injury" in a liability insurance policy "does not include emotional distress *unaccompanied by physical harm*." (Emphasis added; internal quotation marks omitted.) *Moore* v. *Continental Casualty Co.*, supra, 252 Conn. 411–12. Notably, the court did not go on to state that emotional distress accompanied by physical symptoms of such distress would constitute a "bodily injury" under such policies. Id., 412–15. In fact, the court expressly disagreed with the rationale of *Voorhees* v. *Preferred Mutual Ins. Co.*, 128 N.J. 165, 607 A.2d 1255 (1992), in which the Supreme Court of New Jersey concluded that the term " 'bodily injury' " in a homeowners insurance policy, defined in the policy to mean " 'bodily harm, sickness or disease,' "

''encompasses emotional injuries accompanied by physical manifestations,'' such as nausea, stomach pains, and headaches. Id., 175, 179; *Moore* v. *Continental Casualty Co.*, supra, 413. Our Supreme Court determined that *Voorhees*, and decisions by other courts having reached similar conclusions, ''find ambiguity where there is none, and are contrary to the plain meaning of the language of the insurance policy and the reasonable expectations of the parties to the policy.'' *Moore* v. *Continental Casualty Co.*, supra, 414.

Moreover, in rejecting an argument by the plaintiff premised on the proposition that ''modern medical science teaches that emotional distress is accompanied by some physical manifestations''; id.; our Supreme Court in *Moore* stated: ''It is undoubtedly true that emotional distress ordinarily might be accompanied by some physical manifestations, such as an altered heart rate and altered blood pressure, and perhaps other such manifestations as changes in the size of the pupils, and sleeplessness and headaches. That does not mean, however, that 'bodily harm, sickness or disease,' as used in the insurance policy in this case, necessarily includes emotional distress caused by economic loss. The question in this case is the legal meaning of '''[b]odily [i]njury''' as defined in the policy. It is not the medical or scientific question of the degree to which the mind and the body affect each other.'' Id., 415; see also *Taylor* v. *Mucci*, 288 Conn. 379, 387, 952 A.2d 776 (2008) (noting that our Supreme Court in *Moore* ''rejected the plaintiff's claim that emotional distress fell within the policy's definition of 'bodily harm' because it was accompanied by physical manifestations'').

As we determined earlier in this opinion, a ''bodily injury'' under § 38a-336 (a) (1) (A) must be physical in nature. Guided by our Supreme Court's rationale in *Moore*, we are not convinced that the PTSD purportedly developed by the plaintiffs was transformed into a

"bodily injury" under the statute by virtue of the physical manifestations accompanying it.

In their appellate briefs, the plaintiffs also analyze the language immediately preceding "bodily injury" in § 38a-336 (a) (1) (A), providing that uninsured and underinsured motorist coverage is to be provided in each automobile liability insurance policy "for the protection of persons insured thereunder who are *legally entitled to recover damages because of* bodily injury . . . ." (Emphasis added.) General Statutes § 38a-336 (a) (1) (A). We recognize that "[i]t is a basic tenet of statutory construction that the legislature [does] not intend to enact meaningless provisions. . . . [I]n construing statutes, we presume that there is a purpose behind every sentence, clause, or phrase used in an act and that no part of a statute is superfluous. . . . Because [e]very word and phrase [of a statute] is presumed to have meaning . . . [a statute] must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant." (Internal quotation marks omitted.) *Towing & Recovery Professionals of Connecticut, Inc.* v. *Dept. of Motor Vehicles*, 205 Conn. App. 368, 373–74, 257 A.3d 978 (2021). Read in its entirety, we perceive no reasonable construction of the language in § 38a-336 (a) (1) (A) that alters our conclusion that the plaintiffs' PTSD claims are not compensable under the statute. Cf. *Connecticut Ins. Guaranty Assn.* v. *Fontaine*, 278 Conn. 779, 786–88, 900 A.2d 18 (2006) (concluding that phrase " 'because of bodily injury' " in professional liability insurance policy was ambiguous with respect to whether coverage extended to defendant's loss of consortium claim predicated on husband's bodily injury).

As an aside, we observe that, arguably, the plaintiffs' alleged PTSD could be deemed to be compensable under § 38a-336 (a) (1) (A) if the PTSD stemmed directly from the physical injuries that the plaintiffs sustained

from the accident, which unequivocally constitute "bodily injur[ies]" under the statute. As the trial court found, however, "the plaintiffs' PTSD claims are not a result of their personal injuries. Rather, they are premised on having gone through a life-threatening accident and having to reexperience similar work-related scenarios on a regular basis." We do not construe the plaintiffs' claims on appeal as challenging that finding or, in fact, to be asserting that their alleged PTSD resulted from their physical injuries.

In sum, we conclude that the plaintiffs' PTSD claims are not compensable under § 38a-336, and, therefore, the court did not err in declining to award the plaintiffs PTSD-related damages.

B

We next address the plaintiffs' claim that the court improperly reduced their damages by the sums of the workers' compensation benefits that they had received. The plaintiffs contend that the court incorrectly concluded that, pursuant to § 38a-334-6 (d) (1) (B) of the Regulations of Connecticut State Agencies, the state properly had elected to reduce the limits of its uninsured/underinsured motorist coverage by the amount of workers' compensation benefits paid to the plaintiffs, notwithstanding that the state, although maintaining a written document reflecting its election, failed to provide notice of its election to its employees, including the plaintiffs. We reject the plaintiffs' claim of error.[13]

[13] On the basis of their respective appellate briefs, the parties appear to presume that, as a precondition of the trial court reducing the plaintiffs' damages by the sums of the workers' compensation benefits that the plaintiffs received, the state must have made a proper offset election pursuant to § 38a-334-6 (d) (1) (B) of the Regulations of Connecticut State Agencies. The parties do not address whether § 38a-334-6 (d) (1) (B) concerns only reductions of an insurer's *coverage limits*, as opposed to the *damages* recoverable by the insured, and the implications thereof. Because we reject the merits of the plaintiffs' claim that the state failed to make a proper offset election under § 38a-334-6 (d) (1) (B) of the regulations, we decline to discuss further the scope of the regulation.

The following additional facts and procedural history are relevant to our resolution of this claim. Prior to the March 6, 2019 hearing, the parties stipulated that (1) Menard had been paid $130,223.63 in workers' compensation benefits, $3583.33 of which had been repaid on a workers' compensation lien, and (2) Connolly had been paid $134,033 in workers' compensation benefits, $3583 of which had been repaid on a workers' compensation lien.

In a separate joint stipulation, filed on February 26, 2019, the parties further stipulated that, at the time of the accident on September 1, 2012, the state maintained a memorandum, dated January 10, 2012, described by the parties as the state's "statement and summary of its auto[mobile] liability insurance coverage, including its self-insured coverage, for the fleet of [s]tate owned vehicles, as adopted by the State of Connecticut Insurance and Risk Management Board for the policy year [December 31, 2011 through December 31, 2012]" (memo). The memo, a copy of which was appended to the stipulation, provided in relevant part that "[i]t is the intent of the [state] in designing and funding its self-insurance program to avail itself of all rights and benefits conferred to insurers under . . . [§] 38a-336, the applicable Regulations of Connecticut State Agencies, including § 38a-334-6, and the case law interpreting those statutes and regulations. The [s]tate specifically reserves the right to limit its liability pursuant to . . . [§] 38a-334-6 (d) [of the regulations] by reducing the limits of its [uninsured/underinsured motorist] coverage by all sums . . . paid or payable under any workers' compensation law . . . ." The parties also stipulated that the memo "is a public record, created by the [state] Insurance and Risk Management Board and maintained in its insurance/risk management files and created in the ordinary course of business," that the state "does not distribute [the memo] to the [s]tate

employees who may operate [s]tate owned vehicles, and that the [s]tate does not distribute [the memo] to the employees' union or union representatives."

In their joint briefs filed in connection with the March 6, 2019 hearing, the plaintiffs argued that the state had not notified its employees, including the plaintiffs, of its election under § 38a-334-6 (d) (1) (B) of the regulations to reduce its underinsured motorist coverage limits by workers' compensation benefits paid or payable to claimants. The plaintiffs posited that, without providing such notice, the state could not avail itself of the permissive offset for workers' compensation benefits authorized under § 38-334-6 (d) (1) (B) of the regulations. In its respective brief, the state argued in relevant part that it maintained the memo, which documented its election of permissive offsets pursuant to § 38-334-6 (d) (1) (B) of the regulations, in accordance with the requirements of *Piersa* v. *Phoenix Ins. Co.*, 273 Conn. 519, 871 A.2d 992 (2005), and that it had no legal obligation to provide notice of said election to the plaintiffs. In concluding that a reduction of the plaintiffs' damages to account for the workers' compensation benefits was appropriate, the court determined that (1) the memo reflected the state's election of permissive offsets under § 38a-334-6 (d) of the regulations, (2) § 38a-334-6 of the regulations does not mandate that a self-insurer must provide notice to claimants of its adoption of permissive regulatory offsets, and (3) no legal authority had been cited requiring the state to distribute the memo to its employees or their union representatives, which, the court observed, was a public record maintained in the state's files, for notification purposes.

The plaintiffs challenge the court's conclusion that the state was entitled, under § 38a-334-6 (d) (1) (B) of the regulations, to offset its liability for uninsured/underinsured motorist benefits by the amount of the workers' compensation benefits paid to the plaintiffs

notwithstanding that the state had failed to provide notice of its election of that permissive regulatory offset. The crux of the plaintiffs' claim is that the state, which is a self-insurer for its underinsured motorist coverage, should not be subject to less stringent requirements than a commercial insurer, which is obligated to include its election of permissive offsets to its underinsured motorist coverage in a written policy provided to its insured. The state argues that, although, as a self-insurer, it must maintain a preaccident writing reflecting its election of permissive regulatory offsets as mandated by *Piersa* v. *Phoenix Ins. Co.*, supra, 273 Conn. 519, it has no legal obligation to provide its employees with notice of said election. We agree with the state.

Our resolution of the plaintiffs' claim requires us to consider whether the statutory and regulatory scheme governing underinsured motorist coverage in Connecticut imposes a requirement on self-insurers to notify claimants of the self-insurers' election of permissive offsets under § 38a-334-6 (d) of the regulations. "The interpretation of statutes and regulations is a question of law over which our review is plenary." *MSW Associates, LLC* v. *Planning & Zoning Dept.*, 202 Conn. App. 707, 726, 246 A.3d 1064, cert. denied, 336 Conn. 946, 251 A.3d 77 (2021).

Section 38a-334 (a) provides in relevant part: "The Insurance Commissioner shall adopt regulations with respect to minimum provisions to be included in automobile liability insurance policies issued after the effective date of such regulations . . . ." Section 38a-336 (a) (1) (A) provides: "Each automobile liability insurance policy shall provide insurance, herein called uninsured and underinsured motorist coverage, in accordance with the regulations adopted pursuant to section 38a-334, with limits for bodily injury or death not less than those specified in subsection (a) of section 14-112, for

the protection of persons insured thereunder who are legally entitled to recover damages because of bodily injury, including death resulting therefrom, from owners or operators of uninsured motor vehicles and underinsured motor vehicles and insured motor vehicles, the insurer of which becomes insolvent prior to payment of such damages."

Section 38a-334-6 (a) of the Regulations of Connecticut State Agencies, promulgated by the insurance commissioner pursuant to § 38a-334 (a), provides in relevant part: "The insurer shall undertake to pay on behalf of the insured all sums which the insured shall be legally entitled to recover as damages from the owner or operator of an uninsured or underinsured motor vehicle because of bodily injury sustained by the insured caused by an accident involving the uninsured or underinsured motor vehicle. . . ." Subsection (d) (1) of § 38a-334-6 of the regulations provides in relevant part: "The limit of the insurer's liability may not be less than the applicable limits for bodily injury liability specified in subsection (a) of section 14-112 of the general statutes, except that the policy may provide for the reduction of limits to the extent that damages have been . . . (B) paid or are payable under any workers' compensation law . . . ."

Section 38a-334-6 (d) (1) of the regulations contemplates the existence of a "policy" reflecting an insurer's election of permissive offsets to its underinsured motorist coverage. " 'Policy' " is defined by statute as "any document, including attached endorsements and riders, purporting to be an enforceable contract, which memorializes in writing some or all of the terms of an insurance contract." General Statutes § 38a-1 (17). As our Supreme Court recognized in *Piersa* v. *Phoenix Ins. Co.*, supra, 273 Conn. 519, "[t]his definition invokes the traditionally understood insurance policy, with the characteristics of an enforceable written contract between insurer and insured, memorializing the terms

of that contract. That definition does not fit comfortably within a self-insurance context because in such a context the insurer and insured are one and the same, and there is no enforceable contract between them." Id., 527. Thus, as the court determined in *Piersa*, a self-insurer, such as the state in this case, must satisfy unique conditions in order to take advantage of the permissive offsets authorized by § 38a-334-6 (d) of the regulations. Id.

In *Piersa*, a police officer brought an action against his self-insured municipal employer seeking uninsured motorist benefits. *Piersa* v. *Phoenix Ins. Co.*, 82 Conn. App. 752, 753–54, 848 A.2d 485 (2004), rev'd, 273 Conn. 519, 871 A.2d 992 (2005). The municipality moved for summary judgment, inter alia, on the ground that the police officer had received workers' compensation benefits in excess of its uninsured motorist coverage. Id., 754–55. In objecting to the motion for summary judgment, the police officer argued that the municipality could not limit its coverage by the amount of workers' compensation benefits that he received because it "failed to exercise its permissive right to do so by means of a writing." Id., 755. The trial court rendered summary judgment for the municipality, which this court affirmed. Id., 755, 768.

After granting certiorari, our Supreme Court reversed this court's judgment, construing § 38a-334-6 (d) (1) of the regulations "to require a municipal self-insurer that wishes to impose permitted limits on its obligations as such to do so by a written document that appropriately provides for reduction of limits." *Piersa* v. *Phoenix Ins. Co.*, supra, 273 Conn. 527. In construing § 38a-334-6 of the regulations, the court determined that the regulation "is not . . . a notice provision; it is a provision that specifies the basic requirement of how an insurer—self or commercial—may limit its liability." Id., 539.

Additionally, in describing the parameters of the "written document" alluded to, the court "emphasize[d] that there is no particular form that a self-insured entity must use in order to take advantage of the permitted reductions in limits. The required written document may be part of its written notice to the [insurance] commissioner of its election to be self-insured, pursuant to [General Statutes] § 38a-371 (c)[14] . . . . Or . . . it may be as part of a written document that the self-insured entity maintains in its files. Nor is it necessary for the document to repeat verbatim the language of the regulation that the [self-insurer] intends to adopt as limits on its coverage. . . . [T]he [self-insurer] could adopt those limits by appropriate language indicating incorporation by reference. The purpose of the document is to require the self-insured entity to fulfill its obligation as insurer by providing a kind of rough equivalence to the obligation of a commercial insurer to limit its coverage by appropriate language in its policy of insurance. Any document that reasonably fulfills that purpose will suffice." (Footnote added.) Id., 531.

