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Table of Contents

CONNECTICUT REPORTS

Rainbow Housing Corp. *v.* Cromwell, 340 C 501 79
Tax appeals; application for tax exemption pursuant to statute (§ 12-81 (7)) for property used for, inter alia, charitable purposes and for "housing for . . . persons with a mental health disorder"; whether property on which plaintiff charitable organizations operated supervised apartment program for individuals with severe mental illness qualified for property tax exemption under § 12-81 (7); claim that plaintiffs were not aggrieved by denial of application for property tax exemption; whether housing provided by plaintiffs constituted "temporary housing," as that term is used in § 12-81 (7) (B).
State *v.* Jodi D., 340 C 463 41
Assault of disabled person second degree; claim that statute (§ 53a-60b (a) (1)) delineating crime of assault of disabled person in second degree was unconstitutionally vague as applied to defendant's conduct; whether § 53a-60b (a) (1) was unconstitutionally overinclusive.
State *v.* Tinsley, 340 C 425 1
Motion to correct illegal sentence; manslaughter first degree; risk of injury to child; claim that defendant's sentence for both manslaughter in first degree and risk of injury to child violated constitutional prohibition against double jeopardy; certification from Appellate Court; claim that Appellate Court improperly reversed trial court's denial of defendant's motion to correct; whether Appellate Court incorrectly concluded that, although offenses of manslaughter in first degree and risk of injury to child were not same offense under Blockburger *v.* United States *(284 U.S. 299) insofar as each contained statutory element that other offense lacked, they were nevertheless same offense, as charged by state in information, for double jeopardy purposes.*
State *v.* Turner, 340 C 447 25
Robbery first degree; felony murder; certification from Appellate Court; claim that trial court, by referring to larceny by false pretenses in its instructions, improperly presented jury with legally invalid but factually supported basis for finding defendant guilty of robbery and felony murder; whether trial court's instructions, although improper, presented jury with legally valid and factually supported alternative basis for finding defendant guilty of charged crimes; whether inclusion of factually unsupported theory of conviction was harmless.
Volume 340 Cumulative Table of Cases 111

CONNECTICUT APPELLATE REPORTS

Borg *v.* Cloutier (Memorandum Decision), 209 CA 905. . . . . 161A
Hospital Media Network, LLC *v.* Henderson, 209 CA 395 . . . . . 3A
Breach of fiduciary duty; claim that trial court exceeded scope of this court's remand order when it awarded damages to plaintiff; claim that trial court awarded damages that were predicated on factual findings that were not supported by record and were inequitable.
Lippi *v.* United Services Automobile Assn., 209 CA 524 . . . . . 132A
Breach of contract; motion for summary judgment; claim that trial court erred in concluding that there was no genuine issue of material fact as to whether plaintiffs were entitled to coverage under homeowners insurance policy issued by defendant; claim that trial court erred in concluding that plaintiffs' property did not suffer

(continued on next page)

collapse as defined in homeowners insurance policy; claim that there was genuine issue of material fact as to whether damage to property resulting from cracking in basement walls constituted sudden caving in; whether trial court failed to apply correct standard in granting defendant's motion for summary judgment; whether trial court improperly shifted burden of proof to plaintiffs.

M. W. *v.* E. W. (Memorandum Decision), 209 CA 905 . . . . . 161A

Ocwen Loan Servicing, LLC *v.* Mordecai, 209 CA 483 . . . . . 91A

Foreclosure; whether trial court abused its discretion in denying defendants' request to amend answer and special defenses; whether trial court improperly rendered summary judgment as to liability; whether trial court improperly rendered judgment of strict foreclosure.

Overley *v.* Overley, 209 CA 504 . . . . . 112A

Dissolution of marriage; claim that trial court failed to award separate property credit for defendant's contribution to purchase of marital home; whether trial court improperly contravened parties' prenuptial agreement governing tax treatment of alimony payments; whether trial court abused its discretion in denying defendant's motion for continuance.

Reid *v.* Speer, 209 CA 540 . . . . . 148A

Workers' compensation; appeal from decision of Compensation Review Board precluding defendant employer from contesting compensability of claim for work-related injuries; claim that defendant's filing of form contesting her liability as employer for plaintiff's injury would have constituted criminal conduct pursuant to statute (§ 31-290c); claim that Workers' Compensation Commissioner erred in certain factual findings.

State *v.* James K., 209 CA 441 . . . . . 49A

Risk of injury to child; whether trial court abused its discretion when it prohibited defense counsel from asking prospective jurors during voir dire to express opinions with respect to parents who kiss their children on lips; claim that trial court abused its discretion by admitting into evidence videotaped forensic interview of victim; whether trial court violated defendant's rights to due process, fair trial and to be convicted by means of unanimous verdict when it declined to use language in his written request for instructions to urge deadlocked jury to reach verdict; request that this court exercise supervisory authority over administration of justice to require trial courts to instruct deadlocked juries that they need not reach verdict and that jurors have right to disagree with respect to proper verdict.

Volume 209 Cumulative Table of Cases 163A

NOTICES OF CONNECTICUT STATE AGENCIES

DSS—Notice of Proposed Medicaid State Plan (SPA 22-B) 1B

DSS—Notice of Proposed Medicaid State Plan (SPA 22-C) 2B

DSS—Notice of Proposed Medicaid State Plan (SPA 22-D) 3B

DSS—Notice of Proposed Medicaid State Plan (SPA 22-E) 5B

DSS—Notice of Proposed Medicaid State Plan (SPA 22-F) 6B

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DSS—Notice of Proposed Medicaid State Plan (SPA 22-G) 7B
DSS—Notice of Proposed Medicaid State Plan (SPA 22-H) 9B

MISCELLANEOUS

The New Online Ordering Transcript System 1C

CONNECTICUT LAW JOURNAL NOTICE DEADLINES

Revised Law Journal Dates for Notices 2022 Deadlines 1D

CONNECTICUT REPORTS

Vol. 340

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* DARRELL TINSLEY (SC 20479)

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

Syllabus

The defendant, who had been convicted of manslaughter in the first degree and risk of injury to a child, appealed to the Appellate Court from the trial court's denial of his motion to correct an illegal sentence. The defendant's conviction stemmed from an incident that occurred while he was watching the victim, a fifteen month old, when the victim's mother was at work. The defendant had alerted the victim's mother that something was wrong with the victim and picked her up from her place of employment. While the three of them were driving to the hospital, they were involved in a motor vehicle accident. The victim died at the hospital, and an autopsy revealed bruises on his cheek, one of his legs, and his chest, which occurred shortly before his death, and internal abdominal injuries, including a broken rib and a lacerated liver, the latter of which was determined to be the cause of the victim's death. Although the defendant ultimately was convicted of the lesser included offense of manslaughter in the first degree, the operative information had charged him with capital felony, alleging in relevant part that the defendant, "with the intent to cause the death of [the victim], caused the death of [the victim] . . . by blunt trauma to the abdomen." As to the risk of injury charge, the information alleged in relevant part that the defendant "did an act likely to impair the health of [the victim] . . . by inflicting multiple trauma to his face, head, chest, and abdomen and thereby causing: laceration of the liver, internal bleeding in the abdomen, fracture of the tenth right rib, and multiple contusions of the face, head, chest, and abdomen." In his motion to correct, the defendant claimed that his sentence imposed for manslaughter in the first degree and risk of injury to a child violated the constitutional prohibition against double jeopardy. The Appellate Court reversed the trial court's denial of the defendant's motion to correct. The Appellate Court determined that, when a defendant claims that his conviction includes a lesser included offense, the court does not merely compare the elements of each offense under *Blockburger* v. *United States* (284 U.S. 299) but, instead, asks whether it is possible to commit the greater offense, "in the manner described in the information," without having first committed the lesser offense. Accordingly, the Appellate Court concluded that, even though risk of injury was not a lesser included offense of manslaughter in the first degree under *Blockburger*, insofar as each offense required poof of an element that the other did not, it was a lesser included offense as charged by the state in the information because it was not possible

for the defendant to have committed manslaughter in the first degree by inflicting blunt trauma to the victim's abdomen without also impairing the health of the victim by inflicting trauma to his abdomen. On the granting of certification, the state appealed to this court. *Held* that the Appellate Court incorrectly determined that the defendant's convictions of risk of injury to a child and manslaughter in the first degree were the same offense for double jeopardy purposes, as that court improperly considered the facts alleged in the information rather than confining its analysis to the statutory elements of the offenses, and, accordingly, this court reversed the judgment of the Appellate Court and remanded the case with direction to affirm the trial court's denial of the defendant's motion to correct: the Appellate Court improperly conflated the cognate pleadings approach, by which courts determine whether a defendant has received constitutionally adequate notice of the charges against him when a lesser included offense instruction has been requested, with the *Blockburger* test, which protects against cumulative punishments and under which two distinct statutory provisions constitute the same offense only if each provision requires proof of a fact that the other does not; moreover, although the language of the charging documents is relevant to whether the statutory elements of each offense are the same under *Blockburger*, federal and state precedent, including this court's own case law, confirmed that the statutory elements, rather than the factual allegations in the charging documents, drive the *Blockburger* inquiry, notwithstanding a substantial overlap in the proof offered to establish the crimes; furthermore, to the extent that this court has suggested that a court undertaking a double jeopardy analysis should consider the facts alleged by the state "in the manner described in the information," that directive was relevant in determining whether one crime is a lesser included offense of another only insofar as the reviewing court is consulting the information in order to determine whether it alleges distinct elements for each offense, rather than in determining the particular factual predicate of the case; in the present case, manslaughter in the first degree, which requires proof that the defendant, with intent to cause serious physical injury, caused the victim's death, and risk of injury to a child, which requires proof of the defendant's impairment to the health of a child less than sixteen years of age, each contained an element that the other did not, and it was therefore possible to commit either offense without committing the other.

Argued April 1, 2021—officially released August 27, 2021*

Procedural History

Substitute information charging the defendant with the crimes of capital felony and risk of injury to a child,

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

brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Barry*, *J.*; verdict and judgment of guilty of the lesser included offense of manslaughter in the first degree and of risk of injury to a child, from which the defendant appealed to the Appellate Court, *Lavery*, *C. J.*, and *Schaller* and *Zarella*, *Js.*, which affirmed the trial court's judgment; thereafter, the court, *Schuman*, *J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Bright* and *Devlin*, *Js.*, which reversed the trial court's judgment, and the state, on the granting of certification, appealed to this court. *Reversed*; *judgment directed.*

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *Sharmese L. Hodge*, state's attorney, *Gail P. Hardy*, former state's attorney, and *John Fahey*, supervisory assistant state's attorney, for the appellant (state).

Naomi T. Fetterman, for the appellee (defendant).

Opinion

ROBINSON, C. J. The sole issue in this certified appeal is the extent to which a court should consider the facts alleged by the state in the charging documents when determining whether a crime is a lesser included offense of another, rather than confining its analysis to the elements of the statutes at issue, under *Blockburger* v. *United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). The state appeals, upon our grant of its petition for certification,[1] from the judgment of the

[1] We granted the state's petition for certification to appeal, limited to the following issue: "Did the Appellate Court correctly conclude that, notwithstanding the fact that manslaughter in the first degree, under General Statutes § 53a-55 (a) (1), and risk of injury to a child, under General Statutes (Rev. to 1995) § 53-21, as amended by Public Acts 1995, No. 95-142, § 1, are not the same offense under *Blockburger* v. *United States*, [supra, 284 U.S. 299], the defendant's conviction of those crimes nonetheless violated the double jeopardy clause of the United States constitution because, as charged in the information, those crimes stood in relation of greater and lesser included offenses?" *State* v. *Tinsley*, 335 Conn. 927, 234 A.3d 979 (2020).

Appellate Court reversing the judgment of the trial court, which denied the motion to correct an illegal sentence filed by the defendant, Darrell Tinsley, on the basis of its conclusion that the defendant's convictions of manslaughter in the first degree in violation of General Statutes § 53a-55 (a) (1)[2] and risk of injury to a child in violation of General Statutes (Rev. to 1995) § 53-21, as amended by Public Acts 1995, No. 95-142, § 1,[3] violate the constitutional prohibition against double jeopardy. See *State* v. *Tinsley*, 197 Conn. App. 302, 304, 326, 232 A.3d 86 (2020). On appeal, the state claims that the Appellate Court improperly considered the factual allegations in the information in concluding that risk of injury to a child, as charged therein, was a lesser included offense of manslaughter in the first degree, rendering the defendant's conviction of both offenses a violation of his right to be free from double jeopardy. We conclude that the Appellate Court improperly considered the facts alleged in the state's information, rather than confining its analysis to the statutory elements under the *Blockburger* test, insofar as risk of injury to a child is not a lesser included offense of manslaughter in the first degree because each offense requires the state to prove an element the other does not. Accordingly, we reverse the judgment of the Appellate Court.

[2] General Statutes § 53a-55 (a) provides in relevant part: "A person is guilty of manslaughter in the first degree when: (1) With intent to cause serious physical injury to another person, he causes the death of such person or of a third person . . . ."

[3] General Statutes (Rev. to 1995) § 53-21, as amended by No. 95-142, § 1, of the 1995 Public Acts, provides in relevant part: "Any person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child . . . shall be guilty of a class C felony." All references to § 53-21 in this opinion are to the 1995 revision of the statute, as amended by No. 95-142, § 1, of the 1995 Public Acts.

The record reveals the following relevant facts and procedural history, aptly set forth by the Appellate Court in its opinion. "[Despite having] an unstable relationship, [the defendant and the victim's mother] cohabited in a one bedroom apartment along with the [fifteen month old] victim . . . . During the course of the adults' relationship, individuals who knew the victim noticed a marked change in his behavior when he was in the presence of the defendant. At such times, the victim was timid, withdrawn and afraid of the defendant. The defendant's attitude toward the victim ranged from indifference to dislike. When [the victim's mother] was no longer able to avail herself of professional child care, the defendant sometimes took care of the victim while [the victim's mother] worked.

"Prior to his death, the victim was in good health. On December 8, 1996, between 8 and 8:30 a.m., the defendant drove [the victim's mother] to her place of employment. According to [the victim's mother], there was nothing wrong with the victim when she went to work. During the morning, [the victim's mother] and the defendant spoke by telephone several times concerning the victim. At approximately 11:15 a.m., the defendant telephoned [the victim's mother], stating that there was something wrong with the victim and that he did not know what was the matter. The defendant then drove the victim to [the victim's mother's] place of employment, and, from there, all three proceeded to the Connecticut Children's Medical Center (medical center) in Hartford. They were involved in a motor vehicle accident en route.

"When he arrived at the medical center, the victim was in critical condition because he was not breathing and had little heart activity. The victim died when resuscitation efforts failed. An autopsy revealed bruises on the victim's right cheek, left leg and chest, which an associate medical examiner from the [O]ffice of the

[C]hief [M]edical [E]xaminer determined occurred shortly before the victim's death. The injuries were inconsistent with an automobile accident, a twelve inch fall into a bathtub, cardiopulmonary resuscitation or bumping into a fire door, which were explanations offered by the defendant. The victim also suffered significant internal injuries, namely, multiple fresh cranial hemorrhages, a broken rib and a lacerated liver that caused three quarters of his blood to enter his abdominal cavity. According to the associate medical examiner, the victim's liver was lacerated by blunt trauma that occurred within [one] hour of death and was the cause of death." (Internal quotation marks omitted.) Id., 304–306.

"The state charged the defendant with capital felony in violation of General Statutes (Rev. to 1995) § 53a-54b (9), as amended by [§ 3 of] No. 95-16 of the 1995 Public Acts, and risk of injury to a child in violation of § 53-21. The jury found the defendant guilty of the lesser included offense of manslaughter in the first degree in violation of § 53a-55 (a) (1) and risk of injury to a child. On February 6, 1998, the court sentenced the defendant to twenty years of incarceration on the manslaughter count and ten years of incarceration on the risk of injury count with the sentences to run consecutively. . . . On March 8, 2018, the defendant . . . filed a . . . motion to correct an illegal sentence and an accompanying memorandum of law, [claiming that his sentence violated his federal and state constitutional rights to be free from] double jeopardy . . . . On May 15, 2018, the court issued its memorandum of decision denying the defendant's motion to correct an illegal sentence." (Footnotes omitted.) Id., 306–307.

Specifically, the court stated: " 'It . . . seems to me entirely possible that the fatal blows to the ribs, liver, and abdomen could have occurred from a separate blow that was interrupted perhaps by a minute or so before or after trauma was inflicted to the child's face and

head, which is also alleged in the information. And in that situation it would not clearly be one continuous uninterrupted assault. I acknowledge the defense argument that there's no way to actually parse through all this at this time twenty years later, but ultimately it's the defendant's burden, and if we can't do that then the defendant has not met his burden.' " Id., 309.

The defendant appealed from the judgment of the trial court to the Appellate Court, claiming that "his conviction and punishment for manslaughter in the first degree and risk of injury arose from the same transaction and that risk of injury is a lesser included offense of manslaughter in the first degree, as charged in this matter, in violation of his right to be free from double jeopardy." Id. The Appellate Court agreed with the defendant. Specifically, the court concluded that, despite risk of injury not being a lesser included offense of manslaughter in the first degree under the *Blockburger* test, it was nevertheless a lesser included offense as charged in the information in this case. Id., 325. Accordingly, the Appellate Court reversed the judgment of the trial court and remanded the case for further proceedings. Id., 326. This certified appeal followed.

Before turning to the parties' claims, we set forth the applicable standard of review and background principles governing the analysis of double jeopardy claims. "A defendant's double jeopardy claim presents a question of law, over which our review is plenary. . . . The double jeopardy clause of the fifth amendment to the United States constitution provides: [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. The double jeopardy clause [applies] to the states through the due process clause of the fourteenth amendment. . . . This constitutional guarantee prohibits not only multiple trials for the same offense, but also multiple punishments for the same offense in a single trial." (Internal quotation marks omit-

ted.) *State* v. *Porter*, 328 Conn. 648, 654–55, 182 A.3d 625 (2018).

"Double jeopardy analysis in the context of a single trial is a [two step] process, and, to succeed, the defendant must satisfy both steps. . . . First, the charges must arise out of the same act or transaction [step one]. Second, it must be determined whether the charged crimes are the same offense [step two]. Multiple punishments are forbidden only if both conditions are met. . . . At step two, we [t]raditionally . . . have applied the *Blockburger* test to determine whether two statutes criminalize the same offense, thus placing a defendant prosecuted under both statutes in double jeopardy: [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 655; see also *State* v. *Goldson*, 178 Conn. 422, 424, 423 A.2d 114 (1979). At the outset, we note that the Appellate Court's conclusion that the defendant's convictions of manslaughter in the first degree and risk of injury arose from the same act or transaction perpetuated on the same victim is undisputed. See *State* v. *Tinsley*, supra, 197 Conn. App. 319. Accordingly, pursuant to the second step of *Blockburger*, we now turn to whether risk of injury to a child is a lesser included offense of manslaughter in the first degree, rendering them the same offense for double jeopardy purposes.

"Our case law has been consistent and unequivocal" that the second step of *Blockburger* "is a technical one and examines only the statutes, charging instruments, and bill of particulars as opposed to the evidence presented at trial." (Internal quotation marks omitted.) *State* v. *Porter*, supra, 328 Conn. 656; accord *State* v. *Bernacki*, 307 Conn. 1, 9, 52 A.3d 605 (2012), cert.

denied, 569 U.S. 918, 133 S. Ct. 1804, 185 L. Ed. 2d 811 (2013). When conducting this analysis, "we are concerned with theoretical possibilities, and do not focus on the evidence presented." (Internal quotation marks omitted.) *State* v. *Mezrioui*, 26 Conn. App. 395, 403–404, 602 A.2d 29, cert. denied, 224 Conn. 909, 617 A.2d 169 (1992).

Although it is well settled that, under *Blockburger*, a court may look to the charging documents to determine whether one crime is a lesser included offense of another, at issue in this appeal is the extent to which the particular facts alleged within the charging documents are relevant to that analysis. The state challenges the Appellate Court's conclusion that, "[when] the defendant claims that his or her conviction includes a lesser included offense, we employ a different analysis than the traditional *Blockburger* comparison of the elements of each offense. . . . 'The test for determining whether one violation is a lesser included offense in another violation is whether it is possible to commit the greater offense, *in the manner described in the information or bill of particulars*, without having first committed the lesser.' " (Citations omitted; emphasis added.) *State* v. *Tinsley*, supra, 197 Conn. App. 313. The Appellate Court cited to a series of cases from both this court and the Appellate Court that have included the language, "in the manner described in the information," when considering whether one crime is a lesser included offense of another, namely, *State* v. *Miranda*, 260 Conn. 93, 125, 794 A.2d 506, cert. denied, 537 U.S. 902, 123 S. Ct. 224, 154 L. Ed. 2d 175 (2002), *State* v. *Greco*, 216 Conn. 282, 292, 579 A.2d 84 (1990); *State* v. *Goldson*, supra, 178 Conn. 426, *State* v. *Bumgarner-Ramos*, 187 Conn. App. 725, 749, 203 A.3d 619, cert. denied, 331 Conn. 910, 203 A.3d 570 (2019), and *State* v. *Flynn*, 14 Conn. App. 10, 17–18, 539 A.2d 1005, cert. denied, 488 U.S. 891, 109 S. Ct. 226, 102 L. Ed. 2d 217

(1988). See *State* v. *Tinsley*, supra, 313. For the reasons discussed in this opinion, we conclude that, under *Blockburger*, these cases do not require the case specific, fact sensitive inquiry in which the Appellate Court engaged.

The parties dispute whether the Appellate Court correctly determined that the facts alleged by the state in the information are determinative of the double jeopardy inquiry under *Blockburger*. The state claims that the court should consider only the statutory elements of each offense and that two crimes do not become greater or lesser included offenses by virtue of the specific facts alleged by the state in the information. In response, the defendant argues that the Appellate Court correctly determined that the two offenses, *as described in the information*, are the same offense, regardless of their differing statutory elements. We agree with the state and conclude that, under the *Blockburger* test, manslaughter in the first degree and risk of injury to a child are not greater and lesser included offenses because each has a statutory element the other does not, regardless of the facts alleged in the information. Accordingly, the defendant's conviction of both offenses did not violate the prohibition against double jeopardy.

At the center of the parties' dispute and the Appellate Court's conclusion is the language "in the manner described in the information." The issue before us is whether this language alters the *Blockburger* test and requires a court to consider the elements of the offense within the specific factual scenario alleged in the charging documents. At the outset, we recognize that "in the manner described in the information" is language that has appeared, in the double jeopardy context, under two common instances in which a court must determine whether one crime is a lesser included offense of another. A comparison of those two instances highlights how they have been conflated, and we take this opportu-

nity to clarify the appropriate double jeopardy analysis under *Blockburger*.

The first instance in which a court must determine whether one crime is a lesser included offense of another, in the context of double jeopardy, is the "cognate pleadings approach." *State* v. *Tomlin*, 266 Conn. 608, 618, 835 A.2d 12 (2003). The cognate pleadings approach is used to determine whether a defendant has received constitutionally adequate notice of the charges against him when a lesser included offense instruction has been requested. See id., 617–18. "A defendant is entitled to an instruction on a lesser [included] offense if, and only if . . . [among other conditions] it is not possible to commit the greater offense, *in the manner described in the information or bill of particulars*, without having first committed the lesser . . . ."[4] (Emphasis added.) *State* v. *Whistnant*, 179 Conn. 576, 588, 427 A.2d 414 (1980); see also *State* v. *Brown*, 163 Conn. 52, 62, 301 A.2d 547 (1972) ("to require an instruction on a lesser included offense, the lesser offense must not require any element which is not needed to commit the greater offense in the manner alleged in the information or the bill of particulars").

Although the cognate pleadings approach bears some relation to the double jeopardy analysis, it is, by definition, distinct from the *Blockburger* test that a court

[4] By way of background, we note that "[a] defendant is entitled to an instruction on a lesser offense if, and only if, the following conditions are met: (1) an appropriate instruction is requested by either the state or the defendant; (2) it is not possible to commit the greater offense, in the manner described in the information or bill of particulars, without having first committed the lesser; (3) there is some evidence, introduced by either the state or the defendant, or by a combination of their proofs, which justifies conviction of the lesser offense; and (4) the proof on the element or elements which differentiate the lesser offense from the offense charged is sufficiently in dispute to permit the jury consistently to find the defendant innocent of the greater offense but guilty of the lesser." *State* v. *Whistnant*, 179 Conn. 576, 588, 427 A.2d 414 (1980).

engages in to decide if being put to jeopardy on a lesser offense bars a later prosecution on the greater offense or if the conviction of two offenses in a single trial essentially punishes a defendant for a single crime. See *State* v. *Greco*, supra, 216 Conn. 292 (*Blockburger* test is distinct analysis from test evaluating jury instructions). In contrast to the cognate pleadings approach, when the court seeks to determine whether a defendant's conviction of multiple crimes violates his right against double jeopardy under *Blockburger*, it is well settled that "the test . . . is whether each provision requires proof of a fact which the other does not." (Internal quotation marks omitted.) Id., 291; accord *State* v. *John*, 210 Conn. 652, 695, 557 A.2d 93 (1989), cert. denied, 493 U.S. 824, 110 S. Ct. 84, 107 L. Ed. 2d 50 (1989), and cert. denied sub nom. *Seebeck* v. *Connecticut*, 493 U.S. 824, 110 S. Ct. 84, 107 L. Ed. 2d 50 (1989); *State* v. *Wright*, 197 Conn. 588, 593, 500 A.2d 547 (1985).

Subsequent federal and sister state precedent, along with the United States Supreme Court's own "decisions applying [*Blockburger*'s] principle reveal . . . [that] the [c]ourt's application of the [*Blockburger*] test focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, *notwithstanding a substantial overlap in the proof offered to establish the crimes*." (Citations omitted; emphasis added.) *Iannelli* v. *United States*, 420 U.S. 770, 785 n.17, 95 S. Ct. 1284, 43 L. Ed. 2d 616 (1975); see *Gore* v. *United States*, 357 U.S. 386, 389, 78 S. Ct. 1280, 2 L. Ed. 2d 1405 (1958); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 788–89, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946); see also *United States* v. *Dixon*, 509 U.S. 688, 696, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993) ("[i]n both the multiple punishment and multiple prosecution contexts, this [c]ourt has concluded that [when] the two offenses for which the defendant is punished or tried cannot survive

the 'same-elements' test, the double jeopardy bar applies"); *United States* v. *DeCarlo*, 434 F.3d 447, 455–56 (6th Cir. 2006) ("[t]he [d]ouble [j]eopardy [c]lause is not violated merely because the same evidence is used to establish more than one statutory violation if discrete elements must be proved in order to make out a violation of each statute"). The purposes of the two tests highlight a key distinction between the analyses. The *Blockburger* test protects "against cumulative punishments [and] is . . . designed to ensure [only] that the sentencing discretion of the courts is confined to the limits established by the legislature." (Internal quotation marks omitted.) *State* v. *Greco*, supra, 216 Conn. 293. The cognate pleadings approach, on the other hand, is "grounded on the premise that whe[n] one or more offenses are lesser than and included within the crime charged, notice of the crime charged includes notice of all lesser included offenses. . . . This notice permits each party to prepare a case properly, each cognizant of its burden of proof."[5] (Internal quotation marks omitted.) *State* v. *Tomlin*, supra, 266 Conn. 617.

[5] Although we do not consider the cognate pleadings approach in great detail here because this case does not concern a lesser included offense instruction, we note that "[c]ourts face a [two part] analysis when considering lesser included offense issues: first, does the offense meet the definition of a lesser included offense; and second, if it is a lesser included offense, should an instruction be given to the jury?" J. Minerly, "The Interplay of Double Jeopardy, the Doctrine of Lesser Included Offenses, and the Substantive Crimes of Forcible Rape and Statutory Rape," 82 Temp. L. Rev. 1103, 1107 (2009). *Blockburger* addresses the first inquiry as to whether a defendant may be punished for multiple crimes. See id., 1110–11. States have varying approaches to answer the second inquiry regarding jury instructions; Connecticut uses the cognate pleadings approach. See, e.g., *State* v. *Tomlin*, supra, 266 Conn. 618.

"The [cognate pleadings] approach uses the pleadings, rather than the statutory elements, to determine whether a [lesser included] offense charge is acceptable. States using this approach compare the elements, as modified by the defendant's charging instrument, to the elements of the proposed [lesser included] offense. If the lesser offense is described by the pleadings, then the charge is permissible. This method allows the court to consider the specific facts as stated in the pleadings, rather than being tied to the letter of the elements of the charged offense. In sum, it is a more customized

We acknowledge that, under both the cognate pleadings approach and the *Blockburger* test, the language of the statutes under which the defendant is charged, as well as the charging documents, are relevant. See *State* v. *Greco*, supra, 216 Conn. 292. The Appellate Court, however, did more than examine the charging documents to determine the statutory elements of each offense, as is required under *Blockburger*. Instead, the court relied on the specific factual manner in which the defendant's offenses were described in the information: "Focusing our analysis on the theoretical possibilities, rather than the evidence, we cannot discern a scenario in which the defendant could have caused the death of the fifteen month old victim by blunt trauma to the abdomen without also impairing the health of the victim by inflicting trauma to his abdomen. Stated differently, it was not possible for the defendant to commit the homicide offense, *in the manner described in the information*, without first having committed risk of injury to a child." (Emphasis added.) *State* v. *Tinsley*, supra, 197 Conn. App. 324. Therefore, the Appellate Court improperly conflated the cognate pleadings approach with the *Blockburger* analysis because the cognate pleadings approach, unlike the *Blockburger* test, "does not insist that the elements of the lesser offense be a subset of the higher offense. It is sufficient that the lesser offense have certain elements in common with the higher offense . . . . [In addition], the relationship between the offenses is determined not by a comparison of statutory elements in the abstract, but by reference to the pleadings in the case." (Internal quotation marks omitted.) *State* v. *Tomlin*, supra, 266 Conn. 618. Essentially, by its definition, the cognate pleadings approach is inconsistent with the well established *Blockburger*

approach than the statutory-elements method of analysis." (Footnotes omitted.) A. Peters, "Thirty-One Years in the Making: Why the Texas Court of Criminal Appeals' New Single-Method Approach to Lesser-Included Offense Analysis Is a Step in the Right Direction," 60 Baylor L. Rev. 231, 240 (2008).

test, which, by its own terms, is limited to considering only the elements of the statutes and the charging documents.[6]

The defendant argues that, in *State* v. *Tomlin*, supra, 266 Conn. 608, this court rejected the *Blockburger* analysis when determining whether one offense is a lesser included offense of another in favor of the cognate pleadings approach. We disagree. In *Tomlin*, this court considered whether, under the circumstances of that case, the trial court had properly instructed the jury that manslaughter was a lesser included offense of murder. Id., 627–28. As we discussed previously in this opinion, whether a lesser included offense instruction is appropriate in a particular case is governed by an analysis distinct from the *Blockburger* test. Indeed, the court in *Tomlin* appropriately did not reference *Blockburger* at all in the entirety of its opinion in that case. Thus, the defendant's reliance on *Tomlin* is misplaced.

The defendant also points to this court's statement in *State* v. *Bletsch*, 281 Conn. 5, 28, 912 A.2d 992 (2007), that "[t]he *Blockburger* test . . . requires that we look to charging instruments for the facts the state has alleged to satisfy the statutory elements." We disagree with the defendant's characterization of *Bletsch* because this court's reference to the facts alleged in the information in that case was to better ascertain under which portion of the statutes the defendant was charged. The defendant in *Bletsch* alleged that "one cannot engage in sexual intercourse with a child under sixteen . . .

[6] We note that the defendant, throughout his brief, describes the cognate pleading approach as part and parcel of the *Blockburger* analysis. For example, the defendant argues that, because the cognate pleadings approach references the factual allegations contained in the state's information to determine whether one crime is the lesser included offense of another for purposes of jury instructions, the same approach should be applied to a *Blockburger* analysis. The defendant, however, does not direct us to any authority to support the proposition that the two approaches are interchangeable.

without either having contact with her intimate parts or without subjecting the victim to contact with that person's intimate parts . . . and that sexual intercourse with a child under sixteen necessarily will impair the child's morals." Id. This court considered the facts alleged in the information, not to position the elements within the facts of the charged offense, as the Appellate Court did in the present case, but to consider all *hypothetical* scenarios that would prove one offense and not the other under the statutory elements. This court concluded that "it is possible to have contact with the victim's intimate parts, such as her breasts, without engaging in sexual intercourse. Consequently, it was possible to prove each offense in the manner charged in the substitute information without necessarily proving the other offense." Id., 29. Therein lies the distinction. In *Bletsch*, this court referenced the information to ascertain all possible scenarios in which one crime could be committed without the other. In contrast, the defendant in the present case asks us to limit all hypothetical scenarios only to the one that is described in the information, namely, that manslaughter of a minor child cannot occur without risk of injury to that child. Such analysis would alter the emphasis *Blockburger* places on the statutory elements, and we decline to do so.

We recognize that both this court and the Appellate Court have used the phrase in "the manner described in the information" within various *Blockburger* inquiries. Such references appear to have led to significant confusion regarding, and ultimately conflation of, the cognate pleadings approach and the *Blockburger* test. Illustrating this confusion, the Appellate Court concluded that, "[when] the defendant claims that his or her conviction includes a lesser included offense, we employ a different analysis than the traditional *Blockburger* comparison of the elements of each offense." *State* v. *Tinsley*,

supra, 197 Conn. App. 313. To support this conclusion, the court relied on three Connecticut cases, namely, *State* v. *Greco*, supra, 216 Conn. 292, *State* v. *Carlos P.*, 171 Conn. App. 530, 537–39, 157 A.3d 723, cert. denied, 325 Conn. 912, 158 A.3d 321 (2017), and *State* v. *Raymond*, 30 Conn. App. 606, 610–11, 621 A.2d 755 (1993). These cases, however, do not stand for the proposition that an analysis other than the *Blockburger* test should be used to determine whether a defendant's conviction under two statutes violates the prohibition against double jeopardy. In each of these three cases, this court or the Appellate Court undertook a traditional *Blockburger* analysis and examined the statutory elements of the offenses.

The inclusion of "in the manner described in the information" has not, and cannot, alter the application of the *Blockburger* test. To illustrate this point, we briefly review a series of cases that contain the phrase "in the manner described in the information" or similar language, including those cases referenced by the Appellate Court.

In *State* v. *Miranda*, supra, 260 Conn. 93, this court concluded that assault in the first degree and risk of injury to a child "both require proof of elements that the other does not. Consequently, it is *possible* to prove one offense in the manner charged in the information without necessarily proving the other offense." (Emphasis in original.) Id., 126. This court referenced *only the statutory elements* required to prove each offense. See id. The information was relevant in identifying the charges against the defendant and the elements the state had to prove. See id. Similarly, in *Greco*, this court concluded that, because "there are no elements of first degree robbery and first degree burglary [that] are not also elements of felony murder when the felony murder count alleges 'robbery and burglary' as the predicate offenses, these offenses constitute the 'same offense'

as the felony murder charge under the *Blockburger* test." *State* v. *Greco*, supra, 216 Conn. 292. Therefore, the information was relevant to the court's analysis insofar as it identified the predicate offenses for felony murder. See id.; see also *State* v. *Goldson*, supra, 178 Conn. 426–27 (concluding that it is impossible to transport narcotics without possessing narcotics); *State* v. *Bumgarner-Ramos*, supra, 187 Conn. App. 751 ("[c]onsidering the theoretical possibilities . . . and not the evidence, as [a court is] required to do in the second step of the *Blockburger* analysis, [the court is] aware of no conceivable circumstance in which the defendant could have caused [the victim's] death without also having caused her serious physical injury"); *State* v. *Raymond*, supra, 30 Conn. App. 611–12 (considering language of information and concluding "that the information alleges two different intents"); *State* v. *Flynn*, 14 Conn. App. 10, 17–18, 539 A.2d 1005 (considering elements of charges and whether each provision requires proof of additional fact that other does not), cert. denied, 488 U.S. 891, 109 S. Ct. 226, 102 L. Ed. 2d 217 (1988). Thus, the "manner described in the information" is relevant in determining whether one crime is a lesser included offense of another only to the extent the reviewing court is consulting the information in order to determine whether it alleges distinct elements for each offense, rather than to determine the particular factual predicate of the case. Indeed, this court does not always consult the information when it is evident that each offense contains an element the other does not. See, e.g. *State* v. *McCall*, 187 Conn. 73, 91, 444 A.2d 896 (1982) (concluding that risk of injury to child is not lesser included offense of sexual assault in second degree because "[e]ach requires proof of an element not required by the other").

The United States Supreme Court's decision in *Illinois* v. *Vitale*, 447 U.S. 410, 100 S. Ct. 2260, 65 L. Ed. 2d

228 (1980), further confirms that the statutory elements, rather than the factual allegations, drive the *Blockburger* inquiry. In *Vitale*, the defendant argued that, under Illinois law, it was impossible to convict him of manslaughter without also proving his reckless failure to slow his vehicle because the state alleged that the victim's death was caused by his failure to brake. See id., 418. The court disagreed and concluded that "[t]he point is that if manslaughter by automobile does not always entail proof of a failure to slow, then the two offenses are not the 'same' under the *Blockburger* test. The mere possibility that the [s]tate will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution."[7] Id., 419. Therefore, because the well established *Blockburger* test focuses on the elements of each offense rather than the facts alleged in the information, we now consider the elements that the state must prove for manslaughter in the first degree and risk of injury to a child.

In the present case, the defendant, although initially charged with capital felony, was convicted of the lesser included offense of manslaughter in the first degree in violation of § 53a-55 (a) (1), which requires the state to prove that (1) "the defendant intended to cause serious

[7] The United States Supreme Court in *Vitale* did not ultimately resolve the issue of whether manslaughter and failure to reduce speed were greater and lesser included offenses. The court observed that the "Illinois Supreme Court did not expressly address the contentions that manslaughter by automobile could be proved without also proving a careless failure to reduce speed, and [the court is] reluctant to accept its rather cryptic remarks about the relationship between the two offenses involved here as an authoritative holding that under Illinois law proof of manslaughter by automobile would always involve a careless failure to reduce speed to avoid a collision." *Illinois* v. *Vitale*, supra, 447 U.S. 419. The United States Supreme Court remanded the case to the Illinois Supreme Court to determine whether, under Illinois statutes, as construed by the state's highest court, manslaughter always would require proof of failure to slow because, if it did not, the two offenses were not the same for *Blockburger* purposes. See id., 421.

physical injury to the victim," and (2) "he caused [the victim's] death." (Internal quotation marks omitted.) *State* v. *Greene*, 186 Conn. App. 534, 550, 200 A.3d 213 (2018). The information alleged that the defendant, "with the intent to cause the death of [the victim], caused the death of [the victim], who was then [fifteen] months of age, by blunt trauma to the abdomen."[8]

The defendant was also convicted of risk of injury to a child in violation of the act prong of § 53-21.[9] See footnote 9 of this opinion. The state had to prove that the defendant, "with the general intent to do so, committed (1) an act (2) likely to impair the morals or health (3) of a child under the age of sixteen." (Internal quotation marks omitted.) *State* v. *Owens*, 100 Conn. App. 619, 636, 918 A.2d 1041, cert. denied, 282 Conn. 927, 926 A.2d 668 (2007). The information alleged that the defendant "did an act likely to impair the health of [the victim], a child who was then [fifteen] months of age, by inflicting multiple trauma to his face, head, chest, and abdomen and thereby causing: laceration of the liver, internal bleeding in the abdomen, fracture of the

[8] Although the information charges the defendant with capital felony, the statutory elements are the same for manslaughter in the first degree with the exception of the applicable mental state. Because the defendant references the description contained within the information, we address it here only to demonstrate the ultimate importance to the double jeopardy inquiry of the statutory elements of each offense.

[9] This court has identified two distinct prongs under § 53-21, namely, the situation prong and the act prong. See *State* v. *Padua*, 273 Conn. 138, 147–48, 869 A.2d 192 (2005). "The 'situation prong' refers to the language in [the statute that] provides that '[a]ny person who . . . wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired . . . shall be guilty of a class C felony . . . .'

"The 'act prong' refers to the language . . . that provides: 'or does any act likely to impair the health or morals of any such child . . . shall be guilty of a class C felony . . . .' " (Emphasis omitted.) *State* v. *Owens*, 100 Conn. App. 619, 635–36 n.12, 918 A.2d 1041, cert. denied, 282 Conn. 927, 926 A.2d 668 (2007).

tenth right rib, and multiple contusions of the face, head, chest, and abdomen."

The statutory elements of manslaughter in the first degree and risk of injury to a child indicate that each offense contains an element that the other does not. Manslaughter in the first degree under § 53a-55 (a) (1) requires the state to prove that the defendant, with intent to cause serious physical injury, caused the victim's death, whereas risk of injury to a child in violation of § 53-21 requires proof of impairment to the health of a child less than sixteen years of age. Thus, it is conceivable to commit the crime of manslaughter in the first degree without committing risk of injury to a child under sixteen. Similarly, it is entirely possible to commit the crime of risk of injury to a child without committing manslaughter in the first degree because an impairment to the health of a child does not necessarily involve causing the death of a child by intentionally causing serious physical injury. The Appellate Court's additional consideration of the facts alleged in the information, specifically with respect to the victim's abdominal injury, was misplaced because that analysis does not shed light on whether the two offenses each contain an element of proof the other does not. The existence of an abdominal injury is not an element of either offense. Because the United States Supreme Court has declined to consider facts alleged in the information when conducting a *Blockburger* analysis, we decline to import that consideration into the double jeopardy analysis.

Finally, the defendant argues that we should treat his convictions of manslaughter in the first degree in violation of § 53a-55 (a) (1) and risk of injury to a child in violation of § 53-21 as the same offense for double jeopardy purposes, even if they constitute separate offenses under the *Blockburger* test. "The *Blockburger* test is a rule of statutory construction, and because it serves as a means of discerning congressional purpose

the rule should not be controlling [when], for example, there is a clear indication of contrary legislative intent." (Internal quotation marks omitted.) *State* v. *Miranda*, supra, 260 Conn. 127; accord *State* v. *Greco*, supra, 216 Conn. 293. Given our conclusion that, under *Blockburger*, the defendant's convictions of manslaughter in the first degree and risk of injury to a child "do not constitute the same offense, the burden remains on the defendant to demonstrate a clear legislative intent to the contrary." (Internal quotation marks omitted.) *State* v. *Schovanec*, 326 Conn. 310, 326, 163 A.3d 581 (2017). The defendant, however, has provided no authority for his claim that the legislature intended to treat §§ 53a-55 (a) (1) and 53-21 as the same offense for double jeopardy purposes. Accordingly, we conclude that §§ 53a-55 (a) (1) and 53-21 are not the same offense for double jeopardy purposes. See, e.g., *State* v. *Miranda*, supra, 127.[10] The Appellate Court, therefore, incorrectly determined that the defendant's convictions of risk of injury to a child in violation of § 53-21 and manslaughter in the first degree in violation of § 53a-55 (a) (1) violated the defendant's right to be free from double jeopardy.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to affirm the judgment of the trial court.

In this opinion the other justices concurred.

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[10] We note that, because the state did not provide the Appellate Court "with any authority that our legislature authorized separate penalties for the defendant's criminal offenses . . . [that court] defer[red] to the *Blockburger* presumption and conclude[d] that . . . the defendant's punishment cannot withstand constitutional scrutiny." *State* v. *Tinsley*, supra, 197 Conn. App. 325–26. On appeal, the state challenges the Appellate Court's allocation of the burden. Because we conclude that the two offenses are distinct under the *Blockburger* test, it is the defendant's burden to demonstrate contrary legislative intent.

STATE OF CONNECTICUT *v.* ELIZABETH K. TURNER
(SC 20360)

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

Syllabus

Convicted of robbery in the first degree and felony murder, among other crimes, the defendant appealed. The defendant's convictions stemmed from her involvement in the murders of the victims, B and B's son, P. Prior to the murders, the defendant and her husband, C, lived in B's home. The defendant devised a scheme in order to steal from B, pursuant to which the defendant instructed C to tell B that the defendant had been arrested and that he needed money to bail the defendant out of jail. B acquiesced and gave C the money, which C and the defendant used to buy drugs. Subsequently, the defendant and C returned to B's home, where the defendant heard an altercation and subsequently witnessed C stabbing P. The defendant did not intercede, and, according to a statement the defendant later made to the police, it was apparent to her at that point that B may have already been dead. After the killings, the defendant went through B's purse and removed money and personal items, and the defendant and C jointly sold B's and P's personal property for cash. In her appeal before the Appellate Court, the defendant claimed that the trial court's instructions violated her due process rights on the ground that the court, in referring to a larceny by false pretenses in its instructions on the first degree robbery and felony murder charges, improperly presented the jury with a legally invalid but factually supported basis for finding her guilty with respect to those charges. In support of this claim, the defendant argued that a larceny by false pretenses could not, as a matter of law, serve as the predicate felony for robbery and felony murder. The Appellate Court concluded that the trial court's references to larceny by false pretenses presented the jury with a legally valid basis for conviction, albeit one that was factually unsupported by the evidence presented at trial, and that the improper inclusion of the factually unsupported theory was harmless because the post murder larcenies also presented the jury with a legally valid and factually supported alternative basis for finding the defendant guilty of robbery and felony murder. The Appellate Court affirmed the judgment of conviction, and the defendant, on the granting of certification, appealed to this court. *Held* that the jury having been instructed on an alternative theory of conviction that was legally valid and factually supported by the evidence, the Appellate Court properly upheld the defendant's conviction of first degree robbery and felony murder: a larceny by false pretenses that precedes the use of force can satisfy the

larceny element of robbery if the force is used in order to retain the property immediately after the taking, and, therefore, the trial court's references to larceny by false pretenses in its instructions presented the jury with a legally valid theory for finding the defendant guilty of robbery and felony murder; nevertheless, because the evidence established that the defendant and C completed their scheme to take money from B under the pretense that it was to bail the defendant out of jail before B and P were murdered, that scheme could not serve as a factual basis for finding the defendant guilty of robbery or felony murder, and, accordingly, the trial court's references to larceny by false pretenses in its instructions in connection with that scheme was improper; however, the submission of this factually unsupported theory of guilt to the jury did not violate the defendant's due process rights because the jury was provided with a legally valid and factually supported alternative basis for conviction insofar as the jury was instructed that it could find the defendant guilty of first degree robbery and felony murder on the basis of her participation in the larcenies that occurred after the murders were committed, and this alternative theory of criminal liability was amply supported by the evidence.

Argued March 24—officially released August 31, 2021*

Procedural History

Substitute information, in the first case, charging the defendant with the crimes of conspiracy to commit larceny in the third degree and accessory to larceny in the third degree, substitute information, in the second case, charging the defendant with three counts of the crime of robbery in the first degree, two counts of the crime of felony murder, and with one count each of the crimes of criminal attempt to possess narcotics, larceny in the third degree, burglary in the third degree, hindering prosecution in the second degree, forgery in the second degree, conspiracy to commit robbery in the first degree, and tampering with evidence, and substitute information, in the third case, charging the defendant with the crimes of larceny in the second degree, using a motor vehicle without the owner's permission, and forgery in the second degree, brought to the Superior Court in the judicial district of Waterbury, where

* August 31, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

the cases were consolidated; thereafter, the case was tried to the jury before *Cremins*, *J.*; verdicts and judgments of guilty, from which the defendant appealed; subsequently, the Appellate Court, *Lavine*, *Prescott*, *and Bright*, *Js.*, which affirmed the judgments of the trial court, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Mark Rademacher, assistant public defender, for the appellant (defendant).

Ronald G. Weller, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Terence D. Mariani* and *Cynthia S. Serafini*, senior assistant state's attorneys, for the appellee (state).

Opinion

KAHN, J. This certified appeal requires us to consider whether the defendant's convictions of robbery in the first degree in violation of General Statutes § 53a-134 (a) (1) and felony murder in violation of General Statutes § 53a-54c should be reversed due to the trial court's references to larceny by false pretenses in its instructions to the jury on both offenses. The defendant, Elizabeth K. Turner, appeals from the judgment of the Appellate Court affirming her conviction on sixteen counts,[1] including three counts of robbery in the first

[1] The defendant was convicted of two counts of felony murder in violation of General Statutes (Rev. to 2011) § 53a-54c, one count of attempt to possess narcotics, in violation of General Statutes § 53a-49 and General Statutes (Rev. to 2011) § 21a-279 (a), one count of larceny in the third degree, in violation of General Statutes § 53a-124 (a), one count of burglary in the third degree, in violation of General Statutes § 53a-103 (a), one count of hindering prosecution in the second degree, in violation of General Statutes § 53a-166 (a), one count of forgery in the second degree, in violation of General Statutes § 53a-139 (a) (1), two counts of robbery in the first degree in violation of General Statutes § 53a-134 (a) (1), one count of robbery in the first degree in violation of § 53a-134 (a) (3), one count of conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-134 (a), one count of tampering with physical evidence in violation of General Statutes (Rev. to 2011) § 53a-155 (a) (1), one count of

degree and two counts of felony murder, for her involvement in the murder of Donna Bouffard and her son, Michael Perkins (Perkins).[2] The defendant contends that the trial court, by referring to larceny by false pretenses in its instructions, improperly presented the jury with a legally invalid but factually supported basis for finding her guilty of both robbery and felony murder. The Appellate Court rejected that claim, concluding that the trial court's instructions, although improper, provided the jury with a legally valid but factually unsupported basis for finding the defendant guilty and, as a result, did not impact her due process right to a fair trial. See *State* v. *Turner*, 190 Conn. App. 693, 709–15, 212 A.3d 715 (2019). The Appellate Court further held that the trial court's instructional error was harmless because the jury had a legally valid and factually supported alternative basis for finding the defendant guilty of robbery and felony murder. Id., 711–15. We affirm the judgment of the Appellate Court.

The jury reasonably could have found the following relevant facts based on the evidence presented at trial. In February, 2012, Bouffard invited the defendant and her husband, Claude Turner, both of whom were homeless at the time, to live with her in her Watertown home. Bouffard's generosity was an extension of a kindness first offered by her daughter, Christine Perkins, who, after seeing the Turners at a Waterbury mall and recognizing Claude Turner from a Salvation Army food line,

conspiracy to commit larceny in the third degree in violation of §§ 53a-48 (a) and 53a-124 (a), one count of accessory to larceny in the third degree in violation of General Statutes §§ 53a-8 (a) and 53a-124 (a), one count of larceny in the second degree in violation of General Statutes § 53a-123 (a) (1), and one count of using a motor vehicle without the owner's permission in violation of General Statutes § 53a-119b (a) (1).

[2] The defendant was convicted of two counts of robbery in the first degree in violation of § 53a-134 (a) (1) for the robberies of Bouffard and Perkins. The defendant was also convicted of one count of robbery in the first degree in violation of § 53a-134 (a) (3) for robbery using a dangerous instrument.

invited the Turners to stay with her and her mother. Bouffard provided the Turners with their own room on the second floor.

At the beginning of April, 2012, Bouffard received a disability settlement in the amount of $13,000. After using a portion of the settlement to pay various bills, Bouffard put the remaining $7000 in an envelope and hid it under her bed. When she noticed that some of the money was missing, she took the remaining cash and placed it in a safe in her living room. Bouffard accused the defendant and Claude Turner of the theft, but allowed them to remain in her home.

On April 19, 2012, Bouffard traveled to Vermont for a brief vacation with a friend. Prior to her departure, Bouffard served eviction papers on her daughter and her daughter's husband, David Ortiz, so that her son, Perkins, could move back into her home after having moved out following a dispute with Ortiz. While Bouffard was away, the defendant directed her husband to break into the safe with a crowbar in order to access the remainder of the money obtained from the disability settlement. Claude Turner complied, and the couple stole approximately $6000, all of which they used to purchase drugs. When Bouffard returned from Vermont and discovered the open, empty safe, she reported the larceny to the police. In early May, 2012, Bouffard asked the Turners to move out of her home. The couple refused to leave.

The relationship between the Turners and Bouffard deteriorated rapidly following the theft. In the ensuing months, the defendant expressed to her husband and their close friend, Anthony Acosta, that she wanted to put rat poison in Bouffard's and Perkins' food. After her arrest, the defendant told the police that Bouffard frequently complained about being unhappy and that she found such complaints to be condescending. She

also admitted that she and Bouffard argued frequently during this period.

On June 28, 2012, the defendant devised a new scheme to steal from Bouffard. She instructed her husband to go to Bouffard and tell her that the defendant had been arrested and that he needed $50 to bail her out of jail. Bouffard acquiesced and gave Claude Turner the money, which he and the defendant used to buy drugs. Later that same day, again at the direction of the defendant, Claude Turner returned to Bouffard and told her the bond was actually $100. Bouffard again gave Claude Turner $50, and the couple used the money to purchase more drugs.

Just after midnight on June 29, 2012, the Turners returned to Bouffard's home, where Perkins was asleep on a couch and Bouffard was awake in her room. According to the defendant's statement to the police following her arrest, Bouffard began "running her mouth" soon after they arrived. Hoping to avoid a confrontation, the defendant went upstairs and turned on a television in the room that she shared with her husband. Interested in what was going on downstairs, the defendant lowered the sound on the television so that she could listen in.

Soon thereafter, the defendant heard "banging" and "wrestling" noises. The defendant also heard Perkins yell, "[j]ust stop" and "[p]lease stop, I love you." (Internal quotation marks omitted.) The defendant then started to walk down the stairs but stopped when she saw Claude Turner stabbing Perkins in the stomach. The defendant did not intercede, and, according to her statement to the police, it was at that moment that she realized that Bouffard was likely dead because the room to her door was closed despite Perkins' pleas for help. After seeing the defendant, Claude Turner told her to return upstairs, which she promptly did.

Immediately after the killings, Claude Turner walked upstairs and handed Bouffard's purse to the defendant. The defendant went through the purse and removed $200, multiple gift cards, and the keys to Bouffard's car. The defendant then walked down the stairs, past the mutilated bodies of Perkins and Bouffard, and searched for the paperwork for Bouffard's car. The defendant and her husband then drove Bouffard's car to Waterbury, where they picked up Acosta and purchased marijuana and cocaine. The three then returned to Bouffard's home and used the drugs. At trial, the jury heard former testimony from Acosta that, while they were sitting in the Turners' room, the defendant said that she regretted telling her husband to kill Bouffard and Perkins. When the defendant discovered an eviction notice while searching through Bouffard's belongings, she remarked to Acosta, "good for them. They deserved it."

Over the next several days, the defendant, Claude Turner, and Acosta sold a variety of items they stole from the house, including Bouffard's camper, phone, and jewelry, and Perkins' scooter, guitar, and a video game console. The defendant later admitted to the police that she and her husband had jointly decided to sell the various items for cash. The defendant also attempted to withdraw money from Bouffard's bank account using a forged check but was turned away by a skeptical bank teller. On Friday, July 6, 2012, one week after the murders, the defendant and her husband sold Bouffard's car for $400.

The defendant and her husband were ultimately arrested in Baltimore, Maryland, and the defendant waived extradition to Connecticut.[3] The defendant was charged with sixteen offenses. Relevant to the present

[3] While in prison awaiting trial, the defendant wrote a letter to a friend in which she stated that she had "made a huge mistake" that resulted in "lives [being] lost." (Internal quotation marks omitted.)

appeal, the defendant was charged, in the second case, with felony murder as to Bouffard and Perkins in counts one and two, respectively, and robbery in the first degree as to Bouffard and Perkins in counts nine and ten, respectively. At trial, the prosecutor argued that the defendant had engaged in a continuous sequence of larcenous conduct, beginning with the bail scheme and culminating in the theft of the victims' property after the murders. At the conclusion of the state's case-in-chief, defense counsel moved for a judgment of acquittal on the ground that the defendant did not plan or participate in the murder and, as a result, could not be guilty of felony murder or robbery. The prosecutor, in response to the motion, argued that the timing of the murders elevated both the bail scheme larceny and the larcenies committed after the murders to robberies. The trial court denied the motion.

At an on-the-record charging conference held the following day, defense counsel argued that the state's "continuing course of conduct" theory was inappropriate for closing argument on the felony murder counts because the bail scheme had ended prior to the use of force. The trial court disagreed, concluding that whether the bail scheme, as part of a continuous course of conduct, could serve as the predicate felony for felony murder was a question of fact for the jury. The trial court reasoned: "The cases in the brief that was filed by the state in the hearing [on] probable cause do stand for the proposition, in my view, that there can be a continuing course of conduct from a point prior to the murders . . . that can be argued as a continued course of conduct, which would encompass the underlying predicate robbery for the felony murder. . . . My conclusion, further, is that whether or not it is a continuing course of conduct is a fact[ual] issue that has to be decided by the jury."

In its instructions to the jury on the counts of robbery and felony murder, the trial court defined the crime of larceny by false pretenses when it described the larceny element of robbery. The trial court instructed the jury in relevant part: "Larceny simply means theft or stealing. Larceny also includes obtaining property by false pretenses. 'False pretense' means a false representation of fact." The trial court referred to larceny by false pretenses a total of three times in its instructions on robbery and felony murder.

Aside from the various references to larceny by false pretenses, the trial court's instructions hewed closely to the model instructions for robbery and felony murder. See Connecticut Criminal Instructions 5.4-1 and 6.4-1, available at https://www.jud.ct.gov/JI/Criminal/Criminal.pdf (last visited August 20, 2021). When it instructed the jury on the felony murder charges in counts one and two of the second case, the trial court explained that, in order to find the defendant guilty, it had to find that the killings occurred "in the course of, and in furtherance of the commission or attempted commission of the crime of robbery . . . ." The trial court further noted that " '[i]n the course of the commission' of the robbery or attempted robbery means during any part of the defendant's participation in the robbery or attempted robbery." The trial court also instructed the jury that the killing must "in some way be causally connected to, or as a result of, the robbery . . . ." The jury subsequently returned verdicts finding the defendant guilty on all counts. See *State* v. *Turner*, supra, 190 Conn. App. 695–96. Thereafter, the trial court rendered judgments of conviction in accordance with the verdicts and sentenced the defendant to sixty years of incarceration. Id., 700.

On appeal to the Appellate Court, the defendant claimed, inter alia,[4] that the trial court's instructions on

[4] In her appeal before the Appellate Court, the defendant also claimed that insufficient evidence was presented at trial to support her conviction

the charges of robbery and felony murder violated her due process right to a fair trial because the court's various references to larceny by false pretenses permitted the jury to base its guilty verdict on a legally invalid but factually supported theory of guilt. See *State* v. *Turner*, supra, 190 Conn. App. 704–705. In support of this claim, the defendant argued that a larceny by false pretenses cannot, as a matter of law, serve as the predicate felony for robbery and felony murder. Id., 709. According to the defendant, the trial court's reference to larceny by false pretenses created the impression that the jury could find her guilty of robbery and felony murder based on the larceny by false pretenses at issue in this case, namely, the bail scheme. Id., 700–702. The defendant argued that, because the instructions contained a legally invalid theory, the jury's general verdicts must be reversed under *Stromberg* v. *California*, 283 U.S. 359, 51 S. Ct. 532, 75 L. Ed. 1117 (1931). *State* v. *Turner*, supra, 704–705.

The Appellate Court rejected the defendant's claim and held that, although the trial court's references to larceny by false pretenses were improper, the instructional error presented the jury with a legally *valid* theory that was factually unsupported by the evidence presented at trial. Id., 709–10. Relying on our decision in *State* v. *Chapman*, 229 Conn. 529, 643 A.2d 1213 (1994), the Appellate Court held that the inclusion of the factually unsupported theory was harmless because the post murder larcenies also presented the jury with a legally valid and factually supported alternative basis for finding the defendant guilty. See *State* v. *Turner*, supra, 190 Conn. App. 715. This certified appeal followed.[5]

of attempted possession of narcotics. See *State* v. *Turner*, supra, 190 Conn. App. 696. This claim is not at issue in the present certified appeal.

[5] The defendant appealed from her conviction to this court, and we transferred the appeal to the Appellate Court. See General Statutes § 51-199 (c); Practice Book § 65-1. We subsequently granted the defendant's petition for certification to appeal, limited to the following issue: "Did the Appellate

Before turning to the defendant's specific claim on appeal, we begin by reviewing the legal principles relevant to our consideration of claims of instructional error involving multiple theories of guilt on a single count. We have previously recognized the important distinction between instructional errors that present the jury with a legally valid but factually unsupported theory of liability and those that provide the jury with a legally *invalid* basis for convicting the defendant. In *Chapman*, we noted that "the United States Supreme Court has held that a factual insufficiency regarding one statutory basis, which is accompanied by a general verdict of guilty that also covers another, factually supported basis, is not a federal due process violation." *State* v. *Chapman*, supra, 229 Conn. 539; see also, e.g., *State* v. *Burton*, 258 Conn. 153, 162–65, 778 A.2d 955 (2001). In such cases, the inclusion of a legally valid but factually unsupported theory of liability in the instructions does not implicate the due process rights of the defendant because a jury is well equipped to differentiate between factually supported and factually unsupported theories of guilt. See *State* v. *Chapman*, supra, 539; see also *Griffin* v. *United States*, 502 U.S. 46, 56–59, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991).

