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we have determined to be grounded on artificial and illusory distinctions, we believe that the better approach is to provide the trial courts with an illustration of the application of the totality of the circumstances test that we adopt today.

We begin with the following additional procedural background. The primary issue at trial was identification. At the start of trial, the defendant filed a motion in limine to preclude the state from introducing Canty's statement to the police identifying the defendant in the video and the still photograph. The defendant argued that the admission of Canty's statement would violate the prohibition in § 7-3 (a) of the Connecticut Code of Evidence against lay opinion testimony that embraces an ultimate issue to be decided by the trier of fact. In support of his argument that such evidence would constitute a statement of opinion, the defendant contended that the facial features of the subject were not discernible in either the video or the still photograph. The state relied on Canty's familiarity with the defendant to argue that, even if the images of the individual in the video and the still photograph were not clear to persons unfamiliar with the defendant, they were discernible to Canty.

The court first determined that, because the video footage shown to Canty preceded the footage showing

We also take judicial notice of the transcripts in *State* v. *Bruny*, 342 Conn. 169, A.3d (2022), which we also decide today. See *Karp* v. *Urban Redevelopment Commission*, 162 Conn. 525, 527, 294 A.2d 633 (1972) ("[t]here is no question . . . concerning our power to take judicial notice of files of the Superior Court, whether the file is from the case at bar or otherwise"). In *Bruny*, which also involves lay witnesses who identified the defendant in surveillance footage, the trial court spoke more directly about the difficulties of applying *Finan*. Specifically, the court commented on the artificial distinction it was required to draw between video footage that shows the offense being committed and footage that does not, in order to determine whether the identification embraced an ultimate issue. The court further remarked on the uncertainty regarding whether the ultimate issue rule controlled when a witness was familiar with the defendant, thus highlighting the difficulty of the fact/opinion distinction.

the actual shooting by only twenty seconds or so, Canty's identification of the defendant in the video embraced an ultimate issue in the case—the identification of the shooter. Because § 7-3 (a) of the Connecticut Code of Evidence applies only to opinion testimony, the remaining issue was whether Canty's identification was a matter of fact or opinion. To resolve that question, the trial court turned to this court's decision in *State* v. *Finan*, supra, 275 Conn. 60, and its progeny. Specifically, relying on the Appellate Court's refinement of *Finan* in *State* v. *Felder*, 99 Conn. App. 18, 25 n.6, 912 A.2d 1054, cert. denied, 281 Conn. 921, 918 A.2d 273 (2007), the trial court explained that, if there is a sufficient basis for recognition in the video or photograph, a witness' recognition of a subject based on their longstanding association is a statement of fact, not opinion.

Applying that principle from *Felder*, the trial court found that, in the video footage, the suspect was too far away to be recognized. Therefore, the court concluded, Canty's identification of the defendant in the video would constitute lay opinion testimony as to an ultimate issue to be decided by the trier of fact, in violation of § 7-3 (a) of the Connecticut Code of Evidence.

By contrast, the court found that the photograph allowed for recognition because it showed the defendant's face from fairly close up and still. Because Canty indicated in his written statement, however, that he had signed the back of the photograph "to confirm that this was Tron in the video," the court granted the motion in limine as to both the video and the photograph. The court reasoned that, because the person in the video was not recognizable, any testimony stating that the persons depicted in the photograph and the video were one and the same, which inherently required a comparison between the two, was a matter of opinion.

The court subsequently ruled that Placzek's testimony that Canty had told him that the subject in the still photo-

graph was the defendant was admissible pursuant to § 8-5 (2) of the Connecticut Code of Evidence, which provides that the "identification of a person made by a declarant prior to trial where the identification is reliable" is not excluded from evidence by the hearsay rule, provided the declarant is available for cross-examination at trial. The court noted that Canty was available for cross-examination at trial. Although the court did not expressly state that it found Canty's identification to be reliable, that finding may be inferred by the court's reference, in its ruling, to Canty's "long-standing association with [the defendant]." The court ruled that Placzek's testimony as proposed by the state could come in for the truth of the matter asserted pursuant to *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986). Thereafter, at trial, Canty denied that he ever identified the defendant in the still photograph. Consistent with the court's ruling, Placzek testified that Canty had told him that the subject in the still photograph was the defendant.

In the context of lay witness identifications of a person in surveillance video or photographs, the prohibition against opinion testimony on an ultimate issue in § 7-3 (a) of the Connecticut Code of Evidence sometimes requires courts to draw tortuous distinctions in order to render the rule workable. The present case exemplifies the problem—in order to determine whether the identification of the defendant as the subject in the footage embraced an ultimate issue, the trial court found itself counting the seconds between the footage shown to the witness and the footage depicting the offense. It is debatable whether a longer time gap would always suffice to draw the distinction. In some cases, the nature of the video footage may make it impossible to identify the suspect as the defendant at any point in the footage without also finding that the defendant is depicted in the video as the person committing the

crime. For instance, if a shooter's movements are depicted without pause in hours of footage, including during the actual shooting, the identification of the suspect as the defendant at the beginning of the video, hours before the offense is recorded, may very well embrace an ultimate issue.

Laborious calculations of the timing in video footage represent only one of the potential hurdles set by § 7-3 (a) of the Connecticut Code of Evidence. The *Finan* decision illustrates a more fundamental challenge created by the ultimate issue rule—distinguishing between testimony that "embraces an ultimate issue" and testimony that is simply material to the state's case. In *Finan*, four officers had identified the defendant as one of two men depicted in video surveillance footage of a convenience store clerk being robbed at gunpoint. *State* v. *Finan*, supra, 275 Conn. 61–62. The video footage depicted the two men entering the store, one armed and one unarmed. The unarmed man, whom the officers identified as the defendant, walked past the checkout area out of camera range. The armed man, who remained in camera range, aimed his gun at the store clerk. The armed man then exited the store; the unarmed man walked out simultaneously. Id., 62. Each officer testified as to how long he or she had known the defendant, ranging from eight to sixteen years, and also testified as to what enabled him or her to identify the defendant as the unarmed man depicted in the video. Id., 63. The officers cited to details such as the defendant's profile, his mannerisms and his distinctive walk. Id.

In its analysis of the defendant's claim that the officers' testimony violated § 7-3 (a) of the Connecticut Code of Evidence, the Appellate Court concluded that the testimony did not embrace an ultimate issue to be decided by the trier of fact. *State* v. *Finan*, 82 Conn. App. 222, 232, 843 A.2d 630 (2004). The court reasoned that not "every fact that is material to guilt is, for that

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

LENWORTH CHARLES GRANT *v.* COMMISSIONER OF CORRECTION (SC 20561)

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

Syllabus

The petitioner, who had been convicted, on a guilty plea under *North Carolina* v. *Alford* (400 U.S. 25), of risk of injury to a child and strangulation in the third degree in connection with a domestic violence incident in which he assaulted the victim in the presence of their minor child, sought a writ of habeas corpus, claiming ineffective assistance of trial counsel. The petitioner's trial counsel, C, had engaged in numerous plea negotiations, and the state made several plea offers, each one calling for a guilty plea and incarceration. Subsequently, C convinced the trial court to fully suspend the period of incarceration in light of the victim's recantation with respect to the incident. The petitioner ultimately pleaded guilty in exchange for a suspended sentence and probation. In his habeas petition, the petitioner alleged that C's performance violated his right to the effective assistance of counsel insofar as C failed to inquire about the petitioner's immigration status and failed to properly advise him of the immigration consequences of his guilty plea. Specifically, the petitioner alleged that C had access to information that the

petitioner was not a United States citizen and failed to inform the petitioner that he would almost certainly be subject to deportation as a consequence of his guilty plea to the felony of risk of injury to a child. At his habeas trial, the petitioner presented testimony from C and the prosecutors involved in the petitioner's criminal case. The petitioner also testified before the habeas court that he did not know whether he would have gone to trial if he had been properly advised of the immigration consequences of his plea. The habeas court found that the prosecutors testified credibly that they were not willing to consider dropping the risk of injury charge against the petitioner and, therefore, that there was no evidence that there was another, more favorable plea offer that was available to the petitioner. The habeas court concluded that, even if it were to presume that C's performance was deficient, the petitioner did not prove that he would have rejected the plea offer and proceeded to trial, or have accepted an alternative offer. Accordingly, the habeas court denied the petitioner's habeas petition. The petitioner ultimately was deported after the habeas court rendered judgment denying his petition. On the granting of certification, the petitioner appealed. *Held* that the habeas court properly denied the petitioner's habeas petition, as the petitioner failed to meet his burden of establishing that, but for C's allegedly deficient performance, there was a reasonable probability that he would have rejected the state's plea offer and proceeded to trial, and, therefore, the petitioner failed to establish prejudice: the petitioner admitted at his habeas trial that, even with the benefit of hindsight and the knowledge that he would be deported, he was not sure that he would have proceeded to trial; moreover, notwithstanding the petitioner's claims that there was a reasonable probability that he would have rejected the state's plea offer and proceeded to trial insofar as the state's case against him was not very strong and his testimony indicated that he would have made decisions that favored better immigration consequences, those factors could not overcome the petitioner's own testimony at the habeas trial that he still was not sure whether he would have proceeded to trial; furthermore, the habeas court made a specific and undisputed factual finding that there was no more favorable plea offer available to the petitioner in light of the credible testimony of the prosecutors that they would not have considered dropping the risk of injury charge against the petitioner, and the petitioner's testimony during the habeas trial that he would have approached the plea agreements "differently" was of no legal import insofar as he had failed to establish that there were any reasonably probable and more favorable alternatives available to him.

Argued October 20, 2021—officially released April 12, 2022

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, geographical area number nineteen, and tried to the

court, *Bhatt*, *J.*; judgment denying in part the petition, from which the petitioner, on the granting of certification, appealed. *Affirmed.*

Desmond M. Ryan, for the appellant (petitioner).

Sarah Hanna, senior assistant state's attorney, with whom, on the brief, were *Brian W. Preleski*, state's attorney, *Tanya K. Gaul*, former special deputy assistant state's attorney, and *Kelly A. Masi*, senior assistant state's attorney, for the appellee (respondent).

Opinion

MULLINS, J. The petitioner, Lenworth Charles Grant, appeals from the judgment of the habeas court denying in part his petition for a writ of habeas corpus.[1] The petitioner claims that the habeas court incorrectly concluded that he did not demonstrate that he had suffered prejudice from the ineffective assistance of his trial counsel insofar as his trial counsel allegedly failed to properly inform him that he would be subject to deportation as a consequence of his guilty plea to a felony. We disagree and, accordingly, affirm the judgment of the habeas court.[2]

[1] The habeas court granted the petitioner's petition for certification to appeal pursuant to General Statutes § 52-470 (g). The petitioner subsequently appealed from the judgment of the habeas 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.

[2] It is undisputed that the petitioner was in the custody of the respondent, the Commissioner of Correction, at the time he filed his habeas petition. After the habeas trial, but before the petitioner filed this appeal, the federal government deported the petitioner to his native country of Jamaica. As a result, the respondent initially asserted that the petitioner's appeal was moot because the petitioner had been deported based in part on convictions unconnected to this appeal. After briefing was completed in this case, this court issued its decision in *State* v. *Gomes*, 337 Conn. 826, 256 A.3d 131 (2021), which held that deportation does not render an appeal moot because the court can render practical relief regarding the collateral consequences of a criminal conviction. See id., 838, 845.

Thereafter, this court ordered the parties to file supplemental briefs "addressing the impact, if any, of . . . *Gomes* . . . on the present appeal." (Citation omitted.) In his supplemental brief, the respondent conceded that,

The record reveals the following relevant facts and procedural history. The petitioner is a citizen of Jamaica who had resided in Connecticut since 1997 and held a valid green card.[3] In 2014, the petitioner was involved in a domestic violence incident in which the state accused him of assaulting the complainant,[4] his girlfriend and the mother of his child.[5] The incident occurred while the petitioner and the complainant were riding in a motor vehicle with their eleven month old son. The complainant was driving, and an argument ensued between her and the petitioner. The complainant alleged that the petitioner assaulted her by pulling her hair, slapping her and choking her, causing her to nearly lose control of the vehicle while on the highway. Thereafter, the complainant was treated at a hospital for the injuries she sustained. The police took photographs of her injuries, and the complainant gave a written statement detailing this assault. Subsequently, the complainant recanted in statements to the victim's advocate, the New Britain Police Department and the New Britain public defender's office.[6]

in light of this court's holding in *Gomes*, "the petitioner's deportation does not render his appellate challenge to his conviction in this appeal moot." We agree and thus address the merits of the petitioner's appeal.

[3] "A 'green card' is a document [that] evidences an alien's permanent residence status in the United States." *Singh* v. *Singh*, 213 Conn. 637, 640 n.3, 569 A.2d 1112 (1990).

[4] In accordance with our policy of protecting the privacy interests of the victim 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.

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

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

[6] At the time of this incident, the petitioner was on probation after having pleaded guilty to assault in the third degree in violation of General Statutes

As a result of this incident, in the judicial district of New Britain, geographical area number fifteen, the state charged the petitioner with one count each of risk of injury to a child in violation of General Statutes § 53-21 (a) (1), assault in the third degree in violation of General Statutes § 53a-61, strangulation in the third degree in violation of General Statutes (Rev. to 2013) § 53a-64cc, and disorderly conduct in violation of General Statutes § 53a-182.

In the proceedings before the trial court, "[t]he petitioner was represented by Attorney David Cosgrove of the [New Britain public defender's office]. Attorney Cosgrove engaged in numerous plea negotiations on the petitioner's behalf, where the main focus was to avoid incarceration. Attorney Cosgrove attempted to get the petitioner into [substance abuse and domestic violence] treatment to later use as a bargaining chip. The petitioner stopped going to the first program but was then entered into a second program. There were numerous offers made by the state, all of which involved pleas of guilty to felonies and incarceration. From the outset, the state had taken the position that this case would . . . be resolved [only] if the petitioner served time in prison. Attorney Cosgrove focused his efforts on eliminating that prospect. The first offer involved a sentence of three [years of] incarceration, suspended after service of one year, followed by three [years of] probation. Through further negotiation, the state altered that offer to [reduce] the period of incarceration to eight months. Attorney Cosgrove then convinced the trial court, *Hadden*, *J.*, to fully suspend the period of incarceration in light of the recantation [by] the complainant and the [substance abuse and domestic violence] treatment the petitioner had [received] during the pendency of this case."[7]

§ 53a-61, arising from a prior domestic violence incident involving the same complainant.

[7] The habeas court found that Attorney Cosgrove was not aware of the petitioner's immigration status until the very end of the plea canvass, despite

Ultimately, the petitioner pleaded guilty, pursuant to the *Alford* doctrine,[8] to one count each of risk of injury to a child and strangulation in the third degree. The petitioner pleaded guilty in exchange for a court indicated sentence of three years of incarceration, fully suspended, and three years of probation.[9] Approximately one year later, the petitioner was found to have violated his probation and was sentenced to three years of incarceration related to this case.

On July 10, 2017, the petitioner filed a petition for a writ of habeas corpus. He was self-represented at that time. Thereafter, counsel for the petitioner entered an appearance and filed an amended petition. The operative petition in this case is the fourth amended petition filed on August 31, 2018. In that petition, the petitioner alleged two separate counts, claiming ineffective assistance of trial counsel regarding the performance of two different attorneys with respect to two separate guilty

the fact that his file contained a transcript from another, unrelated case that referenced the petitioner's birthplace of Jamaica. Although the habeas court did not rule on whether this was deficient performance, and thus we have no occasion to either, we are troubled by trial counsel's lack of awareness of the immigration status of his client.

[8] "Under *North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), a criminal defendant is not required to admit his guilt, but consents to being punished as if he were guilty to avoid the risk of proceeding to trial. . . . A guilty plea under the *Alford* doctrine is a judicial oxymoron in that the defendant does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea nevertheless. The entry of a guilty plea under the *Alford* doctrine carries the same consequences as a standard plea of guilty. By entering such a plea, a defendant may be able to avoid formally admitting guilt at the time of sentencing, but he nonetheless consents to being treated as if he were guilty with no assurances to the contrary." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Simpson*, 329 Conn. 820, 824 n.4, 189 A.3d 1215 (2018).

[9] Around the same time that this guilty plea was entered, in a separate criminal case, the petitioner also pleaded guilty under the *Alford* doctrine to possession of narcotics in violation of General Statutes (Supp. 2014) § 21a-279 (a), arising from an incident in Manchester, and was sentenced to a term of three years of incarceration, execution suspended, and three years of probation.

pleas, one related to his conviction of possession of narcotics, originating out of Manchester (Manchester case), and one related to the conviction of risk of injury to a child and strangulation in the third degree, originating out of New Britain (New Britain case).

In count one, the petitioner alleged ineffective assistance of counsel in the Manchester case, in which he pleaded guilty to possession of narcotics in violation of General Statutes (Supp. 2014) § 21a-279 (a), in exchange for a fully suspended sentence and probation. In this count, he claimed that his trial counsel, Attorney Mark E. Holmes, failed to adequately inform him regarding the immigration consequences of the plea and that, had trial counsel properly informed him, he would have rejected the state's plea offer.[10]

In count two of this petition—the claim that is the subject of this appeal—the petitioner's allegations were directed at his trial counsel's performance in the New Britain case, in which the petitioner pleaded guilty to risk of injury to a child and strangulation in the third degree. In this count, he claimed that the performance of his trial counsel, Attorney Cosgrove, violated his right

[10] The habeas court found that "the petitioner has sustained his burden of proving both deficient performance and prejudice" as to the claim involving the Manchester case. Therefore, the habeas court granted the petition for a writ of habeas corpus as to the first count. The habeas court found that there were other plea offers available to the petitioner that did not involve pleading guilty to a felony. The habeas court further found that "[i]t stands to reason that, if [the petitioner] did not want to go to [prison] because he would be separated from his child, then had he been properly advised on near certain deportation that would forever separate him from his child, he would have availed himself of the [alternative] offers. [Because] all [of] the offers were available to the petitioner after a judicial pretrial, the court finds that the trial court would have imposed sentence in accordance with the offer. Moreover, transcripts from the underlying proceedings indicate that the trial [court] would have accepted the petitioner's plea agreement for the drug paraphernalia conviction." The respondent, the Commissioner of Correction, has not challenged the habeas court's ruling on this count, and that claim is not at issue in this appeal.

to the effective assistance of counsel under the sixth and fourteenth amendments to the United States constitution because, inter alia, Cosgrove failed to inquire about the petitioner's immigration status and failed to properly advise him of the immigration consequences of his plea. Specifically, the petitioner alleges that Cosgrove had access to information that the petitioner was not a United States citizen and failed to inform the petitioner that he would almost certainly be subject to deportation as a consequence of his guilty plea to a felony, namely, risk of injury to a child, that would likely be considered a "crime of child abuse, child neglect, or child abandonment" under federal law. 8 U.S.C. § 1227 (a) (2) (E) (i) (2012).

Indeed, sometime in or around 2017, the federal government initiated removal proceedings against the petitioner based, in part, on his conviction of risk of injury to a child, which is the subject of this appeal. In connection with those proceedings, on May 30, 2019, the petitioner was deported to Jamaica.

At the habeas trial, as it related to the New Britain case, the petitioner testified and presented testimony from Attorney Cosgrove and the prosecutors involved in his case, Attorneys Louis Luba and Mary Rose Palmese. He also presented expert testimony from two attorneys. With respect to the penultimate question of whether the petitioner would have gone to trial had his trial counsel not performed deficiently, the petitioner repeatedly testified that he did not know whether he would have gone to trial if he was properly advised of the immigration consequences of his guilty pleas. For instance, the petitioner was asked, "[a]nd were you interested in potentially going to trial [in] this case?" The petitioner replied in relevant part: "To be honest with you, I mean . . . I've heard a lot of things about trial, and I'm not an expert or anything like that. I mean, I'm . . . not familiar with anything when it comes to trial,

so I'm not sure where I would have gone with that. But, I mean, I was willing to take the first [guilty plea] option that [my trial counsel] had given me . . . ."

After the hearing, the habeas court issued a memorandum of decision, in which the court found in relevant part: "At the habeas trial, [Attorneys Luba and Palmese] . . . both testified credibly that they were not willing to consider dropping the risk of injury [to a child] charge against the petitioner. Attorney Palmese further testified that, under the circumstances of the petitioner's case, particularly the seriousness of the charges and the description of the petitioner's conduct, she would not change the charges. Thus, there is no evidence that there was another, more favorable offer that was available to the petitioner. . . .

"[On the basis of] the record, even if the court presumed that Attorney Cosgrove . . . [performed] deficient[ly] [by] failing to inquire into the petitioner's immigration status and [to] advise the petitioner [concerning] the potential immigration consequences of his plea, the court finds that the petitioner has not proven that he would have rejected the offer and proceeded to trial or accepted an alternative offer." [11] (Citations omitted.) Accordingly, the habeas court denied the petition for a writ of habeas corpus as to count two, the claim involving the New Britain case. This appeal followed.

We begin by setting forth the standard of review applicable to the petitioner's appeal. "The habeas judge, as

[11] There is some ambiguity in the habeas court's memorandum of decision with respect to whether the habeas court applied the precise prejudice standard from *Hill* v. *Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985), by not including the "reasonable probability" language before its conclusion that the petitioner had not met his burden. It is important to note that the petitioner does not assert that the habeas court applied the incorrect legal standard. Instead, the parties agree that the habeas court applied the correct legal standard to the petitioner's claim—namely, whether the petitioner proved that there was *a reasonable probability* that the petitioner would have rejected the plea offer and proceeded to trial. See id.

the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . The application of historical facts to questions of law that is necessary to determine whether the petitioner has demonstrated prejudice under *Strickland* [v. *Washington*, 466 U.S. 668, 698, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], however, is a mixed question of law and fact subject to our plenary review." (Citation omitted; internal quotation marks omitted.) *Small* v. *Commissioner of Correction*, 286 Conn. 707, 717, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008). "To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [supra, 687]. *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. . . . It is well settled that [a] reviewing court can find against a petitioner on either ground, whichever is easier." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Small* v. *Commissioner of Correction*, supra, 712–13.

"For claims of ineffective assistance of counsel arising out of the plea process, the United States Supreme Court has modified the second prong of the *Strickland* test to require that the petitioner produce evidence that there is a reasonable probability that, but for counsel's errors, [the petitioner] would not have pleaded guilty and would have insisted on going to trial." (Internal quotation marks omitted.) *Taylor* v. *Commissioner of Correction*, 324 Conn. 631, 643, 153 A.3d 1264 (2017); see, e.g., *Hill* v. *Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). Furthermore, to satisfy the required showing of prejudice, "[i]t is clear enough that a [petitioner] must make more than a bare allegation that he would have pleaded differently and gone to trial . . . ." (Citations omitted; internal quotation marks omitted.) *United States* v. *Horne*, 987 F.2d 833,

836 (D.C. Cir.), cert. denied, 510 U.S. 852, 114 S. Ct. 153, 126 L. Ed. 2d 115 (1993). "Courts should not upset a plea solely because of post hoc assertions from a [petitioner] about how he would have pleaded but for his attorney's deficiencies. [Courts] should instead look to contemporaneous evidence to substantiate a [petitioner's] expressed preferences." *Lee* v. *United States*, U.S. , 137 S. Ct. 1958, 1967, 198 L. Ed. 2d 476 (2017).

On appeal, the petitioner asserts that the habeas court incorrectly concluded that he did not meet his burden of establishing that, but for the deficient performance of his trial counsel, there is a reasonable probability that he would have rejected the state's plea offer and proceeded to trial. We disagree.

Not only did the petitioner fail to produce contemporaneous evidence that, but for the deficient performance of his trial counsel, there is a reasonable probability that he would have rejected the plea offer and proceeded to trial; see, e.g., id.; but his own testimony at the habeas trial does not support his claim. Instead, the petitioner admitted that, even with the benefit of hindsight and the knowledge that he would be deported, he is not sure that he would have proceeded to trial, even if he had been advised of the immigration consequences of his guilty plea. Accordingly, the petitioner's own testimony, even if credited, fails to meet his burden of showing that it was reasonably probable that he would have rejected the plea offer and insisted on a trial. See, e.g., *United States* v. *Kelly*, 98 Fed. Appx. 902, 905 (2d Cir. 2004) (even if found to be true, allegation that, but for defense counsel's alleged errors, defendant " 'might have elected to go to trial,' " was not enough to show prejudice).

Acknowledging the equivocal testimony of the petitioner, the petitioner's habeas counsel attempts to fill that gap in the record by pointing to other factors that

support the petitioner's contention that, but for the deficient performance of his trial counsel, there is a reasonable probability that he would have rejected the state's plea offer and proceeded to trial.

First, the petitioner asserts that the state's case against him was not very strong because the complainant had recanted her statement, and that this lack of strength supports the notion that the petitioner would have rejected the plea offer and proceeded to trial. Second, the petitioner points to his testimony that he prioritized keeping his family together and would have made decisions that favored better immigration consequences. Although we acknowledge that these factors would be relevant to assessing whether the petitioner's position that he would have rejected the plea offer and proceeded to trial was reasonable, these factors cannot overcome the petitioner's own testimony that, knowing all of these things, he still was not sure whether he would have proceeded to trial.

The petitioner also asserts that he established prejudice because, but for the deficient performance of his trial counsel, he would have accepted a more favorable plea offer. We disagree. The habeas court made a specific factual finding that there was no more favorable plea offer available to the petitioner. Specifically, the habeas court found that "[Attorneys Luba and Palmese] . . . both testified credibly that they were not willing to consider dropping the risk of injury [to a child] charge against the petitioner. . . . Thus, there is no evidence that there was another, more favorable offer that was available to the petitioner." The petitioner does not challenge this factual finding by the habeas court. Therefore, the record does not support a conclusion that there was a reasonable probability that, but for his trial counsel's deficient performance, the petitioner would have accepted a more favorable plea offer.[12]

[12] To the extent that the petitioner also claims that, even if a more favorable plea offer did not exist, his trial counsel should have obtained a different

The petitioner also points to the following testimony in support of his claim that, had his trial counsel properly informed him of the immigration consequences of his plea, the outcome of the New Britain case would have been more favorable to the petitioner. On redirect examination, the petitioner's habeas counsel asked, "[b]ut I'm talking more about when you were deciding whether or not even to enter into . . . these plea agreements, the risk of injury [to a child] plea agreement . . . . Would you have approached them differently had you understood the immigration consequences better than was explained to you by [trial counsel]?" The petitioner responded, "[a]bsolutely." In light of the habeas court's unchallenged finding that there was no other, more favorable plea offer available to the petitioner when he pleaded guilty, the petitioner's testimony does not satisfy his burden of demonstrating that there is a reasonable probability that he would have proceeded to trial or accepted a more favorable plea offer. Quite simply, the petitioner's testimony that he would have approached the matter "differently" is of no legal import when he has failed to establish that there were any reasonably probable alternatives available to him.

We agree with the habeas court that the petitioner did not meet his burden of establishing that there was a reasonable probability that he would have rejected the plea offer and proceeded to trial. It is well established that "[a] court deciding an ineffective assistance of counsel claim need not address the question of counsel's performance, if it is easier to dispose of the claim

plea offer, and that the petitioner would have taken it if he had, we find no support for this claim. In the present case, Attorneys Luba and Palmese testified that they would not have considered dropping the risk of injury to a child charge against the petitioner, and the habeas court found that testimony credible. Under the facts of this case, particularly when the petitioner was already on probation for a domestic violence incident with the same complainant, and Luba and Palmese testified that they were only considering plea offers with prison time because of the seriousness and nature of the offense, we cannot conclude that the petitioner has demonstrated that trial counsel should have obtained a different plea offer.

on the ground of insufficient prejudice." *Nardini* v. *Manson*, 207 Conn. 118, 124, 540 A.2d 69 (1988). Therefore, because we conclude that the habeas court correctly concluded that the petitioner had failed to establish prejudice, we need not address the performance prong. Accordingly, we conclude that the habeas court properly denied the petitioner's petition for a writ of habeas corpus as to the claim involving the New Britain case.

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* GERJUAN RAINER TYUS
(SC 20462)

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

Syllabus

Convicted of the crime of murder in connection with the shooting death of the victim, the defendant appealed. Prior to the shooting, the defendant was involved in a dispute with the victim, after which the victim drove by the defendant's apartment and shot the defendant, and the defendant fired back at the victim. The defendant's close friend, A, thereafter stated an intention to seek revenge against the victim. Approximately two weeks later, the victim was shot and killed at a café in New London. In an interview with the police after the victim's murder, the defendant told them that, on the night of the victim's murder, he and A had traveled directly from Boston to a nightclub in Norwich located approximately twelve miles away from the café, thereby indicating that he and A were not present at the café at the time of the murder. The defendant and A were subsequently charged with murder and conspiracy to commit murder, but the conspiracy charges were dismissed prior to trial. The trial court granted the state's motion to join the cases against the defendant and A for trial. At trial, A's girlfriend, E, testified that A told her that he had shot someone on the night the victim was killed. Bullet casings from the scene of the shooting at the defendant's apartment and from the murder scene were submitted to the state forensic laboratory. A ballistics analyst, P, examined the evidence and generated a written report containing his findings. S, who also was employed at the labora-

tory, served as a technical reviewer of P's report. P died before trial and was therefore unavailable to testify. The state subsequently sought to admit testimony from S, and the court denied the defendant's motion to preclude S's testimony. The jury found the defendant guilty of murder as a principal or an accessory. The Appellate Court affirmed the defendant's conviction, and the defendant, on the granting of certification, appealed to this court. *Held*:

1. The Appellate Court correctly concluded that the trial court had not abused its discretion in joining the defendant's case with A's case for trial: the state's case against the defendant and the state's case against A both arose from the shooting death of the victim, most of the state's evidence would have been admissible against both the defendant and A if their cases had been tried separately, and the defendant's and A's defenses were not antagonistic because each served as the other's principal alibi witness, the defendant and A both having claimed that they were together at a certain nightclub at the time of the shooting; moreover, the defendant could not prevail on his claim that joinder was improper on the ground that E's testimony regarding A's admission that he had shot someone on the night of the victim's murder could not have been admitted into evidence against the defendant under the coconspirator exception to the hearsay rule, because, contrary to the defendant's claim, that hearsay exception is applicable even in cases, such as the present one, in which the defendant is not facing a conspiracy charge at the time of trial.

2. The defendant could not prevail on his unpreserved claim that the admission into evidence of certain information regarding the location of his cell phone (CSLI) around the time of the victim's murder violated his fourth amendment rights insofar as the police obtained that information without a warrant: the admission of the defendant's CSLI was harmless because evidence other than the defendant's CSLI placed the defendant close to the crime scene at the time of the victim's murder, including CSLI from the cell phone of A, who maintained at trial that he and the defendant were together the entire evening, and there was additional evidence from which the jury could have inferred that the defendant and A had lied about being at the Norwich nightclub at the time of the murder, including testimony from a witness that he saw the defendant and a man matching A's description entering that nightclub fifteen to twenty minutes after the witness was told that the victim had been shot; moreover, there was evidence that the defendant and A were driving in a rented silver vehicle on the night of the murder, and witnesses testified that a man matching A's description ran from the scene of the shooting and entered a vehicle matching the description of the rented vehicle, the defendant's and A's DNA were found in that vehicle, and a substance found in the interior of that vehicle possessed genetic characteristics similar to those of the victim.

3. Although the Appellate Court incorrectly concluded that the defendant's right to confrontation was not violated when the trial court allowed S, an employee of the state forensic laboratory to testify about certain findings made by P, a ballistics analyst with the same laboratory who was unavailable to testify at the defendant's trial, the admission of S's testimony was harmless beyond a reasonable doubt:

a. The defendant's constitutional right to confrontation was violated when the trial court allowed S to testify about certain of P's findings regarding the ballistics evidence in the case, the defendant having been deprived of the opportunity to cross-examine P with respect those findings; although S was asked about his own analysis and conclusions in connection with his independent review of the ballistics evidence, S was also asked during direct examination about certain evidence that P had reviewed, and about which P had made findings, but that S had no recollection of reviewing himself, and, because, in those instances, S relied solely on P's findings rather than his own, the state indirectly communicated P's findings to the jury through S's testimony.

b. The admission of S's testimony about P's findings was harmless beyond a reasonable doubt, as S's testimony was cumulative of other evidence, including S's testimony regarding his analysis and conclusions based on his independent review of the evidence, from which the jury reasonably could have concluded that the firearm that the defendant used to fire back at the victim at the defendant's apartment was the same weapon that was used to kill the victim; moreover, other evidence presented at trial provided the jury with a strong evidentiary basis to conclude that the defendant had ready access to the type of firearm that was used to murder the victim, and there was other compelling evidence of the defendant's guilt, including DNA evidence, motive, and evidence that placed the defendant close to the café at the time of the victim's murder.

Argued October 14, 2021—officially released April 12, 2022

Procedural History

Substitute information charging the defendant with the crimes of murder and conspiracy to commit murder, brought to the Superior Court in the judicial district of New London, where the court, *Jongbloed*, *J.*, granted the defendant's motion to dismiss the charge of conspiracy to commit murder and granted the state's motion to consolidate for trial the defendant's case with that of a codefendant; thereafter, the case was tried to the jury before *A. Hadden*, *J.*; subsequently, the court, *A. Hadden*, *J.*, denied the defendant's motion to preclude certain evidence; verdict and judgment of guilty, from

which the defendant appealed to this court; thereafter, the case was transferred to the Appellate Court, *Lavine*, *Sheldon* and *Harper*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed*.

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

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *Michael L. Regan*, former state's attorney, and *Paul J. Narducci*, state's attorney, for the appellee (state).

Charles D. Ray, *Dana M. Delger*, pro hac vice, *M. Christopher Fabricant*, pro hac vice, *Don O. Burley*, pro hac vice, *Barbara E. Butterworth*, pro hac vice, *Jessica L. Hannah*, pro hac vice, and *Alexander E. Harding*, pro hac vice, filed a brief for the Innocence Project, Inc., as amicus curiae.