In a subsequent decision, our Supreme Court further expounded on *Piersa*. In *Garcia* v. *Bridgeport*, 306 Conn. 340, 51 A.3d 1089 (2012), the court considered the issue of whether, without a preaccident writing requesting lesser coverage limits pursuant to § 38a-336

[14] General Statutes § 38a-371 (c) provides: "Subject to approval of the Insurance Commissioner the security required by this section, may be provided by self-insurance by filing with the commissioner in satisfactory form: (1) A continuing undertaking by the owner or other appropriate person to perform all obligations imposed by this section; (2) evidence that appropriate provision exists for the prompt and efficient administration of all claims, benefits, and obligations provided by this section; and (3) evidence that reliable financial arrangements, deposits or commitments exist providing assurance for payment of all obligations imposed by this section substantially equivalent to those afforded by a policy of insurance that would comply with this section. A person who provides security under this subsection is a self-insurer. A municipality may provide the security required under this section by filing with the commissioner a notice that it is a self-insurer."

(a) (2),[15] a self-insured municipality was deemed to provide unlimited underinsured motorist coverage. Id., 343. The court held that "a self-insurer is deemed to provide the minimum statutory underinsured motorist coverage" and, thereby, "[a] self-insurer need not prove the existence of a document requesting the minimum statutory coverage limits." Id., 371. In so holding, the court distinguished *Piersa*, observing that the matter before it concerned § 38a-336 (a) (2), "a statutory notice provision requiring an insurer to obtain the informed consent of the insured"; id., 353; whereas *Piersa* addressed § 38a-334-6 of the regulations, which is "not such a notice provision, [but rather] a provision that specifies the basic requirement of how an insurer—self or commercial—may limit its liability." (Internal quotation marks omitted.) Id. The court clarified that it was leaving "undisturbed [its] conclusion in *Piersa* that, to take advantage of permissible offsets provided by § 38a-334-6 (d) of the [regulations], a self-insurer must maintain a written document, either in its files or with the commissioner of insurance." Id., 370.

In a footnote in *Garcia*, our Supreme Court made the following additional observations regarding *Piersa*: "The [municipal] defendant has not asked us to reconsider our holding in *Piersa*. Therefore, although we conclude that the reasoning of *Piersa* cannot be

[15] General Statutes § 38a-336 (a) (2) provides in relevant part: "Notwithstanding any provision of this section, each automobile liability insurance policy issued or renewed on and after January 1, 1994, shall provide uninsured and underinsured motorist coverage with limits for bodily injury and death equal to those purchased to protect against loss resulting from the liability imposed by law unless any named insured requests in writing a lesser amount, but not less than the limits specified in subsection (a) of section 14-112. Such written request shall apply to all subsequent renewals of coverage and to all policies or endorsements that extend, change, supersede or replace an existing policy issued to the named insured, unless changed in writing by any named insured. No such written request for a lesser amount shall be effective unless any named insured has signed an informed consent form . . . ."

extended to § 38a-336 (a) (2), we leave for another day both reconsideration of the distinction we made in *Piersa* between that statute and § 38a-334-6 (d) (1) (B) of the [regulations], and the application of our 'rough equivalence' doctrine for self-insurers to justify a prior writing requirement. We note that the 'rough equivalence' achieved by requiring a self-insurer to elect regulatory limits of liability in writing is unlike the other applications of this doctrine that we examine in this opinion. Under *Piersa*, a self-insurer is faced with a pro forma administrative burden, but there is no notice to claimants, such as the plaintiff in this case, and no balancing of cost against benefit by the insured. In the individual commercial insurance context, the policy language requirement serves both as a way for insurers to limit liability and as a way for an insured, as the ultimate potential claimant for uninsured motorist coverage, to provide consent to the cost and benefit tradeoff implied by the election of offsets." Id., 358 n.15.

Our Supreme Court's analyses in *Piersa* and *Garcia* are instructive to our resolution of the plaintiffs' claim. Our Supreme Court expressly construed § 38a-334-6 of the regulations *not* to be a notice provision; rather, the court determined that the regulation serves the "substantive function" of "specif[ying] the basic requirement of how an insurer—self or commercial—may limit its liability." (Internal quotation marks omitted.) *Garcia* v. *Bridgeport*, supra, 306 Conn. 361; see also *Piersa* v. *Phoenix Ins. Co.*, supra, 273 Conn. 539. In addition, the court explained that the written document required for a self-insurer to elect a permissive regulatory offset "may be part of [the self-insurer's] written notice to the [insurance] commissioner of its election to be self-insured . . . [o]r . . . it may be as part of a written document that the self-insured entity maintains in its files." *Piersa* v. *Phoenix Ins. Co.*, supra, 531; see also *Garcia* v. *Bridgeport*, supra, 370 ("to take advantage

of permissible offsets provided by § 38a-334-6 (d) of the [regulations], a self-insurer must maintain a written document, either in its files or with the commissioner of insurance"). The court made no mention of self-insurers providing claimants with copies of such written documents or otherwise notifying claimants of the election of permissive regulatory offsets. In fact, the court explicitly stated in *Garcia* that "[u]nder *Piersa*, a self-insurer is faced with a pro forma administrative burden, *but there is no notice to claimants* . . . ." (Emphasis added.) *Garcia* v. *Bridgeport*, supra, 358 n.15.

Informed by *Piersa* and *Garcia*, we conclude that, as a matter of law, the state was not required to notify its employees, including the plaintiffs, of its election, pursuant to § 38a-334-6 (d) (1) (B) of the regulations, to offset its liability for uninsured/underinsured motorist coverage by the amount of workers' compensation benefits paid to the plaintiffs in order to avail itself of that permissive regulatory offset. Rather, it was sufficient for the state to maintain the memo, containing said election, in its files as a public record. Accordingly, the plaintiffs' claim fails.

III

Turning to the state's cross appeal, the state claims that the trial court committed error in declining to reduce the plaintiffs' damages by the sums that they had recovered pursuant to the dram shop act.[16] Specifically, the state asserts that (1) the court incorrectly construed *American Universal Ins. Co.* v. *DelGreco*,

[16] General Statutes § 30-102 provides in relevant part: "If any person, by such person or such person's agent, sells any alcoholic liquor to an intoxicated person, and such purchaser, in consequence of such intoxication, thereafter injures the person or property of another, such seller shall pay just damages to the person injured, up to the amount of two hundred fifty thousand dollars, or to persons injured in consequence of such intoxication up to an aggregate amount of two hundred fifty thousand dollars, to be recovered in an action under this section . . . ."

205 Conn. 178, 530 A.2d 171 (1987), to prohibit the reduction of the plaintiffs' damages to account for their dram shop recoveries, and (2) the court's failure to deduct the plaintiffs' dram shop recoveries from their damages resulted in the plaintiffs being compensated twice for the same injuries in contravention of the common-law prohibition against double recovery. Limiting our analysis to the portion of the state's cross appeal directed to Connolly, we agree.[17]

The following additional facts and procedural history are relevant to our resolution of this claim. Prior to the March 6, 2019 hearing, the parties stipulated that Connolly had received $83,332 from an establishment under the dram shop act. In their principal joint brief filed in connection with the March 6, 2019 hearing, the plaintiffs argued that *DelGreco* prohibited the limitation of an insurer's underinsured motorist coverage to account for sums received by the insured under a dram shop policy. In its respective brief, the state argued in

[17] In part II B of this opinion, we conclude that the court properly reduced the plaintiffs' damages by the sums of workers' compensation benefits that the plaintiffs had received. Taking into account the workers' compensation benefits, along with the additional sums stipulated to by the parties other than the dram shop payments, the court reduced Menard's damages to zero dollars and Connolly's damages to $32,905.67. Because Menard's damages cannot be further reduced, we consider only whether the court improperly declined to deduct Connolly's dram shop recovery from his damages.

Additionally, although Zdrojeski has withdrawn his portion of the joint appeal, as amended; see footnote 1 of this opinion; the state has not withdrawn its cross appeal as to Zdrojeski, leaving the cross appeal pending against him. See Practice Book § 61-8 ("[e]xcept where otherwise provided, the filing and form of cross appeals, extensions of time for filing them, and all subsequent proceedings shall be the same as though the cross appeal were an original appeal"); *Schurman* v. *Schurman*, 188 Conn. 268, 270, 449 A.2d 169 (1982) ("withdrawal of an appeal does not preclude continued prosecution of a previously filed cross appeal"). In its appellate briefs, however, the state has briefed its claim on cross appeal only with respect to Menard and Connolly. Thus, we deem the state's claim on cross appeal as to Zdrojeski to be abandoned, and, on that basis, we affirm the judgment rendered in favor of Zdrojeski.

relevant part that Connolly's damages should be reduced by the amount of his dram shop recovery to prevent him from receiving a double recovery. The state further argued that *DelGreco* was inapposite because the insured in that case was not compensated twice for the same injury. In declining to subtract Connolly's dram shop recovery from his damages, the court concluded that it was bound by the holding in *DelGreco* that an insurer's underinsured motorist coverage could not be reduced by sums obtained by the insured under a dram shop policy.

The state contends that the court's reliance on *DelGreco* was misplaced because, unlike the present case, the insured in *DelGreco* did not receive a double recovery. The plaintiffs maintain that *DelGreco* is dispositive of the state's claim. We conclude that *DelGreco* does not govern the precise issue before us.

A brief summary of *DelGreco* is apropos. In *DelGreco*, the decedent died from injuries sustained after being struck by a motor vehicle. *American Universal Ins. Co.* v. *DelGreco*, supra, 205 Conn. 179. The parties stipulated that the decedent's estate sustained damages in excess of $100,000. Id., 180. Following the accident, the estate was paid (1) the $20,000 limit under the tortfeasor's motor vehicle liability policy and (2) the $20,000 limit under the dram shop policy of an establishment against which the estate had pursued a claim under the dram shop act. Id., 179–80. Thereafter, the estate submitted a claim for underinsured motorist benefits to the decedent's automobile insurer, which had issued a policy to the decedent providing underinsured motorist coverage in the amount of $40,000 per accident and basic reparation benefits in the amount of $5000. Id., 180. The parties stipulated that the insurer was entitled to a credit for (1) the $20,000 liability insurance payment under the tortfeasor's policy and (2) a $2335.80 payment that the insurer had made in basic reparation benefits,

but the parties disputed whether the insurer was entitled to a setoff for the $20,000 dram shop payment. Id.

The dispute was submitted to a panel of arbitrators, which entered an award in the estate's favor on the ground that, pursuant to the state statutory and regulatory scheme governing underinsured motorists, the insurer was not entitled to a setoff for the dram shop payment. Id., 181–83. The Superior Court subsequently confirmed the arbitration award. Id., 183. The insurer appealed to this court, and our Supreme Court transferred the appeal to itself. Id., 183–84.

On appeal, our Supreme Court affirmed the Superior Court's judgment. Id., 199. The court first considered the language of General Statutes (Rev. to 1983) § 38-175c (b) (1), as amended by Public Acts 1983, No. 83-267, § 2, and No. 83-461 (now § 38a-336 (b)), which provides in relevant part that "[a]n insurance company shall be obligated to make payment to its insured up to the limits of the policy's uninsured motorist coverage *after the limits of liability under all bodily injury liability bonds or insurance policies applicable at the time of the accident* have been exhausted by payment of judgments or settlements . . . ." (Emphasis added.) *American Universal Ins. Co.* v. *DelGreco*, supra, 205 Conn. 192. The court concluded that dram shop policies did not constitute " 'bodily injury liability bonds or insurance policies' " within the meaning of the statute. Id., 195–96. The court next considered § 38-175a-6 (d) (now § 38a-334-6 (d)) of the Regulations of Connecticut State Agencies, which provides in relevant part that "[t]he limit of the insurer's liability may not be less than the applicable limits for bodily injury liability specified in subsection (a) of section 14-112 of the general statutes, except that the policy may provide for the reduction of limits to the extent that damages have been . . . paid by or on behalf of *any person responsible for the injury* . . . ." (Emphasis added.) *American Universal*

Ins. Co. v. *DelGreco*, supra, 182 n.4, 197–98. The court concluded that a dram shop was not an entity " 'responsible for the injury' " under the regulation and that the regulation did not expressly authorize reductions of coverage limits for dram shop payments. Id., 198–99. In sum, the court held that the statute and the regulation "do not allow an insurer to reduce its liability for underinsured motorist coverage by an amount of money received by the insured pursuant to a dram shop policy." Id., 199.

It is apparent that the issue addressed in *DelGreco* is distinct from the inquiry presently before us. In *DelGreco*, the court concluded that, under the statutory and regulatory scheme governing underinsured motorists in Connecticut, an insurer is not entitled to offset a dram shop payment against the limit of its underinsured motorist coverage. Id. The question in the present case, however, is whether a claimant's damages can be reduced by the sum of a dram shop payment in order to prevent a double recovery as proscribed by common law. *DelGreco* did not contemplate this discrete issue. Indeed, the court in *DelGreco* acknowledged that "the sums due the decedent's estate, even if all were to be collected, [were] far short of the damages suffered," thereby foreclosing the possibility of a double recovery in that case. Id., 198. Thus, the trial court improperly relied on *DelGreco* to determine that the dram shop payment received by Connolly was not deductible from his damages.

Having concluded that *DelGreco* is inapposite, we turn to the state's contention that, without a reduction of Connolly's damages to account for his dram shop recovery, Connolly was compensated twice for the same injury in violation of the common-law rule precluding double recovery. We agree.[18]

[18] Our conclusion that *DelGreco* is inapposite and that Connolly would obtain an impermissible double recovery without a reduction of his damages by the sum of his dram shop recovery is in accord with commentary in

Damages recovered under the dram shop act are compensatory. See *Gionfriddo* v. *Gartenhaus Cafe*, 15 Conn. App. 392, 399–400, 546 A.2d 284 (1988), aff'd, 211 Conn. 67, 557 A.2d 540 (1989). Thus, the state's claim requires us to "confront the legal question of whether a plaintiff is entitled to recover compensatory damages twice for the same conduct. Because such a determination involves a question of law, our review is plenary." *Rowe* v. *Goulet*, 89 Conn. App. 836, 848, 875 A.2d 564 (2005).

"[T]he rule precluding double recovery is a simple and time-honored maxim that [a] plaintiff may be compensated only once for his just damages for the same injury. . . . Connecticut courts consistently have upheld and endorsed the principle that a litigant may recover just damages for the same loss only once. The social policy behind this concept is that it is a waste of society's economic resources to do more than compensate an injured party for a loss and, therefore, that the judicial machinery should not be engaged in shifting a loss in order to create such an economic waste."