A jury is not, however, "equipped to determine whether a particular theory of conviction submitted to [it] is contrary to law . . . ." (Internal quotation marks omitted.) *State* v. *Chapman*, supra, 229 Conn. 539. As a result, if a jury is provided with a legally invalid alternative basis for finding the defendant guilty and the jury returns a general verdict of guilty, the defendant's due process rights are violated, and the conviction must be reversed unless the state can show that "the jury *necessarily* found facts to support the conviction on a

Court properly uphold the defendant's conviction of robbery and felony murder based on a legally invalid but factually supported theory for the conviction?" *State* v. *Turner*, 333 Conn. 915, 216 A.3d 650 (2019).

valid theory." (Emphasis added.) *State* v. *Cody M.*, 337 Conn. 92, 116, 259 A.3d 576 (2020); see also *Hedgpeth* v. *Pulido*, 555 U.S. 57, 58, 129 S. Ct. 530, 172 L. Ed. 2d 388 (2008).

In the present appeal, the defendant contends that the Appellate Court incorrectly concluded that the trial court's instructions presented the jury with a legally valid but factually unsupported basis for finding her guilty of robbery and felony murder. Specifically, the defendant argues that the Appellate Court incorrectly determined that a person who obtains property through false pretenses and later uses force to retain that property can, as a matter of law, be convicted of robbery or felony murder. According to the defendant, a larceny by false pretenses can never serve as a legally valid predicate for robbery and felony murder, and, as a result, the trial court's instructions violated her due process rights by providing the jury with a legally invalid basis for finding her guilty. Citing this court's recent decision in *State* v. *Cody M.*, supra, 337 Conn. 92, the defendant argues that her conviction on the charges of robbery and felony murder must be reversed because the state cannot establish that the jury made the factual findings necessary to support her conviction on a legally valid alternative theory. We disagree.

We begin our analysis of the defendant's claim by examining the Appellate Court's conclusion that, under certain circumstances, a larceny by false pretenses can serve as the predicate felony for robbery and felony murder. In support of its conclusion, the Appellate Court offered the following hypothetical: "Suppose that, during the course of the bail scheme, [Perkins] glanced out [of] the window and saw the defendant in the car. If he exclaimed, after Bouffard has handed over the money, that the defendant was not in jail but was outside, and Turner immediately used physical force in order to retain possession of the money, then the lar-

ceny by false pretenses could have been a proper predicate for a robbery." *State* v. *Turner*, supra, 190 Conn. App. 709. We agree with the Appellate Court's reasoning and conclude that a larceny by false pretenses that precedes the use of force can satisfy the larceny element of robbery under General Statutes § 53a-133 if the force is used in order to retain the property immediately after the taking.[6] See General Statutes § 53a-133 ("[a] person commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of . . . the retention [of the property] *immediately after the taking* [of the property]" (emphasis added)). As we have consistently recognized, a larceny that occurs either "immediately before or after" the use of force can serve as the predicate larceny for robbery under § 53a-133. *State* v. *Ghere*, 201 Conn. 289, 297, 513 A.2d 1226 (1986). We, therefore, conclude that the trial court's references to larceny by false pretenses in its charge presented the jury with a legally *valid* theory for finding the defendant guilty of robbery and felony

[6] The case law that the defendant cites in support of the opposite conclusion is unavailing. The defendant relies heavily on the California Supreme Court's decision in *People* v. *Williams*, 57 Cal. 4th, 776, 786–89, 305 P.3d 1241, 161 Cal. Rptr. 3d 81 (2013). Although the majority in that decision held that a larceny by false pretenses that precedes a use of force cannot serve as a predicate larceny for robbery under California law; see id., 788–89; the holding in that case turned on the language of California's robbery statute, which differs significantly from the language contained in § 53a-133. Unlike the relevant California statute, § 53a-133 covers the "use of physical force . . . for the purpose of . . . the retention [of the property] immediately after the taking . . . ." The defendant also mistakenly relies on *People* v. *Quinn*, 186 App. Div. 2d 691, 588 N.Y.S.2d 646 (1992), which makes clear that, under New York state law, a larceny by false pretenses can serve as the predicate felony for robbery if force is used "to overcome . . . resistance to the retention of the [property] 'immediately after the taking.' " Id., 692; see also, e.g., *People* v. *Saia*, 112 App. Div. 2d 804, 805, 492 N.Y.S.2d 306 (recognizing that robbery can be committed by threatening physical force for purpose of retaining property acquired by false pretenses), appeal denied, 66 N.Y.2d 617, 485 N.E.2d 244, 494 N.Y.S.2d 1040 (1985).

murder.[7] See *Griffin* v. *United States*, supra, 502 U.S. 59 (noting that theory of conviction is legally invalid if charged conduct "is protected by the [c]onstitution, is time barred, or fails to come within the statutory definition of the crime"); see also, e.g., *United States* v. *Desnoyers*, 637 F.3d 105, 109 (2d Cir. 2011).

We now must consider whether this legally valid theory was supported by evidence presented at trial. According to the Appellate Court, the evidence established that the bail scheme "was complete[d] before the victims were murdered," and, as a result, it could not serve as the factual basis for finding the defendant guilty of robbery and felony murder. *State* v. *Turner*, supra, 190 Conn. App. 709–10. On the basis of our review of the record, we agree with the Appellate Court. During trial, testimony established that, on the evening of June 28, 2012, Claude Turner and the defendant fraudulently acquired $100 from Bouffard and promptly used that money to purchase drugs. After midnight on June 29, 2012, the defendant and Claude Turner returned to Bouffard's home, and, following an argument with Bouffard, Claude Turner killed both Bouffard and Perkins. By the time the victims were murdered, the proceeds of the bail scheme had been spent. Additionally, no evidence was presented at trial that Claude Turner's use of force was connected to the bail scheme or that he attacked Bouffard for the purpose of "[p]reventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking . . . ." General Statutes § 53a-133. Due to the absence of any evidence connecting the killings to the completed bail scheme, we conclude that this theory of criminal liability was factually unsupported, and, as a result, the

[7] The defendant implicitly concedes as much in her brief when she argues that "the bail larceny may have had a connection to the murder. But it did not have the legally required connection because the Turners had spent the stolen money."

trial court's inclusion of larceny by false pretenses in its instructions on robbery and felony murder was improper. See, e.g., *State* v. *Reid*, 193 Conn. 646, 667 n.22, 480 A.2d 463 (1984) (noting that "[i]t is error for a court to submit to a jury as a basis for a conviction any statutory alternative ground unsupported by the evidence").

Having determined that the instructions improperly presented the jury with a legally valid but factually unsupported theory of conviction, "we must determine whether: (1) the error is constitutional or nonconstitutional in nature; and (2) whether it was harmful." *State* v. *Chapman*, supra, 229 Conn. 537. As we have previously noted, the submission of a factually unsupported theory of guilt does not violate the constitutional rights of a defendant, as long as the trial court's instructions also provided the jury with a legally valid *and* factually supported basis for conviction. Id., 539–44; see also, e.g., *State* v. *Berger*, 249 Conn. 218, 238–39, 733 A.2d 156 (1999).

In her brief, the defendant concedes that her participation in the larcenies that occurred after Bouffard and Perkins were killed provided the jury with a legally valid basis for finding her guilty of both robbery and felony murder.[8] The trial court specifically instructed the jury that, in order to find the defendant guilty of felony murder, it had to find that a "death occurred during . . . any part of the defendant's *participation* in the robbery or attempted robbery." (Emphasis added.) The trial court also instructed the jury that it needed to find that the death was "in some way . . . causally connected to, or as a result of, the robbery . . . ." As the defendant concedes, these instructions

[8] Specifically, the defendant states: "Here, the theft of money and gift cards from Bouffard's purse immediately after her death could support a [conviction of] robbery and felony murder . . . if the defendant knew ahead of time that [Claude] Turner was going to kill the victim to steal from her."

presented the jury with a legally valid basis for finding the defendant guilty of robbery and felony murder based on the larcenies committed after the murders.[9]

We also agree with the Appellate Court's assessment that this alternative theory of liability was amply supported by evidence contained in the record. As the Appellate Court noted, the evidence established, among other things, that (1) the defendant told the police that Claude Turner would do anything for her in order to keep her happy; (2) she twice directed Claude Turner to steal Bouffard's money, first when it was under Bouffard's bed and then again when it was in the safe; (3) she did not intervene when she saw Claude Turner stabbing Perkins; (4) she searched through Bouffard's purse and stole money, gift cards, and car keys immediately after the murders; (5) she walked past the bodies of Bouffard and Perkins when searching for the paperwork for Bouffard's car; (6) she and Claude Turner used the money from Bouffard's purse to purchase drugs; (7) they, along with Acosta, used the drugs in Bouffard's home shortly after the murders; (8) she told Acosta that she regretted telling Claude Turner to kill Bouffard and Perkins; and (9) she stated in a letter that she wrote from prison that she had "made a huge mistake" that resulted in "lives [being] lost."[10] (Internal quotation marks omitted.) *State* v. *Turner*, supra, 190 Conn. App. 700, 712. As the Appellate Court aptly noted, "[t]hese facts, and others, provided a basis for the jury to have concluded beyond a reasonable doubt that at least the killing of Bouffard was planned in advance and was

[9] The defendant's claim of instructional error is limited to the trial court's references to larceny by false pretenses in its robbery and felony murder instructions. The defendant does not allege that any other portion of the instructions was improper.

[10] We also note that, during the prosecutor's closing argument, he argued that, due to the defendant's direct involvement in the crimes leading up to the killings, "common sense" dictated that she was aware of Claude Turner's plan to kill the victims before it happened.

designed to gain possession of her money and property, and that . . . Perkins was killed because he was a witness and/or attempted to intervene." Id., 712–13.

Our conclusion that the jury was instructed on an alternative theory of conviction that was both legally valid and factually supported is sufficient to reject any nonconstitutional claim of instructional error. See, e.g., *State* v. *Chapman*, supra, 229 Conn. 542 ("we have consistently held that submission of an instruction for which there was no basis in the evidence is subject to harmless error analysis"). In the present case, the defendant cannot establish that the trial court's error more probably than not affected the jury's verdict because the trial court's instructions provided the jury with a legally valid and factually supported alternative basis for finding her guilty of robbery and felony murder. When a jury is presented with multiple legally valid theories of conviction, only one of which is unsupported by the evidence presented at trial, "we assume that the jury found the defendant guilty under the supported allegation, rather than the unsupported allegation." Id., 543–44.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* JODI D.*
(SC 20370)

McDonald, D'Auria, Mullins, Kahn and Ecker, Js.

Syllabus

Pursuant to the statute (§ 53a-60b (a) (1)) delineating the crime of assault of a disabled person in the second degree, a person is guilty of that crime when he or she commits the crime of assault in the second degree and the victim is "physically disabled," as defined by statute (§ 1-1f).

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

Pursuant to § 1-1f (b), "[a]n individual is physically disabled if he has any chronic physical handicap, infirmity or impairment . . . ."

Convicted, after a jury trial, of the crime of assault of a disabled person in the second degree, the defendant appealed to the Appellate Court, claiming, inter alia, that § 53a-60b (a) (1), the statute under which she had been convicted, was unconstitutionally vague as applied to her conduct to the extent that it relied on the definition of physical disability set forth in § 1-1f (b). The defendant and her sister, S, had engaged in a physical altercation during which the defendant struck S with a wooden billy club. At the time of the altercation, S suffered from fibromyalgia, a condition for which she had been receiving ongoing medical treatment and taking prescription medication. As a result of that condition, S experienced chronic pain issues and physical limitations that made sitting, standing and walking difficult. The Appellate Court affirmed the judgment of conviction, concluding, inter alia, that § 53a-60b (a) (1) was not unconstitutionally vague as applied to the defendant's conduct because the term "physical disability," as defined in § 1-1f (b), had a readily ascertainable meaning, and the defendant's conduct clearly came within the unmistakable core of conduct prohibited by § 53a-60b (a) (1). The Appellate Court also concluded that there was sufficient evidence to support the jury's finding that the victim suffered from a physical disability. On the granting of certification, the defendant appealed to this court. *Held*:

1. The defendant could not prevail on her claim that §§ 53a-60b (a) (1) and 1-1f (b) were unconstitutionally vague as applied to her conduct: this court consulted the dictionary definitions of "handicap," "infirmity," and "impairment," as used in § 1-1f (b), and concluded that those words, as well as the term "physically disabled" in § 53a-60b (a) (1), are not so inherently vague that a person of ordinary intelligence would not know what conduct is prohibited under § 53a-60b (a) (1), at least as applied to the defendant's conduct toward S; moreover, the courts of other jurisdictions have previously rejected claims that the terms "handicap" and "impaired" are unconstitutionally vague, and there was no merit to the defendant's claim that the statutes were unconstitutionally vague insofar as they conferred unfettered discretion on police officers and prosecutors, among others, to determine which victims are physically disabled enough to warrant prosecution of their aggressors under § 53a-60b (a) (1), as a statute, such as § 53a-60b (a) (1), that is sufficiently clear to give a person of common intelligence notice of what is prohibited necessarily is sufficiently clear to cabin the discretion of police officers and prosecutors within constitutional limits.

2. This court concluded that § 53a-60b (a) (1) was unconstitutionally overinclusive insofar as the statute could be applied to assaults on persons whose physical disabilities neither diminish their ability to defend themselves from assault nor make them particularly vulnerable to injury, which would have no reasonable and substantial relation to the statute's

purpose, and, although § 53a-60b (a) (1) still constitutionally can be applied to conduct that comes within the statute's rational core, because the jury in the present case was not instructed that it was required to find that S had a diminished ability to defend herself or that she was particularly vulnerable to injury at the time of the assault in order to find the defendant guilty under § 53a-60b (a) (1), the case was remanded for a new trial at which the jury could be instructed in accordance with the foregoing standard.

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

Argued December 7, 2020—officially released August 31, 2021**

Procedural History

Substitute information charging the defendant with the crimes of assault of a disabled person in the second degree, assault in the third degree and reckless endangerment in the second degree, brought to the Superior Court in the judicial district of Waterbury, geographical area number four, and tried to the jury before *Cremins*, *J.*; verdict of guilty of assault of a disabled person in the second degree and reckless endangerment in the second degree; thereafter, the court vacated the verdict as to the charge of reckless endangerment in the second degree; judgment of guilty of assault of a disabled person in the second degree, from which the defendant appealed to the Appellate Court, *Sheldon*, *Keller* and *Flynn*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Reversed*; *new trial.*

Megan L. Wade, assigned counsel, with whom was *James P. Sexton*, assigned counsel, for the appellant (defendant).

Brett R. Aiello, deputy assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Karen Diebolt*, former assistant state's attorney, for the appellee (state).

** August 31, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Naomi T. Fetterman filed a brief for the Connecticut Criminal Defense Lawyers Association as amicus curiae.

Opinion

McDONALD, J. The issues before us in this appeal are (1) whether the term "physically disabled," as used in General Statutes § 53a-60b (a) (1) and defined by General Statutes § 1-1f (b), is unconstitutionally vague as applied to the conduct of the defendant, Jodi D., who was convicted of assault on a victim who suffered from fibromyalgia and other physical ailments, (2) if the statutes are not unconstitutionally vague, whether they are unconstitutionally overinclusive, and (3) whether there was insufficient evidence to establish that the victim suffered from a physical disability within the meaning of § 53a-60b (a) (1).

The defendant was charged with assault of a disabled person in the second degree in violation of § 53a-60b (a) (1), assault in the third degree in violation of General Statutes § 53a-61 (a) (1) and reckless endangerment in the second degree in violation of General Statutes § 53a-64 (a) after an altercation with the victim, the defendant's sister, during which the defendant struck the victim with a wooden billy club. The jury found the defendant guilty of assault of a disabled person in the second degree and reckless endangerment in the second degree and not guilty of assault in the third degree, and the trial court rendered judgment of conviction. Thereafter, the defendant appealed to the Appellate Court, claiming, among other things, that "§ 53a-60b (a) (1) is unconstitutionally vague as applied to her conduct" and that "the evidence did not support a finding that the victim was physically disabled . . . ." (Footnote omitted.) *State* v. *Dojnia*, 190 Conn. App. 353, 355–56, 210 A.3d 586 (2019). The Appellate Court rejected these claims and affirmed the judgment of conviction. Id., 386. We then granted the defendant's peti-

tion for certification to appeal to this court, limited to the following issues: (1) "Did the Appellate Court correctly conclude that . . . §§ 1-1f (b) and 53a-60b (a) (1) were not unconstitutionally vague as applied to the defendant?" And (2) "[d]id the Appellate Court correctly conclude that the evidence the state presented at trial was sufficient to prove beyond a reasonable doubt that the victim was 'physically disabled' under the governing statutes?" *State* v. *Dojnia*, 333 Conn. 914, 215 A.3d 1211 (2019). The defendant also claims on appeal that, even if the statutes are not unconstitutionally vague, § 53a-60b (a) (1) is unconstitutional because there is no rational nexus between the broad scope of the statute and the legislature's narrow purpose in enacting it.[1] Although we reject the defendant's claim that the statutes are unconstitutionally vague, we conclude that they are unconstitutionally overinclusive and lack any rational basis as applied to assaults on persons whose physical disabilities neither diminish their ability to defend themselves from assault nor make them particularly vulnerable to injury. Accordingly, we reverse the judgment of the Appellate Court and remand the case for a new trial.

The opinion of the Appellate Court sets forth the following facts that the jury reasonably could have found. "In October, 2015, the defendant and the victim, who are sisters, resided in separate units of a duplex style home in Naugatuck that was owned by their mother. For years prior to the events at issue, the victim suffered from chronic pain and was physically limited

[1] We recognize that this issue may be outside the scope of the certified questions because overinclusiveness and vagueness are distinct concepts. Nevertheless, we address the issue because the defendant raised it before the Appellate Court and it is closely intertwined with the certified questions. See, e.g., *Montoya* v. *Montoya*, 280 Conn. 605, 617 n.11, 909 A.2d 947 (2006) (this court has discretion to review issue that is outside scope of certified questions); see also footnote 6 of this opinion.

in performing everyday tasks, such as standing, walking, and climbing stairs.

"For several years prior to the events at issue, the defendant and the victim did not have a good relationship. The relationship between the defendant and the victim worsened in January, 2015, when the defendant's son, who resided with the defendant, was involved in an altercation with the victim at her residence. According to the victim, during this prior incident, the defendant's son broke down her back door and attacked her, which led to his arrest. Tensions escalated further because the defendant was unhappy with the fact that the victim's dog entered her portion of their shared backyard, and that the victim failed to clean up after her dog. Shortly before the incident underlying this appeal, the defendant erected a small plastic fence to separate her backyard from that of the victim in an attempt to keep the victim's dog away. The fence ran across the backyard and between the two rear doors of the residence. The victim was unhappy about the fence. The victim's mother had asked the victim to look for another place to live, and, by October, 2015, the victim was actively planning to move out of her residence.

"Late in the evening on October 10, 2015, the victim walked out of the front door of her residence. From one of the windows of the defendant's residence, the defendant made a negative comment to the victim, who was talking on her cell phone, but the victim declined to engage the defendant in conversation. At approximately 1:30 a.m., on October 11, 2015, the victim left her residence to walk her dog by means of her back door, which was adjacent to the back door leading into the defendant's residence. By this point in time, the victim had consumed multiple alcoholic beverages. The victim walked her dog in the vicinity of her nearby driveway.

"While the victim was reentering her residence with her dog, she noticed that a light had been turned on

inside of the defendant's residence. The victim then stepped back outside, at which time the defendant, who was lurking near the victim's back door, grabbed the victim by the upper part of her body and pulled her over the small plastic fence that was separating their backyards, causing the victim to topple to the ground. A physical struggle between the defendant and the victim ensued, during which the defendant struck the victim repeatedly with a wooden billy club. The victim, while lying on the ground, tried to prevent the defendant from continuing to strike her. The victim grabbed the defendant's hand and pulled her by her hair, causing [the defendant] to fall on top of [the victim]. The victim repeatedly told the defendant to '[l]et go' of the billy club, and the defendant told the victim that she was tired of her, that she hated her, and that she wanted her 'out of here.'

"Ultimately, the victim restrained the defendant, and the victim asked her what their father, who had died, would say to them if he saw them fighting. The defendant promised not to strike the victim again, at which time the victim released her grasp on the defendant's hair and the defendant stepped away from the victim.

"The defendant picked up the victim's cell phone, which had fallen out of the victim's hands during the altercation, and gave it back to her. The victim tossed aside one of the defendant's garbage pails before making her way back inside. The victim was bleeding from her nose and choking on blood. The victim sustained multiple bruises and lacerations on her face, back, left arm, left shoulder, left leg, and torso. The victim's right eye swelled, and she experienced a great deal of pain, particularly pain that emanated from her jaw. The victim's clothing was stained with blood and dirt, and she was unable immediately to locate either her eyeglasses or a pendant that she had been wearing prior to the altercation.

"After the victim went back inside of her residence, she called the police. Soon thereafter, Naugatuck Police Officer Robert Byrne arrived on the scene. He encountered the defendant and the victim arguing in front of the residence. After he separated the sisters, he met privately with the defendant. The defendant admitted that she had struck the victim with the wooden billy club, which was on her kitchen table but stated that she had acted in self-defense. The defendant also stated that she had begun arguing with the victim after she caught the victim 'snooping around in the backyard . . . .' She stated that the small plastic fence that she had erected to prevent the victim's dog from entering her portion of the backyard was a cause of consternation between her and the victim. The defendant sustained injuries during the incident and claimed to have been 'strangled' by the victim, but her injuries were not serious enough to warrant medical treatment. Byrne arrested the defendant on the assault charge, took her into custody, and transported her to police headquarters to complete the booking process.

"Naugatuck Police Officer Shane Andrew Pucci arrived on the scene to provide Byrne with backup assistance. He spoke with the victim privately in her residence and accompanied her to a hospital after emergency medical services arrived on the scene. At the hospital, medical personnel took X-ray images of the victim and treated her injuries. While at the hospital, the victim provided Byrne with an oral statement concerning the incident and her injuries. By 6 a.m. on October 11, 2015, the victim was discharged from the hospital and transported home. Pucci gave the victim a misdemeanor summons for disorderly conduct." *State* v. *Dojnia*, supra, 190 Conn. App. 356–59.

The defendant was charged with assault of a disabled person in the second degree, assault in the third degree and reckless endangerment in the second degree. "At

trial, the victim testified about her extensive medical history. She testified that she had experienced back problems since 2000 and had undergone two surgical procedures on her back. She testified that she had undergone multiple 'foot surgeries' in 1990, 'five or six ear surgeries' in 2000, and 'one breast surgery.' Also, the victim testified that she had suffered from a nerve condition called fibromyalgia, for which she receives ongoing medical treatment. She testified that, at the time that the assault occurred, she was using a variety of medications that had been prescribed for her. Specifically, she was using a medication called Savella to treat her fibromyalgia, three times per day. She was using a medication called Vicodin to treat her pain, usually once per day. She explained: 'Depending on the day, if . . . I know I'm not going to be doing much that day, I'll probably just take one [Vicodin] in the morning or when I wake up.' She also testified that she used Ambien, which helped her to sleep, as needed. The victim testified that she had experienced physical limitations for many years: 'I can't sit too long. I can't stand too long. Walking a far distance is difficult for me. Stairs are very difficult for me to do if I'm carrying something. Just grocery shopping, doing laundry, it's a task for me to do those things.'

"The victim testified that she had received treatment from her primary care physician as well as from Matthew Letko, whom she described as being an employee of '[the] arthritis center.' The victim testified that she had received Social Security disability payments since 2004, and that, in the ten years prior to her testimony in 2017, she had not been engaged in any employment to supplement her disability income.

"The state presented testimony from Letko, who explained that he was a physician's assistant employed

by the Arthritis Center of Connecticut, in Waterbury.[2] Letko testified that the victim had been a patient of the center since February, 2008, and that he had been treating her since 2009 for 'chronic pain issues, chronic low back pain and fibromyalgia syndrome.' He testified that fibromyalgia is 'a widespread pain syndrome primarily affecting muscles, upper back, mid-back, low back, hips, shoulders. It presents with a lot of tenderness, sensitivity to touch. There can also be other symptoms associated, like fatigue, poor sleep.' Letko testified that the treatment that he provided to the victim included prescribing 'Savella, which is a medication specifically approved for fibromyalgia syndrome, muscle relaxants, anti-inflammatory medications; other treatments also include injections, physical therapy, [and] aquatic therapy.' He testified that, in October, 2015, the victim was prescribed Savella, Ambien and Vicodin. Letko testified that he evaluated the victim on a monthly basis. He stated that the physical limitations related to her chronic back pain and fibromyalgia included difficulty in prolonged sitting, hearing, bending, lifting, and using stairs. Letko testified that, although her pain symptoms may fluctuate from day to day, her condition was not going to improve. He testified that the goal of his treatment plan for the victim 'would be to manage the pain effectively enough where she can have a quality of life where she can function around the home, in the community . . . take care of herself, get out of bed every morning, perform basic tasks around the house.' " (Footnote in original.) Id., 365–67.

The defendant testified on her own behalf at trial. On cross-examination, the defendant testified that she knew that the victim was "disabled" and that she was

[2] "The court recognized Letko, who testified that he had received training and licensure as a physician's assistant and had practiced under the supervision of a medical doctor, to be 'an expert in the area of a physician's assistant.' " *State* v. *Dojnia*, supra, 190 Conn. App. 366 n.4.

aware of some of the victim's surgeries and physical ailments. On redirect, the defendant testified that the victim exaggerated and lied about her medical conditions. She also testified that, contrary to the victim's testimony, the victim had worked as a dog walker and house cleaner.[3]

The jury found the defendant guilty of assault of a disabled person in the second degree and reckless endangerment in the second degree. At sentencing, pursuant to the state's request, the sentencing court vacated the conviction of reckless endangerment in the second degree on double jeopardy grounds pursuant to *State* v. *Polanco*, 308 Conn. 242, 245, 61 A.3d 1084 (2013). The court sentenced the defendant to five years of imprisonment, suspended after two years, and three years of probation.

The defendant appealed from the judgment of conviction to the Appellate Court, claiming, for the first time, that "§ 53a-60b (a) (1) is unconstitutionally vague as applied to her conduct." *State* v. *Dojnia*, supra, 190 Conn. App. 359. Specifically, the defendant claimed that, by incorporating the definition of "physical disability" set forth in § 1-1f (b) into § 53a-60b (a) (1), the legislature "impermissibly delegated basic policy matters to the courts for resolution of whether a diagnosis of fibromyalgia falls within the definition of physically disabled for resolution on an ad hoc basis. In so doing, the enforcement of these statutes in the defendant's case [was] arbitrary." (Internal quotation marks omitted.) Id., 361. The Appellate Court concluded that "the term 'physical disability,' as used in § 1-1f (b), has a

[3] The victim testified during the state's case that she had not done any "side jobs" to supplement her Social Security disability income. When the prosecutor asked the victim whether she had ever cleaned houses, she said "[n]ever." When the prosecutor asked the victim whether she had walked dogs, the victim replied that she had walked her own dog and her friends' dogs. The victim did not indicate that she had done this on a regular basis as a source of income.

readily ascertainable meaning. It refers to *any* recurring bodily condition that detrimentally affects one's ability to carry out life's activities, regardless of whether it is congenital, [or] the result of bodily injury, organic processes, or . . . illness. The language used in the statute, particularly the phrase, 'not limited to,' reflects that the legislature did not intend to set forth an exhaustive list of each and every bodily condition that could result in a physical disability, and the fact that the legislature did not do so does not necessitate a conclusion that the statute lacks sufficient guidance with respect to its meaning." (Emphasis in original.) Id., 369. The court concluded that the defendant's conduct "clearly came within the unmistakable core of conduct prohibited by § 53a-60b (a) (1)"; id.; and, accordingly, rejected the defendant's claim that the statute is unconstitutionally vague as applied to her conduct. Id., 359.

The Appellate Court also rejected the defendant's claim that the state had failed to prove that the victim suffered from fibromyalgia, concluding that there was sufficient evidence that the victim suffered from "various chronic pain issues, chronic low back pain, and fibromyalgia," and that, in any event, the state did not have the burden of proving that "the victim's physical disability was caused by any particular illness or injury." (Internal quotation marks omitted.) Id., 375. For similar reasons, the court rejected the defendant's claim that fibromyalgia is not a physical disability under § 53a-60b (a) (1) as a matter of law. Id., 376–78. Accordingly, the court concluded that there was sufficient evidence to support the jury's finding that the victim suffered from a physical disability. Id., 377–78. Having rejected the defendant's claims on appeal,[4] the court affirmed the judgment of conviction. Id., 386.

[4] The Appellate Court also rejected the defendant's claim that the prosecutor engaged in prosecutorial impropriety during closing argument. *State* v. *Dojnia*, supra, 190 Conn. App. 378. The defendant does not challenge that ruling on appeal to this court.

This certified appeal followed.[5] The defendant claims on appeal that the Appellate Court incorrectly determined that §§ 53a-60b (a) (1) and 1-1f (b) are not unconstitutionally vague as applied to her conduct. Specifically, she contends that, as applied in the criminal context, § 53a-60b (a) (1) is "ambiguous" because § 1-1f (b) is a remedial statute and, therefore, must be liberally construed, whereas § 53a-60b (a) (1) is a criminal statute that must be strictly construed. The defendant further contends that § 53a-60b (a) (1) is unconstitutional because its broad scope lacks any rational nexus to the intent of the legislature in enacting the statute, namely, to protect persons who have a diminished ability to defend themselves from assault or who are particularly vulnerable to injury.[6] Finally, the defendant contends

[5] After this appeal was filed, we granted permission to the Connecticut Criminal Defense Lawyers Association to file an amicus curiae brief in support of the defendant's position.

[6] The state contends that the only claim that the defendant raised before the Appellate Court and that is reviewable by this court is that §§ 53a-60b (a) (1) and 1-1f (b) are unconstitutionally "vague as applied to her because fibromyalgia purportedly does not rise to the level of a physical disability." We disagree. Although the defendant's brief to the Appellate Court was not a model of clarity, the defendant expressly claimed that the statutes are "so unclear that ordinary people cannot understand what specifically constitutes 'physically disabled' . . . ." The defendant also claimed that, although "the legislature intended to enhance penalties [only] for crimes against the most vulnerable, including those with clearly diagnosable and severe disabilities," the statutes "arguably . . . could apply to nearly all victims." Although the defendant did not expressly characterize the latter claim as implicating the overinclusiveness doctrine, her failure to label her argument using the correct technical rubric does not render the claim unreviewable.

The concurrence and dissent disagrees with this conclusion and contends that the defendant's arguments do not "constitute a separate claim under the overinclusiveness doctrine." As we explain subsequently in this opinion, a statute is unconstitutionally overinclusive if it creates a classification and its application to some members of the class is not rationally related to a legitimate government purpose. The defendant in the present case has claimed that it would be arbitrary to apply § 53a-60b (a) (1) to assaults on victims who, although they suffer from a "physical disability," as that term is broadly defined, do not have a diminished ability to defend themselves or a heightened vulnerability to injury. In other words, the defendant contends that the class of persons to which the statute applies is larger than

that the evidence was insufficient to establish that the victim was physically disabled for purposes of § 53a-60b (a) (1). We conclude that §§ 53a-60b (a) (1) and 1-1f (b) are not unconstitutionally vague. We agree with the defendant, however, that § 53a-60b (a) (1) is unconstitutionally overinclusive as applied to assaults on persons whose physical disabilities neither diminish their ability to defend themselves from assault nor make them particularly vulnerable to injury. Because the jury was not instructed on the proper standard for determining whether the victim had a physical disability within the meaning of § 53a-60b (a) (1), we further conclude that the case must be remanded for a new trial.

We first address the defendant's claim that §§ 53a-60b (a) (1) and 1-1f (b) are unconstitutionally vague as applied to her conduct. This issue presents a legal question subject to de novo review. See, e.g., *State* v. *Kirby*, 137 Conn. App. 29, 39, 46 A.3d 1056, cert. denied, 307 Conn. 908, 53 A.3d 222 (2012). "A statute . . . [that] forbids or requires conduct in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process. . . . Laws must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that [she] may act accordingly. . . . A statute is not void for vagueness unless it clearly and unequivocally is unconstitutional, making every presumption in favor of its validity. . . . To demonstrate that [a statute] is unconstitutionally vague as applied to [her], the [defendant] therefore must . . . demonstrate beyond a reasonable doubt that [she] had inadequate notice of what was prohibited or that

the class of persons for whom application of the statute would be rationally related to a legitimate government purpose, which is a classic overinclusiveness claim. The concurrence and dissent cites no authority for the proposition that a claim that has been distinctly raised is unreviewable because the party making the claim did not attach the correct doctrinal label to it.

[she was] the victim of arbitrary and discriminatory enforcement. . . . [T]he void for vagueness doctrine embodies two central precepts: the right to fair warning of the effect of a governing statute . . . and the guarantee against standardless law enforcement. . . . If the meaning of a statute can be fairly ascertained a statute will not be void for vagueness [because] [m]any statutes will have some inherent vagueness, for [i]n most English words and phrases there lurk uncertainties. . . . References to judicial [decisions] involving the statute, the common law, legal dictionaries, or treatises may be necessary to ascertain a statute's meaning to determine if it gives fair warning." (Citation omitted; internal quotation marks omitted.) *State* v. *Scruggs*, 279 Conn. 698, 709–10, 905 A.2d 24 (2006).

The United States Supreme Court has previously held that "the more important aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement. . . . [When] the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." (Citation omitted; internal quotation marks omitted.) *Kolender* v. *Lawson*, 461 U.S. 352, 358, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983); see, e.g., *Grayned* v. *Rockford*, 408 U.S. 104, 108–109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972) ("[a] vague law impermissibly delegates basic policy matters to [police officers], judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application").

With these principles in mind, we turn to the defendant's claim that §§ 53a-60b (a) (1) and 1-1f (b) are unconstitutionally vague. Section 53a-60b (a) provides in relevant part: "A person is guilty of assault of [a] . . . disabled

. . . person . . . in the second degree when such person commits assault in the second degree under section 53a-60 . . . and (1) the victim of such assault . . . is . . . physically disabled, as defined in section 1-1f . . . ." Section 1-1f (b) provides that "[a]n individual is physically disabled if he has any chronic physical handicap, infirmity or impairment, whether congenital or resulting from bodily injury, organic processes or changes or from illness, including, but not limited to, epilepsy, deafness or hearing impairment or reliance on a wheelchair or other remedial appliance or device."

The defendant concedes that "[t]here is nothing inherently ambiguous about [the] terms" used in §§ 53a-60b (a) (1) and 1-1f (b), and that the legislature plainly intended that the definition of "physically disabled" set forth in § 1-1f (b) would, in the civil context, "encompass as many individuals as possible . . . ."[7] The defendant contends, however, as applied in the criminal context, § 53a-60b (a) (1) is "ambiguous" because § 1-1f (b) is a remedial statute and, therefore, must be liberally construed, whereas § 53a-60b (a) (1) is a criminal statute that must be strictly construed. Compare *Vollemans* v. *Wallingford*, 103 Conn. App. 188, 197, 928 A.2d 586 (2007) (Connecticut Fair Employment Practices Act, General Statutes § 46a-51 et seq., is remedial legislation that must "be construed liberally to effectuate [its] beneficent purposes" (internal quotation marks omitted)), aff'd, 289 Conn. 57, 956 A.2d 579 (2008), with

[7] Somewhat inconsistently, the defendant also contends that "a person of ordinary intelligence could not determine with a reasonable degree of certainty that a person who allegedly suffered from fibromyalgia and other chronic pain issues would be considered 'physically disabled' and that, consequently, [the person] would be subject to enhanced criminal liability." In the very next sentence, however, she contends that this is so because § 53a-60b (a) (1) is a criminal statute. As we subsequently explain in the body of this opinion, a statute that is clear and unambiguous in the civil context does not become vague merely because it is applied in the criminal context.

State v. *Skakel*, 276 Conn. 633, 674, 888 A.2d 985 ("criminal statutes are governed by the fundamental principle that such statutes are strictly construed against the state" (internal quotation marks omitted)), cert. denied, 549 U.S. 1030, 127 S. Ct. 578, 166 L. Ed. 2d 428 (2006).

As a preliminary matter, we agree with the defendant that, as used in § 53a-60b (a) (1), the term "physically disabled" and, as used in § 1-1f (b), the words "handicap," "infirmity" and "impairment" are not so inherently vague that a person of ordinary intelligence would not know what conduct is prohibited, at least as applied to the defendant's conduct toward the victim. The term "handicap" is defined in part as "a disadvantage that makes achievement unusually difficult; [especially] . . . a physical disability that limits the capacity to work." Webster's Third New International Dictionary (2002) p. 1027. "Infirmity" is defined in part as "the quality or state of being infirm" and "an unsound, unhealthy, or debilitated state . . . ." Id., 1159. "Infirm" is defined in part as "not strong or sound physically" or "of poor or deteriorated vitality [especially] as a result of age . . . ." Id. "Impairment" is defined in part as "the act of impairing or the state of being impaired: INJURY <physical and mental diseases and [impairments] of man—*Current* [*Biography*]>: DETERIORATION <any [impairment] of his bodily vigor through sickness or age—J.G. Frazer.>" Id., 1131. "Impair" is defined in part as "to make worse," "diminish in quantity, value, excellence, or strength," or "do harm to . . . ." Id. We conclude on the basis of these definitions that "physically disabled," as used in § 53a-60b (a) (1), clearly means having a physical condition that diminishes the ability of a person, or a part or organ of the person, to function properly, thereby limiting the person's ability to perform life's activities, such as working.[8]

[8] The defendant contends that the Appellate Court improperly engrafted language into §§ 53a-60b (a) (1) and 1-1f (b) when it concluded that a

We further note that our sister courts have previously rejected claims that the terms "handicap" and "impaired" are unconstitutionally vague. In *State* v. *Allen*, 334 N.J. Super. 133, 756 A.2d 1087 (Law Div. 2000), overruled in part by *State* v. *Dixon*, 396 N.J. Super. 329, 933 A.2d 978 (App. Div. 2007), the Law Division of the Superior Court of New Jersey considered the constitutionality of a state statute that imposed an enhanced penalty on a defendant who, in committing a crime, "acted with the purpose to intimidate" a person "because of . . . [a] handicap . . . ." (Internal quotation marks omitted.) Id., 136. The court rejected a claim that the statute was unconstitutionally vague because "handicapped" had been defined by dictionary as "having a physical or mental disability that substantially limits activity." (Internal quotation marks omitted.) Id., 139. In addition, "disability" had been defined as "incapacitated by illness, injury or wound."[9] (Internal quotation marks omitted.) Id.

"physical disability" is a condition that "detrimentally affects one's ability to carry out life's activities . . . ." *State* v. *Dojnia*, supra, 190 Conn. App. 369. We disagree. It is implicit in the notion of "physical disability" that a person has a physical condition that detrimentally affects the person's ability to function in some manner, and that functional impairment normally is experienced and measured by the extent to which the condition detrimentally affects the person's ability to carry out life's activities.

We express no opinion as to the defendant's contention that an assault on a person who wears eyeglasses comes within the "physically disabled" prong of § 53a-60b (a) (1). Although, as the defendant points out, poor eyesight undoubtedly reflects a functional impairment of a person's vision and can detrimentally affect a person's ability to carry out life's activities, we note that the legislature has limited the class of victims with vision related impairments under the statute to blind persons. See General Statutes § 53a-60b (a) ("assault of an elderly, blind, disabled or pregnant person or a person with intellectual disability"). In light of this specificity, it would appear that the defendant's hypothetical is inapt. See, e.g., *Brennan* v. *Brennan Associates*, 316 Conn. 677, 696, 113 A.3d 957 (2015) ("specific terms covering the given subject matter will prevail over general language of the same . . . statute which might otherwise prove controlling" (internal quotation marks omitted)).

[9] The court in *State* v. *Allen*, supra, 334 N.J. Super. 133, stated that the criminal statute required the state to prove that "a reasonable person in the

In *People* v. *Percz*, 100 Misc. 2d 1018, 420 N.Y.S.2d 477 (1979), the defendant contended that a New York statute that prohibited, among other things, "driving while impaired by the use of a drug" was unconstitutionally vague. Id., 1018. In support of this claim, he relied on a case holding that two subdivisions of that same statute that prohibited driving while intoxicated—a misdemeanor—or while impaired—a "violation"—were unconstitutionally vague because the statute provided no standards for determining whether a defendant was " 'impaired' " or " 'intoxicated,' " and because "there was no evidence that the defendant was sufficiently drunk to make such standard unnecessary . . . ." Id., 1019. The court in *Percz* held that, because the subdivision of the statute that the defendant was charged with violating only prohibited operation of a vehicle while " 'impaired' " and required "no differentiation between degrees of drug influence," that provision was not unconstitutionally vague. Id. Thus, the court implicitly held that any degree of impairment clearly came within

position of the defendants would be on fair notice that [the victim was] handicapped." Id., 139. This is because the use of the term "because of" in the statute "connotes a causal link between the infliction of injury and bias motivation . . . ." (Internal quotation marks omitted.) Id., 140. In other words, the defendant must know at the time of the assault that the victim is handicapped. In the present case, defense counsel conceded at oral argument before this court that proof of such knowledge is not required under § 53a-60b (a) (1), thereby abandoning any such claim. Accordingly, we express no opinion on that issue here. We note, however, that, even if such knowledge is required, the defendant admitted at trial that she knew that the victim was disabled. We further note that proof of such knowledge would not be constitutionally required. Cf. *State* v. *Higgins*, 265 Conn. 35, 48, 826 A.2d 1126 (2003) (The statute making murder of a person under the age of sixteen a capital felony without requiring the state to prove that the defendant knew the victim's age "poses no risk of unfairness to [the defendant]. It is no snare for the unsuspecting. Although the [defendant] . . . may be surprised to find that his intended victim [is under the age of sixteen], he nonetheless knows from the very outset that his planned course of conduct is wrongful. The situation is not one [in which] legitimate conduct becomes unlawful solely because of the identity of the [victim]. In a case of this kind the offender takes his victim as he finds him." (Internal quotation marks omitted.)).

the statutory prohibition. Accordingly, we conclude—as, indeed, the defendant does not dispute—that the victim in the present case was clearly physically disabled within the meaning of §§ 53a-60b (a) (1) and 1-1f (b) because she had a physical condition that diminished her ability to function, thereby limiting her ability to perform life's activities.

The defendant contends, however, that, because § 53a-60b (a) is a criminal statute that must be strictly construed, and § 1-1f (b) is a remedial statute that must be liberally construed, this somehow renders these otherwise clear statutes vague. We are not persuaded. The rule that criminal statutes must be strictly construed is a rule of statutory construction that applies to inherently ambiguous criminal statutes, not a rule of substantive law barring the legislature from enacting broad criminal statutes. See, e.g., *Albernaz* v. *United States*, 450 U.S. 333, 342, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981) ("Lenity . . . serves only as an aid for resolving an ambiguity; it is not to be used to beget one. The rule comes into operation at the end of the process of construing what [the legislature] has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." (Internal quotation marks omitted.)). Nor does the rule render a broad but clear and unambiguous criminal statute ambiguous. See, e.g., id., 342–43.

The defendant also claims that, even if §§ 53a-60b (a) (1) and 1-1f (b) are sufficiently clear to give notice to a person of ordinary intelligence of what conduct is prohibited, they are unconstitutionally vague because they confer "unfettered discretion [on police officers], prosecutors, judges and juries to determine which victims [are] physically disabled 'enough' to warrant enhanced criminal liability . . . ." See, e.g., *Kolender* v. *Lawson*, supra, 461 U.S. 358 ("[T]he more important aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine—the

requirement that a legislature establish minimal guidelines to govern law enforcement. . . . [When] the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." (Citation omitted; internal quotation marks omitted.)); see also, e.g., *United States* v. *Davis*, U.S. , 139 S. Ct. 2319, 2325, 204 L. Ed. 2d 757 (2019) ("[v]ague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police [officers], prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide"); 16B Am. Jur. 2d 488–89 n.8, Constitutional Law § 962 (2020) ("[a]n unconstitutionally vague law invites arbitrary enforcement . . . if it leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case"). A careful review of these authorities, however, makes it clear that the notice prong and the arbitrary enforcement prong of the vagueness doctrine are inextricably intertwined; that is, an unconstitutionally vague statute allows for arbitrary enforcement *because* a person of common intelligence, whether the person is a defendant, a police officer, a prosecutor, a judge or a juror, must guess at its meaning. Conversely, a statute that is sufficiently clear to give a person of common intelligence notice of what is prohibited necessarily is sufficiently clear to cabin the discretion of police officers and prosecutors within constitutional limits. Because we have concluded that the statutes are sufficiently clear to give notice to a person of ordinary intelligence that the victim was physically disabled for purposes of § 53a-60b (a) (1), we reject this claim.[10]

[10] To the extent that the defendant contends that § 53a-60b (a) (1) is unconstitutionally vague because it confers unfettered discretion on prosecutors whether to prosecute conduct that clearly falls within its scope, we disagree. The United States Supreme Court has previously held that, "[w]ithin the limits set by the legislature's constitutionally valid definition

Finally, the defendant claims that § 53a-60b (a) (1) is unconstitutional because there is no rational nexus between the exceedingly broad scope of the "physically disabled" prong and the legislature's relatively narrow intent in enacting the statute. The defendant points out that the legislative history of § 53a-60b (a) (1) indicates that the legislation was intended to prevent crimes against persons who are particularly vulnerable to assault and injury as a result of being physically disabled, and she claims that, unless a limiting gloss is applied, it can be applied to persons who do not fall within that class. See 20 S. Proc., Pt. 7, 1977 Sess., p. 2822, remarks of Senator Salvatore C. DePiano (proposed legislation "is directed at trying to stop . . . assaults [on] people who are blind and elderly and disabled who cannot defend themselves"); 20 H.R. Proc., Pt. 7, 1977 Sess., p. 2896, remarks of Representative Robert G. Gilligan (expressing concerns about "vulnerability to crime," "diminished physical strength and stamina" and diminished ability of persons covered by statute "to defend themselves or to [escape] from threat-ening situations"); 20 H.R. Proc., supra, p. 2896 (noting that elderly persons are more easily injured and slower to recover from injury); Conn. Joint Standing Committee Hearings, Judiciary, Pt. 2, 1977 Sess., pp. 479–82 (testimony of seventy-seven year old woman regarding multiple assaults and robberies that she had suffered and vulnerabilities of elderly people).

As we indicated, although the defendant frames this claim as implicating the vagueness doctrine, it more properly is characterized as a claim that § 53a-60b (a) (1) is unconstitutionally *overinclusive*. See footnote 6

of chargeable offenses, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation so long as the selection was [not] deliberately based [on] an unjustifiable standard such as race, religion, or other arbitrary classification." (Internal quotation marks omitted.) *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978).

of this opinion; see also footnote 1 of this opinion and accompanying text. In other words, the defendant effectively contends that the statute violates substantive due process principles because many of its clear applications are not rationally related to a legitimate government purpose. See, e.g., *State* v. *Higgins*, 265 Conn. 35, 68–69, 826 A.2d 1126 (2003) (recognizing in dictum that statute may be so overinclusive or underinclusive that it does not rationally advance legislative purpose); see also, e.g., *United States* v. *Thornton*, 901 F.2d 738, 739–40 (9th Cir. 1990) (when defendant claimed that statute was overinclusive, and statute did not impinge on constitutionally protected conduct or implicate suspect class, court considered whether classification created by statute was irrational or unreasonable); *Bynes* v. *State*, 854 So. 2d 289, 291 (Fla. App. 2003) (when defendant claimed that statute was overinclusive, court applied principle that "[t]he rational basis test requires the legislature to have a legitimate purpose for enacting the statute and to select means which have a reasonable and substantial relation to its purpose which are not unreasonable, arbitrary, or capricious"), review denied, 892 So. 2d 1011 (Fla. 2004); *State* v. *Mitchell*, 757 N.W.2d 431, 439 (Iowa 2008) ("[e]ven under the rational basis test, a statute may be unconstitutional if it is so overinclusive and underinclusive as to be irrational").[11]

[11] The concurrence and dissent points out that *State* v. *Higgins*, supra, 265 Conn. 69, and *United States* v. *Thornton*, supra, 901 F.2d 739–40, involved equal protection claims, not substantive due process claims, and it questions whether the overinclusiveness doctrine is applicable outside of the context of an equal protection claim. We agree that the defendant's claim in the present case could have been framed as an equal protection claim. See, e.g., id.; *State* v. *Higgins*, supra, 69; *State* v. *Mitchell*, supra, 757 N.W.2d 439. Specifically, she could have claimed that it is irrational to treat a ninety pound woman with no physical disability who assaults a heavyweight boxer with periodic migraines more harshly than a heavyweight boxer with periodic migraines who assaults a ninety pound woman with no physical disability. We disagree, however, that overinclusiveness claims can never implicate substantive due process principles. It is well established that a statute that is not rationally related to a legitimate government purpose violates the right to substantive due process; see, e.g., *Dutkiewicz* v. *Dutkiewicz*, 289

Conn. 362, 381, 957 A.2d 821 (2008); and the defendant's claim in the present case is that there is no rational nexus between the intent of the legislature, in enacting the statute, to protect those who have a diminished capacity to defend themselves or a heightened vulnerability to injury and the application of the statute to an assault on a person who has neither of those characteristics. See, e.g., *State* v. *Old South Amusements, Inc.*, 275 Ga. 274, 275, 277–78, 564 S.E.2d 710 (2002) (applying "substantive due process rational basis test" to claim that statute criminalizing use and possession of video poker amusement machines was overinclusive); *People* v. *Avila-Briones*, 49 N.E.3d 428, 433, 450 (Ill. App. 2015) (applying rational basis review to claim that sex offender statutory scheme violated substantive due process because it was overinclusive), appeal denied, 48 N.E.3d 1093 (Ill. 2016).

The concurrence and dissent also relies on authority holding that imperfect statutory classifications that are somewhat overinclusive or underinclusive can pass constitutional muster. See, e.g., *State Troopers Non-Commissioned Officers Assn. of New Jersey* v. *New Jersey*, 643 F. Supp. 2d 615, 624 (D.N.J. 2009) ("[C]ourts are compelled under [a rational basis] review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational basis review because it is not made with mathematical nicety or because in practice it results in some inequality. . . . Thus, the fact that a statute is overinclusive or [underinclusive], standing alone, does not render the statute constitutionally invalid." (Citation omitted; internal quotation marks omitted.)), aff'd, 399 Fed. Appx. 752 (3d Cir. 2010). We conclude that there is a distinction between the present case and the cases that have applied this principle to uphold the constitutionality of a statute that creates an imperfect classification, such as *State* v. *Higgins*, supra, 265 Conn. 61–62, in which the defendant challenged a statute imposing the death penalty for the murder of a victim under the age of sixteen, and *United States* v. *Thornton*, supra, 901 F.2d 739 and n.1, in which the defendant challenged a federal statute making it unlawful to distribute a controlled substance within 1000 feet of any school, college, or university. In *Higgins* and *Thornton*, our legislature and Congress, respectively, were faced with a choice of drawing lines that would inevitably be somewhat arbitrary—in the sense that the lines could be moved in one direction or the other without significantly undermining the purpose of the legislation—or drawing no line at all. In such cases, courts will defer to the legislature's choice out of necessity. See, e.g., *State* v. *Higgins*, supra, 69 ("[t]o invalidate the legislature's choice, we would either have to hold that the [l]egislature cannot draw an age line—which would eviscerate any attempt to include [child murders] within the ambit of the capital murder statute—or we would have to hold that the line should be drawn elsewhere—in which case, we would merely be legislating from the bench" (internal quotation marks omitted)).

In the present case, the legislature was not faced with the choice of drawing an arbitrary line or drawing no line. Indeed, the legislature easily could have created a classification that was rationally and closely related to the statute's purpose, namely, the class of persons who assault persons with a physical disability that diminishes their ability to defend themselves

We agree with the defendant that § 53a-60b (a) (1) is unconstitutionally overinclusive. For example, on its face, the statute clearly would apply to an assault on an Olympic boxer who suffered from chronic but episodic migraine headaches that completely incapacitated him while they were occurring even if, at the time of the assault, he was not experiencing one.[12] Such an application of the statute would have no reasonable and substantial relation to the statute's purpose of protecting those who have a diminished capacity to defend themselves or who are particularly vulnerable to injury.

At least one court has recognized that, if a statute is unconstitutionally overinclusive, the statute still may constitutionally be applied to conduct that is within the statute's rational core. In *People* v. *Rodriguez*, 66 Cal. App. 4th 157, 77 Cal. Rptr. 2d 676 (1998), the defendant challenged the constitutionality of a California statute that provided that "[t]he penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if," as was applicable to that case, "[t]he murder was intentional and perpetrated by means

or renders them particularly vulnerable to injury. Instead, the statute, as written, creates a different and much larger class—persons who assault persons with *any* physical disability—and the application of the statute to any member of that class who is not included in the smaller class bears no rational relation to a legitimate government purpose. We further note that the gloss that we place on the statute will place no greater burden on the fact finder than the statute, as written, does. Cf. *State Troopers Non-Commissioned Officers Assn. of New Jersey* v. *New Jersey*, supra, 643 F. Supp. 2d 632 (rule barring state troopers from practicing law was constitutional even though it was both overinclusive and underinclusive because defendant state department "could have determined that the practice of law [by state employees] presented difficult ethical questions better not decided on a case-by-case basis").

[12] Other examples abound. As written, the statute would apply to assaults on persons suffering from chronic ulcers, eczema, lactose intolerance, tinnitus, insomnia, allergies, taste or smelling disorders or growth disorders, even if these physical disabilities had no effect on the victim's ability to defend himself or his vulnerability to injury.

of discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death." (Internal quotation marks omitted.) Id., 164. Specifically, the defendant in *Rodriguez* contended that the statute was "invalid because it [was] unconstitutionally overinclusive on its face." (Internal quotation marks omitted.) Id., 172. The California Court of Appeal observed that "[s]tating that a statute is merely overinclusive . . . presupposes that parts of the statutory coverage have been properly included. Here, [the] defendant recognizes that [the statute] could be constitutionally applied to drive-by shootings, stating that [he] is not asking this [c]ourt to second-guess the wisdom of creating a drive-by special circumstance. The [l]egislative materials, and common knowledge, amply support a judgment that drive-by murders have become a widespread threat to public safety, and a statutory provision directed at deterring such conduct is fully within the power of the [l]egislature and the voters to adopt. [The defendant's] concern is the manner in which the language of the provision will inevitably be applied to reach conduct beyond the evil sought to be remedied . . . . [The] [d]efendant's forthright recognition that [the statute] can be constitutionally applied in at least some circumstances—at least in cases of drive-by shootings—necessarily refutes [his] claim of facial invalidity unless an exception to the general rule applies. . . . [N]o such exception applies. This is not a [f]irst [a]mendment case, the statute is not vague for due process purposes, [the] defendant was not involved in exercising any constitutional right, there is no danger of chilling the exercise of constitutional rights by increasing the penalty for murder by shooting out of a vehicle, etc. Hence [the statute] is not unconstitutional on its face." (Internal quotation marks omitted.) Id.; see, e.g., id., 176 (statute constitutionally applied to defendant because, even if it was overinclusive, he

had not established that his conduct did not come within its rational core).

We find this reasoning persuasive. Accordingly, we conclude that § 53a-60b (a) (1) constitutionally may be applied to conduct that comes within its rational core, namely, an assault on a person with a physical disability that (1) diminishes the ability of the person, or a part or organ of the person, to function properly, thereby limiting the person's ability to perform life's activities, *and* (2) diminishes the person's ability to defend himself from assault or renders him particularly vulnerable to injury. See, e.g., *Boisvert* v. *Gavis*, 332 Conn. 115, 144, 210 A.3d 1 (2019) (court may "add interpretative gloss to a challenged statute in order to render it constitutional" (internal quotation marks omitted)). In making the determination as to whether the victim had a diminished ability to defend himself or was particularly vulnerable to injury, the jury must consider the condition of the victim at the time of the assault.

In the present case, the jury was not instructed that it must find that the victim had a diminished ability to defend herself or that she was particularly vulnerable to injury at the time of the assault in order to find the defendant guilty of assault of a disabled person in the second degree under § 53a-60b (a) (1). We conclude, therefore, that the case must be remanded to the trial court for a new trial at which the jury can be instructed on the proper standard.[13] See, e.g., *State* v. *Salamon*, 287 Conn. 509, 516–17, 550, 949 A.2d 1092 (2008) (defendant was entitled to new trial when jury was not properly instructed with respect to element of offense).

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to

[13] If the state chooses not to retry the defendant, then the trial court must vacate the defendant's conviction under § 53a-60b (a) (1) and reinstate the conviction for reckless endangerment in the second degree. See, e.g., *State* v. *Polanco*, supra, 308 Conn. 263.

reverse the judgment of the trial court and to remand the case to that court for a new trial.

In this opinion D'AURIA and ECKER, Js., concurred.

MULLINS, J., with whom KAHN, J., joins, concurring in part and dissenting in part. I agree with the majority that General Statutes §§ 53a-60b (a) (1) and 1-1f (b) are not unconstitutionally vague as applied to the conduct of the defendant, Jodi D. I disagree with the majority that the issue of whether § 53a-60b (a) (1) is unconstitutionally overinclusive is properly before us. Unlike the majority, I conclude that it is not.

Specifically, I do not believe that the defendant has raised the distinct claim that § 53a-60b (a) (1) is unconstitutional under the overinclusiveness doctrine. In fact, overinclusiveness typically is part of the rational basis test applied to an equal protection challenge. See, e.g., *State* v. *Higgins*, 265 Conn. 35, 68–69, 826 A.2d 1126 (2003) (discussing, as part of equal protection claim analysis, whether defendant raised claim that statute is underinclusive or overinclusive). In the present case, the defendant challenged the statute only as void for vagueness as applied to her conduct. Thus, she had to demonstrate, under the facts of this case, either "(1) [that] the statute does not provide fair warning that it applies to the conduct at issue, or (2) that [s]he was the victim of arbitrary enforcement practices." (Internal quotation marks omitted.) *Rocque* v. *Farricielli*, 269 Conn. 187, 206, 848 A.2d 1206 (2004).

The question before us, then, is whether the defendant's conduct—assaulting a person with fibromyalgia and chronic pain—falls within the statute's core of prohibited conduct. The majority concludes, and I agree, that the defendant's conduct clearly does. In my view, it is not proper to then search for and posit other scenarios in which the statute might possibly be unconstitu-

tional. Consequently, the majority's hypotheticals, including its Olympic boxer with migraines hypothetical, are inapposite in the context of the defendant's claim that the statute is unconstitutionally vague as applied to her conduct. See footnote 12 of the majority opinion and accompanying text. The defendant did not raise a separate claim under the overinclusiveness doctrine before the Appellate Court, in her petition for certification to appeal to this court, or in her brief to this court. Therefore, I disagree with the majority's reframing of the defendant's vagueness claim to include a distinctly separate overinclusiveness challenge.[1]

Accordingly, I would not address whether § 53a-60b (a) (1) is unconstitutionally overinclusive. Instead, I would conclude that § 53a-60b (a) (1) is not unconstitutionally vague as applied to the defendant's conduct. As a result, I would reach the second certified issue and agree with the Appellate Court that the evidence was sufficient to establish that the victim suffered from a physical disability within the meaning of § 53a-60b (a) (1).[2] See *State* v. *Dojnia*, 190 Conn. App. 353, 378, 210 A.3d 586 (2019). Therefore, I would affirm the judgment of the Appellate Court.

In the present case, the defendant claims that the statute violates her due process rights because it is unconstitu-

[1] The majority points out that I cite to "no authority for the proposition that a claim that has been distinctly raised is unreviewable because the party making the claim did not attach the correct doctrinal label . . . ." Footnote 6 of the majority opinion. That is true but also irrelevant. Because I do not believe that the defendant raised a separate overinclusiveness claim in the first instance, either before the Appellate Court or in the petition for certification, I see no reason to supply support for a proposition I am not making.

[2] Because I conclude that the defendant's sufficiency claim was resolved properly in the Appellate Court's well reasoned opinion, and that opinion fully addresses that claim; see *State* v. *Dojnia*, 190 Conn. App. 353, 371–78, 210 A.3d 586 (2019); it would serve no useful purpose for me to repeat the discussion contained therein.

tionally vague as applied to her conduct. The majority engages in a thorough and well reasoned analysis of that claim and correctly concludes, with respect to notice, "that [§§ 53a-60b (a) (1) and 1-1f (b)] are sufficiently clear to give notice to a person of ordinary intelligence that the victim was physically disabled for purposes of § 53a-60b (a) (1) . . . ."