Opinion

KAHN, J. The defendant, Gerjuan Rainer Tyus, appeals from the judgment of the Appellate Court, which affirmed his conviction of murder in violation of General Statutes §§ 53a-54a (a) and 53a-8. In this appeal, the defendant claims that (1) the Appellate Court incorrectly concluded that the trial court had not abused its discretion in joining the defendant's case with that of his codefendant, Darius Armadore, because the evidence in both cases was cross admissible, (2) his fourth amendment rights were violated under *Carpenter* v. *United States*, U.S. , 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018), when the police obtained his cell site location information (CSLI) without a warrant supported by probable cause, and (3) the Appellate Court incorrectly concluded that the defendant's right to confrontation was not violated when the trial court allowed a state's firearms examiner to testify about the findings

of a second firearms examiner, who was deceased and, thus, unavailable to testify at trial. The state disagrees with each of these claims and asserts, in the alternative, that any error was harmless. For the reasons that follow, we agree that the Appellate Court correctly concluded that the trial court had not abused its discretion in joining the defendant's case with the codefendant's case and that the violations of the defendant's constitutional rights were harmless beyond a reasonable doubt. Accordingly, we affirm the judgment of the Appellate Court.

The following facts, which the jury reasonably could have found from the evidence admitted at trial, and procedural history are relevant to our review of the defendant's claims. In December, 2006, the defendant was involved in an ongoing dispute with the victim, Todd Thomas, over jewelry that the victim's brother had given to the defendant. The victim demanded that the defendant return the jewelry, but the defendant refused to do so unless the victim paid him $10,000.

The victim's girlfriend, Devena Colebut, told the police that, after the victim had requested that the jewelry be returned, she and the victim were driving in the victim's white Lexus in New London. She recognized the defendant's vehicle, a blue Range Rover, which began to follow the Lexus. Soon after, she heard three or four gunshots, and the victim pushed her down. The victim made several turns in an attempt to evade the Range Rover.[1]

On December 3, 2006, the victim drove by the defendant's apartment on Willetts Avenue in New London as a passenger in the white Lexus, which was registered to his wife. The victim fired several gunshots from a

[1] At trial, Colebut testified that she did not remember any of these events. In response, the state introduced Colebut's prior statement to the police into evidence pursuant to *State* v. *Whelan*, 200 Conn. 743, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986).

.38 caliber firearm, striking the defendant in the leg and the back. The defendant fired gunshots back at the victim with a nine millimeter firearm. The defendant's acquaintance, Rashard Johnson, who was present at the scene of that shooting, told the police that the defendant had a gun that he thought might be a nine millimeter firearm. Five nine millimeter cartridge casings were subsequently recovered from the scene of the shooting on Willetts Avenue. Those casings were found in front of 28 Willetts Avenue, the very same location the defendant later identified to the police on a hand drawn map as the place he had been standing. Several casings from a .38 caliber firearm were found farther down the street, in front of 24 Willetts Avenue from the location where the victim had fired. Later that same day, while the defendant was being treated for his wounds at the hospital, his close friend, Armadore, visited the defendant at the hospital and was overheard to say, "we're gonna get them niggas . . . ."[2]

On December 15, 2006, the defendant's then girlfriend, Takeisha Betts, went with the defendant to rent a silver Chevrolet Impala and listed herself and the defendant as authorized drivers of that vehicle.[3] The defendant and Armadore drove this rental vehicle to Boston, Mas-

[2] We note that Armadore's counsel challenged the admission of this statement on appeal by claiming that the witness who overhead this statement had improperly identified him as the speaker for the first time in court, in violation of *State* v. *Dickson*, 322 Conn. 410, 426, 141 A.3d 810 (2016), cert. denied, U.S. , 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017). *State* v. *Armadore*, 186 Conn. App. 140, 153, 198 A.3d 586 (2018), aff'd, 338 Conn. 407, 258 A.3d 601 (2021). The Appellate Court agreed, holding that the identification was improper but concluding that the error was harmless. Id., 156–58. We note that defense counsel made no objection to the admission of this statement.

[3] Betts and the defendant rented a car because Betts, who was pregnant at the time, needed a vehicle in order to get to medical appointments. The defendant was no longer in possession of the blue Range Rover by the time that the shooting occurred, as it had been taken into evidence by the police following the prior shooting on Willetts Avenue.

sachusetts, at approximately 7 p.m. on December 22, 2006. While in Boston, the defendant and Armadore visited family and then picked up three women. One of the women subsequently refused to return to Connecticut with them, so the defendant and Armadore drove the other two women back to Connecticut in the silver Impala.

That evening, the victim was at Ernie's Café on Bank Street in New London. Kevin Thorne, an acquaintance of the defendant, testified that he was at Ernie's Café around that time and that, while he was there, he and the defendant communicated several times over their cell phones in order to arrange a marijuana sale. Shortly after midnight, the victim was shot in the head while he was standing outside of the front entrance of Ernie's Café smoking a cigarette. Thorne was outside of the bar and near the victim at the time of the shooting, and his phone records show that he was on the phone with the defendant around that time.

Witnesses observed a light-skinned African American male wearing a hooded sweatshirt fleeing the scene of the crime toward a municipal parking lot on Golden Street, where he entered the passenger side of a silver vehicle that was waiting there with its motor running. The vehicle immediately sped away. The victim was transferred to Lawrence + Memorial Hospital in New London and was pronounced dead upon arrival.

After the shooting, the defendant and Armadore arrived at Bella Notte, a nightclub in Norwich located approximately twelve and one-half miles north of Ernie's Café. The defendant elected to testify at trial and asserted that he and Armadore had driven straight from Boston to Bella Notte, and that they were there at the time the victim was shot. However, CSLI from two cell phones belonging to the defendant and one cell phone belonging to Armadore showed that they were in New London

at the time of the victim's death. Further, a state's witness, Eduardo Guilbert, testified that he saw the defendant and a man matching Armadore's description entering Bella Notte sometime after Guilbert received a phone call informing him that the victim had been shot.[4]

A few hours later, the defendant dropped Armadore off at the apartment Armadore shared with his then girlfriend, Ritchae Ebrahimi. At trial, Ebrahimi testified that, after Armadore arrived at their home, they argued over his having been with other women that evening, and that he told her he had shot someone that night.

The police recovered one nine millimeter cartridge casing from the scene of the December 23, 2006 shooting at Ernie's Café. Ballistics evidence showed that this cartridge casing had been fired from the same firearm as all five of the nine millimeter cartridge casings that were recovered in front of 28 Willetts Avenue at the scene of the December 3, 2006 shooting.

The police also recovered the silver Impala that the defendant and his girlfriend rented, after it was returned to a rental car company in New London. The police then searched that vehicle for evidence related to the shooting. In addition to both the defendant's and Armadore's DNA, a red, bloodlike substance found on the interior of the Impala's front passenger door possessed genetic characteristics similar to that of the victim's. Angela Przech, an employee at the state forensics laboratory, noted that a bloodlike substance, although not blood, could be skin cells, saliva, sweat, or brain tissue.

[4] Although Guilbert, who had consumed several alcoholic beverages that night, could not recall the precise time these events occurred and initially told the police that the defendant may have arrived at Ernie's Café around 11 p.m., he clearly testified that he had learned of the victim's death before the defendant's arrival. He further testified that the defendant offered to buy him a drink but that he declined because he was about to leave. He left and went to the hospital to meet the victim's family.

Both the defendant and Armadore were interviewed by the police relating to their whereabouts during the night of and at the time of the shooting. During his initial interview with the police, the defendant stated that he and Armadore arrived at Bella Notte before 11:30 p.m. and that he did not see anyone he knew at Bella Notte. In a subsequent interview, however, the defendant said that he recognized a female friend at Bella Notte. Further, during an interview with the police shortly after the shooting, the defendant stated that he and Armadore had driven to Boston in a black car, but, after returning to Connecticut, they exchanged it for a rented silver car. In his March, 2008 interview with the police, the defendant stated that he and Armadore drove to Boston in a rental car. During his interview with the police in December, 2006, Armadore stated that he and the defendant traveled to Boston in a silver Impala to visit family. Both the defendant and Armadore testified at trial that they did not recall telling the police that they had ridden in a silver Impala that evening. Specifically, Armadore denied telling the police that he ever had ridden in a silver Impala with the defendant on the evening in question. The jury, however, was presented with forensic evidence showing that both Armadore and the defendant had been inside of the silver Impala rented by the defendant and his girlfriend. Throughout the investigation and even during their trial testimony, both the defendant and Armadore maintained that they were together at all times that evening and night.

On November 20, 2012, the defendant and Armadore were arrested and charged with murder in violation of § 53a-54a and conspiracy to commit murder in violation of § 53a-54a and General Statutes § 53a-48. The conspiracy charges were later dismissed as to both defendants on the ground that they were barred by the statute of limitations. The state then filed long form informations charging the defendant and Armadore with murder,

both as a principal and as an accessory, in violation of §§ 53a-54a (a) and 53a-8.

The state subsequently filed a motion to join for trial the cases against the defendant and Armadore. The trial court granted that motion, over the objections of counsel, and the case was tried before a single jury, which returned guilty verdicts as to both the defendant and Armadore.[5] The court sentenced the defendant to a term of fifty-five years of incarceration.

The defendant appealed from the judgment of conviction to this court, which transferred the appeal to the Appellate Court.[6] Before the Appellate Court, the defendant claimed "(1) that the trial court abused its discretion in granting the state's motion to join his case for trial with that of . . . Armadore; (2) that he was deprived of his constitutional right to confrontation when the state's firearms examiner was permitted to testify regarding the findings of another firearms examiner, who was deceased, and thus unable to testify at trial; and (3) that the court erred in denying his request for a limiting instruction to the jury concerning the testimony of the state's firearms examiner." *State* v. *Tyus*, 184 Conn. App. 669, 670–71, 195 A.3d 737 (2018). The Appellate Court disagreed with those claims and, accordingly, affirmed the trial court's judgment of conviction. Id., 685. This certified appeal followed. See *State* v. *Tyus*, 335 Conn. 907, 227 A.3d 77 (2020). Additional facts and procedural history are set forth subsequently in this opinion as necessary.

The present appeal presents three certified questions: (1) whether the Appellate Court correctly concluded that

[5] The jury did not specify whether its verdict against the defendant was based on principal or accessorial liability.

[6] Armadore filed a separate appeal, and his conviction and sentence were affirmed in *State* v. *Armadore*, 338 Conn. 407, 258 A.3d 601 (2021).

the trial court had not abused its discretion in joining the defendant's case with that of Armadore because the evidence in both cases was cross admissible; (2) whether, in light of the United States Supreme Court's recent decision in *Carpenter*, the defendant's fourth amendment rights were violated when the police obtained his historical CSLI without a warrant; and (3) whether the Appellate Court correctly concluded that the defendant's right to confrontation was not violated when the trial court allowed a substitute firearms examiner to testify about the findings of the primary examiner, who was unable to testify at trial.[7] We address these three claims in turn.

I

The defendant first claims that the Appellate Court incorrectly concluded that the trial court had not abused its discretion in joining the defendant's case with that

[7] The defendant also claims that the Appellate Court improperly upheld the trial court's refusal to give a limiting instruction concerning the firearms examiner's testimony. We agree with the Appellate Court that the trial court's general instruction on expert testimony was sufficient to guide the jury in its assessment of Stephenson's testimony. See *State* v. *Tyus*, supra 184 Conn. App. 682. As the Appellate Court aptly noted, the defendant's requested instruction that "Stephenson's opinions in this case are not to be treated by [the jury] as scientifically definitive" and "that the probability of [Stephenson's] opinion being correct is for [the jury] . . . alone to determine" is substantially similar to the instruction that was actually given. (Internal quotation marks omitted.) Id., 684–85. The jury was instructed that "[s]uch [expert] testimony is presented to you to assist you in your deliberations. No such testimony is binding upon you, however, and you may disregard such testimony either in whole or in part. It is for you to consider the testimony with the other circumstances in the case, and using your best judgment, determine whether you will give any weight to it, and, if so, what weight you will give to it. The testimony is entitled to such weight as you find the expert's qualifications in his or her field entitle it to receive, and it must be considered by you, but it is not controlling upon your judgment." (Internal quotation marks omitted.) Id. Thus, the trial court properly instructed the jury that it alone could assess the credibility of the expert witnesses, including Stephenson. For this reason, we conclude that this claim is wholly without merit.

of Armadore's case because the evidence in both cases was cross admissible.[8] We disagree.

The following additional facts and procedural history are relevant to our consideration of this claim. Before trial, the state filed a motion for joinder of the defendant's case with Armadore's for trial pursuant to Practice Book § 41-19. The state argued that joining the cases would promote judicial economy because the witnesses, physical evidence, and scientific evidence presented for each case would be identical. The state also argued that the defendant's and Armadore's defenses would not be antagonistic, and, therefore, neither would suffer substantial injustice by having their cases tried together.

In an objection to the state's motion for joinder, defense counsel argued that the defendant would be substantially prejudiced by joining his case with Armadore's because Ebrahimi's testimony that Armadore told her he had shot someone on December 23, 2006, would constitute inadmissible hearsay against him. Specifically, counsel argued that the only way the state

[8] In his brief to this court and before the Appellate Court, the defendant claimed, for the first time, that the admission of "inflammatory evidence pertaining [solely] to Armadore" unfairly prejudiced [the defendant] because it made him appear violent and guilty by association. The evidence he points to relates to Armadore's testimony about domestic violence incidents between Armadore and his girlfriend. Defense counsel neither objected to any of the evidence that the defendant now claims prejudiced him at trial nor asked the trial court for a limiting instruction regarding that evidence. Because those claims are not properly preserved, we decline to address them. See, e.g., *State* v. *Cabral*, 275 Conn. 514, 530–31, 881 A.2d 247 ("[t]he standard for the preservation of a claim alleging an improper evidentiary ruling at trial is well settled. This court is not bound to consider claims of law not made at the trial. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling." (Internal quotation marks omitted.)), cert. denied, 546 U.S. 1048, 126 S. Ct. 773, 163 L. Ed. 2d 600 (2005).

could introduce Armadore's confession against the defendant would be pursuant to the coconspirator exception to the hearsay rule but that this exception would not apply because the conspiracy charge against the defendant had been dismissed. The trial court heard argument on the motion for joinder and orally granted that motion, finding that a joint trial would not be unfairly prejudicial to either the defendant or to Armadore.

On appeal, the defendant renews his claim that the joinder of his case with Armadore's case was improper because Armadore's confession to his girlfriend was not admissible against him under the coconspirator exception to the hearsay rule because the conspiracy charges against him had been dismissed. He, thus, argues that its introduction and use in his joint trial with Armadore resulted in unfair prejudice. The Appellate Court rejected this claim, reasoning that it was based on the erroneous legal premise that a coconspirator's statements are only admissible in criminal cases involving conspiracy charges. *State* v. *Tyus*, supra, 184 Conn. App. 678–79. The Appellate Court concluded that, because the defendant provided no other basis for the objection to the joinder, the trial court did not err in joining the cases for trial. Id., 679. We agree with the well reasoned decision of the Appellate Court on this particular point and are, thus, unpersuaded by the defendant's claim.

As the Appellate Court aptly noted, Practice Book § 41-19 provides that "[t]he judicial authority may, upon its own motion or the motion of any party, order that two or more informations, whether against the same defendant or different defendants, be tried together." This court has observed that "[t]he argument for joinder is most persuasive when the offenses are based [on] the same act or criminal transaction, since it seems unduly inefficient to require the state to resolve the same issues at numerous trials. . . . In contrast, when

the cases are not of the same character, the argument for joinder is far less compelling because the state must prove each offense with separate evidence and witnesses [thus] eliminat[ing] any real savings in time or efficiency which might otherwise be provided by a single trial." (Internal quotation marks omitted.) *State* v. *LaFleur*, 307 Conn. 115, 157, 51 A.3d 1048 (2012). Further, "[a] joint trial expedites the administration of justice, reduces the congestion of trial dockets, conserves judicial time, lessens the burden [on] citizens who must sacrifice both time and money to serve [on] juries, and avoids the necessity of recalling witnesses who would otherwise be called to testify only once." (Internal quotation marks omitted.) *State* v. *Booth*, 250 Conn. 611, 622, 737 A.2d 404 (1999), cert. denied sub nom. *Brown* v. *Connecticut*, 529 U.S. 1060, 120 S. Ct. 1568, 146 L. Ed. 2d 471 (2000).

Although joint trials may serve to conserve judicial resources, we note that trials may not be joined if a "substantial injustice is likely to result unless a separate trial be accorded." *State* v. *White*, 229 Conn. 125, 158, 640 A.2d 572 (1994). "A separate trial will be ordered [when] the defenses of the accused are antagonistic, or evidence will be introduced against one which will not be admissible against others, and it clearly appears that a joint trial will probably be prejudicial to the rights of one or more of the accused." (Internal quotation marks omitted.) *State* v. *Booth*, supra, 250 Conn. 620. We also note that "[t]he phrase prejudicial to the rights of the [accused] means something more than that a joint trial will probably be less advantageous to the accused than separate trials." (Internal quotation marks omitted.) Id.

Further, "we will reverse a trial court's ruling on joinder only [when] the trial court commits an abuse of discretion that results in manifest prejudice to one or more of the defendants." *State* v. *Vinal*, 198 Conn.

644, 649, 504 A.2d 1364 (1986). "[I]t is the defendant's burden on appeal to show that joinder was improper by proving substantial prejudice that could not be cured by the trial court's instructions to the jury . . . . [I]n deciding whether to [join informations] for trial, the trial court enjoys broad discretion, which, in the absence of manifest abuse, an appellate court may not disturb." (Citation omitted; internal quotation marks omitted.) *State* v. *Devon D.*, 321 Conn. 656, 665, 138 A.3d 849 (2016).

In the present case, the state's case against the defendant arose from the same criminal incident as its case against Armadore, namely, the shooting death of the victim. Further, at the time of the trial, most of the state's evidence would have been admissible against both the defendant and Armadore had their cases been tried separately. Finally, the defendant's and Armadore's defenses to the charges were not antagonistic. Indeed, each served as the other's principal alibi witness, as both claimed that they were together at Bella Notte at the time of the shooting.

Defense counsel's only opposition to joinder before the trial court, and the basis for the defendant's related claim of error before the Appellate Court and in the present appeal, is that Armadore's confession that he shot someone could only have been admitted into evidence against the defendant under the coconspirator exception to the hearsay rule if he was facing a conspiracy charge. Counsel claimed that this exception could not possibly apply in the defendant's case because the conspiracy charges against both him and Armadore were barred by the statute of limitations. The defendant's argument, in fact, assumed that Armadore's confession would have been admitted against the defendant under the coconspirator exception to the hearsay rule

had his conspiracy charge remained pending.[9] Defense counsel asserted no other evidentiary or other basis for excluding Armadore's confession, and counsel neither objected to Ebrahimi's testimony regarding Armadore's confession at trial nor requested the issuance of a limiting instruction to the jury.

Thus, the defendant's argument that joinder was improper rests squarely on his contention that the absence of a conspiracy charge made Ebrahimi's testimony about Armadore's confession inadmissible against him. As the Appellate Court correctly concluded, this argument must fail as a matter of law. *State* v. *Tyus*, supra, 184 Conn. App. 678–79. Section 8-3 of the 2009 edition of the Connecticut Code of Evidence provides in relevant part: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

"(1) Statement by a party opponent. A statement that is being offered against a party and is . . . (D) a statement by a coconspirator of a party while the conspiracy is ongoing and in furtherance of the conspiracy . . . ." (Emphasis omitted.)

We agree with the Appellate Court that neither the plain language of this rule, nor the common law it is based on, limits the application of the exception only to criminal cases involving charges of conspiracy. See Conn. Code Evid. (2009) § 8-3 (1), commentary ("[t]he [hearsay exception for statements of coconspirators] is applicable in civil and criminal cases alike"); see also

[9] Specifically, as the Appellate Court noted, defense counsel assumed, in his objection to the state's motion for joinder, that "the state will be able to show that Armadore's statement was made (1) while the conspiracy was ongoing and (2) in furtherance of the conspiracy." (Internal quotation marks omitted.) *State* v. *Tyus*, supra, 184 Conn. App. 677 n.5. Counsel also "assume[d] that the state will also have made the threshold showing of the existence of a conspiracy in order that this statement [may] be properly offered, let alone admitted." (Internal quotation marks omitted.) Id.

State v. *Marion*, 175 Conn. 211, 219–20 n.8, 397 A.2d 533 (1978) (noting that application of coconspirator exception to hearsay rule requires prima facie showing of existence of conspiracy); *Cooke* v. *Weed*, 90 Conn. 544, 550, 97 A. 765 (1916) (noting that statement made by alleged coconspirator of defendant was "admissible under the [well settled] rule relating to the declarations of coconspirators" in civil trial for damages when defendant had not been charged with conspiracy). Because this was the defendant's only basis before the trial court for claiming that his case should not have been joined with Armadore's for trial, we conclude that the Appellate Court did not err in determining that the trial court's joinder of the defendant's and Armadore's cases was proper.

II

We now turn to the first of the defendant's constitutional claims. The defendant claims that his constitutional rights were violated when the police obtained three days of his CSLI without a warrant. The state responds by arguing that the admission of the defendant's CSLI into evidence was not error, but, if it was, that error was harmless. Because we ultimately agree with the state that the admission of the CSLI was harmless beyond a reasonable doubt, we need not decide whether it was an error.

The defendant claims for the first time[10] that, in light of the United States Supreme Court's recent decision in

[10] *Carpenter* was decided approximately one month after the defendant's appeal was argued before the Appellate Court. As such, the defendant also claims that, because the rule announced in *Carpenter* is a new constitutional rule, it applies to all pending cases, regardless of whether the claim was preserved at trial. The state argues that the defendant is not entitled to retroactive application of *Carpenter* because he did not pursue any claim, before either the trial court or the Appellate Court, that his CSLI data should have been suppressed. This court first applied the holding of *Carpenter* in *State* v. *Brown*, 331 Conn. 258, 202 A.3d 1003 (2019). In *Brown*, the police had obtained two months of the defendant's CSLI pursuant to an ex parte order. Id., 265–66. The defendant moved to suppress the CSLI. Id., 268. The

Carpenter, his fourth amendment rights were violated when the police obtained three days of his CSLI without a warrant. *Carpenter* held that, under the fourth amendment to the United States constitution, "the [g]overnment must generally obtain a warrant supported by probable cause" before acquiring CSLI; *Carpenter* v. *United States*, supra, 138 S. Ct. 2221; because individuals maintain "a legitimate expectation of privacy in the record[s] of [their] physical movements as captured through CSLI." Id., 2217. The defendant thus argues that his constitutional rights were violated when the police obtained his CSLI without a warrant. The state argues that *Carpenter* did not conclude whether CSLI collection of less than seven days without a warrant constitutes a search, and, therefore, because only three days of CSLI were obtained in the present case, the defendant's rights were not violated.

Additional facts and procedural history are required to resolve this claim. Approximately two weeks after the victim's murder, Detective Franklin S. Jarvis of the New London Police Department filed ex parte orders, pursuant to General Statutes (Rev. to 2007) § 54-47aa (b), to compel the disclosure of historical CSLI for two cell phones belonging to the defendant, and one belonging to Armadore from the day of the murder to the day

appeal in *Brown* was pending before the Appellate Court when *Carpenter* was decided. In *Brown*, this court applied *Carpenter* and held that obtaining CSLI without a warrant violated the defendant's fourth amendment rights. Id., 273. Thus, it is clear that we apply the rule from *Carpenter* retroactively to cases pending on appeal, subject to review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). See *Griffith* v. *Kentucky*, 479 U.S. 314, 322, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987) ("[A]t a minimum, all defendants whose cases [are] still pending on direct appeal at the time of [a law changing] decision should be entitled to invoke the new rule. . . . [F]ailure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." (Citations omitted; footnote omitted; internal quotation marks omitted.))

after the murder. At the time, § 54-47aa (b) required only "a reasonable and articulable suspicion that a crime has been or is being committed" to obtain such historical CSLI. The orders were subsequently granted and the records were submitted to Detective Richard Curcuro of the New London Police Department. Those records were then sent to James J. Wines, an agent with the Federal Bureau of Investigation's cellular analysis survey team, who analyzed the CSLI and prepared a slideshow presentation with his analysis. Neither defense counsel nor Armadore's counsel sought to suppress Wines' expert testimony or his slideshow containing the CSLI, which were admitted without objection.[11]

Because the CSLI evidence provided a comprehensive chronicle of the cell phone users' past physical movements, the data showed that all three phones activated cell towers in New London between approximately 12:04 and 12:15 a.m., within minutes of when a 911 call was received at 12:09 a.m., reporting the shooting of the victim. Specifically, both of the defendant's phones activated cell sites west of the Thames River in New London, approximately 0.4 miles from Ernie's Café, between 12:04 a.m. and 12:13 a.m. Armadore's phone activated a cell site east of the Thames River, approximately three miles from Ernie's Café, at 12:15 a.m. The evidence also showed that the cell phones activated cell towers north of New London from approx-

[11] We note that there was an objection to the labeling on the printout of Wines' slideshow presentation that identified the defendant by name in relation to the cell phone numbers from which calls were made and received on the night of the shooting. The trial court sustained the objection, and the prosecutor had Wines redact the defendant's name, insofar as it revealed to whom the cell phone numbers were registered or by whom they were used. The printout, thus, showed only which cell phone numbers were activated and where and when they were activated. However, there was other evidence admitted at trial that established that two of these phone numbers were connected to a cell phone registered to or used by the defendant and that the other phone number was connected to a cell phone registered to Armadore.

imately 12:42 to 12:44 a.m., and activated a cell tower farther north near Bella Notte, between approximately 1:12 and 1:55 a.m.

Because the defendant's claim related to the admission of CSLI is unpreserved, we look to the familiar test set forth in *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). In order for a defendant to prevail under that test, he or she must show that "(1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Footnote omitted.) *State* v. *Golding*, supra, 239–40; see *In re Yasiel R.*, supra, 781 (modifying third prong of *Golding*). "The first two [prongs of *Golding*] involve a determination of whether the claim is reviewable; the second two . . . involve a determination of whether the defendant may prevail." (Internal quotation marks omitted.) *State* v. *Peeler*, 271 Conn. 338, 360, 857 A.2d 808 (2004), cert. denied, 546 U.S. 845, 126 S. Ct. 94, 163 L. Ed. 2d 110 (2005).

Even if we assume, without deciding, that the defendant's *Carpenter* claim is reviewable under the first two prongs of *Golding* and that a constitutional violation existed under the third prong,[12] it fails under the fourth

[12] We observe that there may not be a meaningful distinction between the state's obtaining more or less than seven days of CSLI without a warrant. See *Carpenter* v. *United States*, supra, 138 S. Ct. 2217 ("time-stamped data [provides] an intimate window into a person's life, revealing not only his [or her] particular movements, but through them his [or her] familial, political, professional, religious, and sexual associations" (internal quotation marks omitted)). Allowing CSLI collection for a period of three days, in the absence of compelling reasons or exigent circumstances, may not adequately alleviate those concerns. See id., 2222. Indeed, several of our sister states have

prong. For the reasons set forth subsequently in this opinion, we conclude that the state has sustained its burden of demonstrating that any claimed error by the trial court in admitting the CSLI evidence was harmless beyond a reasonable doubt. See *State* v. *Armadore*, 338 Conn. 407, 437, 258 A.3d 601 (2021) ("[i]t is well settled that constitutional search and seizure violations are not structural improprieties requiring reversal, but rather, are subject to harmless error analysis" (internal quotation marks omitted)). As a result, the defendant's constitutional claim related to the admission of his CLSI data must fail.

We begin with the applicable standard of review. "Whether any error is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the evidence on the trier of fact and the result of the trial. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless [beyond a reasonable doubt]."

concluded that obtaining less than seven days of CSLI may constitute a search for which a warrant is required. See, e.g., *Commonwealth* v. *Wilkerson*, 486 Mass. 159, 165–66, 156 N.E.3d 754 (2020) ("[c]ollecting more than six hours of CSLI data invades a defendant's reasonable expectation of privacy, and, therefore, under the [f]ourth [a]mendment to the United States [c]onstitution . . . requires a warrant supported by a showing of probable cause); *People* v. *Simpson*, 62 Misc. 3d 374, 380, 88 N.Y.S.3d 763 (2018) ("this [c]ourt finds that the period of time in *Carpenter*—seven days—is less significant to the ultimate decision by the [c]ourt than the underlying rationale supporting the [c]ourt's express holding"); *State* v. *Gibbs*, Docket No. 2017-001846, 2020 WL 4814266, *4 (S.C. App. August 19, 2020) (concluding that CSLI obtained by authorities over five day period constituted search under fourth amendment).

(Internal quotation marks omitted.) Id. Thus, we begin our analysis of that question by placing those pieces of evidence in the context of the other evidence admitted at trial.

First, even without the evidence of the defendant's historical CSLI, there was other compelling evidence admitted at trial that placed the defendant close to the scene of the crime at the time of the shooting. The historical CSLI from Armadore's cell phone was admitted into evidence and was relied on by Wines, who testified that this cell phone was located in New London, approximately three miles from Ernie's Café, minutes after the 911 call was received that reported the shooting. See id., 438–47 (holding that criminal defendant does not have privacy right in his codefendant's CSLI, and, thus, does not have standing to challenge admission of that evidence). Armadore specifically testified at trial that he had this cell phone with him throughout the night of the shooting and that he was receiving calls on it. Both the defendant and Armadore readily admitted to the police, and, indeed, even maintained at trial, that they were together on the night the victim was shot and killed. The confluence of these two pieces of evidence constitutes highly persuasive proof that puts the defendant precisely where he claimed not to be at the time of the shooting, namely, in the city of New London. This evidence directly and categorically contradicts the defendant's assertion that both he and Armadore drove directly from Boston to Bella Notte on the night of the murder.

Even without CSLI, there was additional evidence presented from which the jury could have reasonably inferred that the defendant and Armadore had lied about being at Bella Notte when the shooting occurred, further strengthening the state's case. As stated previously in this opinion, Guilbert testified at trial that he had witnessed the defendant and a man matching

Armadore's description enter Bella Notte approximately fifteen to twenty minutes after Guilbert received a phone call informing him that the victim had been shot. Thus, records of the defendant's historical CSLI were cumulative of other evidence showing that the defendant was not at Bella Notte at the time of the shooting, as he claimed.

Still other circumstantial evidence indicative of the defendant's guilt was presented by the state at trial. There was evidence that the defendant and Armadore went to Boston on the night of the shooting in a rented silver Impala. Multiple witnesses testified that, immediately after the shooting, a man fitting Armadore's description ran from the scene of the shooting and entered the passenger side of a running, silver vehicle matching the appearance of the defendant's rented Impala. Both the defendant's and Armadore's DNA were found in the Impala, even though Armadore testified at trial that he had never been in that vehicle. Additionally, and perhaps more persuasively, a red, bloodlike substance consistent with being either skin cells, saliva, sweat, or brain tissue, found on the interior of the Impala's front passenger door, possessed genetic characteristics similar to those of the victim. The defendant's own contradictory statements to the police during the course of the investigation are particularly damaging, as they are indicative of an effort to hide his role in the shooting. Further, both the defendant and Armadore testified that they were together the entire evening. The state also presented evidence that, hours after the shooting, Armadore confessed to his girlfriend, Ebrahimi, that he had shot someone that night.

Finally, the state presented particularly strong evidence of motive in the present case. The defendant and the victim had an ongoing dispute over the return of certain jewelry that was in the defendant's possession. Specifically, there was evidence that the defendant,

while riding in his Range Rover, previously shot at the victim and his girlfriend. Just three weeks prior to the victim's death, the victim drove by the defendant's residence on Willetts Avenue and shot the defendant in the leg and back. While visiting the defendant at the hospital where he was receiving treatment for those wounds, Armadore stated an intention to seek revenge for the victim's shooting of the defendant.

Because the admission of the defendant's historical CSLI was cumulative of other evidence contained in the record, and because the state presented other significant evidence of motive, intent, and the defendant's participation in the crime, we conclude that the state met its burden of showing that the admission of that evidence was harmless beyond a reasonable doubt.

III

The defendant next claims that the Appellate Court erred in concluding that his right to confrontation was not violated by the testimony of the substitute firearms examiner, who testified about the findings of the primary examiner. We agree with the defendant that the Appellate Court erred by not determining that a constitutional violation occurred; however, we conclude that the violation was harmless beyond a reasonable doubt.

A

The following additional facts and procedural history are relevant to our review of this claim. As stated previously in this opinion, the police recovered five nine millimeter casings from the Willetts Avenue shooting and one nine millimeter casing from the scene of the victim's death. Those casings were then submitted to the state forensic laboratory, where a ballistics analyst, Gerald Petillo, examined the evidence and generated a written report containing his conclusions. James Stephenson, who was also employed at the laboratory at

the time, was the "technical reviewer" of Petillo's report. As part of his technical review, Stephenson also physically examined the casings recovered from the two shootings.

Petillo died prior to trial and, therefore, was unavailable to testify. The state subsequently sought to admit testimony from Stephenson in lieu of Petillo. In response, the defendant filed a motion in limine, seeking to preclude Stephenson from testifying and also to exclude any evidence related to the firearms examination conducted in this case. In that motion, the defendant argued that Stephenson would be testifying as a surrogate expert based on Petillo's examination, which would violate the defendant's right to confrontation under *Bullcoming* v. *New Mexico*, 564 U.S. 647, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011), and *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). The state opposed the defendant's motion, arguing that there was no confrontation clause violation because Stephenson conducted "his own review and comparison of the actual physical evidence . . . ." Stephenson testified, outside of the jury's presence, that he reviewed Petillo's findings but also conducted his own examination of the evidence and reached his own conclusions. The court then denied the motion to preclude Stephenson's testimony.

At trial, Stephenson testified that, when analysts at the state forensic laboratory examine shell casings, they look for class characteristics such as the manufacturer and caliber designations to determine from what types of firearms they may have been fired. They then look for "individual marks that occur only during the firing process" that indicate whether the casings came from a sole source. After finding the marks, the objects can then be viewed through a comparison microscope to look "for those areas of agreement that occurred during

the firing process to determine whether two objects were fired from the same source."

Stephenson also testified about his role as a technical reviewer. He noted that the primary examiner, Petillo, had conducted an examination of the casings using a comparison microscope. Stephenson then testified that his role as technical reviewer was to look at the same evidence and "to determine whether they came to the same conclusions during the examination process." Specifically, Stephenson noted that the "[t]echnical reviewer was the position of signing off after the . . . review of all the . . . evidence . . . ." He also expressly stated that, if the technical reviewer disagreed with the primary examiner's conclusion that items were fired from the same source, the evidence would have to be reviewed again, and both reviewers would have to come to an agreement, or "it would be an inconclusive result, because the [technical reviewer] couldn't come to the same result as the [primary] examiner had come to during his examination."