"the leading treatise regarding Connecticut's uninsured [and underinsured] motorist law . . . ." *Vitti* v. *Allstate Ins. Co.*, 245 Conn. 169, 179 n.9, 713 A.2d 1269 (1998); see J. Berk & M. Jainchill, Connecticut Law of Uninsured and Underinsured Motorist Coverage (4th Ed. 2010). In the treatise, the authors observe that, in *DelGreco*, "[t]he claimant . . . was not made 'whole' and, clearly, no 'double recovery' to the estate was present. Although the *limits* of coverage were not reduced (because the dram shop was not deemed to be an 'automobile tortfeasor' under the regulation), it would certainly appear reasonable that the amount of *damages*, if duplicated, should be reduced accordingly." (Emphasis in original.) J. Berk & M. Jainchill, supra, § 4.9.D, p. 464 n.91; see also id., § 6.2, p. 510 n.11 ("The reduction of coverage *limits* and the reduction of *damages* are distinct issues, turning on different concepts. The reduction of coverage limits is unique to the [uninsured/underinsured motorist] context while the reduction of damages to prevent a double recovery is, it is submitted, a universal concept." (Emphasis in original.)); id., 511–12 (observing that, pursuant to *DelGreco*, moneys received from nonautomobile tortfeasor will not reduce insurer's coverage obligation, but that "the damage award should be reduced by such payments to the extent that a 'double recovery' is present").

(Internal quotation marks omitted.) *Mahon* v. *B.V. Unitron Mfg., Inc.*, 284 Conn. 645, 663, 935 A.2d 1004 (2007).

The legal principle prohibiting double recovery is ingrained in this state's underinsured motorist laws. Section 38a-336 (b) provides in relevant part that "[a]n insurance company shall be obligated to make payment to its insured up to the limits of the policy's uninsured and underinsured motorist coverage after the limits of liability under all bodily injury liability bonds or insurance policies applicable at the time of the accident have been exhausted by payment of judgments or settlements, *but in no event shall the total amount of recovery from all policies . . . exceed the limits of the insured's uninsured and underinsured motorist coverage. . . .*" (Emphasis added.) Our Supreme Court has described § 38a-336 (b) as "emphasiz[ing]" the "policy objective of adhering to the time-honored rule that an injured party is entitled to full recovery only once for the harm suffered." (Internal quotation marks omitted.) *Vitti* v. *Allstate Ins. Co.*, 245 Conn. 169, 186 and n.17, 713 A.2d 1269 (1998).

As our Supreme Court has further explained, "[i]t has often been stated that [t]he public policy established by [§ 38a-336] is that every insured is entitled to recover for the damages he or she would have been able to recover if the [under]insured motorist had maintained [an adequate] policy of liability insurance. . . . However, [t]he statute does not require that [under]insured motorist coverage be made available when the insured has been otherwise protected . . . . Nor does the statute provide that the [under]insured motorist coverage shall stand as an independent source of recovery for the insured, or that the coverage limits shall not be reduced under appropriate circumstances. The statute merely requires that a certain minimum level of protection be provided for those insured under automobile liability insurance policies . . . ." (Citations omitted;

internal quotation marks omitted.) *Guarino* v. *Allstate Property & Casualty Ins. Co.*, 315 Conn. 249, 255–56, 105 A.3d 878 (2015). Moreover, "General Statutes § 38a-335 (c), which sets forth minimum policy provisions for automobile liability policies, provides in part that '[i]n no event shall any person be entitled to receive duplicate payments for the same element of loss.' " *Fahey* v. *Safeco Ins. Co. of America*, 49 Conn. App. 306, 310, 714 A.2d 686 (1998).

Our Supreme Court's decision in *Gionfriddo* v. *Gartenhaus Cafe*, 211 Conn. 67, 557 A.2d 540 (1989), provides additional guidance. In *Gionfriddo*, the decedent died from injuries sustained in a collision with a motor vehicle operated by an intoxicated driver. Id., 69. The decedent's estate recovered $1,187,763 in compensatory, exemplary, and treble damages in an action filed against the tortfeasor and the lessor of the tortfeasor's motor vehicle. Id. Thereafter, the estate commenced an action against the establishment where the tortfeasor had imbibed alcohol prior to the collision, asserting one claim pursuant to the dram shop act and another claim of wanton and reckless misconduct.[19] Id., 69–70. The establishment moved for summary judgment on those claims, contending that satisfaction of the judgment in the estate's preceding action against the tortfeasor and the lessor for the same injuries precluded the estate's recovery in the current action. Id., 70. The trial court denied the motion for summary judgment. Id. Following an ensuing jury trial, the jury returned a verdict for the establishment, and the court rendered judgment in its favor. Id. This court affirmed the judgment, although it determined that the trial court had improperly denied the establishment's motion for summary judgment. Id.

[19] The estate also asserted negligence and public nuisance claims, but those claims were stricken and judgment was rendered thereon in favor of the establishment. *Gionfriddo* v. *Gartenhaus Cafe*, supra, 211 Conn. 69.

After granting certiorari, our Supreme Court affirmed this court's decision, "dispos[ing] of th[e] case by paying heed to the simple and time-honored maxim that [a] plaintiff may be compensated only once for his just damages for the same injury." (Internal quotation marks omitted.) Id., 71. In so ruling, the court observed that (1) the damages claimed by the estate in the dram shop action were identical to those recovered in the preceding action, and (2) the estate never claimed that the verdict for compensatory damages in the preceding action was insufficient. Id., 75–76.

Here, the parties stipulated that, among other sums received by Connolly "on account of the personal injuries sustained in the motor vehicle collision of September 1, 2012," Connolly recovered $83,332 from an establishment under the dram shop act. Without a reduction in his damages accounting for his dram shop recovery, Connolly was compensated twice for the same injury in contravention of the common-law rule precluding double recovery. See also General Statutes § 38a-335 (c).

In sum, the court committed error in declining to reduce Connolly's damages by the sum of his dram shop recovery. Taking into account the $83,332 dram shop payment that Connolly received, the court should have further reduced Connolly's damages from $32,905.67 to zero dollars.

IV

At this juncture, we observe that, as a result of our conclusions in parts II and III of this opinion, neither plaintiff is entitled to recover damages against the state. Under these circumstances, on remand, judgments must be rendered in favor of the state in the plaintiffs' respective cases. See *Fileccia* v. *Nationwide Property & Casualty Ins. Co.*, 92 Conn. App. 481, 496, 886

A.2d 461 (2005) (directing that, on remand, if sum recovered by insured from tortfeasor exceeded insured's damages, then trial court should reduce insured's damages to zero and render judgment in favor of insurer), cert. denied, 277 Conn. 907, 894 A.2d 987 (2006); *Hunte* v. *Amica Mutual Ins. Co.*, 68 Conn. App. 534, 536, 539, 792 A.2d 132 (2002) (concluding that trial court properly rendered judgment for insurer when jury returned verdict for insured in amount less than total of insured's recovery from tortfeasor and insurer's payment of basic reparation benefits); *Fahey* v. *Safeco Ins. Co. of America*, supra, 49 Conn. App. 312 (concluding that trial court properly rendered judgment for insurer when jury returned verdict for insured in amount less than insured's recovery from tortfeasor). Accordingly, with respect to Menard, in favor of whom the court rendered judgment notwithstanding that his damages had been reduced to zero dollars, we must reverse the judgment and remand the matter with direction to render judgment for the state. Similarly, with respect to Connolly, we must reverse the judgment and remand the matter with direction to render judgment for the state.

The original joint appeal is dismissed for lack of final judgments; as to the amended joint appeal and the cross appeal, the judgments as to Scott Menard and Darren Connolly are reversed and the cases are remanded with direction to render judgments in favor of the state consistent with this opinion, and the judgment as to Robert Zdrojeski is affirmed.

In this opinion the other judges concurred.

S. B-R. *v.* J. D.*
(AC 43256)

Alvord, Alexander and Eveleigh, Js.

Syllabus

The plaintiff, a college student, obtained an order of civil protection as to the defendant, a fellow student. The trial court found that the plaintiff, who had been subjected to disturbing comments by the defendant via e-mail and text messages as well as in person, including that he wanted to jump on her back in rage, had a reasonable fear for her physical safety. Accordingly, the court issued the order of civil protection as to the defendant pursuant to statute (§ 46b-16a). On the defendant's appeal to this court, *held* that the trial court abused its discretion in issuing the order of civil protection: the court failed to conduct the necessary analysis when it applied only the subjective standard to the plaintiff's apprehension of fear, rather than the required subjective-objective standard of reasonable fear, and improperly determined that the plaintiff's subjective apprehension was sufficient to make the necessary determination for stalking pursuant to § 46b-16a; moreover, there was insufficient evidence for the court to conclude that the defendant would continue to stalk or to commit acts designed to intimidate or retaliate against the plaintiff, as the plaintiff testified that there had been no communications between the defendant and her for several months preceeding the hearing, the defendant testified that he had withdrawn from the college for a semester and had walked away without approaching or speaking with the plaintiff the only time he saw her, and the testimony that both students would be returning as students to the college did not alone establish reasonable grounds to find that the defendant would continue to stalk the plaintiff.

(*One judge dissenting*)

Argued April 7—officially released October 19, 2021

Procedural History

Application for an order of civil protection, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Edward R. Karazin, Jr.*, judge trial referee, rendered judgment granting the

* 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.

application, from which the defendant appealed to this court. *Reversed*; *judgment directed.*

Stephen A. Lebedevitch, for the appellant (defendant).

Harold R. Burke, for the appellee (plaintiff).

Opinion

ALEXANDER, J. The defendant, J. D., appeals from the judgment of the trial court granting the application for an order of civil protection for the plaintiff, S. B-R. On appeal, the defendant claims that the court erred in finding that there were reasonable grounds to believe that he committed acts of stalking and would continue to stalk the plaintiff. We agree with the defendant that the court abused its discretion when it issued the order of civil protection because (1) it did not apply an objective standard in its determination of "reasonable fear" on the first element of stalking, and (2) there was insufficient evidence on the second element to conclude that the defendant would continue to stalk or to commit acts designed to intimidate or retaliate against the plaintiff. Accordingly, we reverse the judgment of the trial court and remand this case with direction to vacate the order of civil protection.

The following facts and procedural history are relevant to this appeal. The parties were classmates at a community college. Text messages and e-mails between the plaintiff and the defendant, sent between February 28 and March 3, 2019, demonstrate the relationship between the parties prior to late February, 2019. In an e-mail sent to the plaintiff during this period, the defendant wrote that, "[i]n the fall when you asked me to help you study I poured in hours many into preparation." In a text message sent from the plaintiff to the defendant she indicated, "I'm sorry [J. D.] but I think you just blew the friendship we had." After the

defendant responded with multiple text messages to the plaintiff, apologizing, the defendant wrote, "I hate myself for this sorry. I'm shit. Good luck on your exams." When the plaintiff sent another text where she again indicated that she did not want to be "friends," the defendant responded to this text: "[Okay]. I didn't think you'd read the e-mails. We are done. Please read the cheat sheet I sent you."

Between February 28 and March 3, 2019, the defendant made disturbing comments to the plaintiff in person, over e-mail, and through text messages. Specifically, on February 28, 2019, the defendant made a comment to the plaintiff regarding her breasts, and, on March 1, 2019, the defendant sent an e-mail to the plaintiff stating: "Honestly I want to jump on your back a little a rage and that would be dumb." Thereafter, the plaintiff falsely told the defendant that she was going to get married so that he would stop communicating with her. On March 3, 2019, the defendant sent the plaintiff an "absurd amount of e-mails," complaining, in part, about how the plaintiff's marriage would "interfere between us"[1] and also a text message wherein he expressed suicidal thoughts. After March 3, 2019, there were no communications of any nature between the parties.

On or about July 8, 2019, the plaintiff filed an application for an order of civil protection, pursuant to General Statutes § 46b-16a.[2] A hearing on the application was

[1] The e-mail from the defendant to the plaintiff reads: "I'm sorry. I didn't mean to act rude. I'm sorry for being a bad friend. I was self-conscious because I wasn't a great friend for you, which is my fault. I believed our friendship would've ended anyways, because maybe marriage would've separated us."

[2] The plaintiff had attempted twice prior to serve the defendant with notice of the application for a civil protection order, however, those attempts failed because the defendant could not be located. The plaintiff was able to serve the defendant on her third attempt with the assistance of a private investigator.

held on July 22, 2019. At the conclusion of the hearing, the court issued an oral decision granting the order of civil protection. The court's decision reads:

"The Court: Okay. I remember in law school—and I'll date myself when I give you this example—but the question was, could Whistler's Mother assault Muhammad Ali? He was our golden person, Olympic champion heavyweight boxer, and, Whistler's Mother was a little old [lady] in a portrait, rocking in a chair. And, the quick answer was how could that be? And, the test of an assault did not require physical contact, the apprehension was enough. So, if there was apprehension by Muhammad Ali from her then, that would be an assault. And, the test here [is] not what [the defendant's] thoughts are and his actions, but rather [the plaintiff's] apprehension.

"Statute is very clear that indicates that such person causes reasonable fear—the conduct of the defendant causes reasonable fear for the physical safety. So she's made it very clear she's very apprehensive, her conduct on the stand indicated she's reliving some of these things. *Things which depending on your level of threshold and thickness of skin become more or less significant*. But, it's very clear that this is very upsetting to her, and it's affected her ability to carry on life's activities.

"So the court finds that a restraining order will issue. The [defendant] shall not assault, threaten, abuse, harass, follow, interfere with, or stalk her. The [defendant] shall stay away from her home or wherever she shall reside. The [defendant shall] not contact in any matter, including written, electronic, or telephone contact. And not contact home, workplace, or others with whom the contact would likely cause annoyance or alarm to her. I'm going to order the [defendant] stay 100 [yards] away from her." (Emphasis added.)

On July 29, 2019, the defendant filed a motion to reargue pursuant to Practice Book § 11-12. The court summarily denied the defendant's motion. This appeal followed.[3]

On appeal, the defendant argues that the court abused its discretion in issuing the order of civil protection because "the [c]ourt failed to find that the actions of the defendant met the elements of the stalking statute" and because the court "failed to find that [the defendant's] actions were likely to continue in the future." In particular, the defendant argues that the court improperly focused on the plaintiff's "apprehension," while ignoring the continuation requirement set out in § 46b-16a (b). We agree with the defendant that the court abused its discretion in issuing the order of civil protection because the court did not apply an objective standard in finding that the plaintiff's fear was reasonable and because there was insufficient evidence to conclude that the defendant would continue to stalk or to commit acts designed to intimidate or retaliate against the plaintiff.