As to arbitrary enforcement, the majority also rejects the defendant's claim that § 53a-60b (a) (1) is unconstitutional because it confers unfettered discretion on police officers and prosecutors to determine what conduct falls within its scope. Indeed, the majority concludes that "a statute that is sufficiently clear to give a person of common intelligence notice of what is prohibited necessarily is sufficiently clear to cabin the discretion of police officers and prosecutors within constitutional limits."

Notwithstanding these conclusions, the majority culls from different portions of the defendant's brief a claim under the overinclusiveness doctrine. For instance, the majority relies on the defendant's argument that "the statute fails to provide a sufficient nexus between fibromyalgia and/or other chronic pain issues and protecting people with those conditions from opportunistic criminals seeking to attack people [who are] less likely to be able to ward off such attacks." The majority also uses the defendant's reliance on the legislative history of § 53a-60b (a) (1) and her argument that the statute improperly incorporated "wholesale the intentionally broad, remedial definition of 'physically disabled' in the criminal context" to support its conclusion that the defendant raised a separate claim under the overinclusiveness doctrine.

These arguments do not reveal a separate overinclusiveness claim. Rather, these are the defendant's arguments in support of her vagueness as applied claim. The

defendant's able counsel described it as a vagueness challenge. Specifically, the defendant asserted that the lack of clarity as to what constituted physical disability under § 53a-60b (a) (1) leads to (1) lack of notice, and (2) arbitrary enforcement. The majority's conclusion that the statute was clear and that there was no arbitrary enforcement fully addresses and resolves the claim raised by the defendant and should end the analysis.

Instead, the majority reframes the defendant's arguments into a separate overinclusiveness claim. The majority explains that, "although the defendant frames this claim as implicating the vagueness doctrine, it more properly is characterized as a claim that § 53a-60b (a) (1) is unconstitutionally overinclusive. . . . In other words, the defendant effectively contends that the statute violates substantive due process principles because many of its clear applications are not rationally related to a legitimate government purpose." (Citations omitted; emphasis omitted.) I disagree with the majority's decision to reframe the arguments that the defendant made within her vagueness challenge and to treat them as a properly raised claim under the overinclusiveness doctrine.

The majority states that the defendant merely failed to "label her argument using the correct technical rubric . . . ." Footnote 6 of the majority opinion. This is just simply not the case. The defendant raised and briefed only a vagueness as applied challenge. Indeed, this court has previously explained that "[t]he void for vagueness doctrine is a procedural due process concept that originally was derived from the guarantees of due process contained in the fifth and fourteenth amendments to the United States constitution." *Packer* v. *Board of Education*, 246 Conn. 89, 98, 717 A.2d 117 (1998). Thus, the overinclusiveness doctrine is part of a separate legal claim that was not raised by the defendant.

This court has consistently concluded that it "will not review a claim unless it was distinctly raised at trial. . . . We may, however, review legal arguments that differ from those raised before the trial court if they are subsumed within or intertwined with arguments related to the legal claim raised at trial." (Citations omitted.) *Crawford* v. *Commissioner of Correction*, 294 Conn. 165, 203, 982 A.2d 620 (2009). The majority's reframing of the defendant's arguments into a separate overinclusiveness claim under different constitutional protections breaches this well established principle.

I can find no reference to overinclusiveness in the defendant's brief to the Appellate Court or this court, and the Appellate Court did not address the claim of overinclusiveness whatsoever. The majority points to language in the defendant's Appellate Court brief that was used in the context of her claim that § 53a-60b (a) (1) is unconstitutionally vague. In particular, the defendant argued "that ordinary people cannot understand what specifically constitutes 'physically disabled' . . . ." This is a claim directly tied to the notice prong of the vagueness challenge, not an overinclusiveness challenge. The majority also relies on the defendant's claim that, although "the legislature intended to enhance penalties [only] for crimes against the most vulnerable, including those with clearly diagnosable and severe disabilities," §§ 53a-60b (a) (1) and 1-1f (b) "arguably . . . could apply to nearly all victims." This is an argument directed at a claim of arbitrary enforcement. I disagree that either of these arguments in the defendant's Appellate Court brief constitutes a separate claim under the overinclusiveness doctrine.

Indeed, in her brief to this court, the defendant did not cite to any cases that involved claims under the overinclusiveness doctrine. Instead, she relied on *Packer* v. *Board of Education*, supra, 246 Conn. 109–10, in support of her argument that the application of § 53a-

60b (a) (1) to fibromyalgia did not have a sufficient nexus to the legislative purpose of the statute. *Packer* did not involve a claim of overinclusiveness. Instead, *Packer* involved, among other things, a vagueness as applied challenge. See id., 106–113. In *Packer*, this court considered whether there was a nexus between the legislative purpose behind a statute and the conduct prosecuted under the statute for purposes of determining whether there was adequate notice under a vagueness as applied analysis. See id., 109–10 ("[w]e further conclude . . . that a person of ordinary intelligence, apprised only of the language of [General Statutes (Rev. to 1997)] § 10-233d (a) (1) and our prior interpretation . . . of similar language, could not be reasonably certain whether possession of marijuana in the trunk of a car, off the school grounds [and] after school hours, is, by itself and without some tangible nexus to school operation, seriously disruptive of the educational process as required by [that statute] in order to subject a student to expulsion" (emphasis omitted; internal quotation marks omitted)). The defendant's reliance on *Packer* further confirms that she raised only a vagueness challenge here.

Of course, we did not certify any overinclusiveness claim. The majority recognizes this as an issue. However, notwithstanding that substantial stumbling block, the majority explains that "[w]e recognize that this issue may be outside the scope of the certified questions because overinclusiveness and vagueness are distinct concepts. Nevertheless, we address the issue because the defendant raised it before the Appellate Court and it is closely intertwined with the certified questions." Footnote 1 of the majority opinion. I disagree.

To be clear, the only questions we certified were limited to the following: (1) "Did the Appellate Court correctly conclude that . . . §§ 1-1f (b) and 53a-60b (a) (1) were not unconstitutionally vague as applied to the

defendant?" And (2) "[d]id the Appellate Court correctly conclude that the evidence the state presented at trial was sufficient to prove beyond a reasonable doubt that the victim was 'physically disabled' under the governing statutes?" *State* v. *Dojnia*, 333 Conn. 914, 215 A.3d 1211 (2019). As I previously mentioned, I do not believe that overinclusiveness was raised before the Appellate Court, but, even if the defendant had raised it before the Appellate Court, that court did not address it, and we did not certify such a claim.

Furthermore, I disagree with the majority that the question of whether § 53a-60b (a) (1) is unconstitutionally overinclusive is closely intertwined with the certified questions in the present appeal such that the issue is properly before us. The question of whether a statute is overinclusive is not part of the analysis used to determine whether a statute is unconstitutionally vague as applied to a particular defendant's conduct in a particular case. Instead, the question of whether a statute is overinclusive is typically part of the analysis used when applying the rational basis test to an equal protection claim. See, e.g., *Vance* v. *Bradley*, 440 U.S. 93, 108–109, 99 S. Ct. 939, 59 L. Ed. 2d 171 (1979) (considering whether statute violates equal protection clause because it is underinclusive or overinclusive); *Big Tyme Investments, LLC* v. *Edwards*, 985 F.3d 456, 470 (5th Cir. 2021) (concluding that "[i]mperfect classifications that are underinclusive or overinclusive pass constitutional muster" under equal protection clause).

Indeed, most of the cases cited by the majority considered whether a statute is overinclusive as part of an equal protection claim analysis. See, e.g., *State* v. *Higgins*, supra, 265 Conn. 69; see also, e.g., *United States* v. *Thornton*, 901 F.2d 738, 739–40 (9th Cir. 1990) (addressing defendants' claim that statute violated equal protection clause because it was both overinclusive and underinclusive). In one of the cases relied on

by the majority, *People* v. *Rodriguez*, 66 Cal. App. 4th 157, 77 Cal. Rptr. 2d 676 (1998), the court explicitly detailed that "[the] [d]efendant's reliance [on a claim of overinclusiveness] appears misplaced, inasmuch as Justice Kline's comments [in a prior decision] about overinclusiveness and underinclusiveness appear directed more toward questions of equal protection than substantive due process." Id., 179, citing *People* v. *Bostick*, 46 Cal. App. 4th 287, 292, 53 Cal. Rptr. 2d 760 (1996) (Kline, P. J., concurring). In the present case, the defendant does not assert any claim under the equal protection clause.

To be sure, "[t]he general rule is that the constitutionality of a statutory provision being attacked as void for vagueness is determined by the statute's applicability to the particular facts at issue. . . . To do otherwise, [in the absence of] the appearance that the statute in question intrudes [on] fundamental guarantees, particularly first amendment freedoms, would be to put courts in the undesirable position of considering every conceivable situation which might possibly arise in the application of [the statute]. . . . Thus, outside the context of the first amendment, in order to challenge successfully the facial validity of a statute, a party is required to demonstrate as a threshold matter that the statute may not be applied constitutionally to the facts of [the] case." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Packer* v. *Board of Education*, supra, 246 Conn. 105–106.

In the present case, the defendant's claim does not implicate her first amendment rights, and, therefore, in order to be successful in her challenge to the validity of § 53a-60b (a) (1), she must demonstrate that the statute may not be applied constitutionally to the facts of this case. Here, she is accused of assault on a person with fibromyalgia and chronic pain. The statute is not vague as applied to that conduct. There is no need to

look beyond her conduct to the hypotheticals posed by the majority. Because I agree with the majority that the defendant has not established that the statute is unconstitutional as applied to the facts of the present case, I would not attempt to "[consider] every conceivable situation which might possibly arise in the application of [the statute]." (Internal quotation marks omitted.) Id., 106.

In addition, even if I were to agree with the majority that the defendant raised a separate claim that § 53a-60b (a) (1) is unconstitutionally overinclusive as part of a substantive due process claim, I would disagree with the majority's analysis of that claim. Although the majority cites to a few cases in which courts have considered a claim of overinclusiveness as part of a substantive due process claim, I find these cases unpersuasive. As one of those cases pointed out, "a statute is not fatally infirm merely because it may be somewhat underinclusive or overinclusive." (Internal quotation marks omitted.) *People* v. *Avila-Briones*, 49 N.E.3d 428, 450 (Ill. App. 2015), appeal denied, 48 N.E.3d 1093 (Ill. 2016). Those cases support the conclusion that, even if the statute is overinclusive—that is, it may impose a burden on one who harms someone with a latent physical disability—it still has a rational relationship to protecting those with physical disabilities. Therefore, when a statute serves a legitimate government purpose—here, protecting those with physical disabilities—any fine-tuning of the statutory scheme to narrow its reach is a task for the legislature.

Moreover, because we are not dealing with a fundamental right, the rational basis test would apply in the present case. Id., 447 ("[i]f the statute does not impact a fundamental right, then we apply the [rational basis] test to the statute"). "[W]hen conducting rational basis review we will not overturn such [government action] unless the varying treatment of different groups or per-

sons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government's] actions were irrational." (Internal quotation marks omitted.) *Kimel* v. *Florida Board of Regents*, 528 U.S. 62, 84, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000). "On rational basis review, those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it. . . . Ordinarily, that burden is insurmountable. [C]ourts are compelled under [a rational basis] review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational basis review because it is not made with mathematical nicety or because in practice it results in some inequality. . . . Thus, the fact that a statute is overinclusive or [underinclusive], standing alone, does not render the statute constitutionally invalid." (Citations omitted; internal quotation marks omitted.) *State Troopers Non-Commissioned Officers Assn. of New Jersey* v. *New Jersey*, 643 F. Supp. 2d 615, 624 (D.N.J. 2009), aff'd, 399 Fed. Appx. 752 (3d Cir. 2010).

Despite these aforementioned principles, the majority does little more than point to hypotheticals in which § 53a-60b (a) (1) could be considered overinclusive. It posits a hypothetical about an Olympic boxer with migraines and concludes that the statute is unconstitutionally overinclusive because "such an application of the statute would have no reasonable and substantial relation to the statute's purpose of protecting those who have a diminished capacity to defend themselves or who are particularly vulnerable to injury." This is not how we assess the constitutionality of a statute under rational basis review. Rather, it is well established that, "if a statute can be upheld under any plausible justification offered by the state, or even hypothesized by the court, it survives [rational basis] scrutiny." *Amer-*

ican Express Travel Related Services Co. v. *Kentucky*, 641 F.3d 685, 690 (6th Cir. 2011).

Thus, on the basis of the record before us, I cannot conclude that the legislature acted irrationally in providing for a heightened punishment of an individual who assaults someone with a physical disability. Even if § 53a-60b (a) (1) lacks mathematical nicety in its application, the statute still has a rational relationship to a legitimate government purpose—namely, protecting people with physical disabilities that diminish their ability to function. Because there are plausible justifications for upholding the constitutionality of this statute—we need look no further than the case at hand, in which a person with fibromyalgia and chronic pain is assaulted—there is a rational relationship to the legislative purpose of protecting physically disabled people. The majority's view turns rational basis review on its head because, instead of negating every conceivable basis that might support the statute, the majority looks to find conceivable examples of how the statute may be overinclusive. Examples of overinclusiveness, however, do not render statutes unconstitutional.

Accordingly, in the absence of the defendant's raising and analyzing a distinct legal claim of overinclusiveness, I would not read a separate equal protection or substantive due process overinclusiveness claim into the defendant's vagueness challenge. Rather, I conclude that the majority's analysis of overinclusiveness is misplaced. Moreover, even if I were to agree with the majority that the defendant raised a claim under the overinclusiveness doctrine, I disagree that the statute fails rational basis review.

I am mindful that "legislative enactments carry with them a strong presumption of constitutionality, and that a party challenging the constitutionality of a validly enacted statute bears the heavy burden of proving the

statute unconstitutional beyond a reasonable doubt . . . .'' (Citations omitted; internal quotation marks omitted.) *Packer* v. *Board of Education*, supra, 246 Conn. 101–102. I cannot conclude that the defendant has met her heavy burden in the present case.

Accordingly, I would affirm the judgment of the Appellate Court.

For the reasons I previously explained, I respectfully dissent in part.

RAINBOW HOUSING CORPORATION ET AL. *v.* TOWN OF CROMWELL (SC 20506)

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

Syllabus

Pursuant to statute (§ 12-81 (7) (A)), ''the real property of . . . a corporation organized exclusively for . . . charitable purposes . . . and used exclusively for carrying out . . . such purposes'' is exempt from taxation.

Pursuant further to statute (§ 12-81 (7) (B)), ''housing subsidized, in whole or in part, by federal, state or local government . . . shall not constitute a charitable purpose . . . . '[H]ousing' shall not include real property used for temporary housing . . . the primary use of which property is . . . housing for . . . persons with a mental health disorder . . . .''

The plaintiffs, R Co. and G Co., tax-exempt charitable organizations, appealed to the trial court from the decision of the Board of Assessment Appeals of the defendant town. The board had denied the plaintiffs' appeal from the town assessor's allegedly improper denial of their application for a charitable property tax exemption under § 12-81 (7) (A), in connection with residential property that R Co. owns and leases to G Co. G Co. operates a ''supervised apartment program'' on the property. Through the program, G Co. provides housing to as many as five men at a time, all of whom are individuals with severe mental illness who are not able to function in a traditional group home setting. G Co. provides the residents with on-site supervision, as well as various psychiatric, rehabilitative, and skill building services. Residents do not stay at the property for a fixed duration but, rather, remain only until their treatment has progressed to a point that they no longer need G Co.'s

services. The Department of Mental Health and Addiction Services provides G Co. with approximately 75 percent of its funding for the program. The parties stipulated to the relevant facts and filed separate motions for summary judgment. The town claimed that the assessor properly found that, under § 12-81 (7) (B), the property was not tax-exempt because the housing is subsidized in part by the department and is not temporary insofar as residency is not limited to any finite length of time. The plaintiffs claimed that the property was tax-exempt because they are organized exclusively for charitable purposes, the property is used exclusively for furthering those purposes, the housing provided thereon is not government subsidized housing, and the housing is temporary. The trial court agreed with the plaintiffs that the property qualified for tax exemption under § 12-81 (7) (A). Accordingly, the court granted the plaintiffs' motion for summary judgment and rendered judgment thereon, from which the town appealed. *Held*:

1. The town could not prevail on its claim that the plaintiffs were not aggrieved by the denial of their application for tax-exempt status insofar as the plaintiffs failed to provide the assessor with sufficient information to demonstrate that the property qualified for an exemption under § 12-81 (7) and, therefore, that the trial court lacked subject matter jurisdiction; because the town stipulated in the trial court to certain facts that allowed for a finding of aggrievement, namely, that the plaintiffs had filed with the assessor a complete application that contained all of the information necessary for the assessor to ascertain whether the property qualified for an exemption under § 12-81 (7), the town could not challenge that fact for the first time on appeal.

2. Contrary to the town's claim, the subject property was exempt from taxation because, regardless of whether the plaintiffs provide "housing subsidized, in whole or in part, by federal, state or local government" within the meaning of § 12-81 (7) (B), the housing the plaintiffs provided was temporary, and the property therefore qualified for the exemption on that basis: upon review of the statutory scheme governing charitable property tax exemptions and dictionary definitions of the word "temporary," this court concluded that the term "temporary housing" in § 12-81 (7) (B) was ambiguous insofar as it refers to housing that is impermanent and limited in duration without specifying the length of the durational limitation imposed; moreover, to resolve this ambiguity, this court considered the legislative history pertaining to the charitable tax exemption for real property used for temporary housing, especially legislative hearing testimony from representatives of various charitable organizations, which supported the conclusions that the term "temporary" does not entail a fixed durational limitation but, instead, varies depending on the particular purpose of the charitable organization and the needs of the residents being served, and that housing is "temporary" within the meaning of the statute, so long as the resident's stay is impermanent, transitional, and in furtherance of one of the charitable purposes enumer-

ated in § 12-81 (7) (B); furthermore, the plaintiffs satisfied their burden of establishing that the housing provided by the program was "temporary" within the meaning of § 12-81 (7) (B), as the evidence demonstrated that a resident's stay was transitional insofar as its length depended entirely on the resident's treatment progress, the plaintiffs both had charitable purposes pertaining to "housing for . . . persons with a mental health disorder," the supervised apartment program operated in furtherance of those purposes, and the town failed to produce any evidence to rebut the evidence demonstrating that the program's housing was temporary.

(*One justice concurring separately*)

Argued December 11, 2020—officially released September 1, 2021*

Procedural History

Appeal from the decision of the defendant's Board of Assessment Appeals upholding the denial of the plaintiffs' claim for a certain real property tax exemption, and for other relief, brought to the Superior Court in the judicial district of Middlesex and transferred to the judicial district of New Britain, where the court, *Hon. Arnold W. Aronson*, judge trial referee, who, exercising the powers of the Superior Court, granted the plaintiffs' motion for summary judgment and rendered judgment thereon, from which the defendant appealed. *Affirmed.*

Proloy K. Das, with whom were *Kari L. Olson* and, on the brief, *Joseph D. Szerejko* and *Chelsea R. Sousa*, for the appellant (defendant).

Pascal F. Naples, with whom, on the brief, were *Timothy S. Hollister* and *Lilia N. Hrekul*, for the appellees (plaintiffs).

Elliott B. Pollack, *Michael J. Marafito* and *Johanna S. Katz* filed a brief for Connecticut Community Non-Profit Alliance, Inc., as amicus curiae.

* September 1, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Cody N. Guarnieri filed a brief for MARC Community Resources, Inc., as amicus curiae.

Lloyd L. Langhammer filed a brief for the town of Colchester et al. as amici curiae.

Cody N. Guarnieri filed a brief for Adelbrook Community Services, Inc., as amicus curiae.

William Tong, attorney general, and *Clare E. Kindall*, solicitor general, filed a brief for the state of Connecticut as amicus curiae.

Kathleen M. Flaherty filed a brief for Connecticut Legal Rights Project, Inc., et al. as amici curiae.

Brian C. Courtney filed a brief for the Corporation for Independent Living as amicus curiae.

John F. Sullivan, assistant town attorney, filed a brief for the town of Manchester as amicus curiae.

Opinion

ECKER, J. General Statutes § 12-81 (7)[1] generally exempts from taxation real property owned by a tax-

[1] General Statutes § 12-81 provides in relevant part: "The following-described property shall be exempt from taxation . . . (7) (A) Subject to the provisions of sections 12-87 and 12-88, the real property of, or held in trust for, a corporation organized exclusively for scientific, educational, literary, historical or charitable purposes or for two or more such purposes and used exclusively for carrying out one or more of such purposes or for the purpose of preserving open space land, as defined in section 12-107b, for any of the uses specified in said section, that is owned by any such corporation, and the personal property of, or held in trust for, any such corporation, provided (i) any officer, member or employee thereof does not receive or at any future time shall not receive any pecuniary profit from the operations thereof, except reasonable compensation for services in effecting one or more of such purposes or as proper beneficiary of its strictly charitable purposes, and (ii) in 1965, and quadrennially thereafter, a statement shall be filed on or before the first day of November with the assessor or board of assessors of any town, consolidated town and city or consolidated town and borough, in which any of its property claimed to be exempt is situated. Such statement shall be filed on a form provided by such assessor or board of assessors. The real property shall be eligible for the exemption regardless of whether it is used by another corporation organized exclusively for scientific, educational, literary, historical or charitable purposes or for two or more such purposes;

exempt charitable organization and used exclusively for charitable purposes; see General Statutes § 12-81 (7) (A); but excludes from that exemption "housing subsidized, in whole or in part, by federal, state or local government . . . ." General Statutes § 12-81 (7) (B). The subsidized housing exclusion contains an exception for "temporary housing" used primarily for certain enumerated charitable purposes, including "housing for . . . persons with a mental health disorder . . . ." General Statutes § 12-81 (7) (B) (iii). This appeal requires us to determine whether the trial court correctly determined that property used for a residential mental health treatment program was tax exempt under § 12-81 (7) on the grounds that it does not provide housing subsidized by the government and that any housing provided is temporary. We affirm the judgment of the trial court.

The following facts, as stipulated by the parties, are undisputed. The plaintiffs, Rainbow Housing Corporation (Rainbow Housing) and Gilead Community Services, Inc. (Gilead), are both tax-exempt charitable organizations for federal tax purposes and subsidiaries of Connecticut Institute for the Blind, Inc., doing business as Oak Hill, an entity organized to provide support

"(B) On and after July 1, 1967, housing subsidized, in whole or in part, by federal, state or local government and housing for persons or families of low and moderate income shall not constitute a charitable purpose under this section. As used in this subdivision, 'housing' shall not include real property used for temporary housing belonging to, or held in trust for, any corporation organized exclusively for charitable purposes and exempt from taxation for federal income tax purposes, the primary use of which property is one or more of the following: (i) An orphanage; (ii) a drug or alcohol treatment or rehabilitation facility; (iii) housing for persons who are homeless, persons with a mental health disorder, persons with intellectual or physical disability or victims of domestic violence; (iv) housing for ex-offenders or for individuals participating in a program sponsored by the state Department of Correction or Judicial Branch; and (v) short-term housing operated by a charitable organization where the average length of stay is less than six months. The operation of such housing, including the receipt of any rental payments, by such charitable organization shall be deemed to be an exclusively charitable purpose . . . ."

to people with disabilities. Rainbow Housing owns a residential property at 461 Main Street in Cromwell known as Valor Home, which it leases to Gilead for the purpose of providing "a broad range of high quality health care and recovery support services to individuals with the goal of supporting the individual's independent living in the community." Gilead pursues this goal at Valor Home through its "[s]upervised [a]partment [program]," which is an "intensive, community-based [program] designed to serve a specific cohort of clients ([eighteen] years of age and older) with severe mental illness, with or without co-occurring disorders, needing a supportive supervised living environment, [who] are not able to function in the milieu of a traditional group home setting."

Valor Home houses up to five men at a time, all of whom pay a monthly rental fee. The Department of Mental Health and Addiction Services (department) helps fund Valor Home's supervised apartment program. Pursuant to Gilead's contract with the department, Valor Home provides, among other services, "psychiatric clinical services" and "community-based skill building instruction and other rehabilitative activities," including, but not limited to, "[t]eaching, coaching and assisting with daily living activities," "[a]ssistance with location and access of safe, affordable housing of [the resident's] choice, [and] providing education and support regarding tenant rights and responsibilities . . . ." Overall, Gilead receives approximately 75 percent of its funding from the department and "relies [on] donations from the public to make up the difference."

Prior to 2017, the defendant, the town of Cromwell, granted Valor Home a property tax exemption under § 12-81 (7). In 2017, the plaintiffs filed a timely and complete quadrennial renewal form, otherwise known as an M-3 application. See General Statutes § 12-81 (7) (A) (ii). In the M-3 application, the plaintiffs represented

that Valor Home was exempt from taxation on the October 1, 2017 grand list because "[t]he primary use of [the] property is not housing" but, instead, to "[p]rovide support services for . . . clients with mental illness." Shawna Baron, the assessor for the defendant, denied the plaintiffs' application for a property tax exemption.[2]

The plaintiffs timely filed an appeal with the defendant's Board of Assessment Appeals (board) pursuant to General Statutes §§ 12-89 and 12-111 (a). The board denied the plaintiffs' appeal, and the plaintiffs filed the present action in the Superior Court pursuant to General Statutes §§ 12-89, 12-117a and 12-119, claiming that the defendant improperly denied their application for a property tax exemption. Both the plaintiffs and the defendant moved for summary judgment and stipulated to the relevant facts and related exhibits.

The plaintiffs claimed that Valor Home was exempt from taxation under § 12-81 (7) because the plaintiffs are organized exclusively for charitable purposes, Valor Home is used exclusively for the plaintiffs' charitable purpose of serving individuals with severe mental illness, Valor Home does not provide government subsidized housing or low and moderate income housing, and the housing provided is temporary, transitional, and impermanent. In support of their motion for summary judgment, the plaintiffs submitted the affidavit of Dan Osborne, the chief executive officer of Gilead, who averred that "[o]ccupancy at [Valor Home] is temporary and transitional insofar as the individuals who live at [Valor Home] . . . live there [only] until they no longer need the services provided by Gilead. There is no specific term by which an individual must leave [Valor Home]; the term is entirely dependent [on] the individual's treatment progress. Once the individuals are capa-

[2] Rainbow Housing paid more than $3100 in property taxes under protest in July of 2018, pending the outcome of its appeal from the assessor's denial.

ble of living more independently through the services and supports [provided] by Gilead, they move out of [Valor Home]."

In its motion for summary judgment, the defendant argued that Valor Home was not tax-exempt under § 12-81 (7) because it provides housing that is subsidized in part by the department and because the housing is not limited to a finite length of time and, therefore, is not temporary. In support, the defendant relied on the stipulated fact that Valor Home is funded by the department and an affidavit from Baron explaining that she had "determined that [Valor Home] does not qualify for a charitable tax exemption pursuant to . . . § 12-81 (7) because [the] plaintiff[s] failed to establish that [Valor Home] is used for eligible temporary housing."

The trial court held a hearing on the motions for summary judgment, at which counsel for both parties assured the court that there were no disputed factual issues and that the sole question was whether Valor Home was exempt from taxation under § 12-81 (7) as a matter of law. Following the hearing, the court granted the plaintiffs' motion for summary judgment and denied the defendant's motion. This appeal followed.[3]

On appeal, the defendant renews the claims raised below, namely, that Valor Home is not tax-exempt under § 12-81 (7) because it provides subsidized housing that is not limited to a finite length of time and, thus, is not temporary. After amici curiae filed their briefs,[4] the

[3] 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.

[4] On October 28, 2020, we invited amici curiae to file briefs that address the following question: "Did the trial court [correctly] conclude that the plaintiffs, [which] operate a supervised apartment program that includes services rendered by contract with the [department] for men who suffer from severe mental illness, were entitled to a municipal property tax exemption under . . . § 12-81 (7) because the subject property was not 'housing subsidized, in whole or in part, by . . . state . . . government' and qualified as 'temporary housing' under the statute?" In response, the following entities

defendant filed a supplemental brief in which it adopted a new claim, raised for the first time by the amicus curiae town of Manchester. Specifically, the defendant claims that the plaintiffs were not aggrieved by the denial of their M-3 application because they failed to provide the assessor with sufficient information to demonstrate that Valor Home was exempt from taxation under § 12-81 (7).

I

We first address the defendant's claim that the plaintiffs were not aggrieved by the denial of their M-3 application because they failed to provide sufficient information to demonstrate that Valor Home qualified for a property tax exemption under § 12-81 (7). The defendant points out that, "[i]n response to the application questions regarding the average stay of residents at the property, rents, amount of income received from rent, and whether the rent was subsidized by the government, the plaintiffs answered 'N/A,' " and "[n]one of the supporting documentation required in conjunction with the application was supplied . . . ." The defendant contends that, in light of the plaintiffs' failure to provide the assessor with this information, the plaintiffs were not aggrieved by the denial of their application pursuant to our holding in *J.C. Penney Corp., Inc.* v. *Manchester*, 291 Conn. 838, 970 A.2d 704 (2009).[5] We disagree.

filed briefs as amici curiae: Connecticut Community Non-Profit Alliance, Inc., Connecticut Legal Rights Project, Inc., Connecticut Fair Housing Center, Adelbrook Community Services, Inc., MARC Community Resources, Inc., the Corporation for Independent Living, the towns of Colchester and Manchester, and the state of Connecticut.

[5] In *J.C. Penney Corp., Inc.* v. *Manchester*, supra, 291 Conn. 838, we held that, when an appeal under § 12-117a "call[s] in question the valuation placed by assessors [on] . . . property . . . the trial court performs a two step function. The burden, in the first instance, is [on] the plaintiff to show that he has, in fact, been aggrieved by the action of the board in that his property has been overassessed." (Emphasis omitted; internal quotation marks omitted.) Id., 844. If the taxpayer fails "to file with the assessors a list of his taxable property and furnish the facts upon which valuations may be based," then the taxpayer is not "aggrieved by an assessment based" on the informa-

Aggrievement is a component of standing, which is essential to invoke the subject matter jurisdiction of the trial court. See, e.g., *Andross* v. *West Hartford*, 285 Conn. 309, 321, 939 A.2d 1146 (2008). Statutory aggrievement under §§ 12-89, 12-117a and 12-119 "exists by legislative fiat, not by judicial analysis of the particular facts of the case. In other words, in cases of statutory aggrievement, particular legislation grants standing to those who claim injury to an interest protected by that legislation." (Internal quotation marks omitted.) Id., 322. Although the defendant failed to preserve its aggrievement claim in the trial court, we will review it because it implicates the trial court's subject matter jurisdiction. See *Perez-Dickson* v. *Bridgeport*, 304 Conn. 483, 506, 43 A.3d 69 (2012).

Contrary to its claim on appeal, the defendant stipulated below that the plaintiffs filed a "timely" and "complete M-3 application" and that "Rainbow [Housing] is aggrieved by the decision of the assessor to deny their request for a tax exemption of the subject property and by the decision of the board affirming the denial of the tax exemption." The parties cannot confer subject matter jurisdiction by agreement, and, therefore, the conclusory portion of the stipulation stating that the plaintiffs are "aggrieved" is of no consequence to the

tion available to the assessors. (Emphasis omitted; internal quotation marks omitted.) Id., 845. "Only after the court determines that the taxpayer has met his burden of proving that the assessor's valuation was excessive and that the refusal of the board of [assessment appeals] to alter the assessment was improper . . . may the court then proceed to the second step in a § 12-117a appeal and exercise its equitable power to grant such relief as to justice and equity appertains . . . ." (Internal quotation marks omitted.) Id., 844–45.

The plaintiffs in the present case do not call into question the valuation of their property; instead, they claim that Valor Home is completely exempt from taxation and seek relief under §§ 12-89 and 12-119, in addition to § 12-117a. We need not decide whether our holding in *J.C. Penney Corp., Inc.*, applies outside of the valuation context because we resolve the aggrievement issue on other grounds.

present appeal, but the "parties can stipulate to facts to allow [the] finding of aggrievement . . . ." *Fox* v. *Zoning Board of Appeals*, 84 Conn. App. 628, 637, 854 A.2d 806 (2004); see also *Jones* v. *Redding*, 296 Conn. 352, 364, 995 A.2d 51 (2010) (parties stipulated to facts on which "the legal conclusion of aggrievement" was based). That is what occurred here when the parties stipulated to the fact that the plaintiffs' M-3 application was "complete," meaning that it contained all of the information necessary for the assessor to ascertain whether Valor Home was entitled to a property tax exemption under § 12-81 (7). Having so stipulated, the defendant cannot now challenge that fact for the first time on appeal. We therefore reject the defendant's claim that the trial court lacked subject matter jurisdiction.

II

On the merits, the defendant contends that the trial court improperly rendered summary judgment in favor of the plaintiffs because Valor Home provides government subsidized housing that is not temporary in nature and, thus, does not qualify for tax-exempt status under § 12-81 (7). We need not decide whether Valor Home provides "housing subsidized, in whole or in part, by federal, state or local government" within the meaning of § 12-81 (7) (B) because we conclude that Valor Home's housing is "temporary" and therefore qualifies for the exemption on that basis.

The scope of the charitable exemption in § 12-81 (7) is a question of statutory construction, over which we exercise plenary review. See, e.g., *Tannone* v. *Amica Mutual Ins. Co.*, 329 Conn. 665, 671, 189 A.3d 99 (2018). In addition to the usual rules of statutory construction that apply generally; see General Statutes § 1-2z; our analysis of § 12-81 (7) also is governed by the rule of strict construction applicable to statutory provisions

granting tax exemptions. See *St. Joseph's Living Center, Inc.* v. *Windham*, 290 Conn. 695, 707, 966 A.2d 188 (2009). "It is . . . well established that in taxation cases . . . provisions granting a tax exemption are to be construed strictly against the party claiming the exemption, who bears the burden of proving entitlement to it. . . . Exemptions, no matter how meritorious, are of grace . . . . [Therefore] [t]hey embrace only what is strictly within their terms. . . . We strictly construe such statutory exemptions because [e]xemption from taxation is the equivalent of an appropriation of public funds, because the burden of the tax is lifted from the back of the potential taxpayer who is exempted and shifted to the backs of others. . . . [I]t is also true, however, that such strict construction neither requires nor permits the contravention of the true intent and purpose of the statute as expressed in the language used."[6] (Citations omitted; internal quotation marks

[6] As we observed in *St. Joseph's Living Center, Inc.* v. *Windham*, supra, 290 Conn. 695, the rule of strict construction of tax exemption statutes has not always been applied in cases involving "educational, scientific or charitable organizations." Id., 708 n.22. To the contrary, the property of such organizations historically "was treated rather uniformly as being subject to 'a rule of nontaxability.' " Id., quoting *Arnold College for Hygiene & Physical Education* v. *Milford*, 144 Conn. 206, 210, 128 A.2d 537 (1957). The reasoning of this line of cases relied on the "view that such exemptions were 'not merely an act of grace on the part of the [s]tate . . . [but stood] squarely on [s]tate interest. To subject all such property to taxation would tend rather to diminish than increase the amount of taxable property. Other conditions being equal, the happiness, prosperity and wealth of a community may well be measured by the amount of property wisely devoted to the common good . . . .' *Yale University* v. *New Haven*, 71 Conn. 316, 332, 42 A. 87 (1899). Our approach to such statutes reflected this understanding: 'Consequently, [General Statutes (1949 Rev.) § 1761 (7), a functionally identical predecessor of § 12-81 (7)] does not come within the rule that tax exemption statutes must be construed strictly against the taxpayer.' *Arnold College for Hygiene & Physical Education* v. *Milford*, supra, 210; see also *Loomis Institute* v. *Windsor*, 234 Conn. 169, 176, 661 A.2d 1001 (1995) (articulating and following more liberal rule of construction applied to educational institutions)." *St. Joseph's Living Center, Inc.* v. *Windham*, supra, 708 n.22. It is unclear "precisely why this approach has seemingly become extinct, nor is it particularly clear whether it is applicable beyond the educational context."

omitted.) Id. Despite this rule of construction, we define "a charitable use or purpose . . . rather broad[ly] and liberal[ly]." Id., 715. The definition of a charitable use or purpose is not "restricted to mere relief of the destitute or the giving of alms but comprehends activities, not in themselves self-supporting, which are intended to improve the physical, mental and moral condition of the recipients and make it less likely that they will become burdens on society and more likely that they will become useful citizens." (Internal quotation marks omitted.) Id., 715–16. Thus, "[c]harity embraces anything that tends to promote the well-doing and the well-being of social man." (Internal quotation marks omitted.) Id., 716.

We begin our analysis with the statutory scheme governing charitable property tax exemptions. Section 12-81 (7) (A) provides that property used for "scientific, educational, literary, historical or charitable purposes" is "exempt from taxation." Subdivision (B) of § 12-81 (7) creates an exclusion to this tax exemption for "housing subsidized, in whole or in part, by federal, state or local government and housing for persons or families of low and moderate income [which] shall not constitute a charitable purpose under this section." The same provision carves out an exception to this exclusion for five specified categories of temporary housing. Specifically, subdivision (B) provides that, "[a]s used in this subdivision, 'housing' shall not include real property used for temporary housing belonging to, or held in trust for, any corporation organized exclusively for charitable purposes and exempt from taxation for federal income tax purposes, the primary use of which property is one or more of the following: (i) An orphanage; (ii) a drug

Id. Because the parties have not asked us to clarify the rule of construction applicable to § 12-81 (7), we do not resolve the conflict between the modern trend of strict construction and the historical trend of liberal construction in this regard.

or alcohol treatment or rehabilitation facility; (iii) housing for persons who are homeless, persons with a mental health disorder, persons with intellectual or physical disability or victims of domestic violence; (iv) housing for ex-offenders or for individuals participating in a program sponsored by the state Department of Correction or Judicial Branch; and (v) short-term housing operated by a charitable organization where the average length of stay is less than six months. The operation of such housing, including the receipt of any rental payments, by such charitable organization shall be deemed to be an exclusively charitable purpose . . . .'' General Statutes § 12-81 (7) (B). Thus, subsidized housing or low and moderate income housing falls within the scope of the charitable exemption only if it is ''temporary'' and primarily used for one of the five enumerated charitable purposes.

It is undisputed that Valor Home provides treatment and services for ''persons with a mental health disorder . . . .'' General Statutes § 12-81 (7) (B) (iii). The parties dispute whether Valor Home provides ''housing subsidized, in whole or in part, by . . . state . . . government'' and, if so, whether the housing is ''temporary'' within the meaning of § 12-81 (7) (B) (iii). For purposes of this appeal, we will assume, without deciding, that Valor Home provides housing subsidized in part by the department. We nonetheless conclude that the housing is ''temporary'' and, therefore, exempt from taxation under § 12-81 (7) (B) (iii).

The word ''temporary'' is not defined in the statutory scheme, so we look to the ''commonly approved usage of the language . . . .'' General Statutes § 1-1 (a). The word ''temporary'' means ''lasting for a time only: existing or continuing for a limited time: impermanent, transitory . . . .'' Webster's Third New International Dictionary (2002) p. 2353; see also Oxford American Dictionary and Language Guide (1999) p. 1038 (defining

"temporary" as "lasting or meant to last only for a limited time"). Subsidized housing is "temporary" if it is limited in duration, impermanent, or transitory.

We conclude that the term "temporary housing" in § 12-81 (7) (B) is ambiguous because it refers to housing that is "limited in duration" and "impermanent" but does not specify the *length* of the durational limitation imposed. Indeed, only one of the five exceptions in § 12-81 (7) (B) contains an explicit durational limitation, namely, the fifth, catchall provision for "short-term housing operated by a charitable organization where the average length of stay is less than six months." General Statutes § 12-81 (7) (B) (v). There is no defined time limitation for temporary subsidized housing provided (1) by orphanages, (2) by drug or alcohol treatment or rehabilitation facilities, (3) for the homeless, mentally ill, disabled, or victims of domestic violence, and (4) by programs for ex-offenders. The use of a finite durational limitation for "short-term housing," but the omission of such a limitation for "temporary housing," indicates that the legislature intended the terms "short-term" and "temporary" to have different meanings.[7] See,

[7] The defendant contends that the term "temporary" is "appropriately confined to a specified, limited period of time" and relies on certain statutes that variously define the term as ranging in duration from seventy-two hours to three years. See, e.g., General Statutes § 5-196 (25) (defining "temporary position" in State Personnel Act, General Statutes § 5-193 et seq., as "a position in the state service which is expected to require the services of an incumbent for a period not in excess of six months"); General Statutes § 8-68i (defining "temporary" for purposes of "emergency housing on a temporary basis" as "the period of time needed to find housing, not exceeding thirty days"); General Statutes § 20-126c (a) (6) (defining "temporary dental clinic" as "a dental clinic that provides dental care services at no cost to uninsured or underinsured persons and operates for not more than seventy-two consecutive hours"); see also 8 C.F.R. § 2.142 (F) (2) (ii) (B) (2020) (defining "temporary services or labor" as "limited to one year or less, but in the case of a one-time event could last up to 3 years"). The wide disparity in the various time periods identified in these statutes reinforces our conclusion that the term "temporary" is ambiguous with respect to the length of the durational limitation imposed.

e.g., *C. R. Klewin Northeast, LLC* v. *State*, 299 Conn. 167, 177, 9 A.3d 326 (2010) ("[t]he use of the different terms . . . within the same statute suggests that the legislature acted with complete awareness of their different meanings . . . and that it intended the terms to have different meanings" (internal quotation marks omitted)). Because the term "temporary," as used in the statute, imposes no fixed durational limitation, its meaning in this context is not plain and unambiguous. We therefore turn to extratextual sources of legislative intent.

The legislature adopted the charitable tax exemption pertaining to "real property used for temporary housing" in 2003. See Public Acts 2003, No. 03-270, § 1 (P.A. 03-270). As explained by Senator Eileen M. Daily, the purpose of P.A. 03-270, § 1, was "to help clarify two conflicting court decisions in terms of property taxes for housing for orphanages, drug or alcohol treatment or rehab, homeless [intellectually challenged] or mentally ill individuals, people participating in correction or [J]udicial [B]ranch recovery programs, and charitable organizations where the length of stay is less than six months."[8] 46 S. Proc., Pt. 13, 2003 Sess., p. 4069. Thus, P.A. 03-270 was intended to clarify that charitable "properties [that] are utilized for transitional housing purposes shall be deemed [nontaxable]." 46 H.R. Proc., Pt. 21, 2003 Sess., pp. 7002–7003, remarks of Representative Andrea L. Stillman.

[8] It is not clear which two conflicting cases Senator Daily had in mind, but the chronology suggests that they are *Fanny J. Crosby Memorial, Inc.* v. *Bridgeport*, 262 Conn. 213, 811 A.2d 1277 (2002), overruled by *St. Joseph's Living Center, Inc.* v. *Windham*, 290 Conn. 695, 707, 966 A.2d 188 (2009), and *Isaiah 61:1, Inc.* v. *Bridgeport*, 270 Conn. 69, 851 A.2d 277 (2004), the latter of which was pending on appeal in this court at the time of Senator Daily's statements. In neither of these cases did we address the meaning of the term temporary housing in subdivision (B) of § 12-81 (7), and, therefore, our holdings in these cases are not pertinent to the issue on appeal.

During the legislative hearings on P.A. 03-270, the legislature heard testimony from representatives of various charitable organizations regarding the deleterious effects that property taxation has had, or would have, on "transitional shelters and treatment programs" that receive federal, state, or local funding. Conn. Joint Standing Committee Hearings, Finance, Revenue and Bonding, Pt. 1, 2003 Sess., p. 22. The testimony during these hearings emphasized the transitional and impermanent nature of the housing provided by charitable organizations, as well as the fact that housing was secondary or integral to the charitable purpose. For example, Margaret J. Slez, the attorney for Isaiah 61:1, Inc., a federally and state funded nonprofit community justice agency, testified: "[W]e are in no way an established abode under any definition under the [G]eneral [S]tatutes. We are in fact—our clients are there for a period of time that runs from maybe three to six months, maybe [one] year." Id., p. 24. Attorney Slez urged the legislature to exempt from taxation "transition[al] housing" and "rehabilitative housing . . . ." Id., p. 25.

Similarly Reverend Richard Schuster, executive director of St. Luke's Community Services, Inc., a nonprofit organization that provides shelter for the homeless and persons with acquired immune deficiency syndrome and psychiatric disabilities, testified that his charitable organization provides more than "just . . . a bed and a meal." Id., p. 41. Rather, St. Luke's Community Services, Inc., provides a range of treatment and rehabilitative services to help its clients "reach their full potential. Get back on their feet, get back out in society." Id. The provision of housing and services is "purposely designed to meet the needs of these populations in a way that is both healthier and more productive for the client and at a cost savings to both the state and local government." Id., p. 40, remarks of Reverend Shuster.

The testimony at the legislative hearing revealed that the average length of a resident's temporary stay varied depending on the charitable organization's purpose, the nature of the services provided, the treatment and/or rehabilitative goals, and the resident's progress toward those goals. For example, the Bridgeport Rescue Mission, a nonprofit organization that provides faith based addiction services, operates a residential program that lasts for twelve months. Id., p. 120. At Operation HOPE, Inc., a nonprofit center for the homeless, the average length of residency is one to three years, depending on the ability of the individual resident to live independently. Id., pp. 93, 96. Despite the disparity between these lengths of time, the legislative record reflects an intent to include them within the meaning of the term "temporary," provided that the resident's occupancy falls within the scope of the charitable purpose of the organization. See id., p. 74, remarks of Senator John McKinney ("I define permanent housing as 'housing.' I don't define staying in a drug or rehabilitation center for [sixty] days as 'housing.' ").

In light of the objectives animating P.A. 03-270 and the foregoing legislative history, we conclude that the term "temporary" does not have an inflexible or fixed durational limitation; instead, the durational limitation will vary depending on the particular purpose of the charitable organization and the needs of the residents who fall within the categories enumerated in § 12-81 (7) (B).[9] So long as a resident's stay is impermanent, transitional, and in furtherance of one of the enumerated categories of charitable purposes, it is "temporary" within the meaning of § 12-81 (7) (B). For example, an orphanage with the charitable purpose of serving the

[9] An organization's charitable purpose often can be ascertained "by examining [its] foundational documents," such as its charter, certificate of incorporation or bylaws. *St. Joseph's Living Center, Inc.* v. *Windham*, supra, 290 Conn. 714.

needs of minor children without parental guardians may house children for days, weeks, months, or many years. Nonetheless, if a child's stay is impermanent and transitional (i.e., intended to transition the child to a more stable or permanent living environment, such as foster care or adoption), and in furtherance of the orphanage's charitable purpose, the housing is "temporary" under § 12-81 (7) (B). Once the child attains the age of majority and the charitable purpose of the orphanage no longer is being served, then the durational limitation has been reached, and any further stay cannot be considered "temporary" under the statute. The same principle applies to the other specific categories of housing enumerated in § 12-81 (7) (B) (i) through (v).

The defendant contends that a specific, defined time limitation must be read into the statute by judicial construction in order to avoid absurd and unworkable results.[10] We disagree. As discussed previously, the durational limits attaching to the term "temporary" may vary depending on the purpose of the charitable organization and the needs of the residents being served, and our construction of the statute is consistent with the intent of the legislature to exempt from taxation real property used exclusively for the charitable purposes

[10] The defendant also relies on subsequent legislative history, arguing that failed legislative attempts to remove the word "temporary" from subdivision (B) of § 12-81 (7) demonstrate "that, if the legislature had intended for the statute to provide an exemption for housing subsidized by state government that was not clearly temporary, it knew how to do it." See Substitute Senate Bill No. 928, 2019 Sess.; Senate Bill No. 419, 2016 Sess. We are "reluctant to draw inferences regarding legislative intent from the failure of a legislative committee to report a bill to the floor, because in most cases the reasons for that lack of action remain unexpressed and thus obscured in the mist of committee inactivity." *In re Valerie D.*, 223 Conn. 492, 518 n.19, 613 A.2d 748 (1992); see also *Schneidewind* v. *ANR Pipeline, Co.*, 485 U.S. 293, 306, 108 S. Ct. 1145, 99 L. Ed. 2d 316 (1988) ("[t]his [c]ourt generally is reluctant to draw inferences from Congress' failure to act"). Regardless, the failed legislative attempts to delete the term "temporary" from subdivision (B) of § 12-81 (7) do not help to illuminate the term's meaning.

enumerated in § 12-81 (7) (B) (i) through (v). We see nothing absurd or unworkable resulting from this conclusion.[11] See, e.g., *Tayco Corp.* v. *Planning & Zoning Commission*, 294 Conn. 673, 686, 986 A.2d 290 (2010) ("[W]e construe a statute in a manner that will not thwart its intended purpose or lead to absurd results. . . . We must avoid a construction that fails to attain a rational and sensible result that bears directly on the purpose the legislature sought to achieve." (Internal quotation marks omitted.)). Furthermore, "[w]e are not in the business of writing statutes; that is the province of the legislature. Our role is to interpret statutes as they are written. . . . [We] cannot, by [judicial] construction, read into statutes provisions [that] are not clearly stated." (Internal quotation marks omitted.) *Thomas* v. *Dept. of Developmental Services*, 297 Conn. 391, 412, 999 A.2d 682 (2010); see also *Vaillancourt* v. *New Britain Machine/Litton*, 224 Conn. 382, 396, 618 A.2d 1340 (1993) ("[w]e are not permitted to supply statutory language that the legislature may have chosen to omit"). The term "temporary" does not have a specific, defined time limitation, and "[t]he task of promulgating such a limitation lies with the legislature, not with the court." *State* v. *Obas*, 320 Conn. 426, 436, 130 A.3d 252 (2016). Accordingly, we decline the defendant's invitation to graft a specific durational limitation onto the term "temporary" in § 12-81 (7).

With this statutory framework in mind, we address whether the trial court properly rendered summary judgment in favor of the plaintiffs. We begin by examin-

[11] The defendant argues that municipal assessors will "have no reliable or practical metric to apply if an applicant [for a charitable exemption] is not committed to a fixed and limited period of time of residency." We reject this claim because the charitable purpose of an organization, as reflected in its foundational documents, will provide municipal assessors with a reliable and practical metric by which to determine whether a period of residency is temporary within the meaning of § 12-81 (7) (B). See footnote 9 of this opinion.

ing the charitable purpose of the plaintiffs, as reflected in their foundational documents. See footnote 9 of this opinion. According to Rainbow Housing's amended and restated certificate of incorporation, and its amended and restated bylaws, its charitable purpose is "to identify, prepare and establish residential facilities for persons with mental illness . . . ." Similarly, among Gilead's charitable purposes is to "provid[e] a broad range of high quality health care and recovery support services in the home and community to improve mental health and physical well-being, with the goal of supporting the individual's independent living in the community, all without regard to race, color, creed, national and ethnic origin, disability, sexual preference, or socioeconomic status . . . ."

In furtherance of this purpose, the plaintiffs operate the supervised apartment program at Valor Home "to serve a specific cohort of clients ([eighteen] years of age and older) with severe mental illness, with or without co-occuring disorders, needing a supportive, supervised living environment, [who] are not able to function in the milieu of a traditional group home setting." Valor Home "offers [twenty-four] hour, [seven] days per week, on-site supervision for clients who need intensive supervision and support in order to improve or maintain functioning in the community." Valor Home's "programs effectively blend the provision of [twenty-four] hour staffing with increased privacy and opportunities for education and life skill supports (shopping, money management, cooking, laundry, home cleaning, etc.) with an apartment style arrangement of the facility." "The philosophy of the [s]upervised [a]partment [p]rograms places emphasis on a consumer-driven recovery-oriented treatment approach," with the recognition that "empowerment and the ability to instill a hope of recovery are key treatment concepts, and are essential to [clients'] successful transition into the community."

Valor Home's "primary goals are to provide opportunities for community living to individuals who would otherwise require a long-term hospitalization or other more restrictive settings. Other goals include decreasing the number and duration of hospital stays, developing and maintaining satisfying personal relationships, and empowering individuals to take responsibility for managing their own lives to live an optimum life in the community with the least amount of professional support in the least restrictive setting."

As we discussed previously, the plaintiffs submitted the affidavit of Gilead's chief executive officer, Osborne, in support of their motion for summary judgment. Osborne averred that occupancy at Valor Home "is temporary and transitional insofar as the individuals who live at [Valor Home] . . . live there [only] until they no longer need the services provided by Gilead. There is no specific term by which an individual must leave [Valor Home]; the term is entirely dependent [on] the individual's treatment progress. Once the individuals are capable of living more independently through the services and supports [provided] by Gilead, they move out of [Valor Home]."

This evidence was sufficient to meet the plaintiffs' burden of establishing that the housing provided by Valor Home is "temporary" within the meaning of § 12-81 (7) (B) (iii) because it is impermanent, furthers the plaintiffs' charitable purpose of providing treatment to men with severe mental illness, and is designed to "successful[ly] transition [residents] into the community." Once the residents meet the program's goal and are capable of living more independently, "they move out of [Valor Home]." Because the plaintiffs satisfied their burden of production, the defendant was required to "substantiate its adverse claim by showing that there is a genuine issue of material fact *together with the evidence disclosing the existence of such an issue*."

(Emphasis in original; internal quotation marks omitted.) *Squeo* v. *Norwalk Hospital Assn.*, 316 Conn. 558, 593–94, 113 A.3d 932 (2015); see also *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 320–21, 77 A.3d 726 (2013) ("the rule that the party opposing summary judgment must provide evidentiary support for its opposition applies only when the moving party has first made out a prima facie case for summary judgment"). "It is not enough . . . for the opposing party merely to assert the existence of . . . a disputed issue. . . . Mere assertions of fact, whether contained in a complaint or in a brief, are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court [in support of a motion for summary judgment]. . . . As a general rule, then, [w]hen a motion for summary judgment is filed and supported by affidavits and other documents, an adverse party, by affidavit or as otherwise provided by . . . [the rules of practice], must set forth specific facts showing that there is a genuine issue for trial, and if he does not so respond, summary judgment shall be entered against him." (Citations omitted; internal quotation marks omitted.) *Squeo* v. *Norwalk Hospital Assn.*, supra, 594.

The defendant failed to produce any evidence to contradict or rebut the plaintiffs' evidence demonstrating that the housing provided by Valor Home is temporary.[12]

[12] In its supplemental brief, the defendant claims that the housing provided by Valor Home is not temporary because "[a] review of the state voter records shows that at least two residents at Valor Home have voted from that address for several years dating back to at least 2013." This evidence was not presented to the trial court and cannot be considered for the first time on appeal. See *State* v. *Edwards*, 314 Conn. 465, 478, 102 A.3d 52 (2014) ("we cannot consider evidence not available to the trial court to find adjudicative facts for the first time on appeal"); *U.S. Bank National Assn.* v. *Eichten*, 184 Conn. App. 727, 756, 196 A.3d 328 (2018) (appellate courts "do not consider evidence not presented to the trial court").

The defendant also claims that summary judgment was improper because "[t]he plaintiffs refused to provide the [defendant] with any evidence as to how long residents reside at Valor Home . . . ." Practice Book § 17-47

In the absence of such evidence, no disputed issues of material fact existed. See, e.g., *Farrell* v. *Farrell*, 182 Conn. 34, 39, 438 A.2d 415 (1980) ("[G]eneral averments will not suffice to show a triable issue of fact. . . . Indeed, the whole summary judgment procedure would be defeated if, without any showing of evidence, a case could be forced to trial by a mere assertion that an issue exists."). Accordingly, the trial court properly rendered summary judgment in favor of the plaintiffs.

The judgment is affirmed.

In this opinion McDONALD, D'AURIA, MULLINS and KAHN, Js., concurred.

ROBINSON, C. J., concurring in the judgment. I agree with the majority's decision to affirm the judgment of the trial court, which rendered summary judgment in this tax appeal in favor of the plaintiffs, Rainbow Housing Corporation (Rainbow Housing) and Gilead Community Services, Inc. (Gilead), on the ground that they provide temporary housing within the meaning of Gen-

provides that, "[s]hould it appear from the affidavits of a party opposing the motion that such party cannot, for reasons stated, present facts essential to justify opposition, the judicial authority may deny the motion for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just." As we explained in *Dorazio* v. *M. B. Foster Electric Co.*, 157 Conn. 226, 253 A.2d 22 (1968), "[a] party cannot successfully oppose a motion for summary judgment by merely averring that the [opposing party] has exclusive knowledge about certain facts or that affidavits based on personal knowledge are difficult to obtain. Under § 301 [the predecessor to § 17-47], the opposing party must show by affidavit precisely what facts are within the exclusive knowledge of the moving party and what steps he has taken to attempt to acquire these facts." Id., 230; see also *Bank of America, N.A.* v. *Briarwood Connecticut, LLC*, 135 Conn. App. 670, 676–77, 43 A.3d 215 (2012) (trial court properly rendered summary judgment in favor of plaintiff because defendant's request for continuance was not timely filed and "did not comply with the requirements of Practice Book § 17-47"). The defendant did not seek a continuance or discovery in accordance with the requirements of § 17-47, and, therefore, we reject the defendant's claim.

eral Statutes § 12-81 (7) (B).[1] I agree with the majority's ultimate conclusion that Valor Home, which is a residence for adults with mental illness that Rainbow Housing owns and leases to Gilead to operate, provides temporary housing. I write separately, however, because I respectfully disagree with the majority's analysis insofar as it concludes that § 12-81 (7) (B) is ambiguous under our well established principles of statutory construction.[2] I conclude that the statutory language of § 12-81 (7) (B), and particularly the definition of "temporary," is clear and unambiguous, with whether a facility meets that definition being a highly fact sensitive question for the trier. Because the facts in this tax appeal were stipulated, meaning that the defendant, the town of Cromwell, did not establish the existence of a genuine issue of material fact as to the temporary nature of the housing provided by Valor Home, I join with the majority in affirming the judgment of the trial court.

[1] General Statutes § 12-81 provides in relevant part: "The following-described property shall be exempt from taxation . . . (7) (B) On and after July 1, 1967, housing subsidized, in whole or in part, by federal, state or local government and housing for persons or families of low and moderate income shall not constitute a charitable purpose under this section. As used in this subdivision, 'housing' shall not include real property used for temporary housing belonging to, or held in trust for, any corporation organized exclusively for charitable purposes and exempt from taxation for federal income tax purposes, the primary use of which property is one or more of the following: (i) An orphanage; (ii) a drug or alcohol treatment or rehabilitation facility; (iii) housing for persons who are homeless, persons with a mental health disorder, persons with intellectual or physical disability or victims of domestic violence; (iv) housing for ex-offenders or for individuals participating in a program sponsored by the state Department of Correction or Judicial Branch; and (v) short-term housing operated by a charitable organization where the average length of stay is less than six months. The operation of such housing, including the receipt of any rental payments, by such charitable organization shall be deemed to be an exclusively charitable purpose . . . ."

[2] I also note my agreement with part I of the majority opinion, in which the majority concludes that, because the parties stipulated that the plaintiffs' M-3 application was "complete," the defendant cannot now challenge that fact for the first time on appeal.

As noted by the majority, whether Valor Home's housing is "temporary" within the meaning of § 12-81 (7) (B) presents an issue of statutory construction, which is a question of law over which we exercise plenary review. See, e.g., *Boisvert* v. *Gavis*, 332 Conn. 115, 141, 210 A.3d 1 (2019). It is well settled that we follow the plain meaning rule pursuant to General Statutes § 1-2z in construing statutes "to ascertain and give effect to the apparent intent of the legislature." (Internal quotation marks omitted.) *Sena* v. *American Medical Response of Connecticut, Inc.*, 333 Conn. 30, 45, 213 A.3d 1110 (2019); see id., 45–46 (stating plain meaning rule).

We begin with the text of the statute. Section 12-81 (7) (A) provides that, with certain exceptions, property used for "charitable purposes" is exempt from taxation. However, § 12-81 (7) (B) provides in relevant part that "housing subsidized, in whole or in part, by federal, state or local government . . . shall not constitute a charitable purpose under this section. . . ." The statute then provides that the term "housing" does "not include real property used for *temporary housing* belonging to, or held in trust for, any corporation organized exclusively for charitable purposes and exempt from taxation for federal income tax purposes, the primary use of which property is one or more of the following . . . (iii) housing for persons who are homeless, persons with a mental health disorder, persons with intellectual or physical disability or victims of domestic violence . . . and (v) short-term housing operated by a charitable organization where the average length of stay is less than six months. The operation of such housing, including the receipt of any rental payments, by such charitable organization shall be deemed to be an exclusively charitable purpose . . . ." (Emphasis added.) General Statutes § 12-81 (7) (B). Because it is undisputed that Valor Home provides treatment and services for "persons with a mental health disorder," and we

assume, without deciding, that Valor Home is subsidized in part by the Department of Mental Health and Addiction Services, the sole question before us is whether Valor Home provides "temporary" housing so as to qualify for a property tax exemption under § 12-81 (7) (B).