Stephenson ultimately testified that his own examination of the .38 caliber casings found near 24 Willetts Avenue led him to conclude that all of the casings had been fired from the same firearm. He also opined as to his scientific conclusion that all of the nine millimeter casings found near 28 Willetts Avenue were fired from the same firearm. Finally, Stephenson testified that his review had also led him to conclude that the nine millimeter cartridge casing found at Ernie's Café was fired from the same firearm that had fired the nine millimeter casings found near 28 Willetts Avenue.

On appeal, the defendant claims that the trial court improperly admitted Stephenson's testimony in violation of his sixth amendment right to confrontation because his testimony was predicated on Petillo's findings and conclusions. The defendant argues that Petillo's findings and conclusions constituted testimonial

hearsay and that, because Petillo was unavailable for cross-examination, Stephenson could not testify as to Petillo's conclusions without violating the defendant's constitutional right to confrontation. For the reasons that follow, we agree with the defendant that parts of Stephenson's testimony were improperly used as an implicit conduit for Petillo's findings.

We begin with the applicable standard of review. "Under *Crawford* v. *Washington*, [541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)], hearsay statements of an unavailable witness that are testimonial in nature may be admitted in accordance with the confrontation clause only if the defendant previously has had the opportunity to cross-examine the unavailable witness." *State* v. *Smith*, 289 Conn. 598, 618, 960 A.2d 993 (2008). "Nontestimonial [hearsay] statements, however, are not subject to the confrontation clause and may be admitted under state rules of evidence" if they fall under a hearsay exception. Id. A threshold inquiry of whether the admission of the statement presents a constitutional due process claim is whether the hearsay statement was testimonial in nature, which presents a question of law over which our review is plenary. See, e.g., id., 618–19.

We recently addressed an almost identical claim, also involving expert testimony by Stephenson, who acted as a technical reviewer for Petillo in *State* v. *Lebrick*, 334 Conn. 492, 521–22, 223 A.3d 333 (2020). In *Lebrick*, we held that "Stephenson's testimony was admissible, even if predicated in material part on testimonial hearsay, as long as the underlying hearsay was not admitted into evidence or otherwise put before the jury for the truth of the matter asserted." Id., 527. In that case, we concluded that, "[a]lthough the jury was informed that Stephenson had reviewed 'a number of reports and photographs in preparation for [his] testimony,' the contents of those reports were not presented to the jury. When the state attempted to elicit information regarding

'which reports [Stephenson had] reviewed,' the defendant objected to this line of inquiry, and the trial court implicitly sustained the defendant's objection, ruling that Stephenson's testimony must be limited to 'his own conclusions.' Thus, the jury was not informed of the nature of the reports on which Stephenson had relied, who generated the reports, what information they contained, or whether Stephenson's expert opinions were consistent with the reports." Id. As such, we concluded that the trial court did not err in allowing Stephenson's testimony. See id.

Stephenson's testimony in the present case is, however, meaningfully different from his testimony in *Lebrick*. In the present case, Stephenson testified before the jury that, in his role as the technical reviewer of the primary examiner's analysis, he reviewed Petillo's initial notes. In addition, he informed the jury that, if his independent conclusions, as a technical reviewer, had not matched the primary examiner's (Petillo's), findings, the results would have been considered inconclusive. The defendant claims that, from this general testimony, the jury could have readily inferred that, because the results reached were not considered inconclusive, Petillo's results must have matched Stephenson's. Although it is unclear how the jury would have known whether any aspects of Petillo's findings were deemed inconclusive without his actual conclusions or report having been directly admitted, what made Stephenson's testimony in this case problematic was his direct testimony about Petillo's findings. During Stephenson's direct examination, the prosecutor specifically inquired if he had reviewed Petillo's findings as to specific conclusions, rather than focusing on Stephenson's own independent analysis and conclusions. For example, at the outset of Stephenson's testimony relating to the examination of specific cartridges, the following colloquy occurred:

"Q: And who was the original examiner in this particular case?

"A: . . . Petillo.

"Q: And what was your role with respect to the examination of those cartridge cases?

"A: Reviewing the cartridge cases in the comparison microscope to make a determination [as to] whether his conclusions were correct at the time.

"Q: And did you come to an opinion as to what his conclusions were?

"A: I did.

"Q. Did you also come to a conclusion as to whether or not, to a reasonable degree of certainty in the field of ballistics or firearms examination, as to whether or not those were all fired from the same clip?

"A: I did.

"Q: And what was your conclusion with respect to that?

"A: They had been fired in the same firearm."

Although Stephenson was asked about his own analysis and conclusions, there were other times during his direct examination when he was shown other pieces of evidence, such as two bullets contained in state's exhibits 62 and 116, which he had no recollection of independently reviewing. When Stephenson was specifically asked about that evidence, he relied on Petillo's findings. Thus, by inquiring directly about Petillo's report with respect to particular pieces of evidence that Stephenson did not have any recollection of independently reviewing, the state indirectly communicated Petillo's findings to the jury through Stephenson's testimony.[13]

[13] We recognize that, in some cases in which, due to the passage of time and the unavailability of the evidence, such as bodily fluids or DNA samples, a subsequent examiner may by necessity be limited to a review of the analysis of the original examiner, the subsequent examiner should *testify only as to his or her own independent conclusions* based on the review of the analysis conducted by the prior examiner. See, e.g., *Williams* v. *Illinois*, 567 U.S. 50, 56–58, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012) (expert testimony

We, therefore, disagree with the Appellate Court that "the only inculpatory conclusions or statements regarding the firearms evidence that were presented to the jury were made by Stephenson . . . ." *State* v. *Tyus*, supra, 184 Conn. App. 682. Because the defendant was deprived of the opportunity to cross-examine Petillo with respect to Petillo's conclusions, his constitutional right to confrontation was violated.

B

Having concluded that the trial court committed error by permitting Stephenson to implicitly testify as to Petillo's conclusions, we next turn to the question of whether that particular error requires reversal of the defendant's conviction, when considered in the context of the record as a whole. Because the defendant's claim is constitutional in nature, the state bears the burden of establishing that this error was harmless beyond a reasonable doubt. See, e.g., *State* v. *Edwards*, 334 Conn. 688, 706–707, 224 A.3d 504 (2020). "That determination must be made in light of the entire record [including the strength of the state's case without the evidence admitted in error]. . . . Additional factors . . . . include the importance of the challenged evidence to the prosecution's case, whether it is cumulative, the extent of cross-examination permitted, and the presence or absence of corroborating or contradicting evidence or testimony." (Citation omitted; internal quotation marks omitted.) Id., 707.

did not violate defendant's right to confrontation when expert reached independent conclusions after relying on DNA report generated by third-party laboratory from rape kit). In this case, Stephenson's direct testimony was not so limited by the state. By contrast, in *Lebrick*, Stephenson testified only about his own conclusions based on comparisons of photographs of the ballistics evidence, without any reference to Petillo's conclusions. *State* v. *Lebrick*, supra, 334 Conn. 527. Although defense counsel did cross-examine Stephenson about Petillo's findings, this is not a situation in which defense counsel opened the door to the admission of Petillo's findings, because the prosecutor indirectly introduced them during Stephenson's direct examination.

Stephenson's testimony about Petillo's findings and conclusions was redundant to other evidence presented at trial. First, Stephenson's testimony about his own independent observations and conclusions provided powerful evidence from which the jury could have reasonably concluded that the firearm that the defendant used to fire back at the victim after the December 3, 2006 shooting was the same weapon used to shoot and kill the victim three weeks later. Second, even if Stephenson's testimony had been omitted in its entirety, Johnson's testimony and the physical casings, which were submitted into evidence at trial, firmly established the fact that a nine millimeter semiautomatic firearm was used by the defendant to fire back at the victim on Willetts Avenue. It is likewise undisputed that a casing from a nine millimeter semiautomatic firearm was discovered at the scene of the victim's murder. Thus, even without a detailed forensic examination of the casings admitted into evidence, the jury would still have had a strong evidentiary basis to conclude that the defendant had ready access to the type of firearm that was subsequently used to kill the victim.

As we noted in part II of this opinion, there was also other compelling evidence, including Armadore's CSLI that placed the defendant close to the scene of the crime at the time of the murder, a getaway car that resembled the car rented by the defendant, a bloodlike substance with DNA similar to that of the victim that was found in that car, and a confession by Armadore. There was also strong evidence of motive in that the victim and the defendant had an ongoing dispute over the return of jewelry in the defendant's possession. That feud resulted in two prior shooting incidents, including one in which the victim shot and wounded the defendant three weeks before his murder.

Because Stephenson's testimony regarding Petillo's conclusions was cumulative of other evidence, and

because the state presented other significant evidence of intent and of the defendant's guilt and participation in the crime, we conclude that the state met its burden of showing that the admission of that evidence was harmless beyond a reasonable doubt.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

RAKSHITT CHUGH *v.* AASHISH KALRA ET AL. (SC 20562)

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

Syllabus

The plaintiff C sought to recover compensatory and punative damages from the defendants, K and T Co., for, inter alia, breach of a partnership agreement in connection with a failed business venture. In 2004, C and K had agreed to form a partnership to pursue investment opportunities. In furtherance of that agreement, they established numerous companies, including and principally T Co., an investment advisory company incorporated in the Cayman Islands. C and K each held a 50 percent equity interest in T Co. through entities controlled by C and K. The shares of stock representing C's interest were owned by A Co. and H Co., and the shares of stock representing K's interest were owned by P Co. Over time, C and K's relationship deteriorated, and, in 2012, with no notice to C, T Co.'s board of directors voted to remove C as a director, which left K exclusively in charge of T Co. Thereafter, K proceeded to treat T Co. and its assets as his own, and C was excluded from any involvement in T Co.'s affairs. A Co. and H Co. subsequently filed a petition in the Grand Court of the Cayman Islands to wind up T Co. and to liquidate and divide its assets between K and C. P Co. opposed the petition by asserting as an affirmative defense that C had breached his fiduciary duty to T Co. in numerous ways. The Cayman Islands court granted the petition and rejected P Co.'s affirmative defense, concluding that there was no merit to any of the allegations against C. Meanwhile, K, through P Co., brought an action in federal court against C, A Co., and other related entities. T Co. was thereafter substituted as the plaintiff in the federal action and claimed that C had breached his fiduciary duty to T Co. in numerous ways. T Co.'s specific allegations against C substantially reprised the allegations P Co. had asserted in the winding up proceeding. Following the decision of the Cayman Islands court, the District Court

granted the motion for summary judgment filed by the defendants in the federal action on the ground that T Co. was collaterally estopped from pursuing its claims. While the federal action was still pending, C filed the present action against K and T Co., alleging, breach of partnership agreement, breach of fiduciary duty, and libel per se. The libel claim was predicated on a 2013 press release K had issued following the decision of the Cayman Islands court, in which K accused C of stealing T Co.'s customer database and misappropriating its business opportunities, and of paying Cayman Islands liquidators to interfere in the federal action. Following a trial, at which C's expert witness on damages, S, testified that the press release had cost C more than $20 million in lost profit, the jury returned a verdict in favor of C, awarded him $9.4 million in damages, and authorized the imposition of punitive damages, which the trial awarded in the amount of approximately $3 million. K filed a motion to set aside the verdict, arguing, with respect to the verdict on the libel claim, that the record was devoid of evidence supporting S's testimony regarding lost profit because his testimony was predicated on the false assumption that C's hedge fund and private equity fund had $250 million under management in 2012 when it was undisputed that C and his companies had no money under management at that time. The trial court denied K's motion to set aside the verdict, concluding that any error involving the admission of S's testimony was harmless because it was clear that the jury, having awarded C only $4 million in compensatory damages in connection with the libel claim, did not fully accept S's testimony and because, although the jury was instructed that it could award C compensatory damages only if he proved that he lost profits as a result of the harm to his reputation from the press release, that instruction was an incorrect statement of the law, as C was not required to prove actual damages or lost profits in a libel per se case. Thereafter, the trial court rendered judgment for C, from which K appealed. *Held*:

1. K could not prevail on his claim that C's claims in the present action were barred by the federal compulsory counterclaim rule (Fed. R. Civ. P. 13 (a) (1)) on the ground that they were compulsory counterclaims in the federal action, as that rule was inapplicable because there had been no decision on the merits of the claims T Co. asserted in the federal action; in light of the equitable principles of res judicata, estoppel, and waiver underlying rule 13 (a) (1), a court need not apply the rule when to do so would be unjust, such as when a decision on the merits was not rendered in the prior action, and, therefore, regardless of whether K had been a party to the federal action, rule 13 (a) (1) would not bar C's claims in the present action because the District Court determined that T Co. was collaterally estopped from pursuing it claims in the federal action, and it would be anomalous for this court to conclude that C's claims were barred by principles of res judicata, estoppel, or

waiver due to C's failure to assert them as counterclaims in an action that itself was barred by those principles.

2. There was no merit to K's claims that C's breach of partnership agreement and breach of fiduciary duty claims failed as a matter of law under *Karanian* v. *Maulucci* (185 Conn. 320), in which the court indicated that, if partners adopt the corporate form to insulate against personal liability, they cease to be partners, and that any partnership C and K created ceased to exist when they incorporated T Co., among other entities, in 2006: *Karanian* did not control C's claims because, unlike the partners in that case, who intended to and did reorganize their partnership into a corporation, there was no evidence in the present case that C and K ever intended to adopt the corporate form in place of their partnership, but, rather, the evidence indicated that C and K's partnership was an overarching entity comprised of numerous companies owned by C, K, and their families, acting in concert to further the remunerative goals of the partnership, and K cited no authority holding that a partnership cannot operate in such a manner; moreover, insofar as K claimed that the evidence did not support a finding that he and C were ever partners, although the evidence of a partnership was not overwhelming, it was sufficient to support the jury's finding of an oral agreement between C and K to carry on, as co-owners, a business for profit and that they carried on that business from 2004 until at least 2013.

3. The trial court abused its discretion in admitting S's testimony on damages with respect to C's libel per se claim: it was undisputed that S's testimony that C sustained more than $20 million in lost profit as the result of K's 2013 press release had no basis in fact; moreover, the trial court improperly instructed the jury that it could award special damages only if it found that C had proven lost profit and that instructional error was not harmless, as this court could not conclude that the jury would have awarded C $4 million in general damages in connection with C's libel claim but for that error, there was no other evidence to support the award for lost profit, and, therefore, the damages award could not stand; furthermore, because the record revealed that a component of the trial court's punitive damages award was a success fee for C's counsel in the amount of 25 percent of the total compensatory damages award, which included the $4 million award for C's libel claim, the punitive damages award also could not stand; accordingly, the judgment was reversed as to C's libel claim and the case was remanded for a new trial on that claim and for a hearing in damages.

Argued October 13, 2021—officially released April 12, 2022

Procedural History

Action to recover damages for, inter alia, breach of a partnership agreement, and for other relief, brought to the Superior Court in the judicial district of Hartford

and transferred to the Complex Litigation Docket, where ARC Capital, LLC, and Peak XV Capital, LLC, were added as plaintiffs; thereafter, the court, *Schuman*, *J.*, granted the defendants' motion to dismiss certain counts of the complaint; subsequently, the plaintiffs withdrew the complaint in part; thereafter, the court, *Schuman*, *J.*, granted in part the defendants' motion for summary judgment and rendered judgment thereon; subsequently, the court, *Schuman*, *J.*, denied in part the defendants' motion to preclude certain evidence; thereafter, the case was tried to the jury before *Schuman*, *J.*; verdict for the named plaintiff; subsequently, the court, *Schuman*, *J.*, denied the named defendant's motion to set aside the verdict and for judgment notwithstanding the verdict, and rendered judgment for the named plaintiff, from which the named defendant appealed. *Reversed in part*; *further proceedings*.

John W. Cerreta, with whom was *Joseph T. Nawrocki*, for the appellant (named defendant).

John G. Balestriere, pro hac vice, with whom were *Stefan Savic* and, on the brief, *Matthew W. Schmidt*, pro hac vice, for the appellee (named plaintiff).

Opinion

KELLER, J. This case is the latest in a series of cases arising out of a failed business venture between the named plaintiff, Rakshitt Chugh,[1] and the named defendant, Aashish Kalra.[2] Chugh commenced the present action seeking compensatory and punitive damages for,

[1] Two companies controlled by Chugh, Peak XV Capital, LLC (Peak XV), and ARC Capital, LLC (ARC Capital), were also added as plaintiffs in this action. The trial court granted the defendants' motion to dismiss ARC Capital from the case for lack of standing and to dismiss Peak XV from the case with respect to every claim except the libel claim. For the sake of clarity, we refer in this opinion to Chugh, Peak XV, and ARC Capital by name.

[2] Trikona Advisers Limited (TAL) was also named as a defendant in this case. For the sake of clarity, we refer in this opinion to Kalra and TAL collectively as the defendants and individually by name when appropriate.

inter alia, breach of partnership agreement, breach of fiduciary duty, and libel per se. A jury found in favor of Chugh on those three counts, awarding him damages in the amount of $9,400,000[3] and authorizing the imposition of punitive damages, which the trial court awarded in the amount of $2,965,488.29. On appeal,[4] Kalra claims that the trial court improperly denied his motions to set aside the verdict and for judgment notwithstanding the verdict because (1) Chugh's claims are barred by the compulsory counterclaim rule set forth in rule 13 (a) (1) of the Federal Rules of Civil Procedure,[5] (2) as a matter of law, no partnership existed between the parties during the relevant time frame, and (3) with respect to the libel claim, the trial court improperly admitted the testimony of Chugh's expert witness on damages because there was no evidence to support the testimony. We agree with Kalra's third claim and, accordingly, reverse in part the judgment of the trial court.

Because issues related to the underlying action have been litigated on prior occasions in numerous other forums,[6] when appropriate, we quote directly from the

[3] The trial court later ordered a remittitur in the amount of $451,171.24.

[4] Kalra 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 § 65-2.

[5] Rule 13 (a) of the Federal Rules of Civil Procedure provides in relevant part: "(1) *In General.* A pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim:

(A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and

(B) does not require adding another party over whom the court cannot acquire jurisdiction. . . ."

[6] In *Trikona Advisers Ltd.* v. *Haida Investments Ltd.*, 318 Conn. 476, 479 n.5, 122 A.3d 242 (2015), this court observed that "[t]hese parties have filed several actions in multiple domestic and international courts. For example, other than the present action, the parties have filed actions in the United States District Court for the District of Connecticut, the New York Supreme Court, the Grand Court of the Cayman Islands, India, and Mauritius."

decisions in those cases in setting forth the relevant facts and procedural history. Chugh and Kalra, both of whom are naturalized citizens of the United States, were born in India but immigrated to the United States to pursue postsecondary educational and employment opportunities. In 2002, Chugh's brother, who had attended high school with Kalra in India, introduced them in New York City. The two men became friends, and, between 2002 and 2004, Kalra worked as a consultant for Byte Consulting, Inc., a company founded by Chugh in 2000. By 2004, they were meeting nearly every day for lunch. It was during one of their lunch meetings, in early 2004, that they agreed to form a partnership to pursue investment opportunities in India. At the time, India had just announced that it would open its doors to foreign investment in real estate and infrastructure projects in early 2005, an opportunity that they saw themselves as uniquely positioned to exploit. They agreed that theirs would be a 50/50 partnership and that all strategic decisions relating to the business, including where to set up offices and whom to hire, would have to be unanimous.

In furtherance of the partnership agreement, Chugh and Kalra established numerous companies around the world.[7] Principal among them was Trikona Advisors Limited (TAL), an investment advisory company incorporated in the Cayman Islands. "Each man held a [50] percent equity stake in TAL through entities controlled by them. Chugh's shares were owned by ARC Capital, LLC (ARC Capital), and Haida Investments [Limited

[7] Evidence adduced at trial reveals that, as of September 27, 2012, twelve companies comprised what the parties referred to as the "Trikona Group": TAL in the Cayman Islands, Trikona Capital Advisers, LLC, in Delaware, Trinity Capital Limited, TSF Advisers Mauritius Limited, Trikona Advisers Mauritius Limited, Trikona Capital Limited in the Cayman Islands, Trikona Capital Advisers Limited in the United Kingdom, Sankalp Buildwell PVT Limited in India, Trikona Capital Mauritius Limited, Trikona Investments Limited in Mauritius, Trikona Asset Holdings Limited in Mauritius, and TCK Advisers PVT Limited in India.

(Haida)], and Kalra's shares were owned by Asia Pacific [Ventures Limited (Asia Pacific)]. At the same time, the two men formed Trinity Capital [PLC (Trinity)], a closed-end fund listed on the London Stock Exchange, through which they solicited investments. Kalra and Chugh managed Trinity through TAL. Trinity paid TAL a fee for its management services, calculated at [2] percent of Trinity's net asset value plus a performance fee.

"The 2008 economic crisis took its toll on TAL and soured the relationship between Chugh and Kalra. Trinity's shareholders began pressuring the Trinity board [of directors (board)] to sell the company's assets and [to] distribute capital which, while it might benefit the shareholders, would reduce TAL's management fees by lowering Trinity's net asset value. Chugh and Kalra differed on how to respond to the Trinity board's proposed asset sale: Kalra opposed the move, while Chugh wanted to be more conciliatory to the shareholders. TAL tried to prevent the sell-off by acquiring the shares of [QVT Financial LP (QVT)], one of Trinity's main shareholders, but the deal collapsed when TAL could not secure the necessary financing. Frustrated, Kalra advocated taking legal action against QVT for breach of contract, but was ultimately dissuaded from that course by Chugh and outside legal counsel." *Trikona Advisors Ltd.* v. *Chugh*, 846 F.3d 22, 26–27 (2d Cir. 2017).

"The souring of Kalra and Chugh's relationship culminated on January 11, 2012, when, with no notice to Chugh, TAL's board of directors voted to remove him as a director. This left Kalra exclusively in charge of TAL. Thereafter, Kalra proceeded to treat TAL and its assets as his own and Chugh was excluded from further involvement in the business." Id., 27. "TAL's collapse spawned a number of legal proceedings in the United States and abroad, [including] a [winding up] proceed-

ing in the Cayman Islands and [a] federal civil [action] in Connecticut . . . .'' Id.

''On February 13, 2012, ARC [Capital] and Haida, which held Chugh's TAL shares and were controlled by Chugh, filed a petition in the Grand Court of the Cayman Islands (Cayman court), seeking to 'wind up' TAL, a Cayman corporation. The [petition] sought to liquidate the business and [to] divide its assets between Chugh and Kalra. Asia Pacific, which held Kalra's TAL shares and was controlled by Kalra, opposed [the] petition. Under Cayman Islands law, a court may order a company to be wound up if it is 'of [the] opinion that it is just and equitable' to do so. . . . [ARC Capital and Haida] argued to the Cayman court that it would be just and equitable to liquidate the company because: (1) TAL had experienced a 'loss of substratum,' i.e., a loss of its ability to 'carry on the business for which it was established,' due to its dire financial condition and the complete breakdown in trust between Kalra and Chugh; (2) Kalra had wrongfully caused Chugh to be removed from TAL's board and thereby deprived Chugh of his 'legitimate expectation of being involved in [TAL's] management'; and (3) after he had removed Chugh from the board, Kalra proceeded to misuse TAL's assets for his sole benefit.

''[Asia Pacific] opposed the [winding up of TAL] by asserting the affirmative defense that Chugh had breached his fiduciary duty to TAL in several ways, and that his removal from the board was therefore justified. Specifically, [it] argued that: (1) Chugh intentionally sabotaged TAL's attempt to acquire [QVT's] shares in Trinity and had 'caused' TAL to pay QVT $2 million for covenants of 'extremely limited value'; (2) Chugh had later 'prevented' TAL from bringing suit against QVT for breach of contract, over Kalra's objections; (3) Chugh 'forced' Kalra to agree to an unfavorable settlement with Trinity in the breach of contract arbitration arising

out of [a] failed [business] deal; and (4) Chugh 'stole' TAL's assets and customer information for use in establishing Peak XV [Capital, LLC (Peak XV) and other entities] and interfered in the distribution of payments due to Kalra. [Asia Pacific] framed these arguments as jurisdictional defenses, arguing that if any one of these allegations were true, Chugh would be precluded from invoking the Cayman court's equitable jurisdiction under the doctrine of unclean hands.

"The Cayman court tried the [winding up] proceeding over seven days in January of 2013. At the trial's conclusion, the court granted [the] petition. It found that 'each of' [ARC Capital and Haida's] allegations was supported by evidence, and that these allegations 'taken together' supported a finding that it was just and equitable to wind up TAL.[8] It also rejected each of [Asia Pacific's] affirmative defenses, concluding that there was 'no merit whatsoever [to] the allegations made against . . . Chugh.' " (Citation omitted.) Id., 27–28. Indeed, the Cayman court found that Asia Pacific's allegations against Chugh, including its claim that Chugh had stolen TAL's assets and destroyed its business, were "completely at odds with the evidence of what actually happened . . . ." *In re Trikona Advisors Ltd.*, Grand Court of the Cayman Islands, Docket No. FSD 18 of 2012 (AJJ) (January 31, 2013). The court concluded that, in fact, it was Kalra who had engaged in "blatantly improper self-dealing," calling Kalra's testimony to the contrary "disingenuous" and his evidence "wholly unreliable." Id. The court further stated that, after listening to Kalra testify over the course of several days, it had come to the conclusion that there was nothing he would not do, "no matter how dishonest, to ensure that . . . Chugh . . . [is] excluded from any share in [TAL's] remaining [net asset value]." Id. It further stated that Kalra had

[8] A copy of the Cayman court's memorandum of decision was entered into evidence at the trial in the present case.

commenced an action in the United States District Court for the District of Connecticut against Chugh in which he had asserted all of the baseless allegations against Chugh that he had asserted in the winding up proceeding. See id. The court described Kalra's action in the District Court as "a thoroughly dishonest abuse of process." Id. On May 15, 2013, the Cayman court issued a "Default Costs Certificate," ordering Asia Pacific to pay ARC Capital's and Haida's litigation expenses in the winding up proceeding in the amount of $760,067.65.[9]

As the Cayman court indicated, "[o]n December 28, 2011, two months before the commencement of the [winding up] proceeding . . . Kalra, through Asia Pacific, sued . . . [Chugh, ARC Capital, and other related entities (Chugh defendants)] in the [D]istrict [C]ourt in Connecticut. After TAL's board removed Chugh, TAL was substituted as [the] plaintiff. TAL's . . . operative complaint . . . assert[ed] eleven causes of action against the Chugh [d]efendants sounding in breach of fiduciary duty, aiding and abetting breach of fiduciary duty, unfair competition, theft of trade secrets, civil conspiracy, conversion, statutory theft, unjust enrichment, and abuse of process. TAL alleged that Chugh breached his fiduciary duty by: (1) undermining TAL's negotiating positions in the QVT [deal] and [another business deal]; (2) causing TAL to enter into an unfavorable settlement of its claims against

[9] ARC Capital brought an action in the trial court against Asia Pacific and Kalra, seeking to domesticate and enforce the Cayman court's costs order. The trial court later consolidated that case and the present case for trial. "In count three of the domestication complaint, [ARC Capital] sought to pierce the corporate veil of Asia Pacific and to hold Kalra liable for the full amount of the costs judgment." The jury found in favor of ARC Capital on count three, but the trial court granted Kalra's motion to set aside the verdict on the ground that the evidence was insufficient to support the jury's finding that Kalra had used his control of Asia Pacific to commit a fraud or wrong that proximately caused ARC Capital's inability to collect what Asia Pacific owed it under the costs order. ARC Capital did not appeal from that ruling.

Trinity; (3) interfering with payments due to Kalra; and (4) misappropriating TAL's customer information and assets in the course of founding Peak XV to unfairly compete with TAL. These claims substantially reprised the allegations [Asia Pacific] asserted as affirmative defenses to [the winding up] petition in the [Cayman court].

"Following the ruling of the Cayman court in the [winding up] proceeding . . . the Chugh [d]efendants moved for summary judgment in the [D]istrict [C]ourt based on collateral estoppel. They argued that in deciding the petition the Cayman court had already made findings of fact in Chugh's favor on all of [the] assertions regarding TAL's collapse, and that [TAL] was therefore collaterally estopped from relitigating those factual disputes. The [D]istrict [C]ourt agreed, and . . . granted [the] motion for summary judgment." *Trikona Advisers Ltd.* v. *Chugh*, supra, 846 F.3d 28–29. The United States Court of Appeals for the Second Circuit affirmed the District Court's judgment. Id., 35.

On January 8, 2014, while the federal action was still pending, Chugh filed the underlying action against the defendants, alleging, inter alia, breach of partnership agreement, breach of fiduciary duty, and libel per se.[10] The libel claim was predicated on a March 13, 2013 press release Kalra had issued, following the Cayman court's ruling, in which Kalra accused Chugh of stealing TAL's customer database and misappropriating its business opportunities. He also accused Chugh of paying the Cayman Island liquidators "$500,000 to interfere in the Connecticut litigation [then pending in the District Court] against [Chugh]." The trial court subsequently stayed the state court proceeding pending the outcome

[10] The operative complaint alleged three additional claims that were dismissed or withdrawn before trial: breach of an ancillary settlement agreement, breach of an implied contract to form a joint venture, and breach of the implied covenant of good faith and fair dealing.

of TAL's postjudgment motions and appeal in the federal action. Following the lifting of the stay, the defendants filed a motion for summary judgment in which they argued, inter alia, that Chugh's claims[11] were barred by rule 13 (a) (1) of the Federal Rules of Civil Procedure because all of the claims were compulsory counterclaims in the federal action. They further argued that Chugh's breach of partnership agreement and breach of fiduciary duty claims failed as a matter of law because Chugh and Kalra never entered into a partnership agreement and that, even if they had, the agreement ended as a matter of law in 2006 when TAL incorporated in the Cayman Islands because, under *Karanian* v. *Maulucci*, 185 Conn. 320, 323–24, 440 A.2d 959 (1981), a company cannot be both a partnership and a corporation at the same time. Finally, the defendants argued that the libel claim also failed as a matter of law because the 2013 press release addressed a matter of public concern, and, therefore, any statement contained therein was constitutionally protected speech. They further argued that they were entitled to summary judgment on the libel claim because truth is a complete defense to libel, and the press release was an "essentially true" recitation of the federal complaint.

The trial court denied in part the defendants' motion for summary judgment. With respect to their contention that Chugh's claims were compulsory counterclaims in the federal action, the court concluded that Chugh was not required to assert them in the federal action because Kalra was not a party to that action "and there is no authority squarely holding that a party must cite in a nonparty to assert compulsory counterclaims against the nonparty." In light of the court's determination that rule 13 (a) (1) of the Federal Rules of Civil Procedure was inapplicable because Kalra was not an opposing party in the federal action, it did not address Chugh's

[11] See footnote 1 of this opinion.

assertion that the rule also was inapplicable because Chugh's claims in the present case did not arise out of the same transaction or occurrence that was the subject matter of the federal complaint.

The trial court also denied the motion for summary judgment with respect to the defendants' contention that, under *Karanian*, any partnership between the parties ended with TAL's incorporation. Citing *Bartomeli* v. *Bartomeli*, 65 Conn. App. 408, 783 A.2d 1050 (2001), the court concluded that merely because a company cannot be both a corporation and a partnership does not mean that the partnership between Chugh and Kalra ended with TAL's incorporation. Whether the partnership continued to exist after 2006, the court concluded, was a genuine issue of material fact for the jury to decide. The court also noted that, pursuant to Chugh's theory of the case, the partnership was not congruent with TAL but, rather, consisted of all of the companies comprising the Trikona Group, such that TAL's incorporation could not have been a superseding event for the partnership. Finally, the court rejected the defendants' argument that they were entitled to summary judgment on the libel claim because the statements contained in the 2013 press release involved a matter of public concern, and, as such, they were protected by the first amendment to the federal constitution. The court explained that the first amendment "does not absolutely bar defamation claims against public figures or claims involving matters of public concern but, rather, merely affects the standard of proof" and whether the standard was met in this case was a question of fact for the jury. The court similarly rejected the defendants' contention that they were entitled to summary judgment because the statements contained in the press release were factually true, explaining that whether the statements were true was also a question of fact properly reserved for the jury.

After the jury returned a verdict in favor of Chugh on the breach of partnership agreement, breach of fiduciary duty, and libel claims, Kalra filed a motion to set aside the verdict on the same grounds asserted in the motion for summary judgment. Additionally, Kalra argued that the court should set aside the verdict as to the libel claim on the ground that the record was devoid of evidence supporting the testimony of Chugh's expert witness on damages, Professor Fabio Savoldelli, that the 2013 press release cost Chugh between $20.2 and $27.7 million in lost profits. Kalra argued that Savoldelli's testimony was predicated on the false assumption that Chugh's hedge fund and private equity fund had $250 million under management in 2012 when, in fact, it was undisputed that Chugh and his companies had no money under management in 2012. He further argued that "Savoldelli calculated damages based on an assumption that Chugh raised capital through 2012 and then invested that money thereafter." Given that assumption, Kalra argued, "the 2013 press release could not conceivably have affected Chugh's ability to raise capital through 2012."

The trial court denied Kalra's motion to set aside the verdict. Although the court acknowledged that Kalra's argument for setting aside the verdict as to the libel claim had "strong logical appeal," it concluded that any error involving the admission of Savoldelli's testimony was harmless because it was clear that the jury, having awarded Chugh only $4 million in compensatory damages, "did not fully accept Savoldelli's testimony . . . ." The trial court further concluded that Savodelli's testimony was harmless because, although the jury was instructed that it could award Chugh compensatory damages only if Chugh proved " 'that he lost profits as a result of the harm that the statement in question did to his reputation,' " that instruction was an incorrect statement of the law, and, in fact, Chugh "was not required

to prove actual damages or lost profits in a libel per se case."

On appeal, Kalra renews his claims before the trial court that (1) Chugh's entire action is barred by the federal compulsory counterclaim rule, (2) Chugh's breach of partnership agreement and breach of fiduciary duty claims fail as a matter of law under *Karanian*, and (3) there was no evidence to support the testimony of Chugh's expert witness on damages relative to the libel claim, and, therefore, the trial court abused its discretion in admitting that testimony. We address each claim in turn.