"We begin our analysis by setting forth the relevant legal principles and applicable standard of review. We apply the same standard of review to civil protection orders under § 46b-16a as we apply to civil restraining orders under General Statutes § 46b-15. Thus, we will not disturb a trial court's orders unless the court has abused its discretion or it is found that it could not

[3] Following the filing of this appeal, the defendant filed a motion requesting the court to enforce an automatic stay. On August 23, 2019, after hearing arguments from both the defendant and the plaintiff, the court terminated the stay. On August 27, 2019, the defendant filed a motion for review of the termination of the stay with this court, which granted review but denied the requested relief. On August 27, 2019, the defendant filed a motion for articulation, which the trial court denied on December 9, 2019. The defendant filed a motion for review of the denial of his motion for articulation with this court, which granted review but denied the requested relief.

reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion . . . we allow every reasonable presumption in favor of the correctness of its action. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Our deferential standard of review, however, does not extend to the court's interpretation of and application of the law to the facts. It is axiomatic that a matter of law is entitled to plenary review on appeal." (Internal quotation marks omitted.) *C. A.* v. *G. L.*, 201 Conn. App. 734, 738–39, 243 A.3d 807 (2020).

Section 46b-16a provides in relevant part: "(a) Any person who has been the victim of . . . stalking may make an application to the Superior Court for relief under this section . . . . (b) . . . If the court finds that there are reasonable grounds to believe that the respondent has committed acts constituting grounds for issuance of an order under this section and will continue to commit such acts or acts designed to intimidate or retaliate against the applicant, the court, in its discretion, may make such orders as it deems appropriate for the protection of the applicant. . . ."

In order for a court to issue an order of civil protection under § 46b-16a on the basis of stalking, it must find that there are reasonable grounds to believe that the defendant both stalked the plaintiff and will continue to commit such acts. See *C. A.* v. *G. L.*, supra, 201 Conn. App. 740; see also *Kayla M.* v. *Greene*, 163 Conn. App. 493, 506, 136 A.3d 1 (2016) ("an applicant for a civil protection order on the basis of stalking pursuant to § 46b-16a must prove only that there are

reasonable grounds to believe that every element is met and that such conduct will continue" (internal quotation marks omitted)). If a court issues an order without a proper finding or without sufficient evidence to support such a finding, as to either stalking or the continuation of such acts, it will constitute an abuse of discretion. See *C. A.* v. *G. L.*, supra, 739.

We begin with the trial court's determination on the first element of the statute, specifically, that the defendant's conduct caused the plaintiff to reasonably fear for her safety. We conclude, after a thorough review of the record, that the court failed to conduct the necessary analysis when it applied only the subjective standard of apprehension of fear, taken from a definition of assault, rather than the required subjective-objective standard of reasonable fear.

Section 46b-16a (a) defines stalking as "two or more wilful acts, performed in a threatening, predatory or disturbing manner of: Harassing, following, lying in wait for, surveilling, monitoring or sending unwanted gifts or messages to another person directly, indirectly or through a third person, by any method, device or other means, that causes such person to reasonably fear for his or her physical safety." "The standard to be applied in determining the reasonableness of the victim's fear in the context of the crime of stalking is a subjective-objective one. . . . As to the subjective test, the situation and the facts must be evaluated from the perspective of the victim, i.e., did she in fact fear for her physical safety. . . . If so, that fear must be objectively reasonable, i.e., a reasonable person under the existing circumstances would fear for his or her personal safety."[4] (Citations omitted; internal quotation marks omitted.) *C. A.* v. *G. L.*, supra, 201 Conn. App. 740.

[4] A previous revision of § 46b-16a had no subjective requirement, only requiring that a defendant's conduct cause a "reasonable person to fear." See *C. A.* v. *G. L.*, supra, 201 Conn. App. 740 n.6.

In its analysis, the court began with an anecdote, asking, "could Whistler's Mother assault Muhammad Ali?" The court provided the hypothetical analogy in order to set up a test of subjective apprehension in relation to the defendant's actions, rather than applying the subjective-objective standard required by § 46b-16a (a). See *C. A.* v. *G. L.*, supra, 201 Conn App. 740. In applying this logic, the court diluted the necessary finding that the "reasonable fear" be both subjectively and objectively reasonable and, instead, determined that the plaintiff's subjective "apprehension" was sufficient to make the necessary determination for stalking. The court continued to use only a subjective standard wherein it expressly found that "it's very clear that this is very upsetting to her." Further, that use was apparent when the court stated that the plaintiff's apprehension is dependent "on [a person's] level of threshold and thickness of skin . . . ."

Although the trial court's discussion can be construed as finding that the plaintiff was subjectively in fear for her safety, the trial court failed to determine whether the plaintiff's "apprehension" was *objectively* reasonable. As a result of the court's failure to apply the correct standard, it abused its discretion in issuing the protective order.

In addition to applying an improper analysis on the reasonable fear prong, the court failed to make a finding that the defendant would continue to commit acts of stalking against the plaintiff. At the hearing on the plaintiff's application for an order of civil protection in July, 2019, the plaintiff presented no evidence that the defendant would continue to stalk her. The plaintiff testified that there had been no communications between the defendant and her since March 3, 2019. The defendant testified that at some point after March 3, 2019, he dropped all of his classes and withdrew from the community college for that semester. He further testified

that in mid-April, 2019, he saw the plaintiff from a distance on the campus and walked away without contacting or communicating with her. Moreover, the defendant clearly conveyed to the plaintiff by both text messages and e-mails that he understood that their friendship was over and that he would cease communication with her. Although there was testimony that both parties would be returning as students to the community college in the fall of 2019, this evidence alone does not establish reasonable grounds for the court to find that the defendant would continue to commit such acts of stalking or acts designed to intimidate or retaliate against the plaintiff.

Although we recognize that "the court is presumed to know the law and apply it correctly to its legal determinations"; *Iacurci* v. *Sax*, 139 Conn. App. 386, 396, 57 A.3d 736 (2012), aff'd, 313 Conn. 786, 99 A.3d 1145 (2014); the court's decision is devoid of the necessary finding that the defendant would continue to stalk the plaintiff. Moreover, the court made no reference to any testimony or exhibits in support of its findings. The court's singular mention of "statute" relates only to whether the defendant's actions caused the plaintiff "reasonable fear." Thus, the court's analysis is limited to only the first element of whether the defendant "stalked" the plaintiff and does not reveal that the court considered the second element, as required by the relevant statute.

In *Kayla M.* v. *Greene*, supra, 163 Conn. App. 506, this court explained that "an applicant for a civil protection order on the basis of stalking pursuant to § 46b-16a must prove only that there are '*reasonable grounds to believe*' *that every element is met and that such conduct will continue*." (Emphasis added.) In the present case, the court failed to make the requisite findings pursuant to the statute by limiting its analysis to "reasonable fear"—an analysis that was itself incorrect.

The dissent concludes that "[the defendant's] testimony that he never thought about hurting anyone else is not credible" and that this overall lack of credibility supports a finding of continuing conduct. The dissent makes this credibility determination even though the trial court made no findings as to the credibility of the defendant. Rather, the trial court was clear that "the test [it applied] here [was] not what [the defendant's] thoughts are and his actions, but rather [the plaintiff's] apprehension." The trial court, therefore, made no determination as to the defendant's thoughts, actions, or credibility and found such considerations to be irrelevant.

Given the dearth of evidence on the critical factual question of whether the defendant would continue to stalk the plaintiff, we conclude that the court could not reasonably find that the continuing conduct element of § 46b-16a was proven. We therefore conclude that the court abused its discretion in issuing an order of civil protection for the plaintiff against the defendant.

The judgment is reversed and the case is remanded with direction to vacate the order of civil protection.

In this opinion, ALVORD, J., concurred.

EVELEIGH, J., dissenting. I respectfully dissent. I disagree with the conclusion of the majority that (1) the trial court did not apply an objective standard to the first element of stalking in its determination of "reasonable fear" and (2) there is insufficient evidence to support a finding that it was reasonably likely that the defendant, J. D., would continue to stalk or to commit acts designed to intimidate or retaliate against the plaintiff, S. B-R., as required for an order of civil protection pursuant to General Statutes § 46b-16a. To the contrary, I would conclude that (1) the trial court correctly followed the statute, and (2) there is sufficient evidence

in the record to support the trial court's decision granting the plaintiff's application for an order of civil protection pursuant to § 46b-16a. Accordingly, I would affirm the judgment of the trial court.[1]

I begin by setting forth the factual background of this action, as gleaned from the record. At all relevant times, the plaintiff and the defendant were students at a community college, where they were both enrolled in the college's nursing program. On July 8, 2019, the plaintiff filed an application for an order of civil protection. A hearing was held on the plaintiff's application on July 22, 2019, at which both the plaintiff and the defendant testified.

The plaintiff testified that she knew the defendant from school and that, on or about February 28, 2019, the defendant had sent her an "absurd amount of e-mails stating that, first, my marriage would have intervene[d] with things between us . . . ." When asked whether she was married, the plaintiff explained that she was not and that, in an effort to get the defendant to stop communicating with her, she had lied to the defendant and told him that she was getting married. When asked whether the defendant had made any statements to her that made her fear for her personal safety, the plaintiff responded yes. Specifically, she testified about an e-mail that the defendant had sent her on or about March 1, 2019, which stated: "Honestly, I want to jump on your back a little a rage and that would be dumb." The plaintiff further testified that, on March 3, 2019, the defendant sent her text messages about being suicidal, and that, on February 28, 2019, while in the presence of another person, he had made comments about her breasts that made her fearful of his conduct. With

[1] Our Supreme Court has not yet ruled on the issue of whether a § 46b-16a protective order may be granted when (1) there is prior evidence of criminal stalking, (2) there is a threat of a future criminal act, and (3) the defendant's testimony is not credible.

respect to the comments about her breasts, the plaintiff stated that the defendant "was being cocky and . . . was trying to intimidate [her]." Although the plaintiff acknowledged that the communications from the defendant ceased after March 3, 2019, she testified in July, 2019, that his communications with her caused her to fear for her personal safety, that she still feared for her personal safety, that she planned to attend classes at the community college in the fall, and that she feared that her safety would be at risk if she had any contact with the defendant.

The defendant testified that, in the upcoming fall semester, he did have classes with the plaintiff at the community college. He also acknowledged that he suffers from "a major depressive disorder," which includes suicidal thoughts. Although he claimed that the symptoms underlying the disorder are "all controlled," he also acknowledged that all of the symptoms have "not gone yet."

The court granted the plaintiff's application for an order of civil protection in an oral decision, stating that the "[s]tatute is very clear that indicates that such person causes reasonable fear—the conduct of the defendant causes reasonable fear for the physical safety.[2] So she's made it very clear [that] she's very apprehensive, her conduct on the stand indicated she's reliving some of these things. Things which, depending on your level of threshold and thickness of skin, become more or less significant. But, it's very clear that this is very upsetting to her, and it's affected her ability to carry on life's activities." (Footnote added.) The court ordered the defendant not to have any contact with the plaintiff and to stay 100 yards away from the plaintiff,

[2] The court clearly relied on General Statutes § 53a-181e (a), which provides that a person is guilty of stalking in the third degree when such person "recklessly causes another person to reasonably . . . fear for his or her physical safety . . . ."

and its order was effective for one year, until July 22, 2020.[3]

The decision of the majority to reverse the judgment of the trial court hinges on the majority's conclusion that (1) the trial court did not apply an objective standard to the first element of stalking in its determination of "reasonable fear," and (2) "the plaintiff presented no evidence that the defendant would continue to stalk her."[4] I disagree and would conclude, after "allow[ing] every reasonable presumption in favor of the correctness of [the trial court's] action"; (internal quotation marks omitted) *Kayla M.* v. *Greene*, 163 Conn. App. 493, 504, 136 A.3d 1 (2016); that the trial court's decision

[3] Although the order of civil protection has expired, the present appeal is not moot. See *C. A.* v. *G. L.*, 201 Conn. App. 734, 736 n.4, 243 A.3d 807 (2020) (applying to order of civil protection under § 46b-16a principle that "expiration of a six month domestic violence restraining order issued pursuant to General Statutes § 46b-15 does not render an appeal from that order moot due to adverse collateral consequences" (internal quotation marks omitted)).

[4] The majority mentions in its decision the fact that the trial court made no explicit finding on the record that "the defendant would continue to commit acts of stalking against the plaintiff" but never states that such an express finding is required. Pursuant to § 46b-16a (b), a trial court may issue an order of civil protection if it finds "that there are reasonable grounds to believe that the respondent has committed acts constituting grounds for issuance of an order . . . and will continue to commit such acts or acts designed to intimidate or retaliate against the applicant . . . ." This court has explained previously that "an applicant for a civil protection order on the basis of stalking pursuant to § 46b-16a must prove only that there are 'reasonable grounds to believe' that every element is met and that such conduct will continue." *Kayla M.* v. *Greene*, 163 Conn. App. 493, 506, 136 A.3d 1 (2016). Neither the statute nor case law directs that the court's findings must be written or express. Moreover, appellate courts "presume that the trial court, in rendering its judgment . . . undertook the proper analysis of the law and the facts." (Internal quotation marks omitted.) *Brett Stone Painting & Maintenance, LLC* v. *New England Bank*, 143 Conn. App. 671, 681, 72 A.3d 1121 (2013). In the present case, given the trial court's reference, in its oral decision, to the "very clear" requirements of the "statute," it reasonably can be inferred that the court relied on the language in the statute in rendering its decision.

was reasonably supported by the evidence in the record or the inferences drawn therefrom.

I agree with the majority that a subjective-objective test applies to the statute. I respectfully disagree, however, with the majority's conclusion that the trial court did not consider the objective part of the test. The trial court was reading from the statute when it issued its decision. Its emphasis on the subjective part of the test does not necessarily mean that the objective part was excluded. In Connecticut, our appellate courts do not presume error on the part of the trial court. See *Carothers* v. *Capozziello*, 215 Conn. 82, 105, 574 A.2d 1268 (1990). Rather, "we presume that the trial court, in rendering its judgment . . . undertook the proper analysis of the law and the facts." *S & S Tobacco & Candy Co.* v. *Greater New York Mutual Ins. Co.*, 224 Conn. 313, 322, 617 A.2d 1388 (1992). In my view, the reference to Muhammed Ali and Whistler's Mother, and to a person with thin skin, may be interpreted as an example of the judge considering how much each case had to be determined on the basis of the facts and circumstances surrounding it, and whether a reasonable person would be fearful under the circumstances. Indeed, in cases in which there has been no finding by the trial court, appellate courts have searched the record to see if the trial court's decision had an adequate basis in the record. Thus, in *Brett Stone Painting & Maintenance, LLC* v. *New England Bank*, 143 Conn. App. 671, 681, 72 A.3d 1121 (2013), in which a finding of default was a critical element in the case and the trial court had not made that explicit finding, the Appellate Court reviewed the record in its conclusion that an implicit finding of default was warranted. Likewise, in *Young* v. *Commissioner of Correction*, 104 Conn. App. 188, 190 n.1, 932 A.2d 467 (2007), cert. denied, 285 Conn. 907, 942 A.2d 416 (2008), in which the question of whether the habeas petitioner was in custody had not been decided in order

for the petitioner to maintain the habeas action, the Appellate Court was able to infer from the transcript the facts on which the trial court's decision appeared to have been predicated. In the present case, the transcript is replete with the defendant's admissions to his deplorable conduct. These admissions would certainly justify the inference that the objective standard had been met.