Under § 1-2z, we first must determine whether § 12-81 (7) (B) is ambiguous. "The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *Commissioner of Public Safety* v. *Freedom of Information Commission*, 312 Conn. 513, 527, 93 A.3d 1142 (2014). In other words, a statute is considered plain and unambiguous when "the meaning . . . is so strongly indicated or suggested by the [statutory] language . . . that . . . it appears to be *the* meaning and appears to preclude any other likely meaning." (Emphasis in original; internal quotation marks omitted.) *Ledyard* v. *WMS Gaming, Inc.*, 338 Conn. 687, 698 n.6, 258 A.3d 1268 (2021). In interpreting statutes, words and phrases are construed according to their "commonly approved usage . . . ." General Statutes § 1-1 (a); see e.g., *State* v. *Panek*, 328 Conn. 219, 227–29, 177 A.3d 1113 (2018). As discussed by the majority, " 'temporary' means 'lasting for a time only: existing or continuing for a limited time: impermanent, transitory . . . .' Webster's Third New International Dictionary (2002) p. 2353; see also Oxford American Dictionary and Language Guide (1999) p. 1038 (defining 'temporary' as 'lasting or meant to last only for a limited time')." Part II of the majority opinion. Neither the parties nor the majority presents an alternative interpretation for the meaning of "temporary" other than its plain meaning. Instead, the majority concludes that, because the statute provides a durational limitation for short-term housing and is silent regarding a durational limitation for temporary housing,

the statute is ambiguous. I respectfully disagree with the majority's conclusion as to the statute's ambiguity.

First, the majority points out that § 12-81 (7) (B), in enumerating the exceptions to the general exclusion of subsidized housing from tax exempt status, provides a time limit only for "short-term housing," which, as defined in the statute, means an average stay of less than six months in duration. See General Statutes § 12-81 (7) (B) (v). The majority suggests that such an inclusion indicates that the legislature intended the phrases "short-term" and "temporary" to have different meanings. I agree that the meaning of "short-term" is distinct from the previously discussed meaning of "temporary" based on the plain wording of the statute. An inclusion of a time limit for "short-term" housing but not for "temporary" housing, however, does not render the word "temporary" ambiguous. Indeed, it demonstrates that, had the legislature intended to provide a durational limitation for "temporary" housing, rather than just "short-term" housing, it could have done so. See, e.g., *DeNunzio* v. *DeNunzio*, 320 Conn. 178, 194, 128 A.3d 901 (2016) (common principle of statutory construction is that, when legislature expresses list of items, exclusion of item is deliberate); *Stafford* v. *Roadway*, 312 Conn. 184, 194, 93 A.3d 1058 (2014) ("[i]t is a well settled principle of statutory construction that the legislature knows how to convey its intent expressly . . . or to use broader or limiting terms when it chooses to do so" (citation omitted; internal quotation marks omitted)). It is clear from the plain text of the statute that "temporary" housing encompasses residential mental health programs, drug rehabilitation programs, and orphanages, in contrast to "short-term" housing, which is specifically limited in duration, and addresses a broad, catchall category of temporary housing.

Second, I disagree with the majority's conclusion that the statute's silence as to a durational time limit for

"temporary" housing is evidence of its ambiguity. This court has "made clear that [t]he fact that . . . relevant statutory provisions are silent . . . does not mean that they are ambiguous." (Internal quotation marks omitted.) *State* v. *Orr*, 291 Conn. 642, 653–54, 969 A.2d 750 (2009); see, e.g., id., 654 (statute's silence about whether it permits in-court testimony by social worker "should not be skewed as to indicate ambiguity" because it is not susceptible to more than one plausible interpretation); *Manifold* v. *Ragaglia*, 272 Conn. 410, 419, 862 A.2d 292 (2004) ("[statutory] silence does not . . . necessarily equate to ambiguity"). I recognize that, in limited circumstances, this court has found a statute ambiguous as a result of its silence. However, this case does not present such a circumstance. "[S]ilence may render a statute ambiguous when the missing subject reasonably is necessary to effectuate the provision as written." *State* v. *Ramos*, 306 Conn. 125, 136, 49 A.3d 197 (2012); see also *Stuart* v. *Stuart*, 297 Conn. 26, 37, 996 A.2d 259 (2010) (silence as to standard of proof rendered statute ambiguous because there was "more than one plausible interpretation of its meaning"). In contrast, § 12-81 (7) (B) is not silent as to its subject and therefore does not fall within this first instance of ambiguity created by silence.

I also acknowledge that "the legislature's silence as to the scope of a term may render the statute ambiguous. See *Thomas* v. *Dept. of Developmental Services*, 297 Conn. 391, 400, 999 A.2d 682 (2010) ([W]e note that the lien provision is silent with respect to its scope. Although [statutory] silence does not . . . necessarily equate to ambiguity . . . we conclude that this silence renders the provision ambiguous with respect to its scope because there is more than one plausible interpretation of its meaning. . . .)." (Internal quotation marks omitted.) *State* v. *Ramos*, supra, 306 Conn. 137. In *Thomas*, the statute was silent as to an employer's rights

under the lien provision for future workers' compensation claims. See *Thomas* v. *Dept. of Developmental Services*, supra, 396. No such ambiguity exists here. Instead, the silence of § 12-81 (7) (B) as to a specific duration for temporary housing does not render the text of the statute susceptible to more than one plausible reading. See *State* v. *Ramos*, supra, 138–39 (statutory silence as to effect of untimely filed motion did not render statute ambiguous). Rather, the statutory silence simply requires this court to apply the plain and unambiguous meaning of the word "temporary" to the facts of this case in order to determine whether Valor Home provides temporary housing to its residents.

Because the language of § 12-81 (7) (B) is clear and unambiguous, the only remaining question is whether, as a factual matter, Valor Home's residential program provides temporary housing within the common usage of the term.[3] Under the plain meaning of the statute,

[3] I note that, prior to the enactment of § 1-2z, this court addressed latent ambiguity arising from the application of an otherwise unambiguous statute by referencing the legislative history of the statutory provision. "When application of the statute to a particular situation reveals a latent ambiguity in seemingly unambiguous language . . . we turn for guidance to the purpose of the statute and its legislative history . . . ." *University of Connecticut* v. *Freedom of Information Commission*, 217 Conn. 322, 328, 585 A.2d 690 (1991); see also *State* v. *Courchesne*, 262 Conn. 537, 564–65, 572, 816 A.2d 562 (2003); *Conway* v. *Wilton*, 238 Conn. 653, 665, 680 A.2d 242 (1996).

However, after the passage of § 1-2z, this court has recognized that such an approach is no longer appropriate. "Prior to the enactment of § 1-2z, this court sometimes turned to the legislative history of a statutory provision that, although clear on its face, contained a latent ambiguity when the statute was applied to the facts of the case . . . ." *State* v. *Ramos*, supra, 306 Conn. 144 n.4 (*Palmer*, *J.*, concurring); see also *Envirotest Systems Corp.* v. *Commissioner of Motor Vehicles*, 293 Conn. 382, 391 n.8, 978 A.2d 49 (2009) ("the legislature responded to *Courchesne* by passing § 1-2z . . . and rejected, in toto, this [court's] method of interpretation" (citation omitted)); *Envirotest Systems Corp.* v. *Commissioner of Motor Vehicles*, supra, 392 n.8 ("the statutory construction principles set forth in *Courchesne* . . . have been rejected").

As Justice Palmer reiterated in his concurrence in *Ramos*, "we are directed by § 1-2z not to consider extratextual sources in determining the outcome of the present case because [the statute] is not ambiguous on its face with

whether a charitable program provides temporary housing leads to a fact intensive inquiry. I note that the record in this case consists of stipulated facts, under which there is no genuine issue of material fact. Valor Home provides housing for up to five men at a time, each of whom pays a monthly rental fee. Valor Home provides its residents with a myriad of services, including psychiatric clinical services, skill building instruction, and rehabilitative activities. Gilead's chief executive officer, Dan Osborne, states in his affidavit that "[o]ccupancy at [Valor Home] is temporary and transitional insofar as the individuals who live at [Valor Home] . . . live there [only] until they no longer need the services provided by Gilead. There is no specific term by which an individual must leave [Valor Home]; the term is entirely dependent [on] the individual's treatment progress. Once the individuals are capable of living more independently through the services and supports [provided] by Gilead, they move out of [Valor Home]." I agree with the majority's observation that "[t]he defendant failed to produce any evidence to contradict or rebut the plaintiffs' evidence demonstrating that the housing provided by Valor Home is temporary." Part II of the majority opinion.

I emphasize that a more developed factual record might well have led to a different conclusion in this case. For example, the record does not contain any evidence

respect to the issue presently before the court." *State* v. *Ramos*, supra, 306 Conn. 148 (*Palmer*, *J.*, concurring). I agree with Justice Palmer that § 1-2z has the potential to limit this court's ability to ascertain legislative intent accurately, which presents an impediment that is "troubling" in light of a latent ambiguity as is present in this case. Id. (*Palmer*, *J.*, concurring). Thus, under the interpretation regime of § 1-2z, when an ambiguity arises in application, so too does a fact intensive inquiry for the court. This case is illustrative of this potentially difficult point. Instead of looking to the legislative history for further guidance as to the application of the word "temporary" in this context, it appears that we are bound to apply the seemingly plain meaning of the word temporary to the facts in the record. See id., 140–41.

regarding how long residents generally stay at Valor Home. It also does not contain any evidence concerning whether Valor Home's residents act in a manner consistent with living somewhere on a more than temporary basis, such as using its address to register to vote.[4] Cf. *Hicks* v. *Brophy*, 839 F. Supp. 948, 951 (D. Conn. 1993) ("[F]actors [to determine domicil] include the place where civil and political rights are exercised, taxes paid, real and personal property (such as automobiles) located, driver's and other licenses obtained, bank accounts maintained, and places of business or employment. . . . Other factors are also relevant, such as whether the person owns or rents his place of residence, how permanent the residence appears, and the location of a person's physician, lawyer, accountant, dentist, stockbroker . . . ." (Citations omitted.)); *Litvaitis* v. *Litvaitis*, 162 Conn. 540, 546, 295 A.2d 519 (1972) ("[t]o constitute domicil, the residence at the place chosen for the domicil must be actual, and to the fact of residence there must be added the intention of remaining permanently; and that place is the domicil of the person in which he has voluntarily fixed his habitation, not for a mere temporary or special purpose, but with the present intention of making it his home" (internal quotation marks omitted)).

Based on the limited factual record in this case, I conclude that Valor Home provides temporary housing to its clients within the meaning of the plain language of § 12-81 (7) (B). I, therefore, agree with the majority's conclusion that the trial court properly rendered summary judgment in favor of the plaintiffs.

Accordingly, I concur in the judgment of the court affirming the trial court's judgment.

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[4] As the majority notes, the defendant could have sought such evidence pursuant to Practice Book § 17-47. See footnote 13 of the majority opinion.

Cumulative Table of Cases
Connecticut Reports
Volume 340

(Replaces Prior Cumulative Table)

Abel *v.* Johnson 240
Action to enjoin defendant property owner, who was operating landscaping business on her property, from violating restrictive covenant limiting use of property to residential purposes only; certification from Appellate Court; whether Appellate Court incorrectly determined that plaintiff property owners did not have standing to enforce restrictive covenant, which was contained in deed from original grantors to housing developer that subsequently subdivided property; whether language in deeds conveying lots from housing developer to parties' predecessors in title providing that they took title "subject to" earlier deed rendered that restriction enforceable by grantees of housing developer, when residential use restriction in deed from original grantors expressly inured to benefit of their remaining land; whether, in light of deed language and surrounding circumstances, housing developer intended to establish general plan of development limited to residential use.

Anketell *v.* Kulldorff (Order) 905
Baldwin *v.* Commissioner of Correction (Order) 906
Barnes *v.* Greenwich Hospital (Order) 904
Boardwalk Realty Associates, LLC *v.* M & S Gateway Associates, LLC 115
Receiver of rents; claim that trial court improperly granted defendants' motion for summary judgment; whether trial court correctly concluded that plaintiff, which was appointed receiver of rents pursuant to statute (§ 12-163a (a)), was not authorized to collect rent or use and occupancy payments from occupants of property, when defendants had no effective lease and owner abandoned property and did not pursue its rights against defendants, which had been using property to operate automobile dealership since property owner abandoned that property.

Commission on Human Rights & Opportunities *v.* Cantillon (Order) 909
Doe *v.* Madison 1
Negligence; governmental immunity; summary judgment; action against defendant town, defendant board of education, and defendant high school principal alleging negligence insofar as defendants failed to properly supervise teacher who sexually abused plaintiff students during school hours and failed to train school employees to identify and report such abuse or imminent risk of abuse; whether defendants breached ministerial duty to report reasonable suspicion of child abuse, as imposed by mandatory reporting statute (§ 17a-101a) and board of education reporting policy; whether defendants' employees had reasonable cause to suspect that teacher was sexually abusing plaintiffs or exposing plaintiffs to imminent risk of sexual abuse; whether deposition testimony of high school athletic director established ministerial duty of professionalism; whether imminent harm to identifiable persons exception to governmental immunity applied; whether town was liable for failure of its police officer, who was assigned to school as resource officer, to monitor school's security camera footage; whether there was ministerial duty to monitor security camera footage.

Halladay *v.* Commissioner of Correction 52
Habeas corpus; denial of petition for certification to appeal from habeas court's discovery order; certification from Appellate Court; claim that habeas court improperly granted motion filed by respondent, Commissioner of Correction, for production of materials from petitioner's underlying criminal defense and investigative files, which purportedly were relevant to petitioner's ineffective assistance of counsel claim; whether Appellate Court properly granted respondent's motion to dismiss appeal on ground that habeas court's discovery order was not final judgment under State *v.* Curcio *(191 Conn. 27); whether this court should reach merits of petitioner's appellate claims by treating his appeal as*

direct appeal from interlocutory order on certification by Chief Justice pursuant to statute (§ 52-265a) allowing Chief Justice to certify appeals involving matters of substantial public interest.

In re Neveah D. (Order) 904
In re Omar I. (Order) 912
Jackson *v.* Commissioner of Correction (Order) 904
Johnson *v.* Commissioner of Correction (Order) 911
Joyner *v.* Commissioner of Correction (Order) 906
JPMorgan Chase Bank, National Assn. *v.* Malick (Order) 912
KeyBank, N.A. *v.* Yazar (Order) 901
Leconte *v.* Commissioner of Correction (Order) 902
Maghfour *v.* Waterbury 41

Lien filed on certain settlement proceeds pursuant to public act (P.A. 17-165, § 1); whether P.A. 17-165, § 1, authorized city to file lien when plaintiff's injuries occurred and his action against third-party tortfeasor was commenced before effective date of public act; whether trial court properly granted plaintiff's motion for summary judgment; claim that allowing city to place lien on plaintiff's settlement proceeds would not present retroactive application of statute because plaintiff settled his action against third-party tortfeasor after effective date of P.A. 17-165, § 1.

Mathews *v.* Mathews (Order) 912
Medical Device Solutions, LLC *v.* Aferzon (Order) 911
Normandy *v.* American Medical Systems, Inc.. 93

Negligence; recklessness; civil conspiracy; violation of Connecticut Unfair Trade Practices Act (§ 42-110a et seq.); violation of Connecticut Product Liability Act (§ 52-572m et seq.); statutes of limitations; continuing course of conduct doctrine; fraudulent concealment doctrine; summary judgment; claim that defendant was liable for injuries sustained by named plaintiff in connection with surgical implantation of vaginal mesh sling performed at defendant's hospital by obstetrician and gynecologist who was not hospital employee; whether trial court incorrectly determined that defendant was not "product seller," as that term is defined in § 52-572m (a), for purposes of plaintiffs' product liability claim; whether essence of relationship between plaintiff patient and defendant was for provision of medical services or sale of mesh sling product; whether trial court correctly determined that statutes of limitations and repose period were not tolled by continuing course of conduct or fraudulent concealment doctrine.

North Sails Group, LLC *v.* Boards & More GMBH 266

Breach of contract; personal jurisdiction; whether trial court properly granted defendants' motion to dismiss for lack of personal jurisdiction when defendant companies' principal places of business were in Germany and Austria; whether trial court correctly determined that exercise of personal jurisdiction would violate due process; claim that defendant company had sufficient minimum contacts with Connecticut by virtue of its long-term contractual relationship with plaintiff company, which had principal place of business in Connecticut.

NRT New England, LLC *v.* Longo (Order) 906
People's United Bank *v.* Brown (Order) 905
Pietraka *v.* Rogowski (Order) 903
Rainbow Housing Corp. *v.* Cromwell 501

Tax appeals; application for tax exemption pursuant to statute (§ 12-81 (7)) for property used for, inter alia, charitable purposes and for "housing for . . . persons with a mental health disorder"; whether property on which plaintiff charitable organizations operated supervised apartment program for individuals with severe mental illness qualified for property tax exemption under § 12-81 (7); claim that plaintiffs were not aggrieved by denial of application for property tax exemption; whether housing provided by plaintiffs constituted "temporary housing," as that term is used in § 12-81 (7) (B).

Raspberry Junction Holding, LLC *v.* Southeastern Connecticut Water Authority 200

Negligence; summary judgment; whether trial court correctly determined that defendant municipal water authority owed plaintiff no legal duty of care; economic loss doctrine; whether trial court correctly determined that, although plaintiff's economic losses were reasonably foreseeable, imposing duty on defendant was inconsistent with public policy under circumstances of case; whether factors in test first articulated in Jaworski *v.* Kiernan *(241 Conn. 399) militated against imposition of duty, as matter of public policy.*

Shaheer *v.* Commissioner of Correction (Order) 903
State *v.* Culbreath 167
Manslaughter first degree with firearm; criminal possession of firearm; carrying pistol without permit; claim that statements defendant made during custodial interrogation were improperly admitted into evidence because they were elicited by detective after defendant invoked his right to counsel under Miranda *v.* Arizona *(384 U.S. 436), in violation of his state and federal constitutional rights; whether defense counsel waived defendant's unpreserved claim under federal constitution that his* Miranda *rights were violated when counsel stated that he had no objection to admission of defendant's written statement to police and video recording of interrogation; whether defense counsel's waiver of defendant's state constitutional claim was knowing and intelligent when, after jury returned verdict, this court adopted more protective standard for* Miranda *rights under state constitution (art. I, § 8); claim that defendant invoked his right to counsel, before signing written form waiving* Miranda *rights, by asking detective why form stated "that I'm wavering . . . how I don't want the presence of an attorney"; claim that defendant's question regarding whether "there [was] anybody [he could] talk to . . . [l]ike an attorney" was conditional and equivocal inquiry that reasonably could be construed as request for counsel under article first, § 8; whether state satisfied its burden of establishing that improper admission of defendant's out-of-court statements was harmless beyond reasonable doubt.*
State *v.* Dawson 136
Criminal possession of pistol or revolver; criminal trespass third degree; certification from Appellate Court; whether Appellate Court incorrectly concluded that state had adduced sufficient evidence at trial to support defendant's conviction of criminal possession of pistol or revolver; whether there was sufficient evidence to establish beyond reasonable doubt that defendant had knowledge of gun and intent to exercise dominion or control over it; whether jury could have reasonably found that defendant constructively possessed gun; whether DNA evidence presented by state, standing alone or in combination with other evidence, was insufficient to support defendant's conviction.
State *v.* Dionne (Order) 910
State *v.* Fields (Order) 901
State *v.* Gibson 407
Felony murder; robbery first degree; conspiracy to commit robbery first degree; criminal possession of firearm; whether trial court properly admitted portions of written statement of state's witness; whether admission of that evidence, even if improper, was harmless; claim that trial court violated defendant's constitutional right to confront witnesses against him by precluding defense counsel from cross-examining state's witness about pending criminal charges; whether limitations placed on defense counsel's cross-examination, even if in violation of defendant's right to confrontation, was harmless beyond reasonable doubt.
State *v.* Glen S. (Order) 909
State *v.* Green (Order) 905
State *v.* Heriberto B. (Order) 903
State *v.* Jodi D. 463
Assault of disabled person second degree; claim that statute (§ 53a-60b (a) (1)) delineating crime of assault of disabled person in second degree was unconstitutionally vague as applied to defendant's conduct; whether § 53a-60b (a) (1) was unconstitutionally overinclusive.
State *v.* Massaro (Order) 908
State *v.* Paschal (Order) 902
State *v.* Robert R. 69
Sexual assault first degree; whether trial court improperly precluded defense counsel from arguing to jury defendant's theory that victim had planted physical evidence in effort to substantiate her false allegations against defendant, in violation of defendant's constitutional right to assistance of counsel; whether there was sufficient evidence in record to support defendant's theory of case; claim that evidence presented at trial was insufficient to support his conviction of first degree sexual assault; claim that trial court had abused its discretion in admitting testimony of expert in field of child and adolescent sexual abuse when victim was eighteen years old at time of alleged sexual assault.

State *v.* Shawn G. (Order) 907
State *v.* Tinsley. 425
Motion to correct illegal sentence; manslaughter first degree; risk of injury to child; claim that defendant's sentence for both manslaughter in first degree and risk of injury to child violated constitutional prohibition against double jeopardy; certification from Appellate Court; claim that Appellate Court improperly reversed trial court's denial of defendant's motion to correct; whether Appellate Court incorrectly concluded that, although offenses of manslaughter in first degree and risk of injury to child were not same offense under Blockburger *v.* United States (284 U.S. 299) insofar as each contained statutory element that other offense lacked, they were nevertheless same offense, as charged by state in information, for double jeopardy purposes.
State *v.* Turner 447
Robbery first degree; felony murder; certification from Appellate Court; claim that trial court, by referring to larceny by false pretenses in its instructions, improperly presented jury with legally invalid but factually supported basis for finding defendant guilty of robbery and felony murder; whether trial court's instructions, although improper, presented jury with legally valid and factually supported alternative basis for finding defendant guilty of charged crimes; whether inclusion of factually unsupported theory of conviction was harmless.
State *v.* Yury G. (Order) 909
State *v.* Yusef L. (Order) 910
2772 BPR, LLC *v.* Planning & Zoning Commission (Order) 908
Talton *v.* Commissioner of Correction (Order) 907
Watson Real Estate, LLC *v.* Woodland Ridge, LLC (Order) 911

CONNECTICUT APPELLATE REPORTS

Vol. 209

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

HOSPITAL MEDIA NETWORK, LLC *v.* JAMES G. HENDERSON ET AL.
(AC 43986)

Prescott, Moll and Suarez, Js.

Syllabus

The defendant H, a former employee of the plaintiff, appealed from the judgment rendered on remand awarding damages to the plaintiff for H's breach of fiduciary duty. The plaintiff had employed H as its chief revenue officer until 2013 when it fired him for cause. Thereafter, the plaintiff brought an action against H, claiming, among other things, that he breached his fiduciary duty to the plaintiff by working for G Co., a private equity investment firm, to raise capital to acquire C Co., which was involved in the same business sector as the plaintiff, while he was employed by the plaintiff, during regular business hours, and without the plaintiff's permission or knowledge. G Co.'s acquisition of C Co. closed in 2013 shortly after H's employment was terminated, at which time H was paid a $150,000 finder's fee by either G Co. or C Co., was awarded a three year consulting contract with C Co. at $50,000 annually, and was given the opportunity to purchase restricted stock of C Co. H was defaulted for failure to comply with a discovery order and the trial court granted the plaintiff's motion for judgment on the default. Following a hearing, the trial court rendered judgment for the plaintiff and awarded damages against H. H appealed to this court, which reversed the judgment only as to the award of damages against him, concluding that the award did not achieve a just result, as it failed to take into account the equities of the case, and remanded the case for a new hearing in damages. On remand, the trial court rendered judgment

in favor of the plaintiff in the amount of $323,545.84, which represented H's 2013 salary, certain consulting fees paid to H by the plaintiff, the finder's fee, and one year's worth of consulting fees under the consulting contract, and H appealed to this court. *Held*:

1. In rendering its judgment, the trial court acted within the scope of this court's remand order by making its own independent factual findings on the basis of the entire record before it and relying on those findings to assess the equities in the case: this court did not issue a circumscribed remand order binding the trial court to the factual findings in the first action but, rather, reversed the decision as to the damages award against H and remanded the case for a new hearing in damages; moreover, given that the record on remand included additional evidence, it followed that the trial court necessarily made its own findings on the basis of the totality of the evidence in the record and, in light of those findings, considered the relevant equitable factors in determining damages.
2. The damages award on remand was improper only insofar as the trial court ordered H to disgorge $50,000 in consulting fees paid pursuant to the consulting contract: contrary to H's claim, the court's finding that H did not perform substantial work before being hired by the plaintiff in 2013 that entitled him to the $150,000 finder's fee was not clearly erroneous, as it was supported by portions of the hearing testimony and the court was free to resolve any inconsistency in the testimony by crediting only the portions that buttressed its findings; moreover, although the record did not support the court's finding that H attempted to offer into evidence at the hearing in damages numerous exhibits that the plaintiff's counsel had not seen previously, that unsupported finding did not undermine appellate confidence in the court's fact-finding process and, accordingly, it was harmless; furthermore, although the court improperly ordered disgorgement of $50,000 of the $150,000 consulting fees, as it was prohibited by this court's previous decision from ordering disgorgement of amounts earned by H outside of H's period of employment with the plaintiff and it assumed that H had earned the consulting fees for services performed after his employment with the plaintiff had ended, the trial court did not otherwise abuse its discretion in awarding damages but, rather, properly balanced the equities and utilized the equitable remedies of forfeiture and disgorgement, as it properly considered the significant value of H's services to the plaintiff as an employee and balanced that against its other factual findings, the court was not precluded from finding that H acted wilfully and engaged in disloyal acts throughout his employment or from relying on such findings to issue the damages award, as they were supported by the record and fit within the guidance set forth in *Wall Systems, Inc.* v. *Pompa* (324 Conn. 718), there was no suggestion in the court's decision that it had used H's discovery violations to supplant the plaintiff's burden to demonstrate damages, and H's assertion that the plaintiff was unjustly enriched by the award was unavailing.

Argued February 2—officially released December 28, 2021

Procedural History

Action to recover damages for, inter alia, breach of fiduciary duty, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. A. William Mottolese*, judge trial referee, granted the plaintiff's motion for default against the defendants and for nonsuit on the defendants' counterclaim; thereafter, the court, *Hon. A. William Mottolese*, judge trial referee, granted the plaintiff's motion for judgment on the default and rendered a judgment of nonsuit as to the defendants' counterclaim; subsequently, following a hearing in damages, the court, *Hon. Taggart D. Adams*, judge trial referee, rendered judgment for the plaintiff, and the defendants appealed to this court, *Alvord*, *Keller* and *Flynn*, *Js.*, which reversed the trial court's judgment only with respect to the award of damages against the named defendant and remanded the matter for further proceedings; thereafter, following a hearing in damages, the court, *Hon. Kenneth B. Povodator*, judge trial referee, rendered judgment for the plaintiff, from which the named defendant appealed to this court. *Reversed in part*; *judgment directed.*

James G. Henderson, self-represented, the appellant (named defendant).

Gary S. Klein, with whom was *Liam S. Burke*, for the appellee (plaintiff).

Opinion

MOLL, J. This matter returns to us following our decision in *Hospital Media Network, LLC* v. *Henderson*, 187 Conn. App. 40, 201 A.3d 1059 (2019) (*HMN*), in which this court reversed the judgment of the trial court rendered in favor of the plaintiff, Hospital Media Network, LLC, and against the self-represented defendant

James G. Henderson[1] only as to the award of damages and remanded the case for a new hearing in damages. Id., 60. The defendant now appeals from the judgment rendered on remand awarding damages to the plaintiff. On appeal, the defendant claims that the trial court (1) exceeded the scope of this court's remand order in *HMN* and (2) awarded damages that were (a) predicated on factual findings that were not supported by the record and (b) inequitable.[2] We reverse, in part, the judgment of the trial court.

This court's opinion in *HMN* sets forth the following relevant procedural background, which, although lengthy, we recite to place the defendant's claims on appeal in their proper context. "In November, 2013, the plaintiff commenced this action alleging that the defendant, its former employee, violated the Connecticut Uniform Trade Secrets Act (CUTSA), General Statutes § 35-50 et seq., committed tortious interference with the plaintiff's business and contractual relations, breached the duty of employee loyalty, breached his fiduciary duty, and usurped corporate opportunities of the plaintiff. The defendant was defaulted, and the trial court [*Hon. Taggart D. Adams*, judge trial referee] held a hearing in damages. After the hearing, the court awarded the plaintiff damages solely on its claim of breach of fiduciary duty,[3] the essential elements of

[1] The plaintiff's complaint also named Taylor Henderson as a defendant. A judgment was rendered against Taylor Henderson, upon default as to liability, in the amount of $2000, which was not challenged on appeal in *HMN* and which has been fully satisfied. See *Hospital Media Network, LLC* v. *Henderson*, supra, 187 Conn. App. 42 n.1. For the sake of simplicity, we refer in this opinion to James G. Henderson as the defendant.

[2] For ease of reference, we address the defendant's claims in a different order than they are presented in his principal appellate brief.

[3] "Although the plaintiff alleged breach of the duty of employee loyalty separate from its claim of breach of fiduciary duty, it specified in its breach of fiduciary duty count that one such fiduciary duty breached was the duty of loyalty. In its memorandum of decision [awarding the damages at issue in the prior appeal], the court awarded damages for 'breach of fiduciary duty owed to the corporation' and cited case law and secondary sources

which were admitted by virtue of the defendant's default.

"With respect to its breach of fiduciary duty count, the plaintiff alleged that it employed the defendant as its chief revenue officer and paid him substantial compensation from January 1 to September 2013. On September 5, 2013, the plaintiff terminated the defendant's employment 'for cause for several reasons including, without limitation [the defendant's] actively working for various companies unrelated to [the plaintiff] for his own benefit and without [the plaintiff's] permission or knowledge during regular business hours.' Specifically, it alleged that the defendant worked for or on behalf of Generation Partners (Generation), a private equity investment firm, 'to raise capital for other digital media companies including but not limited to' Captivate Network Holdings, Inc. (Captivate), and used the plaintiff's computers and infrastructure to conduct business for those other digital media companies without the plaintiff's permission or knowledge. The plaintiff claimed that the defendant played golf on a social basis and otherwise took time off during regular business hours without the plaintiff's permission.

"The plaintiff further alleged that the parties had a fiduciary relationship 'by virtue of the trust and confidence' the plaintiff placed in the defendant as its chief revenue officer, a senior executive position. Among the duties allegedly owed to the plaintiff were the duty of loyalty, the duty to act in good faith, and the duty to act in the best interest of the plaintiff. The plaintiff asserted that the defendant breached these duties in advancing his own interests to the detriment of the plaintiff. Lastly, the plaintiff alleged that the defendant's

addressing the fiduciary duty of loyalty. Our Supreme Court likewise has treated the duty of loyalty as a fiduciary duty in the employment context. See *Wall Systems, Inc.* v. *Pompa*, 324 Conn. 718, 733, 154 A.3d 989 (2017)." *Hospital Media Network, LLC* v. *Henderson*, supra, 187 Conn. App. 42–43 n.2.

breach caused it to sustain damages. The plaintiff sought, inter alia, compensatory and punitive damages.

"The defendant answered and filed an amended counterclaim, alleging breach of contract, wrongful termination, misrepresentation and deceit, and violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. The defendant requested, inter alia, compensatory and punitive damages.

"The parties engaged in discovery disputes, resulting in an April, 2016 order from the court [*Hon. A. William Mottolese*, judge trial referee] that the parties 'confer face-to-face in an effort to resolve these discovery disputes, bearing in mind that reasonable good faith efforts at compromise are essential to every discovery dispute.' On June 27, 2016, after finding the defendant's objections to the plaintiff's discovery requests 'intentionally evasive and intended to obstruct the process,' the court ordered full compliance within thirty days. On July 28, 2016, the plaintiff filed a motion for default and nonsuit on the basis that the defendant had failed to comply with the court's June 27 order. The court granted the motion, finding that the '[p]laintiff is clearly prejudiced by these obstructive tactics and the only appropriate remedy proportionate to the infraction is default.' On September 26, 2016, the court rendered judgment for the plaintiff on its affirmative claims and against the defendant on his counterclaim.

"On September 27, 2016, the court [*Hon. Taggart D. Adams*, judge trial referee] held a hearing in damages. The plaintiff presented the testimony of Andrew Hertzmark, an employee of Generation; Christopher Culver, chief executive officer of the plaintiff; Taylor Henderson; and [the defendant]. At the conclusion of the hearing, the court requested posttrial briefing, which the parties submitted on October 18, 2016.

"On February 15, 2017, the court issued a memorandum of decision [2017 decision]. In its memorandum, the court reviewed the evidence presented during the [September 27, 2016] hearing in damages. From 2011 to 2013, the defendant was a consultant to the plaintiff, and the plaintiff compensated the defendant by making payments to his consulting company, St. Ives Development Group. On January 1, 2013, the defendant became a full-time employee and chief revenue officer of the plaintiff. The plaintiff paid him a salary of over $12,000 per month, totaling $121,579.84 in 2013, and also paid him a sales target bonus of $25,000 in May, 2013. That bonus was paid to St. Ives Development Group. Just weeks after becoming a full-time employee of the plaintiff, the defendant communicated with Hertzmark, identifying the plaintiff as a possible investment target for his fund, and included the plaintiff's revenues and possible buyout price.

"In 2013, Hertzmark was working on a potential transaction in which Generation would acquire Captivate from Gannett Company, Inc. (Gannett). Both Captivate and the plaintiff are involved in the same business sector. While Captivate sells advertising space on digital monitors in elevators, the plaintiff sells advertising space on monitors located in hospitals and medical offices. Hertzmark testified that the defendant assisted with the Captivate acquisition, giving a presentation with Hertzmark to Gannett and helping formulate the letter of intent memorializing Generation's proposed purchase of Captivate. In March, 2013, Hertzmark e-mailed the defendant stating that Generation's letter of intent was not shared with the head of Captivate and, therefore, Gannett was surprised to learn that the head of Captivate was aware of plans to install the defendant as the new chief executive officer of Captivate once that business was acquired by Generation. In March and April, 2013, the defendant corresponded

with Hertzmark regarding Captivate's attributes as an investment and reviewed due diligence information provided by Captivate from February through April, 2013. He told Hertzmark on July 6, 2013, that he wanted his attorney to review his Captivate employment contract once completed.

"The plaintiff terminated the defendant's employment on September 5, 2013, and Generation's acquisition of Captivate from Gannett closed on September 26, 2013. Upon the transaction's closing, the defendant was paid a finder's fee of $150,000, awarded a consulting contract with Captivate for three years at $50,000 annually, and given the opportunity to purchase restricted stock of Captivate.

"The court found that 'during the events in this case [the defendant] either never comprehended or ignored the different consequences of being a company employee and being a consultant,' referring to the defendant's testimony in which he described himself as a 'consultant employee' of the plaintiff. The court referenced the testimony of Culver, the plaintiff's chief executive officer, that the plaintiff's sales increased from $1.9 million in 2010 to $6.6 million in 2013. The court additionally noted Culver's testimony that the plaintiff 'held itself out to be the fastest growing company of its kind during this period' and his recognition that the defendant was part of this 'terrific growth.' Crediting Culver's testimony, the court found that 'there was a sharp increase in the [plaintiff's] sales' while the defendant worked for the plaintiff.

"Turning to the plaintiff's claimed damages, the court first found that the plaintiff was not entitled to the defendant's 'compensation from Captivate' on the theory that the defendant usurped a corporate opportunity. Specifically, the court found that the opportunity the defendant took was 'employment' at Captivate, which

was not an opportunity available to the plaintiff. The court determined, however, that damages were appropriate on the plaintiff's claim of the breach of fiduciary duty of loyalty, and measured the damages 'by the gain to the faithless employee.' The court awarded damages against the defendant in the total amount of $454,579.76, including $146,579.84, representing the defendant's 2013 salary ($121,579.84) and bonus ($25,000); $150,000, representing the finder's fee paid by Generation or Captivate [($150,000 finder's fee)]; $150,000, representing the consulting fees to be paid by Captivate from 2013 through 2016 [($150,000 consulting fees)]; and $7999.92, representing the value of the Captivate stock at the time of purchase.

"The court declined to award attorney's fees under CUTSA, finding that 'there was minimal or no misappropriation of trade secrets in this case, and no justifiable basis for awarding fees under that statute.' The court further declined to award attorney's fees as punitive damages under the common law, on the basis that the defendant 'has been penalized severely already by this court's decision. To add hundreds of thousands of dollars more, would not only be punitive, it would be overkill.' It additionally found that although the defendant's actions were 'uninformed, and even stupid,' his conduct did not meet the common-law standard for awarding attorney's fees, which, the court observed, requires that the conduct be 'outrageous, done with a bad motive, or with reckless indifference.' " (Footnote in original; footnotes omitted.) Id., 42–48. The court noted one exception to its determination that the defendant's conduct and behavior did not merit awarding common-law attorney's fees, which involved the defendant's "conscious and continuing obstruction of the ordinary discovery process in civil cases." The court underscored prior comments made by Judge Mottolese, including

that the defendant's objections to the plaintiff's discovery requests were " 'without merit' . . . 'intentionally evasive and intended to obstruct the process,' " and that the defendant's conduct " 'demonstrate[d] hardened intransigence . . . .' " Observing that Judge Mottolese had indicated that the plaintiff could seek attorney's fees and costs if the defendant failed to comply with the plaintiff's discovery requests, the court awarded the plaintiff $21,922.50 in attorney's fees, which "represent[ed] the time the plaintiff's counsel spent addressing the parties' discovery disputes."[4] *Hospital Media Network, LLC* v. *Henderson*, supra, 187 Conn. App. 48 n.11.

The defendant appealed from the judgment in the 2017 decision, claiming that the damages award was improper because the plaintiff had failed to offer proof of its damages.[5] Id., 48. On January 8, 2019, this court issued its opinion in *HMN*, reversing the judgment rendered against the defendant in the 2017 decision only as to damages. Id., 40, 60. In addressing the defendant's claim, this court first observed that, "[b]ecause of the default entered against the defendant, he [was] precluded from challenging his liability to the plaintiff under the claims pleaded"; id., 49; however, the defendant was "entitled . . . to challenge the determination of monetary relief awarded by the court." Id., 50. After providing an overview of our Supreme Court's decision in *Wall Systems, Inc.* v. *Pompa*, 324 Conn. 718, 154 A.3d 989 (2017), which was published after the 2017 decision

[4] The defendant did not appeal from the attorney's fees award in *HMN*. See *Hospital Media Network, LLC* v. *Henderson*, supra, 187 Conn. App. 48 n.11. In his principal appellate brief, the defendant represents that the attorney's fees award has been satisfied.

[5] "[T]he plaintiff [did] not cross [appeal] from the [trial] court's refusal to award damages on the claims alleging a violation of CUTSA, tortious interference with the plaintiff's business and contractual relations, breach of the duty of employee loyalty, and usurpation of corporate opportunities." *Hospital Media Network, LLC* v. *Henderson*, supra, 187 Conn. App. 44 n.3.

and which "provided guidance on the equitable remedies available to an employer upon proving that an employee has breached his fiduciary duty of loyalty"; *Hospital Media Network, LLC* v. *Henderson*, supra, 187 Conn. App. 51; this court concluded "that the award of monetary relief [in the 2017 decision] was disproportionate to the misconduct at issue and failed to take into account the equities of the case at hand." Id., 54.

Turning first to the portion of the damages award requiring the defendant to forfeit his 2013 salary plus his sales bonus, totaling $146,579.84, this court stated that the trial court made factual findings that corresponded with the non-exhaustive list of factors delineated in *Wall Systems, Inc.*,[6] but that the court "ultimately failed to give proper weight to these findings in fashioning its damages award." Id., 56. This court noted that "the trial court expressly recognized the value of the services the defendant provided the plaintiff, finding 'a sharp increase in the [plaintiff's] sales' while the defendant worked for the plaintiff, and concluding that the defendant was part of this 'terrific growth.' That finding corresponds with the *Wall Systems, Inc.* factor prompting consideration of 'the effect of the disloyal acts on the value of the employee's properly performed services to the employer.' The court's finding, in essence

[6] The factors enumerated in *Wall Systems, Inc.*, which our Supreme Court "gleaned from existing jurisprudence" and which were "not intended to be exhaustive"; *Wall Systems, Inc.* v. *Pompa*, supra, 324 Conn. 737; are as follows: "[T]he employee's position, duties and degree of responsibility with the employer; the level of compensation that the employee receives from the employer; the frequency, timing and egregiousness of the employee's disloyal acts; the wilfulness of the disloyal acts; the extent or degree of the employer's knowledge of the employee's disloyal acts; the effect of the disloyal acts on the value of the employee's properly performed services to the employer; the potential for harm, or actual harm, to the employer's business as a result of the disloyal acts; the degree of planning taken by the employee to undermine the employer; and the adequacy of other available remedies . . . ." Id.

a recognition that the defendant was providing extraordinary value to the plaintiff despite his breach of fiduciary duty, should have weighed in favor of a measured forfeiture, not the defendant's full salary and bonus." Id.

Next, this court stated that "the [trial] court also made a finding related to the wilfulness of the defendant's actions, another of the *Wall Systems*, *Inc.* factors. The court characterized the defendant's actions as 'uninformed, and even stupid.' By declining to award attorney's fees as punitive damages under the common law on this basis, it is evident that the court rejected any notion that the defendant's conduct was 'outrageous, done with a bad motive, or with reckless indifference.' The court also found that the defendant had 'either never comprehended or ignored the different consequences of being a company employee and being a consultant,' referring to the defendant's testimony in which he described himself as a 'consultant employee' of the plaintiff. Despite recognizing that the defendant potentially 'never comprehended' the distinction between serving as an employee and a consultant and finding that the defendant's behavior was 'uninformed' rather than done with a bad motive, the court failed to give proper weight to these findings when fashioning its award." Id., 57–58. This court continued: "[T]he trial court's express factual findings reflect an uninformed employee who continued to provide significant value to his employer despite his breach of fiduciary duty. These findings, clearly not in the nature of corrupt or reprehensible behavior, should have weighed in favor of an award of something less than full forfeiture." Id., 58.

This court then noted, in reference to another *Wall Systems*, *Inc.* factor, that "forfeiture was not the sole remedy available to the [trial] court, as the court had before it evidence of the benefit the defendant received from third parties Generation and Captivate. . . . The

court found those benefits . . . to amount to a total of $307,99[9].92, and ordered disgorgement in full." (Citation omitted.) Id.

Turning to the portion of the damages award requiring the defendant to disgorge $307,999.92, which comprised the $150,000 finder's fee, the $150,000 consulting fees, and the $7999.92 value of the Captivate stock purchased by the defendant, this court determined that the disgorgement sum "appear[ed] to reflect compensation that the defendant had earned for consulting that he performed both prior to and subsequent to his nine month period of full-time employment with the plaintiff." Id., 58–59. This court stated that, "[t]o the extent the defendant rendered some of the services for which he was compensated by third parties both prior and subsequent to his full-time employment with the plaintiff, some commensurate portion of the compensation received in exchange for those services cannot be said to have been gained by the defendant's breach and should not have been included in the court's order of disgorgement." Id., 59.

In sum, this court concluded that, "[i]n fashioning its damage award [in the 2017 decision], the [trial] court failed to formulate a remedy appropriate to the particular circumstances of this case, in light of its own factual findings which weighed in favor of a measured award. Ultimately, the award of wholesale forfeiture and disgorgement in full failed to take into account the equities of the case at hand and did not achieve a just result." Id., 60. Accordingly, this court reversed the judgment rendered against the defendant in the 2017 decision only as to the damages award and remanded the case for a new hearing in damages. Id.

Following this court's remand in *HMN*, the trial court, *Hon. Kenneth B. Povodator*, judge trial referee, held a new hearing in damages on September 10, 2019. At the

outset of the hearing and without objection, the court indicated that it would consider the exhibits admitted during the September 27, 2016 hearing in damages as part of the record before it. In addition, without objection, the court admitted as a full exhibit a certified copy of the transcript of the September 27, 2016 hearing in damages. Culver, Taylor Henderson, and the defendant testified at the September 10, 2019 hearing in damages, and additional exhibits were admitted. On October 31, 2019, the parties filed posttrial briefs.

On February 25, 2020, the court issued a memorandum of decision rendering judgment in favor of the plaintiff in the amount of $323,545.84—$131,033.92 less than the damages awarded in the 2017 decision. This award represented (1) the defendant's forfeiture of (a) his 2013 salary in the amount of $121,579.84 and (b) $1966 in certain consulting fees paid by the plaintiff, and (2) the defendant's disgorgement of (a) the $150,000 finder's fee and (b) $50,000, constituting one year's worth of the $150,000 consulting fees.[7] This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

We first address the defendant's claim that the trial court exceeded the scope of this court's remand order in *HMN*. Specifically, the defendant asserts that, on remand, the court was bound by the factual findings made in the 2017 decision that were not challenged by the plaintiff in *HMN* by way of a cross appeal, such

[7] Relative to the $454,579.76 in damages awarded in the 2017 decision, the defendant retained on remand his $25,000 sales bonus and $100,000 of the $150,000 consulting fees; however, the court on remand ordered forfeiture of $1966 in the consulting fees paid by the plaintiff, which were not included in the damages award in the 2017 decision. Additionally, on remand, the plaintiff did not seek disgorgement of the $7999.92 in Captivate stock that the defendant had purchased, which had been ordered disgorged in the 2017 decision.

that the court committed error by "reopening and substantially revising" several of the factual findings set forth in the 2017 decision. Relatedly, the defendant contends that the court thus improperly "reweighed [equitable] factors that should have been locked into place." We disagree.

"We begin our analysis with the applicable standard of review. Determining the scope of a remand is a matter of law because it requires the trial court to undertake a legal interpretation of the higher court's mandate in light of that court's analysis. . . . Because a mandate defines the trial court's authority to proceed with the case on remand, determining the scope of a remand is akin to determining subject matter jurisdiction. . . . We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . .

"At the outset, we note that, [i]f a judgment is set aside on appeal, its effect is destroyed and the parties are in the same condition as before it was rendered. . . . As a result, [w]ell established principles govern further proceedings after a remand by this court. In carrying out a mandate of this court, the trial court is limited to the specific direction of the mandate as interpreted in light of the opinion. . . . This is the guiding principle that the trial court must observe. . . . It is the duty of the trial court on remand to comply strictly with the mandate of the appellate court according to its true intent and meaning. . . . The trial court should examine the mandate and the opinion of the reviewing court and proceed in conformity with the views expressed therein. . . .

"Compliance [with a mandate] means that the direction is not deviated from. The trial court cannot adjudicate rights and duties not within the scope of the remand. . . . No judgment other than that directed or

permitted by the reviewing court may be rendered . . . . The trial court should examine the mandate and the opinion of the reviewing court and proceed in conformity with the views expressed therein." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Hurley* v. *Heart Physicians, P.C.*, 298 Conn. 371, 383–84, 3 A.3d 892 (2010).

Mindful of these principles, we turn to this court's opinion and remand order in *HMN*. As we detailed previously in this opinion, this court in *HMN* concluded that the damages award in the 2017 decision was improper because the trial court failed to weigh properly the equities in light of its factual findings. *Hospital Media Network, LLC* v. *Henderson*, supra, 187 Conn. App. 60. This court's remand order provided in relevant part that "[t]he judgment is reversed only as to the award of damages against [the defendant] and the case is remanded for a new hearing in damages . . . ." Id. On remand, the trial court conducted a new hearing in damages, hearing testimony from Culver, Taylor Henderson, and the defendant and admitting additional exhibits offered by the parties that supplemented the evidence adduced during the prior hearing in damages. Whereupon the court issued a decision in which it set forth findings of fact and, guided by the principles detailed in *Wall Systems, Inc.* v. *Pompa*, supra, 324 Conn. 718, awarded damages on the basis of its consideration of the equities in the case. See part II of this opinion.

We conclude that the trial court acted within the scope of this court's remand order in *HMN* by making its own, independent factual findings on the basis of the entire record before it and relying on those findings to assess the equities in the case. This court in *HMN* did not issue a circumscribed remand order that bound Judge Povodator to Judge Adams' factual findings in the 2017 decision; rather, it reversed the 2017 decision

as to the damages awarded against the defendant and remanded the case for a new hearing in damages. *Hospital Media Network, LLC* v. *Henderson*, supra, 187 Conn. App. 60. Nothing in *HMN* indicated that the hearing in damages on remand was to be limited in nature. Insofar as the 2017 decision awarded damages against the defendant, "its effect [was] destroyed and the parties [were] in the same condition as before it was rendered." (Internal quotation marks omitted.) *Hurley* v. *Heart Physicians, P.C.*, supra, 298 Conn. 383. In other words, following *HMN*, there were no factual findings from the 2017 decision that bound the trial court on remand in its determination of damages. Cf. *Fazio* v. *Fazio*, 199 Conn. App. 282, 287, 289–90, 235 A.3d 687 (trial court bound on remand by prior finding of cohabitation when that finding was not challenged in prior appeal and this court in prior appeal, rather than remanding for new trial, issued "limited remand" directing trial court " 'to determine the intent of the parties after consideration of all the available extrinsic evidence and the circumstances surrounding the entering of the [separation] agreement' "), cert. denied, 335 Conn. 963, 239 A.3d 1213 (2020). Moreover, given that the record on remand included additional evidence, it follows that the court necessarily made its own findings on the basis of the totality of the evidence in the record and, in light of those findings, considered the relevant equitable factors in determining damages.[8] Accordingly, the defendant's claim fails.

[8] We recognize that, "[i]n Connecticut, we follow the [well recognized] principle of law that the opinion of an appellate court, so far as it is applicable, establishes the law of the case upon a retrial, and is equally obligatory upon the parties to the action and upon the trial court. . . . The rule is that a determination once made will be treated as correct throughout all subsequent stages of the proceeding except when the question comes before a higher court . . . and applies . . . to remands for new trial . . . ." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Behrns* v. *Behrns*, 124 Conn. App. 794, 815, 6 A.3d 184 (2010). We also recognize that "[i]t is the function of the trial court, not [an appellate] court, to find facts. . . . Imposing a fact-finding function on this court, therefore, would

II

The defendant next claims that the damages award on remand was improper because the trial court (1) made factual findings that were unsupported by the record and (2) improperly weighed the equities in the case. For the reasons that follow, we agree with the defendant that the court committed error, only insofar as the court ordered him to disgorge $50,000 of the $150,000 consulting fees.

We begin by setting forth the following applicable legal principles and standard of review. As our Supreme Court explained in *Wall Systems, Inc.* v. *Pompa*, supra, 324 Conn. 718, "[i]f an employer can prove an employee's breach of his or her duty of loyalty, there are a variety of remedies potentially available." Id., 732. These include the equitable remedies of forfeiture and disgorgement. Id., 729. As to disgorgement, "if an employee realizes a material benefit from a third party in connection with his breach of the duty of loyalty, the employee is subject to liability to deliver the benefit, its proceeds, or its value to the [employer]. . . . Accordingly, [a]n employee who breaches the fiduciary duty of loyalty may be required to disgorge any profit or benefit he received as a result of his disloyal activities, regardless of whether the employer has suffered a corresponding loss." (Citations omitted; internal quotation marks omitted.) Id., 733.

"Additionally, an employer may seek forfeiture of its employee's compensation. . . . [Forfeiture] is derived

be contrary to generally established law. Indeed, it would be inconsistent with the entire process of trial fact-finding for an appellate court to do so." (Citation omitted; internal quotation marks omitted.) *Miller* v. *Westport*, 268 Conn. 207, 221, 842 A.2d 558 (2004). Thus, on remand, the trial court was bound by this court's determination in *HMN* that the damages award in the 2017 decision constituted an abuse of discretion, in addition to any legal precepts set forth in *HMN*; however, this court did not direct the trial court to make any particular factual findings or otherwise restrain the trial court's fact-finding ability on remand.

from a principle of contract law: if the employee breaches the duty of loyalty at the heart of the employment relationship, he or she may be compelled to [forgo] the compensation earned during the period of disloyalty. The remedy is substantially rooted in the notion that compensation during a period in which the employee is disloyal is, in effect, unearned. . . . Forfeiture may be the only available remedy when it is difficult to prove that harm to [the employer] resulted from the [employee's] breach or when the [employee] realizes no profit from the breach. In many cases, forfeiture enables a remedy to be determined at a much lower cost to litigants. Forfeiture may also have a valuable deterrent effect because its availability signals [employees] that some adverse consequence will follow a breach of fiduciary duty. . . . Notably, however, even in cases in which a court orders forfeiture of compensation, the forfeiture normally is apportioned, that is, it is limited to the period of time during which the employee engaged in disloyal activity." (Citations omitted; internal quotation marks omitted.) Id., 733–34. "[W]hen imposing the remedy of forfeiture of compensation, depending on the circumstances, a trial court may in its discretion apply apportionment principles, rather than ordering a wholesale forfeiture that may be disproportionate to the misconduct at issue. . . . Conversely, the court may conclude that all compensation should be forfeited because the employee's unusually egregious or reprehensible conduct pervaded and corrupted the entire [employment] relationship." (Citation omitted; internal quotation marks omitted.) Id., 738; see also id., 734 n.11 ("[I]f an employee's disloyalty is confined to particular pay periods, so is the required forfeiture of compensation. . . . Conversely, if the compensation received by a disloyal employee is not apportioned to particular time periods or items of work, and his or her breach of the duty of loyalty is wilful and deliberate,

forfeiture of his or her entire compensation may result." (Citations omitted; emphasis omitted.)).

Our Supreme Court emphasized that the remedies of forfeiture and disgorgement "are not mandatory upon the finding of a breach of the duty of loyalty, intentional or otherwise, but rather, are discretionary ones whose imposition is dependent upon the equities of the case at hand." Id., 729. "Generally speaking, equitable determinations that depend on the balancing of many factors are committed to the sound discretion of the trial court. . . . [C]ourts exercising their equitable powers are charged with formulating fair and practical remedies appropriate to the specific dispute. . . . In doing equity, [a] court has the power to adapt equitable remedies to the particular circumstances of each particular case. . . . [E]quitable discretion is not governed by fixed principles and definite rules . . . . Rather, implicit therein is conscientious judgment directed by law and reason and looking to a just result." (Citations omitted; internal quotation marks omitted.) Id., 736.

In determining whether to invoke the remedies of forfeiture or disgorgement, "a trial court should consider all of the facts and circumstances of the case before it," including various factors enumerated by our Supreme Court insofar as they apply. Id., 737; see also footnote 6 of this opinion. "The several factors embrace broad considerations which must be weighed together and not mechanically applied. . . . [T]he judicial task is to search for a fair and reasonable solution in light of the relevant considerations . . . and to avoid unjust enrichment to either party." (Citations omitted; internal quotation marks omitted.) *Wall Systems, Inc.* v. *Pompa*, supra, 324 Conn. 738.

"As a general matter, [t]he trial court has broad discretion in determining whether damages are appropriate. . . . Its decision will not be disturbed on appeal

absent a clear abuse of discretion. . . . Our review of the amounts of monetary awards rendered pursuant to various equitable doctrines is similarly deferential." (Internal quotation marks omitted.) *Hospital Media Network, LLC* v. *Henderson*, supra, 187 Conn. App. 51. "Although the determination of whether equitable doctrines are applicable in a particular case is a question of law subject to plenary review . . . the amount of damages awarded under such doctrines is a question for the trier of fact." (Citation omitted.) Id., 51 n.13. "With regard to the trial court's factual findings . . . the clearly erroneous standard of review is appropriate. . . . A factual finding is clearly erroneous when it is not supported by any evidence in the record or when there is evidence to support it, but the reviewing court is left with the definite and firm conviction that a mistake has been made." (Internal quotation marks omitted.) *Howard-Arnold, Inc.* v. *T.N.T. Realty, Inc.*, 145 Conn. App. 696, 717, 77 A.3d 165 (2013), aff'd, 315 Conn. 596, 109 A.3d 473 (2015).

In its decision on remand, the court found the following relevant facts and set forth the following reasoning in support of the damages award. The court observed that, with regard to the remand order in *HMN*, "[i]n stating that the goal should have been 'a measured award' and that the 'wholesale forfeiture and disgorgement in full' were improper, [this court], seemingly unambiguously, was sending a message that adjustments [to the damages awarded in the 2017 decision] were required . . . ." The court construed this court's "mandate [to be] to moderate the amount awarded using equitable principles" and further commented that this court had "directed [the trial court on remand] to award a more measured level of damages, taking into account work performed by the defendant prior to his employment by the plaintiff and work performed by the defendant after termination of his

employment and the work performed for the plaintiff." The court further noted that the record before it included the transcript of the September 27, 2016 hearing in damages, as well as the exhibits admitted at that hearing, as supplemented by the testimony and exhibits admitted during the September 10, 2019 hearing in damages.

At the outset of its analysis, the court stated that, during the September 10, 2019 hearing in damages, "[t]he defendant attempted to offer a large number of documents most of which counsel for the plaintiff claimed never to have seen before . . . . When the defendant proffered many of his exhibits during the . . . hearing, counsel for the plaintiff repeatedly stated that he had not seen the documents previously—the defendant did not challenge such characterizations, implicitly acknowledging that notwithstanding claims that the plaintiff already had access to all relevant documents because they were in the possession of the plaintiff, there were numerous documents that were not and would not have been in the plaintiff's possession. Indeed, after an early e-mail sent [by] the defendant [from] his e-mail address as an employee of the plaintiff, he asked [Hertzmark] to send all further e-mails to the defendant's personal e-mail address . . . indicating the conscious effort of the defendant to minimize usage of the plaintiff's e-mail system [(January 25, 2013 e-mail)]."[9] (Citations omitted.) The court further stated that this conduct by the defendant was "against a backdrop of the defendant having been defaulted for failing to comply with discovery obligations, such conduct eliciting characterizations of the defendant's behavior as 'hardened intransigence' and 'obstructive tactics' . . . ." (Citation omitted.) As the court explained, "[t]he point of this discussion is that the combination of the explicit comments of Judge Mottolese in earlier

[9] The January 25, 2013 e-mail was admitted as a full exhibit.

decisions on motions, leading to the entry of a default against the defendant (and a nonsuit as to [his counterclaim]), coupled with further indications of the existence of available potentially relevant materials not provided to the plaintiff prior to this latest hearing, indicate efforts to subvert the truth finding aspects of these proceedings while then claiming that the plaintiff has not produced sufficient evidence to warrant an award of damages."

Later in its decision, in applying the principles set forth in *Wall Systems, Inc.*, the court "identif[ied] a factor relatively unique to this case." The court explained: "In granting a default as to the plaintiff's claims and a nonsuit against the defendant on his [counterclaim], the court [*Hon. A. William Mottolese*, judge trial referee] characterized the defendant's approach to discovery as reflecting 'hardened intransigence' . . . . Later in that same order, the court concluded that 'the plaintiff is clearly prejudiced by these obstructive tactics and the only appropriate remedy proportionate to the infraction is default.' This was after the court had characterized the defendant's objections to discovery requests in less than flattering terms: '[T]he objections are deemed intentionally evasive and intended to obstruct the process,' followed by what amounted to an invitation to the plaintiff to file an application for attorney's fees . . . .

"The extent to which the defendant was affirmatively disloyal or engaged in self-dealing, the extent to which he took and misused proprietary or confidential information, the extent to which he may have usurped corporate opportunities (or assisted other entities in usurping corporate opportunities), the extent to which he may have interfered with the plaintiff's business expectancies, all would require access to materials in the possession or control of the defendant. . . . Notwithstanding the defendant's nonproduction of [certain] documents

[offered by the plaintiff during the September 27, 2016 hearing in damages], the plaintiff was able to obtain them at least in part due to fortuitous circumstances. . . . [T]here was at least one e-mail within his business account [the January 25, 2013 e-mail] both reflecting other ventures [the defendant was engaged in] and efforts made to conceal that type of activity. Further, the use of a personal e-mail account from the plaintiff's computers prevented the plaintiff from being able to view e-mails themselves, but attachments such as PDF documents, apparently by virtue of their status as attachments, were copied or otherwise preserved on the plaintiff's servers, and therefore could be viewed by the plaintiff. Therefore, the plaintiff had a very limited source of information directly available to it as to the defendant's activities but was able to obtain somewhat more complete information from Generation as to its interactions with the defendant, before, during and after his employment by the plaintiff. . . .

"The plaintiff, then, fortuitously had 'leads' relating to the defendant's continued interaction with Generation and especially the Captivate deal. Absent other such leads, however, the plaintiff would have no way of knowing the extent to which the defendant had used/misused his position or information available to him due to his position in manners detrimental to the plaintiff and/or benefiting the defendant. This is especially significant since the defendant has claimed that despite his having been hired as an employee of the plaintiff, he thought he was an employee-consultant and able to engage in other business ventures despite employment by the plaintiff.