I

We begin with Kalra's claim that the trial court incorrectly concluded that Chugh's claims were not compulsory counterclaims in the federal action because Kalra was not a party to that action. Rule 13 (a) (1) of the Federal Rules of Civil Procedure provides in relevant part that "[a] pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against *an opposing party* if the claim: (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and (B) does not require adding another party over whom the court cannot acquire jurisdiction." (Emphasis added.) Kalra argues that, in applying this rule, federal courts have held that the phrase "opposing party" should be construed liberally to include not only parties who were formally named in the prior action but any party who was in privity with the named party or had control over the action. See *Metropolitan Life Ins. Co.* v. *Kubichek*, 83 Fed. Appx. 425, 431 (3d Cir. 2003) ("the rationales supporting a liberal reading of 'transaction or occurrence' in [rule] 13 (a) should also apply to 'opposing party,' such that the potential counterclaimant is obligated to assert his or her counterclaim against even an

unnamed party if it arises out of the same transaction or occurrence and if the unnamed party is the functional equivalent of the named party, is controlling the litigation, or is an alter ego of the named party"). But see 6 C. Wright et al., Federal Practice and Procedure (3d Ed. 2010) § 1404, pp. 13–14 ("The first sentence of [r]ule 13 (a) requires . . . a pleading to state a counterclaim that the pleader has against an 'opposing party' at the time of its service. The federal courts have not given a definitive answer to the question of who is an opposing party for purposes of a counterclaim, but the point has caused relatively few difficulties." (Footnote omitted.)). Chugh responds that the trial court correctly determined that rule 13 (a) (1) did not bar his claims in the present case because Kalra was not a party to the federal action. He further contends that rule 13 (a) (1) is inapplicable for the additional reason that his claims in the present case do not arise out of the same transaction or occurrence that was the subject matter of the federal complaint. We conclude that rule 13 (a) (1) is inapplicable because there was no decision on the merits in the federal action. Accordingly, we need not decide whether Kalra was an "opposing party" under a liberal reading of rule 13 (a) (1), or whether Chugh's claims in the present case arose out of the same transaction or occurrence as the complaint in the federal action.

We begin our analysis by noting that Connecticut is not a compulsory counterclaim state. "In Connecticut, the fact that a defendant in a prior action did not assert a related cause of action in that prior action does not foreclose the defendant from asserting those claims in a new action filed in the future. As explained in the commentary to the Restatement (Second) of judgments: 'The justification for the existence of such an option is that the defendant should not be required to assert his claim in the forum or the proceeding chosen by the plaintiff but should be allowed to bring suit at a time

and place of his own selection.' 1 Restatement (Second), [Judgments] § 22, comment (a), pp. 186–87 [1982]." (Footnote omitted.) *State* v. *Bacon Construction Co.*, 160 Conn. App. 75, 88, 124 A.3d 941, cert. denied, 319 Conn. 953, 125 A.3d 532 (2015); see also *Lowndes* v. *City National Bank*, 79 Conn. 693, 696, 66 A. 514 (1907) ("[w]hile the law encourages, it does not compel, the settlement of all controversies between the same parties by a single action"); *Hansted* v. *Safeco Ins. Co. of America*, 19 Conn. App. 515, 520 n.4, 562 A.2d 1148 ("[b]ecause Connecticut does not have a compulsory counterclaim rule . . . [the plaintiff] cannot be precluded from bringing the present claim on the ground that he failed to bring [it as] a counterclaim in [the prior action]" (citation omitted)), cert. denied, 212 Conn. 819, 565 A.2d 540 (1989).

Remarkably, this is the first time that this court has been asked to consider the applicability of rule 13 (a) to, and its preclusive effect on, a state court proceeding. Other state appellate courts that have considered this issue, however, generally have held that the rule ought to be applied in the same manner that it is applied by the federal courts. See, e.g., *Nottingham* v. *Weld*, 237 Va. 416, 420, 377 S.E.2d 621 (1989) ("It has been held that a state court must give a federal court order, dismissing a diversity case for failure to prosecute, the same preclusive effect it would have been given in the federal courts, even though state law would have permitted the maintenance of a subsequent action following a dismissal by that state's courts. . . . Although courts have disagreed, the majority, and we think the better view is that the forum court must look to the original court's construction of its compulsory counterclaim rule, and accord it full faith and credit." (Citation omitted; footnote omitted.)). But see *Van Pembrook* v. *Zero Mfg. Co.*, 146 Mich. App. 87, 105, 380 N.W.2d 60 (1985) (rejecting claim that principles of comity or full

faith and credit required Michigan Court of Appeals to give effect to Missouri compulsory counterclaim rule: "[i]n recognizing and enforcing the laws of another state, this [c]ourt is disinclined to overrule the positive law of this forum to give foreign law effect especially when it would contravene the fixed policy of the law of this state"); 6 C. Wright et al., supra, § 1417, p. 161 (questioning the applicability of rule 13 (a) to states that do not have compulsory counterclaim rule: "The rule itself and the [a]dvisory [c]ommittee [n]ote accompanying it are silent on whether [r]ule 13 (a) was intended to be a rule of administration for the federal courts or was expected to have wider application. Indeed, it is doubtful whether the rulemakers are given the power by the Rules Enabling Act [28 U.S.C. § 2072 (2018)] to decide that question or to extend the effect of the federal rules to the state courts." (Footnote omitted.)).

Rooted in principles of res judicata, estoppel, and waiver; see *Tyler* v. *DH Capital Management, Inc.*, 736 F.3d 455, 460 (6th Cir. 2013); the purpose of rule 13 (a) of the Federal Rules of Civil Procedure is "to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters." *Southern Construction Co.* v. *Pickard*, 371 U.S. 57, 60, 83 S. Ct. 108, 9 L. Ed. 2d 31 (1962); see also *Super Natural Distributors, Inc.* v. *MuscleTech Research & Development*, 140 F. Supp. 2d 970, 978–79 (E.D. Wis. 2001) ("[r]ule 13 (a) was designed to balance the interest of the counterclaimant in prosecuting the counterclaim in a forum of its own choosing against the [court's] interest in conserving judicial resources" (internal quotation marks omitted)). In light of the equitable principles underlying the rule, it is apparent that a court need not apply it when to do so would work an injustice; see *Carnation Co.* v. *T.U. Parks Construction Co.*, 816 F.2d 1099, 1103 (6th Cir. 1987) ("the waiver or

estoppel theory [underlying rule 13 (a)] allows more discretion not to hold [that a] claim is barred [when] to do so is manifestly unjust"); such as when a decision on the merits was not rendered in the prior action because it was dismissed on grounds of res judicata or for failure to state a claim on which relief could be granted. See, e.g., *Tyler* v. *DH Capital Management, Inc.*, supra, 460 (plaintiff's failure to plead compulsory counterclaims in prior action was not bar to later action because "the principles of res judicata . . . apply [only] to adjudications on the merits"); id., 459 ("a party is not required to assert a counterclaim [when] it successfully files a [preanswer] motion to dismiss"); *Martino* v. *McDonald's System, Inc.*, 598 F.2d 1079, 1083 (7th Cir.) ("[t]he principle of res judicata at issue . . . treats a judgment *on the merits* as an absolute bar to relitigation between the parties and those in privity with them" (emphasis added)), cert. denied, 444 U.S. 966, 100 S. Ct. 455, 62 L. Ed. 2d 379 (1979); see also *National Union Fire Ins. Co. of Pittsburgh* v. *Jett*, 118 F.R.D. 336, 338 (S.D.N.Y. 1988) ("Rule 13 [(a)] requires that a compulsory counterclaim be raised only when it is related to the 'subject matter of the opposing party's claim.' Dismissal of an action is a judicial determination that the plaintiff has no claim. Therefore, compulsory counterclaims that were not raised prior to dismissal are not barred in future proceedings."); *Horn & Hardart Co.* v. *National Railroad Passenger Corp.*, 659 F. Supp. 1258, 1264 (D.D.C. 1987) ("In this case, the policy driving rule 13 (a) must give way to a more important concern. When [the defendant] filed a rule 12 (b) motion in response to [the plaintiff's] complaint in [the prior action], [the defendant] was in effect arguing that [the plaintiff] had not proffered a valid claim. In holding for [the defendant], the [c]ourt confirmed the [defendant's] contention. The so-called claim did not require a pleading in response. . . . In such a case, the party opposing

an invalid claim should not be required to fully litigate any claims of its own . . . .'' (Citation omitted.)), aff'd, 843 F.2d 546 (D.C. Cir.), cert. denied, 488 U.S. 849, 109 S. Ct. 129, 102 L. Ed. 2d 102 (1988); 6 C. Wright et al., supra, § 1417, pp. 154–55 (''courts have avoided the application of [claim preclusion] rules when no decision on the merits was rendered in the first action'').

Accordingly, even if Kalra had been a party to the federal action, rule 13 (a) of the Federal Rules of Civil Procedure would not bar Chugh's claims in the present case in light of the District Court's determination that TAL was collaterally estopped from pursuing the claims in the federal action. As we indicated, after the Cayman court issued its ruling in the winding up proceeding, the District Court granted the Chugh defendants' motion for summary judgment, stating that ''Asia Pacific . . . attempted to defend against the winding up of TAL on the ground of unclean hands, arguing that [ARC Capital and Haida] . . . were barred from invoking the court's equitable jurisdiction because of Chugh's breaches of fiduciary duty, which were attributable to [them]. As evidence of Chugh's misconduct, Asia Pacific put on evidence relating to each of TAL's claims in this litigation.'' *Trikona Advisers, Ltd.* v. *Chugh*, United States District Court, Docket No. 3:11-cv-2015 (SRU) (D. Conn. June 5, 2015), aff'd, 846 F.3d 22 (2d Cir. 2017). The court further stated: ''The unclean hands defense was a dispositive issue in the Cayman [court] proceeding, and the bulk of the winding up proceeding was devoted to the parties' attempts to prove or disprove Chugh's alleged misconduct.'' Id. ''Having chosen to fight [through Asia Pacific] the winding up petition by advancing as a defense all of the substantive claims raised in this litigation, [TAL] cannot now avoid the consequences of its actions. Even under the . . . restrictive approach [of the Restatement (Second) of Judgments], [its] claims are barred by the doctrine of issue preclusion.'' Id.

It would be anomalous, to say the least, were we to conclude that Chugh's claims in the present case are barred by principles of res judicata, estoppel, or waiver due to his failure to assert them as counterclaims in a case that itself was barred by those principles. We do not read rule 13 (a) of the Federal Rules of Civil Procedure or the case law interpreting it as requiring such a result, and, therefore, we will not impose it.[12] As the United States Court of Appeals for the Fifth Circuit stated in a similar context, "[i]f one hauled into [c]ourt as a defendant has a claim but the adversary plaintiff has not, the nominal defendant ought to be allowed to name the time and place to assert it. . . . It is one thing to concentrate related litigation once it is properly precipitated. It is quite another thing for the [Federal

[12] Kalra contends, nonetheless, that, because the Chugh defendants filed an answer in the federal action several months before filing their motion for summary judgment, Chugh's claims in the present case were compulsory counterclaims in that action. Kalra argues that rule 13 (a) of the Federal Rules of Civil Procedure requires a compulsory counterclaim to be filed at the time of the defendant's responsive "pleading," regardless of the final disposition of the case, and that only in the absence of such a pleading is the defendant relieved of the obligation to file such a counterclaim. See, e.g., *Bluegrass Hosiery, Inc.* v. *Speizman Industries, Inc.*, 214 F.3d 770, 772 (6th Cir. 2000) ("Rule 13 (a) . . . only requires a compulsory counterclaim if the party who desires to assert a claim has served a pleading. . . . In other words, [r]ule 13 (a) does not apply unless there has been some form of pleading." (Citation omitted.)) Under Kalra's reading of rule 13 (a), therefore, if the Chugh defendants had moved for summary judgment prior to filing their answer, Chugh's claims in the present case would not be barred because a motion for summary judgment is not a pleading under the Federal Rules of Civil Procedure. See *National Union Fire Ins. Co. of Pittsburgh* v. *Jett*, supra, 118 F.R.D. 337–38 ("[The plaintiff] never filed a pleading in the [prior] action. Its motion to dismiss or for summary judgment was not a pleading as defined in [rule 7 of the Federal Rules of Civil Procedure]. Therefore, its claims were not required to be raised in the [prior] action.") For the reasons previously set forth, we conclude that Kalra's interpretation of rule 13 (a) is not only inconsistent with the equitable principles underlying that rule but is in no way compelled by the case law interpreting it. Indeed, if Chugh *had* asserted his claims as counterclaims in the federal action, there is no reason to think that the District Court would not have allowed him to withdraw them without prejudice once that court determined that all of TAL's claims were barred by collateral estoppel.

Rules of Civil Procedure] to compel the institution of litigation." *Lawhorn* v. *Atlantic Refining Co.*, 299 F.2d 353, 357 (5th Cir. 1962). In light of the foregoing, we reject Kalra's claim that rule 13 (a) (1) bars Chugh's claims in the present case on the ground that all of them were compulsory counterclaims in the federal action.[13]

II

We next address Kalra's claim that Chugh's breach of partnership agreement and breach of fiduciary duty claims fail as a matter of law under *Karanian* v. *Maulucci*, supra, 185 Conn. 320, in light of language in that case that, "[i]f [partners] adopt the corporate form, with the corporate shield extended over them to protect them against personal liability, they cease to be partners and have only the rights, duties and obligations of stock-

[13] We note, moreover, that it is not at all clear that rule 13 (a) of the Rules of Civil Procedure has any applicability to a state court action that was commenced while the federal court action was still pending, which occurred here. "Although it is well established [in the federal courts] that a party is barred from suing on a claim that should have been pleaded as a compulsory counterclaim in a prior action, one closely related question remains unsettled. What would prevent a defendant who does not want to assert a claim as a compulsory counterclaim in the opposing party's suit from bringing an independent action on that claim while the first action still is pending? Neither claim preclusion nor waiver or estoppel [is an] appropriate [theory] for barring a second suit of this type. Preclusion becomes operative only upon the termination of an action and therefore can have no bearing on the second action in the situation under discussion since the first suit still is pending." (Footnote omitted.) 6 C. Wright et al., supra, § 1418, p. 164 "Clearly the language of [r]ule 13 (a) cannot be construed as empowering the federal court to restrain [state court] proceedings. Thus, if a party asserts a claim in a state court that should be a compulsory counterclaim in an already pending federal action, the federal court cannot enjoin the prosecution of the state proceeding. In this situation the general objective underlying [r]ule 13 (a) of avoiding multiple suits is outweighed by the express statutory policy prohibiting federal interference with the functioning of state judicial systems. The result is that in the absence of voluntary restraint by one of the courts, both the federal and the state actions will proceed toward judgment and the first to reach that point will serve as the basis for asserting a defense of claim or issue preclusion in the action that still is being adjudicated." (Footnote omitted.) Id., pp. 174–75.

holders. They cannot be partners inter sese and a corporation as to the rest of the world." (Internal quotation marks omitted.) Id., 324, quoting *Jackson* v. *Hooper*, 76 N.J. Eq. 592, 599, 75 A. 568 (1910). Kalra argues that "*Karanian* is fatal to Chugh's claim of an enduring partnership agreement that survived corporate formation . . . . Any oral partnership created over lunch in 2004 . . . definitively ceased to exist when Chugh and Kalra incorporated TAL, Trinity, and the subsidiary corporate entities in 2006." Chugh responds that *Karanian* is irrelevant to the outcome of this case for the simple reason that "there is no evidence . . . that Chugh and Kalra intended to adopt the corporate form and [to] replace their partnership with a corporation, as opposed to simply choosing to own corporations within the Trikona Group partnership." (Internal quotation marks omitted.) Chugh further contends that, under Connecticut law, a partnership can own any type of assets, including corporations, and that the jury reasonably found, on the basis of the evidence presented, that Chugh and Kalra's partnership consisted of owning and running a series of companies comprising the Trikona Group, but the partnership was not itself subsumed within any one of those companies. We agree with Chugh.

General Statutes § 34-301 (12) defines "partnership" as "an association of two or more persons to carry on as co-owners a business for profit . . . ." Section 34-301 (13) defines "partnership agreement" as "[an] agreement, whether written, oral or implied, among the partners concerning the partnership, including amendments to the partnership agreement." This court previously has recognized that "general and limited partners are bound in a fiduciary relationship and, as such, must act as trustees and represent the interests of each other." (Internal quotation marks omitted.) *Hi-Ho Tower, Inc.* v. *Com-Tronics, Inc.*, 255 Conn. 20, 39, 761 A.2d 1268

(2000); see also *Iacurci* v. *Sax*, 313 Conn. 786, 800, 99 A.3d 1145 (2014) (partners "are per se fiduciaries"). Whether Chugh and Kalra entered into an oral partnership agreement in 2004 was a question of fact for the jury. See, e.g., *Bender* v. *Bender*, 292 Conn. 696, 728, 975 A.2d 636 (2009) ("[i]t is well settled that the existence of a contract is a question of fact"). Whether, under *Karanian*, that agreement ended as a matter of law in 2006 is a question of law subject to this court's plenary review. See, e.g., *Fish* v. *Fish*, 285 Conn. 24, 37, 939 A.2d 1040 (2008) (trial court's determination of proper legal standard is question of law subject to plenary review).

We agree with Chugh that *Karanian* is not controlling of his breach of partnership agreement and breach of fiduciary duty claims. To understand why, we must revisit the facts of that case. In *Karanian*, the trial court found that the plaintiff's father, Charles Karanian, and the defendant, Richard Maulucci, Sr., "agreed (1) to enter into a joint enterprise to open and operate a roller-skating rink in Wallingford . . . (2) to a 50 percent share for each of them in the business; (3) to change eventually the joint enterprise into a corporation and (4) to contribute [$20,000] each to the business as a capital investment. Karanian made his contribution and named the plaintiff as the holder of the beneficial interest of his investment. Maulucci . . . never fulfilled his promise to make a similar contribution of cash.

"In September, 1977, Maulucci . . . filed with the [O]ffice of the [S]ecretary of the [S]tate a certificate of incorporation, an appointment of statutory agent for service, and an organizational and first annual report.

* * *

"In the latter part of March, 1978, Maulucci . . . barred Karanian from the business premises and took over complete control of the business operation. The

dispute between the parties had escalated to the point where it was no longer feasible for them to operate the business as equal owners. As a result, the plaintiff commenced [an] action, claiming an accounting, damages, the appointment of a receiver and other relief.

"On the basis of these facts, [the trial court concluded] that [a]s a consequence of the neglect to implement the agreement to operate as a corporation, the corporate entity may be a shield for Karanian and Maulucci against the outside world so as to protect them from personal liability for corporate activities, but as between themselves, they, in essence and in reality, have only a partnership, with each having a [50] percent interest therein." (Emphasis omitted; internal quotation marks omitted.) *Karanian* v. *Maulucci*, supra, 185 Conn. 322–23.

On appeal, both parties claimed that the trial court erred in concluding that, as between themselves, Karanian and Maulucci were partners, despite having incorporated their business by filing the necessary paperwork with the Secretary of the State. See id., 323. This court agreed and, in doing so, quoted *Jackson* v. *Hooper*, supra, 76 N.J. Eq. 599, for the proposition that, when partners in a business venture " 'adopt the corporate form, with the corporate shield extended over them to protect them against personal liability, they cease to be partners and have only the rights, duties and obligations of stockholders. They cannot be partners inter sese and a corporation as to the rest of the world.' " *Karanian* v. *Maulucci*, supra, 185 Conn. 324.

Unlike in the present case, however, the trier of fact in *Karanian* found not only that the parties intended to reorganize their joint venture into a corporation but that they did, in fact, complete such a reorganization. See id., 322. On appeal, the sole issue before this court was whether, in light of these findings, the trial court

properly could find, over the parties' objections, that their business was *both* "a corporation and a partnership at the same time." Id., 324. On the basis of the record and the undisputed facts, which included a certified copy of the certificate of incorporation endorsed by the Secretary of the State, this court concluded that "the roller-skating business conducted by [the parties] operated as a corporation and not as a partnership." Id., 324–25. Because the parties in *Karanian* did not claim that their partnership survived the incorporation of the roller-skating rink—indeed, both sides maintained that there was no partnership—this court had no reason to consider whether a partnership could survive incorporation and, if so, under what circumstances.

Courts that have considered this issue, however, as Kalra acknowledges in his appellate brief, consistently have held that a partnership can operate through a corporation, so long as it is the intent of the partners to do so and the rights of third parties, such as creditors or shareholders, are not adversely affected. As the Second Circuit Court of Appeals has explained: "When the parties intend to merge their entire joint venture agreement, including their rights inter sese and the conduct of the business enterprise planned or conducted under the agreement, into the form of a corporation, they are bound by the result and are relegated to their rights as corporate stockholders. . . .

"[However] when the parties to a joint venture agreement, in forming a corporation to carry out one or more of its objectives, intend to reserve certain rights inter sese under their agreement, which do not interfere with or restrict the management of the affairs of the corporation, its exercise of corporate powers, or the rights of third parties doing business with it, these rights being extrinsic to the corporate entity and its operations, such joint venture agreement may be enforced." (Citations omitted.) *Sagamore Corp.* v. *Diamond West Energy*

Corp., 806 F.2d 373, 378 (2d Cir. 1986); see id., 378–79 (citing cases); see also *Arditi* v. *Dubitzky*, 354 F.2d 483, 486–87 (2d Cir. 1965) ("There is little logical reason why individuals cannot be partners inter sese and a corporation as to the rest of the world, so long as the rights of the third parties such as creditors are not involved. . . . The courts of New York and New Jersey have come to recognize this . . . at least to the extent of permitting suit [on] joint venture obligations if it is apparent that the intention of the parties was that the corporation should be only a means of carrying out the joint venture . . . or a way of organizing different branches of a wide-reaching joint enterprise . . . ." (Citations omitted; internal quotation marks omitted.)); *Paretti* v. *Cavalier Label Co.*, 702 F. Supp. 81, 83–84 (S.D.N.Y. 1988) ("[i]n New York, entrepreneurs may consider themselves to be partners even though their business is organized as a corporation, so long as the partnership agreement does not interfere with the rights of third parties such as creditors"); *Eng* v. *Brown*, 21 Cal. App. 5th 675, 696, 230 Cal. Rptr. 3d 771 (2018) ("Partners may, by agreement, continue their relations as copartners in conjunction with their relationship as stockholders of a corporation, and the law would take cognizance of such dual relationship and deal with the parties in the light of their [agreements between themselves], independently of their incorporation . . . . [C]ourts will enforce preincorporation agreements among partners or joint venturers who have incorporated in order to carry out the agreement between or among the partners or joint venturers." (Citations omitted; internal quotation marks omitted.)), review denied, California Supreme Court, Docket No. S248552 (July 11, 2018); *Gruber* v. *Wilner*, 213 Ga. App. 31, 34, 443 S.E.2d 673 (1994) ("[i]t is generally held that a joint venture agreement continues in effect following the formation of a corporation created to implement it if the intention of

the parties to this effect is clear" (emphasis omitted; internal quotation marks omitted)); *Koestner* v. *Wease & Koestner Jewelers, Inc.*, 63 Ill. App. 3d 1047, 1050, 381 N.E.2d 11 (1978) ("[a]n emphasis on substance over form has led numerous courts to conclude that . . . [t]here is little logical reason why individuals cannot be partners inter sese and a corporation as to the rest of the world, so long as the rights of third parties such as creditors are not involved" (internal quotation marks omitted)); *Blank* v. *Blank*, 222 App. Div. 2d 851, 853, 634 N.Y.S.2d 886 (1995) ("[l]acking a compelling reason to preclude individuals from acting as partners between themselves and as a corporation to the rest of the world . . . courts have sanctioned such an arrangement as long as the rights of third parties, like creditors, are not involved and the parties' rights under the partnership agreement are not in conflict with the corporation's functioning"); *Schuster* v. *Largman*, 308 Pa. 520, 531, 162 A. 305 (1932) (principle that business cannot be partnership and corporation at same time "does not mean that a partnership may not organize corporations to handle a portion of its business and own all of the stock in them"); *Jolin* v. *Oster*, 44 Wis. 2d 623, 630, 172 N.W.2d 12 (1969) (citing cases and noting that "a preincorporation joint adventure or partnership agreement providing for the use of a corporation as a medium for the venture survives the corporation").

In the present case, there is simply no evidence that Chugh and Kalra ever intended to adopt the corporate form in place of their partnership. To the contrary, as the trial court stated in denying Kalra's motion to set aside the verdict, the partnership, as presented to the jury, was an "overarching entity" comprised of numerous companies owned by Chugh, Kalra, and their respective families, acting in concert to further the remunerative goals of the partnership. Kalra cites no authority, and we are aware of none, holding that a partnership

cannot operate in this manner.[14] Nor did Kalra argue at trial that a partnership cannot operate in this manner or take exception to the trial court's instruction to the jury that it could.[15] His sole contention, rather, was that the evidence did not support a finding that he and Chugh were ever partners.[16] The jury evidently disagreed.

[14] Although acknowledging the substantial body of law holding that the intent of the parties controls whether a partnership survives incorporation of the partnership business, Kalra argues that there are numerous courts, such as the New York Court of Appeals, that have "never abrogated" the so-called "categorical rule" set forth in *Jackson* v. *Hooper*, supra, 76 N.J. Eq. 599, the 1910 New Jersey case cited in *Karanian*, that a partnership cannot be both a partnership and a corporation at the same time. Kalra cites just one case, *D'Orazio* v. *Mainetti*, 24 App. Div. 3d 915, 805 N.Y.S.2d 455 (2005), as an example of a court that "enforce[ed] the categorical . . . rule and recognize[d] no exceptions [to it]." We disagree that the court in *D'Orazio* applied a different standard from any of the other New York cases cited in this opinion. Although the court in *D'Orazio* recognized the general rule that, "[w]hen parties adopt the corporate form, with the corporate shield extended over them to protect them against personal liability, they cease to be partners and have only the rights, duties and obligations of stockholders"; (internal quotation marks omitted) id., 916; the court "agree[d] that the record as a whole contain[ed] sufficient proof to raise a question of fact as to whether the firm operated as a partnership despite its legal incorporation, [but it did] not find such proof sufficient to establish, as a matter of law, that [the parties] indeed continued to operate as a de facto partnership following the firm's incorporation . . . ." Id., 917. Thus, the court reversed the trial court's summary judgment and remanded the case for a trial to determine the "factual issue" of whether the parties intended for their partnership to survive the incorporation of their business. Id.

[15] The trial court instructed the jury that, "[a]lthough one company cannot be both a corporation and a partnership, it is possible that there can be a partnership separate and apart from a corporate entity or group of corporate entities. . . . Ultimately, the existence of a partnership is a question of the intention of the parties to be determined by you from all the facts and circumstances."

[16] During closing arguments, Kalra's counsel argued: "As further evidence [that the partnership] didn't exist, [Chugh] testified that he never registered the partnership here in Connecticut where he and . . . Kalra lived, that, when he filed tax returns, he never disclosed the partnership to the Internal Revenue Service. Remember, partnerships are about profits, and profits are taxable. He never disclosed the partnership to any department of the [United States] Treasury. He never disclosed the partnership to any regulator like the Securities and Exchange Commission here in the United States. . . .

Chugh's and Kalra's testimony in this regard could not have been more diametrically opposed. Whereas Chugh testified that the two men were introduced in 2002, that they were eating lunch with one another nearly every day by 2004, and that they decided to form a partnership to pursue investment opportunities in India at the beginning of 2004,[17] Kalra testified that he did not know Chugh in 2004, that the two men "never ever discussed a partnership agreement," and that it was "completely unthinkable" that he would have entered into such an agreement with Chugh, in 2004 or any other time. During cross-examination, however, Kalra acknowledged that he repeatedly referred to Chugh as his "partner" during the Cayman winding up proceeding in 2013—and elsewhere over the years—and that he testified during that proceeding that he "did not want [a] winding down [of TAL]," but, rather, he just "did not want to be partners with . . . Chugh anymore." He also acknowledged that he and Chugh "associate[d] for a profit in business" under the umbrella of the Trikona Group and that "a substantial benefit of

Why is this important? It is important because it is clear evidence that the partnership did not exist." Counsel further argued: "Ladies and gentlemen, there is either a partnership or there is not. . . . And we know certainly, it was never written. As a matter of fact, there isn't even a memorandum or a note, nothing, [no] writing of any kind that was submitted by [Chugh] that you could say, here's proof, here's proof there was a partnership."

[17] Specifically, Chugh testified that, "in early 2004, we were having . . . lunch at a Chinese restaurant, and, at that time, I proposed that [we] partner up for this Indian real estate opportunity. We agreed that it was going to be a 50/50 partnership. In my mind at [the] time, you know, it was a pretty simple relationship. We trusted each other. We said everything is going to be equal . . . . And we're going to make decisions . . . completely equally on every single thing. . . . So, it was a 50/50 partnership in that every single decision that we made, whether it was any spending that we did, any employees that we hired, any offices that we opened, any strategic decisions that we made, any investments that we made, every single decision was unanimous, both of [us] checked with each other, and we agreed on it. If there was some disagreement between us, one of us convinced the other person . . . to go ahead or not to go ahead with [a] decision. But pretty much everything was unanimously decided between the two of us."

working in the Trikona Group was to make . . . money for [themselves and their respective families]." Although Chugh's evidence of a partnership was not overwhelming, we agree with the trial court that it was sufficient to support the jury's finding of an oral agreement between Chugh and Kalra to carry on, as coowners, a business for profit—to wit, the Trikona Group—and that the two men carried on that business from 2004 until at least 2013.

III

We turn, therefore, to Kalra's claim that the trial court abused its discretion in admitting the testimony of Chugh's expert witness on damages, Savoldelli, because there was insufficient evidence to support his testimony. Chugh responds that the trial court correctly determined that any error in the admission of Savoldelli's testimony was harmless because the jury obviously did not "fully accept" his testimony and the trial court incorrectly instructed the jury that Chugh was required to prove damages relative to the libel per se claim when, in fact, he was not required to prove damages. We agree with Kalra.

The following additional facts and procedural history are relevant to our resolution of this claim. Prior to trial, Kalra filed a motion in limine to preclude Savoldelli's testimony on the ground that it had no basis in scientific fact but was wholly speculative and conjectural. Kalra argued that Savoldelli had testified, during his deposition, that his damages estimate assumed that Chugh could have raised $250 million for his investment fund, Peak XV, but for Kalra's defamatory statements, because "Chugh was one of two partners at [Trinity] and that fund had raised on the order of $500 million . . . ." Savoldelli stated that "[he] conservatively just assumed that each of the two [partners]" had raised one half of Trinity's funds and, therefore, that Chugh would have

been able to raise that same amount for his own investment fund. In his motion in limine, Kalra argued that Savoldelli's expert testimony was inadmissible under *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998), which requires that "proposed scientific testimony . . . be demonstrably relevant to the facts of the particular case in which it is offered, and not simply . . . valid in the abstract." Id., 65. Kalra argued that, under this standard, Savodelli's testimony must be excluded because it was undisputed that Chugh and Peak XV failed to raise any funds between 2009 and 2015.

In its ruling on the motion in limine, the trial court noted that it had "heard the parties in chambers" with respect to the issues raised in the motion and that it had decided to "allow [their] experts to testify about the market conditions during the time in question and the qualities or conditions necessary to raise funds . . . ." The court further stated that it would "allow the experts to render a damages opinion or analysis that focuses on the amount that the market would yield assuming a particular base amount, provided there is evidence to support that assumption."

At trial, Savoldelli testified that the 2013 press release, which accused Chugh of bribery, would have been "fatal" to Chugh's two investment funds. He further testified that his damages estimate "assum[ed]" that the two funds "had 250 million [dollars] under management as of 2012" and that, by applying a "cash flow analysis begin[ning] effectively midway through the year in 2012," he was able to determine that the companies would have earned $20.2 to $27.7 million between 2012 and 2026, but for the 2013 press release. At the conclusion of the evidence, the trial court instructed the jury in relevant part: "[If] you reject the defendant's affirmative defense [with respect to the libel claim], then you

should consider what damages, if any, to award the plaintiff for libel. Ordinarily, the plaintiff would have to prove that a libelous statement caused harm to his reputation. However, certain written defamatory statements are so harmful in and of themselves that the plaintiff is entitled to recover at least nominal damages for injury to reputation without proving that the publication actually caused harm to the plaintiff. I have determined that the statement in question falls into this category; therefore, if you find that the plaintiff has proven the first two elements of libel and that the defendant has not proven his affirmative defense, then you must award the plaintiff at least $1 in nominal damages.

"Nominal damages should be awarded if you find that the defamatory material is of an insignificant character, or because you find that the plaintiff ha[s] bad character, so that no substantial harm has been done to the plaintiff's reputation, or because there is no proof that serious harm has been done to the plaintiff's reputation.

"It is up to you to decide whether to award . . . Chugh only nominal damages or, instead, to award him compensatory damages for any proven injury to his reputation and economic loss; thus, on this count, if you reach the issue of damages in accordance with these instructions, and if [Chugh] proves that he lost profits as a result of the harm that the statement in question did to his reputation, you should award compensatory damages instead of nominal damages."

During deliberations, the jury sent a note to the judge inquiring whether there was "a cap" on what it could award in nominal damages. In response, the trial court instructed the jury: "No, but here is some additional guidance on the meaning of nominal damages. Nominal damages are a trivial sum of money awarded to a litigant

who has established a cause of action but has not established that he is entitled to compensatory damages."

Following the jury's verdict, Kalra filed a motion to set aside the verdict as to the libel claim on a variety of grounds, but primarily because there was no evidence to support Savoldelli's testimony that Chugh had lost more than $20 million as a result of the 2013 press release. Kalra argued that the trial court should have recognized that Savoldelli's testimony was irrelevant and, therefore, inadmissible under *Porter* given that his damages estimate assumed that Chugh's investment funds had $250 million under management in 2012 when, in fact, according to Chugh's own testimony, they had no money under management in 2012. The trial court denied the motion, reasoning that any error relating to Savoldelli's testimony was harmless. Specifically, the court reasoned: "[Kalra's] argument, which he presented to the jury, has strong logical appeal. Unfortunately, [Chugh's] brief does not respond to it. . . . The court is left with little guidance as to how to handle this newly raised issue.

"The court concludes that any error involving the admission of Savoldelli's testimony was harmless. To begin with, the jury did not fully accept Savoldelli's testimony of damages exceeding $20 million. Instead, the jury awarded $4 million in lost profits on the libel [claim] . . . .