In *Kayla M.* v. *Greene*, supra, 163 Conn. App. 506, this court explained that "an applicant for a civil protection order on the basis of stalking pursuant to § 46b-16a must prove only that there are 'reasonable grounds to believe' that every element is met and that such conduct will continue." In *Kayla M.*, this court found that "there was sufficient evidence in the record from which the court reasonably could have concluded that there were reasonable grounds to believe that the plaintiff subjectively feared for her physical safety." Id., 511. Specifically, this court found that the trial court had credited the plaintiff's statements in her affidavit that she felt threatened by the defendant Edward Greene after he had grabbed her arm at her workplace and sent her a threatening e-mail, and that the trial court reasonably could have inferred, on the basis of those facts, that the plaintiff feared for her physical safety. Id. Moreover, although Greene testified at the hearing on the plaintiff's application for a civil protection order that "he had no intention of ever communicating with the plaintiff again"; id.; the trial court nevertheless found that he was " 'unnaturally obsessed' " with the plaintiff, and it reasonably inferred, on the basis of that obsession, that he "would continue his previous course of conduct." Id., 511, 512.

In the present case, the court reasonably could have found, on the basis of the testimony presented, that there were reasonable grounds to believe that the plaintiff feared for her physical safety and that the defendant

would continue in his course of conduct. We do not expect our trial judges to be soothsayers. All that is required is that there is a reasonable probability that the defendant will repeat the reported conduct such that there is a risk of imminent harm to the plaintiff. In this case, I cannot say that the decision of the trial court was an abuse of discretion or that its finding regarding the plaintiff's clear apprehension of the defendant was clearly erroneous.

The record here clearly shows that the defendant's conduct toward the plaintiff was truly bizarre and frightening. Clearly, the conduct was aberrant, obsessive, and delusional. He also threatened future assaultive conduct against the plaintiff when he said that he wanted to "jump on [her] back," in rage, even though he acknowledged that "that would be dumb." He further indicated delusional behavior when, in response to the plaintiff's statement to him that she was getting married, he stated that her marriage would interfere with their relationship. There was no relationship between the plaintiff and the defendant. On the basis of the plaintiff's testimony, however, the trial court reasonably could have inferred that the defendant wanted more than a mere friendship and that the plaintiff must have realized that, as she otherwise would not have invented the story about being married. See *In re Adalberto S.*, 27 Conn. App. 49, 54, 604 A.2d 822 ("court may draw reasonable, logical inferences from the facts proven"), cert. denied, 222 Conn. 903, 606 A.2d 1328 (1992).

The defendant also testified that he has a major depressive disorder that causes him to have suicidal thoughts and that the disorder, which caused his actions, has not fully gone away. Much like in *Kayla M.* v. *Greene*, supra, 163 Conn. App. 512, in which this court upheld the issuance of a civil protection order based, in part, on the defendant's obsession with the plaintiff, the defendant in the present case was fixated

on the plaintiff, as evidenced by the numerous unwanted e-mail and text messages that he sent to her. In testifying about his major depressive disorder,[5] the defendant stated that he thinks about things over and over, and he also acknowledged that the symptoms and depression associated with his disorder have not gone away yet. The trial court reasonably could have inferred from that testimony that it was reasonably probable that he would continue his conduct toward the plaintiff when school resumed. See *State* v. *Richards*, 196 Conn. App. 387, 397, 229 A.3d 1157 ("in determining whether the evidence supports a particular inference . . . an inference need not be compelled by the evidence; rather, the evidence need only be reasonably susceptible of such an inference" (internal quotation marks omitted)), cert. granted, 335 Conn. 931, 236 A.3d 218 (2020); *Hannon* v. *Redler*, 117 Conn. App. 403, 406, 979 A.2d 558 (2009) ("[i]t is within the province of the trial court to find facts and draw proper inferences from the evidence presented" (internal quotation marks omitted)); *Lupoli* v. *Lupoli*, 38 Conn. App. 639, 643, 662 A.2d 809 ("the role of the trial court as fact finder [is] to judge the credibility of the witnesses, to weigh the evidence and to draw logical inferences and conclusions from the facts proven"), cert. denied, 235 Conn. 907, 665 A.2d 902 (1995).

I also think it is important to note that the trial court in the present case had the benefit of hearing from both

[5] A significant portion of the defendant's testimony on direct examination concerned his major depressive disorder, from which the defendant readily acknowledged that he suffers. He also testified and acknowledged that one of the behaviors of his disorder is obsessive type behavior. Under these circumstances, the court was free to accept or reject all or part of the defendant's testimony about his obsessive type behavior. See *Kayla M.* v. *Greene*, supra, 163 Conn. App. 511–12 (court reasonably could have inferred from evidence produced at hearing that defendant was " 'unnaturally obsessed' " with plaintiff, and, on basis of that obsession, court could have inferred that defendant would continue his previous course of conduct).

parties during the hearing and judging their credibility. The court could have accepted or rejected all or a part of the defendant's testimony. "Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude. . . . An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom." (Internal quotation marks omitted.) *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, 171 Conn. App. 61, 93–94, 156 A.3d 539 (2017), aff'd, 333 Conn. 343, 216 A.3d 629 (2019). It would strain credulity for the court to have accepted the defendant's testimony that he had ideas of hurting himself only and never anyone else, when he clearly had issued a threat to jump on the plaintiff's back in rage. Further, the court obviously did not choose to accept the defendant's testimony that his condition was under control when the hearing occurred only a few months after his bizarre acts and he was going to attend the same school with the plaintiff in September. Moreover, the defendant freely admitted that he had considered suicide. Such an act of violence would certainly justify a trial judge to find that a protective order should issue to protect someone who had spurned him and against whom he had made a threat to jump on her back in rage.

The threat of future conduct has to be a significant element in any trial court's decision to issue a protective order, and there certainly was sufficient evidence of a probability of future assaultive conduct here to cause reasonable fear in the plaintiff and to satisfy the objective standard requirement. "[A]n applicant for a civil protection order on the basis of stalking pursuant to § 46b-16a must prove only that there are reasonable

grounds to believe that every element is met and that such conduct will continue. . . . In determining whether there are reasonable grounds to believe that stalking occurred, it is instructive that, in the criminal context, [t]he phrase reasonable grounds to believe is synonymous with probable cause. . . . While probable cause requires more than mere suspicion . . . the line between mere suspicion and probable cause necessarily must be drawn by an act of judgment formed in light of the particular situation and with account taken of all the circumstances." (Citations omitted; internal quotation marks omitted.) *Kayla M.* v. *Greene*, supra, 163 Conn. App. 506. The defendant's credibility, or lack thereof, is a key element in this determination.

The majority concludes that it must reverse because the court did not consider the objective standard and there is no evidence of future conduct. I respectfully disagree because of the defendant's threat of jumping on the plaintiff's back in rage, his unwanted e-mails, the comment about the plaintiff's breasts, and his overall lack of credibility. I further disagree because it would be the rare case in which a defendant testified that he would keep doing the acts which brought him before the court or told someone else to that effect. The defendant in this case engaged in obsessive behavior. At the hearing, he admitted that part of his major depressive disorder has an obsessive component, namely, that he would keep thinking about the same thing over and over. He further testified that his condition was not fully resolved, as he must take medication every night and get treatment from counselors and therapists. Because he had threatened the plaintiff, his testimony that he never thought about hurting anyone else is not credible. In my view, reviewing both the evidence and the reasonable inferences derived therefrom, there clearly was no abuse of discretion in this matter.

For the foregoing reasons, I respectfully dissent.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 208

U.S. BANK TRUST, N.A., TRUSTEE
v. GREGG P. HEALEY ET AL.
(AC 43586)

Alvord, Cradle and Palmer, Js.

Argued October 5—officially released October 19, 2021

Defendants' appeal from the Superior Court in the judicial district of Stamford-Norwalk, Housing Session at Norwalk, *Spader*, *J.*

Per Curiam. The judgment is affirmed.

HAROLD DAVID SETZER *v.* MICHAEL GUGLIOTTI
(AC 44154)

Elgo, Suarez and Vertefeuille, Js.

Argued October 5—officially released October 19, 2021

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

Per Curiam. The judgment is affirmed.

IN RE NEVEAH D. ET AL.
(AC 44648)

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

Argued October 7—officially released October 19, 2021

Respondent mother's appeal from the Superior Court in the judicial district of New Haven, Juvenile Matters, *Marcus*, *J.*

Per Curiam. The judgments are affirmed.

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claim that admission into evidence of death certificate violated defendant's sixth amendment right to confrontation because death certificate contained testimonial hearsay; claim that trial court violated defendant's constitutional right to conflict free representation when trial court failed to inquire, sua sponte, into conflict of interest defense counsel created.

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SUPREME COURT PENDING CASE

The following appeal is assigned for argument in the Supreme Court on November 16, 2021

AGW SONO PARTNERS, LLC *v.* DOWNTOWN SOHO, LLC, et al.,
SC 20625
Judicial District of Stamford-Norwalk, Housing Session at Norwalk

Contracts; Damages; Whether Trial Court Properly Rejected Defendant's Special Defenses that Executive Orders Issued in Response to COVID-19 Pandemic Excused Breach of Restaurant Lease Under Doctrines of Impossibility, Illegality or Frustration of Purpose; Whether Trial Court Erred in Determining Damages. The plaintiff owns property in Norwalk and was assigned a ten year commercial lease with the defendant Downtown Soho, LLC, which operated a fine dining restaurant and upscale bar. The lease required that the defendant comply with all governing laws and regulations and further provided that the premises could only be used for a "first-class restaurant and bar." The defendant failed to make timely lease payments in January and February, 2020, but cured the defaults shortly thereafter. On March 10, 2020, the governor declared a public health and civil preparedness emergency in response to the spread of the COVID-19 pandemic, and, the next day, the plaintiff sent the defendant a default notice regarding the March lease payment, which was not cured. Beginning in March, 2020, the governor issued a series of executive orders that, inter alia, closed bars and prohibited in-person dining at restaurants through May 20, 2020. Although restaurants were then permitted to operate at 50 percent indoor capacity with social distancing measures in place, the defendant's restaurant, which previously had a capacity of over 140 patrons, was limited to a maximum indoor capacity of twenty-five individuals, including staff. As a result, the restaurant operated at a loss through the summer of 2020, and, after the defendant vacated the premises, the plaintiff found a new tenant that took possession in January, 2021. The plaintiff brought this action for breach of the lease agreement, and the defendant raised as special defenses that, in light of the executive orders, the breach was excused under the doctrines of impossibility, illegality, or frustration of purpose. The court rejected those claims, finding that the lease did not require the operation of a profitable restaurant and, moreover, that the lease had allocated the risk of complying with governmental orders to the defendant. Furthermore, the court disagreed with the defendant's argument that reliance on takeout orders was inconsistent with use of the premises for a "first-class restaurant," as the lease was not

specifically limited to indoor dining or a specific dining experience. The trial court awarded $200,308.76 in damages for unpaid lease payments from March, 2020, through December, 2020, the subsequent real estate commission, and legal fees and costs. The defendant appealed and the plaintiff cross appealed to the Appellate Court, and the Supreme Court transferred the appeals to itself. The defendant claims that the trial court erred because the executive orders made it commercially impractical to operate a fine dining restaurant, frustrating the purpose of the lease, and because the parties had entered into the lease assuming the nonoccurrence of a pandemic that forced the widespread shutdown of restaurants and businesses. The defendant also claims that the court misinterpreted the lease, failed to consider the breakdown of the parties' negotiations, and erred in determining the percentage of business affected by the executive orders. In its cross appeal, the plaintiff claims that the court erred in its damages award by finding certain evidence insufficient or speculative and by failing to award the difference in value between the defendant's lease and the value of the subsequent tenant's lease.

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

Jessie Opinion
Chief Staff Attorney

NOTICES

Notice of Certification as Authorized House Counsel

Upon recommendation of the Bar Examining Committee, in accordance with § 2-15A of the Connecticut Practice Book, notice is hereby given that the following individuals have been certified by the Superior Court as Authorized House Counsel for the organization named:

Certified as of August 28, 2021:

Angela Borreggine	Virtus Investment Partners LLC

Certified as of September 13, 2021:

Melissa A. Snyder	Foley Carrier Services, LLC

Certified as of September 28, 2021:

A. Gregory Finkell	Raytheon Technologies Corp Pratt & Whitney Div.

Certified as of September 29, 2021:

Sadaf Nakhaei	Beiersdorf Inc.

Notice of Suspension of Attorney and Appointment of Trustee

Pursuant to Practice Book § 2-54, notice is hereby given that on August 9, 2021, in Docket Number HHD-CV17-6084248-S, Robert O Wynne, Juris No., was suspended from the practice of law as follows: regarding motion no. 141, the Respondent is suspended from the practice of law for a period of one (1) year, retroactive to January 27, 2021; regarding motion no. 149, the Respondent is suspended from the practice of law for a period of one (1) year, retroactive to January 27, 2021. The intent of the court is that these suspensions run consecutively, not concurrently.

The Respondent shall comply with Practice Book § 2-47B (Restrictions on the Activities of Deactivated Attorneys) and any orders of this court regarding employment as a paralegal previously issued pursuant to Practice Book § 2-47B.

Any application for reinstatement shall be made pursuant to the provision of Practice Book § 2-53.

Prior to any reinstatement, the Respondent shall take, at his own expense, three credit hours of continuing legal education (CLE) in IOLTA Account Management.

Pursuant to Practice Book § 2-64, Attorney Cody N. Guarnieri, Juris No. 434005, of Brown Paindiris & Scott, LLP, 100 Pearl Street, Hartford, CT 06103, is appointed 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.

The Trustee shall not make any disbursements from said accounts without the prior authorization of the Court. The Trustee shall notify all active clients of the

Respondent's suspension and the need to arrange for their self-representation or successor counsel, if necessary.

The Respondent shall cooperate with the Trustee in all respects.

Susan Quinn Cobb
Presiding Judge

OFFICE OF STATE ETHICS

Office of State Ethics advisory opinions are published herein pursuant to General Statutes Sections 1-81 (3) and 1-92 (5) and are printed exactly as submitted to the Commission on Official Legal Publications.