"The court recognizes that the defendant already has been sanctioned for his failure to comply with disclosure obligations by virtue of the entry of a default and nonsuit. There remains, however, an asymmetry with

respect to knowledge/information pertaining to damages. All of the information provided by the plaintiff with respect to its damages claims was known/knowable to the defendant—there were no surprises or potential claims of withholding of information by the plaintiff. The plaintiff, however, was only able to get limited meaningful disclosure through third parties and/or its own efforts—other activities that might have led to claims of wrongdoing with associated further disgorgement, information solely controlled by the defendant, remained unknown to the plaintiff. In effect, the defendant has limited the information available to the plaintiff concerning his wrongdoing, while able to cherry-pick information to be disclosed at trial that he deemed might be helpful. . . .

"This court, then, is concerned about the implications of allowing a defendant to restrict access to detrimental evidence relating to the extent of his wrongdoing and the extent of damages, while allowing him to ask for favorable equitable treatment based on favorable information he is able to proffer (here, the extent of sales he claims to have made). The court must decide this case, but cannot ignore potential implications of allowing an adverse party to have the ability to stymie the court's ability to make a meaningful and reasonably accurate determination of the damages which a party is entitled to recover." (Citations omitted.)

In light of this court's analysis in *HMN*, the trial court also addressed three specific topics: (1) the services that the defendant had provided to the plaintiff during his period of employment; (2) the defendant's efforts, prior to his employment with the plaintiff, to assist Generation in its acquisition of Captivate; and (3) the work performed by the defendant for Captivate after the plaintiff had terminated his employment. As to the services provided by the defendant as the plaintiff's

employee, the court found that, although it was undisputed that the plaintiff's sales increased "substantially" while the defendant was employed by the plaintiff, "as [Culver] testified, it is unknown how much more growth there would have been had the [defendant] been devoting 100 percent of his time—as an employee should—to his employer's business rather than devoting unknown amounts of time to personal ventures. This is in the context of a business that was rapidly growing, and continued to grow even after the departure/termination of the [defendant]. Because of the clandestine manner in which the defendant operated, the plaintiff could not know whether the defendant had been engaged in projects other than (in addition to) the Captivate project that resulted in the $300,000 . . . that had been ordered [to be disgorged in the 2017 decision]." The court further stated that this court in *HMN* "took note of the fact . . . that the defendant had generated something in the area of $4 million in sales. Sales, of course, do not equate to profits. More importantly, it appears that the defendant hit his sales target for a [$25,000] bonus in the first few months of employment (by April [2013])—given the overall annual sales of the [plaintiff] for the full year (under $7 million . . .), there was nothing like that performance over the balance of his employment, suggesting something in the nature of diminishing performance (slacking off or being diverted by other activities?). Others in the company, and notably [Taylor Henderson] who no longer is in the case, also were involved in sales, which would have contributed to overall sales for the year. This is in a business that was experiencing growth in sales before the defendant's involvement and after his termination. . . . There is no doubt that [the defendant] provided services of value to the plaintiff during the time he was an employee, but there are questions as to whether the plaintiff was getting what it was paying for over the course of employment (especially after the first few months) and whether

there was a betrayal of loyalties." (Citations omitted; footnote omitted.) The court further found that "[a] permissible inference confirming some level of slacking off can be drawn from the fact that [the defendant] hit his sales bonus target by April [2013] but the overall sales for the year for the [plaintiff] do not reflect that same kind of sales performance for the remaining four [to] five months that [his] employment continued."

Addressing the defendant's level of involvement in the Captivate deal before his employment with the plaintiff, the court found that, "[p]rior to employment by the plaintiff, the defendant's role with respect to Captivate and Generation was as a finder. There was evidence that there had been prior unsuccessful attempts at bringing those two entities together, as well as efforts by the defendant to bring other investment opportunities to the attention of Generation.

"As the court understands it, as a finder, the defendant was acting in a capacity analogous to that of a real estate broker—no compensation is earned with respect to unsuccessful prospects, no matter how much effort is expended. Only when a deal is brought to fruition—in the case of a real estate sale, typically it is obtaining a ready, willing and able buyer as memorialized in a signed contract (rather than the actual closing)—is a commission or finder's fee 'earned.' Thus, while the final dotting of i's and crossing of t's may not be necessary to earn compensation as a finder, a near final if not final deal in terms of obligations is required before any money is earned; unsuccessful efforts, no matter how extensive, do not result in any compensation.

"From this perspective, the court concludes that there was no evidence much less credible evidence that the defendant had rendered consulting services to Generation or Captivate, prior to 2013, for which he

was entitled to compensation. There was no evidence or suggestion that any compensation was due or payable to the defendant relating to Captivate (or other equity investment opportunities for Generation), absent an actual agreement. Specifically relating to the Captivate deal, there may have been some initial/preliminary work in late December, 2012, but the real work of putting together the framework for a deal appears to have taken place over the course of the first six months or so of 2013, as reflected by the limited documentation available to the plaintiff (despite the defendant's discovery noncooperation), and the testimony of . . . Hertzmark. While a very tentative deal may have been reached earlier, the earliest document presented to the court suggesting a near final deal was [defendant's] exhibit I, dated June, 2013."[10] (Footnotes omitted.)

The court further found that the defendant spent time working on the Captivate deal in February through April, 2013. Specifically, the court found that (1) in March and April, 2013, the defendant responded to certain questions posed by Hertzmark concerning Captivate's "attractiveness as an investment," and (2) the defendant reviewed due diligence information from Captivate from February through April, 2013. (Internal quotation marks omitted.) Additionally, the court found that the defendant sent an e-mail to Hertzmark dated July 6, 2013, writing in relevant part: "[W]hen you have my contract completed, I would like to have my attorney review it . . . ." (Internal quotation marks omitted.) The court observed that, at that time, there was official documentation reflecting that the defendant was going to be named the chief executive officer of Captivate. On the basis of "all of the available evidence, the court [could not] conclude that there was any substantial

[10] Exhibit I is an investment memorandum prepared by Generation regarding Captivate.

compensable work performed by the defendant, relating to the Captivate transaction, prior to his becoming employed by the plaintiff; virtually all of the work relating to that deal occurred during his tenure with the plaintiff." Moreover, the court discredited testimony by the defendant "to the effect that most of the work on the Captivate project requiring input from him had been completed prior to his hire date of January 1, 2013."

With respect to the defendant's activity after his employment was terminated by the plaintiff, the court described the evidence as "also sketchy—perhaps sketchier." The court found that "[t]here was evidence that the defendant was to be paid $50,000 a year for three years by Captivate for consulting services, but the court does not recall any evidence that any substantial work actually was performed in that regard. Context, again, is important. There was evidence . . . that the defendant was to become the chief executive officer of Captivate, once the [Captivate] deal was consummated. The defendant did not become [chief executive officer] of Captivate, and he testified that he really had not wanted that position. He acknowledged that he was aware of that designation being a part of the documentation for the deal, that there could be regulatory consequences for erroneous or misleading information, but that he did nothing to correct the claimed misinformation being disseminated. The court does not find this retrospective denial of interest credible.

"Because of that lack of credibility of denial of interest, the court is concerned that the consulting agreement for the postconsummation period might have been something other than a consulting agreement—possibly compensation for him not being designated [chief executive officer], or possibly a part of the finder's fee paid out over time. Again, the court does not recall any substantial much less credible evidence of what the

defendant actually did to earn those posttermination consulting fees.

"The problem is that the court cannot speculate and there is no affirmative evidence of either alternate scenario. Again, this circles back to the fact that the defendant impeded—apparently stonewalled—discovery, making a proof of any contention favorable to the plaintiff difficult if not impossible. This is especially of concern in the first year after severance, particularly to the extent the plaintiff contended that the defendant took and used confidential/proprietary information," which was deemed admitted by virtue of the defendant's default. (Footnote omitted.) Such information "would have been of most value in that first year after termination by the plaintiff. Although the plaintiff could provide no proof of damages, the defendant was defaulted such that liability for all of the claims asserted is deemed admitted, including especially the claimed violation of [CUTSA], as well as other claims that were deemed admitted that potentially implicated use of internal information, e.g., tortious interference with contract."

The court proceeded to consider several of the factors expressly set forth in *Wall Systems, Inc.* Of import, the court found that, with respect to Generation and Captivate, the defendant's disloyal acts "appear[ed] to have been essentially continuous from the start of his employment until termination, with the actual frequency seemingly moderate," and were conducted with "wilfulness in the sense of the conduct being intentional as opposed to inadvertent." The court further found that, although the defendant claimed to believe that his employment with the plaintiff was "in the nature of a consultant on a nonexclusive basis," his directive to Hertzmark to send correspondence to his personal e-mail rather than to his business e-mail "seems to indicate knowledge of impropriety in using the [plaintiff's] e-mail and server for nonemployer business—in turn

suggesting knowledge that the conduct itself was improper." In addition, in analyzing most of the otherwise applicable *Wall Systems*, *Inc.* factors, the court observed that there was "limited reliable information" available to assess the factors "in large measure due to the defendant's noncompliance with discovery."

At the end of its decision, the court determined that "[t]he claims upon which relief has been awarded allow remedies in the nature of disgorgement and forfeiture, and the various factors/considerations set forth in *Wall Systems*, [*Inc.*] point in varying degrees in favor of equitable relief of that nature." The court summarized its reasoning for each component of the $323,545.84 damages award as follows.

In ordering forfeiture of the defendant's 2013 salary and the $1966 in consulting fees paid by the plaintiff, the court stated that it "believes that the defendant's violation of his fiduciary duty to his employer, coupled with the discovery noncompliance precluding the determination of the actual bounds of any improprieties, warrants full forfeiture of his 'regular' pay from the plaintiff.[11] The court has made an exception for the [$25,000 sales] bonus. The bonus was a focused target for sales, and in that narrow respect, the plaintiff got precisely what it had asked for in exchange for the payment of $25,000—the [defendant], relatively quickly, met the required target. While the sales may have been 'low hanging fruit' or consummation of sales to already identified customers, the court believes that that is an

[11] The court's reference to " 'regular' pay" suggests that the court was addressing only the forfeiture of the defendant's 2013 salary, totaling $121,579.84, and making no mention of the $1966 in consulting fees that the court also ordered to be forfeited. Later in its decision, in discussing its forfeiture order, the court stated that it "believes that the compensation received from the plaintiff properly should be forfeited. The one exception is that . . . the $25,000 performance bonus should be allowed . . . ." Thus, we construe the court's reasoning to encompass the forfeiture of both the defendant's 2013 salary and the $1966 in consulting fees paid by the plaintiff.

appropriate adjustment with respect to compensation by the plaintiff." (Footnote added.)

Next, in ordering disgorgement of the $150,000 finder's fee, the court explained: "With respect to Captivate and the Captivate/Generation deal, the court already noted that as a finder, efforts made in prior years that did not lead to a final agreement were not apparently entitled to any compensation, by the very nature of the work. A finder's fee was only earned when a prospective acquisition became an actual acquisition (at least in a binding agreement/commitment sense). Virtually all of the work relating to the eventual Captivate/Generation deal occurred in 2013, with only a sliver of activity having been identified as possibly occurring in late December, 2012." The court continued: "Because of the nature of a finder's fee, the court does not believe that there was any substantial work performed by the defendant, relating to the eventual Captivate/Generation deal, prior to commencement of employment in January, 2013. There is no reason to believe that unsuccessful efforts years earlier have any material bearing on the eventual transaction. Any work that might have been done in late December [2012] would have been relatively preliminary and there was no credible evidence that anything that might have been done in that short (holiday) time frame was substantial. . . . The court finds not credible the protestations of the defendant that his conduct in 2013 relating to the acquisition of Captivate by Generation was minimal and not substantive. Therefore, the court has no hesitation about requiring disgorgement of the full [$150,000] finder's fee."

Finally, in ordering disgorgement of $50,000 of the $150,000 consulting fees, the court explained: "The court already has expressed its reservations as to whether the consulting agreement truly was a consulting agreement as opposed to a form of additional compensation either as a tail for the finder's fee or as

compensation for the defendant not being made the [chief executive officer] of Captivate. Absent evidence in that regard, however, the court cannot act on such concerns. Therefore, consistent with [this court's mandate in *HMN*] for a more measured approach to damages, the court believes that at a minimum, the first year of consulting fees should be forfeited. The very fact that he was awarded a consulting agreement with Captivate was a consequence of the activities undertaken and performed largely if not exclusively during the course of employment by the plaintiff. In other words, even if the defendant actually performed consulting services, the initiation of the relationship was attributable to his conduct while an employee of the plaintiff; at least the first year has a sufficient nexus to the employment by the plaintiff that the first year's consulting fee should be forfeited." The court continued: "But for the fact that the defendant had been instrumental in consummating the Captivate-Generation acquisition deal, it is highly unlikely that he would have obtained a three year consulting agreement at $50,000 per year. In other words, even if he actually did consulting work during those three years that might warrant such payments—and there was no credible evidence in that regard—it is extremely unlikely that he would have obtained such a long-term agreement but for his role as a 'finder' (if not as a consolation for him not being appointed [chief executive officer]). Under these circumstances, the court believes it to be equitable to require forfeiture of compensation for that first year of consulting services due to its nexus (both causally and temporally) with the earned [$150,000] finder's fee, but consistent with the directive to take into account work performed by the defendant after termination of employment, to allow him to retain the second and third years' compensation."

A

We first address the defendant's claim that the court made certain factual findings that were unsupported by the record. Specifically, the defendant contends that the court clearly erred in finding that (1) he did not perform substantial work prior to his employment with the plaintiff, which began on January 1, 2013, that entitled him to the $150,000 finder's fee, and (2) during the September 10, 2019 hearing in damages, he attempted to offer into evidence numerous exhibits that the plaintiff's counsel had not seen before. We analyze each finding in turn.

1

The defendant contends that the court clearly erred in finding that he did not perform substantial work before being hired by the plaintiff in 2013 that entitled him to the $150,000 finder's fee. In support of his argument, the defendant relies primarily on testimony by Hertzmark, as reflected in the transcript of the September 27, 2016 hearing in damages, which was admitted as a full exhibit.[12] The defendant posits that the court on remand "generally credited" Hertzmark's testimony. This contention is unavailing.

Hertzmark provided inconsistent testimony as to whether the defendant earned the $150,000 finder's fee by providing services before he was employed by the plaintiff. Some of Hertzmark's testimony suggested that the defendant earned the $150,000 finder's fee strictly for work that he had completed in 2013 while employed by the plaintiff. Hertzmark testified that, during that time, the defendant provided information and advice to him about Captivate, prepared a financial model, assisted in the formulation of a letter of intent, and

[12] Hertzmark did not testify in person at the September 10, 2019 hearing in damages.

helped make a presentation. When asked whether it was "accurate that in 2013 [the defendant] earned compensation with respect to the Captivate transaction," whether the defendant "receive[d] cash compensation [in the form of the $150,000 finder's fee] for the work that he did in 2013 . . . for [the Captivate] transaction," and whether it was "accurate that relative to the work that [the defendant] did in connection with the Captivate/Generation transaction . . . in 2013, [the defendant] got [the $150,000 finder's fee]," Hertzmark answered in the affirmative.

In contrast, other portions of Hertzmark's testimony indicated that the defendant performed services before being hired by the plaintiff in 2013 that entitled him to the $150,000 finder's fee. Hertzmark testified that, "during the course of several years, [the defendant] and I . . . looked at a number of companies, thirty-five, thirty different companies, and ultimately settled in 2013 on Captivate. So . . . what you're hearing about with Captivate was the tail end of the relationship." Hertzmark further testified that "2013 was not the first time we approached and wrote a letter of intent to acquire Captivate." When asked whether "the arrangement that you had . . . with [the defendant] . . . dating back to 2010, 2011 [was] that when and if [the Captivate deal] closed, [the defendant] would be paid a finder's fee," Hertzmark answered affirmatively. Hertzmark further agreed with the statement that the defendant was "instrumental . . . in the initial introduction and development of [the Captivate deal] back to 2010, 2011, or when he was a consultant." In addition, when asked whether he would have paid the defendant the $150,000 finder's fee had he known that the defendant was a full-time employee of the plaintiff, Hertzmark testified that "we would have paid [the defendant] the . . . cash compensation [in the form of the $150,000 finder's fee] regardless of [the defendant's] employment

because [the defendant] had made the introduction many years ago" and the defendant had "performed some of the services in 2013."

"It is well established that, even if there are inconsistencies in a witness' testimony, [i]t is the exclusive province of the trier of fact to weigh conflicting testimony and make determinations of credibility, crediting some, all or none of any given witness' testimony. . . . It is not our role to reevaluate the credibility of witnesses or to overturn factual findings of a [trial] court unless they are clearly erroneous. . . . If there is any reasonable way that the [trier of fact] might have reconciled the conflicting testimony before [it], we may not disturb [its] [credibility determination]." (Citations omitted; internal quotation marks omitted.) *Wall Systems, Inc.* v. *Pompa*, supra, 324 Conn. 741. Moreover, a trier of fact is "free to credit one version of events over the other, even from the same witnesses." *Parker* v. *Slosberg*, 73 Conn. App. 254, 265, 808 A.2d 351 (2002).

In light of the foregoing principles, we conclude that the record supports the court's finding that the defendant did not perform any substantial services, prior to his employment with the plaintiff in 2013, entitling him to the $150,000 finder's fee. Portions of Hertzmark's testimony indicate that the defendant earned the $150,000 finder's fee solely on the basis of efforts that he made in 2013 while he was employed by the plaintiff. Although other portions of Hertzmark's testimony may support an opposite finding, the court was free to resolve that inconsistency by crediting only the portions of Hertzmark's testimony buttressing its finding.[13] Additionally, it is notable that the court expressly discredited

[13] In *HMN*, in a portion of a footnote to its statement that the amount ordered to be disgorged in the 2017 decision "appear[ed] to reflect compensation that the defendant had earned for consulting that he performed both prior to and subsequent to his nine month period of full-time employment with the plaintiff"; *Hospital Media Network, LLC* v. *Henderson*, supra, 187 Conn. App. 58–59; this court detailed the testimony by Hertzmark indicating that the defendant had performed work on the Captivate deal prior to 2013.

the defendant's testimony that the majority of his work on the Captivate deal had been completed before he began his employment with the plaintiff, further indicating that the court deemed substantively similar testimony by Hertzmark to be incredible. Thus, we conclude that the court's finding was not clearly erroneous.[14]

2

The defendant also contends that the court clearly erred in finding that he attempted to offer into evidence numerous exhibits that the plaintiff's counsel had not seen previously. Although we agree that the record does not support this finding, we conclude that the court's error is harmless.

During the hearing on remand, the defendant offered more than a dozen additional exhibits into evidence, only two of which were admitted as full exhibits. The plaintiff's counsel objected to the admission of nearly all of the defendant's exhibits; however, counsel's objections were not based on representations that the

Id., 59 n.15. The relevant portion of that footnote should not be construed as this court making factual findings or intruding on the trial court's fact-finding function on remand; see footnote 8 of this opinion; rather, it should be read through the lens that this court in *HMN* was reviewing Judge Adams' damages award in the 2017 decision, which was predicated on the record before Judge Adams at that time.

[14] In addition to relying on Hertzmark's testimony in support of his argument, the defendant makes a passing reference to plaintiff's exhibit 20, which was admitted as a full exhibit and which is composed of a thread of e-mails reflecting communications, dating back to December 27, 2012, involving the defendant, Hertzmark, and/or a Gannett representative concerning Captivate. The defendant characterizes exhibit 20 as "show[ing] that substantial negotiations and communications regarding the [Captivate] deal were taking place before 2013." As the court found, however, "there may have been some initial/preliminary work in late December, 2012," and "only a sliver of activity [had] been identified as possibly occurring in late December, 2012," none of which entitled the defendant to the $150,000 finder's fee. Thus, exhibit 20 does not undermine the court's finding that the defendant did not perform substantial services prior to 2013 that entitled him to the $150,000 finder's fee.

documents had not been previously produced. With regard to defendant's exhibit D, a 2011 e-mail from the defendant to Hertzmark that was marked for identification only, the plaintiff's counsel indicated on the record that he had seen the exhibit for the first time that day; however, counsel did not comment further on that topic, and he objected to the admission of the exhibit for lack of a proper foundation. The record does not reflect protestations by the plaintiff's counsel that he had not seen any of the other exhibits offered by the defendant. Accordingly, insofar as the court found that the defendant sought to introduce "many" or a "large number" of exhibits that the plaintiff's counsel had not seen prior to the hearing on remand, that finding is not supported by the record.

Our conclusion that the court's finding was clearly erroneous does not end our inquiry. "[W]here . . . some of the facts found [by the trial court] are clearly erroneous and others are supported by the evidence, we must examine the clearly erroneous findings to see whether they were harmless, not only in isolation, but also taken as a whole. . . . If, when taken as a whole, they undermine appellate confidence in the court's [fact-finding] process, a new hearing is required." (Internal quotation marks omitted.) *Autry* v. *Hosey*, 200 Conn. App. 795, 801, 239 A.3d 381 (2020).

The defendant posits that the court's unsupported finding factored heavily in its determination of damages. We disagree. Throughout its decision, the court repeatedly referenced the defendant's discovery violations that led, inter alia, to his default as to liability. The defendant's noncompliance with discovery is separate and distinct from his purported transgression found by the court to have occurred during the hearing on remand. At most, the court's belief that the defendant engaged in malfeasance during the hearing on remand amplified its concern, predicated on the defendant's

discovery violations, about the "potential implications of allowing an adverse party to have the ability to stymie the court's ability to make a meaningful and reasonably accurate determination of the damages which a party is entitled to recover." The court's unsupported finding does not "undermine appellate confidence in the court's [fact-finding] process"; (internal quotation marks omitted) *Autry* v. *Hosey*, supra, 200 Conn. App. 801; and, accordingly, we conclude that the court's clearly erroneous finding is harmless.

B

We turn to the defendant's remaining claim that the court on remand abused its discretion in determining damages because the court failed to properly weigh the equities. On the basis of his appellate briefs, we distill the defendant's claims as (1) raising a specific claim of error as to the portion of the damages award ordering disgorgement of $50,000 of the $150,000 consulting fees and (2) challenging the damages award globally. First, as to the disgorgement of $50,000 of the $150,000 consulting fees, the defendant asserts that the court ordered disgorgement notwithstanding the plaintiff's failure to meet its burden to demonstrate that there was a link connecting all or some of the $150,000 consulting fees to the defendant's work on the Captivate deal in 2013, as instructed by this court in *HMN*. Second, the defendant contends that the damages award as a whole was inequitable because (1) the court failed to consider properly the undisputed fact that he had provided significant value to the plaintiff during his period of employment, (2) the court ignored the finding by the trial court in the 2017 decision, as recognized by this court in *HMN*, that his conduct was "uninformed," as opposed to undertaken with "a bad motive," and was "clearly not in the nature of corrupt or reprehensible behavior," (3) the court improperly weighed his noncompliance with discovery against him notwithstanding

that he had been sanctioned previously for his discovery violations, and (4) the damages award resulted in the plaintiff being unjustly enriched. (Internal quotation marks omitted.) We address each of these arguments in turn.

1

The defendant asserts that the court committed error in ordering him to disgorge $50,000 of the $150,000 consulting fees. Specifically, the defendant argues that, under the rationale of *HMN*, the plaintiff failed to meet its burden to establish that the $50,000 amount was earned for work performed by the defendant to advance the Captivate deal in 2013, as opposed to compensation for posttermination services provided by him to Captivate. We agree.[15]

In *HMN*, this court stated that, "[t]o the extent the defendant rendered some of the services for which he was compensated by third parties both prior and subsequent to his full-time employment with the plaintiff, some commensurate portion of the compensation received in exchange for those services cannot be said to have been gained by the defendant's breach and should not have been included in the court's order of disgorgement." *Hospital Media Network, LLC* v. *Henderson*, supra, 187 Conn. App. 59. In a footnote, this court further indicated that there was a distinction between (1) the defendant earning the $150,000 consulting fees for performing services for Captivate after his employment with the plaintiff had been terminated and (2) the defendant being offered the opportunity to earn the $150,000 consulting fees as a result of his work

[15] In challenging the court's ordering disgorgement of $50,000 of the $150,000 consulting fees, the defendant also asserts that the court engaged in speculation and ignored evidence in the record in making certain factual findings. Because we conclude on other grounds that the court improperly ordered disgorgement of $50,000, we need not address the merits of these assertions.

on the Captivate deal in 2013. See id., 59 n.15 ("although [the defendant] was provided the opportunity to sign the agreement [with Captivate] as a consultant on the basis of his work in 2013, he performed the services specified in the agreement and earned the $50,000 per year subsequent to the termination of his employment with the plaintiff").

On remand, the court found that there was no credible evidence that the defendant performed any posttermination consulting work for Captivate to earn the $150,000 consulting fees. The court also was "concerned" and had "reservations" about the true nature of the $150,000 consulting fees, questioning whether they may have constituted a "tail" to the $150,000 finder's fee or a "consolation" in lieu of the defendant being named chief executive officer of Captivate; however, "[a]bsent evidence in that regard," the court determined that it "[could not] act on such concerns." Ultimately, the court found that, even assuming that there was credible evidence that the defendant earned the entirety of the $150,000 consulting fees for services he performed for Captivate following the termination of his employment with the plaintiff, there was a causal and temporal link between the defendant's work on the Captivate deal in 2013 and the $150,000 consulting fees, and, on the basis of that finding, the court determined that it was equitable to order disgorgement of $50,000 of the $150,000 consulting fees (that is, one year's worth of the fees).

As the defendant correctly sets forth in his principal appellate brief, under *HMN*, the court was not permitted on remand to order disgorgement of compensation earned by the defendant outside of his period of employment with the plaintiff. Although the defendant had been defaulted as to liability, it remained the plaintiff's burden to demonstrate that the $150,000 consulting fees, in whole or in part, were earned for work per-

formed by the defendant on the Captivate deal in 2013. See *Hospital Media Network, LLC* v. *Henderson*, supra, 187 Conn. App. 50 ("The limit of [the effect of a default] is to preclude the defaulted defendant from making any further defense and to permit the entry of a judgment against him on the theory that he has admitted such of the facts alleged in the complaint as are essential to such a judgment. It does not follow that the plaintiff is entitled to a judgment for the full amount of the relief claimed. *The plaintiff must still prove how much of the judgment prayed for in the complaint he is entitled to receive*." (Emphasis in original; internal quotation marks omitted.)). The court's decision reflects that the plaintiff did not meet its burden, as the court found that, notwithstanding its concerns regarding their true nature, there was no credible evidence establishing that the $150,000 consulting fees were earned for services performed while the defendant was employed by the plaintiff.[16] Moreover, the court's reasoning for ordering disgorgement of $50,000 was predicated on the assumption that the defendant had earned the $150,000 consulting fees for services performed for Captivate after

[16] The court also found that there was no credible evidence that the defendant performed posttermination services for Captivate for which he had earned the $150,000 consulting fees; however, the defendant did not bear the burden to prove the same on remand.

In addition, we note that the court's finding that there was no credible evidence reflecting that the $150,000 consulting fees were earned for work done by the defendant on the Captivate deal in 2013 should not be conflated with the court's separate finding that the defendant's work on the Captivate deal in 2013 led to his *opportunity* to earn the $150,000 consulting fees, which comprised the foundation of the court's decision to order the disgorgement of $50,000. See *Hospital Media Network, LLC* v. *Henderson*, supra, 187 Conn. App. 59 n.15.

Last, we recognize that the court on remand highlighted the defendant's discovery violations as limiting the plaintiff's ability to demonstrate damages. Although, as the court reasonably found, the defendant's noncompliance with discovery generally hampered the plaintiff's efforts to prove damages, the plaintiff nonetheless was able to offer evidence concerning the defendant's posttermination consulting agreement with Captivate, a copy of which was admitted in full and about which Hertzmark was able to testify.

his employment with the plaintiff had ended. In light of the prohibition in *HMN* against ordering disgorgement of amounts earned before or after the termination of the defendant's employment with the plaintiff, the court's reasoning is untenable. For these reasons, we conclude that the court improperly ordered disgorgement of $50,000 of the $150,000 consulting fees.

2

The defendant next raises several arguments challenging the damages award as a whole. None of these arguments is persuasive.

First, we reject the defendant's argument that the court did not properly consider the significant value of his services to the plaintiff as its employee. The court found that the plaintiff's sales increased "substantially" during the defendant's employment and that "[t]here is no doubt that [the defendant] provided services of value to the plaintiff during the time he was an employee . . . ." In a vacuum, those findings would weigh against the wholesale forfeiture of an employee's salary or the wholesale disgorgement of third-party benefits received by the employee. Within its discretion, however, the court weighed those findings against a myriad of other facts that it found, including its finding that the defendant's sales performance decreased during the latter part of his employment, which, as the court reasonably inferred, stemmed from the defendant's involvement in activities unrelated to his employment with the plaintiff,[17] and which the court found raised "questions as

[17] The defendant asserts that the "evidence relating to exactly how much [he] was 'diverted' by the Captivate deal in 2013 is extremely thin . . . ." As the court found, and as the record reflects, the defendant performed substantive services in furtherance of the Captivate deal while employed by the plaintiff in 2013, including responding to questions sent by Hertzmark regarding Captivate and reviewing due diligence information. To the extent that the defendant claims that the court clearly erred in finding that he was diverted from his employment with the plaintiff in 2013, we reject that claim.

to whether the plaintiff was getting what it was paying for over the course of employment . . . .'' We perceive no abuse of the court's discretion in its balancing of these facts.

Next, in arguing that the damages award was inequitable, the defendant relies on the trial court's finding in the 2017 decision that his conduct was ''uninformed'' rather than ''done with bad motive'' or in the ''nature of corrupt or reprehensible behavior.'' (Internal quotation marks omitted.) This reliance is misplaced. As we explained in part I of this opinion, the findings in the 2017 decision supporting the prior damages award against the defendant were not binding on the trial court on remand. In its decision on remand, the court found that the defendant acted wilfully ''in the sense of the conduct being intentional as opposed to inadvertent'' and that, although the defendant claimed to believe that he ''still was operating as something in the nature of a consultant on a nonexclusive basis,'' the January 25, 2013 e-mail ''indicate[d] knowledge of impropriety in using the [plaintiff's] e-mail and server for nonemployer business—in turn suggesting knowledge that the conduct itself was improper.'' Additionally, the court found that the defendant's disloyal acts ''appear[ed] to have been essentially continuous from the start of his employment until termination, with the actual frequency seemingly moderate.'' The court was not precluded from making these findings, which are supported by the record, and relying on them to issue its damages award. Indeed, such findings fall squarely within the following guidance set forth in *Wall Systems, Inc.* v. *Pompa*, supra, 324 Conn. 718: ''[I]f an employee's disloyalty is confined to particular pay periods, so is the required forfeiture of compensation. . . . *Conversely, if the compensation received by a disloyal employee is not apportioned to particular time periods or items of work, and his or her breach of the duty of*

loyalty is wilful and deliberate, forfeiture of his or her entire compensation may result." (Citations omitted; emphasis altered.) Id., 734 n.11.

The defendant also argues that the court improperly weighed his noncompliance with discovery against him because he was penalized previously for his discovery violations by way of the trial court defaulting him as to liability on the plaintiff's claims, nonsuiting his counterclaim, and awarding the plaintiff $21,922.50 in attorney's fees. We are not persuaded. Simply stated, there is no suggestion in the court's decision that it used the defendant's discovery violations to supplant the plaintiff's burden to demonstrate its damages. Rather, the court's observations concerning the defendant's discovery failures reflect its determination that such failures should weigh against the defendant's requests for more favorable equitable treatment. See, e.g., *Certo* v. *Fink*, 140 Conn. App. 740, 743, 749–50, 60 A.3d 372 (2013) (concluding that, in determining damages, trial court did not commit error in relying on plaintiffs' estimate of damages when court credited plaintiffs, discredited defendant, and found that plaintiffs had to rely on estimate of damages as result of defendant's failure to provide discovery). We find no error in this regard.

Finally, the defendant argues that the damages award unjustly enriched the plaintiff because it enabled the plaintiff to recoup the sums ordered to be forfeited and to obtain the third-party benefits ordered to be disgorged while keeping the millions in dollars of revenue that the plaintiff earned during his employment, along with other benefits of his labor, as well as the $21,922.50 in attorney's fees previously awarded. See *Wall Systems, Inc.* v. *Pompa*, supra, 324 Conn. 738 ("[t]he judicial task [in applying the remedies of forfeiture and disgorgement] is to search for a fair and reasonable solution in light of the relevant considerations . . . and to avoid unjust enrichment to either party" (citation

omitted; internal quotation marks omitted)). This assertion is unavailing. The defendant overlooks the court's findings that, notwithstanding the value that he provided to the plaintiff, his sales performance decreased during the latter part of his employment, and it was "unknown how much more growth there would have been had the [defendant] been devoting 100 percent of his time—as an employee should—to [the plaintiff's] business rather than devoting unknown amounts of time to personal ventures. This is in the context of a business that was rapidly growing, and continued to grow even after the departure/termination of the [defendant]." Under these circumstances, we do not agree that the plaintiff was unjustly enriched.

In sum, except for the court's ordering disgorgement of $50,000 of the $150,000 consulting fees, we conclude that the court balanced the equities and properly utilized the equitable remedies of forfeiture and disgorgement in this case. Accordingly, we further conclude that, other than the court's ordering disgorgement of $50,000, the court did not abuse its discretion in awarding damages.

The judgment is reversed in part and the case is remanded with direction to vacate the damages award insofar as the court ordered the defendant to disgorge $50,000 of the $150,000 consulting fees; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JAMES K.*
(AC 42872)

Prescott, Moll and Suarez, Js.

Syllabus

Convicted of the crime of risk of injury to a child as a result of certain physical contact with his minor daughter, the defendant appealed to this court, claiming, inter alia, that the trial court violated his right to be tried before an impartial jury when it prohibited his counsel from asking prospective jurors during voir dire to express their opinions with respect to parents who kiss their children on the lips. When the state indicated it would seek to introduce into evidence a photograph of the defendant kissing the victim's half sister on the lips, defense counsel objected. The trial court first precluded defense counsel from asking prospective jurors about kissing on the lips because it was too specific to the facts of the case and limited defense counsel to asking prospective jurors about whether parents can have different methods of showing physical affection to their children. Thereafter, the court ruled the photograph inadmissible because it was prejudicial to the defendant. The defendant also had been charged with two counts of sexual assault in the first degree in connection with the incident with the victim. Although the jury initially had been unable to reach a unanimous verdict as to all three charges, the trial court delivered a "Chip Smith" instruction urging the jury to reach a verdict, after which it returned its verdict, which included a finding of not guilty as to the sexual assault charges. *Held*:

1. The trial court did not abuse its discretion when it prohibited defense counsel from asking prospective jurors to express their opinions with respect to parents who kiss their children on the lips: contrary to the defendant's assertion that the court improperly limited the scope of his voir dire because that issue was a central issue in the case and many people view it as inappropriate and offensive, the court's extremely narrow ruling was limited only to that question, it prevented counsel from improperly using voir dire to ascertain prospective jurors' opinions about evidence that would be presented at trial or implanting in their minds an opinion about that evidence, and, by permitting inquiry about the general topic of physical displays of affection, the court provided counsel wide latitude to determine whether prospective jurors had prejudices against parents kissing their children on the lips, and properly

* 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 use the defendant's full name or to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

struck a balance between the competing considerations of protecting a party's inviolate right to ask questions to uncover prejudice and avoiding inquiries that touch on facts before the jury; moreover, after the court excluded the photograph from evidence, there was no photographic evidence of the defendant kissing any child on the lips, the subject of the defendant's kissing the victim on the lips did not form the factual basis of any of the offenses with which he was charged, and the prosecutor did not rely on the evidence of kissing in her closing argument to the jury; furthermore, the defendant failed to demonstrate that the court's ruling resulted in harmful prejudice, as the evidence of kissing played only a slight role in the trial and was not inherently prejudicial in nature, and the jury's split verdict, in which it found the defendant not guilty of the sexual assault charges, supported the conclusion that the court's limitation on voir dire did not result in a jury that was unable to carefully and fairly consider each of the charges and the evidence related thereto.

2. The defendant could not prevail on his claim that the trial court abused its discretion by admitting into evidence a videotaped forensic interview of the victim: rather than summarily rejecting the defendant's assertion that the video was unduly prejudicial and cumulative of the victim's testimony at trial, as the defendant claimed, the broad language of the court's ruling suggested that the court considered and rejected the grounds of objection the defendant raised, and the court explicitly stated that the video fell within the medical diagnosis and treatment exception to the rule against hearsay (§ 8-3 (5)), with which the defendant agreed; moreover, the video was relevant and highly probative with respect to the defendant's conduct with the victim, the video was not admitted as constancy of accusation evidence, as the defendant contended, and it did not bolster the victim's credibility, as the interview was conducted by a clinical social worker, and the video did not contain the opinions of expert witnesses or statements of third parties; furthermore, the video was not unduly prejudicial, as it did not improperly emphasize the victim's testimony by permitting her to testify twice, it did not generate sympathy for her, as any expressions of empathy by the interviewer reflected her effort to build a rapport with the victim, and, although the victim's comments in the video were not identical to her trial testimony, the different language she used in the video was not so different in nature that it would likely engender strong feelings of sympathy over that which may have been engendered by her testimony at trial.

3. The defendant failed to establish that the trial court violated his rights to due process, to a fair and impartial trial, and to be convicted by means of a unanimous verdict when it declined to use language in his written request for instructions to urge the deadlocked jury to reach a verdict and, instead used model instructions from the Judicial Branch website: the defendant was not entitled to the instruction he proposed,

or circumstances in which the court delivered the model instructions led to the conclusion that the instructions were coercive, as the fact that the jury had engaged in deliberations for three days and requested the playback of certain testimony and evidence prior to sending the court a note stating that it was deadlocked merely reflected, at most, that the jury was fulfilling its duty of carefully considering the evidence; moreover, the jurors' note and stated belief in that note that additional deliberation time would not be fruitful did not make the court's instructions coercive or give the unwarranted impression that a verdict was required, as the note did not refer to hostility among jurors or indicate they had not followed their oaths or would not continue to follow their oaths after additional instruction from the court.

4. This court declined to exercise its supervisory authority over the administration of justice to require trial courts to instruct deadlocked juries that they need not reach a verdict and that jurors have the right to disagree with respect to the proper verdict; because the Supreme Court has explicitly addressed the issue of what instructions are proper when a jury is deadlocked, it would be inappropriate for this court to overrule, reevaluate, or reexamine the propriety of the instructions.

Argued February 2—officially released December 28, 2021

Procedural History

Substitute information charging the defendant with two counts of the crime of sexual assault in the first degree and one count of the crime of risk of injury to a child, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *B. Fischer, J.*; thereafter, the court denied the defendant's motion to preclude certain evidence; verdict and judgment of guilty of risk of injury to a child, from which the defendant appealed to this court. *Affirmed.*

Pamela S. Nagy, supervisory assistant public defender, for the appellant (defendant).

Samantha L. Oden, former deputy assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Maxine V. Wilensky*, senior assistant state's attorney, for the appellee (state).

Opinion

SUAREZ, J. The defendant, James K., appeals from the judgment of conviction, rendered following a jury trial, of risk of injury to a child in violation of General Statutes § 53-21 (a) (2).[1] The defendant claims that (1) the trial court violated his right to a fair trial and to be tried before an impartial jury by restricting defense counsel's examination of prospective jurors, (2) the trial court improperly admitted into evidence a videotaped forensic interview of the victim, (3) the trial court violated his rights to due process, to a fair and impartial trial, and to be convicted by means of a unanimous verdict because the deadlocked jury instructions that it provided to the jury were coercive and misleading, and (4) this court, in the exercise of its supervisory authority over the administration of justice, should require trial courts, when delivering deadlocked jury instructions, to instruct the jury that it need not reach a verdict and that jurors have the right to disagree with respect to the proper verdict. We affirm the judgment of the trial court.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. The defendant is the victim's biological father. In 2010, when the victim was approximately six years old, the defendant obtained full physical custody of the victim as a consequence of drug abuse and mental health issues affecting the victim's biological mother. Initially, the victim resided with the defendant; her stepmother, M; her half sister, H; and other relatives. The victim and H are close in age, shared a close bond, and attended

[1] The court imposed a sentence of twenty years of incarceration, five of which are mandatory, execution suspended after sixteen years, followed by fifteen years of probation. The jury found the defendant not guilty of two counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a).

the same school. Later, the defendant, M, H, and the victim moved to a different residence.

On numerous occasions, the defendant used physical force to discipline the victim and H. The defendant often struck the victim on her buttocks, back, and arms with his bare hands or physical objects such as a belt or an extension cord. Occasionally, if the use of force resulted in visible injuries to the victim, the defendant would make the victim conceal her bruises with clothing or he would keep her home from school.

One night in 2011 or 2012, when the victim was seven or eight years of age, the defendant verbally and physically assaulted M in the victim's presence, following which M and H left the residence. The victim, preparing to take a shower, went into her bedroom, undressed, and wrapped herself in a towel. The defendant entered the bedroom and told the victim that he had received a telephone call from her teacher and was upset to have learned that the victim had misbehaved in class. After the victim and the defendant discussed this matter, the defendant instructed the victim to remove her towel and bend over a nearby bed. The victim, expecting to be struck by the defendant as a form of discipline, complied with the defendant's instruction.

The victim positioned herself on all fours on the bed. As the defendant stood behind her, at the edge of the bed, he touched the victim's anus and her vagina with his penis. Penetration did not occur.[2] As the incident

[2] In reciting the facts that the jury reasonably could have found in reaching its verdict, we are mindful that, as we noted in footnote 1 of this opinion, the jury found the defendant not guilty of two counts of sexual assault in the first degree. One count of sexual assault required a finding that the defendant had penetrated the victim's anus, and the other count of sexual assault required a finding that the defendant had penetrated the victim's vagina. See General Statutes § 53a-70 (a) (1).

The jury found the defendant guilty of risk of injury to a child in violation of § 53-21 (a) (2), which did not require a finding that penetration had occurred but required a finding that the defendant had contact with the intimate parts of the victim in a sexual and indecent manner that was likely to impair her health or morals.

progressed, the defendant pushed the victim down so that her head and chest were on the bed. When the victim told the defendant to stop touching her, he responded by telling her to be quiet. Despite the fact that the defendant's hands were on the victim's waist, he stated that he was using "his thumb." After a few minutes, the defendant stopped what he was doing, told the victim to remain bent over until he left her bedroom, and walked into another room. The victim was confused by the defendant's conduct and knew that it was "bad . . . ." She proceeded to use the shower. After the victim showered, the defendant told her that they were going out to get pizza for dinner, and he stated that "what happened in the house stays in the house." The victim understood this to mean that the defendant did not want her to discuss what he had done to her in the bedroom, and she believed that, if she told anyone about it, it would either happen again or the defendant would punish her by beating her.

The defendant and M later separated, and the victim thereafter resided with the defendant and his new girlfriend. The victim resided there until December, 2015, when the defendant was arrested on charges unrelated to the present case. The victim was placed in the custody of her maternal grandmother, B. Thereafter, the Department of Children and Families (department) investigated allegations that the victim had suffered physical abuse caused by the defendant. The department also investigated concerns expressed by B that the defendant had acted inappropriately toward the victim because he had a habit of kissing the victim on the lips. Ultimately, the victim disclosed to a department social worker that the defendant had done something that made her uncomfortable and that he "tried to say it was his finger . . . ." During a forensic interview at Yale-New Haven Hospital's Child Sexual Abuse Clinic in 2016, the victim provided details of the incident

involving the defendant's contact with her intimate parts in her bedroom. The defendant's arrest and conviction followed. Additional facts will be set forth as necessary.

I

First, the defendant claims that the trial court violated his right to a fair trial and to be tried before an impartial jury by restricting defense counsel's examination of prospective jurors. Specifically, the defendant claims that the court improperly prohibited defense counsel from asking prospective jurors to express their opinions with respect to parents who kiss their children on the lips. We disagree.

The following additional facts and procedural history are relevant to this claim. On October 16, 2018, the second day of jury selection, defense counsel alerted the court to the fact that the state was in possession of photographs depicting the defendant kissing H on the lips. Defense counsel expressed her belief that the state intended to introduce these photographs in evidence over defense counsel's objection. The court, *B. Fischer*, *J.*, added that, during the victim's forensic interview, the victim indicated that the defendant had kissed her on the lips. In light of the possibility that evidence of the defendant's habit of kissing his daughters on the lips was likely to be before the jury, defense counsel opined that some potential jurors would have a very strong reaction to such evidence. She argued that it was part of her obligation in selecting a fair and impartial jury to ask prospective jurors to express their feelings about that behavior. Defense counsel provided the court with the type of inquiry she believed was appropriate, stating: "I guess I would ask a venireperson, do they have opinions about how parents might show affection to their children and . . . might they have opinions about whether parents kiss their children

. . . as part of showing affection, and might they also have any strong opinions one way or another about whether . . . it's okay for parents to kiss their children on the lips, in terms of . . . is that a common thing in their mind in terms of showing affection." The prosecutor objected to any inquiry concerning kissing or "physically showing affections between a parent and child."

The court responded, "[t]he kissing is too fact specific. You know, prospective jurors may not be questioned regarding their predisposition to decide issues with respect to evidence that may be offered at trial or with the intent to condition them to prejudge issues that will affect the outcome of the trial. I have no issues with a question along the following lines . . . 'Do you understand that parents can have different methods of showing physical affection to their children' or a question like that, but to specifically ask about kissing on the lips is too fact specific." Defense counsel asked whether a question about kissing on the lips could be asked in the event that a venireperson raised the issue. The court stated that such a follow-up inquiry was not permissible because it would be "too fact specific." The court clarified that defense counsel could ask questions about a parent engaging in "different methods of showing physical affection to their child" but that defense counsel could not ask about kissing on the lips. Defense counsel stated that she disagreed with the court's ruling but that she would abide by it.

Later, during the second day of jury selection, defense counsel asked several venirepersons whether they had opinions concerning how parents show affection to their children.[3] The prosecutor did not object to defense counsel's examination in this regard, and the court did not interfere with the examination in this regard. For

[3] In this opinion, we will use the initials, rather than full names, of venirepersons to protect their privacy interests.

example, during questioning of venireperson M.A., the following colloquy occurred:

"Q. . . . Do you have any opinion about how parents show affection to children?

"A. I think there's a lot of different ways that parents can show affection.

"Q. It kind of runs the gamut, right?

"A. Yep.

"Q. In your personal opinion, do you think that, you know, do you have, kind of like, what's appropriate versus inappropriate?

"A. Well, I have, you know, how my parents showed me affection throughout my life and . . . that's basically it, you know.

"Q. Okay. But if you saw sort of something other than what your parents showed you.

"A. Um-hm.

"Q. Do you . . . you know, I guess would you just have an opinion as to what was appropriate versus—

"A. I wouldn't make any sort of, like, judgmental determinations on it if it was the proper way to show affection or not."

During defense counsel's examination of venireperson K.G., the following colloquy occurred:

"Q. How about different forms of parents showing affection for their kid; do you think some are kind of okay and some are not okay?

"A. In terms of like hugging a child?

"Q. Hugging. Kissing. Yeah.

"A. Or just kissing your child, that's fine.

"Q. Okay. Anything that in your mind would cross the line that you think is just totally inappropriate?

"A. Not if it's not abusive, no."

During defense counsel's examination of venireperson C.D., the following colloquy occurred:

"Q. . . . Do you have any opinion about how parents show children affection?

"A. I think it's great that they do. I think any parent should show their children affection.

"Q. Okay. Do you have an opinion as to . . . what might be appropriate versus inappropriate?

"A. That's what I am when we're hugging and, you know, giving encouragement and being positive. That's kind of what I know."

During defense counsel's examination of venireperson E.B., the following colloquy occurred:

"Q. . . . Do you have any opinions about how parents should show love or affection toward their children physically?

"A. As much as you can.

"Q. Um-hm.

"A. There's a lot that you can do.

"Q. Um-hm. Anything in your mind that, like, crossed the line where it would become kind of inappropriate?

"A. More than a hug and a kiss, I would imagine."

Finally, during defense counsel's examination of venireperson J.S., the following colloquy occurred:

"Q. . . . Do you have any sort of opinion one way or the other about how parents show affection for their children?

"A. I mean, yeah, I mean, there's some parents that will kiss their kids on the cheek, there's other ones that kiss their kids on the lips. I mean, different breakpoints, to certain things.

"Q. Right.

"A. I mean, I've showered with both my daughters when they were younger, but you get to a point where it's like, all right, now that's gotta stop.

"Q. Sure. Do you have any opinion one way or the other, or you just know that it kind of happens?

"A. I think that . . . it happens. Right. And . . . it changes depending on the family dynamic."

The following day, the third day of jury selection, the court invited the parties to make arguments concerning the admissibility of a photograph of the defendant kissing H on the lips. The prosecutor represented that she intended to introduce the photograph into evidence, arguing that it was probative with respect to the type of kissing the defendant engaged in with his daughters. Defense counsel argued that the photograph was "inflammatory" and that it would arouse the passions of the jurors. Defense counsel argued that, when compared to the high degree of prejudice that flowed from the photograph, it had only limited probative value, as it was not direct evidence of any of the crimes with which the defendant stood charged. Defense counsel argued that it was misconduct evidence that merely corroborated the victim's testimony that the defendant had a habit of kissing her on the lips.

The court excluded the photograph from evidence. The court stated: "I'm not going to allow it in. It is a picture of [H], who is not the complainant here. Clearly, as I understand it, there will be evidence from the complainant that the defendant did kiss her on the mouth . . . but we'll wait to hear that testimony. But this is

separate. This is not the complainant's photo, it's the stepsister. The court finds it's too inflammatory, too prejudicial to the defendant." During the remaining three days of jury selection that followed the court's ruling, defense counsel did not question prospective jurors about their opinions, if any, with respect to displays of affection between parents and their children.

Prior to the victim's testimony at trial, defense counsel expressly agreed that testimony about the fact that the defendant had kissed the victim on the lips was admissible. The victim subsequently testified that the defendant had a habit of kissing her on the lips, that this behavior "bother[ed]" her, and that she asked the defendant to kiss her on the cheek instead. The victim testified, however, that the defendant continued to kiss her on the lips.[4] Kelly Adams, a department investigator, testified at trial that, when she spoke with B, she stated that "she believed something happened because [the defendant] would kiss [the victim on] the mouth and she didn't like it, she said it made her feel very uncomfortable . . . ." Adams further testified that B's statements led her to question the victim as to whether anyone had done something that made her feel uncomfortable, and that this inquiry resulted in the victim's initial disclosure of sexual abuse by the defendant. Adams testified that the defendant mentioned to her that he was aware of the fact that others had told her that he had kissed the victim on the lips but that he had not behaved inappropriately. During closing argument, the state did not rely on evidence related to the defendant's habit of kissing the victim on the lips.

[4] The state also presented evidence of statements the victim made in her forensic interview, during which she stated that the defendant would kiss her on her mouth when she was going to travel somewhere "really far" away. The victim stated that, when this type of kissing occurred, both her mouth and the defendant's mouth would remain closed. She stated that her grandmother, B, thought the kissing was "kinda weird" and that "no one should be kissing you on your mouth."

As he did at trial, the defendant argues on appeal that the court improperly limited the scope of his examination of prospective jurors. The defendant argues that the evidence of the defendant's kissing his daughter on the lips was "highly controversial," "many people view [this type of behavior] as inappropriate and offensive," the conduct "was a central issue in this case," and the court's prohibition on questions directly addressing this conduct "violated his constitutional rights to a fair trial and to be tried by an impartial jury . . . ." The defendant argues that the court's ruling precluded him from asking questions of prospective jurors that may have reflected the existence of bias and impartiality. The defendant argues that the inquiry he wanted to undertake was not designed "to ask jurors how they would decide the facts or issues in this case; rather, [the defendant] wanted to determine if jurors would be unable to judge this case fairly once they heard that evidence." The defendant also argues that the curtailed inquiry limited to forms of affection was not adequate, for it failed to give him any insight as to whether potential jurors had strong emotional reactions to a parent kissing a child on the lips.

Having set forth the nature of the defendant's claim, we next set forth the relevant principles of law. "Voir dire plays a critical function in assuring the criminal defendant that his [or her] [s]ixth [a]mendment right to an impartial jury will be honored. . . . Part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors. . . . Our constitutional and statutory law permit each party, typically through his or her attorney, to question each prospective juror individually, outside the presence of other prospective jurors, to determine [his or her] fitness to serve on the jury. . . . Because the purpose of voir dire is to discover if there is any likelihood that some prejudice is in the [prospective] juror's mind [that]

will even subconsciously affect his [or her] decision of the case, the party who may be adversely affected should be permitted [to ask] questions designed to uncover that prejudice. This is particularly true with reference to the defendant in a criminal case. . . . The purpose of voir dire is to facilitate [the] intelligent exercise of peremptory challenges and to help uncover factors that would dictate disqualification for cause." (Internal quotation marks omitted.) *State* v. *Holmes*, 334 Conn. 202, 222–23, 221 A.3d 407 (2019); see also *State* v. *Rios*, 74 Conn. App. 110, 114, 810 A.2d 812 (2002) (discussing constitutional and statutory basis for right to question prospective jurors individually), cert. denied, 262 Conn. 945, 815 A.2d 677 (2003). Moreover, we recognize that the right to a voir dire examination of each prospective juror to elicit the indicia of prejudice "cannot be replaced by a court's charge, which is addressed to a group and does not elicit answers." *State* v. *Rogers*, 197 Conn. 314, 318, 497 A.2d 387 (1985).

Our decisional law reflects, however, that the type of inquiry that is permissible to uncover prejudice on the part of prospective jurors has its limits. "The court has a duty to analyze the examination of venire members and to act to prevent abuses in the voir dire process." *State* v. *Dolphin*, 203 Conn. 506, 512, 525 A.2d 509 (1987). "[I]f there is any likelihood that some prejudice is in the [prospective] juror's mind [that] will even subconsciously affect his [or her] decision of the case, the party who may be adversely affected should be permitted [to ask] questions designed to uncover that prejudice. . . . The latitude . . . afforded the parties in order that they may accomplish the purposes of the voir dire [however] is tempered by the rule that [q]uestions addressed to prospective jurors involving assumptions or hypotheses concerning the evidence which may be offered at the trial . . . should be discouraged . . . . [A]ll too frequently such inquiries represent a

calculated effort on the part of counsel to ascertain before the trial starts what the reaction of the venire[-person] will be to certain issues of fact or law or, at least, to implant in his mind a prejudice or prejudgment on those issues. Such an effort transcends the proper limits of the voir dire and represents an abuse of the statutory right of examination. . . .

"Thus, we afford trial courts wide discretion in their supervision of voir dire proceedings to strike a proper balance between [the] competing considerations . . . but at the same time recognize that, as a practical matter, [v]oir dire that touches on the facts of the case should be discouraged. . . . [T]he permissible content of the voir dire questions cannot be reduced to simplistic rules, but must be left fluid in order to accommodate the particular circumstances under which the trial is being conducted. Thus, a particular question may be appropriate under some circumstances but not under other circumstances. . . . The trial court has broad discretion to determine the latitude and the nature of the questioning that is reasonably necessary to search out potential prejudices of the jurors." (Citation omitted; internal quotation marks omitted.) *State* v. *Patel*, 186 Conn. App. 814, 846–47, 201 A.3d 459, cert. denied, 331 Conn. 906, 203 A.3d 569 (2019). "The court has wide discretion in conducting the voir dire . . . and the exercise of that discretion will not constitute reversible error unless it has clearly been abused or harmful prejudice appears to have resulted." (Citations omitted.) *State* v. *Dahlgren*, 200 Conn. 586, 601, 512 A.2d 906 (1986).

Our analysis must focus on "the scope of the trial court's ruling, i.e., what specific question or questions actually were prohibited." *State* v. *Lugo*, 266 Conn. 674, 684, 835 A.2d 451 (2003). As discussed previously in this opinion, in light of the likelihood that the state would present evidence that the defendant had shown

affection to one or more of his children by kissing them on the lips, the court's prohibition was limited only to the question related to a parent kissing a child on the lips. The court, nonetheless recognizing the nature of the inquiry sought by defense counsel, expressly clarified that its ruling did not preclude defense counsel from asking whether prospective jurors had opinions about parents using different methods of physical affection toward a child.

Because the trial court is vested with broad discretion in conducting the voir dire, there are few, if any, bright-line rules that we may employ in reviewing its rulings related thereto. Indeed, this court has observed that, "[d]espite its importance, the adequacy of voir dire is not easily subject to appellate review." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Rios*, supra, 74 Conn. App. 115. We note that, in the present case, the court's ruling was extremely narrow, and the ruling prohibited only an inquiry that was related to specific evidence in the case. The ruling, therefore, prevented defense counsel from using voir dire for the improper purposes of ascertaining prospective jurors' opinions about the evidence that would be presented at trial or implanting in the jurors' minds an opinion about the evidence. We also note that the court provided defense counsel wide latitude to inquire whether prospective jurors had opinions about the general topic of physical displays of affection. Although the defendant's arguments suggest otherwise, physical displays of affection may include kissing on the lips. Thus, to the extent that defense counsel deemed it important to determine if prospective jurors had prejudices against parents kissing their children on the lips, the court afforded defense counsel latitude to accomplish the purposes of the voir dire in that it permitted defense counsel to raise the general topic of a parent's physical display of affection. Our assessment in this regard is

proven by the fact that, although defense counsel asked only five prospective jurors about a parent's physical display of affection, three of those prospective jurors (K.G., E.B., and J.S.) stated an opinion about kissing. Moreover, one of these prospective jurors (J.S.) stated an opinion about kissing on the lips.

As both this court and our Supreme Court have observed, the trial court in supervising voir dire must balance the competing considerations of protecting a party's inviolate right to ask questions to uncover prejudice and avoiding inquiries that touch on the facts before the jury. See, e.g., *State* v. *Pollitt*, 205 Conn. 61, 75, 530 A.2d 155 (1987); *State* v. *Rios*, supra, 74 Conn. App. 117–18. We are convinced that the court properly struck a balance between these considerations and permitted an inquiry that was sufficient to uncover juror bias against a parent's physical display of affection, including kissing on the lips.

A court's exercise of its discretion to restrict voir dire "will not constitute reversible error unless it has clearly been abused or harmful prejudice appears to have resulted." *State* v. *Dahlgren*, supra, 200 Conn. 601; see also *State* v. *Dolphin*, supra, 203 Conn. 512 (same), and cases cited therein. Beyond concluding that the court did not abuse its discretion, we likewise conclude for the reasons that follow that the defendant has failed to demonstrate that the court's ruling resulted in harmful prejudice.[5]

[5] Although the state correctly refers in its appellate brief to the fact that our decisional law directs us to consider whether a restriction of voir dire reflects an abuse of discretion or harmful prejudice to a defendant, it also argues that the defendant is unable to demonstrate that he was "harmed" by the court's ruling. The defendant responds that "the state is wrong that any error was harmless" and that "[a] trial before jurors who harbor prejudices that work against the defendant can never be harmless." In accordance with prior decisions, our evaluation of whether reversal of the judgment is warranted is focused on whether the court's ruling constituted an abuse of discretion or whether it resulted in harmful prejudice to the defendant.

As we stated previously in this opinion, at the time that the court made the ruling at issue, it had yet to rule on the photograph that the state wanted to introduce that depicted the defendant kissing H on the lips. The following day of jury selection, the court ruled that the photograph was not admissible. It appears that defense counsel's desire to uncover possible prejudice related to a parent kissing a child on the lips was largely motivated by the possibility that this photograph would be part of the evidence.[6] Following its exclusion, there was no photographic evidence of the defendant kissing the victim, or any child, on the lips. Furthermore, as we previously discussed, the subject of the defendant's kissing the victim on the lips was not a prominent part of the evidence, which was presented to the jury over the course of three days. Although the jury heard evidence that the defendant had kissed the victim on the lips, that the victim objected to the kissing, and that B's concern that the defendant's habit of kissing the victim on the lips led Adams to investigate whether the victim had been sexually abused, the defendant's conduct in kissing the victim on the lips did not form the factual basis of any of the offenses with which he stood charged. Moreover, the prosecutor did not rely on the evidence of kissing during her closing argument. Finally, we note that the defendant's prejudice argument stems from his belief that the jury would be "unable to judge this case fairly once they heard [the] evidence [related to his kissing the victim on the lips]." The fact that the jury rendered a split verdict in this case, finding the defendant not guilty of the more serious sexual assault charges; see footnote 2 of this opinion; lends some support to our conclusion that the limitation on voir dire did not result in a jury that was unable

[6] As we noted previously in this opinion, following the court's ruling to exclude the photograph of the defendant kissing H on the lips, jury selection continued over the course of three days. During these three days, however, defense counsel did not ask any prospective juror about physical forms of affection.

to carefully and fairly consider each of the charges and the evidence related thereto. Given the slight role that the evidence of kissing played in the trial, the fact that the evidence that was presented to the jury related to kissing was not inherently prejudicial in nature, we are not persuaded that harmful prejudice resulted to the defendant as a result of the court's ruling.