"Further, [Chugh], under our law, was not required to prove actual damages or lost profits in a libel per se case. The court charged that, because the [2013] press release was libelous per se, the jury should award [Chugh] at least nominal damages and then decide to award him compensatory damages 'if [he] proves that he lost profits as a result of the harm that the statement in question did to his reputation . . . .' In contrast, [Chugh] requested the following charge: 'If you find that

. . . Kalra's statements were libelous per se, you must award . . . Chugh general damages for injury to reputation regardless of whether he demonstrated special damages. In determining the amount of general damages to award for the injury to [Chugh's] reputation, you should consider what reputation [Chugh] had in the community when the writing was made and all of the circumstances surrounding the making of the writing. You may also compensate [Chugh] for damages that he will likely incur in the future. . . . General and special damages together comprise what are called compensatory damages, or damages that compensate . . . Chugh for his loss.' . . . [Chugh's] request to charge . . . was a correct statement of the law. . . . Although [Chugh] does not raise the jury charge issue in his own postverdict briefs, the fact remains that the charge as given was more favorable to [Kalra] than that to which he was entitled. . . . Therefore, [Kalra] cannot prevail on his challenge to the damages award on libel." (Citations omitted; footnotes omitted.)

It is well established that, "[b]efore a party is entitled to a new trial because of an erroneous evidentiary ruling, he or she has the burden of demonstrating that the error was harmful. . . . In other words, an evidentiary ruling will result in a new trial only if the ruling was both wrong and harmful." (Citation omitted; internal quotation marks omitted.) *Klein* v. *Norwalk Hospital*, 299 Conn. 241, 254, 9 A.3d 364 (2010). The same standard applies to claims of instructional error. That is, "not every improper jury instruction requires a new trial because not every improper instruction is harmful. [W]e have often stated that before a party is entitled to a new trial . . . he or she has the burden of demonstrating the error was harmful. . . . An instructional impropriety is harmful if it is likely that it affected the verdict." (Internal quotation marks omitted.) *Burke* v. *Mesniaeff*, 334 Conn. 100, 121, 220 A.3d 777 (2019).

It is true, as the trial court stated, that Chugh was not required to prove lost profits to recover compensatory damages. In a libel per se case, the jury may award the plaintiff general damages in an amount it deems sufficient to compensate him for the injury to his reputation and the mental suffering caused by the defamatory statement. See, e.g., *Battista* v. *United Illuminating Co.*, 10 Conn. App. 486, 492, 523 A.2d 1356 ("When the defamatory words are actionable per se, the law conclusively presumes the existence of injury to the plaintiff's reputation. He is required neither to plead nor to prove it. . . . The individual plaintiff is entitled to recover, as general damages, for the injury to his reputation and for the humiliation and mental suffering [that] the libel caused him." (Citation omitted; internal quotation marks omitted.)), cert. denied, 204 Conn. 802, 525 A.2d 1352 (1987), and cert. denied, 204 Conn. 803, 525 A.2d 1352 (1987); see also *Gleason* v. *Smolinski*, 319 Conn. 394, 435, 125 A.3d 920 (2015) ("there is no dispute that the subject matter of these statements is defamatory per se because they charge crimes punishable by imprisonment and, therefore, the plaintiff is relieved from the burden of pleading and proving damages to her reputation"); *Proto* v. *Bridgeport Herald Corp.*, 136 Conn. 557, 572–73, 72 A.2d 820 (1950) (upholding general damages award of $5150 in libel per se case and concluding that, "[i]n view of the seriousness of the calumny published by the defendant and of the widespread publication given to it throughout the community in which the plaintiff had been brought up, had attended school and had engaged in business, we cannot say that the amount is excessive"); *Miles* v. *Perry*, 11 Conn. App. 584, 587, 594, 529 A.2d 199 (1987) (upholding general damages award of $25,000 in libel per se case).

In order to recover *lost profits*, however, "[a] plaintiff must present sufficiently accurate and complete evi-

dence for the trier of fact to be able to estimate those profits with reasonable certainty." *Beverly Hills Concepts, Inc.* v. *Schatz & Schatz, Ribicoff & Kotkin*, 247 Conn. 48, 70, 717 A.2d 724 (1998); see also *Simone Corp.* v. *Connecticut Light & Power Co.*, 187 Conn. 487, 495, 446 A.2d 1071 (1982) ("[d]amages for losses of profits are recoverable only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty" (internal quotation marks omitted)). This applies equally to a case of libel per se. See, e.g., *DeVito* v. *Schwartz*, 66 Conn. App. 228, 235, 784 A.2d 376 (2001) ("The . . . plaintiff is entitled to recover, as general damages, for the injury to his reputation and for the humiliation and mental suffering which the [defamation] caused him. . . . To recover special damages, however, the plaintiff must prove that he suffered economic loss that was legally caused by the defendant's defamatory statements, even [when] the defamation is per se. See 3 Restatement (Second), Torts § 622 (1977). General and special damages together comprise compensatory damages. See 4 Restatement (Second), Torts, § 904 (1979)." (Citation omitted; internal quotation marks omitted.)).

In the present case, it is undisputed that Savoldelli's testimony that Chugh sustained lost profits in excess of $20 million had no basis in fact. Because the jury was instructed to award special damages *only* if it found that Chugh had proven lost profits, and because there was no other evidence to support the lost profits award, the damages award cannot stand.

In reaching a contrary conclusion, the trial court cited *State* v. *Gradzik*, 193 Conn. 35, 475 A.2d 269 (1984), for the proposition that any evidentiary insufficiency occasioned by that court's instructional error was harmless. *Gradzik*, however, does not support the trial court's ruling. In that case, the defendant was convicted of burglary in the third degree. Id., 36. At the close of

evidence, the trial court instructed the jury that it could find the defendant guilty only if it found that "the defendant had unlawfully entered the building by entering the cellar." Id., 37–38. On appeal, the defendant claimed "that the court erred in denying his motion [for a judgment of acquittal] because there was insufficient evidence from which the jury could conclude that he had entered the cellar. The state counter[ed] that the motion was properly denied because there was sufficient evidence that the defendant had entered the cellar and, in the alternative, that the defendant had unlawfully entered the hatchway which is part of the building. Because [this court] agree[d] that the defendant's presence in the hatchway constituted an unlawful entry into the building, we [concluded that we did not need to] decide whether there was sufficient evidence that the defendant had entered the cellar" because it was "beyond cavil that the hatchway is part of the building in question" and the defendant had "concede[d] that he was in the hatchway . . . ." Id., 38.

Thus, we concluded in *Gradzik* that, even if the evidence was insufficient to support a finding that the defendant had entered the cellar, the error was harmless because the evidence was undeniably sufficient to support a conviction under the correct standard. Id., 38–39. In the present case, however, there is simply no evidence that Chugh sustained lost profits in the amount of $4 million—or in any other amount—as a result of the 2013 press release. Nor are we able to conclude that the jury would have awarded him $4 million in general damages but for the instructional impropriety.[18]

[18] We do not doubt that a properly instructed jury would have awarded Chugh general damages given the jury's finding that Kalra acted with malice in publishing the 2013 press release and its award of punitive damages in connection with the libel claim. Indeed, it is clear that the jury struggled with the limitations imposed on it by the trial court's instructions with respect to the damages award, i.e., that special damages could be awarded *only* if the jury found that Chugh had proven lost profits—which he clearly had not proven—but, otherwise, the jury could award only nominal damages.

A properly instructed jury might have awarded him more or less; we simply have no way of knowing. In light of the foregoing, we cannot conclude that the instructional error in this case was harmless. Accordingly, the verdict must be set aside as to the libel claim, and the case remanded for a new trial on that claim.[19] In addition, we agree with Kalra that a new hearing on punitive damages is also required because the record reveals that a component of the punitive damages award was a "success fee" for Chugh's attorney in the amount of 25 percent of the total compensatory damages award, which included the $4 million libel award.

The judgment is reversed with respect to the libel per se claim and the punitive damages award, and the case is remanded for a new trial on that claim and for a hearing in damages consistent with this opinion; the judgment is affirmed in all other respects.

In this opinion the other justices concurred.

This is evident in the jury's question asking the court whether there was an upper limit on the amount of nominal damages it could award. What we cannot determine, however, without resort to conjecture, is the *amount* of general damages that the jury would have awarded but for the trial court's error. It is for this reason that a new trial on the libel claim is required.

[19] We note that Kalra also sought plain error review of the trial court's instruction to the jury, in accordance with Kalra's request to charge, that Kalra bore the burden of proving the truth of the matter asserted in the 2013 press release. Because we conclude that Kalra is entitled to a new trial due to the court's error relative to the damages instruction, we need not decide whether he is entitled to plain error review of this additional instructional error claim.

ORDERS

CONNECTICUT REPORTS

VOL. 342

STATE OF CONNECTICUT *v.* JOSEPH A. STEPHENSON

The defendant's petition for certification to appeal from the Appellate Court, 207 Conn. App. 154 (AC 40250), is denied.

ECKER, J., would grant the petition with respect to the issues of harmless error and the proper construction of General Statutes (Rev. to 2013) § 53a-155 (a) (1).

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

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

Decided March 29, 2022

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Vol. 211

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

KAREEM LEACH *v.* COMMISSIONER OF CORRECTION (AC 44228)

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

Syllabus

The petitioner, who had been convicted, following a jury trial, of robbery in the first degree and assault in the first degree, sought a writ of habeas corpus, claiming that his trial counsel, R, had provided ineffective assistance as a result of R's failure to meaningfully explain the state's plea offer and to review and explain certain surveillance video evidence prior to plea negotiations and trial. Following a hearing, the habeas court denied the petition. Thereafter, the habeas court denied the petition for certification to appeal, and the petitioner appealed to this court. *Held*

that the habeas court did not abuse its discretion in denying the petition for certification to appeal, the petitioner having failed to demonstrate that his claims involved issues that were debatable among jurists of reason, that a court could resolve the issues in a different manner or that the questions raised were adequate to deserve encouragement to proceed further: after a thorough review of the record and briefs, and based on the underlying facts as found by the habeas court, this court concluded that the habeas court properly found that R did not provide ineffective assistance of counsel, as the habeas court credited R's testimony that he explained the state's plea offer of six years of incarceration and that the petitioner understood the terms of the offer, the court did not credit the petitioner's testimony that he misunderstood the state's offer, the court found that R was generally aware of what the surveillance video depicted prior to viewing the video, R's failure to view the video before trial did not negate his pretrial discussions with the petitioner regarding the content of the video, and it was the petitioner who initially made R aware of the existence of the video; accordingly, R provided the petitioner with adequate information on which he could make an informed decision as to whether to accept or reject the state's plea offer.

Argued February 8—officially released April 12, 2022

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Chaplin, J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Peter G. Billings, assigned counsel, with whom, on the brief, was *Stephanie K. Toronto*, for the appellant (petitioner).

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, were *Paul J. Ferencek*, state's attorney, and *Juliana Waltersdorff*, assistant state's attorney, for the appellee (respondent).

Opinion

ALEXANDER, J. The petitioner, Kareem Leach, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the

petitioner claims that the court (1) abused its discretion by denying his petition for certification to appeal and (2) improperly concluded that his trial counsel had not provided ineffective assistance. We disagree that the court abused its discretion in denying the petition for certification to appeal and, accordingly, dismiss the appeal.

The following facts and procedural history are relevant to this appeal. The petitioner was involved in an incident that occurred on January 13, 2013, and, after a jury trial, he was convicted of robbery in the first degree with a deadly weapon in violation of General Statutes § 53a-134 (a) (2), and assault in the first degree by means of the discharge of a firearm in violation of General Statutes § 53-59 (a) (5). *State* v. *Leach*, 165 Conn. App. 28, 29?31, 138 A.3d 445, cert. denied, 323 Conn. 948, 169 A.3d 792 (2016). He was sentenced to a total effective term of fourteen years of imprisonment and six years of special parole. Id., 31.

The petitioner initiated this habeas action and, on January 16, 2019, filed an amended petition which contained one count alleging ineffective assistance of his criminal trial counsel, Attorney Neal Rogan. Relevant to this appeal, the petitioner claimed that Rogan failed to (1) meaningfully explain the state's plea offer to him and (2) review and explain certain surveillance video evidence prior to trial.

A trial on the habeas petition was held on January 31, 2020. On July 2, 2020, the court issued a memorandum of decision in which it denied the habeas petition, finding that the petitioner had failed to demonstrate that Rogan had rendered deficient performance. On July 17, 2020, the petitioner filed a petition for certification to appeal, which the court denied. This appeal followed.

I

We first address the petitioner's claim that the court abused its discretion in denying his petition for certification to appeal. We disagree.

General Statutes § 52-470 (g) provides: "No appeal from the judgment rendered in a habeas corpus proceeding brought by or on behalf of a person who has been convicted of a crime in order to obtain such person's release may be taken unless the appellant, within ten days after the case is decided, petitions the judge before whom the case was tried or, if such judge is unavailable, a judge of the Superior Court designated by the Chief Court Administrator, to certify that a question is involved in the decision which ought to be reviewed by the court having jurisdiction and the judge so certifies."

"As our Supreme Court has explained, one of the goals our legislature intended by enacting this statute was to limit the number of appeals filed in criminal cases and [to] hasten the final conclusion of the criminal justice process . . . . [T]he legislature intended to discourage frivolous habeas appeals. . . . [Section] 52-470 [g] acts as a limitation on the scope of review, and not the jurisdiction, of the appellate tribunal. . . .

"Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the [disposition] of his [or her] petition for [a writ of] habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, he [or she] must demonstrate that the denial of his [or her] petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he [or she]

must then prove that the decision of the habeas court should be reversed on its merits. . . .

"To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by [our Supreme Court] for determining the propriety of the habeas court's denial of the petition for certification." (Footnote omitted; internal quotation marks omitted.) *Harris* v. *Commissioner of Correction*, 205 Conn. App. 837, 843?44, 257 A.3d 343, cert. denied, 339 Conn. 905, 260 A.3d 484 (2021).

The petitioner requested certification to appeal the following issues, inter alia: "Whether the habeas court erred in finding that [the petitioner] did not prove ineffective assistance of counsel as to [Rogan] in that . . . Rogan failed to meaningfully explain the state's plea offer . . . [and] Rogan failed to review surveillance evidence to prepare for trial . . . ."[1]

[1] The petitioner also requested certification to appeal "[w]hether the habeas court erred in finding that [the petitioner] did not prove ineffective assistance of counsel as to [Rogan] in that . . . Rogan failed to meaningfully explain the state's evidence . . . Rogan failed to properly cross-examine witnesses . . . Rogan failed to move to preclude surveillance video; and/or . . . Rogan failed to object to improper jury instructions." None of these issues has been raised on appeal.

For the reasons set forth in part II of this opinion, we conclude that the petitioner has failed to demonstrate that (1) his claims involve issues that are debatable among jurists of reason, (2) a court could resolve the issues in a different manner, or (3) the questions are adequate to deserve encouragement to proceed further. See *Harris* v. *Commissioner of Correction*, supra, 205 Conn. App. 844. Accordingly, we conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal.

II

Turning to his substantive claims on appeal, the petitioner asserts that the court improperly concluded that Rogan had not provided ineffective assistance of counsel. Specifically, the petitioner alleged ineffective assistance as a result of Rogan's failure to (1) meaningfully explain the state's plea offer to him, and (2) review and explain certain surveillance video evidence prior to plea negotiations and trial.

We begin by setting forth our standard of review and the legal principles governing ineffective assistance of counsel claims. "Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Internal quotation marks omitted.) *Humble* v. *Commissioner of Correction*, 180 Conn. App. 697, 703?704, 184 A.3d 804, cert. denied, 330 Conn. 939, 195 A.3d 692 (2018).

"In *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he

[or she] must show that counsel's assistance was so defective as to require reversal of [the] conviction . . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he [or she] fails to meet either prong. . . .

"To satisfy the performance prong [of the *Strickland* test] the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." (Internal quotation marks omitted.) *Anderson* v. *Commissioner of Correction*, 201 Conn. App. 1, 12, 242 A.3d 107, cert. denied, 335 Conn. 983, 242 A.3d 105 (2020).

A

The petitioner first argues that the habeas court improperly denied his habeas petition because Rogan rendered deficient performance when he failed to meaningfully explain the state's plea offer to him prior to the petitioner rejecting the offer and proceeding to trial. We disagree.

The following additional facts, as found by the habeas court, are relevant to our resolution of this claim. During pretrial plea negotiations, the state extended an offer of twelve years of incarceration, execution suspended after six years, followed by five years of probation.

The petitioner rejected the state's offer and elected to proceed to trial.

"At [the habeas] trial, the petitioner testified that he briefly discussed the state's offer with [Rogan]. He testified that, as a result of that discussion, he understood the state's offer to require him to serve twelve years [of] incarceration. He testified that he did not understand that it meant that he would agree to serve six years [of] incarceration. He testified that, had he understood the offer correctly, he would have accepted the state's offer, instead of going to trial. The petitioner further testified that he had prior convictions, at least one of which included a split sentence . . . .

"[Rogan] testified that he discussed the offer at length with the petitioner, who was adamant that he . . . would not take any offer and that he wanted a trial. For that reason, the case proceeded on a speedy trial basis. He testified that he detailed for the petitioner the state's plea offer and the maximum exposure the petitioner faced if he went to trial. [Rogan] testified that he explained that the offer included six years [of] incarceration to the petitioner. He testified that the petitioner had familiarity with the criminal justice system and that he had no doubt that the petitioner understood the terms of the state's plea offer.

"The court credits [Rogan's] testimony that the petitioner understood the state's plea offer and that they discussed it in great detail. The court does not credit the petitioner's testimony that he understood the state's plea offer to include twelve . . . years of incarceration, instead of six . . . years of incarceration. The court finds that the petitioner failed to provide sufficient credible evidence to demonstrate that [Rogan] failed to meaningfully explain the state's plea offer."

After our thorough review of the record and briefs, and on the basis of the underlying facts found by the

habeas court, we agree with the habeas court that Rogan meaningfully explained the state's plea offer to the petitioner. The court's conclusion is based on a credibility determination as well as a proper application of the law. "[I]t is well established that a reviewing court is not in the position to make credibility determinations. . . . This court does not retry the case or evaluate the credibility of the witnesses. . . . Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude." (Internal quotation marks omitted.) *Martinez* v. *Commissioner of Correction*, 147 Conn. App. 307, 312, 82 A.3d 666 (2013), cert. denied, 311 Conn. 917, 85 A.3d 652 (2014).

The court credited Rogan's testimony that he explained the state's offer of six years of incarceration and that the petitioner understood the terms of the state's plea offer. The court explicitly stated that it did not credit the petitioner's testimony that he understood the state's offer was to serve twelve years of incarceration. On the basis of these credibility determinations, the court found that the petitioner had failed to prove that Rogan rendered deficient performance. The record supports the court's conclusion that Rogan meaningfully explained the plea offer to the petitioner, that the petitioner understood Rogan's explanation of the plea agreement, and that the petitioner rejected the offer and demanded a speedy trial. Therefore, the petitioner's claim must fail.

B

The petitioner next argues that Rogan rendered deficient performance by failing to review and explain certain surveillance video evidence[2] prior to pretrial plea

[2] The surveillance video was taken from a business that was located near the crime scene. At the petitioner's criminal trial, the state argued that the surveillance video depicted the petitioner and his codefendant, Anthony Jean Pierre, near the scene of the crime, but it did not capture or record

negotiations and trial. Specifically, the petitioner asserts that Rogan's representation was deficient because he "allowed the petitioner to reject the pretrial plea offer without either himself or the petitioner being aware of what evidence was contained in the surveillance video" and that Rogan's failure to meaningfully explain the surveillance video to the petitioner "resulted in the petitioner going to trial under the mistaken impression that the state did not have significant evidence against him."

In its memorandum of decision, the court found the following relevant facts: "[Rogan] testified that he met with the petitioner several times to discuss his case. . . . Rogan testified that *the petitioner* made him aware of the surveillance video. He testified that there were issues opening the video file and that he was not able to view the video until at trial, but before any pertinent testimony was given. [Rogan] further testified that he was generally aware of what the video depicted prior to viewing the video. He then testified that he and an associate attorney reviewed and discussed at length the implications of the surveillance video with the petitioner prior to any witness testifying about the surveillance video.

"Upon review of the testimony and the exhibits, the court finds that the petitioner failed to provide credible evidence that [Rogan] failed to discuss or meaningfully explain the state's evidence prior to trial. . . . Regarding the surveillance video, both the petitioner and [Rogan] testified that the petitioner did not have occasion to view the video prior to trial. The court credits [Rogan's] testimony as to the inability to open the video file. The court finds that the petitioner and [Rogan]

any part of the crime itself. At the habeas trial, the petitioner testified that he could not identify anyone in the video footage, including himself, due to the poor quality of the video. Rogan similarly testified that the video was of poor quality and that he had not objected to the use of the video at the petitioner's criminal trial because no one was clearly identified in the video.

viewed the video prior to any evidence being introduced regarding the video. *The court finds that* [*Rogan's*] *failure to show the video to the petitioner prior to trial does not negate his pretrial discussions with the petitioner regarding the content of the video* prior to any evidence being taken regarding the video. For those reasons, the court finds that the petitioner failed to provide sufficient credible evidence to demonstrate that [Rogan] failed to meaningfully explain the state's evidence prior to trial." (Emphasis added.)

The court concluded by determining that "[Rogan] was generally aware of what was depicted in the video prior to reviewing the video at trial and that he and an associate attorney reviewed the video at length with the petitioner prior to the presentation of any evidence regarding the video . . . to the jury. For these reasons, the court finds that [Rogan] failed to review the surveillance footage prior to trial, however, such failure did not cause [Rogan's] representation of the petitioner at his underlying criminal trial to fall below an objective standard of reasonableness. Therefore, the petitioner's claim must fail."

We next set forth the legal principles relevant to claims of ineffective assistance of counsel in the plea bargain context. "Pretrial negotiations implicating the decision whether to plead guilty is a critical stage in criminal proceedings . . . . Although this decision is ultimately made by the [petitioner], the [petitioner's] attorney must make an informed evaluation of the options and determine which alternative will offer the [petitioner] the most favorable outcome." (Citation omitted; internal quotation marks omitted.) *Sanders* v. *Commissioner of Correction*, 169 Conn. App. 813, 825, 153 A.3d 8 (2016), cert. denied, 325 Conn. 904, 156 A.3d 536 (2017).

"[C]ounsel performs effectively and reasonably when he . . . provides [the petitioner] with adequate information and advice upon which the [petitioner] can make

an informed decision as to whether to accept the state's plea offer. . . . We are mindful that [c]ounsel's conclusion as to how best to advise a client in order to avoid, on the one hand, failing to give advice and, on the other, coercing a plea enjoys a wide range of reasonableness . . . . Accordingly, [t]he need for recommendation depends on countless factors, such as the [petitioner's] chances of prevailing at trial, the likely disparity in sentencing after a full trial compared to the guilty plea . . . whether [the] [petitioner] has maintained his innocence, and the [petitioner's] comprehension of the various factors that will inform [his] plea decision." (Internal quotation marks omitted.) *Salmon* v. *Commissioner of Correction*, 178 Conn. App. 695, 710–11, 177 A.3d 566 (2017).

Further, "[t]here is no per se rule requiring specific conduct of defense attorneys during plea negotiations. . . . Instead, we must determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. . . . The parameters of appropriate advice required during plea negotiations are determined by a fact specific inquiry in which we consider whether an attorney's performance fell below an objective standard of reasonableness." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Moore* v. *Commissioner of Correction*, 338 Conn. 330, 341–42, 258 A.3d 40 (2021).

After our thorough review of the record and briefs, and on the basis of the underlying facts found by the habeas court, we agree with the court's conclusion that Rogan did not render deficient performance by failing to view the surveillance video evidence prior to the petitioner's rejection of the state's plea offer and the start of trial. Notably, it was the petitioner who initially made Rogan aware of the existence of such video. The court found that Rogan generally was aware of what

the video depicted prior to viewing the video and that Rogan's failure to view the video before trial did not negate his pretrial discussions with the petitioner regarding the content of the video. Therefore, although Rogan did not view the video prior to the start of trial, he was aware of and discussed the general contents of the video with the petitioner prior to trial and in relation to the state's plea offer.[3] Despite Rogan's pretrial discussions with him, including discussions regarding the surveillance video, the petitioner chose to reject the state's plea offer and proceed to trial. The record supports the habeas court's conclusion that the petitioner failed to demonstrate that Rogan rendered deficient performance by not viewing the surveillance video prior to trial because, given the facts and circumstances of the petitioner's case, Rogan provided the petitioner with adequate information with which he could make an informed decision as to whether to accept or reject the state's plea offer.

As to his claims of ineffective assistance of counsel, the petitioner has failed to demonstrate that the decision of the habeas court should be reversed on its merits. As indicated in part I of this opinion, the petitioner has not established that (1) his claims involve issues that are debatable among jurists of reason, (2) a court could resolve the issues in a different manner, or (3) the questions are adequate to deserve encouragement to proceed further. See *Harris* v. *Commissioner of Correction*, supra, 205 Conn. App. 844. Accordingly, we

[3] Although the petitioner contends that Rogan's failure to view the surveillance video resulted in the petitioner choosing to proceed to trial "under the mistaken impression that the state did not have significant evidence against him," the parties do not dispute that the video was poor quality and did not affirmatively identify the petitioner. Therefore, the petitioner's contention that viewing the poor quality surveillance video would have altered his impression of the state's evidence against him is unavailing, especially in light of Rogan's testimony that the petitioner "was adamant that he . . . would not take any offer and that he wanted to go to trial."

conclude that the petitioner has failed to demonstrate that the court abused its discretion in denying his petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

LANA ROSSOVA *v.* CHARTER COMMUNICATIONS, LLC
(AC 43153)

Alexander, Clark and Palmer, Js.

Syllabus

The plaintiff sought to recover damages for the alleged wrongful termination of her employment by the defendant, which she claimed was the result of pregnancy discrimination in violation of the Connecticut Fair Employment Practices Act (§ 46a-51 et seq.). The defendant hired the plaintiff to work in its brand and creative strategy department. S, the only other employee in the department, was her supervisor. According to the plaintiff, the two had a good working relationship through the end of her first month of employment, when the plaintiff informed S that she was pregnant. Thereafter, the relationship deteriorated. According to the plaintiff, S no longer invited her to collaborate on projects, became curt and unfriendly, and began to micromanage and criticize her work. S also started to document the plaintiff's alleged performance deficiencies. Less than five weeks after the plaintiff disclosed her pregnancy, S informed the plaintiff that her employment was being terminated for her poor performance. Following a trial to the jury, the jury returned a verdict in favor of the plaintiff on the issue of liability. Thereafter, the trial court denied the defendant's motion for judgment notwithstanding the verdict and awarded the plaintiff economic damages in addition to prejudgment interest, postjudgment interest, and attorney's fees. On appeal to this court, the defendant challenged only one element of the plaintiff's prima facie case, namely, whether she established that the termination of her employment occurred under circumstances that gave rise to an inference of discrimination. *Held*:

1. The trial court properly denied the defendant's motion for judgment notwithstanding the verdict:

   a. The plaintiff satisfied her initial burden of establishing a prima facie case of discrimination: there was sufficient evidence in the record from which a rational fact finder could have inferred that the termination of the plaintiff's employment was motivated by discriminatory bias based

on her pregnancy, including evidence of the change in the working environment and in the relationship between the plaintiff and S following the plaintiff's disclosure of her pregnancy.

b. There was sufficient evidence from which the jury reasonably could have found that the defendant's stated reason for the termination of the plaintiff's employment was pretextual and that the defendant intentionally discriminated against the plaintiff on the basis of her pregnancy: evidence in the record supported the plaintiff's claims of a drastic change in the work environment and the working relationship between the plaintiff and S following the plaintiff's disclosure of her pregnancy and there was a lack of documentary evidence of the plaintiff's allegedly defective performance prior to her disclosure, with the exception of a single e-mail, which the jury reasonably could have determined was of little to no consequence when juxtaposed against the considerable evidence supporting the plaintiff's contention that her disclosure marked a dramatic shift in work environment; moreover, pursuant to the United States Supreme Court's holding in *Reeves* v. *Sanderson Plumbing Products, Inc.* (530 U.S. 133), the jury was permitted to infer the ultimate fact of intentional discrimination on the basis of the inferences reasonably drawn from the evidence establishing the plaintiff's prima facie case and rebutting the defendant's nondiscriminatory explanation for the termination of the plaintiff's employment; furthermore, contrary to the defendant's assertion, the plaintiff did not rely solely on evidence of the temporal proximity of the disclosure of her pregnancy to her dismissal to establish her claim, as other evidence, even though not overwhelming, was sufficient when viewed in the light most favorable to sustaining the verdict for the jury to have inferred that the defendant's nondiscriminatory reason was pretextual and that the termination of the plaintiff's employment was actually motivated by intentional discrimination.

2. The trial court's assessment of the plaintiff's damages was not clearly erroneous: the trial court determined that the defendant proved that the plaintiff had failed to mitigate her damages for only seventeen of the fifty-two months that she was unemployed on the basis of all of the evidence before it and, contrary to the defendant's claim, did not rely solely on documentary evidence or the lack thereof; moreover, the burden was on the defendant to prove that suitable work existed and that the plaintiff did not exercise reasonable diligence to obtain employment, and the trial court found that the testimony of the defendant's expert regarding such matters was entitled to little weight.

Argued November 10, 2021—officially released April 12, 2022

Procedural History

Action to recover damages for, inter alia, alleged employment discrimination, and for other relief, brought to the Superior Court in the judicial district of Stamford-

Norwalk and tried to the jury before *Povodator*, *J.*; verdict for the plaintiff; thereafter, the court, *Povodator*, *J.*, denied the defendant's motion for judgment notwithstanding the verdict; subsequently, the court, *Hon. Kenneth B. Povodator*, judge trial referee, rendered judgment in accordance with the verdict and awarded the plaintiff compensatory damages, prejudgment and postjudgment interest and attorney's fees, from which the defendant appealed to this court. *Affirmed.*

Proloy K. Das, with whom were *Patricia E. Reilly* and *Lorey Rives Leddy*, for the appellant (defendant).

John M. Walsh, *Jr.*, for the appellee (plaintiff).

Opinion

CLARK, J. The defendant, Charter Communications, LLC, appeals from the judgment of the trial court, rendered after a jury trial, in favor of the plaintiff, Lana Rossova. The plaintiff brought this action alleging pregnancy discrimination in violation of the Connecticut Fair Employment Practices Act, General Statutes § 46a-51 et seq., after the defendant terminated her employment.[1] On appeal, the defendant claims that the court (1) improperly denied its motion for judgment notwithstanding the verdict because the plaintiff failed to establish a prima facie case of pregnancy discrimination and that the defendant's reason for terminating her employment was a pretext for discrimination against her on the basis of her pregnancy and (2) miscalculated the plaintiff's damages. We disagree with the defendant's claims and, accordingly, affirm the judgment of the court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to this

[1] The plaintiff also asserted a claim of negligent infliction of emotional distress, which was resolved on a motion for summary judgment rendered in favor of the defendant. The plaintiff does not challenge that ruling on appeal.

appeal. In February, 2013, the defendant hired the plaintiff as a senior manager of digital marketing at its Stamford location. Per the defendant's policy, all new employees must successfully complete a ninety day probationary period. The plaintiff began her employment with the defendant on March 4, 2013, and worked directly for the director of the brand and creative strategy department, Jennifer Smith. The plaintiff and Smith were the only two employees in the department. Smith hired the plaintiff to fill a newly created position with the expectation that the plaintiff would improve communications between their department and the digital marketing team and make recommendations to increase sales.

According to the plaintiff, she and Smith had a great relationship during the first few weeks of her employment and had become friends. Smith invited the plaintiff to her office to collaborate on projects and brainstorm ideas on a daily basis. They sometimes spent one half of the day working together in Smith's office and ate lunch together. On March 29, 2013, the plaintiff told Smith that she was pregnant. Smith was happy for the plaintiff and shared that, coincidentally, she was also pregnant. Smith thereafter instructed the plaintiff to speak with the human resources manager, Karina Patel, to complete paperwork to start the process of finding a substitute for the plaintiff while she was on maternity leave. When speaking with Patel, the plaintiff inquired as to whether she would be able to work from home if she experienced complications related to her pregnancy. The plaintiff previously had experienced a high-risk pregnancy, which required her to be on bed rest for more than two months, and her physician had warned that she would encounter similar complications in subsequent pregnancies. Patel informed the plaintiff that, for liability reasons, she would not be permitted

to work from home and then discussed the plaintiff's eligibility for leave.

A few days after informing Smith that she was pregnant, the relationship between the plaintiff and Smith deteriorated. Smith became less cordial than she had been prior to learning that the plaintiff was pregnant. When interacting with the plaintiff following the disclosure, Smith was curt and unfriendly. Although Smith still met with the plaintiff, she no longer invited the plaintiff into her office to brainstorm or collaborate on projects. According to the plaintiff, Smith never expressed concerns about the plaintiff's performance in the first month of her employment but began to micromanage her and criticize the quality of her work after the plaintiff disclosed her pregnancy. The plaintiff acknowledged that she had made some mistakes in her work but claimed that Smith never expressed dissatisfaction with the plaintiff's overall performance or communicated that her employment was in jeopardy of being terminated. On May 2, 2013, fewer than five weeks after the plaintiff disclosed her pregnancy, Smith informed the plaintiff that her employment was being terminated for poor performance. Smith did not elaborate on the reasons supporting her decision to terminate the plaintiff's employment or provide the plaintiff with any documents explaining her alleged performance deficiencies.

On September 20, 2013, the plaintiff filed a discrimination complaint with the Commission on Human Rights and Opportunities (commission). On October 21, 2014, after receiving a release of jurisdiction from the commission, the plaintiff commenced the present action, alleging that the defendant unlawfully had terminated her employment on the basis of pregnancy, in violation of General Statutes § 46a-60 (b) (7) (A).[2] The parties

[2] General Statutes § 46a-60 (b) provides in relevant part: "It shall be a discriminatory practice in violation of this section . . . (7) [f]or an employer, by the employer or the employer's agent: (A) [t]o terminate a woman's employment because of her pregnancy . . . ."

agreed to bifurcate the issues of liability and damages at trial. The issue of liability was tried to a jury on December 6 and 7, 2016. Following the plaintiff's case-in-chief, the defendant moved for a directed verdict on the ground that the plaintiff had failed to establish a prima facie case of pregnancy discrimination. The court reserved its decision on the defendant's motion pursuant to Practice Book § 16-37.[3]

On December 9, 2016, the jury returned a verdict in favor of the plaintiff. Thereafter, the defendant filed a posttrial motion for judgment notwithstanding the verdict, claiming that the plaintiff had failed to establish a prima facie case of discrimination because the evidence was insufficient to establish that the termination of the plaintiff's employment occurred under circumstances giving rise to an inference of discrimination and, additionally, that the plaintiff had failed to carry her ultimate burden of establishing that the defendant's reason for terminating her employment was pretextual and that her dismissal was motivated by unlawful discrimination.[4] In its memorandum of decision denying the defendant's motion, the court concluded that, although the evidence was not overwhelming, the jury

[3] Practice Book § 16-37 provides in relevant part: "Whenever a motion for a directed verdict made at any time after the close of the plaintiff's case-in-chief is denied or for any reason is not granted, the judicial authority is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. . . ."