Advisory Opinion No. 2021-3. September 23, 2021

Questions Presented: **The petitioner asks whether the Code would prohibit him ''from both . . . continuing to hold [his] appointed state position as a Deputy Commissioner at the Department of Administrative Services (ƒDAS''), and . . . concurrently serving [his] community as a volunteer in an elective position on the Guilford Board of Education§; and whether ''there [are] any ethical conflicts that are created by the fact that in [his] state . . . position, [he is] responsible for oversight of the Office of School Construction[.]''**

Brief Answers: **We conclude: (1) Section 5-266a-1 of the regulations—which bars certain state employees from holding elective municipal office—does not apply to the petitioner in his capacity as a Deputy Commissioner at DAS; (2) his uncompensated service on the Guilford Board of Education would not constitute ''employment'' and thus would not violate the Code's outside-employment rules; and (3) the Code's conflict provisions would not, by virtue of his uncompensated service on the Guilford Board of Education, bar him from taking any official actions as Deputy Commissioner at DAS.**

At its August 19, 2021 regular meeting, the Citizen's Ethics Advisory Board (''Board'') granted the petition for an advisory opinion submitted by Noel Petra, Deputy Commissioner of Real Estate & Construction Services at DAS. The Board now issues this advisory opinion in accordance with General Statutes § 1-81 (a) (3) of the Code of Ethics for Public Officials (''Code'').

Background

In his petition, Mr. Petra provides the following for our consideration:

> My name is Noel Petra, I live at 44 Old Quarry Rd, Guilford, CT, and I am the Deputy Commissioner for Real Estate and Construction Services at the Department of Administrative Services (''DAS''). I am planning to run for the Board of Education in my hometown, Guilford, Connecticut. This is an uncompensated, elective position.
>
> Are there any provisions of the State Code of Ethics that would prohibit me from both (1) continuing to hold my appointed state position as a Deputy Commissioner at DAS, and (2) concurrently serving my community as a volunteer in an elective position on the Guilford Board of Education?

> Specifically, are there any ethical conflicts that are created by the fact that in my state Deputy Commissioner position, I am responsible for oversight of the Office of School Construction?

Analysis

We start (as always) with the issue of jurisdiction. Persons generally subject to the Code are described in it as either ''Public officials'' or ''State employees.'' The Code defines the former to include (among others) ''any person appointed to any office of the . . . executive branch of state government by the Governor or an appointee of the Governor . . . .'' General Statutes § 1-79 (11). As a Deputy Commissioner at DAS, Mr. Petra was appointed to a state executive-branch office by the Commissioner of Administrative Services, a gubernatorial appointee. See General Statutes §§ 4-4 through 4-8. He is, therefore, a ''Public official'' and, as such, is subject to the Code, including its outside-employment and conflict provisions, about which he specifically inquires.

Before addressing those provisions, we stress, as did our predecessor, the former State Ethics Commission, that when it comes to political activity, our ''jurisdiction . . . is limited.'' Declaratory Ruling 97-A; see also Informal Request for Advisory Opinion No. 3062 (2002) (''[t]he Ethics Commission has very limited jurisdiction regarding the political activity of state employees''); Informal Request for Advisory Opinion No. 1783 (1997) (''[t]he Commission's jurisdiction regarding political activity is limited'').

Indeed, we have ''jurisdiction over only one aspect of state employee political activity.'' Informal Request for Advisory Opinion No. 3168 (2002). Our jurisdiction stems from General Statutes § 5-266a (b), which mandates that ''[t]he Citizen's Ethics Advisory Board shall establish by regulation definitions of conflict of interest which shall preclude persons in the *classified state service or in the Judicial Department* from holding elective office.'' (Emphasis added.) That regulation—§ 5-266a-1 of the Regulations of Connecticut State Agencies—provides that ''[t]here is a conflict of interests which precludes a person in State service from holding or continuing to hold elective municipal office'' in one of two instances. The first is when ''[t]he Constitution or a provision of the General Statutes prohibits a *classified State employee or a person employed in the Judicial Department* from seeking or holding the municipal office.'' (Emphasis added.) Regs., Conn. State Agencies § 5-266a-1 (a) (1). The second is when ''[t]he *classified State employee* has an office or position which has discretionary power to'' do as follows:

> (A) Remove the incumbent of the municipal office;
>
> (B) Approve the accounts or actions of the municipal office;
>
> (C) Institute or recommend actions for penalties against the incumbent of the municipal office incident to the incumbent's election or performance of the duties of said office;
>
> (D) Regulate the emoluments of the municipal office;
>
> (E) Affect any grants or subsidies, administered by the State, for which the municipality in which the municipal office would be held is eligible.

(Emphasis added.) Regs., Conn. State Agencies § 5-266a-1 (a) (2).

As is clear from the italicized language above, § 5-266a-1 applies to just two groups of persons—namely, ''classified State employee[s]'' and ''person[s] employed by the Judicial Department''—and Mr. Petra fits within neither group. That is, as a Deputy Commissioner at DAS, he is employed by the executive, not judicial, branch of state government; see General Statutes § 4-38c; and as an appointed official under General Statutes § 4-8, he is not a ''classified state employee.''[1] Accordingly, the prohibition in § 5-266a-1 does not apply to Mr. Petra in his capacity as a Deputy Commissioner at DAS. See Advisory Opinion No. 95-5 (concluding that the Deputy Commissioner of the Department of Veterans Affairs ''is an appointed official rather than a classified state employee,'' and that the ''restriction [in '' 5-266a-1 therefore] does not apply to him'').

Moving on to the Code's outside-employment and conflict provisions, Mr. Petra asks, concerning the former, whether ''the outside employment provisions of the Code of State Ethics, specifically C.G.S. Secs. 1-84(b) and 1-84(c), prohibit me from participating as a member of the Guilford Board of Education[.]'' Subsections (b) and (c) of § 1-84 house the Code's primary outside employment rules, which provide, in relevant part, as follows:

> (b) No public official . . . shall accept other employment which will either impair his independence of judgment as to his official duties or employment or require him, or induce him, to disclose confidential information acquired by him in the course of and by reason of his official duties.
>
> (c) No public official . . . shall use his public office . . . or any confidential information received through his holding such public office . . . to obtain financial gain for himself, his spouse, child, child's spouse, parent, brother or sister or a business with which he is associated.

These provisions, according to the regulations, ''are violated when the public official . . . accepts outside employment with an individual or entity which can benefit from the state servant's official actions (e.g., the individual in his or her state capacity has specific regulatory, contractual, or supervisory authority over the private person).'' Regs., Conn. State Agencies § 1-81-17.

In this case, it appears that the town of Guilford and its Board of Education, on which Mr. Petra wants to serve, could benefit from his position as Deputy Commissioner at DAS due to his ''responsibil[ity] for oversight of the Office of School Construction[.]'' Even so, his service on the Board of Education would not trigger the Code's outside-employment prohibitions, given that his *uncompensated* service would not constitute ''employment,'' about which the regulations have this to say:

> [T]he term employment shall be construed to include any work or endeavor, whatever its form, undertaken in order to obtain *financial gain* (e.g., employee of a business, sole practitioner, independent contractor, investor, etc.). *The term shall not, however, include any endeavor undertaken* only as a hobby or *solely for* charitable, educational, or *public service purposes, when no compensation or other financial gain for*

[1] The job description for Deputy Commissioner of Construction Services at DAS states, under ''Job Class Designation,'' that the position is ''Unclassified.'' https://www.jobapscloud.com/CT/specs/classspecdisplay.asp?ClassNumber=0692EX&LinkSpec=RecruitNum2&R1=&R3=.

> *the individual*, his or her immediate family or a business with which the individual is associated *is involved*.

(Emphasis added.) Regs., Conn. State Agencies § 1-81-14. Given that Mr. Petra's ''endeavor'' (i.e., service on the Board of Education) would be undertaken solely for public service purposes, and that there would be no compensation or other financial gain for him (or, presumably, for his immediate family or any ''business with which he [may be] associated''), his service would not constitute ''employment'' and thus would not violate the Code's outside-employment provisions. See Advisory Opinion No. 81-9 (concluding that uncompensated service on a local board of education ''is not, as subsection l-84(b) requires, 'employment' '').

Turning to the Code's conflict provisions, General Statutes §§ 1-85 and 1-86 (a), Mr. Petra asks three questions: (1) whether ''there any substantial or potential conflicts with me participating on my local board of education''; (2) whether ''my participation on the Board of Education [would] prohibit me from taking any official actions in my role overseeing the Office of School Construction''; and (3) whether ''there [are] any matters in which I would be required by the Code . . . to abstain from taking official action[.]''

Sections 1-85 and 1-86 (a)—which define and proscribe substantial and potential conflicts of interests for Code purposes—apply to Mr. Petra's conduct only in his state capacity (and not in his capacity as a member of the Board of Education). Under § 1-85, Mr. Petra generally has a substantial conflict (and may not take official action on a matter) if he has ''reason to believe or expect that he, his spouse, a dependent child, or a *business with which he is associated* will derive a direct monetary gain or suffer a direct monetary loss, as the case may be, by reason of his official activity. . . .''[2] (Emphasis added.) And under § 1-86 (a), he generally has a potential conflict (and likewise may not take official action on a matter) if he ''would be required to take an action that would affect . . . [his] financial interest . . . [or that of his] spouse, parent, brother, sister, child or the spouse of a child or a *business with which [he] . . . is associated*. . . .''[3] (Emphasis added.)

To answer Mr. Petra's questions concerning those provisions, we must first answer whether the Board of Education is a ''business with which he is associated,'' which (with an exception not pertinent here) is defined, in General Statutes § 1-79 (2), as follows:

> [A]ny sole proprietorship, partnership, firm, corporation, trust or other entity through which business for profit or not for profit is conducted in which the public official or state employee or member of his or her immediate family is a director, officer, owner, limited or general partner, beneficiary of a trust or holder of stock constituting five per cent or more of the total outstanding stock of any class. . . . ''Officer'' refers only to the president, executive or senior vice president or treasurer of such business.

That definition was the subject of Advisory Opinion No. 90-29, titled ''Application of 'Business With Which Associated' to Governmental Entities.'' One of the ques-

[2] There is an exception in § 1-85 to the general rule: An individual does not have a substantial conflict, ''if any benefit or detriment accrues to him, his spouse, a dependent child, or a business with which he, his spouse or such dependent child is associated as a member of a profession, occupation or group to no greater extent than any other member of such profession, occupation or group.''

[3] No potential conflict exists if the financial impact is de minimis (i.e., less than $100 per person per year) or indistinct from that of a substantial segment of the general public (e.g., all homeowners). General Statutes § 1-86 (a); Regs. Conn. State Agencies § 1-81-30.

tions there was ''whether governmental entities are excluded from the . . . Code's definition of 'Business with which . . . associated' . . . .'' The answer, in the former State Ethics Commission's opinion (with which we agree), was yes: ''The Commission declines . . . to . . . rule that the term . . . includes municipalities and other governmental entities,'' for ''[n]othing in the legislative history supports such a construction,'' and ''no Connecticut case has held that the terms 'business' and 'government' are in any way synonymous.''

Here, then, the Board of Education would not be a ''business with which [Mr. Petra] is associated'' because it is not a business, but rather a governmental entity. See *Cheney* v. *Strasburger*, 168 Conn. 135, 141 (1975) (noting that ''a town board of education is an agent of the state when carrying out the educational interests of the state,'' and that its ''members . . . are . . . officers of the town''). And because it would not be a ''business with which he is associated,'' his mere uncompensated service on the Board of Education would not create any conflicts under §§ 1-85 and 1-86 (a), meaning those provisions would not (in answer to his questions) prohibit him from taking any official actions as Deputy Commissioner at DAS (including actions in his role overseeing the Office of School Construction).[4]

Before concluding, we stress that this opinion interprets the Code only, and that it does not address appearance issues, which are beyond the Code's scope. See Advisory Opinion No. 2009-7 (''[t]he Code . . . does not speak of appearances of conflict, only actualities,'' so in ''interpreting and enforcing the Code . . . [we are] limited, by statute, from addressing appearances or perceptions of conflict of interest'' [internal quotation marks omitted]).

Conclusion

We conclude that (1) the prohibitions in § 5-266a-1 do not apply to Mr. Petra in his capacity as a Deputy Commissioner at DAS; (2) his uncompensated service on the Guildford Board of Education would not constitute ''employment'' and thus would not violate the Code's outside-employment rules; and (3) §§ 1-85 and 1-86 (a) would not, by virtue of his uncompensated service on the Guilford Board of Education, prohibit him from taking any official actions as Deputy Commissioner at DAS.

By order of the Board,

Dated 9/23/21

/s/Dena Castricone
Chairperson

[4] This assumes, of course, that neither Mr. Petra himself nor any of the family members listed in §§ 1-85 and 1-86 (a) would be impacted financially by virtue of such official action.

Notice of Public Hearing on Proposed Revisions to Probate Court Rules of Procedure

Adoption of Revisions to the Probate Court Rules of Procedure

Notice is hereby given that on November 17, 2021 at 2:00 p.m., the probate court judges designated by the Probate Court Administrator will conduct a public hearing in the Supreme Court in Hartford for the purpose of receiving comments concerning the following proposed revisions to the Connecticut Probate Court Rules of Procedure. The proposed revisions are recommended by the Probate Court Administrator pursuant to the provisions of § 45a-78 of the Connecticut General Statutes and are also posted on the Probate Court Administrator's website at www.ctprobate.gov.

Written comments concerning these proposed revisions may be forwarded to the following address:

Probate Court Administrator
186 Newington Road
West Hartford, CT 06110

Written comments must be received by November 16, 2021.

Hon. Beverly K. Streit-Kefalas
Probate Court Administrator

Rule 1

Definitions

Section
1.1 Definitions

Section 1.1 Definitions

In these rules:

(15) ''Electronic signature'' means an electronic symbol or process executed or adopted by a person with the intent to sign the document. and does not include a juris number or conformed copy of a signature.

(17) ~~''Fiduciary'' means a person serving as an administrator, executor, conservator of the estate, conservator of the person, guardian of an adult with intellectual disability, guardian of the estate of a minor, guardian of the person of a minor, temporary custodian of the person of a minor, trustee or person serving in any other role that the court deter- mines is fiduciary in nature.~~ ''Exemplified copy'' means a copy of a document that has been authenticated by a court of competent jurisdiction.

~~(17)~~(18) ''Fiduciary'' means a person serving as an administrator, executor, conservator of the estate, conservator of the person, guardian of an adult with intellectual disability, guardian of the estate of a minor, guardian of the person of a minor, temporary custodian of the person of a minor, trustee or person serving in any other role that the court determines is fiduciary in nature.

~~(18)~~(19) ''Financial report'' means a simplified form of accounting meeting the requirements of rule 37 by which a fiduciary provides summary information about the management of an estate.

~~(19)~~(20) ''Heir'' means an individual who would take any share of the estate of a decedent who died intestate.