II

Next, the defendant claims that the court improperly admitted into evidence a videotaped forensic interview of the victim. We disagree.

The following facts are relevant to this claim. Prior to trial, the state filed a notice of its intent to offer into evidence a video recording of the victim's forensic interview that occurred on March 9, 2016, and was conducted by Monica Vidro Madigan, a clinical social worker employed by the Yale-New Haven Hospital's Child Sexual Abuse Clinic. Later, the defendant filed a motion in limine to preclude the admission of the video. The defendant assumed for purposes of his motion that the victim would testify at trial and would be able to recall and narrate the details of her sexual abuse allegations against the defendant. The defendant expressly stated that he did not object to the admissibility of the video on hearsay grounds. Instead, the defendant raised what he characterized as an objection related to "relevance and bolstering . . . ." The defendant argued that the video had limited probative value and was unduly prejudicial to him. In arguing that it was unduly prejudicial, defense counsel argued that it was unnecessary and cumulative evidence of the facts to be elicited during the victim's trial testimony, and it would improperly bolster the victim's testimony.

Following the victim's trial testimony, on October 24, 2018, the court heard arguments on the motion. Defense

counsel reiterated that the video would not add anything to the victim's trial testimony and argued that the admission of the video would constitute an improper bolstering of that testimony. Defense counsel argued that "[the victim] had clear recollection. She did not have any confusion about the details. This isn't a case like some where the child [victim] kind of broke down and had trouble and, therefore, the state tried to offer this evidence [of prior disclosure] . . . . [The victim] had clear detail, clear memory and so I think to pile on another version of her statement, it's very prejudicial and I think it's cumulative . . . . It's really important to be clear about bolstering. And so I think, here, when you're allowing . . . the jury to hear twice, once live in person, once on a tape-recorded forensic interview from the same complainant, that really . . . is highly prejudicial. . . .

"[T]here's nothing contained in that forensic interview which was not already testified to by [the victim] in front of this jury. It would simply be a rerun of her testimony, of course without any sort of cross-examination there, and I think . . . its prejudicial impact outweighs its probative value. I don't think it has any probative value. We've heard her testimony." Defense counsel acknowledged, however, that she was unaware of any authority to support the proposition that a forensic interview is not admissible evidence.

Responding to the argument that the evidence was cumulative, the prosecutor argued that the details provided by the victim during the forensic interview differed in some ways from the details provided by the victim during her trial testimony. For example, the prosecutor stated that the victim provided different descriptions of the alleged anal penetration by the defendant.[7]

[7] Despite the many factual similarities, or overlap, between the victim's trial testimony and the victim's forensic interview, our review of these two matters reveals that factual differences do exist. Appellate review of the victim's trial testimony is greatly hampered by the fact that the victim

The prosecutor also responded that the state was seeking the admission of the video under the medical diagnosis and treatment exception to the rule against hearsay.

The court stated that "the record obviously reflects that the [victim] did appear here at this trial and was subject to cross-examination, and the forensic interview will be admitted, and that's going to be admitted under the medical diagnosis and treatment exceptions to the hearsay rule, [Connecticut Code of Evidence § 8-3 (5)], and our existing case law under *State* v. *Griswold*, [160 Conn. App. 528, 127 A.3d 189, cert. denied, 320 Conn. 907, 128 A.3d 952 (2015)]. You know, the purpose of the interview is to minimize trauma so a child doesn't have to repeat allegations to numerous officials such as school officials, [the department], police, et cetera, and it also . . . assesses medical and mental health needs of the particular child, and it also advances and coordinates the prompt investigation of suspected cases of child abuse. So, for those reasons, and no

testified while, for demonstrative purposes, pointing to one or more visual aids depicting the human body. In many instances, however, neither the court nor the prosecutor clarified for the record what part of the human body she was pointing to while testifying. The consequence of that failure is that, at times, the record is ambiguous with respect to the most critical facts of the case, namely, the intimate part or parts of the victim's body with which the defendant had made contact. In the victim's trial testimony, she appears to have described the defendant touching her anus and feeling "a sharp pain inside of [her]" but that she "wasn't sure what it was . . . ." While apparently referring to contact with her vagina, she testified that she believed the contact was painful " 'cause [the defendant] tried to go in" and "[i]t didn't work." The victim did not state what the defendant had used to make contact with her, except that he stated that it was "[h]is thumb."

Unlike the victim's trial testimony, in the victim's forensic interview she added additional details about the defendant's touching of her vagina and anus. Specifically, she stated that, when the defendant was touching "both parts," meaning her vagina and her anus, she "felt something else going inside of me . . . ." The victim also stated that, although the defendant stated that he was using his thumb during the incident, in light of the fact that she felt the defendant's hands on her waist at the time, she believed that it was "[a] man's private."

existing case law to support the defendant's position, I am going to deny the defendant's motion." The video of the forensic interview was admitted into evidence during the testimony of Vidro Madigan.[8]

On appeal, the defendant argues as he did at trial that "[t]he only purpose of the video was to bolster [the victim's] testimony at trial, and it was unnecessary because she testified. Moreover, the prejudicial effect of this evidence greatly outweighed its probative value. By allowing the state to double-team its case in this manner when [the victim's] credibility was crucial to the outcome, the court committed harmful error." The defendant argues that the court summarily rejected the basis of his objection by stating that the video was admissible under the medical treatment and diagnosis exception to the rule against hearsay but failed to address the issue of whether the probative value of the video, if any, was outweighed by its prejudicial effect. The defendant argues that the court failed to analyze the objection raised in that it "automatically" determined that the video was admissible after concluding that it fell within the hearsay exception and, thus, failed to exercise any discretion with respect to the issue of whether the evidence was unduly prejudicial. The defendant argues that, even if the court conducted the proper balancing test, it incorrectly exercised its discretion to admit the video in evidence.

"We review the trial court's decision to admit [or exclude] evidence, if premised on a correct view of the

[8] Later, in the absence of objection by the defendant, the state offered, and the court admitted into evidence, a transcript of the video. The defendant's claim on appeal is limited to the admission of the video but not the transcript. Although we reject the claim that the video was inadmissible and, thus, need not reach the issue of whether the admission of the video amounted to harmful evidentiary error, we observe that the admission of the transcript of the video would pose a significant hurdle to the defendant in attempting to demonstrate that the admission of the video was harmful to him. See footnote 9 of this opinion.

law . . . for an abuse of discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . The trial court has wide discretion to determine the relevancy [and admissibility] of evidence . . . . In order to establish reversible error on an evidentiary impropriety . . . the defendant must prove both an abuse of discretion and a harm that resulted from such abuse." (Citations omitted; internal quotation marks omitted.) *State* v. *Cecil J.*, 291 Conn. 813, 818–19, 970 A.2d 710 (2009).[9]

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." Conn. Code Evid. § 4-1. Irrelevant evidence is inadmissible and, unless there is a basis in law for its exclusion, "[a]ll relevant evidence is admissible . . . ." Conn. Code Evid. § 4-2. "Relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice . . . or by considerations of . . . needless presentation of cumulative evidence." Conn. Code Evid. § 4-3. "Of course, [a]ll adverse evidence is

[9] "When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [W]hether [an improper ruling] is harmless in a particular case depends [on] a number of factors, such as the importance of the . . . testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the . . . evidence on the trier of fact and the result of the trial. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Ayala*, 333 Conn. 225, 231–32, 215 A.3d 116 (2019).

damaging to one's case, but it is inadmissible only if it creates undue prejudice so that it threatens an injustice were it to be admitted. . . . The test for determining whether evidence is unduly prejudicial is not whether it is damaging to the defendant but whether it will improperly arouse the emotions of the [jurors]." (Internal quotation marks omitted.) *State* v. *Wilson*, 308 Conn. 412, 429–30, 64 A.3d 91 (2013).

"By cumulative evidence is meant additional evidence of the same general character, to the same fact or point which was the subject of proof before." *Waller* v. *Graves*, 20 Conn. 305, 310 (1850). "In excluding evidence on the ground that it would be only cumulative, care must be taken *not* to exclude merely because of an *overlap* with evidence previously received. To the extent that evidence presents new matter, it is obviously not cumulative with evidence previously received." (Emphasis in original; internal quotation marks omitted.) *State* v. *Parris*, 219 Conn. 283, 293, 592 A.2d 943 (1991).

Preliminarily, we reject the defendant's contention that the court, having concluded that the video was admissible under the medical diagnosis and treatment exception to the rule against hearsay; see Conn. Code Evid. § 8-3 (5); "summarily reject[ed]" his argument that the video should be excluded because it was unduly prejudicial and cumulative. The record reflects that the court, in its oral ruling, did not specifically address the defendant's arguments that the video, although admissible under a well established exception to the rule against hearsay, should be excluded because it was unduly prejudicial and cumulative. Instead, the court explicitly stated that the evidence fell within the hearsay objection. The court, however, also used broad language that suggests that it had considered and rejected the specific grounds of the defendant's objection by

stating that it was unable to identify "existing case law to support the defendant's position . . . ."

Thus, the court's oral ruling does not unambiguously reflect whether it exercised its discretion and considered the grounds raised in the defendant's objection. Nonetheless, our review of the relevant portion of the transcript of the trial proceedings does not suggest that the court failed to consider both of these grounds and did not exercise its discretion. "In the discretionary realm, it is improper for the trial court to fail to exercise its discretion." *State* v. *Lee*, 229 Conn. 60, 73–74, 640 A.2d 553 (1994). Although the court did not explicitly refer to these grounds, there is nothing in the court's statements to indicate that it erroneously believed that it lacked the discretion to exclude the evidence at issue. Cf. id. (record reflects that trial court's evidentiary ruling was result of mistaken belief that evidence was categorically inadmissible); *State* v. *Martin*, 201 Conn. 74, 88–89, 513 A.2d 116 (1986) (record reflects that trial court's evidentiary ruling was result of expressed belief that it lacked discretion to preclude evidence). In light of the foregoing and in conformity with our precedent, we will not presume error in the court's analysis but instead presume that the court properly exercised its discretion and considered the merits of the objection raised. "In Connecticut, our appellate courts do not presume error on the part of the trial court. . . . Rather, the burden rests with the appellant to demonstrate reversible error." (Internal quotation marks omitted.) *Pettiford* v. *State*, 179 Conn. App. 246, 260–61, 178 A.3d 1126, cert. denied, 328 Conn. 919, 180 A.3d 964 (2018).

We now turn to the merits of the evidentiary claim. We readily conclude that the forensic interview of the victim by Vidro Madigan was relevant. Therein, the victim described in detail the incident giving rise to the offenses with which the defendant was charged. The

defendant does not argue that the video lacked probative value because it did not tend to make it more or less probable that the defendant committed one or more of the charged offenses. Instead, the defendant argues that "[t]he video had little, if any, probative value because [the victim], who was fourteen years old at the time of trial, testified without hesitation and gave a complete recounting of her allegations. She did not seem confused or uncertain about any of the details and did not claim she could not remember them." These arguments lead us to observe that the defendant improperly conflates what is relevant evidence and what is cumulative evidence.

The victim's forensic interview was highly probative with respect to the defendant's conduct during the incident in which he made contact with her vagina and anus.[10] The defendant was charged with two counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1). One count was premised on the allegation that the defendant forcibly engaged in penile-vaginal intercourse with the victim, and one count was premised on the allegation that the defendant forcibly engaged in penile-anal intercourse with the victim.

Section 53a-70 (a) provides in relevant part: "A person is guilty of sexual assault in the first degree when such person (1) compels another person to engage in sexual intercourse by the use of force against such other person or a third person, or by the threat of use of force against such other person or against a third person which reasonably causes such person to fear physical injury to such person or a third person . . . ." "'Sexual intercourse' means vaginal intercourse, anal intercourse, fellatio or cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient

[10] See footnote 7 of this opinion.

to complete vaginal intercourse, anal intercourse or fellatio and does not require emission of semen. Penetration may be committed by an object manipulated by the actor into the genital or anal opening of the victim's body." General Statutes § 53a-65 (2). The victim's statement in the forensic interview that she felt something "inside" of her vagina and anus made it more likely that penetration of the vagina and anus had occurred.

Moreover, the state charged the defendant with risk of injury to a child in violation of § 53-21 (a), which provides in relevant part: "Any person who . . . (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of . . . (B) a class B felony for a violation of subdivision (2) of this subsection, except that, if the violation is of subdivision (2) of this subsection and the victim of the offense is under thirteen years of age, such person shall be sentenced to a term of imprisonment of which five years of the sentence imposed may not be suspended or reduced by the court." This charged offense required the state to prove not only that intimate contact with the victim's intimate parts occurred but that it occurred in a sexual and indecent manner likely to impair the health or morals of the victim. The victim's forensic interview provided additional insight into the manner in which the intimate contact with her private parts occurred, specifically, her belief that she felt "[a] man's private" make contact with her private parts. This additional detail made it more likely that the defendant used his penis during the incident. This, in turn, made it more likely that the intimate contact not only occurred in a sexual and indecent manner but that it was likely to impair the victim's health or morals. Accordingly, we are not

persuaded that the evidence was irrelevant or that it should have been excluded because it was cumulative. Indeed, we conclude that the evidence was highly probative.

Having discussed the considerable probative value of the video of the forensic interview, we now consider the defendant's argument that its probative value was outweighed by the risk of undue prejudice to the defense. The defendant posits that the danger of prejudice arose from the fact that the video improperly bolstered the victim's testimony because it essentially constituted constancy of accusation evidence, the video placed an undue emphasis on her testimony, and the video unduly aroused the jurors' sympathy for the victim. We disagree with these contentions.

The defendant's attempt, for the first time on appeal, to recast the video as constancy of accusation evidence is unavailing. The state did not offer the video as constancy of accusation evidence. The state argued that the video was admissible under the medical diagnosis and treatment exception to the rule against hearsay; see Conn. Code Evid. § 8-3 (5); and because it provided additional details to the manner in which the contact at issue occurred. The defendant agreed at trial, and does not dispute on appeal, that the video fell within the hearsay exception. The evidence consisted of the victim's own statements to a medical provider, not the statements of multiple third parties to whom she disclosed abuse. The court admitted the video without limitation. Thus, it was admitted for substantive purposes instead of merely being corroborative of the credibility of the victim, which is the sole proper use of constancy of accusation testimony. See, e.g., *State* v. *Daniel W. E.*, 322 Conn. 593, 612–13, 142 A.3d 265 (2016) (discussing limited purpose for which constancy of accusation testimony should be considered).

Moreover, the defendant did not suggest, as he does on appeal, that the videotaped forensic interview, which occurred in March, 2016, was generated merely to prepare the victim for the trial that occurred more than two years later. The defendant's suggestion that the interview was essentially manufactured by the prosecutor for use at trial lacks any factual basis. The forensic interview was conducted by a clinical social worker, and the video did not contain the opinions of expert witnesses about the victim's credibility or statements of third parties to whom the victim disclosed abuse.[11] We are not persuaded that the video unfairly bolstered the victim's credibility.

Next, the defendant argues that the video was unduly prejudicial in that it placed an improper emphasis on the victim's testimony by permitting the victim to testify twice, once as a witness and once by means of the video. The defendant relies on *State* v. *Gould*, 241 Conn. 1, 9–15, 695 A.2d 1022 (1997), in which the state was permitted to present at trial the videotaped testimony of a state's witness, who, for health reasons, could not be present in court to testify. Id., 10. During the jury's deliberations, it requested to view the videotaped testimony in the jury room. Id., 11. The court granted the request. Id. On appeal, the defendants in *Gould* claimed that it was improper for the court to have granted the request to replay the videotaped testimony in the jury room, outside of the court's supervision, and that they

[11] The defendant argues that, in the video, Vidro Madigan enhanced the victim's credibility because she indicated to the victim that she believed her allegations. Although, in the video, Vidro Madigan made statements to the victim that could be interpreted as expressions of belief in the victim's statements, we are not persuaded that the jury would have interpreted such statements accordingly. During her testimony, Vidro Madigan explained the techniques that she used in conducting a forensic interview, which included building a rapport with the children she interviewed and making them comfortable so that they can answer questions in a narrative style. Vidro Madigan testified, however, that making a determination as to whether or not the child has made truthful statements was not a part of her job.

were prejudiced by the court's ruling because it "unduly emphasized" the witness' testimony, essentially permitting the witness to testify twice. Id., 12.

Our Supreme Court rejected the argument that the rules of practice prohibited the trial court from permitting the replay of the videotaped testimony in the jury room. See id. The court determined that the ruling did not reflect an abuse of the trial court's discretion because "the most reliable means for the jury to review [the witness'] testimony was to view the videotape." Id., 13. Our Supreme Court, however, exercised its supervisory authority over the administration of justice to require that, "[w]here a court decides, pursuant to that court's sound discretion, that the jury should be permitted to replay videotaped deposition testimony, it must be done in open court under the supervision of the trial judge and in the presence of the parties and their counsel." Id., 15. Our Supreme Court, in concluding that the ruling was not improper, nonetheless noted that the defendants had raised valid concerns that might have existed in other cases in which a danger existed that a jury might have given undue weight to the videotaped testimony of a witness over that witness' in-court testimony. See id., 14.[12]

The court's concern in *Gould* centered on the jury's unsupervised use of videotaped testimony during its deliberations. The court, in the exercise of its supervisory authority, did not prohibit the admission of videotaped forensic interviews. It required that, when a trial court permits a jury to replay videotaped deposition testimony, it must be done in open court under the

[12] The court in *Gould*, having exercised its supervisory authority, also noted that "[the witness] was not the victim of the crimes in this case and her videotaped testimony, which we have reviewed, does not engender the passion, animation or sympathy presented in the videotapes of child victims of sexual abuse." *State* v. *Gould*, supra, 241 Conn. 14. Although the defendant relies on this small portion of the court's analysis, we do not interpret it to be integral to its holding in *Gould* or a rule of admissibility.

supervision of the trial judge and in the presence of the parties and their counsel. Id., 15. The defendant's claim in the present case concerns the admissibility of the videotaped forensic interview; the defendant has not raised a claim of error related to the jury's unsupervised use of the videotaped forensic interview in the jury room. Thus, we are not persuaded that *Gould* supports his claim of undue prejudice.

Finally, the defendant argues that the video was unduly prejudicial because it generated sympathy for the victim. Specifically, the defendant claims that statements made by Vidro Madigan during her questioning of the victim engendered feelings of sympathy for the victim because Vidro Madigan expressed feelings of empathy to the victim. Vidro Madigan testified that her duties as a clinical social worker did not include making a determination as to the credibility of the victim's allegations. See footnote 11 of this opinion. Thus, it is likely that the jury would have interpreted any statements that suggested empathy to have reflected Vidro Madigan's effort to build a rapport with the victim during the interview, not a genuine belief by Vidro Madigan that the victim was being truthful or a belief that she had actually suffered any abuse at the hands of the defendant.

The defendant also relies on the fact that the video depicted the victim, aged twelve, discussing the details of her allegations of sexual abuse with "a stranger," and that the victim made some comments in the video, but not in her live testimony, that would have generated sympathy for her. These comments by the victim included a description of a picture that she drew of a flower that represented her and her mother, multiple references to the defendant having "forced [her] to have sex with him," and an expressed preference in favor of living with her grandmother because her grandmother did not beat her.

At the time of trial, the victim was fourteen years of age and in the eighth grade. The victim was examined and cross-examined at length in open court about the allegations of sexual abuse. We are not persuaded that the mere fact that she discussed her allegations at age twelve with Vidro Madigan was likely to cause any additional feelings of sympathy in the eyes of the jurors than would the fact that she endured testifying at trial. Moreover, we recognize that the victim's statements to Vidro Madigan at age twelve were not identical to her trial testimony. To the extent that she used different language at the trial, however, to describe the allegations and her relationship with the defendant, the statements were not so different in nature that they were likely to engender strong feelings of sympathy over those that may have been engendered by the victim's trial testimony.

"To be unfairly prejudicial, evidence must be likely to cause *a disproportionate emotional response in the* [*jurors*], thereby threatening to overwhelm [*their*] neutrality and rationality to the detriment of the opposing party. . . . A mere adverse effect on the party opposing admission of the evidence is insufficient. . . . Evidence is prejudicial when it tends to have some adverse effect [on] a defendant beyond tending to prove the fact or issue that justified its admission into evidence." (Emphasis added; internal quotation marks omitted.) *State* v. *Miguel C.*, 305 Conn. 562, 575–76, 46 A.3d 126 (2012). In substance, the victim, in her trial testimony and during her forensic interview, described the fact that she made a drawing depicting her and her mother, the fact that the defendant forced her to submit to the sexual contact that occurred in her bedroom, and the fact that the defendant beat her. Thus, the video did not introduce facts that were of a materially different nature than those introduced during the trial, and, thus,

we are not persuaded that the differences in facts, to the extent they existed, unduly prejudiced the defendant.

For the foregoing reasons, we conclude that the court's admission of the videotaped forensic interview of the victim did not reflect an abuse of its discretion.

III

Next, the defendant claims that the trial court violated his rights to due process, to a fair and impartial trial, and to be convicted by means of a unanimous verdict because the deadlocked jury instructions the court provided to the jury were coercive and misleading. We disagree.

The following additional facts are relevant to this claim. The jury deliberated over the course of four days. On the third day of jury deliberations, the jury sent the court a note, stating: "At this time, the jury is not unanimous on any of the three charges. It does not appear this will change with additional deliberation time." Outside of the jury's presence, the court discussed the note with counsel. The court noted that it was prepared to deliver to the jury deadlocked jury instructions, also known as "Chip Smith" instructions.[13] The court stated that it would use the model jury instructions on the Judicial Branch website that pertain to deadlocked juries. See Connecticut Criminal Jury Instructions 2.10-4, available at https://www.jud.ct.gov/JI/Criminal/Criminal.pdf (last visited December 21, 2021). Defense counsel submitted a written request that the court instruct the jury with *some* of the language from the instructions found on the Judicial Branch website but with added language at the beginning of the instructions to clarify that *the jury need not reach a*

[13] A "Chip Smith" charge provides guidance to a deadlocked jury in reaching a verdict. See, e.g., *State* v. *O'Neil*, 261 Conn. 49, 74–75, 801 A.2d 730 (2002).

verdict. The language in the first paragraph of the defendant's requested instructions forms the basis of the present claim.[14] Defense counsel addressed the court, noting that, if a unanimous verdict was not possible, the jury should be informed that its failure to reach a verdict was "a perfectly proper outcome." The court noted that it had considered the defendant's request but that it would deliver the model instructions from the Judicial Branch website.[15] After the court delivered

[14] The defendant requested the following instruction: "Ladies and gentlemen, I have received your note and will now have some further instructions for you at this time. At the outset, let me make it clear to you that it is not the purpose of these instructions to require or even suggest that you reach a verdict in this case. I in no way wish to suggest or imply that a verdict should or could be reached in this case; in fact, our legal system recognizes the right of jurors not to agree. I do think, however, that the following instructions may be of aid to you if, in fact, a verdict can be reached.

"The verdict to which each of you agrees must express your own conclusion and not merely the acquiescence on the conclusion of your fellow jurors. Yet, in order to bring your minds to a unanimous result, you should consider the question you have to decide not only carefully but also with due regard and deference to the opinions of each other.

"In conferring together, you ought to pay proper respect to each other's opinions and listen with an open mind to each other's arguments. If the much greater number of you reach a certain conclusion, dissenting jurors should consider whether their opinion is a reasonable one when the evidence does not lend itself to a similar result in the minds of so many of you who are equally honest and equally intelligent, who have heard the same evidence with an equal desire to arrive at the truth and under the sanctions of the same oath.

"But please remember this: Do not ever change your mind just because other jurors see things differently or to get the case over with. As I told you before, in the end, your vote must be exactly that—your own vote. As important as it may be for you to reach a unanimous agreement, it is just as important that you do so honestly and in good conscience.

"I now ask you to resume your deliberations with these instructions in mind." (Emphasis in original.)

[15] The court instructed the jury as follows: "Ladies and gentlemen, I'm now going to give you an additional charge, and this charge is when the jury fails to agree. And here is the charge. The instruction[s] that I shall give you now are only to provide you with additional information so that you may return to your deliberations and see whether you can arrive at a verdict. Along these lines, I would like to state the following to you:

"The verdict to which each of you agree must express your own conclusion and not merely acquiesce in the conclusion of your fellow jurors, yet in order to bring your minds to [a] unanimous result, you should consider the

its instructions, defense counsel reiterated that the defendant not only objected to the court's failure to instruct the jury in accordance with the first paragraph of his requested instructions but that the defendant also objected to the last paragraph of the court's instructions. Defense counsel argued that the last paragraph of the court's instructions suggested that the jury *should* agree on a verdict, and, thus, it was unduly coercive in nature. The court noted the objection. The following day, the jury returned a verdict. At the defendant's request, each member of the jury was individually polled, and each juror indicated that he or she agreed with the verdict.

On appeal, the defendant argues that, "[u]nlike the standard instruction [delivered by the court], the proposed instruction made it clear the jurors had the right not to agree and that the court was not suggesting a verdict had to be reached. Under the circumstances of this case, where, after three days of deliberating the jurors indicated further deliberations would not be fruitful, the verdict was the result of an impermissibly coercive and misleading instruction." The defendant acknowledges that the instruction that the court delivered to

question you have to decide, not only carefully, but also with due regard and deference to the opinions of each other.

"In conferring together, you ought to pay proper respect to each other's opinions and listen with an open mind to each other's arguments. If the much greater number of you reach a certain conclusion, dissenting jurors should consider whether their opinion is a reasonable one when the evidence does not lend itself to a similar result in the minds of so many of you who are equally honest and equally intelligent, who have heard the same evidence with an equal desire to arrive at the truth, and under the sanction of the same oath.

"But please remember this, do not ever change your mind just because other jurors see things differently or to get the case over with. As I told you before, in the end, your vote must be exactly that, your own vote. As important as it is for you to reach a unanimous agreement, it is just as important that you do so honestly and in good conscience.

"What I have said to you is not intended to rush you into agreeing on a verdict. Take as much time as you need to discuss this matter. There is no hurry. So with that, you will continue your deliberations. Thank you."

the jury has survived prior judicial scrutiny yet asserts that "there was no reason for the court to reject [his] proposed instruction, which was a more balanced instruction that accurately stated the law." The defendant argues that, because the possibility of a hung jury is a consequence of the unanimity requirement, a court sends the wrong message when it suggests that the jury's inability to reach a verdict is not an acceptable outcome of its deliberations. The defendant argues that "the court's instructions misled the jurors by giving them the unwarranted impression that a verdict was required. . . . [T]he court's instructions simply told them *how* they should continue to deliberate in order to arrive at a verdict, and not that it was permissible for them not to deliver a verdict." (Emphasis in original.)

The defendant adequately preserved his claim that the court's instructions were impermissibly coercive. Because this presents an issue of law, we review the instructions under a plenary standard of review. See, e.g., *State* v. *Carrasquillo*, 191 Conn. App. 665, 680, 216 A.3d 782, cert. denied, 333 Conn. 930, 218 A.3d 69 (2019).

"The possibility of disagreement by the jury is implicit in the requirement of an unanimous verdict and is part of the constitutional safeguard of trial by jury." (Internal quotation marks omitted.) *State* v. *Stankowski*, 184 Conn. 121, 147, 439 A.2d 918, cert. denied, 454 U.S. 1052, 102 S. Ct. 596, 70 L. Ed. 2d 588 (1981). We are mindful that "[a] jury that is coerced in its deliberations deprives the defendant of his right to a fair trial under the sixth and fourteenth amendments to the federal constitution, and article first, § 8, of the state constitution. Whether a jury [was] coerced by statements of the trial judge is to be determined by an examination of the record. . . . The question is whether in the context and under the circumstances in which the statements were made, the jury [was], actually, or even probably, misled or coerced . . . . *We recognize that a defendant is not entitled to*

an instruction that a jury may hang . . . [but] he is entitled to a jury unfettered by an order to decide." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Carrasquillo*, supra, 191 Conn. App. 680. Stated otherwise, in evaluating whether coercion occurred, we do not merely examine the content of the court's instructions but "the context and . . . circumstances in which they were given . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Daley*, 161 Conn. App. 861, 878, 129 A.3d 190 (2015), cert. denied, 320 Conn. 919, 132 A.3d 1093 (2016).

"It is well settled that a Chip Smith charge is an acceptable method of assisting the jury to achieve unanimity. . . . The purpose of the instruction is to prevent a hung jury by urging the jurors to attempt to reach agreement. It is a settled part of Connecticut jurisprudence . . . . Better than any other statement . . . it makes clear the necessity, on the one hand, of unanimity among the jurors in any verdict, and on the other hand the duty of careful consideration by each juror of the views and opinions of each of his fellow jurors . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Feliciano*, 256 Conn. 429, 439, 778 A.2d 812 (2001). "The language of the charge does not direct a verdict, but encourages it." Id., 440.

The trial court's instructions mirrored the deadlocked jury instructions crafted by our Supreme Court in *State* v. *O'Neil*, 261 Conn. 49, 74–75, 801 A.2d 730 (2002). Our Supreme Court affirmed the instructions "as an acceptable method of encouraging a deadlocked jury to reach a verdict." Id., 75. As the defendant correctly observes, the use of the deadlocked jury instruction set forth in *O'Neil* has been upheld in numerous appellate decisions. In the present case, the defendant asked the court to instruct the jury that it "in no way wish[ed] to suggest or imply *that a verdict should or could be reached in this case* . . . ." (Emphasis added.) See

footnote 14 of this opinion. This requested instruction condoned a hung jury. Both this court and our Supreme Court have expressly stated that a defendant is not entitled to an instruction of this nature. See, e.g., *State* v. *Breton*, 235 Conn. 206, 239, 663 A.2d 1026 (1995); *State* v. *Peary*, 176 Conn. 170, 184, 405 A.2d 626 (1978), cert. denied, 441 U.S. 966, 99 S. Ct. 2417, 60 L. Ed. 2d 1072 (1979); *State* v. *Ralls*, 167 Conn. 408, 421, 356 A.2d 147 (1974), overruled on other grounds by *State* v. *Rutan*, 194 Conn. 438, 479 A.2d 1209 (1984); *State* v. *Carrasquillo*, supra, 191 Conn. App. 680; *State* v. *Spyke*, 68 Conn. App. 97, 116, 792 A.2d 93, cert. denied, 261 Conn. 909, 804 A.2d 214 (2002). We reject the defendant's invitation to conclude that the model instructions used in the present case were not an acceptable method of encouraging a deadlocked jury to reach a verdict. As an intermediate court of appeal, we are unable to overrule, reevaluate, or reexamine the propriety of the instruction that has been bestowed by our Supreme Court. See *State* v. *Carrasquillo*, supra, 683.

Moreover, setting aside the *content* of the court's instructions, contrary to the defendant's arguments, there is nothing concerning the *context and circumstances* in which the court delivered its deadlocked jury instructions that leads us to conclude that the use of the instructions in the present case was coercive. The defendant focuses on the fact that, when the jury sent the note to the court, it had already deliberated over the course of three days. During these three days, the jury had requested playback of the victim's forensic interview, the victim's testimony, and B's testimony. As noted previously in this opinion, in its note, the jury expressed its belief that additional deliberation time would not lead to a unanimous verdict. The fact that the jury had engaged in deliberations and requested playback of some of the testimony and evidence prior to sending the note merely reflected, at most, that the

jury was fulfilling its duty of carefully considering the evidence. The jury's note, the first and only time that it communicated with the court with respect to an impasse, and the jury's belief that additional deliberation time would not be fruitful, did not make the court's instructions coercive. The note did not refer to hostility among jurors, any indication that jurors had not followed their juror oaths, or any indication that one or more jurors would not continue to follow their juror oaths following additional instruction. Nothing in the context or circumstances made the instructions coercive. Stated otherwise, the defendant has not drawn a meaningful distinction between the circumstances of the present case and any other case in which a jury had expressed its belief that it was unable to reach a unanimous verdict, thereby prompting the court to deliver deadlocked jury instructions.[16]

Finally, we address the defendant's argument that, "[i]ndeed, the split verdict, which cannot be reconciled with the evidence, signifies there was coercion and that the jurors rendered a compromise verdict because they felt they had no other choice but to agree." Setting aside the issue of whether the split verdict may be reconciled with the evidence, the defendant's attempt to use the split verdict as evidence of coercion is unavailing. As this court has observed, "in the context of a coerciveness claim, a verdict of not guilty with respect to one or more counts does not necessarily shed light on the source of the jury's disagreement or whether the verdict of one or more jurors was the result of coercion rather than conscience." *State* v. *Carrasquillo*, supra, 191 Conn. App. 689–90 n.12.

[16] The defendant also argues that the fact that the jury reached a verdict following the court's instructions "indicates the instruction coerced a verdict." Thus, the defendant appears to suggest that any verdict that follows deadlocked jury instructions ipso facto is the product of coercion.

For the foregoing reasons, we are not persuaded that the court's deadlocked jury instructions were coercive. Thus, the defendant has failed to establish the basis for his claim that the court violated his rights to due process, to a fair and impartial trial, and to be convicted by means of a unanimous verdict.

IV

Finally, the defendant claims that this court, in the exercise of its supervisory authority over the administration of justice, should require trial courts, when delivering deadlocked jury instructions, to instruct the jury that it need not reach a verdict and that jurors have the right to disagree with respect to the proper verdict. We decline to exercise our supervisory authority.

Consistent with the defendant's third claim, he argues that the specific language he sought in his requested instructions is "warranted to protect the defendant's due process rights and right of trial by jury, and to ensure that the jury is not coerced into reaching a verdict." According to the defendant, "[b]ecause the purpose of giving a Chip Smith instruction is to urge jurors to return a verdict . . . there ought to be some language, similar to what [he] proposed, to cure the unevenness of the instruction." (Citation omitted.) The defendant argues that the well established instructions used by the court in the present case did not "avoid the problem of jurors feeling that they must abandon their beliefs because a verdict is required."

The defendant argues that the court's instructions gave precedence to the state's right to obtain a verdict over his right not to be convicted of a crime in the absence of proof beyond a reasonable doubt. The defendant argues that the need for change in the deadlocked jury instructions is demonstrated by the fact that the jury, having represented that it was deadlocked, returned a verdict in the present case after the court

delivered the instructions. He also argues that the jury's verdict represented a "paradoxical split verdict [that] can only be the result of the coercive instruction given by the court."[17]

"It is well settled that [a]ppellate courts possess an inherent supervisory authority over the administration of justice. . . . Supervisory powers are exercised to direct trial courts to adopt judicial procedures that will address matters that are of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole. . . . Under our supervisory authority, we have adopted rules intended to guide the lower courts in the administration of justice in all aspects of the criminal process. . . . The exercise of our supervisory powers is an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole. . . . Indeed, there is no principle that would bar us from exercising our supervisory authority to craft a remedy that might extend beyond the constitutional minimum because articulating a rule of policy and reversing a conviction under our supervisory powers is perfectly in line with the general principle that this court ordinarily invoke[s] [its] supervisory powers to enunciate a rule that is not constitutionally required but that [it] think[s] is preferable as a matter of policy." (Citations omitted; internal quotation marks omitted.) *State* v. *Elson*, 311 Conn. 726, 764–65, 91 A.3d 862 (2014).

We decline to exercise our supervisory authority in the present case. In *State* v. *O'Neil*, supra, 261 Conn.

[17] The defendant also refers to model jury instructions in other jurisdictions that, in his view, comport with the language in his requested instructions and make clear that the jury has a right not to agree on a unanimous verdict.

74–75, our Supreme Court, in the exercise of its supervisory authority, crafted the deadlocked jury instructions that have become Connecticut's model instructions and were delivered by the court in the present case. Our Supreme Court exercised its supervisory authority because "jurors should be reminded not to acquiesce in the conclusion of their fellow jurors merely for the sake of arriving at a unanimous verdict." Id., 74. Our Supreme Court explained that it did "not find the language directed at minority view jurors unduly coercive, especially in light of the balancing language reminding jurors not to abandon their conscientiously held beliefs. On the contrary, we believe that the version of the charge that we adopt today for our trial courts most appropriately balances the systemic interest in a unanimous verdict and the defendant's right to have each and every juror vote his or her conscience irrespective of whether such vote results in a hung jury." Id., 75–76. Because our Supreme Court has explicitly addressed the issue of what instructions are proper, it would be inappropriate for this court to overrule, reevaluate, or reexamine the propriety of the instructions. See *State* v. *Carrasquillo*, supra, 191 Conn. App. 683.

The judgment is affirmed.

In this opinion the other judges concurred.

OCWEN LOAN SERVICING, LLC *v.* MICHAEL A. MORDECAI ET AL.
(AC 43295)

Prescott, Alexander and Suarez, Js.

Syllabus

In 2011, the plaintiff, O Co., sought to foreclose a mortgage on certain real property owned by the defendants, and thereafter filed a motion to substitute N Co. as the plaintiff. In 2017, N Co. filed a motion for summary judgment as to liability only as to its amended complaint. Soon thereafter, N Co. assigned the mortgage to W Co., and filed a motion to substitute W Co. as the plaintiff, which the court granted. For several months, the parties engaged in discovery and litigated discovery disputes, including W Co.'s inability to locate and produce loan payment history records for a period of more than two years. While discovery objections were still outstanding, W Co. reclaimed the motion for summary judgment in 2018. Subsequently, the trial court ordered W Co. to provide additional discovery regarding its search efforts to locate the missing loan payment records. After the completion of discovery, the defendants filed a request to amend their answer and special defenses, which contained seven special defenses to address the incomplete payment records and related issues regarding changes in the amount of escrow payments. The defendants also submitted a caseflow request for a continuance to respond to W Co.'s motion for summary judgment until after the court ruled on their request to amend, arguing, in relevant part, that the amended special defenses, if granted, would have direct significance on the motion for summary judgment, and, therefore, should be considered first. The court, however, denied the requested continuance. W Co. filed an objection to the defendants' request to amend, claiming that the defendants' counsel sought to delay the case, which the court sustained, and thereafter denied the defendants' request to amend without explanation or analysis. In 2019, W Co. filed a reply to the defendants' original special defenses and a certificate of closed pleadings. The court granted W Co.'s motion for summary judgment, finding that no genuine issues of material fact existed as to liability on the note and mortgage, but provided no legal analysis. Thereafter, the court rendered a judgment of strict foreclosure in favor of W Co., from which the defendants appealed to this court. *Held* that the trial court's denial of the defendants' request to amend their answer and special defenses constituted an abuse of discretion: the court failed to provide a sound reason for denying the defendants' request as the granting of the amendment would not have unduly delayed trial or unfairly prejudiced W Co. in light of the facts that the proposed amendment was filed prior to W Co.'s certificate of closed pleadings, the motion for summary judgment had languished on

the docket for a significant period of time without being claimed for a hearing by W Co., and no trial date had been scheduled; moreover, it was appropriate procedurally and as a matter of legal strategy for the defendants to wait until discovery was completed as the missing information could have been relevant to the defendants' theory of defense where such discovery related to the amount of the debt owed and the issue of default; furthermore, although the case had been pending for a significant period of time, some of that delay was attributable to W Co. or to its predecessors in interest and nothing in the record supported a finding that the defendants engaged in unreasonable or purely dilatory behavior in defending the foreclosure action; additionally, the defendants sought to have the trial court articulate the factual and/or legal basis for its decision to disallow the amendment but were thwarted in their efforts by the unavailability of the trial judge; accordingly, the trial court's error in failing to allow the defendants to amend their answer and special defenses required the reversal of the court's granting of the motion for summary judgment as to liability and the judgment of strict foreclosure because such judgment was rendered in part on the summary determination of liability.

Argued September 16—officially released December 28, 2021

Procedural History

Action to foreclose a mortgage on certain real property of the defendants, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where Wilmington Savings Fund Society, F.S.B., was substituted as the plaintiff; thereafter, the court, *Bruno*, *J.*, denied the defendants' request to amend their answer and special defenses; subsequently, the court, *Bruno*, *J.*, granted the substitute plaintiff's motion for summary judgment as to liability only; thereafter, the court, *Bruno*, *J.*, rendered judgment of strict foreclosure, from which the defendants appealed to this court. *Reversed; further proceedings.*

Jeremy E. Baver, for the appellants (defendants).

Christopher J. Picard, for the appellee (plaintiff).

Opinion

PRESCOTT, J. The defendants, Michael A. Mordecai and Elizabeth M. Keyser, appeal from the judgment of

strict foreclosure rendered by the trial court in favor of the substitute plaintiff Wilmington Savings Fund Society, F.S.B., D/B/A Christiana Trust, not individually but as trustee for Pretium Mortgage Acquisition Trust (Wilmington).[1] The defendants claim that the court (1) abused its discretion by denying their request to amend their special defenses, (2) improperly granted summary judgment as to liability because a genuine issue of material fact existed regarding whether they had defaulted on the note, and (3) misapplied Practice Book § 23-18 (a)[2] in rendering a judgment of strict foreclosure because they had asserted a defense regarding the amount of the debt owed. We agree with the defendants that the court abused its discretion by not allowing them to amend their special defenses and, consequently, also improperly granted the motion for summary judgment as to liability and rendered a judgment of strict foreclosure without due consideration of those defenses.[3] Accordingly, we reverse the judgment of the court and remand for further proceedings consistent with this opinion.

The record reveals the following relevant undisputed facts and procedural history. In 2007, the defendants

[1] The original plaintiff, Ocwen Loan Servicing, LLC, assigned the subject mortgage deed to Nationstar Mortgage, LLC (Nationstar). Nationstar later was substituted as the plaintiff. Nationstar subsequently assigned the mortgage to Wilmington, which was substituted as the plaintiff for Nationstar. In this opinion, for clarity purposes, we refer to the original plaintiff and the substitute plaintiffs by name.

[2] Practice Book § 23-18 (a) provides: "In any action to foreclose a mortgage *where no defense as to the amount of the mortgage debt is interposed*, such debt may be proved by presenting to the judicial authority the original note and mortgage, together with the affidavit of the plaintiff or other person familiar with the indebtedness, stating what amount, including interest to the date of the hearing, is due, and that there is no setoff or counterclaim thereto." (Emphasis added.)

[3] Because we reverse the granting of the motion for summary judgment as to liability and the resulting judgment of strict foreclosure on the ground that the court improperly failed to allow the defendants to amend their special defenses, it is unnecessary to reach the other claims of error raised by the defendants.

purchased residential property in Fairfield. They executed a promissory note in favor of Taylor, Bean & Whitaker Mortgage Corporation (TB&W) in the principal amount of $340,000 (note). As security for the note, the defendants executed a mortgage on the Fairfield property in favor of Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for TB&W (mortgage).[4] TB&W later endorsed the note in blank.

In August, 2011, Ocwen Loan Servicing, LLC (Ocwen), as successor in interest to TB&W, commenced the underlying mortgage foreclosure action. In its complaint, Ocwen alleged that the mortgage had been "assigned to [it] by virtue of an assignment of mortgage," and that it was "the holder of [the] note and mortgage." Ocwen further alleged that the note was in default and that it had elected to accelerate the balance due on the note, declare the note due in full, and foreclose the mortgage securing the note.

For more than four years, the parties participated in court-sponsored foreclosure mediation.[5] The defendants, however, were unable to obtain a loan modification, and the mediation was terminated by order of the court on January 22, 2016.

[4] "MERS acts as the nominal mortgagee for the loans owned by its members . . . which include originators, lenders, servicers, and investors . . . . [If a] member transfers an interest in a mortgage loan to another MERS member, MERS privately tracks the assignment within its system but remains the mortgagee of record. According to MERS, this system saves lenders time and money, and reduces paperwork, by eliminating the need to prepare and record assignments when trading loans. . . . If, on the other hand, a MERS member transfers an interest in a mortgage loan to a non-MERS member, MERS no longer acts as the mortgagee of record and an assignment of the security instrument to the non-MERS member is drafted, executed, and typically recorded in the local land recording office." (Internal quotation marks omitted.) *Equity One, Inc.* v. *Shivers*, 310 Conn. 119, 122 n.1, 74 A.3d 1225 (2013).

[5] During the pendency of mediation, "[a] litigation hold is placed on the case, during which time a mortgagee is prohibited from making any motion, request or demand of a mortgagor, except as it may relate to the mediation program; General Statutes § 49-31*l* (c) (6); and no judgment of strict foreclosure or foreclosure by sale may be rendered against the mortgagor during

On April 11, 2016, Ocwen filed a motion to default the defendants for failure to plead. It also filed a demand for a disclosure of defenses. The clerk initially granted the motion for default. That same day, however, the defendants filed a disclosure of defenses and a request to revise the complaint. As a result, the clerk vacated the default against the defendants. One of the revisions sought by the defendants was for Ocwen to provide more factual details regarding its allegation that it currently was the holder of the note. Ocwen filed an objection, which the court sustained.

Soon thereafter, however, Ocwen filed a motion to substitute Nationstar Mortgage, LLC (Nationstar), as the plaintiff. Ocwen stated in its motion that it had assigned the subject mortgage deed and note to Nationstar. Attached to the motion to substitute was a copy of a page from the Fairfield land records showing that an assignment of mortgage from Ocwen to Nationstar had been executed on October 29, 2013, and subsequently recorded on November 18, 2013.[6] The defendants objected to the substitution, arguing, inter alia, that the assignment only referred to the mortgage and not the note. Further, the defendants argued that, in objecting to their request to revise, Ocwen had made admissions to the court about its own status as the holder of the note and that it had the right to enforce the mortgage that appeared to conflict with the assignment attached to the motion to substitute. The court sustained the defendants' objection and denied the motion to substitute, stating: "There is no indication that Nationstar is the holder or owner of the note."

the mediation period. General Statutes §§ 49-31*l* (c) (6) and 49-31n (c) (9)." *U.S. Bank National Assn.* v. *Blowers*, 332 Conn. 656, 677–78 n.17, 212 A.3d 226 (2019).

[6] Ocwen's motion to substitute suggests that the defendants' earlier attempt to obtain revisions regarding the identity of the holder of the note was more than appropriate.

On October 26, 2016, Ocwen filed a motion for judgment of strict foreclosure and a preliminary statement of the debt calculated as of October 5, 2016. According to that statement, the principal and accrued interest on the note totaled $481,708.53. Ocwen simultaneously filed an appraisal that indicated that the fair market value of the subject property was $430,000. Ocwen also filed a second motion to default the defendants for failure to plead.

The clerk denied the motion for default, noting that, on November 1, 2016, the defendants filed a motion to strike the foreclosure complaint. In their motion to strike, the defendants argued, in relevant part, that the complaint failed to state a cause of action for foreclosure because Ocwen had failed to adequately plead regarding its status as the holder of the note or to identify the precise nature of the alleged default. Ocwen filed an opposition to the motion to strike and also renewed its motion to substitute Nationstar as the plaintiff. The renewed motion to substitute contained a representation that Nationstar, through its counsel, was in possession of the note, which was endorsed in blank, and, thus, Nationstar was the current holder of the note.

On January 5, 2017, the court granted the defendants' motion to strike the foreclosure complaint, agreeing with the defendants that the original complaint lacked sufficient allegations regarding "prima facie elements of a cause of action for foreclosure of a mortgage . . . ." The court also granted Ocwen's motion to substitute Nationstar as the plaintiff by virtue of Ocwen's allegation that it had assigned the subject mortgage to Nationstar on October 29, 2013, and that Nationstar, through its counsel, was in possession of the note endorsed in blank. Nationstar then filed an amended complaint on January 11, 2017, which is the operative complaint in this action.

The defendants filed a timely answer to the amended complaint on February 2, 2017. The defendants also asserted four special defenses at that time.[7]

On June 22, 2017, Nationstar filed a motion for summary judgment as to liability only. On July 6, 2017, the defendants filed a motion to dismiss the foreclosure action in which they argued that the court lacked subject matter jurisdiction because Nationstar was neither the owner of the debt nor the holder of the note. Nationstar sought and was granted an extension of time to respond to the motion to dismiss, following which, on August 22, 2017, it filed a motion to substitute Wilmington as the plaintiff, stating that it had assigned the subject mortgage to Wilmington, which currently was in possession of the note. A copy of the assignment of mortgage from Nationstar to Wilmington was attached and showed that the assignment had been executed on July 6, 2017, the day the defendants filed their motion to dismiss.

The court granted the motion to substitute Wilmington as the plaintiff on September 14, 2017. On January 21, 2018, the court denied the defendants' motion to dismiss. Over the next several months, the parties exchanged discovery and litigated several discovery disputes. The parties argued their outstanding discovery disputes to the court, *Hon. Alfred J. Jennings, Jr.*, judge trial referee, on May 29, 2018, which issued a ruling on September 23, 2018. Among the issues to be resolved was Wilmington's inability to locate and produce loan

[7] The first special defense asserted unclean hands premised on Nationstar or intervening holders of the note having knowingly presented false documents to the court. The second special defense asserted that the defendants previously had paid off the note in full to a prior holder or Nationstar had "received payments sufficient to pay off the entire alleged outstanding balance." The third special defense asserted that the note was endorsed with an unauthorized signature. Finally, the fourth special defense alleged that Nationstar lacked standing to prosecute the foreclosure action.

payment history records for a period of more than two years starting from the loan origination date through August 19, 2009. Judge Jennings stated in his discovery ruling that the defendants have provided a payment history that "admittedly has a gap or gaps," and that Wilmington "is unable to find payment history records for the gap period(s)." In relevant part, the court ordered Wilmington to provide the defendants with additional discovery regarding its search efforts to locate the missing loan payment records.

On December 26, 2018, following the completion of discovery, the defendants filed a request to amend their answer and special defenses. The attached proposed amended pleading contained seven special defenses, the primary basis of which were to address the incomplete payment records and related issues regarding changes in the amount of escrow payments. The first and second amended special defenses alleged unclean hands, asserting generally that Wilmington and its predecessors in interest knew about the incomplete payment history, and that the amount of the claimed debt was inaccurate, which unduly prejudiced the defendants both during mediation and in defending against the foreclosure action. The third special defense asserted that the defendants had not been given proper notice of the alleged default or other requisite statutory notice requirements. The fourth special defense sounded in payment pursuant to General Statutes § 42a-3-602 and alleged that the defendants "were current on the correctly calculated mortgage payment amounts." The fifth special defense alleged a failure to comply with regulations promulgated under the federal Real Estate Settlement Procedures Act of 1974 (RESPA), in particular 12 C.F.R. § 1024.38, which requires loan servicers to provide borrowers with accurate and current information regarding a borrower's mortgage loan. The sixth special defense sounded in fraud. The seventh

special defense asserted, inter alia, that the note was endorsed in blank by someone "not authorized to endorse the instrument."

The defendants also filed a separate caseflow request that sought a continuance to respond to and argue the motion for summary judgment as to liability until after the court had ruled on their request to amend their special defenses. Judge Jennings issued an order on December 28, 2018, denying the requested continuance. The court explained that, unless an objection to a request to amend is filed within fifteen days, it is deemed granted by consent; see Practice Book § 10-60 (a) (3); and no such objection had been filed. The court ordered the parties to appear on January 2, 2019, as previously scheduled, "with a timetable for hearing the motion for summary judgment, which has been pending for more than eighteen months." Wilmington thereafter filed an objection to the defendants' request to amend their special defenses.

On January 7, 2019, the court ordered the defendants to file any opposition to the motion for summary judgment within fourteen days of the court's ruling on the objection to their request to amend, which was scheduled for a hearing on January 22, 2019. Following that hearing, on January 30, 2019, the court, *Bruno*, *J.*, denied the defendants' request to amend their special defenses without any explanation or analysis. Wilmington filed a reply to the defendants' original special defenses on February 1, 2019, denying all allegations therein. The same day, Wilmington filed a certificate of closed pleadings.

On February 13, 2019, the defendants filed their memorandum in opposition to the motion for summary judgment. Wilmington thereafter filed a reply to the opposition. Judge Bruno heard argument on the motion for

summary judgment on February 19, 2019. At the hearing, the court asked the defendants to submit a supplemental memorandum of case law that supported their legal arguments. The defendants complied with that request.

On April 25, 2019, the court, *Bruno*, *J.*, issued an order granting the motion for summary judgment as to liability. The court provided no legal analysis for its ruling, including failing to address directly any of the defendants' original special defenses. Rather, the court provided the following statement only: "When counsel for [Wilmington] and the defendant[s] appeared at short calendar in February to present their respective arguments on this motion for summary judgment . . . this case had been pending since 2011. Since that hearing, there have been many more pleadings filed . . . addressed to [the motion for summary judgment], and . . . specifically to information asserted by defense counsel during oral argument on the motion for summary judgment. The court has had the benefit of the able oral arguments of counsel, as well as the pleadings, and has considered all of this in reaching its decision that summary judgment should enter for the plaintiff. . . . The motion for summary judgment having been heard, the court finds that there are no genuine issues of material fact. The motion is granted as to liability. Judgment may enter for [Wilmington] on the complaint."

On April 29, 2019, the court, *Bellis*, *J.*, issued a dormancy dismissal order that required Wilmington "to file the appropriate motion and obtain judgment on or before [July 29, 2019], or the case will be dismissed for failure to prosecute with due diligence." Wilmington, on July 23, 2019, filed a caseflow request asking the court to grant it an exemption to the court's dormancy order or, alternatively, to write in the matter on the upcoming foreclosure calendar for July 29, 2019. In

support of its request, Wilmington stated that it "has all the requisite documents to obtain judgment including an updated appraisal and executed affidavit of debt. Given the aforementioned, it would be an exercise of futility and would unduly burden the court's docket to dismiss this matter and require [Wilmington] to commence a new action." The following day, the court clerk issued an order that the motion for judgment would be written on the foreclosure docket for July 29, 2019.

On July 25, 2019, Wilmington filed a foreclosure worksheet, an affidavit of debt, and an affidavit regarding attorney's fees. The next day, the defendants filed a memorandum in opposition to the motion for judgment of strict foreclosure.[8] Wilmington filed a reply to the opposition that same day. On the day of the July 29, 2019 hearing, Wilmington filed a motion for extension of time and a caseflow request arguing, in essence, that it sought relief from the dormancy order in the event that the court determined additional argument would be necessary or was otherwise inclined to hold off the hearing on the motion for judgment of strict foreclosure.

[8] Specifically, the defendants raised the following six arguments: "(1) The defendants dispute the amount of the debt and raised a defense. Practice Book § 23-18 does not apply and a decision that relies on [the affidavit of debt] is improper. An evidentiary hearing must be held to decide the amount of the debt.

"(2) The defendants dispute the amount of the debt and the appraised value of the house and believe that it is undervalued by at least $20,000.

"(3) The [affidavit of debt] is hearsay, it is contradicted by [Wilmington's] previous admissions, is otherwise unreliable, and it fails to prove the amount of the debt.

"(4) The affidavit of attorney's fees fails to meet any showing of reasonableness and should be thrown out.

"(5) [Wilmington's] attempt to rush to judgment before the dormancy dismissal order enters has severed the defendants' rights to a fair hearing.

"(6) As a matter of equity, the defendants should not be liable, and [Wilmington] should not experience a windfall for the delay caused by the . . . multiple substitutions, delays, and failure to diligently prosecute this matter that has been pending for over seven years. The court should adjust the amount of the damages accordingly."

The court, *Bruno*, *J.*, proceeded with the hearing on the motion for judgment of strict foreclosure, following which it rendered judgment in favor of Wilmington. The court made findings as to the amount of the debt and the fair market value of the property, and it set law days to commence on October 29, 2019. The court's order did not address the substance of the defendants' objections.[9] The defendants timely filed the present appeal.

Shortly after the appeal was filed, on October 4, 2019, Wilmington filed a motion for articulation asking Judge Bruno to provide the factual and legal basis for her decision to grant the motion for summary judgment as to liability. Wilmington, citing this court's then recent decision in *Bayview Loan Servicing, LLC* v. *Frimel*, 192 Conn. App. 786, 218 A.3d 717 (2019), argued that the court's summary judgment ruling had failed to include any findings by the court that Wilmington had established a prima facie case for foreclosure or met its evidentiary burden of establishing in the first instance that there were no genuine issues of material fact.[10]

On February 4, 2020, Judge Stevens issued the following case management order: "This motion for articulation, and all other matters [in] this case involving Judge

[9] On August 12, 2019, Judge Bruno issued an order directed at the defendants' opposition to the motion for judgment of strict foreclosure, stating simply that the opposition was marked "off" and citing to the "[c]ourt's entry of strict foreclosure on July 29, 2019."

[10] In *Bayview Loan Servicing, LLC* v. *Frimel*, supra, 192 Conn. App. 786, the trial court granted the plaintiff mortgagee's motion for summary judgment as to liability only and subsequently rendered a judgment of foreclosure by sale. Id., 791–92. This court reversed the judgment. Id., 788. It determined, in relevant part, that the trial court had improperly granted summary judgment solely on the ground that the defendant mortgagor had not timely filed any opposition to summary judgment. Id., 793. This court explained: "[T]he court was required to consider, in the first instance, whether the plaintiff, as the movant, had satisfied its burden of establishing its entitlement to summary judgment. *If the plaintiff had failed to meet its initial burden*, it would not matter if the defendant had not filed any response." (Emphasis added.) Id., 795.

Bruno, are hereby reassigned to Judge Spader." Judge Spader soon thereafter issued an order effectively granting the motion for articulation and articulating what it speculated to be the factual and legal basis for Judge Bruno's decision to grant summary judgment as to liability. The court indicated that it had read Judge Bruno's order on the motion for summary judgment, reviewed all the applicable pleadings, and listened to a recording of oral argument. It acknowledged that Judge Bruno did "not proactively make a statement in her order of the plaintiff's setting forth its prima facie case," but the court nonetheless concluded that "[i]t is clear, however, that the plaintiff did set forth its prima facie case . . . ." Judge Spader then proceeded to set forth his analysis for why Wilmington was entitled to summary judgment. In addition to concluding that Wilmington had established its entitlement to summary judgment, the court also concluded that "[t]he defendants simply fail to establish their special defenses."[11] The defendants filed a motion for further articulation directed at Judge Spader's "articulation," which, according to the defendants, contained "factual detail[s] not present in the original order and case law that was not briefed or argued by the parties." The court denied the defendants' motion.

This court later granted the defendants permission to file a late motion for articulation directed at Judge Bruno's denial of their request to amend their special defenses. Specifically, the defendants asked the trial court to articulate the factual and legal basis for denying their request to amend and to state whether the court had found that the proposed special defenses were valid under *U.S. Bank National Assn.* v. *Blowers*, 332 Conn.

[11] The defendants, of course, had no obligation to "establish their special defenses" in opposing summary judgment, but only needed to raise a genuine issue of material fact with respect to one or more of their defenses.

656, 212 A.3d 226 (2019).[12] This motion for articulation again was referred to Judge Spader, who denied the motion, stating in relevant part that "while Judge Bruno is unavailable presently, had the movant requested an articulation from her on a timelier basis, she may have been able to provide one. This court is unable to provide more articulation but posits that none is really necessary. A summary judgment motion was pending and it was then that the defendant[s] wanted to amend its defenses, the court would not then allow the *late prejudicial* amendment, which was in its discretion to do."[13] (Emphasis added.) The defendants filed a motion for

[12] In *Blowers*, our Supreme Court discussed the standard that courts apply in evaluating counterclaims and special defenses asserted by defendants in mortgage foreclosure actions, clarifying that the so-called "making, validity or enforcement test" that routinely had been applied by lower courts is "nothing more than a practical application of the standard rules of practice that apply to all civil actions to the specific context of foreclosure actions." (Internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Blowers*, supra, 332 Conn. 667; see also Practice Book § 10-10. The Supreme Court specifically held that "a proper construction of 'enforcement' [under that test] includes allegations of harm resulting from a mortgagee's wrongful postorigination conduct in negotiating loan modifications, when such conduct is alleged to have materially added to the debt and substantially prevented the mortgagor from curing the default." (Footnote omitted.) *U.S. Bank National Assn.* v. *Blowers*, supra, 667. The court observed that "appellate case law recognizes that conduct occurring after the origination of the loan, after default, and even after the initiation of the foreclosure action may form a proper basis for defenses in a foreclosure action." Id., 672. The court continued: "[A]llegations that the mortgagee has engaged in conduct that wrongly and substantially increased the mortgagor's overall indebtedness, caused the mortgagor to incur costs that impeded the mortgagor from curing the default, or reneged upon modifications are the types of misconduct that are directly and inseparably connected . . . to enforcement . . . . Such allegations, therefore, provide a legally sufficient basis for special defenses in [a] foreclosure action." (Citations omitted; internal quotation marks omitted.) Id., 675–76.