[4] The defendant also claimed that it was entitled to judgment notwithstanding the verdict because the plaintiff failed to prove that she was qualified for her position, as is required to establish a prima facie case of employment discrimination. But see *Perez-Dickson* v. *Bridgeport*, 304 Conn. 483, 514 n.34, 43 A.3d 69 (2012) (courts require showing that plaintiff is qualified for position only when it is germane to issues involved). Additionally, the defendant moved to set aside the verdict on the ground that, before the court instructed the jury to reconcile the discrepancy, the jury's initial answer to an interrogatory was inconsistent with its verdict and, thus, demonstrated that the jury was confused, warranting a new trial. The trial court rejected both claims, and the defendant does not appeal from those rulings.

reasonably could have inferred from the "relatively sharp" change in Smith's attitude toward the plaintiff and the abrupt commencement of complaints regarding the plaintiff's job performance after she disclosed her pregnancy that the defendant's proffered reason for terminating the plaintiff's employment was pretextual and that the defendant intentionally had discriminated against her on the basis of pregnancy.

On November 1, 2018, the issue of damages was tried to the court. The court awarded the plaintiff $315,187.83 in economic damages, as well as prejudgment and postjudgment interest and attorney's fees. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

On appeal, the defendant claims that the court improperly denied its motion for judgment notwithstanding the verdict because the plaintiff failed to establish (1) a prima facie case of pregnancy discrimination and (2) that the defendant's reason for terminating the plaintiff's employment was a pretext for intentional discrimination.[5]

We begin our discussion of the defendant's claim that it was entitled to judgment as a matter of law by setting forth the standard of review. "Appellate review of a trial court's refusal to render judgment notwithstanding

[5] In its principal brief, the defendant specifically claimed that the court improperly denied its motion for a directed verdict on the ground that the plaintiff failed to establish a prima facie case of discrimination. As we previously noted in this opinion, the court deferred its decision on the defendant's motion, which, pursuant to our rules of practice, was "the equivalent of a denial of the motion for purposes of subsequent proceedings . . . ." *Riley* v. *Travelers Home & Marine Ins. Co.*, 333 Conn. 60, 72, 214 A.3d 345 (2019). The defendant renewed its motion for a directed verdict in its posttrial motion for judgment notwithstanding the verdict, and, accordingly, the court's ruling on the posttrial motion became the controlling disposition for purposes of this appeal. See id., 73.

the verdict occurs within carefully defined parameters." (Internal quotation marks omitted.) *Elliott* v. *Larson*, 81 Conn. App. 468, 472, 840 A.2d 59 (2004). "We must consider the evidence, and all inferences that may be drawn from the evidence, in a light most favorable to the party that was successful at trial. . . . This standard of review extends deference to the judgment of the judge and the jury who were present to evaluate witnesses and testimony." (Citation omitted.) *Craine* v. *Trinity College*, 259 Conn. 625, 635–36, 791 A.2d 518 (2002).

"Judgment notwithstanding the verdict should be granted only if we find that the jurors could not reasonably and legally have reached the conclusion that they did reach." (Internal quotation marks omitted.) *Elliott* v. *Larson*, supra, 81 Conn. App. 472–73. "Although it is the jury's right to draw logical deductions and make reasonable inferences from the facts proven . . . it may not resort to mere conjecture and speculation." (Internal quotation marks omitted.) *Bagley* v. *Adel Wiggins Group*, 327 Conn. 89, 102, 171 A.3d 432 (2017). "Whether the evidence presented by the plaintiff was sufficient to withstand a motion for [judgment notwithstanding the verdict] is a question of law, over which our review is plenary."[6] *Curran* v. *Kroll*, 303 Conn. 845, 855, 37 A.3d 700 (2012).

[6] Relying on various appellate cases, the parties assert that the proper standard of review of the defendant's claim is the abuse of discretion standard. As this court recently has explained, however, although our opinions sometimes have referred to the abuse of discretion standard in the context of reviewing a trial court's decision regarding a motion for judgment notwithstanding the verdict, where a party challenges a trial court's ruling on a motion for judgment notwithstanding the verdict on the basis of insufficient evidence, our review is plenary. *Cockayne* v. *Bristol Hospital, Inc.*, 210 Conn. App. 450, 457–59, A.3d (2022), petition for cert. filed (Conn. February 28, 2022) (No. 210338); see also *Pellet* v. *Keller Williams Realty Corp.*, 177 Conn. App. 42, 50 n.9, 172 A.3d 283 (2017) (standard of review governing claims that trial court improperly granted motion for directed verdict became conflated with standard of review governing challenges to trial court's granting or denying motion to set aside verdict, but plenary

"Two further fundamental points bear emphasis. First, the plaintiff in a civil matter is not required to prove [her] case beyond a reasonable doubt; a mere preponderance of the evidence is sufficient. Second, the well established standards compelling great deference to the historical function of the jury find their roots in the constitutional right to a trial by jury." (Internal quotation marks omitted.) *Madigan* v. *Housing Authority*, 156 Conn. App. 339, 362, 113 A.3d 1018 (2015).

Having set forth the applicable standard of review, we now turn to the general principles governing a claim of pregnancy discrimination in violation of § 46a-60 (b) (7) (A). Although the language of Title VII of the Civil Rights Act of 1964 and the Connecticut Fair Employment Practices Act differ slightly, our Supreme Court has observed that the legislature intended to make our state discrimination laws coextensive with the federal statute. *State* v. *Commission on Human Rights & Opportunities*, 211 Conn. 464, 469–70, 559 A.2d 1120 (1989). Thus, Connecticut courts often look to federal employment discrimination law for guidance in enforcing our own antidiscrimination statute. Id.; *Ayantola* v. *Board of Trustees of Technical Colleges*, 116 Conn. App. 531, 536, 976 A.2d 784 (2009).

"The framework this court employs in assessing . . . discrimination claims under Connecticut law was adapted from the United States Supreme Court's decision in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and its progeny." (Internal quotation marks omitted.) *Tomick* v. *United Parcel Service, Inc.*, 157 Conn. App. 312, 325, 115 A.3d 1143 (2015), aff'd, 324 Conn. 470, 153 A.3d 615 (2016). Under the *McDonnell Douglas Corp.* burden shifting analysis, the employee must "first make a prima

review applies when party moves for directed verdict on basis of insufficient evidence).

facie case of discrimination. . . . The employer may then rebut the prima facie case by stating a legitimate, nondiscriminatory justification for the employment decision in question. . . . The employee then must demonstrate that the reason proffered by the employer is merely a pretext and that the decision actually was motivated by illegal discriminatory bias." (Internal quotation marks omitted.) *Taing* v. *CAMRAC, LLC*, 189 Conn. App. 23, 28, 206 A.3d 194 (2019).

In reviewing a discrimination claim we bear in mind that "the question facing triers of fact in [employment] discrimination cases is both sensitive and difficult . . . . There rarely will be direct evidence of discrimination." (Citation omitted; internal quotation marks omitted.) *Board of Education* v. *Commission on Human Rights & Opportunities*, 266 Conn. 492, 516, 832 A.2d 660 (2003). The *McDonnell Douglas Corp.* framework "is intended to provide guidance to fact finders who are faced with the difficult task of determining intent in complicated discrimination cases. It must not, however, cloud the fact that it is the plaintiff's ultimate burden to prove that the defendant intentionally discriminated against her because of her [pregnancy]." *Craine* v. *Trinity College*, supra, 259 Conn. 637; see also *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

A

Prima Facie Case of Discrimination

We first address whether the plaintiff established a prima facie case of pregnancy discrimination. In general, "[i]n order for the employee to first make a prima facie case of discrimination, the plaintiff must show: (1) the plaintiff is a member of a protected class; (2) the plaintiff was qualified for the position; (3) the plaintiff suffered an adverse employment action; and (4) the

adverse employment action occurred under circumstances that give rise to an inference of discrimination." (Internal quotation marks omitted.) *Feliciano* v. *Autozone, Inc.*, 316 Conn. 65, 73, 111 A.3d 453 (2015).

If the plaintiff succeeds in establishing a prima facie case, it creates a rebuttable presumption that the employer intentionally discriminated against the employee. *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502, 506, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993); see also *Texas Dept. of Community Affairs* v. *Burdine*, supra, 450 U.S. 254 n.7. Thereafter, the burden shifts to the defendant to rebut the presumption raised by articulating a legitimate, nondiscriminatory reason for the adverse employment action. *St. Mary's Honor Center* v. *Hicks*, supra, 506–507.

On appeal, the defendant does not challenge the plaintiff's prima facie case on the grounds that she failed to prove that she was a member of a protected class, was qualified for her position, and suffered an adverse employment action. See footnote 4 of this opinion. Accordingly, only the fourth element of the plaintiff's prima facie case—whether the plaintiff established that the termination of her employment occurred under circumstances giving rise to an inference of discrimination—is at issue in this appeal.

"Circumstances contributing to a permissible inference of discriminatory intent may include the employer's continuing, after discharging the plaintiff, to seek applicants from persons of the plaintiff's qualifications to fill that position . . . or [the employer's] invidious comments about others in the employee's protected group . . . or the more favorable treatment of employees not in the protected group . . . or the sequence of events leading to the plaintiff's discharge . . . or the timing of the discharge . . . ." (Citations omitted.) *Chambers* v. *TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d

Cir. 1994); see also *Martinez* v. *Premier Maintenance, Inc.*, 185 Conn. App. 425, 439–40, 197 A.3d 919 (2018). As our Supreme Court has recognized, however, "[n]othing in *McDonnell Douglas Corp.* . . . limits the type of circumstantial evidence that may be used to establish the fourth prong of the test for a prima facie case of [pregnancy] discrimination." *Craine* v. *Trinity College*, supra, 259 Conn. 640–41.

The plaintiff primarily relies on the sequence of events over the course of her employment with the defendant to establish that her dismissal occurred under circumstances giving rise to an inference of discrimination. Specifically, the plaintiff testified that, in the first few weeks of her employment, Smith was very friendly to her, spent hours working collaboratively with her on projects, and developed a great working relationship with her. Furthermore, prior to the disclosure of her pregnancy, Smith neither informed the plaintiff that she was not meeting Smith's expectations nor otherwise indicated that her performance was deficient. The plaintiff testified, however, that after disclosing her pregnancy to Smith, Smith's attitude toward her abruptly changed and Smith began to micromanage her and criticized her work. Smith subsequently terminated her employment, approximately five weeks after the plaintiff had disclosed that she was pregnant.

The defendant contends that the plaintiff's evidence was insufficient to give rise to an inference that her dismissal was the result of discrimination. We disagree and conclude that there is sufficient evidence in the record from which a rational fact finder could infer that the termination of the plaintiff's employment was motivated by discriminatory bias toward the plaintiff based on her pregnancy.

Evidence of the working environment and the relationship between the plaintiff and Smith prior to, and

after, the plaintiff's disclosure of her pregnancy, namely, Smith's (1) sudden micromanagement of the plaintiff, (2) brusque and cold manner toward the plaintiff, (3) abrupt dissatisfaction with the plaintiff's job performance, and (4) discharging of the plaintiff shortly after learning of the plaintiff's pregnancy, was sufficient to create an inference that the defendant unlawfully discriminated against the plaintiff on the basis of pregnancy when it terminated her employment.

Viewing the plaintiff's evidence in its entirety, the jury reasonably could have inferred that a nexus existed between the plaintiff's disclosure of her pregnancy and the defendant's termination of her employment. In the context of a wrongful discharge action, this court previously has held that, for purposes of a prima facie case, a plaintiff may establish an inference of discrimination by demonstrating that the protected activity was followed close in time by an adverse action. See, e.g., *Li* v. *Canberra Industries*, 134 Conn. App. 448, 454–57, 39 A.3d 789 (2012); see also *El Sayed* v. *Hilton Hotels Corp.*, 627 F.3d 931, 933 (2d Cir. 2010) (temporal proximity between employee filing complaint and subsequent discharge may give rise to inference sufficient to establish prima facie case of retaliation); *Asmo* v. *Keane, Inc.*, 471 F.3d 588, 594 (6th Cir. 2006) (two months between supervisor learning plaintiff was pregnant and termination of plaintiff's employment was sufficient to establish nexus for purposes of prima facie case of discrimination).

Because the plaintiff put forth sufficient evidence to establish that the termination of her employment occurred under circumstances giving rise to an inference of discrimination, the plaintiff satisfied her initial burden of establishing a prima facie case of discrimination. The trial court, therefore, properly denied the defendant's motion for judgment notwithstanding the verdict on that ground.

B

Pretext and Intentional Discrimination

We next turn to whether there was sufficient evidence to support the jury's finding that the defendant intentionally discriminated against the plaintiff on the basis of her pregnancy. The defendant claims that the court improperly denied its motion for judgment notwithstanding the verdict because there was no evidentiary basis to support the jury's determination that the defendant's proffered reason for terminating the plaintiff's employment was pretextual or that the defendant intentionally discriminated against the plaintiff.[7] The defendant argues that, even assuming that the plaintiff adduced evidence sufficient to support a finding that the defendant's explanation was pretextual, the plaintiff failed to adduce any concrete evidence, beyond the inferences relied on in her prima facie case, to establish that her dismissal was motivated by intentional discrimination and that the jury, therefore, resorted to impermissible speculation and conjecture in returning its verdict in favor of the plaintiff. The defendant relatedly argues that the plaintiff did not adduce evidence beyond the temporal proximity between her pregnancy disclosure and her dismissal to prove that the defendant's explanation was a pretext for intentional discrimination, which is insufficient as a matter of law to establish a discrimination claim. See *Govori* v. *Goat Fifty, L.L.C.*,

[7] In its principal brief, the defendant asserts that the "trial court erred in denying [the defendant's] motion to set aside the jury verdict on liability" and "*should have . . . entered judgment in favor of* [*the defendant*]" and that the proper standard of review on appeal of the trial court's denial of a motion to set aside the verdict is abuse of discretion. (Emphasis added.) We agree that the appropriate standard of appellate review with respect to a trial court's ruling on a motion to set aside a verdict is abuse of discretion. See *Madigan* v. *Housing Authority*, supra, 156 Conn. App. 348. We interpret the defendant's claim on appeal, however, as seeking review of the court's denial of its motion for judgment notwithstanding the verdict on the basis of insufficient evidence, which we review de novo.

519 Fed. Appx. 732, 734 (2d Cir. 2013). For the following reasons, we conclude that there was sufficient evidence from which the jury reasonably could have found that the defendant discriminated against the plaintiff on the basis of her pregnancy.

We first set forth the relevant legal principles that guide our analysis of this claim. Once a plaintiff has adduced evidence sufficient to establish a prima facie case of discrimination, the burden shifts to the defendant to rebut the presumption raised, by articulating a legitimate, nondiscriminatory reason for the adverse employment action. *Taing* v. *CAMRAC, LLC*, 189 Conn. App. 23, 28, 206 A.3d 194 (2019). The defendant's "burden is one of production, not persuasion; it can involve no credibility assessment." (Internal quotation marks omitted.) *Feliciano* v. *Autozone, Inc.*, supra, 316 Conn. 74. Although the defendant must produce sufficient evidence to support its nondiscriminatory explanation, it bears emphasizing that the ultimate burden of persuading the fact finder "that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." (Internal quotation marks omitted.) *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).

If the defendant carries its burden of production, the presumption raised by the plaintiff's prima facie case "drops from the case"; (internal quotation marks omitted) *St. Mary's Honor Center* v. *Hicks*, supra, 509 U.S. 507; and the sole remaining issue becomes "discrimination vel non . . . ." (Citation omitted; internal quotation marks omitted.) *Reeves* v. *Sanderson Plumbing Products, Inc.*, supra, 530 U.S. 143. In other words, the plaintiff must persuade the trier of fact, by a preponderance of the evidence, that the defendant's justification for her dismissal "is merely a pretext and that the decision actually was motivated by illegal discriminatory bias." *Craine* v. *Trinity College*, supra, 259 Conn. 637.

"[The plaintiff] may succeed in this either directly by persuading the [jury] that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Texas Dept. of Community Affairs* v. *Burdine*, supra, 450 U.S. 256.

Although the presumption created by the prima facie case disappears after the defendant has produced evidence sufficient to establish a nondiscriminatory reason for the adverse employment action, "the plaintiff may rely upon the evidence used in establishing [her] prima facie case to prove the ultimate issue of [pregnancy] discrimination." *Craine* v. *Trinity College*, supra, 259 Conn. 644. Furthermore, "[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and . . . upon such rejection, [n]o additional proof of discrimination is required . . . ." (Internal quotation marks omitted.) *Jackson* v. *Water Pollution Control Authority*, 278 Conn. 692, 706, 900 A.2d 498 (2006), quoting *St. Mary's Honor Center* v. *Hicks*, supra, 509 U.S. 511.

The following additional facts, viewed in the light most favorable to the plaintiff, are relevant to our resolution of the defendant's claim. At trial, the defendant contended that it terminated the plaintiff's employment because of her poor performance. Smith testified that, after she had received feedback from Patel on the plaintiff's first day of work that the plaintiff appeared disinterested and unengaged at orientation, Smith and Patel frequently discussed among themselves Smith's concerns about the plaintiff's performance. Smith began documenting the plaintiff's performance issues when,

in Smith's opinion, the plaintiff's performance did not improve following later discussions with the plaintiff about her deficiencies.

The defendant placed into evidence a chart generated by Smith that summarized the plaintiff's performance issues, as well as e-mails that purported to support Smith's observations. Among other things, Smith noted that the plaintiff's performance was deficient in the following areas: communication, knowledge of the defendant's brand and products, organization, attention to detail, being proactive, and adhering to the expected work schedule. Significantly, all of the documents introduced into evidence by the defendant were dated on or after March 29, 2013, the day that the plaintiff disclosed her pregnancy to Smith. Moreover, the plaintiff produced evidence calling into question many of the defendant's claims about her deficient performance.

With respect to the defendant's claims about the plaintiff's schedule, Smith testified that she did not instruct the plaintiff to arrive for work by 8:30 a.m. Instead, she testified that she told the plaintiff that she generally arrived to work between 8 and 8:30 a.m. and that she therefore had expected that the plaintiff would arrive at approximately the same time. The plaintiff routinely arrived at approximately 9 a.m. until Smith e-mailed the plaintiff on April 5, 2013, to inform her that she was expected to attend daily meetings with the digital team at 8:30 a.m. The plaintiff regularly met with Smith in the first few weeks of her employment, often for many hours at a time, and it was only after disclosing her pregnancy that Smith told her that she was expected to attend the digital team's morning meetings and that she must arrive to work by 8:30 a.m. The plaintiff had assumed that her hours were that of a "regular job, nine to five," and was never told otherwise until after she informed Smith about her pregnancy. The plaintiff started attending the digital team's daily

morning meetings after receiving Smith's e-mail about her expected work hours.

With respect to the defendant's claim concerning the plaintiff's communication issues, Smith noted that the plaintiff did not effectively communicate with her when she had childcare obligations requiring her to arrive late or leave early. In her April 5, 2013 e-mail to the plaintiff, Smith asked the plaintiff for the first time to communicate her schedule. The plaintiff subsequently provided Smith with her schedule for the following two weeks and adhered to that schedule. Smith testified that she did not receive any further communications from the plaintiff about any scheduling conflicts. Smith, however, could not say definitively whether the plaintiff continued to have childcare related scheduling issues or whether any such issues were resolved, which, if resolved, would obviate any need for the plaintiff to keep Smith apprised of any such issues.

Smith also documented the plaintiff's lack of organizational skills, proactivity, and attention to detail. Specifically, she testified that, on March 29, 2013, the plaintiff hastily responded to a request for marketing materials from another department within the company and, in so doing, did not send all of the marketing images or file sizes requested. On April 22, 2013, Smith also received feedback from the director of the digital team, Brad Stamulis, that the plaintiff had not been proactive in providing his team with information about when they could expect certain marketing materials. The plaintiff testified, however, that she was unable to provide that information because, after e-mailing Smith to express that she urgently needed Smith to respond about the outstanding materials, Smith had failed to reply.

The defendant also produced evidence that, on April 10, 2013, the plaintiff gave approval to an external agency to publish an advertisement with the wrong

hyperlink. Smith testified that, had Smith not recognized and rectified the advertisement the plaintiff had approved, it would have directed consumers to a product that was unavailable in the market segment where the advertisement was to be published. According to Smith, such an error potentially could have exposed the defendant to legal action. The plaintiff acknowledged that she made a " 'huge mistake,' " but also testified that the error was partly due to a problem with the notification feature in the defendant's project management system that had caused her to overlook a communication from someone seeking to confirm that the hyperlink was correct.

With respect to the plaintiff's knowledge of the defendant's brand and products, Smith testified that, on April 12, 2013, the plaintiff provided incorrect information to an external marketing agency, which demonstrated a fundamental lack of understanding about the defendant's rate plans. The plaintiff testified, however, that the defendant did not provide her with official training on the defendant's pricing policies until April 18, 2013.

In sum, Smith asserted that the plaintiff was in probationary status throughout her employment and that, per the defendant's policy, Smith was not required to notify the plaintiff that her performance was deficient or warn her that she was in jeopardy of her employment being terminated. Smith testified that, although she did not document the exact dates or details regarding the discussions she had with the plaintiff and did not provide the plaintiff with any written documentation of her concerns with the plaintiff's performance, she frequently had talked with the plaintiff about her performance issues over the course of her employment and had fairly apprised the plaintiff of her deficiencies. Additionally, Smith and Patel testified that they reviewed the chart

that Smith generated and made the decision to terminate the plaintiff's employment because her performance had not improved. Smith and Patel further testified that the plaintiff's employment was terminated because she had made basic errors and did not satisfactorily meet the expectations of the senior manager position.

The plaintiff did not dispute that she had made some mistakes during her employment with the defendant. The plaintiff, however, testified that Smith never had expressed dissatisfaction with her performance or otherwise indicated that she was not meeting Smith's expectations. Rather, Smith told the plaintiff that she understood that the plaintiff was still learning and occasionally would make mistakes. According to the plaintiff, it was not until she disclosed her pregnancy that Smith began to critique and micromanage her work on every project that she was assigned. The plaintiff testified that her dismissal came as a "complete shock" and that she never had been shown the documents regarding her performance deficiencies until after she filed a complaint with the commission.

Having set forth the relevant facts, we first review whether the plaintiff adduced evidence from which the jury could have found that the defendant's nondiscriminatory reason for terminating the plaintiff's employment was pretextual. "A plaintiff may show pretext by demonstrating such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable [fact finder] could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons." (Internal quotation marks omitted.) *Stubbs* v. *ICare Management, LLC*, 198 Conn. App. 511, 523, 233 A.3d 1170 (2020).

Having reviewed the record, we conclude that there was sufficient evidence for the jury to have concluded that the defendant's stated reason for the plaintiff's dismissal was pretextual. To wit, the plaintiff established that Smith did not begin documenting her allegedly deficient performance until after she informed Smith that she was pregnant. Although Smith testified that she had numerous conversations with the plaintiff about her performance before the plaintiff disclosed that she was pregnant, none of the documents admitted into evidence supports that claim. Moreover, the plaintiff testified that, prior to disclosing her pregnancy, Smith never expressed dissatisfaction with her performance and that Smith began to micromanage and criticize her work only after learning that the plaintiff was pregnant. As the trial court observed in its memorandum of decision denying the defendant's motion for judgment notwithstanding the verdict, the jury was not required to assume that the rather abrupt identification of performance problems, as evidenced by the defendant's documents and the plaintiff's testimony, was a mere coincidence. The jury reasonably could infer from the timing of Smith's marked dissatisfaction with the plaintiff's performance, which coincided with the plaintiff's disclosure of her pregnancy, that the termination of the plaintiff's employment was more likely motivated by discriminatory bias than by her alleged performance deficiencies.

The defendant contends that its uncontroverted proof of a performance issue identified on the same day the plaintiff disclosed her pregnancy, by someone without knowledge of the plaintiff's pregnancy, contradicts any inference that the defendant's nondiscriminatory reason for terminating her employment was pretextual. Specifically, the defendant asserts that the March 29, 2013 e-mail indicating that the plaintiff did not provide all of the marketing materials requested by another

department within the company conflicts with the plaintiff's claim that she did not receive any feedback about her performance until after she disclosed her pregnancy and, consequently, that the plaintiff's evidence was insufficient to prove that the defendant's justification for terminating her employment was false. Evidence, however, is not insufficient simply because it is conflicting or inconsistent. *State* v. *Douglas F.*, 145 Conn. App. 238, 244, 73 A.3d 915, cert. denied, 310 Conn. 955, 81 A.3d 1181 (2013). Moreover, it is well established that "[i]t is the jury's right to accept some, none or all of the evidence presented. . . . It is the [jury's] exclusive province to weigh the conflicting evidence and to determine the credibility of witnesses." (Internal quotation marks omitted.) *Cusano* v. *Lajoie*, 178 Conn. App. 605, 609, 176 A.3d 1228 (2017). Accordingly, the jury reasonably could have determined that the March 29, 2013 e-mail was of little to no consequence, especially when juxtaposed against the considerable evidence supporting the plaintiff's contention that her pregnancy disclosure marked a dramatic shift in the work environment.

There was also evidence that, although not directly refuting the alleged performance issues, may have nevertheless persuaded the jury that the defendant's nondiscriminatory justification was not the real reason underlying the plaintiff's dismissal. The plaintiff's evidence, if believed, cast doubt on some of the defendant's claims about her performance issues. With respect to the plaintiff's failure to adhere to the required work schedule, for example, the plaintiff testified that she was never informed that she was to report to work at 8:30 a.m. prior to disclosing her pregnancy. The plaintiff's testimony that she and Smith spent many hours collaborating in the first few weeks of the plaintiff's employment and, according to the plaintiff, Smith never discussed with the plaintiff that she was reporting late to work until after learning the plaintiff was pregnant,

supports a reasonable inference that the plaintiff's timeliness was not a legitimate concern. See *Board of Education* v. *Commission on Human Rights & Opportunities*, supra, 266 Conn. 513–14 (there is distinction between fact finder second-guessing employer's business judgment, which would be improper, and fact finder concluding that employer's justifications are not credible). Although Smith disputed the plaintiff's account, the jury was not required to accept Smith's testimony. See *State* v. *Brown*, 198 Conn. App. 630, 637, 233 A.3d 1258, cert. denied, 335 Conn. 942, 237 A.3d 730 (2020). The plaintiff also testified that Stamulis' feedback about her lack of proactivity at a morning meeting resulted from Smith's failure to respond to the plaintiff's questions about certain marketing materials. Additionally, Smith's own testimony appeared to undermine her assertion that the plaintiff failed to keep her apprised of scheduling conflicts. Smith could not state definitively whether the plaintiff's childcare obligations had been resolved, which would have made it unnecessary to keep Smith apprised of any such conflicts.

We conclude that the evidence at trial was sufficient for a rational jury to reject the defendant's proffered explanation and find that the plaintiff's dismissal was actually motivated by discrimination. The jury reasonably could have found that, prior to the plaintiff's disclosure of her pregnancy to Smith, the plaintiff and Smith often worked collaboratively for many hours and had developed a good relationship; Smith was cordial when interacting with the plaintiff; and Smith never indicated to the plaintiff that she was not meeting expectations or criticized the plaintiff's work. Within a few days of disclosing her pregnancy to Smith and informing Patel, who met regularly with Smith to discuss the plaintiff's alleged performance issues, that she would almost certainly require an extended leave of absence because of potential pregnancy complications, Smith began to treat

the plaintiff differently. After informing Smith that she was pregnant, Smith was curt and unfriendly toward the plaintiff, no longer invited the plaintiff into her office to collaborate on projects, micromanaged the plaintiff, became critical of the plaintiff's work performance and terminated the plaintiff's employment fewer than five weeks later. On the basis of this evidence, the jury reasonably could have found that the timing of Smith's abrupt dissatisfaction with the plaintiff's performance was suspicious and that there was a nexus between the plaintiff's pregnancy and the termination of her employment. This inference is further buttressed by the fact that Smith extensively documented the plaintiff's alleged performance deficiencies only after the plaintiff disclosed her pregnancy.

Although there may well be other reasonable inferences that can be drawn from the plaintiff's evidence, we do not agree that the jury must have resorted to speculation and conjecture in reaching its verdict. As our Supreme Court has observed, "[p]roof of a material fact by inference from circumstantial evidence need not be so conclusive as to exclude every other hypothesis. It is sufficient if the evidence produces in the mind of the trier a reasonable belief in the probability of the existence of the material fact. . . . [A]n inference need not be compelled by the evidence; rather, the evidence need only be reasonably susceptible of such an inference." (Internal quotation marks omitted.) *Curran* v. *Kroll*, supra, 303 Conn. 857. We find these principles particularly compelling in the context of a discrimination claim where a plaintiff is often constrained to rely on circumstantial evidence to prove intent. See, e.g., *Chambers* v. *TRM Copy Centers Corp.*, supra, 43 F.3d 37 ("[e]mployers are rarely so cooperative as to include a notation in the personnel file that their actions are motivated by factors expressly forbidden by law" (internal quotation marks omitted)).

At oral argument before this court, the defendant contended that, assuming, arguendo, there was sufficient evidence to establish that the defendant's proffered justification was pretextual, pursuant to *Craine* v. *Trinity College*, supra, 259 Conn. 625, and *Perez-Dickson* v. *Bridgeport*, 304 Conn. 483, 43 A.3d 69 (2012), the plaintiff was also required to adduce additional evidence beyond the inferences relied on in support of her prima facie case in order to prevail. We are not persuaded by the defendant's reading of *Craine* or *Perez-Dickson*. Neither of those decisions stands for the broad proposition that, if a plaintiff successfully rebuts the defendant's nondiscriminatory reason for the adverse employment action, a plaintiff must produce *additional* evidence of discriminatory intent beyond that which may be inferred from the plaintiff's prima facie case in order to prevail in an employment discrimination action. Rather, our Supreme Court's conclusions in *Craine* and in *Perez-Dickson* turned on the specific facts and circumstances of those cases.

Furthermore, in *Craine*, the court was guided by the United States Supreme Court's holding in *Reeves* v. *Sanderson Plumbing Products, Inc.*, supra, 530 U.S. 148. In *Reeves*, the court held that a plaintiff's prima facie case, combined with sufficient evidence for a reasonable fact finder to reject the employer's nondiscriminatory explanation for the adverse employment action, *permits* the trier of fact to conclude that the employer unlawfully discriminated. Id.; see also *Craine* v. *Trinity College*, supra, 259 Conn. 645. Stated differently, on establishing that the employer's asserted reason for its action is pretextual, the plaintiff is not required to put forth additional evidence of discrimination to prevail.[8]

[8] The United States Supreme Court, however, also noted that the plaintiff would not be entitled to judgment as a matter of law on putting forth sufficient evidence to prove the defendant's explanation was pretextual, stating: "This is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case

The defendant has not directed us to any legal authority that would make *Reeves* inapplicable to the present appeal. The jury, therefore, on rejecting the defendant's reason, was permitted to infer the ultimate fact of intentional discrimination on the basis of the inferences reasonably drawn from the evidence rebutting the defendant's explanation and establishing the plaintiff's prima facie case.

The defendant additionally claims that the plaintiff relied solely on evidence of "temporal proximity" to prove her discrimination claim, without bringing forth any additional evidence that the defendant's proffered legitimate reason for its action was pretextual, which it argues is insufficient as matter of law. The defendant cites *Govori* v. *Goat Fifty, L.L.C.*, supra, 519 Fed. Appx. 734, for the proposition that, although proximity between protected activity and an adverse employment action may be sufficient to establish a prima facie case of discrimination, such evidence is, by itself, insufficient to establish that an employer's nondiscriminatory reasons for dismissing an employee are pretextual.

In contending that the plaintiff relied solely on evidence of temporal proximity to establish her pregnancy discrimination claim, the defendant mistakenly conflates the concept of temporal proximity evidence with evidence establishing a sequence of events that transpired following the plaintiff's disclosure of her protected status. Evidence contrasting the plaintiff's working environment prior to and after she disclosed her pregnancy, however, is more than evidence merely establishing temporal proximity between the plaintiff's

and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory." (Emphasis in original.) *Reeves* v. *Sanderson Plumbing Products, Inc.*, supra, 530 U.S. 148; see also *St. Mary's Honor Center* v. *Hicks*, supra, 509 U.S. 511 (fact finder's rejection of employer's legitimate nondiscriminatory reason for its actions does not *compel* judgment for plaintiff).

disclosure and her subsequent dismissal. Whereas temporal proximity between two events alone may be sufficient to establish a prima facie case, the broader sequence of events leading up to and including an adverse employment decision provides important context that may establish whether there exists a nexus between those two events. In other words, the close proximity between when Smith learned about the plaintiff's pregnancy and the plaintiff's subsequent dismissal raises a permissible inference that there exists a relationship between those events. The stark contrast between the working environment prior to and after the plaintiff disclosed her pregnancy constitutes evidence beyond mere "temporal proximity" and supports the inference of unlawful discrimination.

Although, as the trial court noted, the plaintiff's evidence was not particularly overwhelming, viewed in the light most favorable to sustaining the verdict, we conclude that there was sufficient evidence from which the jury could have inferred that the defendant's nondiscriminatory reason for terminating the plaintiff's employment was pretextual and that the plaintiff's dismissal was actually motivated by intentional discrimination. In so concluding, we are mindful of the well recognized principles that compel our deference to the historical function of the jury. See, e.g., *Jackson* v. *Water Pollution Control Authority*, supra, 278 Conn. 704 ("[i]f the jury could reasonably have reached its conclusion, the verdict must stand, even if this court disagrees with it" (internal quotation marks omitted)); *Elliott* v. *Larson*, supra, 81 Conn. App. 475 ("[w]e test the propriety of a motion for a judgment notwithstanding the verdict in accordance with the principle that we give the evidence at trial the most favorable reasonable construction in support of the verdict to which it is entitled" (internal quotation marks omitted)).