~~(20)~~(21)''Intestate'' means having died without a valid will.

~~(21)~~(22) ''Minor'' has the meaning provided in C.G.S. section 45a-604(4).

~~(22)~~(23)''Motion'' means a written filing seeking court action that is incidental to the matter before the court.

~~(23)~~(24)''News media'' means an entity, or representative of an entity, that is regularly engaged in the gathering and dissemination of news and is approved by the office of the chief court administrator.

~~(24)~~(25)''News media coverage'' means broadcasting, televising, recording or photographing a hearing or conference by news media.

~~(25)~~(26)''Nontaxable estate'' means the estate of a decedent whose Connecticut taxable estate is less than or equal to the amount that is exempt from the Connecticut estate tax under C.G.S. section 12-391.

~~(26)~~(27)''Party'' means a person having a legal or financial interest in a proceeding before the court, a fiduciary under section 4.2 and any other person whom the court determines to be a party. The term has the same meaning as interested party.

~~(27)~~(28)''Person'' means an individual or entity.

~~(28)~~(29)''Person under conservatorship'' means a conserved person as defined under C.G.S. section 45a-644(h) or a person under voluntary representation under C.G.S. section 45a-646.

~~(29)~~(30)''Personal surety'' means a surety that does not meet the requirements to be a corporate surety.

~~(30)~~(31)''Petition'' means a written filing that commences a matter in the court. The term has the same meaning as application.

~~(31)~~(32)''Presumptive remainder beneficiary'' means a trust beneficiary who would be a distributee or permissible distributee of trust income or principal on the date the beneficiary's interest is determined if:

(A) the trust terminated on the date; or

(B) the interests of the current beneficiaries terminated on the date without causing the trust to terminate.

~~(32)~~(33)''Probate bond'' has the meaning provided in C.G.S. section 45a-139.

~~(33)~~(34)''Probate court administrator'' means the individual holding the office of the probate court administrator of this state.

~~(34)~~(35) ''Probate Court Rules'' means the Connecticut Probate Court Rules of Procedure.

~~(35)~~(36) ''Public notice'' has the meaning provided in C.G.S. section 45a-126.

~~(36)~~(37) ''Purported will'' means an instrument purporting to be a decedent's last will and testament and any codicil to it that has not been admitted to probate.

~~(37)~~(38) 'Registered filer'' means a person who has registered to use the eFiling system.

~~(38)~~(39)''Send'' means transmit by electronic means, United States mail, private carrier, in-hand delivery or other commonly accepted method of communication.

~~(39)~~(40)''Structured settlement'' means an arrangement under which a claimant accepts deferred payment of some or all of the proceeds of the settlement of a disputed or doubtful claim.

~~(40)~~(41)''Taxable estate'' means the estate of a decedent whose Connecticut taxable estate exceeds the amount that is exempt from the Connecticut estate tax under C.G.S. section 12-391.

~~(41)~~(42)''Testate'' means having died leaving a valid will.

~~(42)~~(43)''Trust beneficiary'' means a person that has a present or future beneficial interest in a trust, whether vested or contingent.

~~(43)~~(44) ''Trust protector'' means a person identified in a will or other governing instrument who is charged with protecting the interests of a trust beneficiary and is identified as a trust protector, trust advisor, or beneficiary surrogate or as a person in an equivalent role.

~~(44)~~(45)''Will'' means an instrument and any codicil to it admitted to probate as the last will and testament of a decedent.

Rule 4

Parties

Section 4.1 Parties

(a) Except as otherwise permitted by the court, only a party may participate in a proceeding before the court.

(b) Special notice under C.G.S. section 45a-127 or ~~The~~ listing ~~of~~ a person on an order of notice does not make the person a party.

Rule 5

Self-representation; Representation by Attorney and Appearance

Section 5.5 Form of appearance

(a) An appearance of an attorney shall:

(1) list in the heading the name of the matter, the name of the Probate Court and the date of the appearance;

(2) contain the name and mailing address of the client represented by the attorney;

(3) be signed by the attorney making the appearance;

~~(3)~~(4) contain the attorney's name, juris number, law firm, mailing address, email address and telephone number; and

~~(4)~~(5) indicate whether the appearance is filed in lieu of, or in addition to, an appearance on file.

(b) An attorney shall send a copy of the appearance to each attorney and self-represented party and certify to the court that the copy has been sent.

(c) If the appearance is in lieu of an appearance on file, the attorney filing the new appearance shall, in addition to the requirements of subsection (b), send a copy of the new appearance to the attorney whose appearance is to be replaced and certify to the court that the copy has been sent.

Rule 7

Filing Requirements

Section 7.1 General filing requirements

(a) Except as provided in section 7.1a, a registered filer who has been granted eFiling access to a matter under section 22.2 shall eFile all documents relating to the matter. A person without eFiling access to the matter shall file all documents in paper form.

(b) A document filed with the court shall:

(1) be typed or printed and, if submitted on paper, be prepared using ink;

(2) be signed in accordance with section 7.4;

(3) after the matter is commenced, refer to the name that the court assigned the matter; and

(4) satisfy the filing requirements under governing statutes and these rules.

(c) The court may accept for filing a document that is in substantial compliance with the requirements of subsection (b).

(d) The court may require a party to file an amended or substitute document to correct a document ~~by substituting a corrected or substituted document or page~~ previously filed with the court.

(e) If required by these rules, a person filing a petition or other document shall send a copy of the petition or document to each party and attorney of record and certify to the court that the copy has been sent. If these rules do not require the filing party to send a copy of the petition or document to each party and attorney, the filing party shall send a copy of the filing to any party or attorney who requests it, free of charge.

Section 7.1a Documents not to be eFiled

A person may not eFile:

(1) an original will, codicil or other testamentary document, including an exemplified copy of the will and record of proceedings to commence an ancillary estate under C.G.S. section 45a-288;

(2) an original probate bond or bond rider;

(3) an original record of adoption on a form published by the commissioner of public health;

(4) an original record of paternity on a form published by the commissioner of public health; or

(5) a document that the court requires in paper form.

Rule 8

Notice

Section 8.6 Streamline notice procedure

(a) The streamline notice procedure described in subsections (b) through (f) is an alternative method of notifying the parties of a pending petition. For the types of matters described in subsections (g) and (h), use of the streamline notice procedure under this section satisfies a requirement for notice and hearing under statute or these rules.

(b) When using the streamline notice procedure, the court shall give notice of the right to request a hearing to each person that the court determines is entitled to notice under section 8.2.

(c) A notice of the right to request a hearing shall include a statement that:

(1) the court will, on written request of a party, schedule a hearing on the motion or petition;

(2) the court must receive the written request for a hearing on or before the date specified in the notice; and

(3) the court may approve the motion or petition without a hearing if a written request for a hearing is not received on or before the date specified in the notice.

(d) The court shall give notice of the right to request a hearing at least ten days before the deadline to request a hearing.

(e) If the court receives a timely written request for a hearing, the court shall schedule a hearing and give notice of the hearing.

(f) If the court does not receive a timely written request for a hearing, the court may approve the motion or petition. The court may not deny the motion or petition without scheduling a hearing and giving notice of the hearing.

(g) Except as provided in subsection (i), the court shall use the streamline notice procedure under this section in the following types of matters:

(1) decedents' estates; and

(2) trusts.

(h) Except as provided in subsection (i), the court may use the streamline notice procedure under this section in the following types of matters:

(1) an account of a guardian of the estate of a minor;

(2) an account or petition to excuse an account under rule 33.17 of a conservator of the estate;

(3) an account of a guardian of an adult with intellectual disability;

(4) a motion to modify visitation orders;

(5) a motion to transfer a probate file between probate courts under C.G.S. section 45a-599 or 45a-677(h);

(6) a motion to transfer a contested children's matter to the Superior Court under C.G.S. section 45a-623 or 45a-715(g); ~~and~~

(7) a petition to transfer a conservatorship matter to another state or accept a transfer from another state under C.G.S. section 45a-667p or 45a-667q; and

(8) a motion to transfer a children's matter to a Regional Children's Probate Court by a court that does not participate in a children's court under rule 18.5.

(i) The court shall schedule a hearing rather than using the streamline notice procedure for a proceeding specified in subsection (g) or (h) if the court determines that:

(1) the matter is contested or requires testimony or legal argument;

(2) public notice is required to protect the interests of a party;

(3) the circumstances related to the particular petition require the conduct of a hearing with attendance by a party; or

(4) the matter involves the doctrine of cy pres or equitable deviation or the construction of a document that affects a charitable beneficiary or interest.

Rule 13

Court-appointed Guardian Ad Litem

Section

13.9 Guardian ad litem fees and expenses

Section 13.9 Guardian ad litem fees and expenses

The court shall determine whether the guardian ad litem fees and expenses are reasonable in light of the scope of appointment, whether or not an interested party raises an objection to the fees or expenses.

Rule 18

Transfer of Matter between Probate Courts

Section 18.5 Transfer of children's matter to Regional Children's Probate Court

(a) On motion of a party or on the court's own motion, a court that does not participate in a Regional Children's Probate Court may transfer a children's matter to a children's court.

(b) Before deciding a motion to transfer, the court shall consult with the administrative judge of the children's court concerning the resources available at the children's court to handle the matter. The court may act on its own motion without notice and hearing.

(c) A matter transferred under this section may be heard by the transferring judge or a judge who participates in the children's court.

Rule 22

eFiling

Section 22.2 eFiling access in a matter

(a) No person may access an existing matter through the eFiling system unless the person is~~:~~

~~(1)~~ a registered filer who has requested eFiling access to the matter; and is:

(1) a party~~; or~~

(2) an attorney for a party in the matter; ~~or~~

(3) a guardian ad litem for a party in the matter;

(4) an auditor appointed by the court under C.G.S. section 45a-175(f) or by the probate court administrator under C.G.S. section 45a-181; or

(5) a Connecticut state agency that is a party or has a statutory duty or obligation in the matter.

(b) By requesting eFiling access, a person agrees to receive eService of filings, notices, decrees and other documents and to waive any other form of notice specified in statute or rule.

(c) The court shall approve a person's request for eFiling access to an existing matter on verification that the person is a party to the matter.

(d) The court shall ~~approve an attorney's request for~~ provide eFiling access to an existing matter to an attorney on:

(1) receipt of the attorney's appearance on behalf of a party in the matter;

(2) appointment of the attorney to represent a party in the matter; or

(3) admission of an out-of-state attorney to appear pro hac vice in the matter.

(e) The court shall approve the request of a court-appointed guardian ad litem for eFiling access to an existing matter.

(f) Court approval is not required to eFile a petition that commences a new matter or an appearance as an attorney in a matter.

(g) An auditor appointed under C.G.S. section 45a-175(f) or 45a-181 shall have eFiling access until the auditor's report is filed with the court.

Rule 30

Decedents' Estates

Section

30.27 Where to file petition to access safe deposit box to search for will or cemetery deed

Section 30.19 When executor or administrator to submit financial report or account

(a) An executor or administrator shall submit a final financial report or account when the executor or administrator has completed settlement of a decedent's estate or when the executor or administrator seeks to resign or is removed by the court.

(b) The fiduciary of the estate of an executor or administrator who dies while administering a decedent's estate shall file a final financial report or account on behalf of the deceased executor or administrator. A successor executor or administrator appointed for the original decedent's estate may file a final financial report or

account on behalf of the deceased executor or administrator if no fiduciary has been appointed for the deceased executor or administrator's estate.

(c) On motion of a party or on the court's own motion, the court may direct the executor or administrator to file an interim financial report or account if necessary to protect the interests of the estate.

(d) An executor or administrator may submit a final financial report or account simultaneously with a petition for determination of insolvency under C.G.S. section 45a-383.

Section 30.27 Where to file petition to access safe deposit box to search for will or cemetery deed

A petition to access a safe deposit box to search for a will or cemetery deed may be filed:

(1) in the court for the probate district in which the decedent was domiciled on the date of death if the decedent was a Connecticut resident.

(2) in the court for a probate district meeting the requirements of C.G.S. section 45a-287 or 45a-303 if the decedent was not a Connecticut resident.

Rule 31

Estate Tax Matters

Section 31.3 Valuation of property for nontaxable estates

(a) Except as provided in subsection (c), a person filing a DRS Form CT-706 NT for a nontaxable estate shall substantiate the fair market value of real property required to be reported on the form by submitting any one of the following:

(1) a comparative market analysis prepared by a real estate broker or agent;

(2) information from the municipal assessment of the property, adjusted to reflect 100 percent of the fair market value as of the date of the assessment;

(3) a written appraisal; or

(4) written proof of the actual sales price if the property is sold in an arm's-length transaction that is completed not later than six months after the death of the decedent.

(b) Except as provided in subsection (c), the court may require a person filing a DRS Form CT-706 NT to substantiate the fair market value of any personal property required to be reported on the form by supplying a written appraisal or other reasonable proof of value, including, but not limited to, an affidavit setting forth the fair market value of the decedent's interest in an entity, such as a membership interest in a limited liability company, and the method used to determine the value of the interest.

(c) If an Internal Revenue Service Form 706 is required for the decedent, the person filing a DRS Form CT-706 NT shall report each asset on the DRS Form CT-706 NT at the value shown on the Internal Revenue Service Form 706.

Rule 32

Trusts

Section 32.2 Notice in trust proceeding

(a) The court shall send notice of a proceeding concerning a trust to:

(1) the settlor, if living;

(2) each current beneficiary;

(3) each presumptive remainder beneficiary;

(4) the Attorney General, if:

(A) a current beneficiary or presumptive remainder beneficiary is a charity or charitable interest; or

(B) the trust is a special needs trust established under C.G.S. section 45a-151(b) or 45a-655(e);

(5) the trustee;

(6) the trust protector, if any; ~~and~~

(7) the trust director, if any;

(8) a designated representative, if any; and

~~(7)~~(9) other persons as the court determines.

(b) Notice to contingent remainder beneficiaries is not required unless the court determines that the interests of the presumptive remainder beneficiaries conflict with the interests of the contingent remainder beneficiaries.

Section 32.3 Virtual representation and appointment of guardian ad litem in trust proceeding

(a) A petitioner in a trust proceeding shall inform the court if a trust beneficiary entitled to notice under section 32.2 is a minor or is incompetent, undetermined or unborn or if the beneficiary's name or address is unknown. The petitioner shall indicate whether an adult beneficiary who is legally capable of acting can virtually represent the beneficiary under ~~Public Act 19-137, sections 17-20~~ C.G.S. sections 45a-499q to 45a-499t.

(b) On receipt of information under subsection (a) or on the court's own motion, the court shall make a written determination whether a beneficiary or class of beneficiaries will be virtually represented in the proceeding. If the court determines that the interests of the beneficiary or class of beneficiaries are not virtually represented or that the representation might be inadequate, the court shall appoint a guardian ad litem to represent the interests of the beneficiary or class of beneficiaries. The court may act under this subsection without notice and hearing.