[13] We note, on the basis of our review of the record, that Judge Bruno, who denied the request to amend without comment, never made any findings that the defendants' request to amend, which was made prior to the close of pleadings, was somehow untimely or made solely for the purpose of delay. Nor did the court indicate that granting the request would have unduly prejudiced Wilmington.

review of the denial of their motion for articulation. This court granted the motion for review but denied the relief requested therein.[14]

With the following background in mind, we turn to our discussion of the defendants' first claim on appeal. The defendants claim that the court abused its discretion by denying their request to amend their special defenses to the foreclosure complaint. The defendants argue that the amendments would not cause delay and that the amendments were necessary "to conform with facts verified by the final resolution of several discovery disputes." For the reasons that follow, we agree with the defendants.

General Statutes § 52-130 provides: "Parties may amend any defect, mistake or informality in the pleadings or other parts of the record or proceedings. When either party supposes that in any part of the pleadings he has missed the ground of his plea, and that he can plead a different plea that will save him in his cause, he may change his plea, answer, replication or rejoinder, as the case may be, and plead anew, and the other party

[14] Although the defendants did not file a motion for review of Judge Spader's earlier articulation or challenge in their later motion for review Judge Spader's authority to articulate decisions rendered by Judge Bruno, we are aware of no statute or rule of practice that authorizes an articulation of a trial court's ruling by anyone other than the judge who rendered it. Practice Book § 66-5 expressly provides that, upon the filing of a motion for articulation, "[t]he appellate clerk shall forward the motion . . . *to the trial judge who decided, or presided over, the subject matter of the motion* . . . for a decision on the motion. . . ." (Emphasis added.) We have repeatedly stated that a request for articulation is not intended to provide the trial court with an opportunity to substitute a new decision or to change the reasoning or basis for a prior decision. See, e.g., *Lusa* v. *Grunberg*, 101 Conn. App. 739, 743, 923 A.2d 795 (2007). If a judge other than the one who rendered a decision is permitted to attempt to divine from its review of the record the factual and legal basis for a decision, the result, effectively, is a wholly new decision. Because there is no way to know whether that new decision was rendered on the same factual and legal basis as the original, we disavow the procedure followed in this case.

shall have reasonable time to answer the same; and, in any case when a party amends or alters any part of the pleadings or pleads anew, if it occasions any delay in the trial or inconvenience to the other party, he shall be liable to pay costs at the discretion of the court. Any court may restrain the amendment or alteration of pleadings, so far as may be necessary to compel the parties to join issue in a reasonable time for trial." See also Practice Book § 10-60. Thus, by statute, a party, as a matter of right, may make substantive amendments to any pleading. That right is subject only to the court's discretion to award costs or to limit an amendment if doing so is *necessary* to prevent undue delay of a trial.

"The granting or denial of a motion to amend the pleadings is a matter within the trial court's discretion. . . . In the interest of justice courts are liberal in permitting amendments; *unless there is a sound reason, refusal to allow an amendment is an abuse of discretion.* . . . The trial court is in the best position to assess the burden which an amendment would impose on the opposing party in light of the facts of the particular case. The essential tests are whether the ruling of the court will work an injustice to either the plaintiff or the defendant and whether the granting of the motion will unduly delay a trial." (Citations omitted; emphasis added; internal quotation marks omitted.) *Baker* v. *Cordisco*, 37 Conn. App. 515, 522–23, 657 A.2d 230, cert. denied, 234 Conn. 907, 659 A.2d 1207 (1995).

"In determining whether there has been an abuse of discretion [in granting or denying an amendment], much depends on the circumstances of each case. . . . In the final analysis, the court will allow an amendment unless it will cause an unreasonable delay, mislead the opposing party, take unfair advantage of the opposing party or confuse the issues, or if there has been negligence or laches attaching to the offering party." (Internal quotation marks omitted.) *Miller* v. *Fishman*, 102

Conn. App. 286, 293, 925 A.2d 441 (2007), cert. denied, 285 Conn 905, 942 A.2d 414 (2008).

"The court's discretion [to deny an amendment] is not unfettered; it is a legal discretion subject to review. . . . The trial court's discretion imports something more than leeway in decision making and should be exercised in conformity with the spirit of the law and should not impede or defeat the ends of substantial justice." (Citation omitted; internal quotation marks omitted.) Id., 291–92.

"In exercising its discretion with reference to a motion for leave to amend, a court should ordinarily be guided by its determination of the question whether the greater injustice will be done to the mover by denying him his day in court on the subject matter of the proposed amendment or to his adversary by granting the motion, with the resultant delay." (Internal quotation marks omitted.) *Jacob* v. *Dometic Origo AB*, 100 Conn. App. 107, 113, 916 A.2d 872, cert. granted, 282 Conn. 922, 925 A.2d 1103 (2007) (appeal withdrawn August 7, 2007). The law of this state favors courts allowing amendments in the absence of some sound basis for not doing so; id., 111; particularly if the record fails to disclose some significant injustice or prejudice to the nonmoving party. Id., 114; see also *Conference Center Ltd.* v. *TRC*, 189 Conn. 212, 216–17, 455 A.2d 857 (1983) ("a trial court may be well-advised to exercise leniency when amendments are proffered in response to a motion for summary judgment, rather than on the eve of trial"); *Miller* v. *Fishman*, supra, 102 Conn. App. 286 (holding that it was abuse of discretion for court to rule on motion for summary judgment without first considering pending request to amend because proposed amendment would not have unduly delayed trial or unfairly prejudiced other party); but see *Citizens National Bank* v. *Hubney*, 182 Conn. 310, 313, 438 A.2d 430 (1980) (court properly exercised discretion by not

permitting amendment "after the pleadings had been closed and the motion for summary judgment filed"). We are mindful that, "[a]lthough it is not [the] habit [of appellate courts] to disturb a trial court's determination of whether an amendment should be permitted, we have done so on rare occasions when allowing the rul[ing] to stand would work an injustice to one of the parties." (Internal quotation marks omitted.) *Connecticut National Bank* v. *Voog*, 233 Conn. 352, 369, 659 A.2d 172 (1995). Our careful review of the record before us leads us to conclude, for the following reasons, that this is such a case.

First, the pleadings had not yet been closed at the time the defendants sought to amend their answer and special defenses. Wilmington in fact had not yet filed *any response to the original special defenses* raised by the defendants. Accordingly, the court could not reasonably have viewed the need to respond to the amended answer and special defenses as an "inconvenience to the other party . . . ." General Statutes § 52-130. Moreover, although Wilmington's predecessor, Nationstar, had filed a motion for summary judgment, that motion already had languished on the docket for a significant period of time without being claimed for a hearing by Wilmington.

Second, it was appropriate procedurally and as a matter of legal strategy for the defendants to wait to fully develop and perfect their special defenses until Wilmington had complied with their discovery request. They made their request to amend promptly thereafter. It was reasonable for the defendants to wait to amend their special defenses until discovery was completed because information regarding the missing payment records may have proved relevant to the defendants' theory of defense that escrow payments had been improperly calculated and increased, which had a bearing on both the amount of any debt owed and the issue

of default. The request to amend also cannot reasonably be construed as having been made "on the eve of trial . . . ." *Conference Center Ltd.* v. *TRC*, supra, 189 Conn. 217. No trial date had been scheduled, and the court could have permitted the amendments and then allowed Wilmington sufficient time to respond without "occasion[ing] any delay in the trial . . . ." General Statutes § 52-130.

Third, to the extent that the case had been pending for a significant period of time, some of that delay fairly is attributable to Wilmington or its predecessors in interest rather than to the defendants. Certainly, the underlying foreclosure action had been on the trial court's docket for many years, and the court had a legitimate interest in advancing the case. A significant portion of the delay in this case, however, nearly four years, was the result of the lengthy court-sponsored mediation process. Moreover, the multiple transfers of the mortgage during the pendency of the action and the resulting need to substitute plaintiffs resulted in additional delays that were outside of the control of the defendants. Nothing in the record before us would support a finding that the defendants engaged in unreasonable or purely dilatory behavior in defending the foreclosure action, certainly none that would justify disallowing an amendment of their answer and special defenses prior to the close of pleadings. For example, the record does not reflect that the defendant filed multiple and frivolous bankruptcy proceedings, improper interlocutory appeals, or excessive and unproductive motions. Although the defendants engaged in motion practice, they only filed pleadings permitted under our rules of practice and in the proper order. See Practice Book §§ 10-6 and 10-8. Furthermore, the defendants' motions were meritorious, resulting, for example, in the striking of the original complaint. The operative

complaint in this matter was not filed until 2017, a few years prior to the judgment of strict foreclosure.

Finally, we are mindful that the defendants sought to have the court articulate the factual and/or legal basis for its decision to disallow the defendants' amendment, but they were thwarted in their efforts by the unavailability of Judge Bruno. "[O]ur appellate courts often have recited . . . that, in the face of an ambiguous or incomplete record, we will presume, *in the absence of an articulation*, a trial court acted correctly, meaning that it undertook a proper analysis of the law and made whatever findings of the facts were necessary." (Emphasis in original.) *Zaniewski* v. *Zaniewski*, 190 Conn. App. 386, 396, 210 A.3d 620 (2019); see also *Bell Food Services, Inc.* v. *Sherbacow*, 217 Conn. 476, 482, 586 A.2d 1157 (1991). This court has made clear, however, that the adoption of such a presumption of correctness is not warranted in a case such as the present one "in which a party has done all that can reasonably be expected to obtain an articulation but has been thwarted through no fault of its own." *Zaniewski* v. *Zaniewski*, supra, 397.[15]

In sum, the court failed to provide any explanation, let alone a " 'sound reason,' " for denying the defendants'

[15] In *Zaniewski*, this court declined to apply any presumption of correctness to the trial court orders issued as part of a judgment of dissolution of marriage. Like in the present case, the court's decision in *Zaniewski* was "devoid of any factual findings in support of its conclusions." *Zaniewski* v. *Zaniewski*, supra, 190 Conn. App. 397. The appellant in *Zaniewski* filed a motion for an articulation but was prevented from obtaining one by the immediate retirement of the trial judge in that case following the issuance of his decision. Id., 391. This court reasoned, in part, that an action to dissolve a marriage is an equitable proceeding and, accordingly "principles of equity must guide the entire process, including any appeal." Id., 397. To the extent that our decision in *Zaniewski* turned on the equitable nature of the underlying proceedings, we note that a foreclosure action is also equitable in nature. See *People's United Bank* v. *Sarno*, 160 Conn. App. 748, 754, 125 A.3d 1065 (2015).

request to amend their special defenses. *Baker* v. *Cordisco*, supra, 37 Conn. App. 522. The record reflects no such reason. As previously stated, at the time they made their request, the pleadings had not yet closed. Although a motion for summary judgment had been filed, the motion had not been calendared for a hearing on its merits. No trial date had been set, and, although the trial court had an interest in moving the case forward, this was not a matter in which the defendants had engaged in dilatory defense tactics. For all these reasons, we conclude that the court's denial of the defendants' request to amend their answer and special defenses was an abuse of discretion.[16]

The court's error in failing to allow the amended answer and special defenses requires the reversal of the court's subsequent order granting the motion for summary judgment. "[B]ecause any valid special defense raised by the defendant ultimately would prevent the court from rendering judgment for the plaintiff, a motion for summary judgment should be denied when any [special] defense presents significant fact issues that should be tried." (Internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Eichten*, 184 Conn. App. 727, 745, 196 A.3d 328 (2018). Furthermore, because the judgment of strict foreclosure was rendered in part on the summary determination of liability, that judgment likewise cannot stand.

The judgment of strict foreclosure, the summary judgment as to liability only, and the trial court's denial of the defendants' request to amend their special defenses are reversed, and the case is remanded with direction to grant the defendants' request to amend the answer and special defenses and for further proceedings in accordance with this opinion.

In this opinion the other judges concurred.

[16] Nothing in this opinion should be read as commenting on the merits of the defendants' proposed amended pleading.

MONICA R. OVERLEY *v.* MARK S. OVERLEY
(AC 43249)

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

Syllabus

The defendant appealed to this court from the judgment of the trial court dissolving his marriage to the plaintiff and making certain orders regarding the parties' finances and custody of the parties' three minor children. *Held*:

1. This court declined to review the defendant's claim that the trial court improperly awarded the marital home to the plaintiff without first awarding him a credit for the separate property he contributed to its purchase: the defendant failed to distinctly raise at trial the claim that the funds he withdrew from a trust to pay for the home were his separate property, and, instead, had maintained that the funds were a marital liability, and that the court was required to allocate that liability and the marital home between the parties; moreover, although the plaintiff did not argue that the defendant failed to preserve this claim, it would have been manifestly unjust to both the plaintiff and the trial court to have permitted the defendant to pursue this claim on appeal.
2. The trial court improperly ordered that the defendant may not, under any circumstances, deduct alimony payments from his income for tax purposes, which was consistent with recently enacted federal tax laws but contravened the parties' prenuptial agreement; contrary to the plaintiff's argument, the defendant's claim that this order was improper was, in part, preserved for appeal, because, although the defendant could have articulated more fully to the trial court how it could have reconciled the apparent conflict between the parties' agreement and the new federal tax laws, both the plaintiff and the trial court had notice of the defendant's claim, he consistently sought enforcement of the alimony provision of the parties' prenuptial agreement as written, he explained to the court that alimony payments remained deductible in Puerto Rico where he resided, and the plaintiff addressed the issue in her posttrial brief; moreover, the defendant's additional, related claims were not raised at trial and were, therefore, unreviewable on appeal; furthermore, the court's order was overly broad in that it would prevent the defendant from deducting his alimony payments in accordance with the parties' prenuptial agreement even if his income tax obligations are governed by the laws of a jurisdiction that would otherwise permit such deductions and even if federal tax laws are amended in the future to permit such deductions.
3. The trial court did not abuse its discretion in denying the defendant's motion for a continuance to secure new counsel: the court's order was reasonable given that the dissolution action had been pending for more

than two years and the defendant sought a continuance of up to three months, less than one week before trial was scheduled to begin; moreover, the court properly balanced the parties' competing interests and reasonably concluded that the plaintiff's interest in a prompt and final resolution of the matter outweighed any prejudice the defendant might experience if he was required to proceed as a self-represented party, particularly because the defendant had previously been represented by two different attorneys who had each withdrawn on the ground of a breakdown in the attorney-client relationship, and to grant a continuance on the eve of trial could have resulted in a prolonged delay in a matter involving the well-being of minor children.

Argued September 14—officially released December 28, 2021

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Fairfield; thereafter, the matter was transferred to the Regional Family Trial Docket at Middletown; subsequently, the court, *Hon. Gerard I. Adelman*, judge trial referee, denied the defendant's motion for a continuance; thereafter, the matter was tried to the court, *Hon. Gerard I. Adelman*, judge trial referee; judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to this court. *Affirmed in part; reversed in part*; *further proceedings*.

Anthony A. Piazza, with whom, on the brief, was *John H. Van Lenten*, for the appellant (defendant).

Sarah E. Murray, for the appellee (plaintiff).

Opinion

CLARK, J. The defendant, Mark S. Overley, appeals from the judgment of the trial court dissolving his marriage to the plaintiff, Monica R. Overley. He claims that the court improperly (1) failed to award him a separate property credit for his contribution to the purchase of the marital home prior to distributing that property as a marital asset, (2) contravened the parties' prenuptial

agreement governing the tax treatment of alimony payments he was ordered to pay the plaintiff, and (3) denied his request for a continuance to obtain new counsel. We disagree with the defendant's first and third claims but agree, in part, with his second claim. We therefore reverse in part and affirm in part the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. In 2006, the parties were married and established residence in New York. Prior to the marriage, they executed a prenuptial agreement (agreement). The agreement provides that, in the event of a marital dissolution, if the value of the marital assets do not exceed a specified amount and the parties are unable to agree upon an equitable division of the marital assets, either party may seek a distribution in court. The agreement includes a choice of law provision, which provides that it shall be interpreted and construed under the laws of New York. Additionally, it stipulates that the plaintiff is entitled to alimony. Under the agreement, alimony payments are to be taxable as income to the plaintiff and deductible from the defendant's income.

During the marriage, the parties moved from New York to Connecticut and had three children together. The defendant primarily worked in finance, but later formed two limited liability companies that raise capital for investment managers. The plaintiff did not work outside the home on a regular basis and assumed the majority of the childcare responsibilities. In 2014, the defendant informed the plaintiff that he wanted to move the family and his businesses to Puerto Rico to take advantage of its more favorable tax laws. The plaintiff strongly opposed the idea because of the community ties she and the children had developed in Connecticut.

In 2016, however, she agreed to relocate to Puerto Rico on a trial basis, on the condition that the parties

buy a home in Connecticut where the family could return if the move proved unsuccessful. Consequently, the parties purchased a home in Westport. The defendant moved to Puerto Rico in May, 2016, and the plaintiff and their children joined him shortly thereafter.

In April, 2017, the plaintiff and the children moved back to Connecticut. The plaintiff commenced this dissolution action on April 25, 2017. Because the defendant continued to reside in Puerto Rico, a lengthy dispute followed regarding whether Puerto Rico or Connecticut had jurisdiction to resolve the matters involving the parties' children. On July 27, 2018, the dispute was resolved in favor of Connecticut assuming jurisdiction over the child support and custody issues. Trial initially was scheduled to take place in November, 2018. The defendant was represented by counsel at that time. When the parties appeared for trial, however, the court, for administrative reasons, continued the trial and transferred the case to the Regional Family Trial Docket.

On May 7, 2019, less than one week before the rescheduled dissolution trial was to commence, the defendant's counsel moved to withdraw his appearance and for a continuance in order to provide the defendant time to secure replacement counsel. The next day, the defendant filed an appearance as a self-represented party. The court denied the motion for a continuance. At trial, on May 13, 2019, the defendant renewed his motion for a continuance to secure replacement counsel. After hearing from the defendant and the plaintiff, who was represented by counsel, the court denied the motion. The parties were the only witnesses at trial, and neither party contested the validity or enforceability of the agreement. After the conclusion of evidence, the court ordered the parties to submit posttrial briefs concerning alimony and the distribution of marital property. The defendant retained counsel, who appeared in the case and filed a posttrial brief on his behalf.

On July 11, 2019, the court issued its memorandum of decision dissolving the marriage. In its decision, the court ordered the defendant to quitclaim his interest in the marital home to the plaintiff and to pay alimony in the amount of $10,000 per month, terminating upon the death of either party, the plaintiff's remarriage, or July 1, 2028. Contrary to the parties' agreement, the court also ordered that the defendant's alimony payments shall be nondeductible from his income and nontaxable as income to the plaintiff. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the trial court improperly awarded the marital home to the plaintiff without first awarding him a credit for the separate property he contributed to its purchase, which he claims is required under New York law. Our review of the record discloses that the defendant never raised this claim in the trial court. Accordingly, we decline to review it.

The following additional facts are relevant to our decision. The defendant is a cotrustee and beneficiary of a trust that was created prior to the marriage. To fund a $700,000 cash purchase of the marital home in Westport, the defendant withdrew $699,000 from the trust. At trial, the parties agreed that the defendant's interest in the trust is the defendant's separate property and that, pursuant to the parties' agreement, the home was marital property because it was purchased during the marriage and title was in both parties' names.

Under the agreement, if the pretax value of marital assets did not exceed a certain amount in accordance with a formula set forth in the agreement and the parties were unable to agree upon a division of the marital assets, either party could ask a court to divide the marital assets in accordance with New York law. Both parties agreed, and the trial court found, that the value of

the marital assets did not exceed the threshold amount set forth in the agreement and that they had not reached an agreement with respect to the division of marital assets. As a result, the court was required to divide the marital assets in accordance with New York law.[1]

The court found that the value of the home was $750,000 and that the total value of all marital assets equaled approximately $902,000. The home thus comprised the bulk of the parties' marital property. The defendant contended throughout the proceedings that he had borrowed the money used to purchase the home from the trust. Accordingly, in his financial affidavits, the defendant classified the $699,000 withdrawal from the trust as a marital liability. In his posttrial brief, the defendant argued that the money withdrawn from the trust was a joint liability and that the court should exercise its power of equitable distribution to order that the marital home be sold and the proceeds be used to satisfy that liability.[2] At trial, however, the defendant had also testified that, in the past, he had taken advances from the trust in the form of loans for the purpose of delaying or avoiding the tax consequences of distributions. The plaintiff asked the court to award her the home to maintain stability for the parties' children and contended that the trust loan was not a genuine debt but, rather, an advance against the defendant's future distributions from the trust.

In its memorandum of decision, the court ultimately found that the funds the defendant withdrew from the

[1] New York is an equitable distribution state. See N.Y. Dom. Rel. Law § 236 (B) (5) (d) (McKinney 2020) (delineating fourteen factors court must weigh when allocating marital property).

[2] The defendant asserted and the court agreed that, under New York law, marital property includes both assets and liabilities. See, e.g., *Haggerty* v. *Haggerty*, 169 App. Div. 3d 1388, 1390, 92 N.Y.S.3d 773 (2019).

trust to buy the marital home were, in fact, "distributions called loans to avoid tax consequences."[3] Pursuant to New York's equitable distribution law, the court determined that the plaintiff should retain the home and ordered the defendant to quitclaim his rights and interest therein to the plaintiff, while the defendant "assumed responsibility—if any—for the loan from the [trust] used to purchase that property."

On appeal, the defendant characterizes the funds withdrawn from the trust to purchase the home as his separate property, not a marital liability, and claims for the first time that the court was required to award him a separate property credit in the amount of those funds prior to distributing the remaining value of the home as a marital asset. He argues that New York law entitles a party who contributes separate property toward the purchase of a marital asset to a credit in the amount so contributed before marital property is distributed between the parties in a dissolution action. See, e.g., *Jacobi* v. *Jacobi*, 118 App. Div. 3d 1285, 1286, 988 N.Y.S.2d 339 (2014) (spouse entitled to credit for contribution of separate property toward purchase of marital home).

During oral argument, however, the defendant conceded that he never made this argument in the trial court. Our review of the record confirms that, throughout the dissolution proceedings, the defendant maintained that the funds he withdrew from the trust to pay for the home were a loan that constituted a marital liability, and that, in contrast to the separate property credit theory he advances on appeal, the court was required to allocate that liability and the marital home between the parties in accordance with New York's

[3] The defendant does not challenge the trial court's finding on appeal. The question of whether the funds were a loan or distribution does not alter our resolution of this claim.

equitable distribution scheme. The court ultimately adopted that approach and, in the exercise of its substantial discretion; see, e.g., *Ragucci* v. *Ragucci*, 170 App. Div. 3d 1481, 1482, 96 N.Y.S.3d 736 (2019) ("[i]t is well settled that trial courts are granted substantial discretion in determining what distribution of marital property—including debt—will be equitable under all the circumstances" (internal quotation marks omitted)); awarded the plaintiff the marital home and assigned to the defendant the liability, if any, associated with the funds he withdrew from the trust to purchase the home.

"It is fundamental that claims of error must be distinctly raised and decided in the trial court." (Internal quotation marks omitted.) *DeChellis* v. *DeChellis*, 190 Conn. App. 853, 860, 213 A.3d 1, cert. denied, 333 Conn. 913, 215 A.3d 1210 (2019). "[A]n appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. . . . The requirement that [a] claim be raised distinctly means that it must be so stated as to bring to the attention of the court the *precise* matter on which its decision is being asked. . . . The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court . . . to address the claim—would encourage trial by ambuscade . . . ." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Remillard* v. *Remillard*, 297 Conn. 345, 351–52, 999 A.2d. 713 (2010); see also Practice Book § 60-5 ("[t]he court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial").

Although the plaintiff has not argued that the defendant failed to preserve the separate property credit theory he has advanced before this court, we conclude that it would be manifestly unjust to both the plaintiff and the trial court to permit the defendant to pursue

that claim in this appeal. "[A] party *cannot present a case to the trial court on one theory and then seek appellate relief on a different one* . . . . For this court to . . . consider [a] claim on the basis of a specific legal ground not raised during trial would . . . [be] unfair both to the [court] and to the opposing party." (Emphasis added; internal quotation marks omitted.) *State* v. *Rodriquez*, 192 Conn. App. 115, 119, 217 A.3d 21 (2019). "We will not promote a Kafkaesque academic test by which [a trial judge] may be determined on appeal to have failed because of questions never asked of [him] or issues never clearly presented to [him]." (Internal quotation marks omitted.) *DiGiuseppe* v. *DiGiuseppe*, 174 Conn. App. 855, 864, 167 A.3d 411 (2017). Accordingly, we decline to review the defendant's claim that the court misapplied New York law when it failed to award him a separate property credit for his contribution to the purchase of the marital home.

II

The defendant's second claim is that the court improperly contravened the parties' agreement when it ordered that he may not deduct for income tax purposes the alimony payments he was ordered to pay the plaintiff. The plaintiff counters that the defendant's claim is not reviewable because the defendant failed to raise this claim in the trial court and that, even if the issue is reviewable, the court properly severed the alimony tax provision from the agreement because it is unenforceable under the federal tax code. We conclude that the defendant's claim was raised at trial and, therefore, is reviewable. We also conclude that the court's order unconditionally prohibiting the defendant from deducting alimony payments from his income for tax purposes was overly broad to the extent that it purports (1) to preclude the defendant from taking such deductions if his income tax obligations are governed by the laws of a jurisdiction that permits such deductions, or

(2) to preclude either party from seeking to enforce the agreement in the future if the federal tax laws are amended in a manner that permits enforcement of the agreement.

A

We first address the plaintiff's argument that the defendant failed to preserve this claim. As we previously explained in part I of this opinion, in general, a party must distinctly raise a claim at trial to preserve the issue for appeal. See Practice Book § 60-5. "The purpose of our preservation requirements is to ensure fair notice of a party's claims to both the trial court and opposing parties." (Internal quotation marks omitted.) *Moyher* v. *Moyher*, 198 Conn. App. 334, 340, 232 A.3d 1212, cert. denied, 335 Conn. 965, 240 A.3d 284 (2020). "Thus, because the sine qua non of preservation is fair notice to the trial court . . . the determination of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated below with sufficient clarity to place the trial court on reasonable notice of that very same claim." (Citation omitted.) *State* v. *Jorge P.*, 308 Conn. 740, 753–54, 66 A.3d 869 (2013).

In his December 20, 2017 answer and cross-complaint, the defendant demanded enforcement of the agreement. The agreement provided that alimony payments to the plaintiff "shall be includible in [the plaintiff's] income and deductible from [the defendant's] income for income tax purposes." Moreover, during the course of the trial, the court asked the defendant to explain whether he was proposing draft orders that permitted him to deduct alimony payments from his taxable income and how the recent changes to the federal tax laws repealing such deductions impacted his

proposal.[4] The defendant responded that "in Puerto Rico, [alimony] still is deductible. Alimony comes off before you get to the taxable income number. So, there is no change in the . . . Puerto Rico tax code in respect to [my proposed orders]."

Although the defendant's posttrial brief did not specifically address what effect, if any, the federal tax law change had on the parties' agreement, the defendant did, in his answer and cross-complaint, and closing argument, urge the court to order alimony in accordance with the parties' agreement. The plaintiff argued, conversely, that the tax provision in the parties' agreement was without force and effect because alimony payments are no longer deductible due to the recent changes to the federal tax laws and that, consequently, the provision of the agreement permitting such deductions should be severed from the agreement.[5] In its memorandum of decision, the court discussed the recent changes to the federal tax laws, but did so only in the context of its analysis of a separate provision of the agreement concerning the amount of alimony to which the plaintiff was entitled under the agreement. Ultimately, the court ordered, without discussion, that

[4] In 2017, Congress passed the Tax Cuts and Jobs Act (TCJA), Pub. L. No. 115-97, 131 Stat. 2054 (2017), which provides that, with respect to divorce decrees and separation agreements executed on or after December 31, 2018, a payor of alimony may not deduct such payments from taxable income and a recipient of alimony is not required to report the receipt of alimony payments as taxable income. See Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11051, 131 Stat. 2054, 2089 (2017) (repealing 26 U.S.C. §§ 71 and 215). In divorce decrees and separation agreements executed prior to the effective date of the TCJA, a payor of alimony may deduct alimony payments from taxable income, in which case a recipient of alimony is required to report alimony as taxable income. 26 U.S.C. §§ 71 and 215 (2012).

[5] The parties' agreement contains a severability clause that provides: "In the event of a determination that any provision of this Agreement is without force and effect, the remaining provisions hereof shall not be affected thereby, and the obligations of the parties shall continue in full force and effect with respect to the performance of such remaining provisions."

"alimony shall be nontaxable to the plaintiff and nondeductible to the defendant."

On the basis of our review of the entire record, we conclude that, under the specific circumstances of this case, the defendant's claim concerning the tax treatment of his alimony payments was preserved because both the plaintiff and the court had notice of that claim. Throughout the proceedings, the defendant consistently sought enforcement of the parties' agreement as written. More significantly, in response to the court's question about recent changes to the federal tax laws, the defendant explained that alimony payments remained deductible in Puerto Rico, where he resided, and that, accordingly, the federal tax laws did not interfere with the enforcement of the agreement or the draft orders that he had proposed. Although the defendant could have articulated more fully how the court could have reconciled the apparent conflict between the parties' agreement and the new federal tax laws, we conclude that the issue was preserved.[6]

B

Having determined that the defendant's claim is reviewable, we now address whether the court improperly prohibited him from deducting his alimony payments from his taxable income in any tax returns that

[6] We limit our review, however, to the precise issue that was fairly before the trial court. In his brief to this court, the defendant additionally claims that the court's order improperly (1) precludes him from arguing to the Internal Revenue Service that the alimony at issue in this case is "grandfathered" under the Tax Cuts and Jobs Act; see footnote 4 of this opinion; and the agreement is therefore enforceable, and (2) contravenes the parties' agreement concerning how much alimony the plaintiff should receive because at the time the parties entered the agreement, they both understood and presumed that the alimony the plaintiff would receive would be taxable income. The defendant thus contends that the court's order results in an unexpected "windfall" to the plaintiff that is inconsistent with the agreement. Because the defendant did not raise either of these claims at trial, we decline to review them on appeal. Instead, we limit our review to the discrete claim that the court improperly contravened the parties' agreement when

he may file in the future. We first set forth the standard of review that governs our resolution of this claim. Although the choice of law provision in the parties' agreement provides that it "shall be interpreted, construed and governed under the laws of the state of New York," Connecticut law guides our resolution of all procedural issues, including the standard of review to be applied in an appeal from a Connecticut court's judgment of dissolution. See *Ferri* v. *Powell-Ferri*, 326 Conn. 438, 447, 165 A.3d 1137 (2017) (matters of substance are analyzed according to parties' choice of law provision but procedural issues are governed by Connecticut law).

"[A]lthough the court has broad equitable remedial powers in the area of marital dissolutions . . . our marital dissolution law is essentially a creature of, and governed by, statute. . . . The Superior Court's power to grant divorces and thereby dissolve marriages comes from statutory authority, and from such jurisdiction over divorce derives the court's jurisdiction to make and enforce orders . . . . Thus, it is well settled that judicial review of a trial court's exercise of its broad discretion in domestic relations cases is limited to the questions of whether the court correctly applied the law and could reasonably have concluded as it did. . . . Notwithstanding the great deference accorded the trial court in dissolution proceedings, a trial court's ruling . . . may be reversed if, in the exercise of its discretion, the trial court applies the wrong standard of law." (Citations omitted; internal quotation marks omitted.) *Loughlin* v. *Loughlin*, 280 Conn. 632, 653–54, 910 A.2d 963 (2006).

As the court noted in its decision, Congress recently passed the Tax Cuts and Jobs Act (TCJA), which

it ordered, without exception, that the defendant's alimony payments shall be nondeductible from his income for tax purposes.

included certain changes to the provisions of the federal tax code governing the tax treatment of alimony payments. See footnote 4 of this opinion. Specifically, under the TCJA, alimony payments are no longer considered taxable income of the recipient and may not be deducted from income by the payor. We agree with the plaintiff that neither the parties' prenuptial agreement nor a decree of dissolution can supersede the federal tax code. See *Shenk* v. *C.I.R*, 140 T.C. 200, 206 (2013) ("ultimately it is the Internal Revenue Code and not [s]tate court orders that determine one's eligibility to claim a deduction for [f]ederal income tax purposes"); *Lowe* v. *Commissioner of Internal Revenue*, T. C. Memo 2016-206, pp. 7–8, 112 T.C.M. (CCH) 514 (T.C. 2016) ("as we have consistently held, a taxpayer's eligibility for deductions is determined under [f]ederal law—specifically, the express terms of the Internal Revenue Code—and [s]tate courts cannot bind the Commissioner [of Internal Revenue] to any particular treatment of a taxpayer").

The claim that we have determined was preserved for our review is more narrow, however. That claim concerns whether the court should have entered orders that preserved for the defendant the ability to enjoy the benefits of the agreement to the extent permissible under the laws of the jurisdiction governing his income tax obligations. We agree with the defendant that the trial court's orders appear to preclude him from doing so.

The order at issue simply states, without reference to the parties' agreement, that "alimony shall be nontaxable to the plaintiff and nondeductible to the defendant." We presume, and on appeal the plaintiff contends, that the trial court entered this order to make it clear that the parties' respective tax obligations are to be governed by the recently enacted federal tax laws,

not the conflicting provisions of the agreement. As written, however, the court's order would prevent the defendant from exercising his contractual right to deduct alimony payments in accordance with the agreement even if his income tax obligations are governed by the laws of a jurisdiction that would otherwise permit such deductions and even if federal tax laws are amended in the future to permit such deductions. The court provided no justification for that result, and we suspect that it did not intend to issue orders having that effect.

Accordingly, we conclude that the court improperly ordered that the defendant may not, under any circumstances, deduct alimony payments from his income for tax purposes. We, therefore, reverse the judgment of the court as to tax deductibility and remand the case with direction to enter a new order that the provision of the agreement as to deductibility shall apply so long as it does not conflict with the controlling law of any jurisdiction in which the parties file tax returns.[7]

III

The defendant's final claim is that the court abused its discretion and denied him due process of law by arbitrarily denying his motion for a continuance to

[7] We further conclude that the order at issue is severable and does not require reconsideration of the court's other financial orders on remand. "A financial order is severable when it is not in any way interdependent with other orders and is not improperly based on a factor that is linked to other factors. . . . In other words, an order is severable if its impropriety does not place the correctness of the other orders in question." (Internal quotation marks omitted.) *Tuckman* v. *Tuckman*, 308 Conn. 194, 214, 61 A.3d 449 (2013). In the present case, the court's order precluding the defendant from deducting alimony payments from his taxable income, even if doing so is or becomes permissible under the laws of the jurisdiction governing his income tax obligations, is wholly independent of the court's other financial orders. Under the circumstances of this case, preserving for the defendant the *possibility* of deducting from his income the amount of alimony payments he makes has no bearing on the other financial orders the court issued and does not place the correctness of those orders in question.

secure new counsel after his attorney withdrew from the case. We are not persuaded.

As an initial matter, we note that the defendant did not assert a constitutional claim before the trial court and does not seek review of such a claim pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 188 (2015). Rather, the defendant frames the issue in his brief as whether the court abused its discretion. As a result, we employ the abuse of discretion standard in reviewing the court's refusal to grant his motion for a continuance. See *Watrous* v. *Watrous*, 108 Conn. App. 813, 826–27, 949 A.2d 557 (2008) (citing *Kelly* v. *Kelly*, 85 Conn. App. 794, 799, 859 A.2d 60 (2004)).

"Decisions to grant or to deny continuances are very often matters involving judicial economy, docket management or courtroom proceedings and, therefore, are particularly within the province of a trial court. . . . Whether to grant or to deny such motions clearly involves discretion, and a reviewing court should not disturb those decisions, unless there has been an abuse of that discretion, absent a showing that a specific constitutional right would be infringed. . . .

"Our Supreme Court has articulated a number of factors that appropriately may enter into an appellate court's review of a trial court's exercise of its discretion in denying a motion for a continuance. Although resistant to precise cataloguing, such factors revolve around the circumstances before the trial court at the time it rendered its decision, including: the timeliness of the request for continuance; the likely length of the delay; the age and complexity of the case; the granting of other continuances in the past; the impact of delay on the litigants, witnesses, opposing counsel and the court;

the perceived legitimacy of the reasons proffered in support of the request; [and] the [party's] personal responsibility for the timing of the request . . . ." (Citation omitted; internal quotation marks omitted.) *Kelly* v. *Kelly*, supra, 85 Conn. App. 800.

"In the event that the trial court acted unreasonably in denying a continuance, the reviewing court must also engage in harmless error analysis." (Internal quotation marks omitted.) *Boccanfuso* v. *Daghoghi*, 193 Conn. App. 137, 169, 219 A.3d 400 (2019), aff'd, 337 Conn. 228, 253 A.3d 1 (2020). "[I]n order to establish reversible error in nonconstitutional claims, the [appellant] must prove both an abuse of discretion and harm . . . ." (Internal quotation marks omitted.) *Cunniffe* v. *Cunniffe*, 141 Conn. App. 227, 235, 60 A.3d 1051, cert. denied, 308 Conn. 934, 66 A.3d 497 (2013).

The record reveals that the defendant was represented by counsel in this action from May 8, 2017, until February 14, 2019, when his first attorney filed a motion to withdraw her appearance because the attorney-client relationship had broken down irreparably.[8] The defendant subsequently secured new counsel, who filed an appearance on February 25, 2019. On May 7, 2019, less than one week before trial was scheduled to begin, the defendant's second attorney filed a motion to withdraw in which he, too, cited a breakdown in the attorney-client relationship and further stated that withdrawal was necessary in order to comply with the Rules of Professional Conduct.

At the time that the second attorney moved to withdraw from the case, he also moved for a continuance to afford the defendant additional time to secure replacement counsel. The next day, however, the defendant filed an appearance as a self-represented party.

[8] The hearing on the motion to withdraw was scheduled for February 28, 2019. It was marked off by the court because the parties failed to appear.

The court issued a written order denying the request for a continuance, noting that trial was scheduled to commence the following Monday.[9] Trial commenced on May 13, 2019. Prior to the start of evidence, the defendant renewed his request for a continuance by way of an oral motion to the court on the grounds that he had been unsuccessful in securing new counsel and that he could not adequately represent his interests in the proceedings. When the court inquired as to the length of delay the defendant sought, the defendant responded that one attorney with whom he had spoken indicated needing at least three months to prepare for trial.

The court then heard from the plaintiff's counsel, who opposed any continuance of the trial. Counsel noted that the dissolution action had been filed more than two years earlier, had been litigated extensively during that time, and that the parties had been ready to proceed to trial six months earlier when the matter was postponed by the court. He also argued that the plaintiff would be prejudiced by any further delay because the defendant had accrued a substantial alimony arrearage and there was an outstanding motion for child support, pendente lite, which had been filed on May 26, 2017. The plaintiff's counsel further represented that the defendant had not been providing adequate child support and that out-of-pocket medical expenses, medical insurance, and fees for the children's extracurricular activities had gone unpaid.

After hearing from both parties, the court denied the defendant's motion for a continuance, stating: "Well . . . the national goal for dealing with cases involving divorce, certainly with children, is to resolve the matter

[9] A hearing regarding the motion to withdraw was scheduled to occur on May 10, 2019. The hearing on that motion was marked off after the defendant filed an appearance as a self-represented party.

within twelve months. Your case is some . . . 720 days past the return date. This is a matter that's been docketed for a considerable period of time. . . . [Y]our oral motion for continuance is . . . denied. We'll go forward. The [c]ourt will give you what latitude it can, but self-represented parties are required to follow the same rules and Practice Book obligations as . . . a licensed attorney." The case proceeded to trial with the defendant acting in a self-represented capacity. After the close of evidence but before the court rendered judgment, the defendant secured new counsel, who appeared and filed a posttrial brief on his behalf.

On the basis of our review of the entire record and the factors articulated by our Supreme Court; see *State* v. *Rivera*, 268 Conn. 351, 379, 844 A.2d 191 (2004); we conclude that the court did not abuse its discretion when it denied the defendant's motion for a continuance. At the time of trial, this action had been pending for more than two years and had been heavily litigated. In his oral motion for a continuance on the first day of trial, the defendant informed the court that he might need a continuance of up to three months.

In deciding whether to grant the continuance, the court properly balanced the parties' competing interests. The court reasonably concluded that the plaintiff's interest in a prompt and final resolution of the matter outweighed any prejudice the defendant might experience if he was required to proceed as a self-represented party. That conclusion was neither arbitrary nor unreasonable, especially in light of the fact that two attorneys representing the defendant had withdrawn on the ground of a breakdown in the attorney-client relationship. Under such circumstances, it was not unreasonable for the court to conclude that granting a continuance on the eve of trial could have resulted in a prolonged delay in a matter involving the well-being of minor children. See, e.g., *Vossbrinck* v. *Vossbrinck*, 194

Conn. 229, 230–32, 478 A.2d 1011 (1984), cert. denied, 471 U.S. 1020, 105 S. Ct. 2048, 85 L. Ed. 2d 311 (1985) (court did not abuse its discretion in denying motion for continuance after granting attorney's motion to withdraw based on disagreements between defendant and counsel about how case should be litigated); *Bevilacqua* v. *Bevilacqua*, 201 Conn. App. 261, 266–69, 242 A.3d 542 (2020) (court did not abuse its discretion in denying motion for continuance in dissolution action involving children that had been pending for more than two years even though delays had been outside of parties' control); see also *Thode* v. *Thode*, 190 Conn. 694, 697, 462 A.2d 4 (1983) (court was "especially hesitant to find an abuse of discretion where the [trial] court ha[d] denied a motion for continuance made on the day of trial"); *Day* v. *Commissioner of Correction*, 118 Conn. App. 130, 134, 983 A.2d 869 (2009) (court did not abuse its discretion when it denied motion for continuance on first day of trial), cert. denied, 294 Conn. 930, 986 A.2d 1055 (2010).

Accordingly, we conclude that the defendant has failed to demonstrate that the court abused its discretion when it denied his motion for a continuance.[10]

[10] Because we conclude that the court did not abuse its discretion, it is unnecessary to consider whether its denial of the motion for a continuance was harmless error. We note, however, that the record provides little support for the defendant's claim that he was prejudiced at all, much less to an extent that would require reversal. The court was extremely accommodating toward the defendant at trial. During the course of the trial, the court patiently explained procedural matters and granted the defendant several lengthy recesses to prepare. It permitted the defendant to submit filings after the deadlines for doing so had passed and gave wide latitude to the defendant during his own direct testimony and cross-examination of the plaintiff. Nearly all of the exhibits the defendant offered into evidence were admitted as full exhibits. Perhaps most significantly, after the close of evidence, the defendant secured counsel, who raised issues and made legal arguments in a posttrial brief that was filed on his behalf. Although the defendant makes a number of arguments about how he was prejudiced by virtue of having to proceed as a self-represented party at trial, his attempts to demonstrate how or to what extent his self-represented status caused any of those alleged harms are unpersuasive.

The judgment is reversed only as to the order regarding the tax consequences of alimony payments, and the case is remanded for further proceedings consistent with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

KRIS J. LIPPI ET AL. *v.* UNITED SERVICES AUTOMOBILE ASSOCIATION (AC 43470)

Alvord, Alexander and Bishop, Js.

Syllabus

The plaintiffs sought to recover damages from the defendant insurance company, alleging that the defendant breached a homeowners insurance policy that insured their residential property. The policy excluded coverage for "collapse," except as specifically provided for in the policy, which defined "collapse" as, inter alia, a "sudden falling or caving in" of a building. The plaintiffs discovered cracks in the walls of their basement, and filed a claim for coverage with the defendant. A contractor inspected the cracks and stated that they appeared similar to the cracks associated with the deterioration of concrete caused by the presence of a chemical compound, pyrrhotite, in the mixture used to make the concrete walls. The defendant denied coverage on the basis of a provision of the policy excluding coverage for, inter alia, cracking of walls, floors, roofs or ceilings. The plaintiffs alleged that the defendant breached the policy by denying coverage for the cracks in the basement walls under the collapse provision of the policy. The defendant filed a motion for summary judgment, arguing that the plaintiffs demonstrated no evidence of collapse under the policy. The trial court granted the defendant's motion for summary judgment, concluding that the plaintiffs could not demonstrate that the damage to their property constituted a sudden "caving in," and, therefore, concluded that the defendant had not breached its contract with the plaintiffs. From the judgment rendered thereon, the plaintiffs appealed to this court. *Held*:

1. The plaintiffs could not prevail on their claim that the trial court erred in concluding that there was no genuine issue of material fact as to whether they were entitled to coverage under their homeowners insurance policy because their property did not suffer a collapse as defined in the policy, which was based on their claim that the trial court improperly interpreted the phrase "caving in": the phrase "caving in" was not ambiguous, the only damage alleged by the plaintiffs was the appearance of

cracks in their basement walls, and, although the plaintiffs argued that the term "caving in" can mean that the basement walls have yielded to the internal force of the oxidation of pyrrhotite, this was just an alternative description of the cracks, thus, the mere cracks in the walls of the plaintiffs' basement, in the absence of any evidence of displacement, shifting or bowing of the walls, could not be understood to be included under the policy's definition of "collapse" as a "caving in"; moreover, the meaning of the word "sudden" as used in the context of the collapse provision could not be construed to encompass the gradual nature of the cracking that had occurred to the walls of the plaintiffs' basement.

2. The trial court applied the correct standard in granting the defendant's motion for summary judgment: although the plaintiffs claimed that the court improperly shifted the burden to them and that the defendant offered no evidence demonstrating that their home had not caved in, the court found that the defendant provided evidence that the house had not fallen or caved in, was safe to live in, and that the damage occurred over a long period of time, and the plaintiffs failed to recite specific facts that contradicted those provided by the defendant's evidence because they did not allege or provide any evidence that the damage to the walls constituted more than mere cracking.

Argued September 22—officially released December 28, 2021

Procedural History

Action seeking to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Tolland, where the court, *Farley*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

Jeffrey R. Lindequist, for the appellants (plaintiffs).

Theodore C. Schultz, pro hac vice, with whom were *Alice M. Forbes*, pro hac vice, and *William J. Forbes*, for the appellee (defendant).

Opinion

ALEXANDER, J. The plaintiffs, Kris J. Lippi and Gina M. Lippi, appeal from the trial court's rendering of summary judgment in favor of the defendant, United Services Automobile Association, on the plaintiffs' two

count complaint that alleged breach of an insurance policy and extracontractual claims. On appeal, the plaintiffs claim that the court erred by improperly granting the defendant's motion for summary judgment. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. The plaintiffs purchased residential property at 46 Ellsworth Circle in South Windsor in 2010. The house on this property was built in 1998. The plaintiffs have maintained a homeowners insurance policy on the property with the defendant from the time they purchased the property.

The policy provides coverage for direct, physical loss to the covered property, unless excluded in "SECTION I—LOSSES WE DO NOT COVER." The exclusions include "[s]ettling, cracking, shrinking, bulging or expansion of pavements, patios, foundations, walls, floors, roofs or ceilings . . . ." These exclusions apply to the "ADDITIONAL COVERAGES" provision of the policy by endorsement. The policy does not insure for damages consisting or caused, directly or indirectly, by "collapse," other than as provided under the "ADDITIONAL COVERAGES" provision. (Internal quotation marks omitted.) The "ADDITIONAL COVERAGES" provision provides in relevant part: "8. 'Collapse' For an entire building or any part of a building covered by this insurance we insure for direct physical loss to covered property involving 'collapse' of a building or any part of a building only when the 'collapse' is caused by one or more of the following: a. 'Named peril(s)' apply to covered buildings and personal property for loss insured by this additional coverage. b. Decay that is hidden from view, meaning damage that is unknown prior to collapse or that does not result from a failure to reasonably maintain the property . . . f. Use of

defective material or methods in construction, remodeling or renovation . . . .'' (Emphasis omitted.) The policy defines ''collapse'' as ''a. A sudden falling or caving in; or b. A sudden breaking apart or deformation such that the building or part of a building is in imminent peril of falling or caving in and is not fit for its intended use.'' (Internal quotation marks omitted.) Thus, the policy excludes coverage for ''collapse,'' except as provided by the ''ADDITIONAL COVERAGES'' provision and subject to the exclusions described under ''LOSSES WE DO NOT COVER,'' with ''collapse'' defined under the policy's ''DEFINITIONS'' section, as amended by endorsement. (Internal quotation marks omitted.)

In 2016, the plaintiffs discovered cracks in the walls of their basement. A contractor inspected the cracks and stated that they appeared similar to the cracks associated with the deterioration of concrete caused by the presence of a chemical compound, pyrrhotite, in the mixture used to make the concrete walls. The plaintiffs learned that their basement walls likely were constructed with concrete that contained pyrrhotite and was manufactured by the J.J. Mottes Concrete Company. The plaintiffs filed a claim for coverage with the defendant, which the defendant denied on the basis of the ''LOSSES WE DO NOT COVER'' provision that excludes coverage for ''[s]ettling, cracking, shrinking, bulging or expansion of pavements, patios, foundations, walls, floors, roofs or ceilings . . . .''

The plaintiffs commenced this action in July, 2016, claiming that the defendant breached the homeowners insurance policy that it had issued to them by denying coverage for cracks in the walls of their basement under the collapse provision of the policy. Thereafter, the plaintiffs had the property inspected by two engineers, James L. Silva and David Grandprè. Silva stated that the cracking ''appears to be consistent with the conditions that are usually observed after the incipient stage

of a concrete sulfate attack . . . .'' (Emphasis omitted.) He further explained that ''the immediate replacement of the foundation is not warranted'' but that ''the rate of damage can accelerate and a foundation replacement could likely be required within the next two to five years.'' (Emphasis omitted.) Grandprè stated that the property was not unsafe to live in and he could not say when, or if, the walls would ever need to be replaced. He did not observe any shifting, bowing or other displacement of the walls or other structural elements. The plaintiffs have continued to reside at the property and stated that they feel safe living there.

In April, 2019, the defendant filed a motion for summary judgment maintaining that ''the [plaintiffs] have no evidence of collapse under the policy . . . . The [plaintiffs'] own expert admits the [plaintiffs'] foundation does not need replacement now, and may never need replacing in the future . . . . Furthermore, the [plaintiffs'] policy does not cover losses that happen over time, such as pyrrhotite degradation in concrete.'' The plaintiffs countered in their opposition to the defendant's motion that ''the record suggests that [the plaintiffs] have suffered a collapse of the basement walls of their home, as defined by the terms of one or more of the policies issued by the defendant, which collapse was caused by an enumerated peril. To the extent that the record does not clearly demonstrate such a covered collapse, or the timing thereof, this lack of clarity arises from factual issues that preclude summary judgment.'' After oral argument, and in a written decision, the court granted the defendant's motion for summary judgment.

In its decision, the court discussed the definition of ''collapse'' as it applied to the ''collapse'' coverage contained within the policy issued by the defendant to the plaintiffs. (Internal quotation marks omitted.) The court noted that the policy defines ''[c]ollapse'' as ''a. A sudden falling or caving in; or b. A sudden breaking apart

or deformation such that the building or part of a building is in imminent peril of falling or caving in and is not fit for its intended use." The court also noted the policy's exclusion for "[s]ettling, *cracking*, shrinking, bulging or expansion of pavements, patios, foundations, walls, floors, roofs, or ceilings." (Emphasis added.) The court concluded that the plaintiffs could not establish that the damage to their property constituted a "sudden . . . caving in" and, therefore, the defendant had not breached its contract with the plaintiffs. (Internal quotation marks omitted.)

The court determined that "[t]he facts of this case do not raise a jury question as to whether the plaintiffs' basement walls have experienced a caving in. There is no evidence of any displacement, shifting or bowing of [the] walls. There is only evidence of cracking resulting from the internal pressure caused by the chemical reaction the plaintiffs maintain is occurring. . . . Moreover, the evidence in this case places the damage to the plaintiff's basement walls squarely within the scope of the cracking exclusion recited above.

"Further, in order for the plaintiffs to establish coverage, any caving in must have occurred suddenly, i.e., abruptly. A gradual loss of strength, even where it does include a gradual succumbing to external forces, is not sudden. While there is evidence that the basement walls have experienced a gradual loss of strength, the record evidence only supports a conclusion that it has been a gradual process. Damage that occurs gradually over time does not satisfy the requirement that any caving in must be sudden." The court then concluded that the plaintiffs' extracontractual claims were not viable.

On appeal, the plaintiffs claim that the trial court erred in granting the defendant's motion for summary judgment. Specifically, the plaintiffs contend that the trial court erred by (1) concluding that the plaintiffs'

property did not suffer a collapse as defined in the policy issued by the defendant because there existed a genuine issue of material fact as to whether the damage to the property constituted a "sudden . . . caving in," and (2) failing to apply the correct standard in granting the defendant's motion for summary judgment.[1] (Internal quotation marks omitted.) We disagree and, accordingly, affirm the judgment of the trial court.

We first set forth the applicable standard of review. "The standard of review of a trial court's decision granting summary judgment is well established. Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . Our review of the trial court's decision to grant . . . summary judgment is plenary. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Internal quotation marks omitted.) *Warzecha* v. *USAA Casualty Ins. Co.*, 206 Conn. App. 188, 190–91, 259 A.3d 1251 (2021).

"[C]onstruction of a contract of insurance presents a question of law for the [trial] court which this court

[1] The plaintiffs also claim that the court erred in rendering summary judgment in favor of the defendants on their extracontractual claims. Because we conclude that the trial court properly granted the defendant's motion for summary judgment as to the breach of contract claim, the plaintiffs' extracontractual claims also fail. See, e.g., *Zulick* v. *Patrons Mutual Ins. Co.*, 287 Conn. 367, 378, 949 A.2d 1084 (2008) (trial court's rendering of summary judgment in favor of defendant on breach of contract claim was proper, therefore, there was no genuine issue of material fact as to whether application of policy constituted violation of extracontractual claims).

reviews de novo." (Internal quotation marks omitted.) *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, 333 Conn. 343, 364, 216 A.3d 629 (2019). "An insurance policy is to be interpreted by the same general rules that govern the construction of any written contract . . . . In accordance with those principles, [t]he determinative question is the intent of the parties, that is, what coverage the . . . [insured] expected to receive and what the [insurer] was to provide, as disclosed by the provisions of the policy. . . . If the terms of the policy are clear and unambiguous, then the language, from which the intention of the parties is to be deduced, must be accorded its natural and ordinary meaning. . . . Under those circumstances, the policy is to be given effect according to its terms. . . . When interpreting [an insurance policy], we must look at the contract as a whole, consider all relevant portions together and, if possible, give operative effect to every provision in order to reach a reasonable overall result. . . .

"In determining whether the terms of an insurance policy are clear and unambiguous, [a] court will not torture words to import ambiguity [when] the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms. . . . As with contracts generally, a provision in an insurance policy is ambiguous when it is reasonably susceptible to more than one reading. . . . Under those circumstances, any ambiguity in the terms of an insurance policy must be construed in favor of the insured because the insurance company drafted the policy." (Internal quotation marks omitted.) *Jemiola* v. *Hartford Casualty Ins. Co.*, 335 Conn. 117, 128–29, 229 A.3d 84 (2019).

In *Jemiola*, the plaintiff commenced an action against the defendant insurance company, claiming that cracks

in the basement walls of the plaintiff's home were covered under the collapse provision of her homeowners insurance policy. Id., 119. The trial court granted the defendant's motion for summary judgment and, on appeal, our Supreme Court affirmed the trial court's judgment. Id., 119–20. The definition of collapse in that policy was "an abrupt falling down or caving in of a building or any part of a building with the result that the building or part of the building cannot be occupied for its current intended purpose." (Internal quotation marks omitted.) Id., 121. The court concluded that there was no plausible interpretation of the policy's definition of "collapse" that "reasonably encompasses a home, such as the plaintiff's, that is still standing and capable of being safely lived in for many years—if not decades—to come." Id., 135. Additionally, the court concluded that the plaintiff's reliance in *Jemiola* on cases with materially different facts was misplaced, because "[c]ontext is . . . central to the way in which policy language is applied; the same language may be found both ambiguous and unambiguous as applied to different facts. . . . Language in an insurance contract, therefore, must be construed in the circumstances of [a particular] case, and cannot be found to be ambiguous [or unambiguous] in the abstract. . . . [O]ne court's determination that [a] term . . . was unambiguous, in the specific context of the case that was before it, is not dispositive of whether the term is clear in the context of a wholly different matter." (Internal quotation marks omitted.) Id., 134.

I

The plaintiffs first argue that the court erred when it concluded that there was no genuine issue of material fact as to whether they were entitled to coverage under the insurance policy issued by the defendant. They contend that the trial court's interpretation of the phrase "sudden falling or caving in" was in error because it

"failed to construe the ambiguities in favor of the plaintiffs . . . ." (Internal quotation marks omitted.) They argue that the term "cave in" can reasonably be defined as to "yield" or to "submit to pressure" and that the basement walls of the property have yielded to the chemical reaction in the concrete. (Internal quotation marks omitted.) However, we will not construe words in a contract to import ambiguity when an ambiguity is not present. See *Jemiola* v. *Hartford Casualty Ins. Co.*, supra, 335 Conn. 129. In this context, we do not conclude that the phrase "caving in" is ambiguous.

In support of their argument, the plaintiffs cite multiple cases that can be distinguished from the circumstances of the present case. In *Sirois* v. *USAA Casualty Ins. Co.*, 342 F. Supp. 3d 235, 241–42 (D. Conn. 2018), the United States District Court for the District of Connecticut, in interpreting the same policy language as that which is at issue in the present case, denied the defendant insurance company's motion for summary judgment after finding that the phrase "caving in" was ambiguous. (Internal quotation marks omitted.) The court stated that the plaintiffs' proposed meaning, "yield" or to "submit to pressure," was a reasonable interpretation. (Internal quotation marks omitted.) Id., 242. In that case, however, the plaintiffs alleged in their complaint that the basement walls of their home had "a series of horizontal and vertical cracks" and that they had begun to show signs of "bowing, bulging, jacking, shifting, and other instances of differential inward and upward motion." (Internal quotation marks omitted.) *Sirois* v. *USAA Casualty Ins. Co.*, United States District Court, Docket No. 3:16-CV-1172 (MPS) (D. Conn. August 29, 2017) (prior decision denying defendant's motion to dismiss).

In *Gnann* v. *United Services Automobile Assn.*, Superior Court, judicial district of Tolland, Docket No. CV-16-6010517-S (July 11, 2019) (68 Conn. L. Rptr. 882, 890),

the court, also interpreting the same policy language as that which is at issue in the present case, denied the defendant insurance company's motion for summary judgment, finding that there was a genuine issue of material fact as to whether the damage to the plaintiff's basement walls constituted a " 'caving in.' " The plaintiffs in that case alleged that there were large cracks in their basement walls, loose pieces of concrete that could be removed from the walls, and the deterioration had "resulted in the bulging, bowing and shifting of the walls" and further, that these conditions "are evidence that the concrete basement walls have failed and have begun to move inward . . . ." (Internal quotation marks omitted.) Id., 883. On the basis of these facts, the court found the phrase " 'caving in' " to be ambiguous and concluded that there was a genuine issue of material fact as to whether the damage constituted " 'caving in . . . .' " Id., 890.

Turning to the present case and considering the evidence in the light most favorable to the plaintiffs as the nonmoving parties, the facts of this case can be distinguished from both *Sirois* and *Gnann* because the only damage alleged by the plaintiffs is the appearance of cracks in their basement walls. Although the plaintiffs contend that the term "caving in" can mean that the "basement walls have *yielded* to the internal force of the expansive oxidation of pyrrhotite," this is just an alternative description of the cracks in the walls of their basement. (Emphasis in original; internal quotation marks omitted.) On the basis of the facts and circumstances of the present case, the mere cracks in the walls of the plaintiffs' basement, in the absence of any evidence of displacement, shifting or bowing of the walls, cannot be understood to be included under the policy's definition of "collapse" as a "caving in . . . ." See *Jemiola* v. *Hartford Casualty Ins. Co.*, supra, 335 Conn. 134.