Because "it is apparent that there was some evidence upon which the jury might reasonably [have] reach[ed]

[its] conclusion"; (internal quotation marks omitted) *Salaman* v. *Waterbury*, 246 Conn. 298, 304, 717 A.2d 161 (1998); the trial court properly denied the defendant's motion for judgment notwithstanding the verdict.

II

The defendant's final claim is that the court miscalculated the plaintiff's damages because it improperly failed to exclude from the plaintiff's award ten months of back pay for which the plaintiff did not produce documents to prove her efforts to obtain employment. The defendant's claim is predicated on its belief that the court based its decision to exclude seventeen months of back pay entirely on the plaintiff's failure to produce documents supporting her request for damages for those months. The defendant therefore argues that the court similarly should not have awarded back pay for any month in which the plaintiff failed to produce documentary evidence that she attempted to mitigate her damages by actively seeking employment. We disagree with the defendant's interpretation of the court's decision and conclude that the court's assessment of damages was not clearly erroneous.

Before addressing the merits of the defendant's claim, we set forth the relevant legal principles and standard of review that guide our analysis. It is axiomatic that a plaintiff has a duty to make reasonable efforts to mitigate damages. *Cweklinsky* v. *Mobil Chemical Co.*, 267 Conn. 210, 223, 837 A.2d 759 (2004). An employer seeking to reduce or avoid a back pay award "bears the burden of demonstrating that a plaintiff has failed to satisfy the duty to mitigate." (Internal quotation marks omitted.) *Gaither* v. *Stop & Shop Supermarket Co., LLC*, 84 F. Supp. 3d 113, 123 (D. Conn. 2015); see also *Ann Howard's Apricots Restaurant, Inc.* v. *Commission on Human Rights & Opportunities*, 237 Conn. 209, 229, 676 A.2d 844 (1996). The employer must therefore

demonstrate that "suitable work existed, and that the employee did not make reasonable efforts to obtain it." *Clarke* v. *Frank*, 960 F.2d 1146, 1152 (2d Cir. 1992).

Whether a plaintiff made a reasonable effort to mitigate her damages under the circumstances of a particular case is a question of fact. *Dunleavey* v. *Paris Ceramics USA, Inc.*, 97 Conn. App. 579, 582, 905 A.2d 703 (2006). "In a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony." (Internal quotation marks omitted.) *Aldin Associates Ltd. Partnership* v. *Hess Corp.*, 176 Conn. App. 461, 484, 170 A.3d 682 (2017). "[W]e will upset a factual determination of the trial court only if it is clearly erroneous. The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . We cannot retry the facts or pass on the credibility of the witnesses. A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Dunleavey* v. *Paris Ceramics USA, Inc.*, supra, 583.

The following additional facts and procedural history are relevant to our resolution of the defendant's claim. Following her dismissal, the plaintiff was unable to obtain employment until September, 2017. During the damages portion of the trial, which was tried to the court, the plaintiff sought approximately fifty-two months of back pay.[9] For twenty-seven of the approximately fifty-two months that she was unemployed, the plaintiff did not produce documents supporting her

[9] The court calculated the plaintiff's presumptive damages, net of unemployment compensation she had received, as $468,279.07.

claim that she made efforts to mitigate her damages. The plaintiff worked with several recruiters, utilized employment websites, regularly spoke with acquaintances about potential opportunities, and networked with former coworkers approximately once a week to learn of available jobs. She failed, however, to maintain a complete set of records of her search efforts. Instead, she attempted to document her efforts to find employment by combining information from her e-mails, networking websites, employer websites, the contact list on her cell phone, and memory. The plaintiff also acknowledged that she inadvertently may have failed to produce some documents that would further demonstrate her mitigation efforts due to the volume of e-mails that were in her inbox.[10]

A vocational expert, Rona Wexler, testified on behalf of the defendant. Wexler opined that the plaintiff's search for employment was ineffective, inconsistent, and evidenced minimal effort. According to Wexler, the marketing industry was still recovering from the recession in 2013 when the plaintiff was seeking employment, but the demand for employees with digital marketing experience increased in the following few years. She was unaware of how many opportunities actually existed in the geographical area where the plaintiff sought employment during the time the plaintiff was unemployed.

In its memorandum of decision, the court found that the plaintiff had failed to record and preserve documents relating to her mitigation efforts, which it weighed in its determination of damages. As to Wexler's testimony, the court found that it lacked specificity with regard to the number and types of comparable positions that were available in the marketing industry when the

[10] There were approximately 40,000 e-mails in the plaintiff's inbox. She had conducted a keyword search to find documents to comply with the defendant's request for production.

plaintiff was searching for employment, thus diminishing the persuasiveness of Wexler's conclusions about the plaintiff's search efforts. Because the plaintiff had provided no documents and "no satisfactory explanation" regarding the absence of tangible proof concerning her search during significant periods of time, the court found that the defendant had proven that the plaintiff failed to satisfy her duty to mitigate damages during certain months when she was unemployed. Specifically, the court found that the plaintiff did not actively participate in the job market from May to December, 2013, when she was on bed rest and postpartum. The court also found that there was a pattern of minimal to no activity during the summer months in 2014, 2015, and 2016. Accordingly, the court awarded the plaintiff approximately thirty-five months of back pay, not the fifty-two months of back pay that she was seeking.[11]

On appeal, the defendant claims that the court improperly awarded the plaintiff ten months of back pay because the plaintiff did not provide any tangible proof of her efforts to obtain employment during those months. The defendant argues that the trial court's decision awarding the plaintiff back pay for those ten months is inconsistent with, and contrary to, the court's decision to exclude seventeen months of back pay based on the plaintiff's failure to produce physical evidence supporting her mitigation efforts during those months. The defendant mischaracterizes the court's findings.

The court's memorandum of decision makes clear that it did not determine that the plaintiff had failed to mitigate her damages for a total of seventeen months

[11] The court found that the plaintiff was not entitled to back pay for eight months in 2013 and three summer months in years 2014, 2015, and 2016.

on the basis of the plaintiff's failure to produce physical evidence alone. The court took into account the plaintiff's failure to adequately document or preserve evidence of her efforts with respect to her job search, stating that it goes "to the weight of the evidence presented and at least in some measure to the credibility of the plaintiff." Accordingly, although the plaintiff testified that she consistently searched for employment, the court concluded, on the basis of all of the evidence it heard concerning her damages, not just the documentary evidence or lack thereof, that the plaintiff did not make a reasonable effort to mitigate her damages for seventeen months while she was unemployed.

We therefore conclude that the court's decision to award back pay for some months in which the plaintiff did not corroborate her mitigation efforts with tangible proof was not clearly erroneous. It was for the court, as the finder of fact, to weigh the plaintiff's testimony with respect to her overall efforts to obtain employment against the lack of tangible evidence of those efforts. See *Llera* v. *Commissioner of Correction*, 156 Conn. App. 421, 440, 114 A.3d 178, cert. denied, 317 Conn. 907, 114 A.3d 1222 (2015). Moreover, it was the defendant's burden to prove that suitable work existed and that the plaintiff did not exercise reasonable diligence to obtain employment. The court found that Wexler's testimony on each of those points was entitled to little weight.

On the basis of our review of the record, we conclude that the court's finding that the defendant had proven that the plaintiff had failed to mitigate her damages for only seventeen of the fifty-two months that she was unemployed was not clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

MICHAEL KLING *v.* HARTFORD CASUALTY INSURANCE COMPANY (AC 44292)

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

Syllabus

The plaintiff sought to recover damages from the defendant insurance company for, inter alia, breach of contract, claiming that the defendant had a duty to defend C, doing business as E Co., under a business liability insurance policy it had issued to C, and that its failure to do so left the defendant liable to the plaintiff for damages the plaintiff suffered due to C's and E Co.'s negligence. The plaintiff sustained injuries when a trailer that was attached to a pickup truck driven by C, transporting large kettle corn equipment owned by E Co., dislodged from the pickup truck and struck the plaintiff. After the incident occurred, the plaintiff brought a personal injury action against C and E Co., seeking to recover damages for his injuries. At the time of the incident, C was insured under the business liability insurance policy issued by the defendant. The defendant, however, declined to defend C, citing a provision that excluded coverage for bodily injuries that arose out of the use of an "auto." C did not appear or otherwise defend the personal injury action, and the plaintiff obtained a default judgment against C and E Co. Thereafter, the plaintiff brought the present action against the defendant pursuant to the applicable statute (§ 38a-321). The defendant filed a motion for summary judgment, arguing that, on the basis of a provision in the policy that excluded coverage for injuries arising out of the operation of an "auto," it was entitled to a declaration that the policy did not provide liability coverage for the injuries sustained by the plaintiff. While that motion was pending, the case proceeded to a bench trial on the breach of contract count based on a stipulated record. The trial court rendered judgment for the defendant on that count, finding that the defendant did not have a duty to defend C or E Co. because the policy's auto exclusion applied and, thus, precluded coverage for the plaintiff's injuries. The trial court also dismissed the remaining two counts of the plaintiff's complaint, concluding that the plaintiff did not have standing to bring either count in light of the court's conclusion that the plaintiff did not have privity of contract with the defendant and there was no statutory or common-law basis to support the plaintiff's allegations under either count. On the plaintiff's appeal to this court, *held* that the trial court did not err in determining that the defendant did not have a duty to defend C and E Co., that court having correctly concluded that all of the injuries that the plaintiff sustained were excluded from coverage under the provision in the business liability insurance policy applicable to injuries arising out of the use of an auto:

the auto exclusion in C's insurance policy plainly and unambiguously precluded coverage for the plaintiff's injuries as the injuries that he sustained arose out of C's act of driving his truck and trailer on public roads and, therefore, arose out of the use of an auto; moreover, although negligence unrelated to the use of an auto, namely, the claim that the trailer and kettle corn equipment were disconnected from C's truck due to his failure to properly secure the trailer to the truck and/or his failure to properly maintain the hitch on the truck to which the trailer was attached, may have contributed to the plaintiff's injuries, those injuries nonetheless arose out of the use of an auto because the plaintiff would not have been injured without C's use of the truck and trailer.

Argued November 17, 2021—officially released April 12, 2022

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of New Haven, and tried to the court, *S. Richards*, *J.*, as to count one of the complaint in accordance with the parties' stipulation; thereafter, the court, *S. Richards*, *J.*, granted the defendant's motion to dismiss the remaining counts of the complaint; judgment for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

Leann Riether, for the appellant (plaintiff).

Daniel J. Raccuia, for the appellee (defendant).

Opinion

BRIGHT, C. J. The plaintiff, Michael Kling, appeals from the judgment of the trial court in favor of the defendant, Hartford Casualty Insurance Company.[1] On appeal, the plaintiff claims that the court erred in concluding that the defendant did not owe a duty to defend its insured, Newton Carroll doing business as Elm City Kettle Corn Company (Elm City), in connection with injuries that the plaintiff suffered as a result of Carroll's

[1] Although the plaintiff named "The Hartford" as the defendant on the summons, the plaintiff identified the defendant in the complaint as "Hartford Casualty Insurance Company," which is the defendant's correct name.

and Elm City's negligence. We affirm the judgment of the trial court.

The following facts, which are undisputed, and procedural history are relevant to our resolution of this appeal. On the morning of July 13, 2012, the plaintiff was walking north on the sidewalk along Orchard Street in New Haven. At the same time, Carroll was driving a pickup truck that was towing a trailer north on Orchard Street. Attached to the inside of the trailer was equipment that Carroll used to make kettle corn. As Carroll was driving past where the plaintiff was walking, the trailer detached from the truck, catapulted over a curb, and struck the plaintiff, pinning him to the ground. The plaintiff suffered several injuries including a fractured right femur, a fractured right elbow, and meniscal tears in his right knee.

In May, 2014, the plaintiff brought a personal injury action against Carroll and Elm City, alleging that Carroll's negligence in operating his truck and trailer—specifically, Carroll's failure to ensure that the trailer was securely attached to the truck—had caused the plaintiff "severe personal and painful injuries." See *Kling* v. *Elm City Kettle Corn Co., LLC*, Superior Court, judicial district of New Haven, Docket No. CV-14-6047194-S. At the time of the accident, Carroll and Elm City were insured under a business liability policy that had been issued by the defendant, which provided coverage for "sums that the insured becomes legally obligated to pay as damages because of 'bodily injury . . . .' " The policy also stated that the defendant had "the right and duty to defend the insured against any 'suit' seeking those damages." The defendant declined to defend Carroll, citing a provision in the policy that excluded coverage for bodily injuries that arose out of the use of an automobile. Carroll did not appear or otherwise defend the personal injury action, and the

plaintiff obtained a default judgment against him and Elm City for $495,843.57.

The plaintiff then filed this action against the defendant pursuant to General Statutes § 38a-321,[2] alleging in the operative complaint breach of contract (count one), breach of the implied covenant of good faith and fair dealing (count two), and negligent infliction of emotional distress (count three). The underlying premise of the plaintiff's claims was that the defendant had a duty to defend Carroll and Elm City under the business liability policy and that its failure to do so left the defendant liable to the plaintiff for the damages he suffered due to Carroll's and Elm City's negligence. In its answer to the plaintiff's complaint, the defendant, inter alia, alleged in its second special defense that the plaintiff's claims were barred by the language of the business liability policy, in particular the language that excludes coverage for injuries resulting from the operation of an "auto."

The defendant then moved for summary judgment on all three counts based on the alleged auto exclusion. The court denied the defendant's motion for summary judgment after finding that the language of the insurance policy was ambiguous. The defendant then filed a motion to dismiss counts two and three on the basis that the plaintiff lacked standing to assert those claims because § 38a-321 only permits a direct action by a plaintiff for breach of contract. While that motion was

[2] General Statutes § 38a-321 provides in relevant part: "Upon the recovery of a final judgment against any person, firm or corporation by any person . . . for loss or damage on account of bodily injury or death or damage to property, if the defendant in such action was insured against such loss or damage at the time when the right of action arose and if such judgment is not satisfied within thirty days after the date when it was rendered, such judgment creditor shall be subrogated to all the rights of the defendant and shall have a right of action against the insurer to the same extent that the defendant in such action could have enforced his claim against such insurer had such defendant paid such judgment."

pending, the case proceeded to a bench trial on count one based on a stipulated record. In count one, the plaintiff specifically alleged that the defendant had breached its contract of insurance when it failed to defend Carroll and Elm City in the plaintiff's personal injury action.

Thereafter, the court issued its memorandum of decision, wherein it rendered judgment for the defendant on count one, after finding that the defendant had no duty to defend Carroll and Elm City because the policy's auto exclusion applied, thus precluding coverage for the plaintiff's injuries. The court also dismissed counts two and three of the plaintiff's complaint after concluding that the plaintiff did not have standing to bring either count in light of the court's conclusion that the plaintiff did not have privity of contract with the defendant and that there was no statutory or common-law basis to support the plaintiff's allegations under either count. The plaintiff then filed a motion to reargue/reconsider, which the court denied. This appeal followed, challenging both the judgment rendered after the trial on count one and the dismissal of counts two and three. Additional facts will be set forth as necessary.

The parties agree, as do we, that if the court's contractual analysis regarding the duty to defend is correct then the plaintiff cannot succeed on any of his three counts. Consequently, we address that issue first. We begin by setting forth the applicable standard of review and principles of law that guide our analysis. Our standard of review for interpreting insurance policies is well settled. "The construction of an insurance policy presents a question of law that we review de novo." *Warzecha* v. *USAA Casualty Ins. Co.*, 206 Conn. App. 188, 191, 259 A.3d 1251 (2021). When construing an insurance policy, "we look at the [policy] 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." (Internal quotation marks omitted.) *Israel* v. *State Farm Mutual Automobile Ins. Co.*, 259 Conn. 503, 509, 789 A.2d 974 (2002). "Insurance policies are interpreted based on the same rules that govern the interpretation of contracts. . . . In accordance with those rules, [t]he determinative question is the intent of the parties . . . . 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. . . . In determining whether the terms of an insurance policy are clear and unambiguous, [a] court will not torture words to import ambiguity where 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 . . . ." (Citation omitted; internal quotation marks omitted.) *Warzecha* v. *USAA Casualty Ins. Co.*, supra, 191–92.

An insurer's duty to defend "is determined by reference to the allegations contained in the [underlying] complaint." (Internal quotation marks omitted.) *DaCruz* v. *State Farm Fire & Casualty Co.*, 268 Conn. 675, 687, 846 A.2d 849 (2004). The duty to defend "does not depend on whether the injured party will successfully maintain a cause of action against the insured but on whether [the complaint] stated facts which bring the injury within the coverage." (Internal quotation marks omitted.) *Security Ins. Co. of Hartford* v. *Lumbermens Mutual Casualty Co.*, 264 Conn. 688, 712, 826 A.2d 107 (2003). "If an allegation of the complaint falls even

possibly within the coverage, then the insurance company must defend the insured." (Internal quotation marks omitted.) *Moore* v. *Continental Casualty Co.*, 252 Conn. 405, 409, 746 A.2d 1252 (2000). That being said, an insurer "has a duty to defend only if the underlying complaint *reasonably* alleges an injury that is covered by the policy." (Emphasis in original.) *Misiti, LLC* v. *Travelers Property Casualty Co. of America*, 308 Conn. 146, 156, 61 A.3d 485 (2013). "[W]e will not predicate the duty to defend on a reading of the complaint that is . . . conceivable but tortured and unreasonable." (Internal quotation marks omitted.) Id. There is also no duty to defend "if the complaint alleges a liability which the policy does not cover . . . ." (Internal quotation marks omitted.) Id.

The plaintiff claims that the defendant has a duty to defend because (1) the policy language is ambiguous and, thus, must be construed in favor of providing coverage and (2) the allegations in the plaintiff's complaint have a clear possibility of falling within the coverage provided under the policy.[3] On the basis of our review of the policy language and the plaintiff's complaint, we are not persuaded.

We begin with the relevant language of the plaintiff's complaint in the personal injury action on which he relies for his claim of coverage:

"2. On [July 13, 2012, at approximately 9:25 a.m., Carroll] was the operator of a 2012 Dodge truck . . . which vehicle was towing a trailer with large kettle corn equipment affixed . . . and was traveling north on Orchard Street . . . .

"4. [W]hile said vehicle was being operated by [Carroll], said trailer with large kettle corn equipment owned

[3] For the sake of clarity and ease of discussion, we have reordered the arguments as they are set forth in the plaintiff's brief.

by [Elm City] dislodged from the truck, catapulted over the curb striking the plaintiff and pinning the plaintiff thereby causing the plaintiff severe personal and painful injuries as hereinafter more particularly set forth. . . .

"6. Said collision of debris and the resulting injuries, damages, and losses to the plaintiff were caused by the carelessness and negligence of [Carroll doing business as Elm City] in one or more of the following ways . . .

"c. in that he secured the truck camp trailer improperly to prevent equipment to fall on the roadway, posing a risk to the plaintiff . . . .

"f. in that the fastening equipment on the trailer hitch was in a broken condition and the defendant failed to inspect the trailer to observe the broken and loose condition of the trailer hitch; [and]

"g. in that [Carroll] failed to adequately secure a safety chain to secure the trailer in the event that the hitch/fastening equipment became dislodged."

The plaintiff argues that these allegations fall within the coverage of the business liability insurance policy issued by the defendant which provides liability coverage, including a legal defense, for any lawsuits seeking damages "because of 'bodily injury' . . . to which this insurance applies." The defendant agrees that there would be coverage for the plaintiff's injuries if it were not for the policy's exclusions, principally the auto exclusion. Under that exclusion, the policy does not provide coverage or a duty to defend for " 'bodily injury' . . . *arising out of* the ownership, maintenance, use or entrustment to others of any . . . auto . . . owned or operated by . . . any insured." (Emphasis added.) "Auto" is defined under the policy as "a land motor vehicle, trailer or semi-trailer designed for travel on public roads, including any attached machinery or equipment."

The defendant argues that the language of the exclusion is plain and unambiguous as applied to the plaintiff's claim. In particular, it argues that there is no question that the plaintiff's injuries, as alleged, arose out of Carroll's operation of an auto owned by Elm City. The defendant further argues that the definition of auto in the exclusion includes not only the truck Carroll was driving, but also the trailer attached thereto and the kettle corn equipment attached to the trailer. Consequently, the defendant argues that the claim clearly is excluded from coverage, and that the defendant owed no duty to defend Carroll and Elm City in the personal injury action.

Connecticut courts have had previous occasions to interpret the phrase "arising out of," as the phrase is used in auto exclusions in insurance policies and consistently have held that the phrase broadly applies to preclude coverage for claims whenever a plaintiff's injuries are related—even slightly—to the use of an automobile. See *New London County Mutual Ins. Co.* v. *Nantes*, 303 Conn. 737, 753–54, 36 A.3d 224 (2012); *Hogle* v. *Hogle*, 167 Conn. 572, 577, 356 A.2d 172 (1975).

For example, in *Hogle*, our Supreme Court concluded that a homeowners insurance policy did not provide coverage for injuries that a passenger in a car sustained when the driver's dog jumped from the rear seat into the front seat, causing the driver to crash the car and injure the passenger. *Hogle* v. *Hogle*, supra, 167 Conn. 578–79. The policy in *Hogle* included an auto exclusion, which stated that "coverage does not apply to the operation . . . of . . . automobiles . . . while away from" the insured's home. (Internal quotation marks omitted.) Id., 576. In interpreting that exclusion, the court broadly held that "it is generally understood that for liability for an accident or an injury to be said to arise out of the use of an automobile for the purpose of determining coverage under the appropriate provisions of a liability

insurance policy, it is sufficient to show only that the accident or injury was connected with, had its origins in, grew out of, flowed from, or was incident to the use of the automobile, in order to meet the requirement that there be a causal relationship between the accident or injury and the use of the automobile." (Internal quotation marks omitted.) Id., 577. Accordingly, because the driver's use of a car was in some way connected "with the accident or the creation of a condition that caused the accident," there was no coverage for the passenger's injuries under the auto exclusion, and the insurer thus did not have a duty to defend. Id., 578.

Similarly, in *Nantes*, our Supreme Court determined that a homeowners insurance policy did not provide coverage for injuries that houseguests suffered from carbon monoxide poisoning that was caused by the homeowner leaving her car running overnight in an attached garage. *New London County Mutual Ins. Co.* v. *Nantes*, supra, 303 Conn. 759. That policy also contained an auto exclusion, which stated that coverage "do[es] not apply to bodily injury or property damage . . . [a]rising out of . . . [t]he . . . use . . . of motor vehicles . . . ." (Internal quotation marks omitted.) Id., 741. On the basis of this exclusion, and the court's earlier holding in *Hogle*, the court in *Nantes* likewise concluded that, because the guests' injuries "had [their] origins in, grew out of, flowed from, or [were] incident to" the homeowner's use of a car, the insurer had no duty to defend. (Internal quotation marks omitted.) Id., 759.

As alleged in the underlying complaint, the plaintiff's injuries resulted from Carroll's operation of a truck and trailer on the public roads of New Haven. Specifically, the plaintiff was injured when the trailer transporting the attached kettle corn equipment detached from the truck and struck him. The auto exclusion in the insurance policy issued by the defendant unambiguously

precludes coverage for injuries that arise out of the use of an auto. The policy also unambiguously defines "auto" to include "land motor vehicles" (such as trucks), trailers, *and* any equipment that is *attached* to said trailers. Under the plain language of the policy, it is indisputable that the plaintiff's injuries arose out of the use of an auto: but for Carroll's use of a truck, an auto, to transport a trailer containing kettle corn equipment, a second auto, the plaintiff never would have been struck by the trailer and, consequently, would not have been injured. Therefore, those injuries are connected with, have their origins in, grew out of, flowed from, or were incident to Carroll's use of two autos. See *Hogle* v. *Hogle*, supra, 167 Conn. 577. As such, because the plaintiff's injuries were related to, and thus arose out of, Carroll's use of an auto, there is no coverage for those injuries under the insurance policy.

Given our conclusion that the auto exclusion clearly precludes coverage for the plaintiff's injuries, we necessarily reject the plaintiff's claim that the language of the policy is ambiguous. The plaintiff claims that both factual and legal uncertainty exist with regard to whether the defendant has a duty to defend, and that such uncertainty is enough to make the policy ambiguous. In *Nash Street, LLC* v. *Main Street America Assurance Co.*, 337 Conn. 1, 10–11, 251 A.3d 600 (2020), our Supreme Court explained how factual and/or legal uncertainty can create ambiguity in an insurance policy and thus give rise to a duty to defend: "Factual uncertainty arises when it is unclear from the face of the complaint whether an alleged injury occurred in a manner that is covered by the policy. . . . Legal uncertainty arises when it is unclear how a court might interpret the policy language at issue, and, as a result, it is unclear whether the alleged injury falls within coverage." (Citations omitted.)

The plaintiff argues that there is factual uncertainty because the complaint in the personal injury action

included allegations that the trailer and kettle corn equipment became disconnected from Carroll's truck due to his failure to properly secure the trailer to the truck and/or due to his failure to properly maintain the hitch on the truck to which the trailer was attached. Thus, according to the plaintiff, his injuries were due to Carroll's negligence before he ever began operating the truck to which the trailer was attached and, thus, did not arise out of the use of an auto. He argues that, at the very least, the allegations of his personal injury complaint raised the possibility of coverage and, therefore, triggered the defendant's duty to defend. We are not persuaded.

We initially note that the word "maintenance" is never used in the plaintiff's complaint and that the plaintiff conceded as much at oral argument before this court. In addition, the auto exclusion applies not only to bodily injuries arising out of the operation of an auto, but also to those arising out of the ownership, maintenance, and use of an auto. The exclusion defines "use" as including " 'loading or unloading.' " Thus, even construing the allegations of the plaintiff's personal injury complaint as alleging negligence in how Carroll and Elm City maintained the truck or trailer or how they connected the two, the claims are excluded from coverage by the plain language of the policy.

Finally, as noted previously in this opinion, our Supreme Court consistently has interpreted the "arising out of" language in auto exclusions very broadly. In both *Hogle* and *Nantes*, our Supreme Court concluded that the auto exclusions in both insurance policies precluded coverage for the plaintiff's injuries *even though* the underlying complaints in both cases alleged acts of negligence that occurred independently of the insured's use of an automobile. See *Hogle* v. *Hogle*, supra, 167 Conn. 578 ("Aetna's obligation to pay the judgment rendered . . . does not depend on whether it was [the

driver's] negligent operation of the car, or the activities of his dog inside the car, which constituted the 'proximate cause' of the accident . . . . Such obligation, rather, depends in this case on another fact, namely whether [the driver's] 'use' of his car was connected with the accident or the creation of a condition that caused the accident."); see also *New London County Mutual Ins. Co.* v. *Nantes*, supra, 303 Conn. 758 ("[I]t is irrelevant that an arguably covered event—[the host's] closing of the garage door—was a contributing cause of [the guests'] injuries. . . . [T]he fact that [the host's] use of her motor vehicle was connected to or created a condition that caused [the guests'] injuries is enough to bring [the injuries] within the motor vehicle exclusion.").

In the present case, as in those two cases, although negligence unrelated to the use of an auto *may* have contributed to the plaintiff's injuries, those injuries nonetheless arose out of the use of an auto because, again, the plaintiff would not have been injured without Carroll's use of two autos: his truck and trailer. Consequently, the role that those autos played in injuring the plaintiff is enough to exclude those injuries from coverage under the policy, regardless of any other non-auto related acts of negligence that may have also contributed to the plaintiff's injuries. Whatever the specific cause for the dislodging of the trailer from Carroll's truck, there is no question that the plaintiff's complaint in the personal injury action alleged that his injuries arose out of the operation of an auto, the definition of which includes both the truck and the trailer with its attached equipment. Consequently, there is no factual uncertainty as to how the plaintiff's injuries were alleged to have occurred.

As to legal uncertainty, the plaintiff argues that the definition of auto in the policy, to which the auto exclusion applies, states that " 'auto' does not include 'mobile

equipment.' " He argues that, because the kettle corn equipment that was affixed to the trailer is mobile equipment, there is legal uncertainty as to whether the auto exclusion applies to injuries caused by any of the kettle corn equipment that may have struck the plaintiff.[4]

There are a number of problems with the plaintiff's argument. First, the policy has a definition of "mobile equipment," which is limited to a specific list of "land vehicles." The kettle corn equipment at issue does not fall under any of the vehicles listed in the mobile equipment definition.

Second, it is clear from the policy language that the kettle corn equipment attached to the trailer also meets the definition of auto under the policy's exclusions. The insurance policy defines "auto" as including trailers that are "designed for travel on public roads, *including any attached machinery or equipment*." (Emphasis added.) The trailer and attached equipment here certainly fall within that definition of "auto," meaning that the auto exclusion applies to bar coverage for any injuries that arose out of the use of that trailer and equipment.

Finally, the plaintiff's complaint did not allege that his injuries arose out of the operation of the kettle corn equipment. The complaint alleged that the plaintiff's injuries arose during the transportation of the kettle corn equipment. The policy explicitly excludes from

[4] The plaintiff's fourth amended complaint does not explicitly allege that he was struck by the kettle corn equipment. Instead, it alleges that while Carroll was driving his truck the "trailer with large kettle corn equipment . . . dislodged from the truck, catapulted over the curb striking the plaintiff and pinning the plaintiff thereby causing the plaintiff severe personal and painful injuries . . . ." This allegation suggests that the plaintiff was struck by the trailer and not separately by the kettle corn equipment. Nevertheless, in considering the plaintiff's "mobile equipment" argument, we will construe the allegation broadly as encompassing the possibility that the plaintiff was struck by the kettle corn equipment.

coverage bodily injury arising out of "[t]he transportation of 'mobile equipment' by an 'auto' owned or operated by or rented or loaned to any insured . . . ." Thus, even if the kettle corn equipment was considered mobile equipment under the policy, the exclusion of coverage for the transportation of mobile equipment clearly would apply. Consequently, there is no legal uncertainty that the defendant had no duty to defend Carroll and Elm City.

Nevertheless, the plaintiff contends that the policy language is ambiguous because the various exceptions in the policy "essentially foreclose all liability coverage" and that such a result cannot be what the parties intended. We are not persuaded. Even though the insurance policy does not provide coverage for the injuries alleged in the present case, the policy still provides valuable coverage. For example, the policy certainly would provide coverage if, while Carroll was making and selling kettle corn on the sidewalk, a vat of hot oil spilled and caused injury to a patron or a passerby. Thus, just because the policy does not cover the plaintiff's injuries in the present case does not mean that the policy provides no coverage in other situations.

We also reject the plaintiff's argument that the law of the case doctrine compels us to conclude that the policy language was ambiguous. According to the plaintiff, because the trial court found the policy language ambiguous when it denied the defendant's motion for summary judgment, it could not conclude otherwise at trial, and we too should conclude that such ambiguity exists. This assertion, however, ignores the fact that appellate courts review a lower court's interpretation of an insurance policy de novo. *Warzecha* v. *USAA Casualty Ins. Co.*, supra, 206 Conn. App. 191. As such, we are not bound by the trial court's findings or by the law of the case that was made during the proceedings at trial. *Danehy* v. *Danehy*, 118 Conn. App. 29, 33 n.5, 982

A.2d 273 (2009) (law of case "cannot bind an appellate court, whose function is to determine whether the trial court correctly applied the law"). Thus, our conclusion that the policy's auto exclusion unambiguously precludes coverage for the plaintiff's injuries is unaffected by the trial court's prior conclusion that the policy was ambiguous.[5] See id.

In sum, given our Supreme Court's broad interpretation of the phrase "arising out of" in both *Hogle* and *Nantes*, we conclude that the auto exclusion in the business liability policy at issue here plainly and unambiguously precludes coverage for the plaintiff's injuries.[6] Accordingly, the defendant did not have a duty to defend Carroll and Elm City in the personal injury action.[7]

The judgment is affirmed.

In this opinion the other judges concurred.

[5] We also note that, given the trial court's eventual holding that the defendant did not owe a duty to defend, the court itself appears to have rejected its earlier conclusion that the policy language was ambiguous, which it was permitted to do. See *Knoblaugh* v. *Marshall*, 64 Conn. App. 32, 37, 779 A.2d 218 ("A judge should hesitate to change his own rulings in a case . . . . Nevertheless, if the case comes before him regularly and he becomes convinced that the view of the law previously applied . . . was clearly erroneous and would work a manifest injustice if followed, he may apply his own judgment." (Internal quotation marks omitted.)), cert. denied, 258 Conn. 916, 782 A.2d 1243 (2001).

[6] In his reply brief, the plaintiff attempts to distinguish *Nantes* and *Hogle* by arguing that both cases involved homeowners policies and that this case involves a business liability policy. The plaintiff does not explain why the type of policy matters to the analysis and we conclude that it does not. The same contract interpretation principles apply regardless of the underlying coverage provided by the policy. Consequently, our Supreme Court's reasoning in those cases is equally applicable in the present case, despite the difference in the type of policy.

[7] Given our conclusion regarding count one, and because the plaintiff conceded at oral argument before this court that if he loses on count one, he also loses on counts two and three, we further conclude that the defendant was entitled to judgment in its favor as to counts two and three.

The plaintiff also claims on appeal that the court erred when it denied his motion to reargue/reconsider. Because our conclusion that the defendant

ELECTRICAL CONTRACTORS, INC. *v.* 50 MORGAN HOSPITALITY GROUP, LLC, ET AL.
(AC 44475)

Alvord, Cradle and Lavine, Js.

Syllabus

The plaintiff subcontractor sought to recover damages from, among others, the defendant general contractor, G Co., for, inter alia, breach of contract and breach of the implied covenant of good faith and fair dealing. The plaintiff entered into a contract with G Co. in connection with a construction project for the renovation of a property owned by the named defendant, M Co. In its operative complaint, the plaintiff alleged, inter alia, that G Co. had failed to pay for materials and services that the plaintiff had provided. In its special defenses, G Co. asserted that language in the parties' contract made clear that the G Co.'s obligation to pay the plaintiff was dependent upon G Co. first receiving payment from M Co. Specifically, the contract stated that the plaintiff expressly agreed that payment by M Co. to G Co. was a "condition precedent" to G Co.'s obligation to make partial or final payments to the plaintiff. G Co. filed a motion for summary judgment on the counts against it based on that contractual language, arguing that it had no duty to pay the plaintiff because it had not yet received payment from M Co. The trial court granted G Co.'s motion and rendered summary judgment in favor of G Co., and the plaintiff appealed to this court.