Section 32.4 Trustee to send copy of inventory, financial report or account, affidavit of closing, and petition to terminate to each party and attorney

(a) A trustee of a testamentary trust or other trust subject to continuing jurisdiction of the court shall send a copy of the inventory and each supplemental or substitute inventory, at the time of filing, to each party and attorney of record and shall certify to the court that the copy has been sent.

(b) A trustee of a testamentary trust, an inter vivos trust subject to the jurisdiction of the court under C.G.S. section 45a-175 or another trust subject to continuing jurisdiction of the court shall send a copy of each financial report or account and the affidavit of closing, at the time of filing, to each party and attorney of record and shall certify to the court that the copy has been sent.

(c) The trustee of a testamentary trust, an inter vivos trust subject to the jurisdiction of the court under C.G.S. section 45a-175 or another trust subject to continuing jurisdiction of the court shall send a copy of a petition to terminate the trust under ~~Public Act 19-137, section 35~~ ~~or~~ C.G.S. section 45a-499ii or 45a-520, at the time of filing, to each party and attorney of record and shall certify to the court that the copy has been sent.

(d) If a beneficiary of a trust is a charity or charitable interest, the trustee shall send a copy of each filing under subsection (a), (b) or (c), at the time of filing, to the Attorney General and shall certify to the court that the copy has been sent.

Rule 34

Guardians of Estates of Minors

Section 34.8 When guardian of estate to submit financial report or account

(a) A guardian of the estate of a minor shall submit an annual financial report or account for the first year following the guardian's appointment or, with prior court approval, for the first year following the guardian's first receipt of funds on behalf of the estate.

(b) After submitting the first annual financial report or account under subsection (a), the guardian shall thereafter submit a periodic financial report or account at least once during each three-year period, unless the court directs more frequent accounts.

(c) The guardian shall submit a final financial report or account when the minor reaches age 18 or when the guardian seeks to resign or is removed by the court.

(d) If the guardian dies while administering the estate, the executor or administrator of the estate of the deceased guardian shall file, on behalf of the deceased guardian, a final financial report or account for the guardianship estate. If an executor or administrator has not been appointed for the estate of the deceased guardian, a successor guardian of the estate may file, on behalf of the deceased guardian, a final financial report or account for the guardianship estate.

Rule 36

Fiduciary Accounting: General Provisions

Section 36.13 Records to be maintained by fiduciary

(a) Subject to subsection (c), ~~A~~ a fiduciary shall maintain complete records of the fiduciary's management of the estate including, but not limited to, the paper copy or electronic equivalent of:

(1) each accounting, report, journal or ledger used in managing the estate, including all data recorded with accounting software;

(2) each statement and passbook for each ~~bank~~ financial account, including savings, checking, money market, certificates of deposit, investment, individual retirement and other types of accounts;

(3) each canceled check or check image for each ~~bank~~ financial account, if provided by the ~~bank~~ financial institution;

(4) ~~each statement for each investment account;~~

~~(5)~~ a receipt for each deposit made into each ~~bank~~ financial ~~or investment~~ account and supporting information relating to the deposit;

~~(6)~~(5) supporting information relating to each disbursement made from each ~~bank~~ financial ~~or investment~~ account, including original supporting vendor invoices and receipts;

(6) supporting information relating to each peer-to-peer commerce and any other electronic means to transfer funds;

(7) each statement for each credit card, including a store card, account;

(8) ~~each statement for each store card account;~~

~~(9)~~ supporting information relating to each charge made on each credit card, store card or debit card, including supporting vendor invoices and charge slips or receipts;

(9) supporting information relating to transactions involving electronic wallets, electronic currency, cryptocurrencies and other forms of virtual financial transactions;

(10) supporting information relating to each distribution made from the estate or trust to any heir, beneficiary, conserved person or minor, as applicable;

(11) with respect to a conservatorship of the estate, supporting information relating to each gift or other transfer for less than full consideration made from the estate to a party other than the conserved person, provided, however, that a conservator may make gifts and transfers only with prior court approval under C.G.S. section 45a-655(e);

(12) detailed payroll information for each employee engaged or paid by the estate for each pay period, including time reporting records, original payroll registers, journals, and reports and copies of all Internal Revenue Service Forms 940, 941, 942, W-3 and W-2 and other payroll tax ~~returns~~ forms;

(13) details of each contracted service provider engaged or paid by the estate for each calendar year, including original invoices from contractors and copies of all Internal Revenue Service Forms 1096 and 1099 and other tax forms;

(14) a detailed journal describing the fiduciary's services and compensation paid to the fiduciary;

(15) with respect to a decedent's estate or trust, a copy of each state and federal fiduciary income tax return filed by or on behalf of the estate or trust;

(16) with respect to a conservatorship of the estate or guardianship of the estate of a minor, a copy of each state and federal personal income tax return filed by or on behalf of the person under conservatorship or minor, including each form and information received for each tax year used in the completion of each return;

(17) with respect to a conservatorship of the estate, a copy of each state and federal gift tax return filed by or on behalf of the person under conservatorship; ~~and~~

(18) supporting information relating to the sale of any asset required to be reported on an inventory such as real property, motor vehicles or other personal property;

(19) with respect to rental property, copies of all lease agreements and supporting information for security deposits, income and expenses for each property;

(20) supporting information relating to trademarks, copyrights, patents and other forms of intellectual property; and

~~(18)~~(21) any other record not specified in this section documenting the fiduciary's actions in the management of the trust or estate.

(b) The fiduciary shall not destroy any estate financial records until the court approves the fiduciary's financial report or account, the conclusion of any appeal on the report or account, or the termination of any other applicable record retention requirement, whichever is later.

(c) When considering whether the fiduciary has satisfied the requirements of subsection (a), the court shall consider the totality of the circumstances, the extent of compliance and whether the fiduciary made good faith efforts to comply.

Rule 39

Fiduciary and Attorney's Fees

Section 39.2 Task statement of fiduciary and attorney

(a) In reviewing a proposed fee for services already rendered, the court may require a fiduciary or attorney to submit a task statement describing the services performed.

(b) A fiduciary's task statement shall address:

(1) size of the estate;

(2) responsibilities involved;

(3) character of the work required;

(4) special problems and difficulties met in doing the work;

(5) results achieved;

(6) knowledge, skill and judgment required;

(7) manner and promptness in which the matter was handled;

(8) time and labor required; and

(9) other relevant and material circumstances.

(c) An attorney's task statement shall include a copy of the attorney's engagement letter and shall address:

(1) time and labor required;

(2) novelty and difficulty of the questions involved;

(3) skill required to perform the legal service properly;

(4) likelihood, if made known to the client, that the acceptance of the particular employment will preclude other employment by the attorney;

(5) fee customarily charged in the locality for similar legal services;

(6) value of the estate involved, results obtained and time limitations imposed by the client or circumstances;

(7) nature and length of the attorney's professional relationship with the person whose estate is being administered or with the fiduciary;

(8) experience, reputation and ability of the attorney performing the services; and

(9) whether the fee is fixed or contingent.

Rule 40

Children's Matters: General Provisions

Section

40.23 Notice in proceedings to determine parentage after death

Section 40.7 Reinstatement as guardian

Except as provided under C.G.S. section 45a-611, a parent or guardian who was removed as guardian of a minor may file a petition seeking reinstatement as guardian. The petitioner shall have the burden of proving by a preponderance of the evidence that the factors that resulted in removal have been resolved satisfactorily. If the court finds that the parent or former guardian has met the burden of proof, ~~the court shall determine whether reinstatement of the parent or former guardian is in the minor's best interests~~ there is a presumption that reinstatement is in the best interests of the minor. ~~The evidentiary standard for the findings in this section and C.G.S. section 45a-611 is preponderance of the evidence.~~ To rebut this presumption, a party opposing reinstatement of guardianship must present clear and convincing evidence that reinstatement is not in the best interests of the minor.

Section 40.8 Temporary guardianship

(a) A parent or guardian may petition to appoint a temporary guardian for a minor without another parent or guardian joining as copetitioner. The court shall give notice to each party, including a nonpetitioning parent or guardian, and each attorney of record.

(b) The ~~If the~~ appointing parent or guardian may terminate ~~terminates~~ a temporary guardianship under ~~in accordance with~~ C.G.S. section 45a-622 by notifying the temporary guardian and filing written notice of the termination with the Probate Court. On receipt of the written notice, the court shall notify each party and attorney of record that the guardianship is terminated. The court is not required to give notice if the temporary guardianship expires on the date specified in the order establishing the guardianship.

Section 40.23 Notice in proceedings to determine parentage after death

(a) Except as otherwise provided under C.G.S. section 46b-172a, the court shall send notice of hearing on a petition seeking the determination of parentage of an alleged genetic parent after the death of a child to:

(1) the petitioner;

(2) the birth parent;

(3) the fiduciary of the estate of the deceased child, if any;

(4) each beneficiary under the will of the deceased child or heir of the deceased child;

(5) each attorney of record;

(6) each guardian ad litem, if any;

(7) the Attorney General; and

(8) other persons as the court determines.

(b) Except as otherwise provided under C.G.S. section 46b-172a, the court shall send notice of hearing on a petition seeking the determination of parentage of a deceased alleged genetic parent of a child after the death of an alleged genetic parent to:

(1) the petitioner;

(2) the child;

(3) the fiduciary of the estate of the deceased alleged genetic parent, if any;

(4) each beneficiary under the will of the deceased alleged genetic parent or heir of the deceased alleged genetic parent;

(5) each attorney of record;

(6) each guardian ad litem, if any; and

(7) other persons as the court determines.

Rule 43

Guardians of Adults with Intellectual Disability

Section

43.9 Extension of authority of guardian to manage finances pending decision on conservatorship of estate petition

43.10 Single petition to appoint a guardian with authority to manage finances and appoint a plenary or limited guardian of an adult with intellectual disability

Section 43.9 Extension of authority of guardian to manage finances pending decision on conservatorship of estate petition

On written request of a party, the court may extend the authority of a guardian of an adult with intellectual disability to manage finances until disposition of a pending conservatorship of estate petition, provided that the extension may not exceed 60 days. The court may act on the request without notice and hearing.

Section 43.10 Single petition to appoint a guardian with authority to manage finances and appoint a plenary or limited guardian of an adult with intellectual disability

(a) If a petitioner simultaneously files a petition for appointment of a guardian of an adult with intellectual disability, whether plenary or limited, and a petition to appoint a guardian with the authority to manage finances of the adult, the court may treat the petitions as a single petition subject to one filing fee.

(b) The court may charge a separate filing fee for a petition under subsection (a) if the court determines that it is necessary to hear the petitions separately.

Rule 44

Commitment for Treatment of Psychiatric Disability

Section 44.1 Confidentiality of psychiatric commitment proceeding

The court shall exclude a person who is not a party or an attorney for a party from attending or participating in any hearing relating to commitment for treatment of psychiatric disability under C.G.S. sections 17a-75 through 17a-83 or sections 17a-495 through 17a-528, except that:

(1) a parent or guardian of a respondent who is under the age of 16 may participate in the hearing; ~~and~~

(2) a conservator or guardian of the respondent may participate in the hearing; and

~~(2)~~(3) the court may:

(A) on request of the respondent, permit a person to participate in the hearing;

(B) after considering any objection of the respondent, permit a relative or friend who is interested in the welfare of the respondent to participate in the hearing; and

(C) permit a witness to attend any part of the hearing.

Rule 45

Proceedings for Medication and Treatment of Psychiatric Disability

Section

45.1 Confidentiality of proceeding for medication to treat psychiatric disability or shock therapy ~~or medication to treat psychiatric disability~~
45.2 Audio recording of proceeding for medication to treat psychiatric disability or shock therapy ~~or medication to treat psychiatric disability~~
45.3 Where to file petition for medication to treat psychiatric disability
45.4 Notice of hearing on petition for medication to treat psychiatric disability
45.5 Petition for shock therapy

Section 45.1 Confidentiality of proceeding for medication to treat psychiatric disability or shock therapy ~~or medication to treat psychiatric disability~~

(a) Except as provided in subsections (b) and (c), ~~The~~ the court shall exclude a person who is not a party or attorney for a party from attending or participating in a hearing on a petition for medication for treatment of a psychiatric disability under C.G.S. section 17a-543(e), 17a-543(f), 17a-543(g) or 17a-543a or a hearing on a petition for shock therapy under C.G.S. section 17a-543(c)~~, except that: the court may:~~

(b) A conservator or guardian of the respondent shall be permitted to participate in a hearing on a petition for medication for treatment of a psychiatric disability or for shock therapy.

(c) The court may,

(1) on request of the patient, permit a person to participate in the hearing;

(2) after considering any objection of the patient, permit a relative or friend who is interested in the welfare of the patient to participate in the hearing; and

(3) permit a witness to attend any part of the hearing.

Rule 46

Commitment for Treatment of Drug and Alcohol Dependency

Section 46.1 Confidentiality of drug and alcohol dependency commitment proceeding

(a) Except as provided in subsections (b) and (c), ~~The~~ the court shall exclude a person who is not a party or attorney for a party from attending or participating in a hearing on a petition for commitment for treatment of drug or alcohol dependency.~~, except that the court may:~~

(b) A conservator or guardian of the respondent shall be permitted to participate in the hearing.

(c) The court may,

(1) on request of the patient, permit a person to participate in the hearing;

(2) after considering any objection of the patient, permit a relative or friend who is interested in the welfare of the patient to participate in the hearing; and

(3) permit a witness to attend any part of the hearing.

Rule 66

Participation in Hearing by Electronic Means

Section 66.1 When participation by electronic means permitted

(a) ~~On~~ Unless otherwise prohibited by law, on request of a party, ~~or~~ witness, or attorney of record, or on the court's own motion, the court may allow participation in a hearing, conference or deposition by ~~telephonic or other~~ electronic means.

(b) In determining whether to allow participation by electronic means, the court shall consider:

(1) the importance, subject matter, and nature of the proceeding;

~~(1)~~(2) the nature of the rights at issue;

(3) the technology available to the court, parties, witnesses and attorneys;

~~(2)~~(4) whether surprise or prejudice would result from electronic participation ~~or from the inability to participate by electronic means~~;

~~(3) whether a party is unable to secure the presence of the witness in person;~~

~~(4) the cost of attending the hearing in person;~~

(5) any efficiency or cost savings to be achieved by allowing participation by electronic means;

~~(5)~~(6) whether participation by electronic means will allow full and effective examination and cross examination;

~~(6) the importance of the testimony;~~

~~(7) whether the subject matter of the testimony is disputed;~~

~~(8)~~(7) the convenience of the parties and witnesses, including representatives of state agencies; and

~~(9)~~(8) other relevant factors.