Next, the plaintiffs contend that the term "sudden" must be construed to mean "unexpected" or, in the alternative, that the word "sudden" is ambiguous and should be construed in favor of the insured.[2] (Internal quotation marks omitted.) We disagree. In *Buell Industries, Inc.* v. *Greater New York Mutual Ins. Co.*, 259 Conn. 527, 540, 791 A.2d 489 (2002) (*Buell*), our Supreme Court interpreted the word "sudden" in an insurance policy to mean "temporally abrupt . . . ." The policy at issue in that case excluded pollution related claims from coverage but contained an exception to the pollution exclusion reinstating coverage when the release of pollutants was " 'sudden and accidental.' " Id., 534. The plaintiff argued that although the pollution occurred over a period of years, the exception to the pollution exclusion should apply because the term " 'sudden' " meant "unexpected . . . ." Id., 536. The court stated that the word "sudden" generally described the unexpected nature of an event but is also used to describe a situation that is abrupt or quickly occurring. Id., 540. It explained that the word "sudden" may "connote either state—or even a combination of both an unexpected and a temporally abrupt quality—in a given context, [but] what matters for our purposes is what the word was intended to mean in the context of the 'sudden and accidental' exception to the pollution exclusion." Id. Within the context of that policy, and

[2] The plaintiffs also argue that the defendant's interpretation of "sudden" as meaning "temporally abrupt" would render coverage illusory. Specifically, they contend that requiring the insured to wait for a catastrophic event to occur, such as a complete falling to the ground of their home, "defies the reasonable expectations of the insured and serves only to render the collapse coverage illusory." We disagree that the coverage provided by the defendant is illusory. The policy's definition of "collapse" provides coverage before a complete falling to the ground of a home, such as when "a building is in imminent peril of falling or caving in and is not fit for its intended use." (Internal quotation marks omitted.) Coverage is not rendered illusory merely because the policy's definition of collapse does not encompass the damage to the plaintiffs' basement walls.

due to "the juxtaposition of the word 'sudden' with the word 'accidental,' " the court concluded that the definition of "sudden" included the phrase "temporally abrupt . . . ." Id.

We conclude that the meaning of the word "sudden" as used in the context of the collapse provision of the policy in the present case includes the "temporally abrupt" quality of the word. Although the language in the present case does not use the phrase "sudden and accidental," we conclude that our Supreme Court's reasoning in *Buell* and *Jemiola* is instructive. In both cases, the court emphasized the importance of interpreting words in the context of the policy at issue and the facts of the case. See *Jemiola* v. *Hartford Casualty Ins. Co.*, supra, 335 Conn. 134; *Buell Industries, Inc.* v. *Greater New York Mutual Ins. Co.*, supra, 259 Conn. 540. Furthermore, although the plaintiffs cite to dictionary definitions of "sudden" in support of their argument that "sudden" is an ambiguous term, "[t]he existence of more than one dictionary definition is not the sine qua non of ambiguity." (Internal quotation marks omitted.) *Buell Industries, Inc.* v. *Greater New York Mutual Ins. Co.*, supra, 546. It is untenable to construe the word "sudden" "as an event whose only requirement is that it be unexpected to the observer." (Internal quotation marks omitted.) Id., 544. "A provision in an insurance policy is ambiguous only when it is *reasonably* susceptible of more than one reading"; (emphasis in original) *Jemiola* v. *Hartford Casualty Ins. Co.*, supra, 135; and, here, the word sudden cannot be susceptible to the meaning the plaintiffs ask us to ascribe to it. Here, as the trial court noted, the cracks in the walls of the plaintiffs' basement have occurred gradually over time, and, as we noted earlier in this opinion, the cracks do not constitute a " 'caving in . . . .' " In the context of this case, therefore, the word "sudden" cannot be construed to encompass the gradual nature of the cracking

that has occurred in the walls of the plaintiffs' basement. Thus, the trial court correctly concluded that there was no genuine issue of material fact as to whether the cracks in the walls of the plaintiffs' basement constituted a " 'sudden . . . caving in . . . .' "

II

The plaintiffs next claim that the trial court failed to apply the correct standard in granting the defendant's motion for summary judgment. Specifically, they contend that the court improperly shifted the burden to them, and that the defendant "offered no evidence that affirmatively demonstrated that the [plaintiffs'] home had not caved in." We conclude that the trial court applied the correct standard in granting the defendant's motion for summary judgment.

The general principles governing a trial court's decision on a motion for summary judgment are well established. "In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met

its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue." (Internal quotation marks omitted.) *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 319–20, 77 A.3d 726 (2013). "To oppose a motion for summary judgment successfully, the nonmovant must recite specific facts . . . which contradict those stated in the movant's affidavits and documents. . . . The opposing party to a motion for summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue." (Internal quotation marks omitted.) *Brusby* v. *Metropolitan District*, 160 Conn. App. 638, 646, 127 A.3d 257 (2015).

In their complaint, the plaintiffs alleged that the "pattern cracking" damage to their basement walls constituted a " 'collapse' " and was covered under the collapse provision of the policy. In its motion for summary judgment, the defendant argued that there was no genuine issue of material fact as to whether the damage to the plaintiffs' basement walls constituted a "collapse" as defined in the policy. First, the defendant argued that the "slow degradation of concrete that took years to develop" could not constitute a " 'sudden' " collapse, as that term is used in the policy's definition of collapse. In support of its argument, the defendant provided evidence in the form of statements from the plaintiffs' engineers, Silva and Grandprè, as well as its own engineer, Joseph Malo, all of whom inspected the property and stated that the chemical reaction occurring within the basement walls was slow and took place over a long period of time.

The defendant also argued that the plaintiffs could not show that the damage constituted a " 'collapse' " because the house had not collapsed, fallen down or caved in, and it was safe to live in. The defendant pointed again to Silva's and Grandprè's statements that

replacement of the plaintiffs' foundation was not warranted at that time and that the plaintiffs' house may never fall down. In addition, the defendant referred to Grandprè's statements that the plaintiffs' basement walls were plumb, the cracks were generally smaller than he had seen in other residences, the home was safe to live in, and the foundation was able to support the load of the house above and was able to keep out soil and water.

In their objection to the defendant's motion, the plaintiffs offered an interpretation of the policy language at issue suggesting that the mere cracks in the basement walls constituted a "collapse" as defined in the homeowners policy. The plaintiffs argued that the damage constituted a "caving in" because that phrase is defined as to " 'yield' " or to " 'submit to pressure' " and pointed to Grandprè's statement that the basement walls had yielded to the internal force of the chemical reaction in the concrete. The plaintiffs further argued that the word " 'sudden' " was ambiguous and should be construed in their favor to mean " 'unexpected,' " and that "it is only reasonable to conclude that the chemical reaction at work in [the plaintiffs'] walls was completely unexpected."

The trial court construed the language at issue in the policy and concluded that, based on the facts of the case, there was no genuine issue of material fact as to whether the damage to the plaintiffs' home constituted a " 'collapse' " such that it would be covered under the collapse provision of the policy. The court concluded that the defendant met its burden of establishing that there was no genuine issue of material fact by providing evidence that the house had not fallen or caved in, was safe to live in, and that the damage occurred over a period of time. The plaintiffs argued in their opposition that the cracking, in and of itself, constituted a "caving in" because that phrase should be interpreted to mean

to " 'yield' " or to " 'submit to pressure' " and that the term " 'sudden' " means " 'unexpected' " and that the cracking occurred unexpectedly. The court, however, found that there was "no evidence of any displacement, shifting or bowing of walls. . . . There is no evidence that any loss of strength associated with the cracking has undermined the structural integrity of the building or part of it such that a part of the building has actually given way to external forces." Therefore, the plaintiffs failed to recite specific facts that contradicted those provided by the defendant's evidence because they did not allege or provide any evidence that the damage to the walls of their basement constituted more than mere cracking. See, e.g., *Brusby* v. *Metropolitan District*, supra, 160 Conn. App. 646. The court concluded that, even when construing the facts in the light most favorable to the plaintiffs, the mere cracking in the basement walls of the plaintiffs' home could not support a finding that the plaintiffs' home suffered a "collapse" as defined in the policy.

Therefore, we conclude that the plaintiffs failed to show that a genuine issue of material fact existed as to whether the damage to their property constituted a "collapse" as covered under the insurance policy provided by the defendant. Accordingly, the trial court did not err in rendering summary judgment in favor of the defendant.

The judgment is affirmed.

In this opinion the other judges concurred.

JEREMY M. REID *v.* SHERI A. SPEER ET AL.
(AC 36663)

Alexander, Clark and Palmer, Js.

Syllabus

The defendant employer appealed to this court from the decision of the Compensation Review Board, which affirmed the decision of the Workers' Compensation Commissioner finding that the plaintiff was employed

by the defendant within the meaning of the Workers' Compensation Act (act) (§ 31-275 et seq.) and granting the plaintiff's motion to preclude the defendant from contesting the compensability of his injury pursuant to statute (§ 31-294c (b)). The defendant received the plaintiff's notice of claim for compensation but failed to file a form 43 within twenty-eight days contesting liability for the plaintiff's injury. On appeal, the defendant claimed, inter alia, that filing a form 43 would have violated the applicable statute (§ 31-290c), as she had knowledge that the plaintiff's claim for compensation was fraudulent. *Held* that the defendant could not prevail on her challenges to the fact-finding and credibility determinations made by the commissioner: evidence in the record supported the commissioner's express findings that the alleged injury suffered by the plaintiff, if proven, would constitute a compensable injury under the act and that, at the time of the alleged injury, the plaintiff was an employee of the defendant; moreover, the defendant could not prevail on her claim that her filing of a form 43 would have constituted criminal conduct, as she provided no legal support for the claim, and the purpose of filing the form, to contest the defendant's liability for the plaintiff's injury, would not fall within the language of § 31-290c that criminalizes conduct by a claimant for benefits under the act.

Submitted on briefs November 10, 2021—officially released December 28, 2021

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Second District finding that the plaintiff was an employee of the named defendant subject to coverage under the Workers' Compensation Act and granting the plaintiff's motion to preclude the defendants from contesting liability as to his claim for certain workers' compensation benefits, brought to the Compensation Review Board, which affirmed the commissioner's decision, and the named defendant appealed to this court. *Affirmed.*

Sheri A. Speer, self-represented, filed a brief as the appellant (named defendant).

Lance G. Proctor, filed a brief for the appellee (plaintiff).

PER CURIAM. The self-represented defendant Sheri A. Speer appeals from the decision of the Compensation Review Board (board) affirming the finding and award of preclusion rendered by the Workers' Compensation Commissioner for the Second District (commissioner), in favor of the plaintiff, Jeremy M. Reid.[1] On appeal, the defendant challenges several of the commissioner's findings and also claims that filing a form 43 to contest liability for the plaintiff's injury would have constituted a criminal act punishable pursuant to General Statutes § 31-290c, due to her alleged knowledge that his claim was fraudulent. We affirm the decision of the board.[2]

The following facts and procedural history are relevant to this appeal. The plaintiff filed a form 30C on

[1] General Statutes § 31-301b provides that "[a]ny party aggrieved by the decision of the Compensation Review Board upon any question or questions of law arising in the proceedings may appeal the decision of the Compensation Review Board to the Appellate Court, whether or not the decision is a final decision within the meaning of section 4-183 or a final judgment within the meaning of section 52-263." Our appellate courts expressly have recognized that the final judgment requirement does not apply to appeals taken from the board. See *Dechio* v. *Raymark Industries, Inc.*, 299 Conn. 376, 399–400, 10 A.3d 20 (2010); *Hadden* v. *Capital Region Education Council*, 164 Conn. App. 41, 46 n.7, 137 A.3d 775 (2016).

[2] The plaintiff named Sheri A. Speer and Speer Enterprises, LLC, as his employer when he commenced this claim for workers' compensation benefits. During the proceedings before the commissioner and the board, the name of the employer was changed to "Sheri A. Speer d/b/a Speer Enterprises, LLC." The commissioner found that Sheri A. Speer was an employer for purposes of the Workers' Compensation Act, and that "[a]ll of [the plaintiff's] duties for [the defendant] and/or Speer Enterprises were performed within the state of Connecticut." All references herein to the defendant are to Sheri A. Speer.

Additionally, the commissioner found that the defendant did not carry workers' compensation insurance either individually or in the name of any of her businesses. The Second Injury Fund (fund) was cited in as a party pursuant to General Statutes § 31-355. See, e.g., *DeJesus* v. *R.P.M. Enterprises, Inc.*, 204 Conn. App. 665, 668, 255 A.3d 885 (2021). The fund has not participated in this appeal.

May 5, 2010, alleging that he had sustained a compensable injury to his right shoulder while employed by the defendant.[3] This injury allegedly had occurred on December 31, 2009, when he had been shoveling snow at one of the defendant's properties. The defendant did not respond to the plaintiff's filing in any manner, including the filing of a form 43 within twenty-eight days.[4] On August 20, 2010, the plaintiff filed a motion to preclude the defendant from contesting liability.[5]

After informal and formal hearings, the commissioner determined that, although the plaintiff initially had been an independent contractor, the relationship between the plaintiff and the defendant had evolved into one of an employee-employer. The plaintiff's alleged injury, therefore, fell within scope of the Workers' Compensation Act (act), General Statutes § 31-275 et seq. The commissioner also granted the plaintiff's motion to preclude. As a result, the defendant was precluded from contesting liability[6] for the plaintiff's claimed injury to

[3] "A form 30C is the form prescribed by the workers' compensation commission of Connecticut for use in filing a notice of [a workers' compensation] claim . . . ." (Internal quotation marks omitted.) *Wiblyi* v. *McDonald's Corp.*, 168 Conn. App. 92, 94 n.3, 144 A.3d 530 (2016).

[4] "A form 43 is a disclaimer that notifies a claimant who seeks workers' compensation benefits that the employer intends to contest liability to pay compensation. If an employer fails timely to file a form 43, a claimant may file a motion to preclude the employer from contesting the compensability of his claim. . . . The form 43 generally must be filed within twenty-eight days of receiving written notice of the claim. See General Statutes § 31-294c . . . ." (Citation omitted; internal quotation marks omitted.) *Wiblyi* v. *McDonald's Corp.*, 168 Conn. App. 77, 79 n.2, 144 A.3d 1075 (2016).

[5] We have described a motion to preclude in this context as "a statutorily created waiver mechanism that, following an employer's failure to comply with the requirement of [General Statutes] § 31-294c (b), bars that employer from contesting the compensability of its employee's claimed injury or the extent of the employee's resulting disability." (Internal quotation marks omitted.) *Dominguez* v. *New York Sports Club*, 198 Conn. App. 854, 865, 234 A.3d 1017 (2020).

[6] See, e.g., *Dominguez* v. *New York Sports Club*, 198 Conn. App. 854, 864, 234 A.3d 1017 (2020) (employer who fails to contest liability and commence payment for alleged injury on or before twenty-eighth day shall be conclusively presumed to have accepted compensability for alleged injury and this

his right shoulder and from contesting the extent of any resulting disability. The commissioner further ordered the plaintiff to provide a list of benefits claimed and noted that, if the parties were unable to reach an agreement as to the benefits owed to the plaintiff, a formal hearing would ensue. At that hearing, the plaintiff would be required to prove his claims as to compensability, the extent of his disability and entitlement to benefits;[7] however, as a result of the granting of the motion to preclude, the defendant would be "barred from offering exculpatory evidence into the record, from examining witnesses, from commenting on evidence offered by the [plaintiff] or making argument."[8] This appeal, initially filed in 2014, followed.[9]

We begin by setting forth the relevant legal principles. "The purpose of the [act] is to compensate the worker for injuries arising out of and in the course of employment, without regard to fault, by imposing a form of strict liability on the employer . . . . The [act] compromise[s] an employee's right to a [common-law] tort action for work related injuries in return for relatively quick and certain compensation. . . . The act indisputably is a remedial statute that should be construed generously to accomplish its purpose. . . . The humanitarian and remedial purposes of the act counsel against an overly narrow construction that unduly limits

conclusive presumption cannot be overcome by any additional evidence or argument); *Woodbury-Correa* v. *Reflexite Corp.*, 190 Conn. App. 623, 628–29, 212 A.3d 252 (2019) (if commissioner determines that employee's notice of claim is adequate on its face and that employer failed to comply with [General Statutes] § 31-294c, then motion to preclude must be granted).

[7] See, e.g., *Donahue* v. *Veridiem, Inc.*, 291 Conn. 537, 545–47, 970 A.2d 630 (2009).

[8] But see *Del Toro* v. *Stamford*, 270 Conn. 532, 543, 853 A.2d 95 (2004) (conclusive presumption does not prevent employer from contesting liability when issue of lack of subject matter jurisdiction has been presented squarely to commissioner).

[9] Resolution of this appeal was delayed pursuant to a bankruptcy stay, which was lifted on December 1, 2020.

eligibility for workers' compensation. . . . Further, our Supreme Court has recognized that the state of Connecticut has an interest in compensating injured employees to the fullest extent possible . . . .

"The principles that govern 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 [board's] hearing of an appeal from the commissioner is not a de novo hearing of the facts. . . . *[T]he power and duty of determining the facts rests on the commissioner . . . . [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. . . .*

"This court's review of decisions of the board is similarly limited. . . . The conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . [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.*" (Citations omitted; emphasis added; internal quotation marks omitted.) *Jones* v. *Connecticut Children's Medical Center Faculty Practice Plan*, 131 Conn. App. 415, 422–24, 28 A.3d 347 (2011); see also *Leonetti* v. *MacDermid, Inc.*, 310 Conn. 195, 205–206, 76 A.3d 168 (2013).

On appeal, the defendant first challenges certain factual findings made by the commissioner.[10] Specifically, she contends that the commissioner erred in finding that (1) the plaintiff was injured in the course of his employment and was unable to work, (2) an employer-employee relationship existed, and (3) a sufficient quantity of snow existed that required the plaintiff to engage in the act of shoveling.

We carefully have reviewed the record before us and conclude that the defendant cannot prevail on her challenges to the fact-finding[11] and credibility determinations[12] made by the commissioner. The commissioner expressly found that the alleged injury suffered by the plaintiff while shoveling snow at the defendant's property, if proven, would constitute a compensable injury under the act, assuming that he was an employee of the defendant.[13] The commissioner further found that,

[10] The defendant filed a motion to correct the factual findings of the commissioner pursuant to § 31-301-4 of the Regulations of Connecticut State Agencies, and, therefore, is not prohibited from challenging those findings before the board or this court. See, e.g., *DeJesus* v. *R.P.M. Enterprises, Inc.*, 204 Conn. App. 665, 686, 255 A.3d 885 (2021); *Melendez* v. *Fresh Start General Remodeling & Contracting, LLC*, 180 Conn. App. 355, 367–68, 183 A.3d 670 (2018).

[11] We emphasize that the power and duty for determining the facts and the conclusions drawn therefrom rests with the commissioner in a workers' compensation case. See *Orzech* v. *Giacco Oil Co.*, 208 Conn. App. 275, 281, A.3d (2021); see also *Marandino* v. *Prometheus Pharmacy*, 294 Conn. 564, 572, 986 A.2d 1023 (2010); *Six* v. *Thomas O'Connor & Co.*, 235 Conn. 790, 798, 669 A.2d 1214 (1996).

[12] "It is within the discretion of the commissioner alone to determine the credibility of witnesses and the weighing of the evidence. It is . . . immaterial that the facts permit the drawing of diverse inferences. The [commissioner] alone is charged with the duty of initially selecting the inference which seems most reasonable, and [the commissioner's choice], if otherwise sustainable, may not be disturbed by a reviewing court." (Internal quotation marks omitted.) *Ayna* v. *Graebel/CT Movers, Inc.*, 133 Conn. App. 65, 71, 33 A.3d 832, cert. denied, 304 Conn. 905, 38 A.3d 1201 (2012); see also *McFarland* v. *Dept. of Developmental Services*, 115 Conn. App. 306, 322, 971 A.2d 853, cert. denied, 293 Conn. 919, 979 A.2d 490 (2009).

[13] "[I]t is well settled that, because the purpose of the act is to compensate employees for injuries without fault by imposing a form of strict liability

at the time of this alleged injury, the plaintiff was an employee of the defendant.[14] See, e.g., *DeJesus* v. *R.P.M. Enterprises, Inc.*, 204 Conn. App. 665, 694–97, 255 A.3d 885 (2021); *Rodriguez* v. *E.D. Construction, Inc.*, 126 Conn. App. 717, 727–28, 12 A.3d 603, cert. denied, 301 Conn. 904, 17 A.3d 1046 (2011). Evidence exists in the record to support these findings. Cognizant of our limited role, we conclude that the defendant's challenges to the facts found by the commissioner are without merit.

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) in the course of the employment.* . . . Proof that [an] injury arose out of the employment relates to the time, place and circumstances of the injury. . . . Proof that [an] injury occurred in the course of the employment means that the injury must occur (a) within the period of the employment; (b) at a place the employee may reasonably be; and (c) while the employee is reasonably fulfilling the duties of the employment or doing something incidental to it." (Emphasis added; internal quotation marks omitted.) *Sapko* v. *State*, 305 Conn. 360, 371–72, 44 A.3d 827 (2012); see also *Jones* v. *Connecticut Children's Medical Center Faculty Practice Plan*, supra, 131 Conn. App. 423.

[14] Our Supreme Court has "stated that [t]he fundamental distinction between an employee and an independent contractor depends upon the existence or nonexistence of the right to control the means and methods of work. . . . The test of the relationship is the right to control. It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant or agent. . . . An employer-employee relationship does not depend upon the actual exercise of the right to control. The right to control is sufficient. . . . The decisive test is who has the right to direct what shall be done and when and how it shall be done? Who has the right of general control? . . . Under this test, we have stated that [a]n independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his or her employer, except as to the result of his work." (Citation omitted; internal quotation marks omitted.) *Standard Oil of Connecticut, Inc.* v. *Administrator, Unemployment Compensation Act*, 320 Conn. 611, 623, 134 A.3d 581 (2016).

In the present case, the board noted that the commissioner concluded, after a "thorough review of the facts and law" that the plaintiff was not an independent contractor at the time of his claimed injury and that this conclusion was reasonable. Specifically, the board found that the defendant's decision to install time clocks and to establish policies as to the time,

Next, the defendant claims that, under these facts, she could not file a form 43 to contest liability and, therefore, the court improperly granted the plaintiff's motion to preclude. Specifically, she contends that the filing of a form 43, when she allegedly knew the plaintiff's claim to be fraudulent, would have constituted a criminal act punishable pursuant to § 31-290c.[15] Specifically, she contends that, had she filed a form 43, she would have "intentionally aided, abetted and facilitated fraudulently obtained payments [for the plaintiff]." We are not persuaded by this novel interpretation of § 31-290c.[16]

place, and manner that work was to be performed at her properties "clearly demonstrate[d] that she asserted the right to control the [plaintiff's] work, and he was no longer acting in an autonomous manner."

[15] General Statutes § 31-290c provides: "(a) Any person or his representative who makes or attempts to make any claim for benefits, receives or attempts to receive benefits, prevents or attempts to prevent the receipt of benefits or reduces or attempts to reduce the amount of benefits under this chapter based in whole or in part upon (1) the intentional misrepresentation of any material fact including, but not limited to, the existence, time, date, place, location, circumstances or symptoms of the claimed injury or illness or (2) the intentional nondisclosure of any material fact affecting such claim or the collection of such benefits, shall be guilty of a class C felony if the amount of benefits claimed or received, including but not limited to, the value of medical services, is less than two thousand dollars, or shall be guilty of a class B felony if the amount of such benefits exceeds two thousand dollars. Such person shall also be liable for treble damages in a civil proceeding under section 52-564.

"(b) Any person, including an employer, who intentionally aids, abets, assists, promotes or facilitates the making of, or the attempt to make, any claim for benefits or the receipt or attempted receipt of benefits under this chapter by another person in violation of subsection (a) of this section shall be liable for the same criminal and civil penalties as the person making or attempting to make the claim or receiving or attempting to receive the benefits."

[16] "[It] is well established that [a]lthough not dispositive, we accord great weight to the construction given to the workers' compensation statutes by the commissioner and [the] board. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . We have determined, therefore, that the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the con-

In her brief to this court, the defendant offers no support for her argument that the mere act of filing a form 43 would have constituted criminal conduct. Our Supreme Court has explained that § 31-290c "criminalizes the behavior of a person who makes a claim or obtains an award based in whole or part on a material misrepresentation or intentional nondisclosure of material fact, and it also confers the right to bring a cause of action for statutory theft pursuant to General Statutes § 52-564." *Leonetti* v. *MacDermid, Inc.*, supra, 310 Conn. 217–18; see also *Dowling* v. *Slotnik*, 244 Conn. 781, 815, 712 A.2d 396, cert. denied sub nom. *Slotnik* v. *Considine*, 525 U.S. 1017, 119 S. Ct. 542, 142 L. Ed. 2d 451 (1998). Likewise, it applies to an employer that prevents or attempts to prevent the receipt of benefits or reduces or attempts to reduce the amount of benefits based on a material misrepresentation or intentional nondisclosure of a material fact. See, e.g., *Desmond* v. *Yale-New Haven Hospital, Inc.*, 138 Conn. App. 93, 100, 50 A.3d 910 (plaintiff claimed that defendants prevented, or attempted to prevent, receipt of benefits or reduced or attempted to reduce amount of benefits by casting workers' compensation claims in false light by making certain misrepresentations), cert. denied, 307 Conn. 942, 58 A.3d 258 (2012).

In addition to the absence of any legal support for the defendant's claim, we are unable to discern any logical basis for her position that filing a form 43 would

struction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation . . . ." (Internal quotation marks omitted.) *Brocuglio* v. *Thompsonville Fire District #2*, 190 Conn. App. 718, 734, 212 A.3d 751 (2019); see also *Barker* v. *All Roofs by Dominic*, 336 Conn. 592, 598–99, 248 A.3d 650 (2020); see generally *Del Toro* v. *Stamford*, 270 Conn. 532, 539, 853 A.2d 95 (2004) (when workers' compensation appeal involves issue of statutory construction that had not yet been subjected to judicial scrutiny, appellate courts employ plenary review).

have subjected her to potential criminal liability or prosecution. The purpose of filing this document is to contest an employer's liability for an employee's injury. It would not, therefore, fall within the language of § 31-290c that criminalizes conduct by a claimant for workers' compensation benefits. Furthermore, her contention is premised on her own assertion that the plaintiff used a material misrepresentation or an intentional nondisclosure of a material fact to obtain such benefits improperly. Thus, she would not fall within the ambit of the prohibition in § 31-290c against an employer's prevention, or attempt to prevent, the receipt of benefits, or reduction therefrom on the basis of the employer's material misrepresentation or intentional nondisclosure of a material fact. For these same reasons, the filing of a form 43 in this case would not have constituted a violation of § 31-290c (b). In sum, the defendant's contention that her filing of a form 43 in this case would constitute criminal activity is without merit.

The decision of the Compensation Review Board is affirmed.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 209

M. W. *v.* E. W.
(AC 44453)

Elgo, Cradle and Suarez, Js.

Argued December 8—officially released December 28, 2021

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

Per Curiam. The judgment is affirmed.

JOHN BORG ET AL. *v.* LYNNE CLOUTIER
(AC 44444)

Elgo, Cradle and Suarez, Js.

Argued December 8—officially released December 28, 2021

Plaintiff's appeal from the Superior Court in the judicial district of Stamford-Norwalk, *Hon. Kenneth B. Povodator*, judge trial referee.

Per Curiam. The judgment is affirmed.

Cumulative Table of Cases
Connecticut Appellate Reports
Volume 209

(Replaces Prior Cumulative Table)

A. D. *v.* B. R. (Memorandum Decision) . . . 901
Aguiar *v.* Between-the-Bridges, LLC (Memorandum Decision) . . . 902
Anderson *v.* Semple (Memorandum Decision) . . . 905
Anim *v.* DaCosta (Memorandum Decision) . . . 901
Austin *v.* Coin Depot Corp.. . . . 131
Workers' compensation; appeal from decision of Compensation Review Board affirming decision of Workers' Compensation Commissioner; whether board erred in determining that commissioner properly concluded that defendant had discharged its obligations under applicable statute (§ 31-307a (c)); whether board correctly concluded that commissioner properly declined to apply negotiable instruments provisions of Uniform Commercial Code.
Bayview Loan Servicing, LLC *v.* Gallant . . . 185
Foreclosure; whether trial court properly denied motion to dismiss foreclosure action; whether substitute plaintiff's assignor had standing to bring foreclosure action at time it was commenced; whether substitute plaintiff's failure to produce original note in court was fatal to its foreclosure of mortgage; whether loss of note while in note assignor's possession affected substitute plaintiff's ability to foreclose mortgage.
Borg *v.* Cloutier (Memorandum Decision) . . . 905
Briarwood of Silvermine, LLC *v.* Yew Street Partners, LLC . . . 271
Adverse possession; quiet title; trespass; motion to dismiss; whether trial court erred in dismissing plaintiffs' adverse possession claim pursuant to rule of practice (§ 15-8) because, when determining whether plaintiffs had established prima facie case, court incorrectly applied law of adverse possession; claim that trial court erred by rendering judgment for defendants on counterclaims seeking to quiet title and for trespass.
Brown *v.* New Milford Crossings, LLC (Memorandum Decision) . . . 903
Cammarato *v.* Sacred Heart University, Inc. (Memorandum Decision) . . . 902
Corbo *v.* Savluk . . . 351
Negligence; hearsay; whether trial court erred in allowing defendant's attorney to question plaintiff about timing of her first consultation with counsel after motor vehicle accident; whether trial court erred in admitting letter that indicated that plaintiff had retained counsel to represent her in connection with motor vehicle accident under residual exception to hearsay rule.
Cordero *v.* Commissioner of Correction (Memorandum Decision) . . . 903
Global Staffing Services, LLC *v.* Murray (Memorandum Decision) . . . 904
Grzeszczyk *v.* Connecticut State Employees Retirement Commission . . . 313
Administrative appeal; whether trial court properly determined that record was sufficient to support declaratory ruling of defendant Connecticut State Employees Retirement Commission denying plaintiff's application for request of refund of certain retirement contributions; whether trial court properly determined that ruling of commission was consistent with applicable statutes (§§ 7-439g (a) and 7-440 (h)) and forms filed; claim that member of municipal employees retirement fund properly changed designation of his beneficiary.
Hospital Media Network, LLC *v.* Henderson . . . 395
Breach of fiduciary duty; claim that trial court exceeded scope of this court's remand order when it awarded damages to plaintiff; claim that trial court awarded damages that were predicated on factual findings that were not supported by record and were inequitable.
In re Amanda L. . . . 1
Termination of parental rights; whether trial court made factual findings required under statute (§ 17a-112 (j) (3) (B) and (k)); claim that trial court improperly terminated respondent parents' parental rights; claim that termination of parental rights was unconstitutional, unlawful, and fraudulent.

Jones *v.* Law Offices of William S. Palmieri, LLC (Memorandum Decision) 901
Lebanon Historical Society, Inc *v.* Attorney General 337
Quiet title; motion to dismiss; standing; subject matter jurisdiction; whether trial court correctly concluded that plaintiff lacked standing to bring action because it claimed no title or interest in parcel to which it sought to quiet title and to impose conservation and preservation restrictions, as required by statute (§ 47-31 (a)).
Lippi *v.* United Services Automobile Assn. 524
Breach of contract; motion for summary judgment; claim that trial court erred in concluding that there was no genuine issue of material fact as to whether plaintiffs were entitled to coverage under homeowners insurance policy issued by defendant; claim that trial court erred in concluding that plaintiffs' property did not suffer collapse as defined in homeowners insurance policy; claim that there was genuine issue of material fact as to whether damage to property resulting from cracking in basement walls constituted sudden caving in; whether trial court failed to apply correct standard in granting defendant's motion for summary judgment; whether trial court improperly shifted burden of proof to plaintiffs.
Lockhart *v.* NAI Elite, LLC 308
Unpaid wages; whether trial court abused its discretion in awarding full amount of attorney's fees; claim that attorney's fees were excessive because plaintiff was only partially successful on his claims.
M. W. *v.* E. W. (Memorandum Decision) 905
Norwich *v.* Norwich Properties Realty, LLC (Memorandum Decision) 902
Ocwen Loan Servicing, LLC *v.* Mordecai 483
Foreclosure; whether trial court abused its discretion in denying defendants' request to amend answer and special defenses; whether trial court improperly rendered summary judgment as to liability; whether trial court improperly rendered judgment of strict foreclosure.
O'Neill *v.* O'Neill 165
Dissolution of marriage; claim that periodic alimony and child support amounts exceeded defendant's net income; whether trial court's finding of defendant's net earning capacity was clearly erroneous; whether trial court improperly ordered that alimony would increase after plaintiff vacated marital residence; whether trial court had authority to award nonmodifiable alimony; claim that nonmodifiable alimony conflicted with cohabitation statute (§ 46b-86); whether trial court improperly awarded plaintiff marital residence without specifying that she would take property subject to all mortgages and liens of record; whether trial court improperly ordered that plaintiff could relocate with parties' minor children; whether trial court's order was ambiguous as to time period for periodic alimony.
Overley *v.* Overley 504
Dissolution of marriage; claim that trial court failed to award separate property credit for defendant's contribution to purchase of marital home; whether trial court improperly contravened parties' prenuptial agreement governing tax treatment of alimony payments; whether trial court abused its discretion in denying defendant's motion for continuance.
PHH Mortgage Corp. *v.* Kowalsky (Memorandum Decision) 903
R. A. *v.* R. A. 327
Dissolution of marriage; whether defendant's claim that trial court improperly included her minor child from previous relationship in custody order without accounting for rights of biological father was moot; whether trial court abused its discretion in crafting its visitation order; whether trial court relied on inaccurate information in fashioning its child support orders.
Reid *v.* Speer 540
Workers' compensation; appeal from decision of Compensation Review Board precluding defendant employer from contesting compensability of claim for work-related injuries; claim that defendant's filing of form contesting her liability as employer for plaintiff's injury would have constituted criminal conduct pursuant to statute (§ 31-290c); claim that Workers' Compensation Commissioner erred in certain factual findings.
S. A. *v.* D. G. (Memorandum Decision) 904
Silano *v.* Cooney (Memorandum Decision) 904
State *v.* Alvarez 250
Sexual assault in fourth degree; risk of injury to child; motion to allow introduction of uncharged misconduct evidence; claim that trial court improperly admitted uncharged misconduct evidence; whether trial court erred in failing to disclose

certain confidential records relating to credibility of witness; whether trial court followed procedure required by State *v.* Esposito *(192 Conn. 166) in disclosing confidential records to parties.*

State *v.* Bouvier 9

Operating motor vehicle while under influence of intoxicating liquor; reckless driving; whether trial court properly denied defendant's motion to suppress certain statements made during police interrogation; claim that defendant had not been advised of his rights pursuant to Miranda *v.* Arizona *(384 U.S. 436) before making statements in custodial interview; claim that trial court improperly determined that defendant implicitly had waived his* Miranda *rights; whether trial court abused its discretion in denying defendant's motion in limine to preclude testimony of arresting officers; whether trial court erred in sustaining state's objection to defense counsel's questions to arresting officer regarding finding of no probable cause to arrest made by Department of Motor Vehicles hearing officer; claim that hearing officer's finding of no probable cause to arrest could be introduced to impeach testimony of arresting officer; claim that hearing officer's finding of no probable cause to arrest was relevant and admissible to prove that there was no probable cause to arrest defendant.*

State *v.* Butler 63

Risk of injury to child; breach of peace in second degree; statutory (§ 54-56l) supervised diversionary program for persons with psychiatric disabilities; subject matter jurisdiction; whether criminal court had power to open judgment of dismissal rendered by it after concluding that defendant had satisfactorily completed diversionary program; claim that statute (§ 52-212a) permitting opening of civil judgment on filing of motion to open within four months of date on which judgment was rendered also applied to criminal judgments.

State *v.* Carrillo 213

Sexual assault in third degree; sexual assault in fourth degree; risk of injury to child; whether defendant's due process right to fair trial was violated as result of unpreserved claims of prosecutorial impropriety.

State *v.* Holmes 197

Manslaughter in first degree with firearm; felony murder; motion to correct illegal sentence; whether trial court properly dismissed for lack of subject matter jurisdiction defendant's claim that charging document listed multiple homicide offenses in violation of constitutional prohibition against double jeopardy; whether defendant's claim attacked proceedings leading up to conviction instead of sentence or sentencing proceeding; whether trial court properly denied defendant's claim that his sentence for felony murder conviction was illegal; whether felony murder and manslaughter in first degree were separate crimes; whether sentencing court's decision to vacate less serious felony of manslaughter was proper.

State *v.* James K. 441

Risk of injury to child; whether trial court abused its discretion when it prohibited defense counsel from asking prospective jurors during voir dire to express opinions with respect to parents who kiss their children on lips; claim that trial court abused its discretion by admitting into evidence videotaped forensic interview of victim; whether trial court violated defendant's rights to due process, fair trial and to be convicted by means of unanimous verdict when it declined to use language in his written request for instructions to urge deadlocked jury to reach verdict; request that this court exercise supervisory authority over administration of justice to require trial courts to instruct deadlocked juries that they need not reach verdict and that jurors have right to disagree with respect to proper verdict.

State *v.* McKinney 363

Assault of elderly person in second degree; violation of probation; reviewability of claim that prior trial court abused its discretion in denying motion to correct illegal sentence; claim that trial court's decision not to consider second motion to correct illegal sentence negated withdrawal of appeal from denial of first motion to correct illegal sentence, thereby allowing defendant to renew challenge to denial of first motion to correct illegal sentence; reviewability of assertion that trial court erred in excluding testimony as to whether sock with rock in it was weapon; whether trial court abused its discretion in determining that testimony about incident six years earlier in which police officer allegedly hit defendant with baton was relevant; unpreserved claim that trial court improperly struck certain of defense counsel's statements during closing argument to jury and thereby violated defendant's sixth amendment right to effective assistance of counsel.

State *v.* Omar. 283
Possession of narcotics with intent to sell by person who is not drug-dependent; sale of narcotics by person who is not drug-dependent; conspiracy to sell narcotics by person who is not drug-dependent; sale of controlled substance within 1500 feet of school; possession of controlled substance within 1500 feet of school; motion to correct illegal sentence; claim that trial court erred in denying defendant's motion to correct illegal sentence; whether trial court properly concluded that certain amendments to statutes (§§ 53a-28 (b) and 54-125e (b)) embodied in public act (P.A. 18-63) did not apply retroactively to render defendant's sentence imposing special parole void.
State *v.* Smith 296
Possession of narcotics with intent to sell; motion to correct illegal sentence; claim that trial court erred in denying defendant's motion to correct illegal sentence; claim that public act (P.A. 18-63) was clarifying legislation; claim that amendments of certain statutes (§§ 53a-28 (b) and 54-125e (b)) embodied in P.A. 18-63 should have been applied retroactively to render defendant's sentence imposing period of special parole void.
United Public Service Employees Union, Cops Local 062 *v.* Hamden 116
Temporary injunction; whether trial court employed correct legal standard in granting plaintiff's application for temporary injunction.
White *v.* Commissioner of Correction 144
Habeas corpus; whether habeas court abused its discretion in denying petition for certification to appeal; claim that habeas counsel failed to procure testimony at habeas trial of witness who allegedly had perjured her testimony against petitioner at his criminal trial; claim that habeas counsel failed to procure testimony at habeas trial of witness whose testimony allegedly supported petitioner's claim that his trial counsel was ineffective and who could have impeached testimony of eyewitnesses at petitioner's criminal trial.
Wright *v.* Commissioner of Correction 50
Habeas corpus; ineffective assistance of counsel; whether habeas court correctly determined that petitioner's trial counsel rendered ineffective assistance by failing to present alibi defense.

NOTICE OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 22-B: Physician and Audiology Services – HIPAA Compliance Fee Schedule Updates and Changes to Select Manually Priced Codes

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

Changes to Medicaid State Plan

Effective on or after January 1, 2022, SPA 22-B will amend Attachment 4.19-B of the Medicaid State Plan to make the updates to the payment for physician services described below.

First, this SPA will incorporate various January 2022 federal Healthcare Common Procedural Coding System (HCPCS) updates (additions, deletions and description changes) to the physician office and outpatient, physician-radiology, physician anesthesia, physician-surgery and audiology fee schedules. Codes that are being added are being priced using a comparable methodology to other codes in the same or similar category. DSS is making these changes to ensure that these fee schedules remain compliant with the Health Insurance Portability and Accountability Act (HIPAA).

Second, in accordance with the existing federally approved methodology for physician-administered drugs in the Medicaid State Plan, this SPA will update the reimbursement methodology to 100% of the January 2022 Medicare Average Sales Price (ASP) Drug Pricing file for physician-administered drugs, immune globulins, vaccines, and toxoids.

For procedure codes that are not priced on the January 2022 Medicare ASP Drug Pricing File and procedure codes that are described as ''unclassified'', the drug will be priced at the lowest of:

- The usual and customary charge to the public or the actual submitted ingredient cost;
- The National Average Drug Acquisition Cost (NADAC) established by CMS;
- The Affordable Care Act Federal Upper Limit (FUL); or
- Wholesale Acquisition Cost (WAC) plus zero (0) percent when no NADAC is available for the specific drug.

Lastly, several procedure codes that are currently manually priced listed on the physician office and outpatient fee schedule, physician radiology and physician surgery fee schedule (specifically, codes 66987, 66988, 76499, 77520, 77522, 77522, 77523, 77525, 92229 and 92650) will be priced at 57.5% of the 2022 Medicare physician fee schedule.

Fee schedules are published at this link: http://www.ctdssmap.com, then select ''Provider'', then select ''Provider Fee Schedule Download.''

Fiscal Impact

DSS does not anticipate that the HIPAA compliant updates to the physician office and outpatient, physician radiology, physician anesthesiology, and audiology fee schedules will have any significant changes in annual aggregate expenditures.

DSS estimates that the HIPAA compliance changes will increase annual aggregate expenditures for physician surgery by approximately $22,498 in State Fiscal Year (SFY) 2022 and $55,614 in SFY 2023.

DSS estimates that updating the physician-administered drugs to the January 2022 Medicare ASP Drug Pricing File, will increase aggregate expenditures by approximately $4,302 in SFY 2022 and $10,715 in SFY 2023.

DSS does not anticipate that the changes to several procedure codes listed on the physician office and outpatient fee schedule, physician radiology and physician surgery fee schedules will have any significant fiscal impact in annual aggregate expenditures.

Obtaining SPA Language and Submitting Comments

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

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105. Please reference ''SPA 22-B: Physician and Audiology Services – HIPAA Compliance Fee Schedule Updates and Changes to Select Manually Priced Codes''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than January 12, 2022.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 22-C: Independent Radiology and Independent Laboratory – HIPAA Compliance Fee Schedule Updates

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

Changes to Medicaid State Plan

Effective on or after January 1, 2022, SPA 22-C will amend Attachment 4.19-B of the Medicaid State Plan to incorporate the 2022 Healthcare Common Procedural Cod-

ing System (HCPCS) changes (additions, deletions, and description changes) to the independent radiology and independent laboratory fee schedules. DSS is making these changes to ensure that these fee schedules remain compliant with the Health Insurance Portability and Accountability Act (HIPAA). This SPA also establishes fixed fees for certain laboratory codes that were previously manually priced because Medicare recently established fees for those codes. Codes that are being added are being priced using a comparable methodology to other codes in the same or similar category based on available information. The purpose of that change is to establish more consistent pricing for those codes.

Fee schedules are published at this link: http://www.ctdssmap.com, then select ''Provider'', then select ''Provider Fee Schedule Download.''

Fiscal Impact

DSS estimates the changes to independent radiology services will not affect annual aggregate expenditures in State Fiscal Year (SFY) 2022 and SFY 2023.

DSS estimates the changes to the independent laboratory services, will increase annual aggregate expenditures by approximately $20,753 in SFY 2022 and $32,064 for SFY 2023.

Obtaining SPA Language and Submitting Comments

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

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105. Please reference ''SPA 22-C: Independent Radiology and Independent Laboratory – HIPAA Compliance Fee Schedule Updates''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than January 12, 2022.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 22-D: Medical Equipment Devices and Supplies (MEDS) - HIPAA Compliance Fee Schedule Update for Medical Surgical Supplies (MSS)

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

Changes to Medicaid State Plan

Effective on or after January 1, 2022, SPA 22-D will amend Attachment 4.19-B of the Medicaid State Plan in order to implement the changes detailed below. First, this SPA incorporates the January 2022 Healthcare Common Procedural Cod-

ing System (HCPCS) updates to the Medical Surgical Supplies (MSS) fee schedule. DSS is making these changes to ensure that this fee schedule remains compliant with the Health Insurance Portability and Accountability Act (HIPAA).

Second, this SPA reflects that procedure code A4397 (irrigation supply sleeve, each) will be discontinued from the MSS fee schedule because this irrigation supply sleeve code A4397 is being divided into separate reusable and disposable irrigation sleeve billing codes.

Finally, the following replacement procedure codes will be added to the MSS fee schedule:

- A4436 (Irrigation supply; sleeve, reusable, per month), and
- A4437 (Irrigation supply; sleeve, disposable, per month)

The fee schedule amount for 1 month of the sleeves will be equivalent to the A4397 fee schedule amount multiplied by the monthly use limit of 4. Therefore, the current monthly fee schedule amounts will continue to apply to procedure codes A4436 and A4437 effective on or after January 1, 2022. The new established fee schedule amounts for each procedure code will be $19.94 per month.

Fee schedules are published at this link: http://www.ctdssmap.com, then select ''Provider'', then select ''Provider Fee Schedule Download'', then Accept or Decline the Terms and Conditions and then select the applicable fee schedule.

Fiscal Impact

DSS does not anticipate that the HIPAA compliance update to MEDS will have significant changes in annual aggregate expenditures in State Fiscal Year (SFY) 2022 and SFY 2023.

Obtaining SPA Language and Submitting Comments

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

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105. Please reference ''SPA 22-D: Medical Equipment Devices and Supplies (MEDS) - HIPAA Compliance Fee Schedule Update for Medical Surgical Supplies (MSS).''

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than January 12, 2022.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 22-E: Clinic Services – HIPAA Compliance Billing Code and Reimbursement Updates

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

Changes to Medicaid State Plan

Effective on or after January 1, 2022, SPA 22-E will amend Attachment 4.19-B of the Medicaid State Plan to revise various of the clinic fee schedules as detailed below.

First, this SPA updates the Medical Clinic and Ambulatory Surgical Center fee schedules to incorporate the 2022 Healthcare Common Procedural Coding System (HCPCS) changes (additions, deletions and description changes) to remain compliant with the Health Insurance Portability and Accountability Act (HIPAA). Codes that are being added are being priced using a comparable methodology to other codes in the same or similar category. For newly added codes that are replacing codes that are being deleted, they are being priced in a manner designed to be cost-neutral to the previous overall payment methodology.

Second, this update adds payment for specified drugs on the Family Planning Clinic fee schedule. The drugs are being added to ensure continued access to care. Family planning clinics currently provides other drugs in similar categories and other forms of birth control.

Finally, as required by the existing federally approved methodology for physician-administered drugs set forth in the approved outpatient prescription drugs section of the Medicaid State Plan, this SPA will update the relevant fee schedules to conform to 100% of the January 2022 Medicare Average Sales Price (ASP) Drug Pricing file for physician-administered drugs that are administered in dialysis clinics, behavioral health clinics, and medical clinics. Also in accordance with that approved methodology, for procedure codes that are not priced on the January 2022 Medicare ASP Drug Pricing File and procedure codes that are described as ''unclassified'', the drug will be priced at the lowest of:

- The usual and customary charge to the public or the actual submitted ingredient cost;
- The National Average Drug Acquisition Cost (NADAC) established by CMS;
- The Affordable Care Act Federal Upper Limit (FUL); or
- Wholesale Acquisition Cost (WAC) plus zero (0) percent when no NADAC is available for the specific drug.

Fee schedules are published at this link: http://www.ctdssmap.com, then select ''Provider'', then select ''Provider Fee Schedule Download.''

Fiscal Impact

DSS estimates that the updates to the family planning, medical, ambulatory surgical center clinic fee schedules will not change annual aggregate expenditures in State Fiscal Year (SFY) 2022 and SFY 2023.

As described above, DSS is making updates to specified clinic fee schedules to incorporate the latest required update in physician-administered drug reimbursement in order to remain in compliance with the existing federally approved methodology in the Medicaid State Plan. Accordingly, for SPA purposes, this update is not a change in reimbursement methodology. For informational purposes, DSS does not anticipate that the physician-adminsitered drug updates to the medical clinic and behavioral health clinic fee schedules will change annual aggregate expenditures in SFY 2022 and SFY 2023. DSS estimates the required updates to the physician-administered drug updates to the dialysis clinic fee schedule will decrease annual aggregate expenditures by approximately $186,346 in SFY 2022 and $460,648 for SFY 2023.

Obtaining SPA Language and Submitting Comments

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

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105. Please reference ''SPA 22-E: Clinic Services – HIPAA Compliance Billing Code and Reimbursement Updates''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than January 12, 2022.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 22-F: Mandatory Medicaid Coverage of Routine Patient Costs Furnished in Connection with Participation in Qualifying Clinical Trials

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

Changes to Medicaid State Plan

Effective on or after January 1, 2022, SPA 22-F will amend Attachments 3.1-A, 3.1-B, and 4.19-B of the Medicaid State Plan in order to add coverage and payment provisions to the Medicaid State Plan for the new mandatory benefit category to provide coverage of routine patient costs provided to Medicaid members participating in qualifying clinical trials.

Specifically, federal law in Division CC, Title II, Section 210 of the Consolidated Appropriations Act, 2021 (Public Law 116-260) amended section 1905(a) of the Social Security Act (''Act'') by adding to the definition of medical assistance a new mandatory Medicaid State Plan benefit category in section 1905(a)(30) for routine patient costs for items and services furnished in connection with participation by Medicaid beneficiaries in qualifying clinical trials, subject to further provisions in a new section 1905(gg) of the Act. Federal law was also amended to make this benefit mandatory under any benchmark plan, also known as an Alternative Benefit Plan (ABP), which in Connecticut's Medicaid program is the benefit package provided to the Medicaid expansion population or HUSKY D. Accordingly, DSS will also submit a SPA to amend the ABP to add this benefit category, which will be in SPA 22-H.

As set forth in the federal law referenced above and as further detailed in the CMS State Medicaid Director Letter (SMD) # 21-005 dated December 7, 2021, this new benefit category includes only routine patient costs as defined in that federal law that would otherwise be covered under the Medicaid State Plan, waiver, or demonstration waiver under section 1115 of the Act and do not include any investigational item or service that is the subject of the qualifying clinical trial and not otherwise covered under the state plan, waiver, or demonstration waiver. This coverage category also applies only to qualifying clinical trials that meet the specifications set forth in the federal law referenced above. Given that the federal requirements provide only for coverage and payment for otherwise covered services, this SPA will specify that the services covered and the payment methodology will remain the same as the underlying services. Therefore, DSS does not anticipate any substantive change in coverage or payment, nor does DSS anticipate that this SPA will change Medicaid expenditures.

Fee schedules are published at this link: http://www.ctdssmap.com, then select ''Provider'', then select ''Provider Fee Schedule Download'', then Accept or Decline the Terms and Conditions and then select the applicable fee schedule.

Fiscal Impact

As explained above, DSS does not anticipate that this SPA will have any significant in annual aggregate expenditures in State Fiscal Year (SFY) 2022 and SFY 2023.

Obtaining SPA Language and Submitting Comments

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

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105. Please reference ''SPA 22-F: Mandatory Medicaid Coverage of Routine Patient Costs Furnished in Connection with Participation in Qualifying Clinical Trials.''

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than January 12, 2022.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 22-G: Dental Services – HIPAA Compliance Fee Schedule Updates

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

Changes to Medicaid State Plan

Effective on or after January 1, 2022, SPA 22-G will amend Attachment 4.19-B of the Medicaid State Plan to incorporate the January 2022 Healthcare Common Procedure Coding System (HCPCS) changes (additions, deletions and description changes) to the dental fee schedules for adults and children. Codes that are being added are being priced using a comparable methodology to other codes in the same or similar category and replacement codes are being priced in a manner designed to make the billing code updates cost neutral. DSS is making these changes to ensure that these fee schedules remain compliant with the Health Insurance Portability and Accountability Act (HIPAA).

Specifically, the following procedure codes are being added to the Dental fee schedule:

Added Code	Description
D7299	Removal of temporary anchorage device, requiring flap
D7300	Removal of temporary anchorage device without flap
D5725	Rebase hybrid prosthesis
D5765	Soft liner for complete or partial removable denture-indirect
D8020	Limited orthodontic treatment of the transitional dentition

The former code, D7997 ''removal of hardware'' is now better defined by the addition of codes D7299 and D7300 by describing two types of common hardware types used to treat dental facial conditions.'' In addition, D5725 and D5765 will be added to the existing fee schedule in the prosthodontic section. These codes have been created to be more inclusive and expand on the existing types of partials. Lastly, D8020 has also been added to be more specific regarding the types of dental services that will be rendered.

Fee schedules are published at this link: http://www.ctdssmap.com, then select ''Provider'', then select ''Provider Fee Schedule Download'' Accept or Decline the

Terms and Conditions and go to the Adult or Children's Dental Fee Schedule, as applicable.

Fiscal Impact

DSS estimates that this SPA will not change annual aggregate expenditures in State Fiscal Year (SFY) 2022 and SFY 2023.

Obtaining SPA Language and Submitting Comments

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

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105. Please reference ''SPA 22-G: Dental Services – HIPAA Compliance Fee Schedule Updates''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than January 12, 2022.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 22-H: Updates to Alternative Benefit Plan (ABP) for the Medicaid Cover age Group for Low-Income Adults to Add Mandatory Medicaid Coverage of Routine Patient Costs Furnished in Connection with Participation in Qualifying Clinical Trials

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

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

Changes to Medicaid State Plan

Effective on or after January 1, 2022, SPA 22-H will amend the ABP (Attachment 3.1-L of the Medicaid State Plan) in order to add coverage for the federally required coverage of routine patient costs provided to Medicaid members participating in qualifying clinical trials.

Specifically, effective for items or services furnished on or after January 1, 2022, federal law in Division CC, Title II, Section 210 of the Consolidated Appropriations Act, 2021 (Public Law 116-260) (section 210) amended sections 1905(a)(10)(A) and 1937(b)(5) of the Social Security Act to make coverage of this new benefit mandatory under the Medicaid State Plan and any benchmark or benchmark equivalent coverage also referred to as alternative benefit plans, or ABPs with respect to items and services furnished on or after January 1, 2022.

This SPA corresponds to SPA 22-F, which adds this benefit category to the underlying Medicaid State Plan (Attachments 3.1-A, 3.1-B, and 4.19-B).

As set forth in the federal law referenced above and as further detailed in the CMS State Medicaid Director Letter (SMD) # 21-005 dated December 7, 2021, this new benefit within the ABP includes only routine patient costs as defined in that federal law that would otherwise be covered under the Medicaid State Plan, waiver, or demonstration waiver under section 1115 of the Act and do not include any investigational item or service that is the subject of the qualifying clinical trial and not otherwise covered under the state plan, waiver, or demonstration waiver. This coverage category also applies only to qualifying clinical trials that meet the specifications set forth in the federal law referenced above. Given that the federal requirements provide only for coverage and payment for otherwise covered services, this SPA will specify that the services covered will remain the same as the underlying services. Therefore, DSS does not anticipate any substantive change in coverage, nor does DSS anticipate that this SPA will change Medicaid expenditures.

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

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

Fiscal Impact

DSS estimates this SPA will not change annual aggregate expenditures in Federal Fiscal Year (FFY) 2022 and FFY 2023.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link:
https://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-State-Plan-Amendments.

The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105. Please reference ''SPA 22-H: Updates to Alternative Benefit Plan (ABP) for the Medicaid Coverage Group for Low-Income Adults Regarding Mandatory Medicaid Coverage of Routine Patient Costs Furnished in Connection with Participation in Qualifying Clinical Trials.''

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than January 27, 2022.

NOTICES

The New Online Ordering Transcript System

Effective January 3, 2022, the procedure for ordering court transcripts will change. All attorneys will be required to order transcripts utilizing a new online ordering system located within E-Services at https://sso.eservices.jud.ct.gov/TranscriptReq. Please note, this link will not be operational until January 3, 2022. In addition, if you are not an attorney, but are enrolled in E-Services, you may also use the online transcript ordering system. Those individuals who are not attorneys or not registered with E-Services will still be able to order transcripts utilizing the current paper format.

The online ordering system is an easy-to-use process created to mirror the paper form. An instructional quick card will be created and posted on the Judicial Branch's website.

If you have any questions, please contact Court Transcript Services at 860-706-5310 or CourtTranscriptServices@jud.ct.gov.

CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar by Uniform Bar Examination score transfer in October and November 2021. Written objections or comments regarding any candidate should be addressed to the Connecticut Bar Examining Committee, 100 Washington Street, 1st Floor, Hartford, CT 06106 as soon as possible.

Kathleen B. Harrington
Deputy Director, Attorney Services

Aguilar, Lourdes G. of Stamford, CT
Dent, Jayme L. of Brooklyn, NY
Garrett, Wade Graham of New Hvaen, CT
Gendelberg, Leonard R. of Brooklyn, NY
Hannoush, Andro Samir of Shrewbury, MA
Hogan, Victoria Elizabeth of Lowell, MA
Lindberg, Christopher John of North Providence, RI
Mitchell, John H.G. of West Hartford, CT
Pearson, William Alexander of Keene, NH
Smith, Taylor of Norwalk, CT
Stalder, Mason Garrett Russell of New Carlisle, OH
Wagner, Christopher Lee of Shelton, CT
Wolfer, Nicole Alexandra of Woodbury, NY

CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar without examination in October and November 2021. Written objections or comments regarding any candidate should be addressed to the Connecticut Bar Examining Committee, 100 Washington Street, 1st Floor, Hartford, CT 06106 as soon as possible.

Kathleen B. Harrington
Deputy Director, Attorney Services

Amatruda, Matthew Steven of Branford, CT
Beadnell, Jeffrey Michael of Southbury, CT
Carnevale IV, Joseph P. of Providence, RI
Gluck, Abbe Rubin of New Haven, CT
Hellman, Matthew Carl of Windsor, CT
Hughes, Stephen E. of Boston, MA
James, Patrick B. of Niantic, CT
Jiao, Anli of Newton, MA
Levin-Epstein, Joshua Dov of New York, NY
Mickel, Erin Plasteras of Darien, CT
O'Hare, Kathleen Maura of Berlin, CT
Vasudevan, Divya Manga of North Haven, CT

Revised Law Journal Deadlines for Issues Published January 2022 through December 2022

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

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

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

Law Journal Publication Date (every Tuesday)	Deadline Date (at 12:00 Noon)
January 04, 2022	**Tuesday, December 28, 2021**
January 11, 2022	Wednesday, January 05, 2022
January 18, 2022	**Tuesday, January 11, 2022**
January 25, 2022	Wednesday, January 19, 2022
February 01, 2022	Wednesday, January 26, 2022
February 08, 2022	Wednesday, February 02, 2022
February 15, 2022	**Tuesday, February 08, 2022**
February 22, 2022	**Tuesday, February 15, 2022**
March 01, 2022	Wednesday, February 23, 2022
March 08, 2022	Wednesday, March 02, 2022
March 15, 2022	Wednesday, March 09, 2022
March 22, 2022	Wednesday, March 16, 2022
March 29, 2022	Wednesday, March 23, 2022
April 05, 2022	Wednesday, March 30, 2022
April 12, 2022	Wednesday, April 06, 2022
April 19, 2022	**Tuesday, April 12, 2022**
April 26, 2022	Wednesday, April 20, 2022
May 03, 2022	Wednesday, April 27, 2022
May 10, 2022	Wednesday, May 04, 2022
May 17, 2022	Wednesday, May 11, 2022
May 24, 2022	Wednesday, May 18, 2022
May 31, 2022	**Tuesday, May 24, 2022**
June 07, 2022	Wednesday, June 01, 2022
June 14, 2022	Wednesday, June 08, 2022
June 21, 2022	Wednesday, June 15, 2022
June 28, 2022	Wednesday, June 22, 2022
July 05, 2022	**Tuesday, June 28, 2022**
July 12, 2022	Wednesday, July 06, 2022
July 19, 2022	Wednesday, July 13, 2022

July 26, 2022	Wednesday, July 20, 2022
August 02, 2022	Wednesday, July 27, 2022
August 09, 2022	Wednesday, August 03, 2022
August 16, 2022	Wednesday, August 10, 2022
August 23, 2022	Wednesday, August 17, 2022
August 30, 2022	Wednesday, August 24, 2022
September 06, 2022	**Tuesday, August 30, 2022**
September 13, 2022	Wednesday, September 07, 2022
September 20, 2022	Wednesday, September 14, 2022
September 27, 2022	Wednesday, September 21, 2022
October 04, 2022	Wednesday, September 28, 2022
October 11, 2022	**Tuesday, October 04, 2022**
October 18, 2022	Wednesday, October 12, 2022
October 25, 2022	Wednesday,October 19, 2022
November 01, 2022	Wednesday, October 26, 2022
November 08, 2022	Wednesday, November 02, 2022
November 15, 2022	**Tuesday, November 08, 2022**
November 22, 2022	Wednesday, November 16, 2022
November 29, 2022	**Tuesday, November 22, 2022**
December 06, 2022	Wednesday, November 30, 2022
December 13, 2022	Wednesday, December 07, 2022
December 20, 2022	Wednesday, December 14, 2022
December 27, 2022	**Tuesday, December 20, 2022**