1. The trial court properly granted G Co.'s motion for summary judgment as to the plaintiff's breach of contract claim: the clear and unambiguous language of the parties' contract provided that G Co. was not obligated to pay the plaintiff until it received payment from M Co.; moreover, this court declined the plaintiff's invitation to find ambiguity in the payment provision and to interpret it to mean that G Co.'s obligation to pay the plaintiff merely was postponed for a reasonable period of time; furthermore, the plaintiff did not cite any binding appellate authority to support its assertion that clauses such as the one at issue in the present case are disfavored in Connecticut and, more particularly, in the construction industry.
2. The trial court properly granted G Co.'s motion for summary judgment as to the plaintiff's claim for breach of the implied covenant of good faith and fair dealing: the plaintiff failed to allege or to provide any evidence to create a genuine issue of material fact that G Co. acted in bad faith in attempting to collect payment from M Co. or in failing to pay the plaintiff; moreover, this court's independent review of the record that was before the trial court when it rendered its summary judgment

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did not have a duty to defend is dispositive of the claims raised in the motion to reargue/reconsider, we need not address this argument.

did not reveal a potential sinister motive or dishonest purpose on the part of G Co.

Argued January 3—officially released April 12, 2022

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Moukawsher*, *J.*, rendered summary judgment in favor of the defendant Greython Construction, LLC, and the plaintiff appealed to this court. *Affirmed.*

Paul R. Fitzgerald, for the appellant (plaintiff).

Edward R. Scofield, with whom, on the brief, were *Heather Spaide* and *Joseph J. Cessario*, for the appellee (defendant Greython Construction, LLC).

Opinion

LAVINE, J. The plaintiff, Electrical Contractors, Inc., appeals from the summary judgment rendered by the trial court in favor of the defendant Greython Construction, LLC (Greython), regarding claims arising out of a contract between the plaintiff and Greython pursuant to which the plaintiff, as Greython's subcontractor, was to complete work on a property owned by the defendant 50 Morgan Hospitality Group, LLC (50 Morgan).[1] On appeal, the plaintiff claims that the court erred in granting Greython's motion for summary judgment (1) based on language in the contract providing that payment by 50 Morgan to Greython was a "condition precedent" to Greython's obligation to make payments to the plaintiff, and (2) because Greython failed to present any evidence demonstrating the absence of a genuine issue of material fact either that it was not the cause of 50 Morgan's

[1] The amended complaint, which serves as the operative complaint, lists sixteen defendants, including Greython and 50 Morgan. Greython is the only defendant participating in the present appeal. For purposes of clarity, we will refer in this opinion to Greython and 50 Morgan by name.

failure to make payment or that it had made a substantive effort to collect payment. We disagree with the plaintiff and, accordingly, affirm the judgment of the court.

The record reveals the following relevant undisputed facts and procedural history. Greython served as the general contractor for a project involving the renovation of a property owned by 50 Morgan. The plaintiff served as a subcontractor for Greython. On or about February 3, 2017, Greython entered into a contract with the plaintiff in which the plaintiff agreed to "furnish all labor, material, and equipment to perform all [electrical] work" for the project. The plaintiff provided Greython with requisitions seeking payment for materials furnished and services provided in connection with the project.

At the heart of this appeal is the meaning of the following language of the contract between the plaintiff and Greython. Article 2 of the contract provides that Greython will pay the plaintiff fixed sums of money in accordance with article 6 of the contract. Article 6 provides in relevant part: "[The plaintiff] shall submit to [Greython] a requisition, on forms provided by [Greython] . . . . Partial payments shall be due following receipt of payment [from] [50 Morgan] to [Greython] in the amount of 95 [percent] of the material in place for which payment has been made to [Greython] by [50 Morgan]. [*The plaintiff*] *expressly agrees that payment by* [*50 Morgan*] *to* [*Greython*] *is a condition precedent to* [*Greython's*] *obligation to make partial or final payments to* [*the plaintiff*] *as provided in this paragraph.* . . ." (Emphasis added.)

On January 31, 2018, the plaintiff commenced this action seeking payment for the costs of the materials it had furnished and the services it had provided in connection with the renovation project. On July 6, 2018, the plaintiff filed the amended complaint, which is the

operative complaint. In the complaint, the plaintiff alleged that it performed its obligations under the subcontract by providing labor, materials, and equipment for the project. Greython, however, failed to pay the plaintiff for all amounts due for the work it had completed on the project. The plaintiff asserted that "the sum of $350,616.65, plus attorney's fees, accrued interest, and costs remains due and owing to [the plaintiff]."

The plaintiff alleged the following relevant counts against Greython:[2] breach of contract for failing to pay the plaintiff the contract balance of $350,616.65 (count two); breach of the implied covenant of good faith and fair dealing for "failing to make payment of the sums due to [the plaintiff] that are not subject to a good faith dispute" and for "failing to provide notice or response to [the plaintiff] in good faith as to the specific, justifiable reasons for Greython's failure to make payment to [the plaintiff]" (count three); unjust enrichment (count four); and a violation of General Statutes § 42-158j for failure to pay the plaintiff any undisputed amount and refusing to place any disputed funds in escrow when it was put on notice of the plaintiff's claim (count six).[3]

On March 4, 2019, Greython filed an amended answer and special defenses to the operative complaint, in which it asserted two special defenses, both of which contended that the relevant language in article 6 made clear that Greython's obligation to pay the plaintiff was dependent upon Greython first receiving payment from 50 Morgan. On the same date, Greython filed a motion for summary judgment as to the second, third, fourth, and sixth counts of the operative complaint. Greython

[2] The first count of the operative complaint was brought against all of the defendants, including Greython, to foreclose on a mechanic's lien that the plaintiff filed on the land records for the city of Hartford. On October 24, 2019, the plaintiff withdrew that count.

[3] Counts five, seven, and eight of the operative complaint were directed against 50 Morgan, which is not a party to this appeal.

filed a memorandum of law in support of its motion, in which it argued that the language in article 6 of the contract was clear and unambiguous that it was not obligated to pay the plaintiff until it received payment from 50 Morgan. Because it had not yet received payment from 50 Morgan, Greython argued, "[it] ha[d] no duty to pay [the plaintiff] . . . ." On April 5, 2019, the plaintiff filed an objection to Greython's motion and an accompanying memorandum of law. The gist of the plaintiff's argument was that the payment provision in article 6 was ambiguous as to which party bore the risk of 50 Morgan's nonpayment. Thus, the plaintiff argued, this provision should be interpreted to mean that nonpayment by 50 Morgan "merely postpone[s] for a reasonable period of time" Greython's obligation to pay the plaintiff. On April 18, 2019, Greython filed a reply to the plaintiff's objection.

On April 24, 2019, the court heard oral argument on Greython's motion for summary judgment. On April 30, 2019, the court issued a memorandum of decision granting Greython's motion for summary judgment in its entirety as it pertained to the plaintiff. The court concluded that, pursuant to article 6 of the contract, Greython was not obligated to pay the plaintiff until 50 Morgan paid Greython. The court stated: "[The plaintiff] say[s] the court should read the language at issue [in article 6 of the contract] to mean that [Greython] will pay [the plaintiff] within a reasonable period of time even if the owner never pays [Greython]." The court noted that "courts have deviated from this view and read into some contracts the reasonable time language based upon the implications of labelling a provision . . . 'pay-when-paid' . . . or . . . ['pay-if-paid'].[4] But

[4] See, e.g., *DeCarlo & Doll, Inc.* v. *Dilozir*, 45 Conn. App. 633, 641 n.4, 698 A.2d 318 (1997) (comparing contract provision to "pay-when-paid" clause, which had been held by Massachusetts Supreme Judicial Court to merely postpone general contractor's obligation to pay subcontractors for reasonable time); *Titan Mechanical Contractors, Inc.* v. *Klewin Building Co.*, Superior Court, judicial district of Hartford, Docket No. CV-07-5009771

none of [their decisions] bind [the trial] court to do likewise." (Footnote added.) On the contrary, the court stated, "[t]he courts that do bind [the trial] court suggest that [a reviewing court] will see an obvious condition precedent and the risk bearing arrangement it reflects and enforce it."

The court further stated: "The obvious import of the contract language in this case is that if [Greython] never gets paid then neither do its subcontractors. Because [50 Morgan's] payment is labelled a condition precedent—a thing that *must* happen first—the contract needed no additional words to make this consequence clear to a reader of ordinary intelligence." (Emphasis in original.) The court concluded: "So [the plaintiff cannot]—under the present circumstances—win under the plain language of the contract."

Regarding the count alleging breach of the covenant of good faith and fair dealing, the court stated: "[T]he [plaintiff] certainly express[es] dissatisfaction with Greython's efforts [to collect payment from 50 Morgan] but [does not] offer any evidence sufficient to create an issue of fact over whether Greython acted in bad faith. Instead, [although] questions have been raised about Greython's efforts, the [plaintiff has] cited no evidence that could possibly support a claim that Greython has acted from some interested or sinister motive."

On May 15, 2019, the plaintiff, pursuant to Practice Book §§ 11-11 and 11-12, filed a "motion for reargument/

(October 30, 2007) (44 Conn. L. Rptr. 429, 429–30) (contract stated that payment from owner to general contractor was "express condition precedent to any payment by [g]eneral [c]ontractor to [s]ubcontractor," but court interpreted provision as "pay-when-paid" clause and stated that "under this interpretation payment would be required within a reasonable time even if [the general contractor was] not paid"); *R & L Acoustics* v. *Liberty Mutual Ins. Co.*, Superior Court, judicial district of Fairfield, Docket No. CV-00-0380506-S (September 27, 2001) (even though parties expressly and unambiguously conditioned subcontractor's right to payment on general contractor's receipt of funds from owner, court held that general contractor's duty to pay subcontractor was only temporarily postponed for reasonable time).

reconsideration and articulation" of the court's decision on Greython's motion for summary judgment. On May 20, 2019, the court denied that motion. This appeal followed.[5] Additional facts and procedural history will be set forth as necessary.

We begin by setting forth the relevant standard of review, which applies to both of the plaintiff's claims. "This court's standard of review for a motion for summary judgment is well established. Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . [I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find sup-

[5] The court rendered summary judgment in favor of Greython as to counts two, three, four, and six. The plaintiff's appeal form states that it is appealing from the "granting of [Greython's] motion for summary judgment." In its brief to this court, the plaintiff only challenges the court's conclusions as to count two (breach of contract) and count three (breach of the implied covenant of good faith and fair dealing).

port in the record." (Internal quotation marks omitted.) *Buehler* v. *Newtown*, 206 Conn. App. 472, 480–81, 262 A.3d 170 (2021).

I

The plaintiff first claims that the court erred in granting Greython's motion for summary judgment based on language in the contract providing that payment by 50 Morgan was a "condition precedent" to Greython's obligation to make payments to the plaintiff. The plaintiff contends that "the overwhelming weight of authority in Connecticut holds that similar provisions in construction contracts do not excuse a general contractor's payment obligations to its subcontractors." We disagree.

The following legal principles govern our interpretation of contracts. "A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . .

"[T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the [writing]. . . . Where the language of the [writing] is clear and unambiguous, the [writing] is to be given effect according to its terms. A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a [written instrument] must emanate from the language used in the [writing] rather than from one party's subjective perception of the terms. . . . If a contract is unambiguous within its four corners, the determination of what the parties intended by their contractual commitments is a question of law." (Cita-

tions omitted; internal quotation marks omitted.) *Murtha* v. *Hartford*, 303 Conn. 1, 7–8, 35 A.3d 177 (2011).

The plaintiff argues that the court incorrectly interpreted the payment provision in article 6 to mean that if Greython never receives payment from 50 Morgan, it is not obligated to pay its subcontractors. Specifically, the plaintiff argues that the court incorrectly interpreted the payment provision in article 6 as a "pay-if-paid" clause. The plaintiff states: " 'Pay-if-paid' provisions in construction contracts seek to transfer the risk of owner default between the general contractor and subcontractor by contractually making the owner's payment to the general contractor a condition precedent to the general contractor's payment to the subcontractor." Thus, unlike a "pay-when-paid" clause, if a general contractor never receives payment from an owner, it is not obligated to pay its subcontractors at all. The plaintiff asserts that the court instead should have interpreted the payment provision in article 6 as a "pay-when-paid" clause. A "pay-when-paid" clause merely postpones a general contractor's obligation to pay its subcontractors for a reasonable period of time, as opposed to creating a condition precedent to payment. See *DeCarlo & Doll, Inc.* v. *Dilozir*, 45 Conn. App. 633, 641 n.4, 698 A.2d 318 (1997) (*DeCarlo*). Thus, it claims, when a contract contains a "pay-when-paid" clause, a general contractor remains obligated to pay its subcontractors even if it never receives payment from the owner.

The plaintiff argues that clauses like the one in article 6 are "disfavored" in Connecticut and that "[t]he trial court's decision . . . represents the minority position not only in Connecticut, but also nationally." The plaintiff reasons that because such clauses "are disfavored by courts, they will be enforced only where the contract language clearly reflects the subcontractor's agreement to assume the risk of the owner's nonpayment." The

plaintiff contends, without citing any binding authority, that "Connecticut courts have universally stated that in order to effectively transfer the risk of owner nonpayment from the general contractor to a subcontractor, a contingent payment provision must be clear and unequivocal," and, "[a]t [a] minimum, the provision must clearly state which party bears the risk of the project owner failing to pay or becoming insolvent."[6] The plaintiff argues that article 6 "is not sufficiently clear and unequivocal to transfer the risk of [50 Morgan's] default from [Greython] to the plaintiff." In essence, the plaintiff argues that article 6 is ambiguous as to which party assumed the risk of 50 Morgan becoming insolvent. Thus, the plaintiff asks this court to interpret the payment provision in article 6 to mean that Greython's obligation to pay it merely was temporarily postponed for a reasonable period of time and insists that Connecticut law favors such a result.

The plaintiff, however, is unable to cite any binding appellate authority, and we are aware of none, that supports its assertion that clauses like the one in article 6 are disfavored in Connecticut generally, and particularly, as it argues, in the construction industry.[7] In support of its argument that we should interpret the relevant language in article 6 as a "pay-when-paid" clause, the plaintiff relies primarily on *DeCarlo & Doll, Inc.* v. *Dilozir*, supra, 45 Conn. App. 633, which is distinguish-

[6] At oral argument before this court, counsel for the plaintiff acknowledged that he is not aware of any appellate authority to support the plaintiff's contention that including the phrase "condition precedent" in a contract without clarifying language is not sufficient to clearly and unambiguously transfer the risk of owner nonpayment from a general contractor to its subcontractor.

[7] In advancing this argument, the plaintiff relies on *Thos. J. Dyer Co.* v. *Bishop International Engineering Co.*, 303 F.2d 655 (6th Cir. 1962), and *R & L Acoustics* v. *Liberty Mutual Ins. Co.*, Superior Court, judicial district of Fairfield, Docket No. CV-00-0380506-S (September 27, 2001), neither of which is binding on this court.

able from the present case.[8] As this court noted in *Suntech of Connecticut, Inc.* v. *Lawrence Brunoli, Inc.*, 143 Conn. App. 581, 591 n.4, 72 A.3d 1113, cert. denied, 310 Conn. 910, 76 A.3d 626 (2013), *DeCarlo* "simply did

[8] In *DeCarlo & Doll, Inc.* v. *Dilozir*, supra, 45 Conn. App. 639, the contract provided that payment from the defendant to the plaintiff was due thirty days after the defendant was billed on the first invoice. The parties then amended the contract by adding a clause that stated: " 'Subject to payment with all outstanding payments to be paid in full at time of financing of project' . . . ." Id., 637. The defendant did not receive financing and did not pay the entire bill for the services rendered by the plaintiff. Id. The plaintiff brought a breach of contract action against the defendant and "the trial court permitted the defendant to prevail on a special defense that alleged that the defendant's payment obligations under the contract were conditioned on the defendant's securing financing from a third party, which never occurred." Id., 634. On appeal, this court stated that the clause "was not a condition on which payment was contingent." Id., 641. This court held: "Viewing the contract as a whole, we conclude that the clause 'subject to payment with all outstanding payments to be paid in full at time of financing' is not a condition precedent but a date of payment set by the defendant." Id., 643. In reaching its conclusion, this court compared the clause to a "pay when paid" clause used by contractors in the construction industry. Id., 641 n.4.

Several Superior Court cases have cited *DeCarlo* when interpreting contract clauses that, like the clause in the present case, expressly and unambiguously condition an obligee's right to payment on an obligor's receipt of payment from a third party. Some of those cases refer to these types of clauses as "pay-if-paid" clauses. Our trial courts have reached different conclusions as to the interpretation of this type of clause. See, e.g., *R & L Acoustics* v. *Liberty Mutual Ins. Co.*, Superior Court, judicial district of Fairfield, Docket No. CV-00-0380506-S (September 27, 2001) (clause not enforceable as condition precedent even though it stated "[t]he Contractor shall have no liability or responsibility for any amount due or claimed to be due to Subcontractor except to the extent Contractor actually receives funds from Owner specifically designated for disbursement to the Subcontractor as receipt of such funds from the Owner are *specifically made a condition precedent* to the Contractor's obligation to make payments to Subcontractor hereunder" (emphasis added; internal quotation marks omitted)); *Lindade Construction, Inc.* v. *Continental Casualty Co.*, Superior Court, judicial district of Waterbury, Docket No. CV-05-008767-S (February 25, 2009) (47 Conn. L. Rptr. 323) ("pay-if-paid" clause was enforceable and not void as against public policy given strong public policy in Connecticut favoring freedom of contract). In the present case, the plaintiff does not cite any Connecticut appellate cases, and we are aware of none, that address the enforceability of "pay-if-paid" clauses.

not involve a 'pay-when-paid' provision. Although the court made a comparison to 'pay-when-paid' provisions, that comparison was dicta . . . ." (Citation omitted.) Furthermore, unlike in the present case, the clause at issue in *DeCarlo* did not include the phrase "condition precedent," and this court expressly concluded in *DeCarlo* that the relevant provision "[was] not a condition precedent . . . ." *DeCarlo & Doll, Inc.* v. *Dilozir*, supra, 643.[9]

Greython counters that the payment provision in article 6 is clear and unambiguous that its obligation to pay the plaintiff is expressly conditioned on it receiving payment from 50 Morgan. Greython notes that article 6 "contains no language or provisions [that] are focused on establish[ing] the time frame in which [the plaintiff] must or shall be paid by Greython." We agree.

We decline the plaintiff's invitation to find ambiguity in the payment provision in article 6 when we see none. Rather, we rely on the plain language of the contract, which has just one possible reasonable interpretation. To reiterate, the relevant payment provision in article 6 of the contract states: "[The plaintiff] expressly agrees that payment by [50 Morgan] to [Greython] is a *condition precedent* to [Greython's] obligation to make partial or final payments to [the plaintiff] . . . ." (Emphasis added.) It is well settled that "[a] condition precedent is a fact or event which the parties intend must exist or take place before there is a right to performance. . . . A condition is distinguished from a promise in that

[9] At oral argument before this court, counsel for the plaintiff stated that he was "100 percent certain" that Greython drafted the contract and asserted that it is typical for a general contractor to use its own standard form contract with its subcontractors. Because we conclude that the contractual language is plain and unambiguous, we need not consider the maxim of contract construction that states that, where an ambiguity exists, contractual language is to be construed against the drafter. See, e.g., *Cantonbury Heights Condominium Assn., Inc.* v. *Local Land Development, LLC*, 273 Conn. 724, 735, 873 A.2d 898 (2005).

it creates no right or duty in and of itself but is merely a limiting or modifying factor. . . . If the condition is not fulfilled, the right to enforce the contract does not come into existence. . . . Whether a provision in a contract is a condition the [nonfulfillment] of which excuses performance depends [on] the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in the light of all the surrounding circumstances when they executed the contract." (Internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Lorson*, 341 Conn. 430, 440, 267 A.3d 1 (2021).

The plaintiff has not cited any appellate case holding that the term "condition precedent" has a special, understood meaning in the construction industry, nor has the plaintiff pointed to any industry custom in which these types of contractual provisions are acknowledged to require a general contractor to pay its subcontractors within a reasonable time even if the general contractor never receives payment from the owner. We decline to read into the contract a "reasonable time" provision. Instead, we are duty bound to rely on the plain language of the contract, which makes clear that 50 Morgan must pay Greython in order to trigger Greython's duty to pay the plaintiff.

"There is a strong public policy in Connecticut favoring freedom of contract . . . . This freedom includes the right to contract for the assumption of known or unknown hazards and risks that may arise as a consequence of the execution of the contract. Accordingly, in private disputes, a court must enforce the contract as drafted by the parties and may not relieve a contracting party from anticipated or actual difficulties undertaken pursuant to the contract, unless the contract is voidable on grounds such as mistake, fraud or unconscionability. . . . If a contract violates public policy, this would be a ground to not enforce the contract. . . . *A contract*

. . . however, does not violate public policy just because the contract was made unwisely. . . . [C]ourts do not unmake bargains unwisely made. Absent other infirmities, bargains moved on calculated considerations, and whether provident or improvident, are entitled nevertheless to sanctions of the law. . . . *Although parties might prefer to have the court decide the plain effect of their contract contrary to the agreement, it is not within its power to make a new and different agreement; contracts voluntarily and fairly made should be held valid and enforced in the courts.*" (Emphasis added; internal quotation marks omitted.) *Geysen* v. *Securitas Security Services USA, Inc.*, 322 Conn. 385, 392–93, 142 A.3d 227 (2016).

In any construction project, there is a risk that an owner will become insolvent and therefore be unable to pay its general contractor. The plaintiff in the present case is a sophisticated construction company.[10] It could have added language to the contract specifying that Greython's duty to pay would be postponed *only temporarily* if Greython did not receive payment from 50 Morgan. Instead, the plaintiff now asks this court to write such clarifying language into the contract. We are not inclined to make a new and different agreement by adding terms to which the plaintiff and Greython did not agree. Furthermore, as the court noted in its memorandum of decision, our conclusion "[does not] change the [plaintiff's] right to be paid any time Greython gets paid in the future. It just means that not having been paid by [50 Morgan], Greython's failure to pay the [plaintiff] now [does not] breach the express contract language."

We are not being asked whether the contractual language, in hindsight, appears to us to be fair or reasonable. We are simply being asked to determine if the

[10] At oral argument before this court, counsel for the plaintiff agreed with this court's characterization of the plaintiff as a "sophisticated" construction company.

language means what it says. We conclude that the plain language of article 6 of the contract is clear and unambiguous that Greython is not obligated to pay the plaintiff until it receives payment from 50 Morgan. Accordingly, we also conclude that the court properly granted Greython's motion for summary judgment as to the plaintiff's breach of contract claim.[11]

II

The plaintiff next claims that the court erred in granting Greython's motion for summary judgment because Greython failed to present any evidence demonstrating the absence of a genuine issue of material fact either that it was not the cause of 50 Morgan's failure to make payment or that it had made a substantive effort to collect payment. We will address this argument as it relates to the plaintiff's breach of the implied covenant of good faith and fair dealing claim against Greython.[12] We conclude that the court did not err in granting Greython's motion for summary judgment as to this claim.[13]

[11] Our conclusion as to this claim addresses the court's determination as to count two of the operative complaint. In part II of this opinion, we will address the court's determination as to count three. The plaintiff does not challenge the court's determinations as to counts four and six. See footnote 5 of this opinion.

[12] In this claim, the plaintiff challenges the court's conclusions as to the granting of Greython's motion for summary judgment regarding both the breach of contract and the breach of the implied covenant of good faith and fair dealing claims. Previously in this opinion, we have concluded that Greython is not required to pay the plaintiff until it receives payment from 50 Morgan. The plaintiff does not cite any binding appellate authority that supports its assertion that, in order for Greython to prevail on its motion for summary judgment, Greython was required to demonstrate that it either was not the cause of 50 Morgan's failure to make payment or that it made a substantive effort to collect payment. For the reasons set forth in this section of the opinion, the plaintiff's argument on this issue is more properly encompassed by its claim that Greython breached the implied covenant of good faith and fair dealing.

[13] As part of this claim, the plaintiff argues that there was no factual support for the court's conclusion that Greython provided evidence that it acted in good faith. In its memorandum of decision, the court stated: "In support of its motion, Greython asserts that it has a great deal of its own

"[I]t is axiomatic that the . . . duty of good faith and fair dealing is a covenant implied into a contract or a contractual relationship. . . . In other words, every contract carries an implied duty requiring that neither party do anything that will injure the right of the other to receive the benefits of the agreement. . . . The covenant of good faith and fair dealing presupposes that the terms and purpose of the contract are agreed upon by the parties and that what is in dispute is a party's discretionary application or interpretation of a contract term. . . . To constitute a breach of [the implied covenant of good faith and fair dealing], the acts by which a defendant allegedly impedes the plaintiff's right to receive benefits that he or she reasonably expected to receive under the contract must have been taken in bad

money at stake and [it] has tried diligently to collect the sums owed to it and its subcontractors." After concluding that the plaintiff did not offer evidence sufficient to create an issue of fact as to whether Greython acted in bad faith, the court stated: "The [plaintiff cannot] survive summary judgment when [it has] produced no evidence of bad faith in response to [Greython's] evidence of good faith." The plaintiff takes issue with the court's conclusion that Greython provided evidence of good faith regarding its efforts to collect from 50 Morgan. It argues that Greython "failed to present any evidence that it made any effort—beyond merely forwarding the plaintiff's payment applications to [50 Morgan]—to obtain payment from [50 Morgan] for the plaintiff's work."

Our independent review of the record before the court at the time it granted the motion for summary judgment indicates that the only evidence that Greython presented about its good faith efforts to collect payment from 50 Morgan came from a portion of the affidavit of Kyle Klewin, Greython's president, which states that Greython submitted requisitions seeking payments for the materials and services provided both by Greython and its subcontractors. At the hearing on Greython's motion for summary judgment, counsel for Greython detailed its efforts to collect payment from 50 Morgan. In its memorandum of decision, the court appeared to rely in part on those statements by counsel, which are not evidence. Accordingly, the court apparently overstated the scant evidence in the record about Greython's efforts to collect payment from 50 Morgan. As we discuss in more detail later in this opinion, however, the plaintiff did not submit evidence of bad faith on the part of Greython. Thus, there was a lack of evidence sufficient to create a genuine issue of material fact as to Greython's bad faith. In the absence of such evidence, this mischaracterization in the court's memorandum of decision does not affect the outcome of this case.

faith." (Internal quotation marks omitted.) *Renaissance Management Co.* v. *Connecticut Housing Finance Authority*, 281 Conn. 227, 240, 915 A.2d 290 (2007).

"Bad faith in general implies . . . actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. . . . Bad faith means more than mere negligence; it involves a dishonest purpose." (Internal quotation marks omitted.) *Geysen* v. *Securitas Security Services USA, Inc.*, supra, 322 Conn. 399–400. "The standard of proof applicable to claims of bad faith is clear and convincing evidence." *M.J. Daly & Sons, Inc.* v. *West Haven*, 66 Conn. App. 41, 53, 783 A.2d 1138, cert. denied, 258 Conn. 944, 786 A.2d 430 (2001).

The following additional procedural history is relevant to this claim. In the operative complaint, the plaintiff stated that the contract "contains an implied covenant of good faith and fair dealing requiring that neither party do anything that will injure the right of the other to receive the benefits of the agreement." The plaintiff alleged that Greython breached its duty of good faith and fair dealing by (1) "failing to make payment of the sums due to [the plaintiff] that are not subject to a good faith dispute," and (2) "failing to provide notice or response to [the plaintiff] in good faith as to the specific, justifiable reasons for Greython's failure to make payment to [the plaintiff]." The plaintiff further alleged: "These acts and omissions by Greython were undertaken in bad faith, solely for the purpose of avoiding Greython's express and implied obligations under the parties' contract." We reasonably interpret the plaintiff's claim before this court as arguing that Greython breached the implied covenant of good faith and fair dealing by not making a "substantive effort" to collect payment from 50 Morgan, thereby injuring

the plaintiff's right to receive the benefits of its agreement with Greython.[14]

Viewing the record in the light most favorable to the plaintiff as the nonmoving party, there is no evidence, let alone evidence sufficient to create a genuine issue of material fact, that Greython acted in bad faith when attempting to collect payment from 50 Morgan. Our independent review of the evidence that was before the court when it rendered its summary judgment does not reveal a potential sinister motive or dishonest purpose on the part of Greython.[15]

The plaintiff did not allege or provide evidence that Greython acted with a dishonest purpose in unsuccessfully attempting to collect payment from 50 Morgan.

[14] For example, at oral argument before this court, when discussing the lack of evidence of bad faith submitted by the plaintiff, counsel for the plaintiff argued that Greython's "failure to take any action" against 50 Morgan was "telling." In other words, the plaintiff seemed to argue that Greython's failure to more aggressively pursue payment from 50 Morgan is evidence of bad faith.

[15] Greython attached to its memorandum in support of its motion for summary judgment the affidavit of its president, Kyle Klewin. This affidavit states that Greython submitted requisitions seeking payment for the materials and services provided both by it and its subcontractors. The plaintiff argues that Greython failed to present evidence that it made any effort to collect payment beyond merely submitting those requisitions. The affidavit of William Flynn, Jr., the plaintiff's vice president, which was attached to the plaintiff's memorandum in opposition to summary judgment, provides some insight into why Greython did not take additional steps to collect payment from 50 Morgan. Flynn's affidavit states that on July 25, 2018, "Greython advised [the plaintiff] that [50 Morgan] had obtained new funding for the Project and that [the plaintiff] would be paid in full with proceeds from the loan closing." The affidavit further states that on August 16, 2018, and January 4, 2019, Greython contacted the plaintiff and reiterated that the loan closing was taking place and that the plaintiff would be paid in full with proceeds from the loan. E-mails supporting these statements were attached to the affidavit as exhibits. The affidavit then states that the closing never occurred.

The plaintiff did not attempt to show that Greython's statements about the closing were made in bad faith. It did not allege, for example, that those statements were false or misleading. Although the correspondences about the closing took place after the plaintiff brought its action against Greython, they nevertheless provide evidence of Greython's effort to collect payment from 50 Morgan.

Accordingly, we conclude that the court properly decided that there was no genuine issue of material fact that Greython did not act in bad faith when it did not pay the plaintiff.

The judgment is affirmed.

In this opinion the other judges concurred.

MEMORANDUM DECISIONS

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PAOLA PISTELLO-JONES *v.* STEPHEN JONES
(AC 44708)

Elgo, Cradle and Suarez, Js.

Argued April 4—officially released April 12, 2022

Defendant's appeal from the Superior Court in the judicial district of Stamford-Norwalk, *M. Moore*, *J.*

Per Curiam. The judgment is affirmed.

MEB LOAN TRUST IV *v.* JOHNNY R. MOORE
(AC 44599)

Elgo, Cradle and Suarez, Js.

Argued April 4—officially released April 12, 2022

Defendant's appeal from the Superior Court in the judicial district of New Haven, *Young*, *J.*

Per Curiam. The judgment is affirmed.

CLARENCE PATTERSON *v.* COMMISSIONER OF CORRECTION
(AC 44049)

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

Argued April 5—officially released April 12, 2022

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

Per Curiam. The judgment is affirmed.

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SUPREME COURT PENDING CASE

The following appeal is assigned for argument in the Supreme Court on April 27, 2022.

NEW HAVEN BOARD OF EDUCATION *v.* COMMISSION ON HUMAN RIGHTS & OPPORTUNITIES, SC 20696
Judicial District of New Britain

Administrative Appeal; Whether Defendant Had Jurisdiction over Claims Brought against Plaintiff under Americans with Disabilities Act and State Anti-Discrimination Law in Connection with Student's Educational Needs. On November 1, 2011, Andrew Miranda filed a complaint with the defendant on behalf of his minor son, A.J. Miranda. Andrew alleged that the plaintiff had violated the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., and General Statutes §§ 46a-58 (a) and 46a-64, which in relevant part prohibit discrimination and denial of access to a place of public accommodation on the basis of disability, through its treatment of A.J. In September 2010, A.J. began kindergarten at the John Daniels Magnet School in New Haven. He initially received special education services due to his diagnoses, which included Asperger's syndrome, childhood disintegrative disorder, and attention deficit hyperactivity disorder, but it was subsequently determined that A.J. did not qualify for those services. On March 29, 2011, A.J. fell at school and was taken to a hospital, where he was diagnosed with a concussion and discharged with a certificate indicating that he could return to school when he was "symptom free for 24 [hrs] earliest 3/31/11." A.J. continued to display post-concussion symptoms in the following days. Andrew spoke with A.J.'s pediatrician, who recommended that he not return to school until he was symptom free. In April 2011, the plaintiff sent a "habitual truancy" notice to Andrew due to A.J.'s prolonged absence from school. Andrew met with school officials on May 5, 2011, to discuss whether A.J. was qualified to receive special education services. At that meeting, Andrew was questioned about A.J.'s prolonged absence from school. He attempted to proffer a handwritten note from A.J.'s pediatrician, which the school officials did not accept, and stated that A.J. would not return to school until he was medically cleared to do so. Andrew left the meeting with the understanding that A.J. was still enrolled at the school. Immediately after the meeting, however, school officials completed a withdrawal form, reflecting discussions that they had three weeks prior during which it was suggested that A.J. be withdrawn from the school. Andrew did not learn of the unilateral withdrawal until June 2011. A human rights referee with the defendant held a

hearing and issued a final decision concluding that the school was a place of public accommodation, that A.J. was an individual with disabilities, and that the plaintiff had engaged in unlawful discrimination against him by unilaterally withdrawing him from the school. The referee awarded, inter alia, $25,000 in emotional distress damages. The plaintiff filed an administrative appeal from the defendant's decision in the trial court, which dismissed the appeal. The plaintiff then filed an appeal in the Appellate Court, and the Supreme Court transferred the appeal to its docket. The Supreme Court will decide whether the trial court properly determined that the defendant had jurisdiction over Andrew's complaint where the plaintiff claims (1) that the defendant could not adjudicate federal claims brought under the ADA, (2) that the school was not a "place of public accommodation" under § 46a-64, and (3) that Andrew was required to exhaust his administrative remedies before the state Department of Education because his complaint alleged the denial of a free and appropriate public education in violation of the Individuals with Disabilities Education Act.

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

Jessie Opinion
Chief Staff Attorney